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H-2A in the Trump era: Lessons from the H-2B program

Daniel Costa
Director of Immigration Law and Policy Research – EPI

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UC Davis

What is H-2B?

- Seasonal non-agricultural jobs when U.S. workers are unavailable
- Education level required: None
- Top occs: Landscaping, forestry (top 2 account for 50%), hospitality, seafood processing, amusement park attendants, construction
- Annual numerical limit:
  - 66,000 + some uncapped occupations
- Size:
  - With returning worker exemption in FY 2016: 85,000 workers
  - Total size of H-2B population in 2016: 136,500
  - Duration: no more than 9 months; up to 3 years for "one-time occurrence" or with extensions

H-2B: labor shortages?

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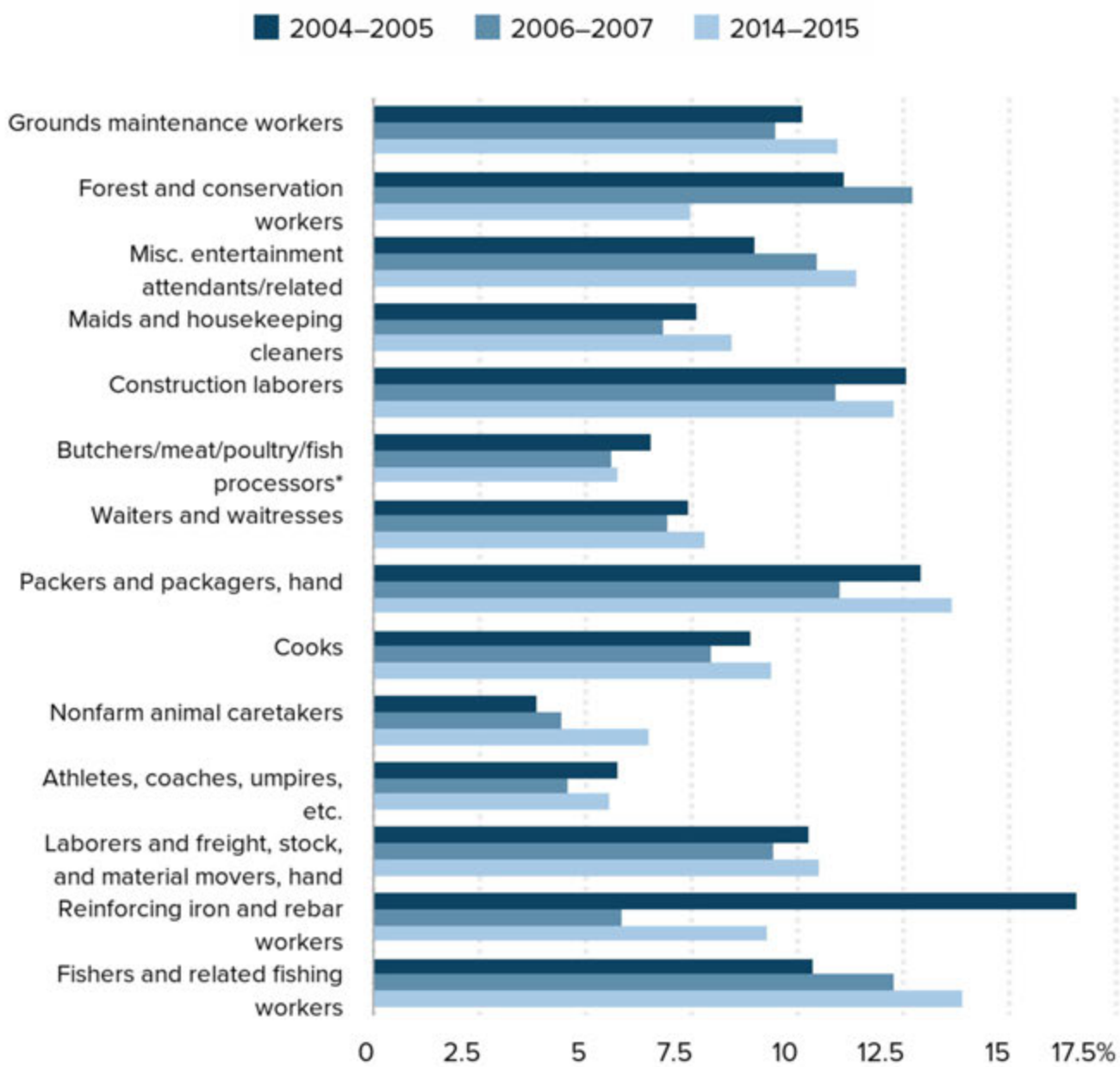
America's Growing Labor Shortage

Lack of workers in ag and construction is hurting the economy.

Change in average hourly wages of workers in all U.S. occupations and in top 15 H-2B occupations, 2004–2015

H-2B Rank FY2015*	SOC code	Occupation	Number of H-2B workers certified, FY15	2004	2015	2004–2015 real change in 2015 dollars	2004–2015 percentage change
	00-0000	All		$22.42	$23.25	$0.82	3.7%
1	37-3011	Landscaping and Groundskeeping Workers	42,104	$13.38	$13.21	-$0.17	-1.3%
2	45-4011	Forest and Conservation Workers	8,339	$14.28	$14.37	$0.09	0.6%
3	39-3091	Amusement and Recreation Attendants	6,906	$10.08	$10.28	$0.20	2.0%
4	37-2012	Maids and Housekeeping Cleaners	6,667	$10.86	$11.06	$0.20	1.8%
5	47-2061	Construction Laborers	3,619	$17.46	$17.58	$0.12	0.7%
6	51-3022	Meat, Poultry, and Fish Cutters and Trimmers	2,822	$12.09	$11.94	-$0.15	-1.3%
7	35-3031	Waiters and Waitresses	2,062	$9.65	$11.08	$1.43	14.8%
8	53-7064	Packers and Packagers, Hand	1,644	$11.30	$11.41	$0.11	1.0%
9	35-2014	Cooks, Restaurant	1,539	$12.26	$11.75	-$0.51	-4.1%
10	39-2021	Nonfarm Animal Caretakers	1,515	$11.64	$11.37	-$0.27	-2.3%
11	27-2022	Coaches and Scouts*	1,349	$19.85	$19.27	-$0.58	-2.9%
12	53-7062	Laborers and Freight, Stock, and Material Movers, Hand	1,159	$13.26	$13.40	$0.14	1.0%
13	47-2051	Cement Masons and Concrete Finishers	1,139	$20.61	$20.24	-$0.36	-1.8%
14	51-9031	Cutters and Trimmers, Hand	1,013	$14.61	$13.88	-$0.73	-5.0%
15	45-3011	Fishers and Related Fishing Workers	912	$17.68	$14.42	-$3.27	-18.5%

Unemployment rates in FY 2015 top 15 H-2B occupations, 2004–2015



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H-2A vs H-2B: occupations

Top 10 Crops/ Occupations			
	Berries[3]	15,335	9.3%
	Hay and Straw[4]	10,066	6.1%
	Apples[5]	9,764	5.9%
	Tobacco[6]	9,269	5.6%
	General Farmworker	8,717	5.3%
	Melons[7]	8,513	5.1%
	Sweet Potatoes	7,426	4.5%
	Lettuce[8]	7,060	4.3%
	Nursery and Greenhouse Workers	6,008	3.6%
	Corn[9]	5,893	3.6%

Top 10 Occupations (based on SOC Codes)			
	Landscaping and Groundskeeping Workers	44,981	37.7%
	Forest and Conservation Workers	9,434	7.9%
	Maids and Housekeeping Cleaners	7,751	6.5%
	Amusement and Recreation Attendants	6,992	5.9%
	Meat, Poultry, and Fish Cutters and Trimmers	5,447	4.6%
	Construction Laborers	5,237	4.4%
	Waiters and Waitresses	3,426	2.9%
	Cooks, Restaurant	2,161	1.8%
	Helpers--Production Workers	1,974	1.7%
	Nonfarm Animal Caretaker	1,636	1.4%

H-2A vs H-2B

	H-2A	H-2B
Recruitment of U.S. workers	Yes – via SWA, positive recruitment	Yes – via SWA, recruitment report
Wages	AEWR; CBA; other prevailing wage	Highest of local average; CBA; private wage surveys
Housing	Employer pays	Worker pays
Transportation	Employer pays (inbound/outbound and daily)	Employer pays (inbound and outbound)
Contract guarantees	Three-fourths rule, corresponding employment	Three-fourths rule, corresponding employment
Annual Cap	Unlimited	66,000 + uncapped occupations (+ returning worker exemption in some years
Number of workers (2016)	134,368	136,505 (85,000 new workers in FY16)
Duration	Less than one year	9 months; or up to 3 years for "one-time occurrence"

H-2B: scandals and abuses

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H-2B: The political and legal saga

- Bush deregulation in 2008
  - Wage levels
- Litigation
  - CATA: APA case
- New wage regs + new comprehensive program regs
  - Litigation brought on behalf of industry to stop regs
- Riders
- More regs
  - 201 -> elimination of wage levels led to employers shifting to surveys en masse
  - 201 joint DOL/DHS regulations

H-2B reforms: 2017 proposed legislation

- Returning workers exemption (House)
- Save our Small and Seasonal Businesses Act of 2017 (Senate: Tillis)
  - Returning workers
  - Attestation

H-2B reforms: approps riders

- Pre-2016: Kept new wage and program rules from being implemented
- In 2016: Prohibited funds from being used to enforce corresponding employment and three-fourths rule
- Prohibited funds from being used by DOL to conduct audit examinations and assisted recruitment activities
- Expanded use of private wage surveys
- Returning worker exemption (expand cap) in 2016

What could Trump and Congress do on H-2A?

Regs, riders, or legislation:

- Defund DOL enforcement of important worker protections
  - Corresponding employment/three-fourths rule
  - Audits of recruitment
- Switch back to attestation (like 2009)
- Impact of DOL proposed budget cuts and/or prosecutorial discretion: lax enforcement
- Make H-2A a year-round visa (or more)
  - Some Democrats might support this
- Immigration enforcement will increase pressure for these measures

Trump admin enforcement on H-2A/H-2B

Hints so far:

- Trump Org and sons hire H-2A and H-2B workers
- CEO of Western Growers Association on Trump's agricultural advisory board
- H-2B recruiters on labor transition team
- Leaked EO in January:
  - Focuses on reform of higher-skilled visa programs
  - Does not call for reform of H-2 programs:
    - "within 90 days of this order, submit to the President a list of options for **ensuring the efficient processing of petitions** for the H-2A nonimmigrant agricultural visa program, while maintaining programmatic integrity."
- ***Possible deal between Sessions/Bannon/Miller wing of the party and business?***
  - More enforcement for skilled visa programs, less for low-wage?

Impact of less enforcement/regulation

- More trafficking
- More worker abuses
- Fewer complaints
- Fewer judgments against employers for wage theft, etc.