



April 2020

H-2B VISAS

Additional Steps Needed to Meet Employers' Hiring Needs and Protect U.S. Workers

Highlights of [GAO-20-230](#), a report to congressional requesters

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Why GAO Did This Study

Since 1990, there has been an annual statutory cap of 66,000 on the number of H-2B visa holders who can work for U.S. employers. DHS administers the program with support from other federal agencies including DOL. In recent years, demand for H-2B visas has exceeded the cap. To meet the needs of U.S. businesses, Congress authorized additional visas in fiscal years 2017-2019. GAO was asked to examine the effects of the annual cap on employers and U.S. workers.

This report examines, among other objectives: (1) trends in the demand for H-2B visa workers, (2) selected employers' reports of the visa cap's influence on their performance and employment of U.S. workers, and (3) how federal agencies have sought to meet employers' H-2B hiring needs and protect U.S. workers. GAO analyzed nationwide data on H-2B visas and county labor market indicators. GAO interviewed 35 H-2B employers in four industries that are among the largest users of H-2B visas. The employers were in five counties selected for variation in factors including the share of H-2B workers in the workforce and the unemployment rate. GAO also reviewed relevant federal laws, regulations, and documents and interviewed federal officials and stakeholders.

What GAO Recommends

GAO is making five recommendations. These include that DHS and DOL assess options to adjust the H-2B visa program and DOL take a risk-based approach to selecting H-2B employers for audits. The agencies agreed with these recommendations as well as one other. DHS disagreed with one, which GAO continues to believe is warranted.

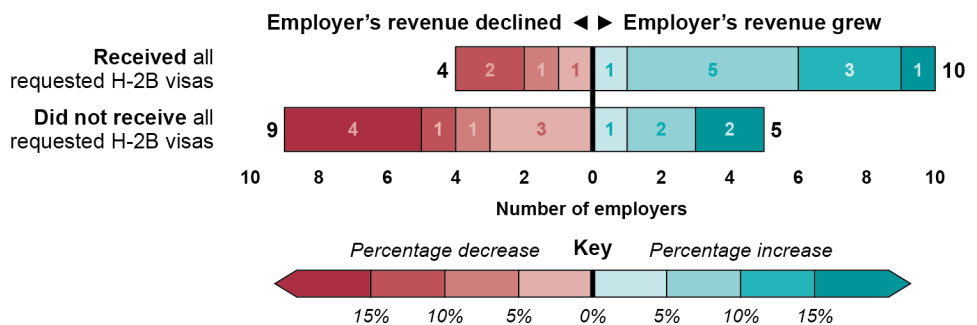
View [GAO-20-230](#). For more information, contact Cindy Brown Barnes at (202) 512-7215 or brownbarnesc@gao.gov.

What GAO Found

Employer demand for H-2B visa workers has increased as the national unemployment rate has declined. H-2B visas are intended to help employers fill temporary, non-agricultural positions when no U.S. workers are available and are subject to an annual statutory cap of 66,000. From 2010 to 2018, the number of H-2B workers requested on employer applications increased from about 86,600 to 147,600. Regarding local economic conditions, GAO found that counties with H-2B employers generally had lower unemployment rates and higher weekly wages than those without H-2B employers.

Most of the 35 H-2B employers GAO interviewed said that business planning was affected by uncertainty about whether they would be able to hire the number of H-2B visa workers they requested given the statutory cap. Employers who did not receive all H-2B visas requested under the statutory cap in 2018 were somewhat more likely than those who did to report declines in revenue (see figure) and purchases of goods and services. However, GAO found no clear pattern in changes to the number of U.S. workers hired by these employers. Employers interviewed by GAO varied in how they adjusted to having fewer H-2B workers. For example, two seafood employers reported shutting down operations in the absence of H-2B workers, and employers said that barriers to finding U.S. workers included remote location and seasonality of the work.

Reported Revenue Changes from Previous Year for H-2B Employers, Fiscal Year 2018



Source: GAO questionnaire of selected H-2B employers. | GAO-20-230

Federal agencies have identified program changes that consider employers' hiring needs and protect U.S. workers, but gaps remain in implementation. The Department of Homeland Security (DHS), in consultation with the Department of Labor (DOL), has identified options for changing the H-2B visa allocation process to address employers' uncertainty about receiving visas. However, DHS and DOL have not assessed any of these options or determined which would not require Congressional action, and employers continue to struggle with uncertainty. To help ensure H-2B employers comply with U.S. worker recruitment and other requirements, DOL has audited employers' compliance with these requirements. However, in general, DOL randomly selected employers for these audits, rather than taking a risk-based approach using factors such as violation trends by industry. As a result, the agency may not be using its limited audit resources efficiently or effectively.

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Abbreviations

BLS	Bureau of Labor Statistics
CLAIMS3	Computer Linked Application Information Management System
DHS	Department of Homeland Security
DOL	Department of Labor
INA	Immigration and Nationality Act of 1952
LAUS	Local Area Unemployment Statistics
NAICS	North American Industry Classification System
OES	Occupational Employment Statistics
OFLC	Office of Foreign Labor Certification
OIG	Office of Inspector General
QCEW	Quarterly Census of Employment and Wages
TLC	temporary labor certification
USCIS	United States Citizenship and Immigration Services
WHD	Wage and Hour Division

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April 1, 2020

Congressional Requesters

H-2B nonimmigrant visas are intended to help employers fill temporary, non-agricultural positions when no qualified U.S. workers capable of performing the work are available in the United States.¹ Employers have used the visas to bring foreign nationals into the United States for jobs in fields as diverse as landscaping and seafood processing.² As part of the H-2B visa application process, the Department of Labor (DOL) screens employers' applications for temporary labor certification (TLC) to determine whether there are sufficient U.S. workers who are qualified and available to perform the temporary services or labor for which the employer seeks to hire foreign workers, and whether hiring foreign workers will adversely affect the wages and working conditions of similarly employed U.S. workers.³ For TLCs approved by DOL, the Department of Homeland Security (DHS) processes employers' petitions to hire a specific number of foreign workers.⁴

In recent years, rising demand for H-2B visas has exceeded the statutory cap of 66,000 visas annually provided to employers, which was established in 1990.⁵ In each of the last three fiscal years (2017, 2018, and 2019), DHS has been authorized to make additional H-2B visas

¹ 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

² Besides the requirement that H-2B visas be used for non-agricultural labor, the program is not restricted to specific occupations.

³ 8 C.F.R. § 214.2(h)(6)(iv)(A), 20 C.F.R. § 655.1.

⁴ The TLC application requests approval to hire a certain number of H-2B workers, and filing this application with DOL is the first step in the H-2B screening process. Once an employer's TLC has been approved, the employer may file a petition with DHS to hire the same or a smaller number of workers than was approved on the TLC. Additionally, the Department of State's consular officers interview individual foreign workers and adjudicate their visa applications before they enter the United States, and DHS's U.S. Customs and Border Protection is responsible for inspecting all people applying for entry to the United States to determine their admissibility to the country. In certain cases, foreign nationals may work in the United States temporarily without a visa.

⁵ The annual cap was created under the Immigration Act of 1990, which amended the Immigration and Nationality Act of 1952. Pub. L. No. 101-649, § 205, 104 Stat. 4978, 5109 (1990). Certain categories of H-2B workers are exempt from the cap, including fish roe processors and technicians. Pub. L. No. 108-287, § 14006, 118 Stat. 951, 1014 (2004).

available.⁶ Nonetheless, business groups and some members of Congress have raised questions about whether employers whose visa petitions are rejected due to the cap may suffer financial consequences. Further, it is possible that demand for visas will continue to grow, especially as the U.S. labor force is expected to grow at an annual rate of 0.5 percent over the next several years—a lower rate than in previous decades.⁷ Meanwhile, different perspectives have emerged concerning the possible impact of the H-2B visa program on U.S. workers. For example, one view is that each H-2B worker supports multiple jobs for U.S. workers, potentially because employers use H-2Bs for hard-to-fill jobs that are critical for business expansion.⁸ In contrast, another perspective is that little evidence of widespread labor shortages in the occupations that most commonly employ H-2B workers, and that employers may be able to fill jobs with U.S. workers if they broaden their search efforts or offer better wages.⁹

You asked us to examine the effects of the H-2B visa statutory cap on employers and U.S. workers.¹⁰ This report (1) describes trends in the demand for H-2B workers, (2) describes selected employers' reports of how the visa cap has influenced their economic performance and employment of U.S. workers, (3) summarizes proposals for adjusting the H-2B statutory cap or how visas are allocated, and (4) assesses how the federal agencies that administer H-2B visas sought to meet employers' H-2B hiring needs and protect U.S. workers.

To address our first objective, we analyzed DOL data on TLC applications, DHS data on H-2B petitions, and Bureau of Labor Statistics (BLS) data on unemployment and wages. We examined trends from fiscal

⁶ DHS was also authorized to make additional visas available in fiscal year 2020.

⁷ The Bureau of Labor Statistics projected that the U.S. labor force would grow at a 0.5 percent annual rate between 2018 and 2028, a slower rate than in past decades. Projected slowing is due to factors including slower population growth and the aging of the U.S. population.

⁸ See, for example, Zavodny, Madeline, *Immigration and American Jobs*, American Enterprise Institute and Partnership for a New American Economy.

⁹ See, for example, Costa, Daniel, *H-2B Visas and Labor Shortages*, Economic Policy Institute (July 17, 2017).

¹⁰ The Chairman, Subcommittee on Homeland Security, House Committee on Appropriations, John Carter was a requestor of this work but is no longer Chairman of the Homeland Security Subcommittee.

years 2010 to 2018 or fewer years, depending on data availability. We assessed the reliability of the data through review of documentation, interviews, and electronic testing, and found the relevant data fields to be sufficiently reliable for our reporting purposes. To address our second objective, we conducted case studies of four industries in specific counties: construction in Maricopa County, Arizona; hospitality in Mackinac County, Michigan (hotels), and Barnstable County, Massachusetts (restaurants); landscaping in Dallas County, Texas; and seafood processing in Dorchester County, Maryland. We selected industries that were among those that applied, and were approved, for the most H-2B visas in fiscal year 2018, and selected counties representing variation in factors including the number of H-2B workers in the specific industry, the proportion of H-2B workers to the county labor force, and county unemployment rate.¹¹ Across all case studies, we interviewed 35 H-2B employers who either did or did not receive visas in fiscal year 2018, who we identified with the help of industry groups; representatives of 12 companies that supply the businesses of H-2B employers; and officials in four state workforce agencies. The results of these interviews are not generalizable to the overall populations of employers and state agencies. We also distributed questionnaires to the 35 H-2B employers and received responses from 30. To address our third objective, we identified proposals for changing the H-2B program from interviews with knowledgeable stakeholders and publications by these stakeholders. We held two discussion groups and two interviews with 12 knowledgeable stakeholders representing diverse perspectives to obtain their views on the potential effects of each proposal we identified.¹² To address our fourth objective, we reviewed relevant federal laws, regulations, and other documents related to DHS's and DOL's administration of the H-2B program; reviewed agency administrative data that we determined were sufficiently reliable for our reporting purposes; and interviewed federal officials. We assessed the agencies' actions according to standards for internal controls in the federal government related to identifying and responding to risk and change. See appendix I for more details on our objectives, scope, and methodology.

¹¹ Amusement, gambling, and recreation industries and support activities for forestry were also major users of the H-2B program. We decided not to conduct case studies of these industries because businesses typically move from location to location during the operating season, thus making it difficult to conduct a case study of employers in a particular location.

¹² In this report, we are not recommending or endorsing the adoption of any particular proposal or package of proposals.

We conducted this performance audit from September 2018 to April 2020 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The Immigration and Nationality Act (INA) of 1952, as amended by the Immigration Reform and Control Act of 1986, authorizes the establishment of the H-2B visa category which allows U.S. employers to bring non-immigrant workers into the United States to perform temporary non-agricultural work.¹³ Generally, U.S. employers¹⁴ may apply for H-2B visas when they can establish that (1) their need for an H-2B worker's labor is temporary, meaning a one-time occurrence, a seasonal need, a peak load need, or an intermittent need¹⁵; (2) qualified U.S. workers are unavailable to perform the work¹⁶; and (3) the employment of an H-2B worker will not adversely affect the wages or working conditions of similarly-employed U.S. workers.¹⁷ Generally, an H-2B worker's authorized stay per the TLC will be no more than 10 months. However, DHS may authorize an extension of up to one year to H-2B workers already in the United States, based on a subsequent TLC, with a maximum stay of up to three years.¹⁸

¹³ H-2B visas are one of many nonimmigrant visas issued to foreign nationals seeking temporary admission into the United States. Other nonimmigrant visas that allow foreign nationals to work in the United States for a specified period of time and purpose include H-1B visas for workers in specialty occupations, H-2A visas for agricultural workers, B-1 visas for business travelers, B-2 visas for tourists, and J visas for exchange visitors such as certain teachers and students. By contrast, immigrant visas are for those seeking permanent residency in the United States. For example, EB-3 immigrant visas are available to certain eligible categories of skilled and unskilled workers.

¹⁴ Petitions may be filed by employers or by U.S. agents.

¹⁵ 8 C.F.R. § 214.2(h)(6)(ii)(B).

¹⁶ 8 C.F.R. § 214.2(h)(6)(iv)(A).

¹⁷ *Id.*

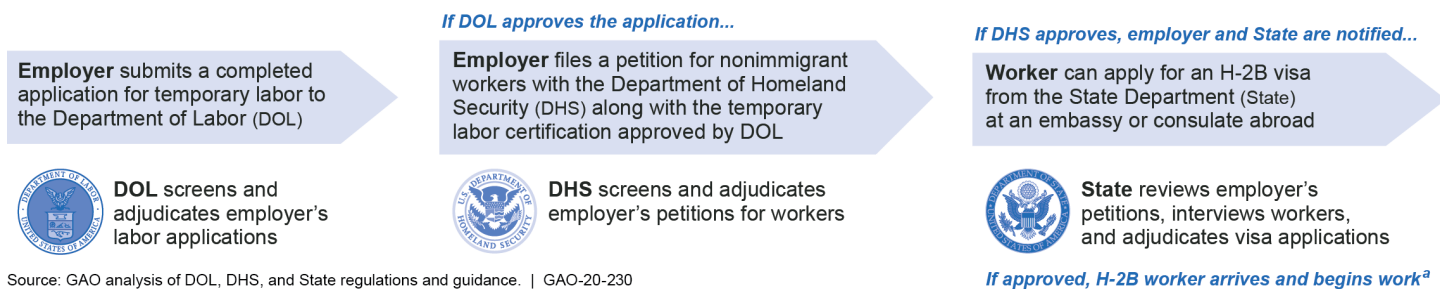
¹⁸ 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

Pursuant to the INA, as amended by the Immigration Act of 1990, the H-2B visa program is subject to an annual cap of 66,000 visas.¹⁹ These visas are divided into two semiannual allocations: up to 33,000 workers may be issued H-2B visas or provided H-2B nonimmigrant status in the first half of the fiscal year (October 1 – March 31), and the remaining annual allocation will be available in the second half of the fiscal year (April 1 – September 30).²⁰ In fiscal years 2005, 2006, 2007, and 2016, Congress amended the INA to include a provision that established a returning worker exemption.²¹ This exemption enabled H-2B workers who were counted against the visa cap during one of the three preceding fiscal years to not be counted against the visa cap for the relevant fiscal year.²²

H-2B Program Screening and Approval Process

Federal agencies use a multi-step process to screen employers to ensure eligibility to hire H-2B workers and later screen nonimmigrant workers on eligibility to work under the H-2B visa category (see fig. 1).²³

Figure 1: Summary Description of H-2B Visa Application Screening Process for Federal Agencies



Source: GAO analysis of DOL, DHS, and State regulations and guidance. | GAO-20-230

^a Under an approved visa, the visa holder is allowed to travel to the United States; however, upon arrival, U.S. Customs and Border Protection determine if the traveler may be admitted into the United States.

¹⁹ 8 U.S.C. § 1184 (g)(1)(B).

²⁰ 8 U.S.C. § 1184(g)(10).

²¹ Pub. L. No. 109-13, div. B, tit. IV, § 402 (2005); Pub. L. No. 109-364, div. A, tit. X, § 1074 (2006); Pub. L. No. 114-113, div. F, tit. V, § 565 (2015).

²² As part of their petitions, employers were required to name all returning workers they intended to hire and certify that these workers had been issued an H-2B visa or been changed to H-2B status in one of the three preceding years.

²³ The Department of State's consular offices also work in the H-2B screening process by interviewing individual foreign workers and adjudicating their visa applications prior to entering the United States.

DOL's Office of Foreign Labor Certification (OFLC) screens and processes TLC applications from employers. OFLC is to review these applications to ensure that no qualified U.S. workers are available for the job in question and that the wages and working conditions offered to H-2B workers will not adversely affect similarly employed U.S. workers.²⁴ In 2015, DOL and DHS jointly issued regulations that set forth a number of specific requirements that employers must meet in order to obtain a TLC,²⁵ including taking specific steps to recruit U.S. workers before hiring H-2B workers; paying a wage equal to or exceeding the highest of the prevailing wage or the federal, state, or local minimum wage; paying for H-2B workers' transportation costs; and guaranteeing a minimum number of work hours to H-2B workers.²⁶ Although employers may submit a TLC application requesting a specific number of H-2B workers, DOL may approve all the workers requested, approve a smaller number of workers, or deny the application.²⁷ Employers can petition DHS's U.S. Citizenship and Immigration Services (USCIS) for a number of workers up to the number approved by DOL, then USCIS screens and processes employer's petitions. DHS is to send the approved petitions to the Department of State, which screens workers that apply for H-2B visas at

²⁴ We previously reported on possible abuses in the recruitment and employment of H-2B workers and federal efforts to protect them. See [GAO- H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers](#), [GAO-15-154](#) (Washington, D.C.: March 6, 2015).

²⁵ See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 Fed. Reg. 24,042 (Apr. 29, 2015); *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 80 Fed. Reg. 24,146 (Apr. 29, 2015). There is ongoing litigation concerning DOL's authority to enact regulations pertaining to the H-2B program. In a September 2018 memorandum opinion, the U.S. District Court for the District of Maryland granted the government's motion for summary judgment, finding that DOL's 2015 regulations were consistent with Congress's intent in allowing DOL to enact regulations pertaining to the H-2B program. The plaintiffs in this case filed a notice of appeal with the Fourth Circuit to challenge the district court's rulings in *Outdoor Amusement Business Assn., Inc., et al. v. DHS, et al.*, No. 15-cv-3463 (D. Md.), appeal docketed, No. 16-1015 (4th Cir.).

²⁶ On November 15, 2019, DHS and DOL jointly published a final rule concerning recruitment requirements for the H-2B program. *Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States*, 84 Fed. Reg. 62,431 (Nov. 15, 2019). This rule rescinded the requirement that an employer advertise its job opportunity in a print newspaper of general circulation in the area of intended employment, and expanded and enhanced DOL's electronic job registry to disseminate available job opportunities to the widest audience possible.

²⁷ 20 C.F.R. §§ 655.50-655.54.

U.S. embassies and consulates overseas.²⁸ The Department of State is responsible for interviewing H-2B applicants and reviewing their visa applications and supporting documentation as part of their adjudication process.²⁹

Enforcement of the H-2B Program

DOL is the primary agency that enforces H-2B employer requirements and relevant labor laws.³⁰ This enforcement authority is delegated within the DOL to the Administrator of the Wage and Hour Division (WHD). WHD conducts investigations, inspections, and law enforcement functions that carry out the provisions of 8 U.S.C. § 1184(c), INA section 214(c), and the regulations pertaining to the employment of H-2B workers, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced, according to DOL. WHD investigates complaints filed by both foreign and U.S. workers affected by the H-2B program, as well as concerns raised by other federal agencies, such as DHS or the Department of State, regarding particular employers and agents. WHD also conducts targeted or directed (i.e., not complaint-based) investigations of H-2B employers to evaluate program compliance.

Through OFLC, DOL may audit adjudicated applications to ensure employers' compliance with the terms and conditions of their H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition and to fulfill the Secretary's statutory mandate to certify applications only where unemployed U.S. workers capable of performing such services cannot be found. For non-compliant applications, OFLC may request more information from employers prior to possible debarment.³¹ Audits can also be used to establish a record of employer compliance or non-compliance with program requirements and because the information they contain assists DOL in determining whether it needs to further investigate an

²⁸ Some workers may be exempt from obtaining a visa at a U.S. embassy or consulate, according to DHS. These workers are to present the necessary documentation to U.S. Customs and Border Protection for admission to the United States.

²⁹ We have previously reported on H-2B employers' recruitment of foreign workers. See [GAO-15-154](#).

³⁰ 8 U.S.C. § 1184(c)(14)(B), 20 C.F.R. part 655, subpart A.

³¹ If an employer commits certain violations listed in the regulations, such as a willful misrepresentation of a material fact in their application, DOL may not issue any future labor certifications to that employer, which is referred to as a debarment, 20 C.F.R. § 655.73(a).

employer or its agent or attorney. In such instances, OFLC refers its audit findings and underlying documentation to DHS, WHD, or other appropriate enforcement agencies, who in their turn might conduct a targeted investigation.

Moreover, DOL's Office of Inspector General may conduct investigations of applications suspected of potential fraud. DHS can also conduct certain enforcement activities exercised through USCIS. USCIS has the authority to adjudicate the H-2B petition and conduct inquiries on the employer's H-2B petition, which includes the approved TLC and any supporting documentation, to prevent fraud and ensure compliance with H-2B requirements.

Administration of H-2B Visas and Statutory Changes Made in Recent Years

Generally, according to DHS, it processes and approves employers' petitions in order of receipt until the cap is reached. However, for the second half of fiscal year 2018, USCIS announced that employers had petitioned for more visas during the first five business days of the filing period than were available under the semiannual allocation. As a result, per its regulations, DHS used a computer-generated process to randomly select petitions to consider for approval.³² Additionally, during fiscal years 2017, 2018 and 2019, Congress enacted provisions that authorized DHS, after consultation with DOL, to make more visas available beyond the statutory cap of 66,000 if the agencies determined that the needs of U.S. businesses could not be satisfied with willing, qualified and able U.S. workers.³³ Under these provisions, the total number of additional visas that DHS could make available could be up to the highest number of returning workers approved in any fiscal year that the returning worker exemption was in place, which was about 65,000 visas in fiscal year 2007, according to DHS and DOL (therefore up to about 131,000 visas could be made available in each of these fiscal years). The Secretary of Homeland Security, after consultation with DOL, decided to make 15,000 additional visas available for each year in fiscal years 2017 and 2018 (81,000 visas total in each year) and 30,000 additional visas for returning workers in fiscal year 2019 (96,000 visas total). The federal agencies announced the availability of these additional visas during different months, based on the date they received statutory authorization, which

³² See 8 C.F.R. § 214.2(h)(8)(vii). On March 1, 2018, USCIS announced that they had received petitions requesting about 47,000 H-2B workers, which went beyond the 33,000 semiannual visa allocation.

³³ Pub. L. No. 115-31, div. F, tit. V, § 543, 131 Stat. 135, 432; Pub. L. No. 115-141, div. M, tit. II, § 205, 132 Stat. 348, 1049; Pub. L. No. 116-6, div. H, tit. I, § 105, 133 Stat. 13, 475.

were all in the second half of the respective fiscal years (July 2017, May 2018, and May 2019).

Demand for H-2B Visa Workers Increased as Unemployment Decreased

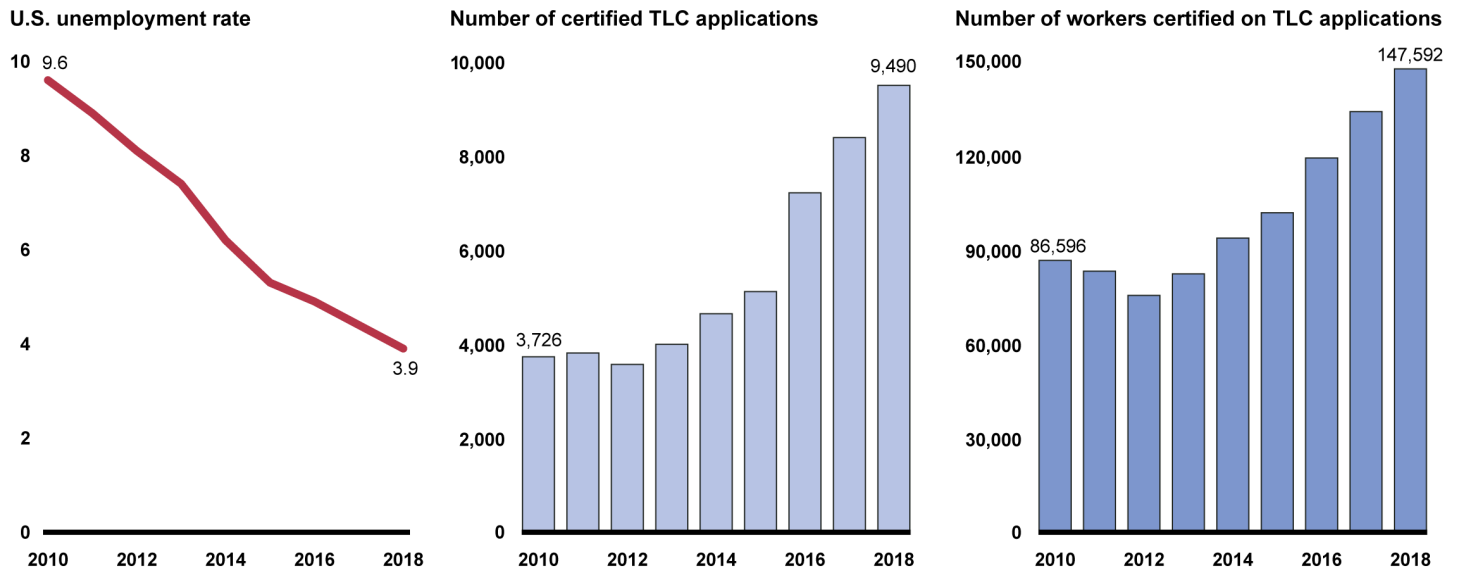
Employer demand for H-2B visas increased from 2010 through 2018 as the U.S. economy strengthened.³⁴ The number of employer-submitted TLC applications that were certified by DOL increased in each year since 2012, and more than doubled from fiscal year 2010 (about 3,700) to 2018 (about 9,500).³⁵ Additionally, the number of H-2B workers on DOL-certified applications has increased each year since 2012.³⁶ In fiscal year 2018, DOL certified applications representing about 147,600 H-2B workers, about a 70 percent increase from fiscal year 2010. As the number of certified TLC applications and workers has generally increased since 2010, national unemployment has declined each year since 2010 (see fig. 2).

³⁴ We are using number of TLC applications and workers as proxy for demand for H-2B visas. While this provides a general sense of demand for H-2B visas, it is possible that it overstates the actual demand because, according to DOL representatives, there is no disincentive for employers to apply because no personally identifiable information is required or collected and no application fees are incurred. As a result, more employers may apply for temporary labor certifications than would complete the DHS petition for H-2B visas.

³⁵ We are using the time period of 2010 through 2018 because effective January 2009, DOL changed the TLC application filing and review process to introduce audits and procedures for penalizing employers who fail to comply with program requirements. 73 Fed. Reg. 78,020 (Dec. 19, 2008).

³⁶ Similar results hold when we include non-certified TLC applications as well. We only present the certified TLC application data because the TLC data field for the total number of workers requested (which includes both certified and non-certified applications) is missing for fiscal years 2009, 2013, and 2014.

Figure 2: Number of Certified Temporary Labor Certification (TLC) Applications and Workers, with U.S. Unemployment Rates, 2010 through 2018



Source: GAO analysis of Department of Labor U.S. Unemployment and Temporary Labor Certification (TLC) data. | GAO-20-230

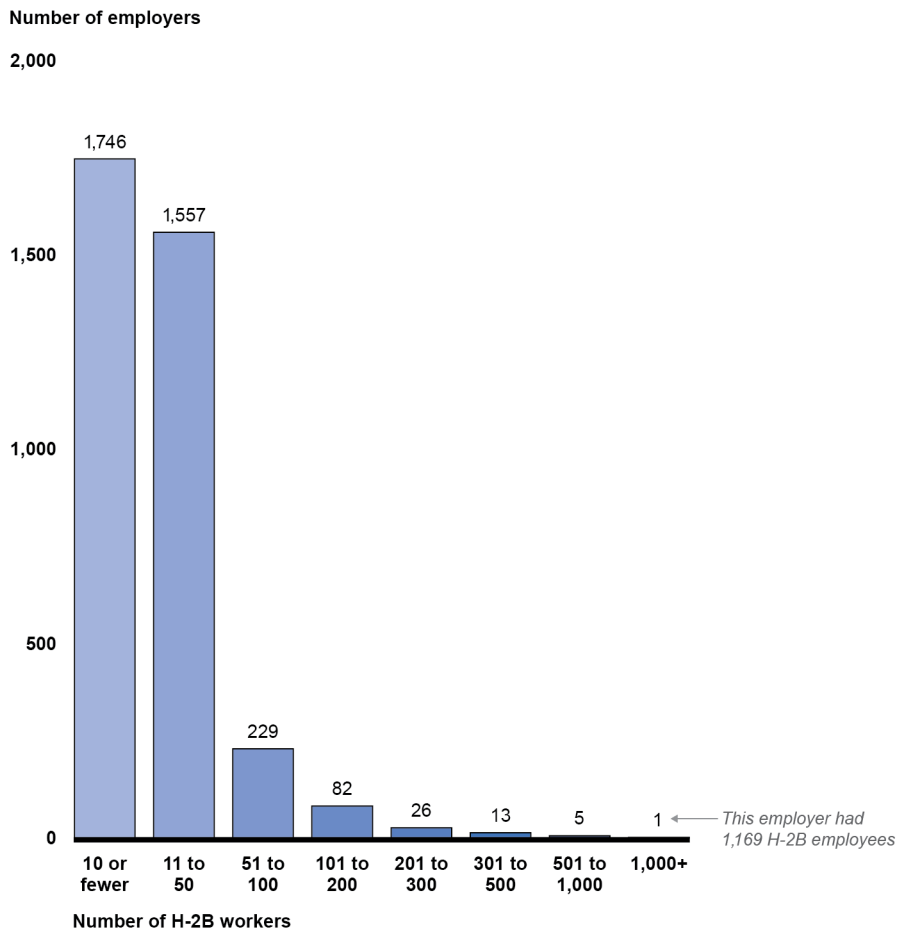
After DOL certifies the TLC, employers petition DHS to obtain H-2B visas for the workers they plan to employ.³⁷ Employers that filed petitions for H-2B workers varied in the number of workers requested and most were concentrated in several industries.³⁸ According to our analysis of DHS data, in fiscal year 2018, DHS approved petitions from about 3,700 H-2B employers.³⁹ The number of H-2B visa workers that employers were approved for ranged from one to 1,169, with a median of 12 approved H-2B workers (see fig. 3 for full distribution). Of the about 3,700 employers, 127 were approved for more than 100 visas.

³⁷ Employers can petition for a number of workers up to the number approved by DOL.

³⁸ As discussed in the background, the process for employers to get H-2B workers consists of an employer first applying for a TLC from DOL and then petitioning DHS. In this analysis, we use H-2B petitions to refer to the employer petitions to DHS for H-2B workers. Generally, DHS processes and approves employers' petitions in order of receipt until the cap is reached.

³⁹ In the CLAIMS3 dataset we received from DHS, most observations were individual workers, but some instances had multiple workers listed. For our analysis, we count each observation as a single worker.

Figure 3: Number of H-2B Workers for Which Employers Were Approved, 2018



Source: GAO analysis of Department of Homeland Security CLAIMS3 data. | GAO-20-230

The employers were generally concentrated in administrative and support services (including landscaping); hospitality, amusement and recreation; forestry, fishing, and hunting; construction; and manufacturing industries (see table 1).⁴⁰

⁴⁰ We compared the average weekly wages of workers within four selected industries (seafood processing, landscaping, construction, and hospitality) and found generally higher wages in counties with H-2B employers than without. These analyses are presented in appendix II.

Table 1: Top Six Industries by Number of Approved H-2B Workers, Fiscal Year 2018

Industry (2-Digit North American Industry Classification System (NAICS) code)^a	Number of approved H-2B workers	Median number of approved H-2B workers per employer
Administrative and Support Services (including Landscaping) (56)	31,071	12
Hospitality (72)	11,914	9
Arts, Entertainment, and Recreation (71) ^b	10,207	13
Forestry, Fishing and Hunting (11)	6,566	25
Construction (23)	5,756	12
Food, Beverage, Textile, and Apparel Manufacturing (31) ^c	4,500	25

Source: GAO analysis of Department of Homeland Security (DHS) CLAIMS3 data. | GAO-20-230

Note: this table only represents visas in the top six industries in fiscal year 2018. As such, the total number of visas in this table is not representative of the total number of visas issued in fiscal year 2018. The total number of visas available in fiscal year 2018 was 81,000.

^aWe are reporting number of H-2B workers approved by DHS broken out by 2-digit NAICS codes in this table. We report the number of approved temporary labor certifications (TLC) to the Department of Labor as part of our case study selection criteria in Appendix I.

^bArts, Entertainment, and Recreation includes businesses in sports, gambling, outdoor amusement, golf courses, skiing facilities, fitness centers, and bowling centers.

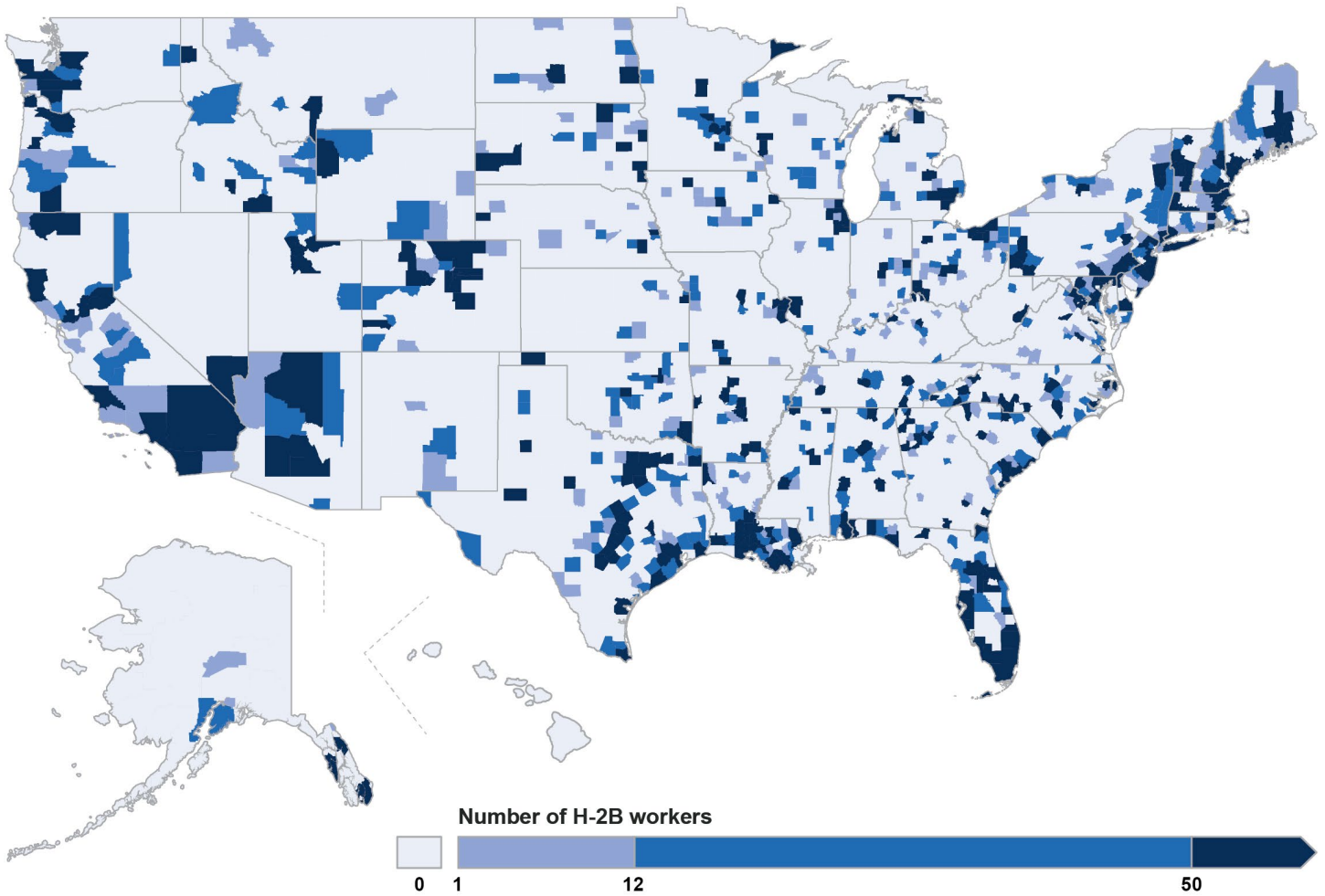
^cSeafood Processing and Preparation is part of the food manufacturing industry.

In our analysis, we found that in 2018, H-2B employers were concentrated in 737 counties in the United States that have, on average, larger labor forces and stronger labor markets than counties without H-2B employers.⁴¹ For each fiscal year from 2015 through 2018, there were about 700 counties with H-2B employers and about 2,400 counties without any H-2B employers, according to our analysis of DHS CLAIMS3 data.⁴² Our analysis showed counties with H-2B employers have, on average, larger labor forces than those without H-2B employers and are located mostly along the coasts, but can be found throughout the United States (see fig. 4).

⁴¹ We are considering counties with lower unemployment rates and higher average weekly wages as having stronger labor markets.

⁴² In fiscal years 2015 through 2018, the number of counties with H-2B employers ranged from a low of 661 (fiscal year 2015) to a high of 738 (fiscal year 2017).

Figure 4: Number of Approved H-2B Workers across Counties within the United States, Fiscal Year 2018



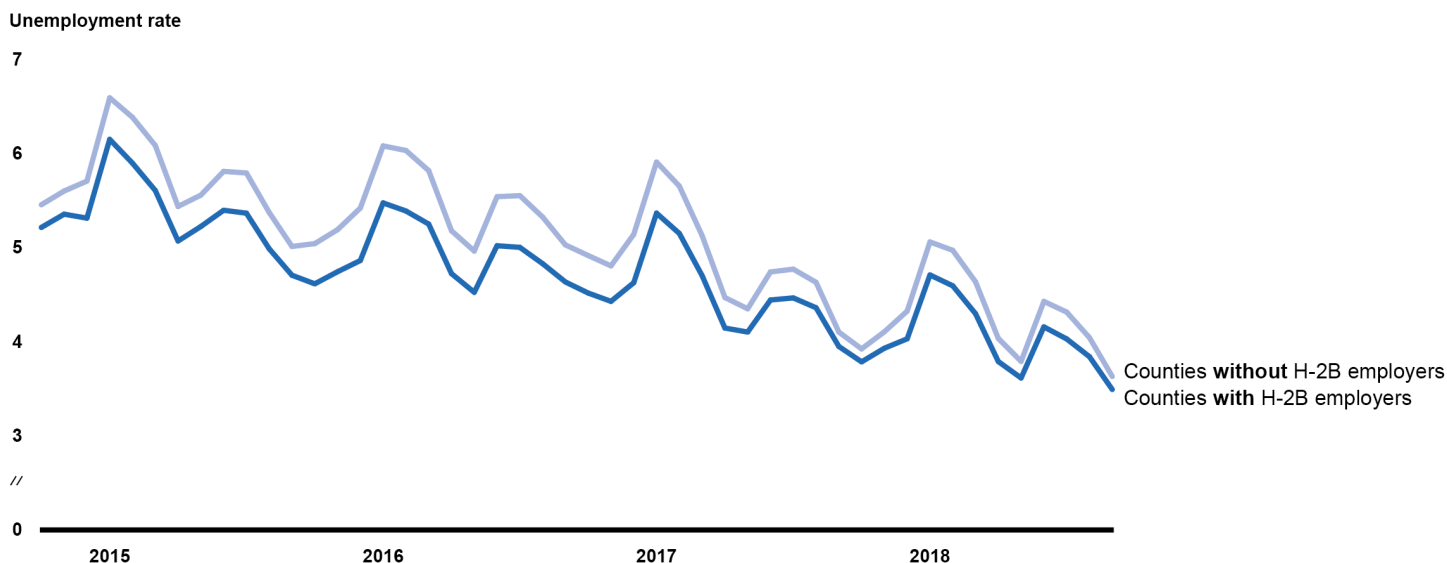
Source: GAO analysis of Department of Homeland Security CLAIMS3 data; MapInfo (base map). | GAO-20-230

Note: the addresses used in determining the number of H-2B workers within a county are based on the employers' primary locations and may not reflect the location where the work is performed.

Our analysis of DHS and DOL data found that counties with H-2B employers generally had lower unemployment rates and higher average

weekly wages than counties that do not have any H-2B employers.⁴³ Specifically, the approximate 700 counties with H-2B employers had, on average, unemployment rates that were about 0.4 of a percentage point lower than those in counties without H-2B employers.⁴⁴ Moreover, lower unemployment was consistent in every month from fiscal years 2015 through 2018, regardless of seasonality (see fig. 5). Further, average weekly wages in counties with H-2B employers were higher by about \$113 per week r than in counties without H-2B employers (average weekly wage for counties with H-2B employers is \$866 and for counties without H-2B employers is \$754).⁴⁵ This relationship held for every quarter from fiscal years 2015 through 2018 (see fig. 6).

Figure 5: Mean Monthly Unemployment Rates for Counties With and Without H-2B Employers, Fiscal Years 2015 through 2018



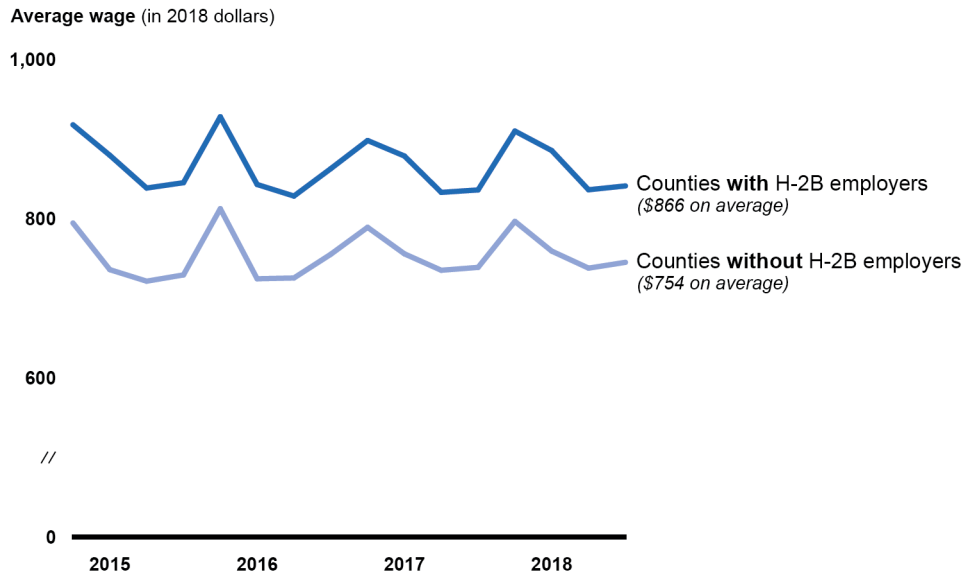
Source: GAO analysis of Department of Labor Local Area Unemployment Statistics and Department of Homeland Security CLAIMS3 data. | GAO-20-230

⁴³ Additional analyses on the relationship between labor market conditions and the employment of H-2B workers are presented in Appendix II where we control for labor force, number of H-2B workers, the ratio of number of H-2B workers to total labor force, and industry type and find that average weekly wages may be partially driven by counties with larger labor forces.

⁴⁴ We do not provide any measure of precision because Local Area Unemployment Statistics (LAUS) estimates do not provide model-based error measurements for counties.

⁴⁵ Since Quarterly Census of Employment and Wages (QCEW) is a census of establishments, every unit is in the sample and represents itself. As such, we do not report any measurement of precision for estimates based on QCEW.

Figure 6: Mean Weekly Wages for Counties With and Without H-2B Employers, Fiscal Year 2015 through 2018



Source: GAO analysis of Department of Homeland Security CLAIMS3 and Department of Labor Quarterly Census of Employment and Wages data. | GAO-20-230

The connection between strong labor markets and employers' use of H-2B workers may stem from multiple factors. Counties with strong labor markets may have a smaller pool of unemployed workers to fill seasonal positions leading employers in these counties to use H-2B visas as a way to fill these positions. Alternatively, counties with larger, more urban populations may have stronger labor markets. These larger population counties have more employers than smaller counties; therefore, they are more likely to have at least one employer with H-2B workers.⁴⁶

⁴⁶ We also conducted our analysis controlling for county population size and found similar results to our main findings. This analysis is presented in appendix II.

Selected Businesses Reported Difficulty with Planning Due to Visa Cap, but Effects on Economic Performance and U.S. Employment Varied across Industries

Many Selected Businesses Reported that Uncertainty in Getting H-2B Visas Presented a Planning Challenge, but Responses about Economic Performance and Employment Were Not as Consistent

Most selected H-2B employers we interviewed said uncertainty in getting H-2B visas is a challenge to their business planning. We interviewed and gave questionnaires to 35 H-2B employers—19 of which operated small businesses.⁴⁷ In our interviews, 21 H-2B employers said the uncertainty of receiving H-2B visas affected their ability to plan for possible business growth and investment.⁴⁸

Some employers explained that their operations depended on getting H-2B workers annually and that any decrease in the number of expected H-2B workers would substantially impact their business decisions. For example, one Texas-based landscaping employer we interviewed cited uncertainty as a reason to stop accepting new contracts and to reduce investments in new equipment, such as trucks and lawn mowers, and other landscaping supplies. In Maryland, one seafood processing employer said that because of the uncertainty related to receiving H-2B visas they could not implement planned investments, such as expanding their facilities or purchasing trucks for transporting goods, and shut down their business for a time. Similarly, one hospitality employer in Michigan

⁴⁷ We received completed questionnaires from 30 of the 35 employers, but did not include one employer's questionnaire response because the employer did not receive all requested H-2B visas in 2017, but did receive all requested H-2B visas in 2018. We excluded this questionnaire to prevent any distortion in our analysis regarding economic impacts, which looked at 2017 and 2018. We determined that 19 of the remaining 29 businesses can be classified as small businesses, based on small business size standards from the U.S. Small Business Administration.

⁴⁸In our interviews, we asked all 35 H-2B employers the same type of questions, with some variation between interviews. While 21 H-2B employers mentioned uncertainty as a challenge to planning for business growth and investment, employers who did not cite uncertainty in our interviews may or may not have experienced uncertainty as a challenge.

told us that due to the uncertainty of getting visas, they opted not to invest in expanding their hotel amenities or make renovations.

In addition, of the 35 H-2B employers we interviewed, seven said the lottery system used by DHS exacerbated the uncertainty of getting H-2B visas. Some of these seven employers described the lottery as seemingly unfair to employers who might have been long-time participants of the program and would not be able to predict if they will be getting visas. Some employers stated that they would prefer that DHS use a more equitable method to award and distribute visas, such as giving every employer a proportion of the visas they petition for.

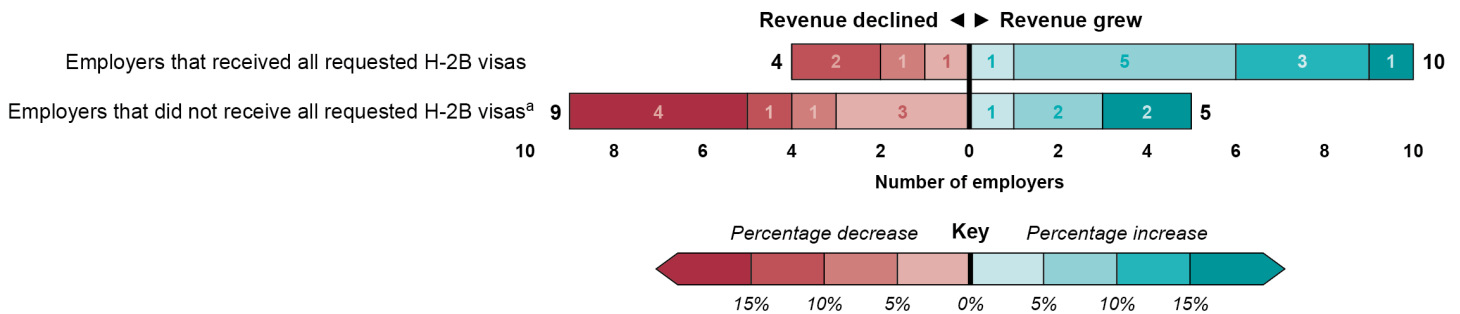
Beyond the uncertainty associated with the H-2B program, employers we spoke with reported varying business experiences during fiscal years 2017 and 2018. Specifically, the 29 H-2B employers who completed our questionnaire—15 of whom did not receive all requested H-2B visas under the standard cap in 2018—reported varied experiences in terms of revenue, purchases of goods and services for their businesses, and the employment of U.S. workers.⁴⁹

Revenues. Employers who did not receive all requested H-2B visas under the standard cap more frequently reported revenue declines than employers who received visas, according to our analysis of the questionnaire responses (see fig. 7).⁵⁰ Some employers reported that the loss of customers or contracts may have also contributed to these revenue declines. According to the questionnaire responses, 12 of the 14 employers who did not receive all requested H-2B visas under the standard cap reported losing customers and contracts in fiscal year 2018.

⁴⁹Throughout this report, the phrase “did not receive all requested H-2B visas under the standard cap” encompasses three employer-reported scenarios in fiscal year 2018: (1) received no visas (5 total); (2) received some visas, but fewer than petitioned for (5 total); or (3) received visas late (5 total) through the 15,000 additional visas provided in fiscal year 2018 above the statutory cap of 66,000. We also use the term “received visas” to indicate that the employers self-reported that they were approved for all the visas they petitioned for under the standard visa cap. Further details can be found in appendix I.

⁵⁰Information on revenues, purchases of goods and services, and employment of U.S. workers was self-reported by H-2B employers who completed our questionnaire. We did not validate the responses or evaluate for causality.

Figure 7: Number of Selected Employers Reporting Revenue Increases or Declines in Fiscal Year 2018, by H-2B Visa Approval Status



Source: GAO questionnaire of selected H-2B employers. | GAO-20-230

^aOne of the H-2B employers did not respond to our question concerning changes in their revenue. In the figure, the label "Employers that did not receive all requested H-2B visas" includes employers that self-reported not getting any visas, getting fewer visas than requested, or getting visas late through the 15,000 additional visas provided in fiscal year 2018 above the statutory cap of 66,000.

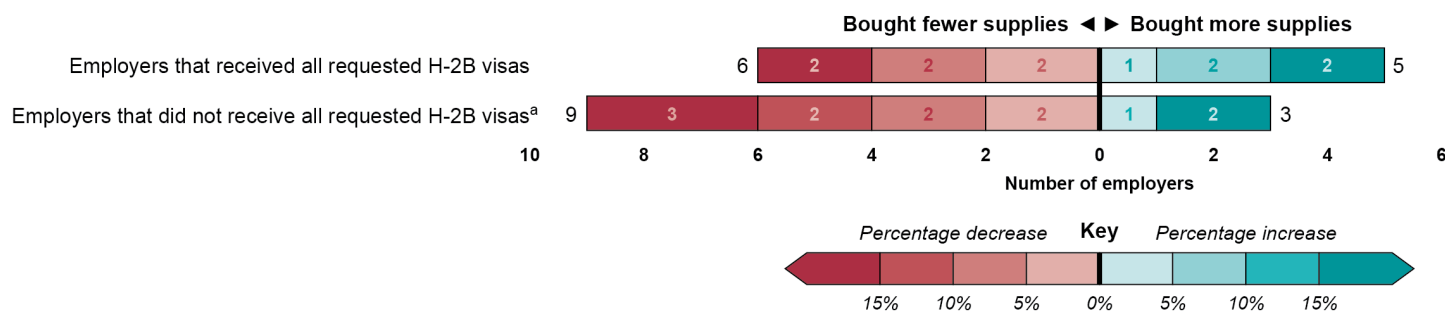
However, employers' experiences varied across industries, and other factors besides obtaining H-2B visas may have also affected revenues. For example, seafood processing employers that did not receive all requested H-2B visas under the standard cap more frequently experienced revenue declines than construction employers that did not receive all requested H-2B visas under the standard cap, as the latter may have been better positioned to mitigate the loss of H-2B workers. (Industry and location-specific factors from our case studies are discussed later in this report.)

Purchases of goods and services. Based on responses to our questionnaire, employers that did not receive all requested H-2B visas under the standard cap more frequently reported declines in purchases of goods and services than employers who received visas in 2018 (see fig. 8).⁵¹ Employers' decisions to delay investments on their businesses may have contributed to declines in the purchases of goods and services. Based on questionnaire responses, 11 of the 15 employers who did not receive all requested H-2B visas under the standard cap reported delayed investments in equipment or maintenance repairs. Additionally, some also reported delayed investments in business expansion. Corroborating what H-2B employers reported, nine of the 12 supply companies we

⁵¹Of the 29 responses collected, six employers either did not respond or gave a partial response to our question regarding changes to their supply purchases from fiscal year 2017 to 2018. This included employers who did and did not receive H-2B visas as requested for fiscal year 2018.

interviewed in our case studies said they experienced decreased demand for their services when H-2B employers did not get visas or got them late.

Figure 8: Number of Selected Employers Reporting Increases or Decreases in Supply Purchases in Fiscal Year 2018, by H-2B Approval Status



Source: GAO questionnaire of selected H-2B employers. | GAO-20-230

^aSix of 29 employers did not respond or partially responded to our question concerning changes in their supply purchases. In the figure, the label “Employers that did not receive all requested H-2B visas” includes employers that self-reported not getting any visas, getting fewer visas than requested, or getting visas late through the 15,000 additional visas provided in fiscal year 2018 above the statutory cap of 66,000.

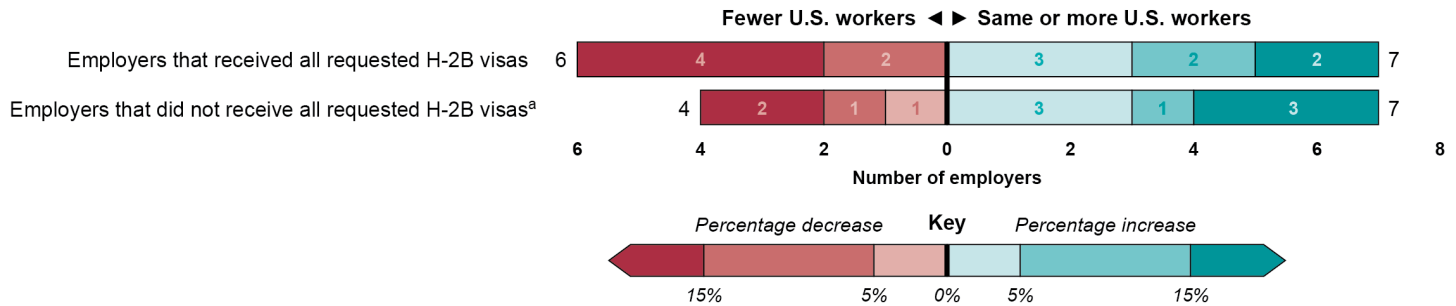
Similar to their experiences with revenues, employers’ reported experiences with purchases of goods and services varied across industries as other factors apart from obtaining H-2B visas may have affected employers’ purchases of goods and services. For example, more construction employers who did not receive all requested H-2B visas under the standard cap reported on their questionnaires that they could maintain their levels of purchasing goods and services than hospitality employers who did not receive all requested H-2B visas under the standard cap, possibly due to construction employers’ ability to mitigate the impacts of not receiving H-2B workers.

Employment of U.S. workers. Based on our questionnaire responses, no clear pattern emerged among employers with regard to changes in the employment of U.S. workers (see fig. 9).⁵² Mainly there is no evidence of a notable number of layoffs of U.S. workers among employers that did not receive all requested H-2B visas under the standard cap. According to our questionnaire responses, three of the 15 employers who did not

⁵²Throughout this report, we use the term U.S. workers to include U.S. citizens and permanent residents. Moreover, our analysis regarding changes to the employment of U.S. workers considers U.S. workers who are employed in similar job positions as H-2B workers.

receive all requested H-2B visas under the standard cap in fiscal year 2018 reported having to lay off or reduce hours of U.S. workers. However, responses regarding increases in U.S. employment are difficult to interpret because our questionnaire did not ask how long newly hired employees actually stayed with employers.

Figure 9: Number of Selected Employers Reporting Increases or Declines in Their Employment of U.S. Workers, by Fiscal Year 2018 H-2B Approval Status



Source: GAO questionnaire of selected H-2B employers. | GAO-20-230

^aIn the figure, the label “Employers that did not receive all requested H-2B visas” includes employers that self-reported not getting any visas, getting fewer visas than requested, or getting visas late through the 15,000 additional visas provided in fiscal year 2018 above the statutory cap of 66,000.

Employers in Different Industries and Locations Reported Varying Characteristics and Efforts to Mitigate Effects of Visa Cap

Local and industry-specific characteristics affected how selected employers mitigated impacts from the H-2B visa cap and may help explain the varied outcomes reported in revenue, supply purchases, and employment of U.S. workers. For example, 18 of the 35 employers we interviewed said that the characteristics of their own businesses, such as seasonality, affected how they tried to mitigate impacts from the H-2B visa cap. Employers told us that they used several methods to mitigate the effects of not having H-2B workers; however, their success in mitigating impacts varied (see table 2).

Table 2: Strategies Reported by Selected H-2B Employers to Mitigate Effects of Not Having H-2B Workers in 2018

Attempted mitigation strategies	Seafood	Landscaping	Construction	Hospitality
Requested visa extensions to hire other H-2B visa holders already in the U.S. ^a	-	-	-	<input checked="" type="checkbox"/>
Used J1 visa holders to complement existing staff ^b	-	-	-	<input checked="" type="checkbox"/>
Applied for employment based immigration visas (EB-3) for returning H-2B visa holders ^c	-	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	-
Spread work or prolonged work across the year	-	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	-
Attempted to develop alternatives to manual labor	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	-	-

Attempted mitigation strategies	Seafood	Landscaping	Construction	Hospitality
Hired subcontractors or contracted work to other businesses	-	-	☑	☑
(Practices Related to Recruitment of U.S. Workers)				
Increased recruitment efforts of local U.S. workers to fill vacant H-2B positions	☑	☑	☑	☑
Raised wages to attract more U.S. workers	☑	☑	☑	☑
Increased hours, including overtime, for existing U.S. employees	-	☑	☑	☑
Increased recruitment efforts of U.S. workers from other localities (states)	☑	-	☑	☑

Source: Interviews with selected H-2B employers. | GAO-20-230

Note: Results for 2018 mitigation practices are reported from interviews. A checkmark is placed for each industry where at least one employer reported trying a particular mitigation practice. A dash is placed where employers of each industry did not report any attempts.

^aUnder the Form I-129, Petition for Nonimmigrant Worker, employers can request an H-2B visa extension which enables an employer to hire an H-2B worker who is already in the United States. According to DHS, these workers generally are not subject to the statutory visa cap during their extensions.

^bThe Exchange Visitor (J) non-immigrant visa category is for individuals approved to participate in work-and-study visitor programs.

^cEB-3 visas are employment based immigration visas for skilled workers, professionals, or other workers.

Seafood Processing

Seafood processing employers on Maryland’s eastern shore—which includes Dorchester County—hire H-2B workers for picking meat out of crabs, according to a local trade association (see fig. 10).⁵³ Typically, crabbing season begins on April 1st and ends in late November. These employers are heavily reliant on H-2B workers, and, on average, 54 percent of their workforce is comprised of H-2B workers for fiscal year 2018, according to questionnaire responses. Seafood processing employers we interviewed were also long-time users of the H-2B program. Of the six seafood processing employers we interviewed, five said they had participated in the H-2B visa program for more than 20 years, while the remaining employer had participated for about two years.⁵⁴

⁵³In our case study, we interviewed a total of six seafood processing companies, of which five responded to our questionnaire.

⁵⁴Across all four industries, employers gave us estimates of when they began participating in the H-2B visa program. In some instances, employers could not recall or did not say when exactly their businesses began participating in the H-2B visa program.

Figure 10: Basket of Blue Crabs Processed by an H-2B Employer from Dorchester County



Source: GAO. | GAO-20-230

Seafood processing employers that did not receive all requested H-2B visas under the standard cap in 2018 reported notable impacts to their businesses. Of the five seafood employers that responded to our questionnaire, three did not receive the H-2B visas they requested under the standard cap, and these employers reported that their revenue

declined by more than 10 percent. All three employers attributed their revenue declines to not getting the requested H-2B workers in time for the season. Two of the employers who did not receive H-2B workers in time for the season, told us that they shut down their operations for part of the season.

Moreover, seafood processing employers told us that not getting H-2B workers, or getting them late in the season, led to a reduction in U.S. employment. For example, one employer we interviewed said the use of truck drivers and administrative staff declined without H-2B workers to perform the crab picking work. In addition, all of the seafood processing employers who did not get their H-2B workers reported declines in supplies purchased (e.g., crabs, boxes, pots, and packaging). Of the five seafood supply companies we interviewed, all of them confirmed that when H-2B employers did not receive all requested H-2B visas under the standard cap, demand for their services and products declined.

Employers told us that impacts of the H-2B visa cap were aggravated by several industry-specific factors. For example, one employer said the strict seasonality of crab picking made delays in receiving H-2B workers problematic.⁵⁵ In addition, seafood employers said their efforts to recruit U.S. workers faced challenges. Different employers mentioned challenges including this strict seasonality; the nature of the work, which generally does not appeal to U.S. workers including high school and college students; and the employer's remote location.⁵⁶ Finally, some employers emphasized that there was not a good substitute for manual labor when they did not get H-2B workers. One seafood processing employer said the industry had tried to automate crab picking, but was unsuccessful.⁵⁷

Landscaping

Selected landscaping employers we interviewed in Dallas-Ft. Worth, Texas said they typically hire H-2B workers to perform residential and

⁵⁵ In Maryland, commercial fishing seasons are set under the Code of Maryland Regulations 08.02.03.11C and by Public Notice, which set catch limits for male and female blue crab respectively.

⁵⁶ Some state workforce agency officials confirmed the challenges employers faced when attempting to recruit more U.S. workers.

⁵⁷ In the past, seafood processing companies and local universities have sought ways to mechanize the process of picking meat from shellfish; however, they told us the efforts were unsuccessful, in part because the machines broke up the meat too much and left in more shells than desired.

commercial landscaping, such as mowing lawns, planting trees, building outdoor living spaces, and performing other lawn care maintenance (see fig. 11).⁵⁸ Landscaping employers told us that their season can begin as early as February and can last until mid-December. On average, among the landscaping employers that responded to our questionnaire, 35 percent of their workforce was comprised of H-2B workers. Of the 11 landscaping employers we interviewed, eight said they have participated for about 10 years or more, while three said they have participated in the H-2B visa program for about three years or less.

Figure 11: Landscaping Work Done by H-2B Employer in Dallas Area



Source: Photo provided by a Dallas area landscaping firm. | GAO-20-230

Of the 11 landscaping employers who responded to our questionnaire, three did not get all visas requested under the standard cap. All three employers who did not receive all requested H-2B visas reported revenue declines and said during our interviews that revenue declines were due to not getting H-2B workers or getting them late in the season. Moreover, of the 11 landscaping employers that responded to our questionnaire, six—

⁵⁸ In our case study, we interviewed a total of 11 landscaping employers, all of which responded to our questionnaire.

including employers that did and did not receive all requested visas under the standard cap—reported declines in supply purchases.⁵⁹

Landscaping employers told us that low local unemployment and the intensive manual labor in the heat were challenges to recruiting more U.S. workers. Of the 11 landscaping employers we interviewed, three said that when they did not get their H-2B workers, they tried to partially mitigate the situation by having existing staff work additional overtime hours. Other efforts to mitigate the impacts of having fewer H-2B workers included spreading their work across the year and helping returning H-2B workers apply for permanent residency using EB-3 visas—immigrant visas available to certain categories of skilled and unskilled workers. Some landscaping employers said that using EB-3 visas would enable them to have more workers who are permanent residents, which would help promote a more stable workforce, according to our interviews.

Construction

Selected construction employers we interviewed in Maricopa County, Arizona, said they generally hire H-2B workers to perform manual labor, such as building housing panels or drywalling (see fig. 12).⁶⁰ Construction employers said their season generally begins as early as March and lasts until November. On average, among the construction employers that responded to our questionnaire, 8.5 percent of their workforce was comprised of H-2B workers. Of the six construction companies we interviewed, all of them said they have participated in the H-2B visa program for about five years or less.

⁵⁹Of the 11 landscaping employers that responded to our questionnaire, three employers did not fully report information on their supplies purchased between 2017 and 2018.

⁶⁰In our case study, we interviewed a total of six construction companies, of which four responded to our questionnaire.

Figure 12: Housing Units Being Constructed by Company that Subcontracts with an H-2B Employer in Maricopa County, Arizona



Source: GAO. | GAO-20-230

The three construction employers who did not receive all requested H-2B visas under the standard cap in 2018 and responded to our questionnaire reported that they did not experience significant revenue declines. Of these three employers, two reported increased revenues between 2017 and 2018, while one did not report revenue.⁶¹ One employer said during interviews that had they received H-2B workers in 2018 they might have experienced a significant revenue increase compared to 2017 because of the expansion of the construction industry overall in Maricopa County. In addition, among the three construction employers who responded to our questionnaire and did not receive all requested H-2B visas under the standard cap, two reported increased supply purchases during fiscal year 2018.

Although construction employers told us that recruiting more U.S. workers was challenging due to low unemployment and the manual nature of the work, several factors may have helped construction employers mitigate the impacts of the visa cap. Of the six construction employers we interviewed, two told us they attempted to mitigate impacts from the visa cap by spreading their work across the year and prebuilding housing

⁶¹ Of the three construction employers who did not receive all requested H-2B visas, one of them did not respond to our question concerning revenues between 2017 and 2018.

frames during the offseason—a practice referred to as even-flowing.⁶² Moreover, some construction employers said they either subcontracted work during times they could not hire new U.S. workers, or had their existing U.S. workers work additional overtime hours.

Hospitality

Selected hospitality employers in Mackinac Island, Michigan, and Barnstable County, Massachusetts, said they commonly hire H-2B workers to perform work such as housekeeping and working in kitchens (see fig. 13).⁶³ Generally, some employers said their season begins in April and lasts through the end of October or early November. Of the 12 hospitality employers we interviewed, five said they have participated in the H-2B visa program for between five to 20 years, four said they have participated in the visa program for more than 20 years, and three did not say when they started participating in the visa program. Moreover, H-2B workers comprised an average of 35 percent of the hospitality employers' workforce, based on questionnaire responses.

⁶²Attempting to spread the work across the year may adversely affect these employers' H-2B applications as construction companies we interviewed said DOL rejected their TLC applications because of insufficient evidence proving their companies had a temporary need for labor.

⁶³In our case study, we interviewed a total of 12 hospitality employers (from Mackinac Island, Michigan and Barnstable County, Massachusetts), of which nine responded to our questionnaire.

Figure 13: Kitchen of a Hotel that Hires H-2B Workers on Mackinac Island, Michigan



Source: GAO. | GAO-20-230

Of the nine hospitality employers who responded to our questionnaire, six did not receive all requested H-2B visas they petitioned for under the standard cap in 2018. Of those six employers, three reported revenue declines in 2018, while the other three reported increased revenues. However, some hospitality employers said that the lack of H-2B workers did affect the quality of their services or led them to reduce their operations. For example, one resort we interviewed said they had to close down a signature restaurant because they did not receive the H-2B

workers necessary for the season. Of the nine hospitality employers that responded to our questionnaire, five reported a decline in supply purchases for 2018.⁶⁴

A variety of factors may help explain the outcomes for hospitality employers. On one hand, hospitality employers told us they were challenged to recruit more U.S. workers due to the seasonality of the work and sparse local population, and the fact that students are not available for the whole season. On the other hand, one hospitality employer that did not receive H-2B visas in 2018 said during interviews that they did not experience a revenue decline because guests had booked their reservations in advance. Also, hospitality employers reported using various strategies to mitigate the impact of the cap. For example, of the six hospitality employers who did not receive all requested H-2B visas in 2018, three employers hired more foreign students under the J-1 exchange program for certain students and other visitors. Moreover, four hospitality employers said they applied for H-2B visa extensions, which according to one employer are for H-2B workers already in the United States. In addition, one employer also mentioned that they contracted their housekeeping services to outside cleaning crews, which negatively affected the establishment's quality of service.

Stakeholders Identified Potential Effects of Proposed Changes to the H-2B Visa Program

In response to the increase in demand for H-2B visas and the uncertainty employers expressed regarding whether they would be approved for workers under the H-2B visa cap, stakeholders and others have suggested changes to the H-2B program. Based on interviews with knowledgeable stakeholders and a review of their publications, we identified six proposals for changing the H-2B visa cap.⁶⁵ In our discussion groups and interviews, 12 knowledgeable stakeholders—henceforth referred to as stakeholders—identified potential effects for each of the six proposals.⁶⁶ As the stakeholders discussed the various policy proposals, they identified two recurring policy goals: policy proposals should (1) minimize uncertainty and (2) maintain or increase

⁶⁴ Of the nine hospitality employers that responded to our questionnaire, one did not respond to our question regarding changes in supply purchases.

⁶⁵ In this report, we are not recommending or endorsing the adoption of any particular proposal or package of proposals. Rather, we identified these proposals from the literature review as those that could be considered. For more information about how we identified these proposals, including the sources of these options, see appendix I.

⁶⁶ For the complete list of stakeholders included in our discussions and interviews, see appendix I.

protections for U.S. and H-2B workers. We did not independently assess the individual merits or accuracy of the views expressed by these stakeholders, nor did we assess the feasibility or administrative costs of the proposals discussed. Additionally, we did not assess which options would require Congressional action or which options could be implemented through agency action. Below, we present summaries of the six proposals and some of their potential effects as identified by these stakeholders.⁶⁷ The first two proposals listed would eliminate or adjust the cap and the remaining four would keep the current cap in place and address alternative ways to allocate visas.

Shortage list. This proposal would eliminate the statutory cap and allow employers to recruit foreign workers for occupations with worker shortages. An expert commission would compile the shortage list annually, based on relevant factors, such as wage growth or job vacancies.

- Potential effects identified by stakeholders:
 - It would provide more evidence-based and data-driven justifications for the number of visas and the industries/occupations that receive them.
 - It would foster public credibility for the H-2B visa program because it demonstrates a bona fide need for H-2B workers.
 - It would accelerate the H-2B visa approval process for certain industries.
 - Because wage growth would be an indicator of occupational shortages, it may incentivize employers in major H-2B industries to offer higher wages, if economically beneficial.
 - Some employers approved under the current system would not be approved for H-2B visa workers because their occupations are not on the shortage list.
 - It may lack accuracy because national level occupational shortages may not reflect shortages in certain industries and occupations within specific locations or identify local labor market trends. BLS data may not accurately capture such trends.

⁶⁷ As part of our discussion with the stakeholders, we asked for additional proposals that were not included in the identified six. These additional proposals are presented in appendix I.

Annual adjustment. This proposal would adjust the cap annually (either up or down) based on economic indicators such as unemployment rate or number of TLC applications approved by DOL.

- Potential effects identified by stakeholders:
 - It would allow employers to use H-2B workers when U.S. workers are not available due to low unemployment and revert to U.S. workers in times of higher unemployment. Having a flexible cap could be more predictable than the current system.
 - It would be a more accurate reflection of need than using an arbitrary cap.
 - While not discussed in the proposal language, if wage growth is also considered as an economic indicator in the annual adjustment, it might incentivize employers to improve wages, if economically beneficial.
 - Using a national indicator would not fully reflect localized needs for H-2B workers.
 - It would put DOL in a position where it would be determining employers' needs.
 - Using approved TLC applications is not a good measure of demand because they may not reflect demand for labor.
 - Any delays in processing TLC applications could lead to difficulties in determining the annual adjustment in a timely manner.

Returning workers exemption. This proposal would retain the current H-2B visa cap of 66,000 and make the returning worker exemption permanent.⁶⁸

- Potential effects identified by stakeholders:
 - It could lead to increased predictability. Employers would have more certainty on whether they will be approved for H-2B visas, and H-2B workers would know whether they would have the option to return to their jobs in the United States.

⁶⁸ In fiscal years 2005, 2006, 2007, and 2016, the INA was amended to establish a returning worker exemption. This exemption enabled H-2B workers who were counted against the visa cap during one of the three preceding fiscal years to not be counted against the visa cap for the relevant fiscal year. To not be counted against the visa cap, returning workers must have been previously issued an H-2B visa within the previous three fiscal years.

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- There is familiarity—among employers, H-2B workers, and administrators—with returning worker exemption as it has been implemented before.
 - It may be more efficient for employers as returning workers already have training.
 - There could be potential cost savings for program as returning workers have already been vetted.
 - It rewards both workers and employers who are compliant with the H-2B program.
 - A permanent returning worker exemption, like any proposed reform that involves eliminating or increasing the cap, requires better enforcement of worker protections.
 - It could increase the possibility that H-2B workers return to poor working conditions because they have no other economic options. One stakeholder said this could be mitigated by allowing returning workers the flexibility to work for different employers than they worked for in prior years if so desired.⁶⁹

Priority list. This proposal would retain the current H-2B visa cap of 66,000 and give priority to applications from employers that offer the highest wages or better working conditions.

- Potential effects identified by stakeholders:
 - It creates incentives for employers to improve working conditions.
 - It may be easy to implement under current law, and may not require new legislation.
 - It alleviates problems associated with calculating the prevailing wage.
 - It does not account for the wage variation among small and large employers, geographical locations, or industries. Using the highest wages to allocate the visas skews the program to certain occupations and higher-paying geographical locations (even within the same industries and among similarly sized employers).
 - If based solely on wages, a priority list could penalize employers that also have to provide workers with additional benefits such as housing at no cost.

⁶⁹ In technical comments, DHS officials noted that there has never been a requirement for returning H-2B workers to return to the same employer.

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- It would need to be combined with stronger enforcement, such as employer audits, to ensure that workers are getting paid the promised higher wage or better conditions.

Quarterly allocation. This proposal would retain the current H-2B visa cap of 66,000 and allocate visas quarterly rather than twice a year.

- Potential effects identified by stakeholders:
 - It might improve fairness for employers whose season starts late in the semiannual allocations.
 - It helps ease the burden on DOL's computer system.⁷⁰
 - It reduces the number of employers applying for visas before their period of need and spreads demand more evenly across the year.
 - It does not seem to mitigate the issue of having demand exceed the cap.
 - In practical terms, quarterly allocation would result in shifting visas away from certain employers and toward others. Demand for H-2Bs is especially high in April to June, the third quarter of the fiscal year. This option would reduce the number of visas for the third quarter and shift more visas to the fourth quarter.

Auction. This proposal would retain the current H-2B visa cap of 66,000 and the visas would be auctioned to the highest employer bidders.

- Potential effects identified by stakeholders:
 - It uses market forces; employers evaluate how much an H-2B worker is worth.
 - It demonstrates the economic cost of keeping the cap low and determines whether employers are strictly looking for cheap labor.
 - Auction revenues could be used to ensure the H-2B program has less adverse effects on U.S. and H-2B workers, raises wages, or leads to more audits by DOL.
 - Depending on the design of the auction, it may create a system where larger, better funded employers unfairly benefit.

⁷⁰ According to one stakeholder, on January 1, 2019, DOL's electronic filing system became unresponsive because so many users were seeking to access the system simultaneously.

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- It does not address issues of uncertainty faced by employers of H-2B workers.
 - It increases labor costs which could reduce the profitability using H-2B workers.
-

Federal Agencies Have Taken Steps to Address H-2B Employers' Hiring Needs and Protect U.S. Workers, but Gaps Remain

Agencies Made Efforts to Respond to Demand for H-2B Workers but Have Not Fully Considered Alternative Approaches Identified in the 2019 Report

Alternative Approaches for Visa Allocation

DHS, in consultation with DOL, has identified some alternatives to the current approach for allocating H-2B visas. In the Joint Explanatory Statement accompanying the fiscal year 2018 DHS Appropriations Act, Congress directed DHS—in consultation with DOL—to review and report on options for addressing the problem of unavailability of H-2B visas for employers that need foreign workers late in each semiannual period of visa availability. In response, DHS issued a report to Congress in June 2019 that laid out six approaches for revising how H-2B visas are allocated among employers—some of which were similar to the proposals identified above.⁷¹ The DHS options include (1) a merit-based system for eligibility that prioritizes employers that have made a significant contribution to the U.S. economy, (2) designation of eligible occupations

⁷¹ DHS, *Options for Reforming the H-2B Visa Program and Improving Late Season Employers' Access to Workers* (June 7, 2019).

or industries based on factors such as industry unemployment rates, and (3) distributing visas on a quarterly basis.⁷²

DHS has not assessed which of the options outlined in the June 2019 report could be implemented by agency action alone and which would require Congressional action, nor has it identified which options have the greatest potential benefit for employers. DHS officials have told us that they currently lack the resources to assess or implement the proposals from their June 2019 report or any other alternatives and, while an assessment may be possible in the future, it would have to be balanced against other administration priorities. Standards for internal control in the federal government call on agencies to identify, analyze, and respond to significant change, including change in the economic environment.⁷³ Moving forward with assessing available reform options would position DHS and DOL to better inform their own and Congress's decision-making.

Consideration of Economic Trends in Determining Additional Visa Numbers

In determining the number of additional H-2B visas to make available beyond the standard cap in fiscal years 2017 to 2019, DHS—in consultation with DOL—relied on data from prior years.⁷⁴ In each of the three years, federal law authorized DHS after consultation with DOL to provide additional H-2B visas beyond the standard cap if the needs of U.S. businesses could not be met with U.S. workers, up to the maximum number of H-2B returning workers in any prior year when the returning worker exemption was in effect (about 65,000 in 2007, according to the agencies).⁷⁵ DHS made up to 15,000 additional visas available in fiscal years 2017 and 2018 and up to 30,000 in 2019. In each year, DHS in consultation with DOL determined the appropriate number of additional visas by looking at demand for visas in prior years. Specifically, in 2017 it

⁷² DHS's report "describe[s] options that generally are phrased in terms of actions that Congress or [DHS and DOL] could take to improve late season employers' access to H-2B workers" and "improving the overall H-2B program," states that these options "should not be construed as expressing an opinion on the scope of [either agency's] current statutory or regulatory authorities." The report states that Congress has the authority to implement any of the options it presents.

⁷³ GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014).

⁷⁴ See 82 Fed. Reg. 32,987 (Jul. 19, 2017); 83 Fed. Reg. 24,905 (May 31, 2018); 84 Fed. Reg. 20,005 (May 8, 2019).

⁷⁵ DHS has called on Congress to decide when the statutory cap on H-2B visas should be raised, as Congress set the existing cap of 66,000 visas.

determined that 15,000 visas would be sufficient to at least meet the same level of demand as in fiscal year 2016.⁷⁶ In 2018, DHS used the same rationale to determine that up to 15,000 additional visas would again be sufficient, based on experience with the additional visas in 2017.⁷⁷ Most recently, in 2019, DHS in consultation with DOL raised the number of additional visas to 30,000 in recognition partly of the higher demand in 2018—when employers filed petitions for about 29,000 visas during the first five days of the filing period for additional visas.⁷⁸ The demand for returning H-2B workers in prior years and the amount of time remaining in the fiscal year were also factors in the agencies' decision about how many additional visas to provide.

However, using demand in prior years as the primary basis for setting the number of additional visas in the current year is not consistent with standards for internal control in the federal government, which call for agencies to identify, analyze, and respond to significant change, including change in the economic environment.⁷⁹ Indeed, the outcome in 2018, when DHS made 15,000 additional visas available but employers applied for almost 30,000 visas, demonstrates the potential limitations of relying solely on past demand as a predictor of future demand. Examples of other types of data that may be relevant to gauging trends in employer demand include unemployment rate, employment, and earnings, which we have previously identified as potential indicators of labor market shortages.⁸⁰ Some stakeholders have also suggested that the number of H-2B workers on approved TLC applications is a good measure of visa demand. The agencies said in the 2018 and 2019 temporary rules making additional visas available that they did not have enough time remaining in those fiscal years to conduct a more formal analysis of the adverse effects on U.S. workers that may result from a broader cap increase.⁸¹ Assessing the advantages and disadvantages of considering current economic trends in addition to past demand would help the

⁷⁶ 82 Fed. Reg. 32,987, 32,989 (Jul. 19, 2017). The agencies made this determination based on the number of foreign workers who acquired H-2B status through the returning worker exemption in fiscal year 2016.

⁷⁷ 83 Fed. Reg. 24,905, 24,908 (May 31, 2018).

⁷⁸ 84 Fed. Reg. 20,005, 20,009 (May 8, 2019).

⁷⁹ [GAO-14-704G](#).

⁸⁰ GAO, *Aviation Workforce: Current and Future Availability of Airline Pilots*, [GAO-14-232](#) (Washington, D.C.: Feb. 28, 2014).

⁸¹ 83 Fed. Reg. 24,905, 24,907 (May 31, 2018), 84 Fed. Reg. 20,008 (May 8, 2019).

agencies decide if such an approach would be a better way to estimate employer need in any future years when Congress authorizes visas beyond the H-2B standard cap.

According to DHS and DOL, the agencies have also sought to balance employers' hiring needs and the interests of U.S. workers by setting a higher standard that employers must meet to qualify for additional H-2B visas. To qualify for visas under the standard cap, employers must have an approved TLC, demonstrating, among other things, that they have a temporary need for labor and have taken steps to recruit workers in the United States. From 2017 to 2019, employers applying for the additional visas were also required to attest that without the visas, they were likely to suffer irreparable harm, i.e., suffer a severe and permanent financial loss.⁸² According to the 2017 temporary rule announcing the availability of additional H-2B visas above the statutory cap, DHS decided to focus on businesses likely to suffer a severe and permanent financial loss, in part, to be responsive to some stakeholders that U.S. workers could potentially be adversely affected by a general cap increase applicable to all potential employers.⁸³ To support their attestation of severe and permanent financial loss, employers were required to retain documentation, such as contracts, reservations, or orders that would have to be cancelled absent the requested H-2B workers. DOL officials told us the agency's Wage and Hour Division evaluates the sufficiency of this documentation in the course of its investigations of H-2B employers, when applicable. Officials said they examine documentation related to loss of contracts and dependence on H-2B workers, among other things, in order to detect significant and voluntary violations of program requirements.⁸⁴

⁸²In addition, in fiscal year 2019, the agencies prescribed that employers could only petition for the additional visas on behalf of workers who were granted H-2B visa status in fiscal years 2016, 2017, or 2018. The agencies' rationale for this requirement is that it limits the additional visas to foreign workers who have already demonstrated the willingness to return home after their authorized period of stay in the United States. 84 Fed. Reg. 20,008.

⁸³ 82 Fed. Reg. 32,987, 32,989 (July 19, 2017). DHS, in consultation with DOL, reiterated this concern in the temporary rule announcing additional visas in 2018. 83 Fed. Reg. 24,905, 24,907 (May 31, 2018).

⁸⁴ DOL's Office of Foreign Labor Certification also plans to examine this documentation as part of its audits of H-2B employers.

Changes to Procedures for Assigning TLC Applications to Analysts for Review and Processing

- DOL has sought to address rising demand for TLCs and H-2B visas through changes to how it assigns TLC applications to analysts for review and processing. Prior to 2018, DOL processed applications sequentially according to the day they were received, and released certifications on a rolling basis as all requirements for certification were met. DOL reported that on January 1, 2018, the first day of the filing period for employers seeking workers to start on April 1, 2018, it received approximately 4,498 applications covering 81,008 worker positions, exceeding the annual visa allotment by nearly 250 percent. According to the agency, this was the first time in recent years that this had happened. On January 17, 2018, agency officials announced that beginning February 20, 2018, they would begin to release certified applications sequentially according to the day and time of receipt. This in turn led to a large number of employers with approved TLCs submitting their H-2B visa petitions within a small window. DHS officials explained that receiving a large volume of petitions in a short time frame required USCIS to approve petitions following random selection.⁸⁵
- In June 2018, anticipating further increases in applications, DOL announced that it would sequentially assign applications to analysts in order of day and—in an adjustment from the earlier procedures—time of receipt to the millisecond. Once applications were assigned, analysts would initiate review of applications in the order of receipt date and time, issue first actions on a rolling basis, and issue certifications as all regulatory requirements were met.
- DOL reported that in January 2019, it received approximately 5,276 applications covering more than 96,400 worker positions for start dates of work on April 1, exceeding the semiannual visa allocation by nearly 300 percent. Furthermore, DOL reported that on January 1, 2019, within the first five minutes of the filing period for April 1 start dates of employment, the agency’s network infrastructure supporting OFLC’s electronic filing system experienced almost 23,000 log-in attempts, in contrast with 721 attempts in the same time period in 2018. This volume of simultaneous system users caused the electronic filing system to become unresponsive, preventing nearly all

⁸⁵ According to DHS regulations, the agency must use random selection to allocate H-2B visas when it receives petitions requesting more than the total number of visas available under the semi-annual cap within the first five days of the petition filing period. 8 C.F.R. § 214.2(h)(8)(vii).

employers from submitting applications until the system reopened on January 7, 2019..

- In July 2019, DOL implemented a new approach, involving a randomization process for assigning TLC applications to analysts for processing; DOL believes this process is fair and orderly for employers while minimizing user disruption.^{86, 87}

DOL Has Made Efforts to Strengthen U.S. Worker Protections, but Does Not Target Its Audits of H-2B Employers

Audits of H-2B Employers

DOL's Office of Foreign Labor Certification conducts recordkeeping audits of adjudicated TLCs to assess employers' compliance with the terms and conditions attested to in their applications and to fulfill the Secretary's statutory mandate to certify applications only where unemployed U.S. workers capable of performing the needed work cannot be found.⁸⁸ DOL officials told us the agency reviews the original TLC application and requests additional documentation of the employer's activities when conducting audits to determine whether the employer is in compliance with program requirements. Specifically, employers with minor violations receive a warning; violations described in 20 C.F.R. § 655.71 could lead to increased DOL monitoring and assistance with the employer's recruitment efforts; and employers with violations described in 20 C.F.R. § 655.73 could be debarred from the H-2B program.

During fiscal year 2018, according to DOL, the agency audited fewer than 10 percent of adjudicated TLCs, and often issued warning letters. DOL

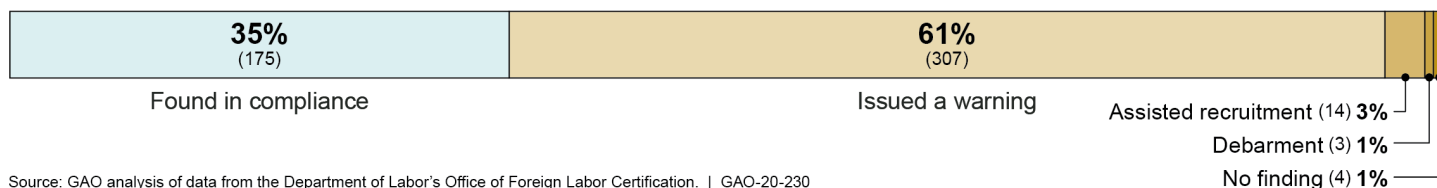
⁸⁶ DOL is defending a challenge to its implementation of the randomization process for assigning applications filed by employers seeking H-2B visas, in *Padilla Construction Co. v. Scalia*, No. 2:18-cv-01214-GW-AGR (C.D. Cal.).

⁸⁷ While DOL has changed its TLC procedures so they call for a randomization process on an on-going basis, DHS generally processes employers' petitions on a first-come, first-served basis except when a large number of petitions are received in the first five days of the filing period.

⁸⁸ The agency resumed its audits of H-2B employers in September 2017, after it was prohibited by federal law from conducting such audits from December 2015 to May 2017.: Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. H, § 114, 129 Stat. 2242, 2600.

officials reported that during fiscal year 2018 they initiated 493 audits of H-2B employers, representing seven percent of all employers with approved TLCs issued during the year. They also reported that of the 503 audits completed during fiscal year 2018, which includes audits initiated during 2017, more than half resulted in a warning letter being sent to the employer, with only a small number finding more serious violations (see fig. 14).

Figure 14: Outcomes of DOL Audits of H-2B Employers Completed in Fiscal Year 2018



Source: GAO analysis of data from the Department of Labor's Office of Foreign Labor Certification. | GAO-20-230

In our review of a non-generalizable sample of letters sent to H-2B employers with audit results, we found several examples of the types of issues identified by DOL.⁸⁹ Several warning letters noted violations related to the period of employment of H-2B workers, such as failing to notify OFLC when H-2B workers left their jobs earlier than planned. In letters of assisted recruitment that we reviewed, employer violations included failure to accurately advertise rates of pay and failure to meet requirements for posting job advertisements in newspapers. Finally, the debarment letters we reviewed cited the employer's failure to provide the documentation that DOL requested as part of the audit.

DOL has not taken a risk-based approach to selecting employers to audit. OFLC's Certifying Officer has the sole discretion to choose the applications selected for audit, including selecting applications using a random assignment method.⁹⁰ DOL officials said the agency has for the most part randomly selected H-2B employers for audits, although they also select some employers because of a prior violation. Officials said that the system currently used to track audits captures data on audit workloads and final audit outcomes, but the agency has a plan to develop a new system that would also track the individual violations found in

⁸⁹ We reviewed a non-generalizable sample of 25 letters sent to employers based on audits conducted since 2017. For more details on how we selected this sample, see appendix I.

⁹⁰ 20 C.F.R. § 655.70.

audits and the industry and job classification associated with the employer. With this capacity, officials said they could take a more risk-based approach to selecting employers for audits, based on trends in violations by industry or job classification. However, officials said that the further development and implementation of this tracking system is currently on hold due to resource constraints with no firm date for moving forward. Standards for internal control in the federal government call on agencies to identify, analyze, and respond to risks to meeting their objectives.⁹¹ Until it implements a risk-based approach to selecting H-2B employers for audits, DOL may miss opportunities to allocate its limited audit resources more efficiently and to detect violations that could adversely affect U.S. and H-2B workers. Taking a more targeted approach is especially important in light of a 2019 Office of Inspector General (OIG) report that stated over the past decade, the OIG and other federal agencies have conducted over 70 criminal investigations in the H-2B program related to potential fraud involving employers, attorneys, and others.⁹²

Determination of Prevailing Wage

DOL also works to protect U.S. workers through setting the prevailing wage that employers must pay and has taken steps to enhance the accuracy of its prevailing wage determination by limiting the use of employer-provided wage surveys. DOL is responsible for determining the prevailing wage applicable to an H-2B application.⁹³ An employer must pay a wage at least equal to the prevailing wage obtained from the National Prevailing Wage center within OFLC, or the federal, state, or local minimum wage, whichever is the highest.⁹⁴ The prevailing wage that H-2B employers must pay their H-2B and U.S. workers is set by BLS's Occupational Employment Statistics (OES) survey in all cases except when a wage is set by a valid and controlling collective bargaining agreement or the employer submits an employer-provided survey that

⁹¹ [GAO-14-704G](#).

⁹² DOL OIG, *Recommendations for Enhancing Forms used for H-2B Non-Agricultural Temporary Workers*, 50-19-001-03-321 (Jan. 30, 2019).

⁹³ 20 C.F.R. § 655.10(a), 655.20(a).

⁹⁴ 20 C.F.R. § 655.10(a).

meets DOL's requirements.⁹⁵ When they promulgated a final rule in 2015 on the methodology for determining the prevailing wages to be paid H-2B workers, DHS and DOL decided that it would limit the circumstances under which employers may use employer-provided wage surveys to set the prevailing wage.⁹⁶ The preamble to the rule described a court decision that found that DOL had arbitrarily allowed wealthy employers to pay for expensive private surveys when other employers in the same occupation who could not afford to conduct such surveys paid the higher OES mean wage.⁹⁷ In light of this decision, as well as DOL's own experience that employer-provided surveys are not any more consistent or reliable, and concerns raised by worker advocates, the agencies determined that the options for accepting employer-provided surveys are more limited. The 2015 regulations require, among other things, that employer-provided surveys be conducted independently by a state agency or university, and meet certain methodological standards.⁹⁸ Since 2014, the proportion of H-2B employers using employer-provided wage surveys to set the prevailing wage has declined from almost 20 percent to less than one percent according to our analysis of DOL data (see fig. 15). DOL officials told us the most significant contributor to the decline in employer-provided wage surveys was the requirement to have a state agency or university independently conduct employer-provided wage surveys—prohibiting employers from directly paying for these surveys. Officials also said that the seafood industry in locations such as Maryland and Louisiana continues to use employer-provided wage surveys, as state agencies

⁹⁵ The OES collects wage data from over 1 million establishments, and can be used to determine wage levels for 840 specific occupations, for the nation, states, metropolitan areas, and non-metropolitan areas. According to DOL officials, when DOL assigns a prevailing wage based on OES, the agency examines the job duties the employer has specified for its H-2B workers, determines the appropriate occupational code, and assigns as the prevailing wage the OES wage for similarly employed workers in the employer's geographic area. If the job duties listed by the employer in the TLC application fit into multiple occupational codes, DOL assigns as a prevailing wage the highest OES wage level associated with any of these occupational codes. We did not assess the validity of the OES wage survey or DOL's process for using it to set prevailing wage levels for H-2B employers.

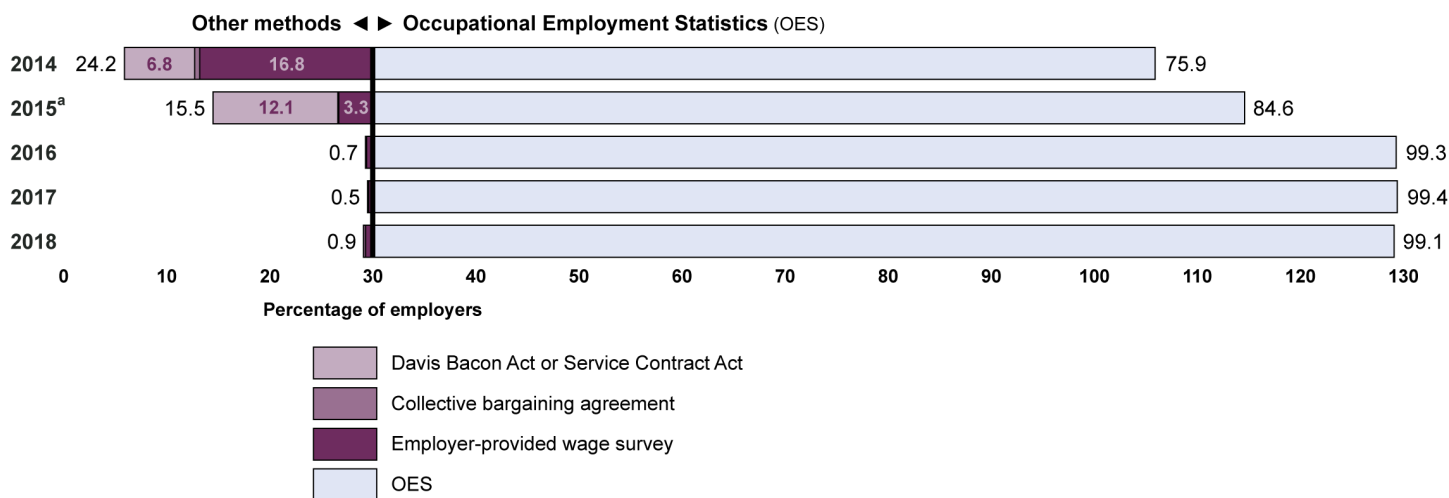
⁹⁶ Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 80 Fed. Reg. 24,146, 24,168 (Apr. 29, 2015).

⁹⁷ 80 Fed. Reg. 24,146, 24,150 citing *Comite de Apoyo a los Trabajadores Agricolas v. Perez*, 774 F.3d 173 at 189-190 (3d Cir. 2014).

⁹⁸ There are limited circumstances where the survey can be administered by a bona fide third party, which cannot be an H-2B employer or an H-2B employer's agent, representative, or attorney. 20 C.F.R. § 655.10(f)(4)(iii).

have long histories of conducting wage surveys for seafood employers in these areas.

Figure 15: Percentage of H-2B Employers Using Different Methods for Setting Prevailing Wage, Fiscal Years 2014-2018



Source: GAO analysis of Department of Labor prevailing wage data. | GAO-20-230

^a Davis Bacon Act and Service Contract Act were no longer permitted as methods for setting the prevailing wage after April 2015. Also, the percentages for employer-provided wage survey and collective bargaining agreement are combined for 2016 through 2018.

Conclusions

Employers we interviewed who depend on temporary foreign labor said the statutory cap on H-2B visas presents challenges for them, and these challenges can be driven at least partly by demand that fluctuates with the economy. Some employers—for example, those with fewer local workers available for hire—may face greater financial risks than others when they are denied H-2B workers due to the cap. More broadly, H-2B employers are challenged by uncertainty regarding whether they will receive H-2B workers in any given year, complicating their efforts to plan future operations, such as expansion or investment. DHS and DOL have taken an important first step towards addressing these challenges by identifying options for allocating visas. However, until the agencies assess such options, they cannot determine which, if any, to implement under their current authority or what legislative changes may be needed to improve the program. In the meantime, as long as DHS and DOL continue to rely primarily on prior year demand to determine the appropriate number of additional visas to make available beyond the standard cap—when granted this authority by Congress—the agencies may miss an opportunity to leverage data on current economic trends and

other factors. Assessing the advantages and disadvantages of using current economic data would help the agencies determine the feasibility of more accurate projections, which would help mitigate uncertainty and related challenges for H-2B employers. The steps DOL has taken in recent years to enforce worker protection requirements and promote accurate wage levels so as not to undermine U.S. workers show promise. However, until DOL moves ahead with taking a more targeted approach to selecting employers for audits, it may miss opportunities to efficiently leverage the scarce resources available to identify and prevent worker protection violations.

Recommendations for Executive Action

The Director of United States Citizenship and Immigration Services should work with the Assistant Secretary for the Employment and Training Administration to assess options for changing the H-2B visa program and, as warranted, implement changes or submit proposed legislative changes to Congress. DHS and DOL could consider options included in their June 2019 report to Congress and identify those that may be implemented cost effectively and without adversely affecting U.S. workers. (Recommendation 1)

The Assistant Secretary for the Employment and Training Administration should work with the Director of United States Citizenship and Immigration Services to assess options for changing the H-2B visa program and, as warranted, implement changes or submit proposed legislative changes to Congress. DOL and DHS could consider options included in their June 2019 report to Congress and identify those that may be implemented cost effectively and without adversely affecting U.S. workers. (Recommendation 2)

The Director of United States Citizenship and Immigration Services should work with the Assistant Secretary for the Employment and Training Administration to assess the advantages and disadvantages of considering current economic trends in determining the appropriate number of additional H-2B visas to provide when given this authority by Congress and, as warranted, implement an approach that considers such trends. (Recommendation 3)

The Assistant Secretary for the Employment and Training Administration should work with the Director of United States Citizenship and Immigration Services to assess the advantages and disadvantages of considering current economic trends in determining the appropriate number of additional H-2B visas to provide when given this authority by

Congress and, as warranted, implement an approach that considers such trends. (Recommendation 4)

The Assistant Secretary for the Employment and Training Administration should take steps to target its audits of H-2B employers to employers with the highest likelihood of violating program requirements; such steps could include moving ahead with developing a system for identifying trends in H-2B employer audit outcomes. (Recommendation 5)

Agency Comments

We provided a draft of this report to DHS and DOL for their review and comment. Both agencies provided written comments, which are reproduced in appendices III and IV, respectively. Both agencies also provided technical comments, which we incorporated as appropriate.

In its comments, DHS agreed with our first recommendation to assess options for changing the H-2B visa program, and noted that it plans to work further with DOL to explore options for improving the H-2B visa program and possibly develop proposals for legislative changes. DHS did not agree with our third recommendation to assess the advantages and disadvantages of considering current economic trends—which was the other recommendation we directed to the agency. Specifically, DHS said it would continue to work with DOL—as it has done in prior years—if and when Congress delegates the authority to make additional H-2B visas available beyond the statutory cap to DHS. The agency also expressed its view that Congress is better positioned to determine whether and how many additional visas should be made available to meet the needs of U.S. businesses.

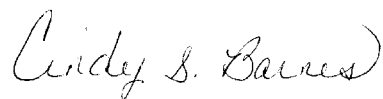
In fiscal years 2017 through 2020, DHS was authorized to increase the number of H-2B visas beyond the statutory cap, after consulting with DOL to determine that “the needs of American businesses [could not] be satisfied...with United States workers...” In exercising this authority in prior years, DHS stated that “[t]he scope of the assessment called for by the statute [in making this determination] is quite broad, and accordingly delegates the Secretary of Homeland Security broad discretion to identify the business needs [s]he finds most relevant.” In light of DHS’s broad view of its authority, we continue to believe that it would be appropriate for DHS, in consultation with DOL, to assess the advantages and disadvantages of considering current economic trends in determining the appropriate number of additional H-2B visas to provide. If they determine that using such data would be warranted, the agencies would then be well positioned to implement such an approach if DHS is granted such authority in the future. Moreover, if—as DHS stated in its response to our

recommendation—the agency believes that Congress is best suited to determine what increases in visa numbers may be needed to meet the needs of U.S. businesses, consistent with protecting American workers, it may wish to work with Congress to draft a legislative proposal reflecting this view.

DOL agreed with the three recommendations addressed to it. Regarding our second recommendation to work with DHS to assess options for changing the H-2B visa program, DOL said it is prepared to work with DHS to consider options for changing the H-2B program and to provide any technical assistance that Congress may need on this issue. Regarding our fourth recommendation, DOL said it is prepared to draw on its data on labor market and economic trends to provide technical assistance to DHS on the determination of how many additional H-2B visas to make available. Regarding our fifth recommendation, DOL noted that while further development of a system for tracking industry and occupational trends in H-2B employer violations is currently on hold due to budgetary constraints, when this system is available it will provide the capacity to take a risk-based approach to selecting employers for audits.

We are sending copies of this report to applicable Congressional committees, the Secretary of Homeland Security, the Secretary of Labor, and other interested parties. In addition, the report will be available at no charge on GAO's website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-7215 or brownbarnesc@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff members who made key contributions to this report are listed in appendix V.



Cindy Brown Barnes
Director, Education, Workforce, and Income Security

List of Requesters

Jack Bergman, Member of Congress
Rob Bishop, Member of Congress
Mike Bost, Member of Congress
K. Michael Conaway, Member of Congress
Rodney Davis, Member of Congress
Bob Gibbs, Member of Congress
Andy Harris, Member of Congress
William R. Keating, Member of Congress
Anne McLane Kuster, Member of Congress
Chellie Pingree, Member of Congress
John Shimkus, Member of Congress
Chris Stewart, Member of Congress
Fred Upton, Member of Congress
Ann Wagner, Member of Congress
Peter Welch, Member of Congress
Rob Woodall, Member of Congress

Appendix I: Objectives, Scope, and Methodology

Our review: (1) describes trends in the demand for H-2B workers, (2) describes selected employers' reports of how the visa cap has influenced their economic performance and employment of U.S. workers, (3) summarizes proposals for adjusting the H-2B statutory cap or how visas are allocated, and (4) assesses how the federal agencies that administer H-2B visas sought to meet employers' H-2B hiring needs and protect U.S. workers.

To address our first objective, we analyzed administrative data sets from the Department of Homeland Security (DHS), the Department of Labor (DOL) Employment and Training Administration, and the Bureau of Labor Statistics (BLS). To address our second objective, we conducted case studies of four industries in specific locations. To address our third objective, we held discussion groups and conducted interviews with knowledgeable stakeholders regarding proposals to change the H-2B visa cap we had identified through background research. To address our fourth objective, we reviewed relevant federal laws, regulations, and other documents; reviewed agency data; and interviewed federal officials.

Analysis of National- and County-Level Administrative Data

National-Level Data

We used DOL temporary labor certification (TLC) data and national unemployment rate statistics for fiscal years 2010 through 2018 to provide trends in number of applications DOL has received and national unemployment rate. The TLC data are administrative data on applications from employers for H-2B visas, which we found sufficiently reliable for our purposes after reviewing technical documentation and interviewing knowledgeable agency officials. DOL releases public disclosure files that contain administrative data from employers' H-2B applications for TLC. Our analysis took the public disclosure files and reported the number of certified applications and workers for each fiscal year from 2010 through 2018. In order to report the national unemployment rate for the United States, we used BLS' report on historical national unemployment rates.

We also analyzed how selected industries use the H-2B visa program.¹ To accomplish this, we collapsed the North American Industry Classification System (NAICS) codes into 2-digit groupings that matched

¹ We additionally matched the TLC data to CLAIMS3 data to analyze H-2B visa petitions at the county-level. This is discussed in more detail in the Analysis of County-Level Data section.

the groups we had selected (shown below). The industries and respective 2-digit NAICS codes that match our case study industries—which we describe in more detail below—are:

- Construction – NAICS code 23
- Hospitality – NAICS code 72
- Administrative and Support Services (including Landscaping) – NAICS code 56
- Food, Beverage, Textile, and Apparel Manufacturing (including seafood processing) – NAICS code 31

County-Level Data

To address how counties with H-2B employers compare to counties without H-2B employers, we utilized several administrative data sets.² We used DHS Computer Linked Application Information Management System (CLAIMS3) data, which we found sufficiently reliable for our purposes by reviewing technical documentation, interviewing knowledgeable agency officials, and electronic testing of data, to identify the counties with H-2B employers for each fiscal year from 2015 through 2018. The CLAIMS3 data track all petitions for H-2B visas (as well as other visas). These data include employer address and number of H-2B visas approved.³ Using the employer address information, we identified the county in which H-2B visa employer is located. After the county is identified, we then aggregated all of the approved H-2B visa petitions within each county. After identifying the counties with H-2B employers, we then combined this with BLS data sets—Local Area Unemployment Statistics (LAUS) and Quarterly Census of Employment and Wages (QCEW)—which we found sufficiently reliable after reviewing technical documentation to get county-level data on unemployment rate, labor force, and average weekly wages to make county-level comparisons. The LAUS is a federal-state cooperative effort in which monthly estimates of total employment and unemployment are prepared for counties and county-equivalents. From this data set, we used the unemployment rate and the labor force

² For our analysis, we define a county with H-2B employers as a county that had at least one H-2B petition approved by an employer in the county. A county without H-2B employers is conversely one that had zero H-2B visa petitions approved for employers in the county.

³ One potential limitation with the CLAIMS3 data set is that the addresses given are employers' primary locations and may not reflect the location where the work is performed.

statistics by county.⁴ The QCEW program publishes a quarterly count of employment and wages reported by employers. From this data set, we used the average weekly wages data across counties for fiscal years 2015 through 2018.⁵ After we had combined the CLAIMS3 data with the LAUS and QCEW data sets, we compared summary statistics on unemployment rates and average weekly wages for counties with H-2B employers to counties without H-2B employers. The average weekly wages were inflation adjusted at the state level to constant 2018 dollars.

To check whether our results of the comparison were being driven by a few outlying counties, we performed several additional analyses. To see if the results were being driven by counties that relied more heavily on H-2B visas, we created quartiles using the number of H-2B petitions approved within a county and also created quartiles using the percentage of H-2B visas as a percent of the total labor force. Next, in order to determine if the results were because of the population sizes of the counties, we split the counties in quartiles based on the size of labor force to compare counties with and without H-2B employers by similar sized counties by population. Finally, we incorporated TLC data on industries to provide comparisons between our selected industries noted above (see appendix II).

Case Studies of Four Industries

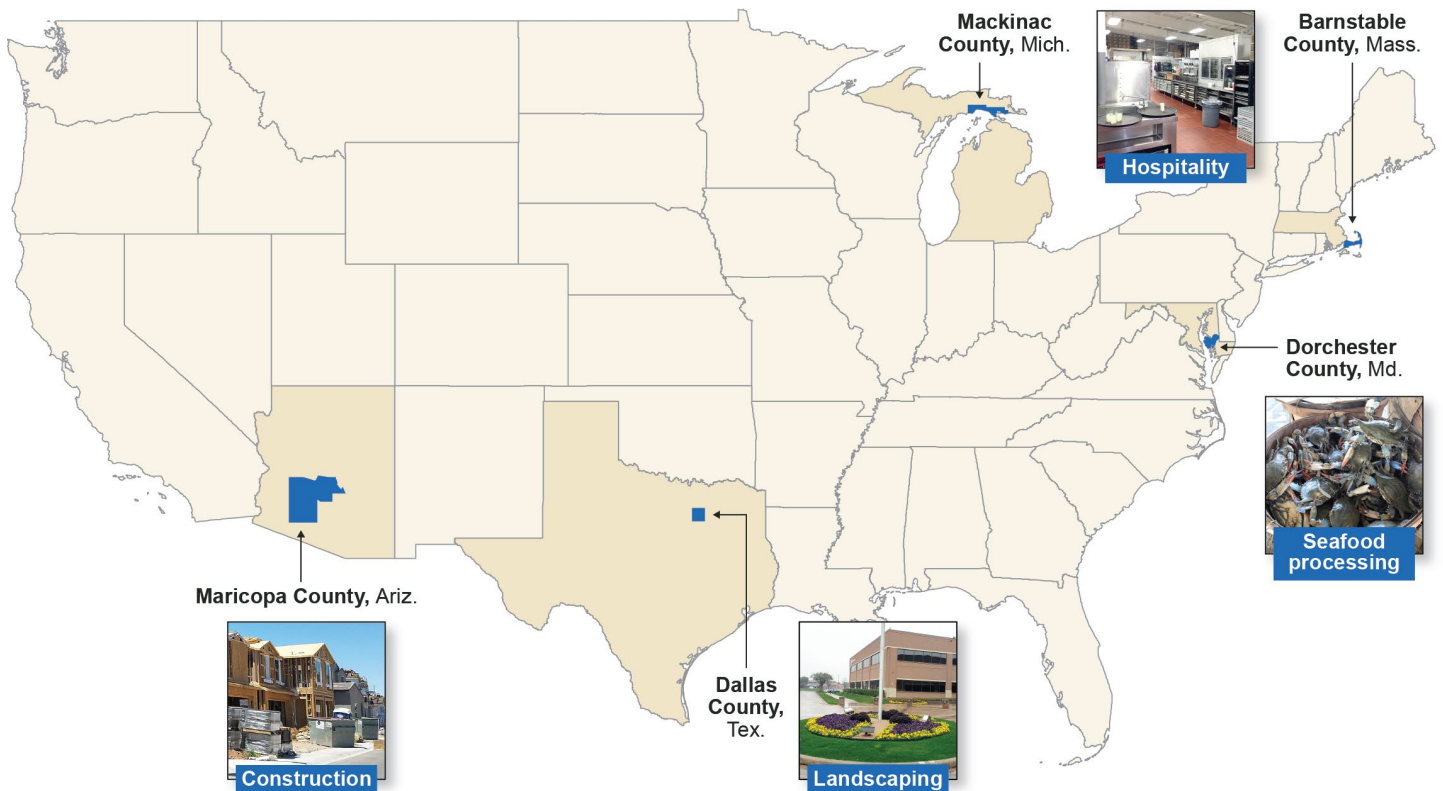
To examine the experiences of H-2B employers and their suppliers with the H-2B program in recent years we conducted case studies of four industries in specific locations: seafood processing in Dorchester County, Maryland; landscaping in Dallas County, Texas; construction in Maricopa County, Arizona; and hospitality in Mackinac County, Michigan (hotels), and Barnstable County, Massachusetts (restaurants).⁶ (See fig. 16).

⁴ We do not provide any measure of precision because LAUS estimates do not provide model-based error measurements for counties.

⁵ Since QCEW is a census of establishments, every unit is in the sample and represents itself only. As such, we do not report standard errors for estimates based on QCEW.

⁶ We considered examining employers' experiences when they did not receive H-2B visas in fiscal year 2018 using DHS data on employers whose H-2B applications were rejected in conjunction with data on employers' business outcomes. However, we determined that this analysis was not feasible, as a result of reliability issues with the available data sources on business outcomes and on employers with rejected H-2B petitions. For example, certain outcome data we considered using were problematic because they were estimates and because the time period covered was not clear. Data on rejected petitions did not include all petitions rejected in 2018 and did not consistently specify the reason for rejection.

Figure 16: Case Study Industries and Locations



Source: All photos by GAO except the landscaping image, which was provided by a Dallas area landscaping firm; MapInfo (base map). | GAO-20-230

We selected these industries because they were among the heaviest users of the H-2B program in fiscal year 2018. Using DOL data on fiscal year 2018 TLCs, we determined the total number of H-2B workers approved across all TLCs associated with each NAICS code, and then identified the NAICS codes with the greatest number of approved workers.⁷ The four selected industries were all among the ten leading industries in terms of number of approved workers (see table 3). Amusement, gambling, and recreation industries and support activities for forestry were also among the top ten. However, representatives of these industries told us that employers typically move from location to location

⁷ We initially ranked the 3-digit NAICS codes by number of approved workers. In cases where one 5-digit NAICS code comprised at least 80 percent of the workers associated with a 3-digit code, we replaced the 3-digit code with the 5-digit code in our analysis.

during their seasons, making it difficult to conduct a case study of employers in a particular location.

Table 3: Top H-2B Industries by Number of Approved Workers on Temporary Labor Certifications, Fiscal Year 2018

Rank	North American Industry Classification System code	Industry title	Number of approved workers
1	56173	Landscaping Services	63,388
2	713	Amusement, Gambling, and Recreation Industries	15,599
3	72111	Hotels (except Casino Hotels) and Motels	11,602
4	11531	Support Activities for Forestry	10,263
5	238	Specialty Trade Contractors	7,599
6	31171	Seafood Product Preparation and Packaging	6,496
7	722	Food Services and Drinking Places	2,972
8	711	Performing Arts, Spectator Sports, and Related Industries	2,866
9	236	Construction of Buildings	1,672
10	11411	Fishing	1,554

Source: GAO analysis of Department of Labor data | GAO-20-230

For each industry, we selected one or two counties in which to conduct our case study.⁸ We selected these counties to achieve diversity in several factors: the total number of H-2B workers approved for employers in the county in fiscal year 2018; the number of H-2B workers approved under TLCs associated with that particular industry in the county in fiscal year 2018 (e.g., the number of H-2B landscaping or hospitality workers); the proportion of all workers in the county who are H-2B workers in 2018; the proportion of workers in that particular industry that are H-2B workers in the county in 2018 (e.g., the proportion of all landscaping workers in the county that are H-2B workers); county unemployment rate in January 2018; and geographic location (see table 4).

⁸ In several cases, we combined multiple NAICS codes into broader industry categories for the purpose of this analysis. For example, hospitality includes both Hotels (except Casino Hotels) and Motels and Food Services and Drinking Places.

Appendix I: Objectives, Scope, and Methodology

Table 4: Characteristics of Selected Counties

County, state, (Industry)	Number of H-2B workers under approved TLCs, FY 2018 ^a	H-2B workers as share of all workers in county ^b	Number of H-2B workers in selected industry, FY 2018 ^a	H-2B workers in selected industry as share of All workers in selected industry in county ^b	Unemployment rate, January 2018 ^c
Dorchester, Maryland (seafood processing)	556	4.9%	548	97.0%	6.7%
Dallas, Texas (landscaping)	1,946	0.1%	1,549	16.2%	3.8%
Maricopa, Arizona (construction)	2,580	0.1%	311	0.4%	4.4%
Mackinac, Michigan (hospitality—hotels and motels)	1,088	17.6%	878	34.7%	21.5%
Barnstable, Massachusetts (hospitality—food services and drinking places)	2,064	1.8%	802	3.9%	6.8%

Source: GAO analysis of DOL data | GAO-20-230

^aDepartment of Labor (DOL) Temporary Labor Certification (TLC) data

^bDOL TLC data and Bureau of Labor Statistics (BLS) Quarterly Census of Employment and Wages data

^cBLS Local Area Unemployment Statistics data

As part of each case study, we interviewed H-2B employers who received visas during fiscal year 2018, H-2B employers who did not receive visas during fiscal year 2018, and businesses who supply goods or services to H-2B employers. Across the case studies, we interviewed 15 H-2B employers who received visas, 20 H-2B employers who did not receive visas, and 12 supplier businesses. We conducted a mix of individual and group interviews with employers, and generally used the same questions for each category of employers across industries. For all of our case studies, we worked with industry groups to recruit employers to participate in our interviews. These industry groups reached out to local employers to identify H-2B employers and in some cases also supplier businesses who would be willing to speak with us. In a few cases, we also identified supplier businesses for interviews through our case study interviews with employers. In our interviews with employers, we asked about topics including their efforts to recruit U.S. workers, their experiences with the H-2B program in recent years, any impacts on their businesses of being denied H-2B visas, actions taken to adapt to not receiving visas, and any impacts on supplier businesses of being denied H-2B visas. Besides interviewing employers, we also interviewed a state

workforce agency as part of each case study, asking questions about topics including the agency's role in helping H-2B employers recruit U.S. workers, the outcomes of H-2B employers' recruitment efforts, and any challenges with such recruiting efforts.

In addition, as part of our case studies, we asked the H-2B employers we interviewed to complete a questionnaire. This questionnaire covered topics including the employer's gross sales in fiscal years 2017 and 2018; the employer's number of employees in fiscal years 2017 and 2018, both U.S. and H-2B employees; the employer's purchases of goods and services in fiscal years 2017 and 2018; and any challenges created by not receiving H-2B visas in fiscal year 2018. We received responses from 30 employers, including from five seafood processing employers, 11 landscaping employers, four construction employers, and 10 hospitality employers. Some respondents did not answer every question in the questionnaire. We dropped one of the 30 questionnaire responses from our analyses because the employer reported not receiving H-2B visas in 2017 which, if included, could distort our findings. In our analysis of changes to revenues, supply purchases, and employment based on questionnaire responses, we did not control for factors beyond the H-2B visa cap that may have affected the results. So, any results reported from the questionnaire may be due in part to these unobserved factors. Additionally, we did not independently verify the information provided in the questionnaire responses, which could lead to our analysis not completely representing the full effect of the H-2B visa cap. Finally, the questionnaire responses we received are representative of only the firms that responded and may not be more widely generalizable to the industry level or larger geographic regions.

Discussion Groups and Interviews with Stakeholders on Proposals to Change the H-2B Visa Cap

As we performed background research on H-2B visas and the cap, we interviewed several knowledgeable stakeholders. We then identified the proposals for changing the H-2B visa cap in the background interviews and publications of these stakeholders (see table 5).

Table 5: List of Proposals and Sources

Proposal Summary	Source
This proposal would eliminate the statutory cap and allow employers to recruit foreign workers for occupations with worker shortages. An expert commission would compile the shortage list annually, based on relevant factors, such as wage growth or job vacancies	Temporary Labor Migration Programs: Governance, Migrant Worker Rights, and Recommendations for the U.N. Global Compact on Migration, by Daniel Costa, Economic Policy Institute, and Philip Martin, UC-Davis, Aug. 1, 2018
This proposal would adjust the cap annually (either up or down) based on economic indicators such as unemployment rate or number of TLC applications approved by DOL	Interview with Tamar Jacoby, President of ImmigrationWorks USA
This proposal would retain the current H-2B visa cap of 66,000 and make the returning worker exemption permanent	Interview with Connor Spalding, VP of Government Affairs at Michigan Restaurant and Lodging Association
This proposal would retain the current H-2B visa cap of 66,000 and give priority to applications from employers that offer the highest wages or better working conditions	Interview with Daniel Costa, Director of Immigration Law and Policy at Economic Policy Institute
This proposal would retain the current H-2B visa cap of 66,000 and allocate visas quarterly rather than twice a year	Interview with Madeline Zavodny, Professor of Economics at University of North Florida
This proposal would retain the current H-2B visa cap of 66,000 and the visas would be auctioned to the highest employer bidders	New Sources of Revenue and Efficiency, Proposal 12: Overhauling the Temporary Work Visa System, by Pia Orrenius, Federal Reserve Bank of Dallas & American Enterprise Institute, Giovanni Peri, UC-Davis, and Madeline Zavodny, Agnes Scott College & American Enterprise Institute

Source: GAO analysis of interviews and publications. | GAO-20-230

To address what options have been proposed for adjusting the H-2B statutory cap or how visas are allocated, we interviewed 12 knowledgeable stakeholders across two discussion groups and two interviews. The discussion groups were held on July 25, 2019 and July 29, 2019, and the interviews were held on August 1, 2019 and August 12, 2019.

As part of our discussion with the experts and knowledgeable stakeholders, we asked for additional proposals that were not included in the six identified in the above table. This discussion led to additional proposals. These additional proposals are presented in table 6.

Table 6: List of Additional Proposals from Discussion Groups and Interviews

Proposal Summary	Source
Cap the total number H-2B workers that individual businesses can hire.	First discussion group with knowledgeable stakeholders.
A proportional allocation where employers would receive the proportional percent of their H-2B visas similar to the proportion of the total demand to total visas.	First discussion group with knowledgeable stakeholders.
H-2B visa cap remains at 66,000, but give priority in lottery to employers who offer the highest wages or better working conditions.	First discussion group with knowledgeable stakeholders.
A cap on the percent of H-2B workers that each business can receive.	First discussion group with knowledgeable stakeholders.
Charge a higher rate for employers that are more dependent on H-2B workers.	Second discussion group with knowledgeable stakeholders.
Allow portability of H-2B visas between employers.	Second discussion group with knowledgeable stakeholders.

Source: GAO analysis of discussion groups and interviews. | GAO-20-230

Note: The potential effects of these six proposals in this table were not fully discussed during the discussion groups and interviews with experts and stakeholders.

We used several approaches to begin identifying potential stakeholders on the H-2B visa program. First, we reviewed our background interviews with stakeholders for this engagement to craft a preliminary list of potential individuals to contact. Then, we identified additional researchers that have published works on the H-2B visa program. Afterward, we conducted several searches on the Congressional Quarterly website to collect a list of witnesses who testified before Congress on H-2B visa issues. Finally, obtained an additional list of authors who published work on the H-2B visa program and names of individuals that have testified before Congress on issues related to the H-2B visa program. Through this process, we identified 22 stakeholders to be included in our discussion groups and interviews. We selected 12 knowledgeable stakeholders based on several criteria: published work on the H-2B visa program and number of times publications have been cited by other scholars, testified before Congress on H-2B visa issues, advocated for relevant stakeholder groups interested in the H-2B visa program, and identified by peers as being a knowledgeable stakeholder on the H-2B

visa program. We also sought to achieve a balance of perspectives by the selected knowledgeable stakeholders (see table 7).⁹

Table 7: List of Knowledgeable Stakeholders

Knowledgeable stakeholder name and title	Organization	Group
Benjamin Botts, Legal Director	Centro de los Derechos del Migrante	Second Discussion
Andorra Bruno, Immigration Analyst	Congressional Research Service	First Discussion
Steve Bronars, Partner	Edgeworth Economics	Second Discussion
Cathleen Caron, Founder and Executive Director	Justice in Motion	Second Discussion
Greg Chiecko, President	Outdoor Amusement Business Association	Interview
Daniel Costa, Director of Immigration Law and Policy Research	Economic Policy Institute	First Discussion
Laurie Ann Flanagan, Co-Chair	H-2B Workforce Coalition	First Discussion
Randel K. Johnson, Partner	Seyfarth Shaw LLP	Second Discussion
Shannon Lederer, Director of Immigration Policy	American Federation of Labor and Congress of Industrial Organizations	Second Discussion
Arthur N. Read, General Counsel	Justice at Work	Interview
Meredith Stewart, Senior Attorney	Southern Poverty Law Center	First Discussion
Madeline Zavodny, Professor of Economics	University of North Florida	Second Discussion

Source: GAO analysis of discussion groups and interviews. | GAO-20-230

Assessment of Federal Agencies' Administration of H-2B Visa Program

To assess DHS's and DOL's efforts to meet employers' hiring needs and protect U.S. workers, we reviewed relevant federal laws, regulations, and documents such as agency procedures and visa application forms. We interviewed DHS and DOL officials. We reviewed DOL data on the number and outcomes of audits conducted of H-2B employers during fiscal year 2018. We assessed the reliability of these data by interviewing DOL officials, and found them to be sufficiently reliable for our reporting purpose, which was to present a summary of the agency's H-2B audit

⁹ We also followed-up our discussion groups with a poll of the experts but do not report the results due to low return rate.

program in fiscal year 2018. We reviewed 25 letters that DOL sent to H-2B employers as part of audits completed from September 14, 2017, through April 5, 2019, including eight requests for supplemental information, six warning letters, six assisted recruitment letters, and five debarment letters. The samples of requests for supplemental information, warning letters, and assisted recruitment letters were non-generalizable samples of all letters in these categories. They were judgmentally selected from a randomly generated sample of all letters in the universe to achieve diversity in terms of employer industry and location, among other things. The debarment letters we reviewed represented the full universe of such letters. In our review of the letters, one analyst identified issues discussed in each letter and placed them in broader categories, another analyst verified the issues and categories, and any differences in interpretation were resolved. We analyzed DOL data on how prevailing wage levels were determined for H-2B employers for fiscal years 2014 to 2018. We assessed the reliability of these data through review of related documentation and interviews with DOL officials, and found the data to be sufficiently reliable for our reporting purpose, which was to present the trends in how prevailing wage was set among H-2B employers over a 5-year period. After identifying DHS's and DOL's actions through methods such as reviewing documents and interviewing agency officials, we assessed them according to standards for internal control in the federal government related to identifying and responding to change and risk.¹⁰

¹⁰ GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014).

Appendix II: Additional Analyses

In our analysis of Department of Homeland Security and Department of Labor data, we found that counties with H-2B employers have lower unemployment rates and higher average weekly wages than counties without H-2B employers. We extended this analysis to determine whether the results are robust to changes in labor force, employers' usage of H-2B workers, and industries.

To see if our results were being driven by larger population counties, we separated counties into quartiles by labor force and compared similar-sized counties.¹ Looking at the top quartile, we found that, similar to our main results, counties with H-2B employers had about 0.3 percentage point lower unemployment rate and about \$120 higher average weekly wage than counties without H-2B employers. For the bottom quartile, counties with H-2B employers had about a 0.1 percentage point lower unemployment rate than counties without H-2B employers, but about \$34 lower average weekly wages, which we discuss further in the following paragraph.

We next split the counties with H-2B employers by their usage of H-2B employees to analyze the connection between intensity of employer usage and strong labor markets. The first way we measure usage of H-2B employees is by the number of approved H-2B petitions within the county. When we compare the top quartile of counties by number of approved H-2B petitions to all counties without H-2B employers, we found that they have about 0.5 percentage point lower unemployment rates and about \$187 higher average weekly wages. We also used the ratio of approved H-2B visas to the county's labor force population to capture the counties' reliance on H-2B visas. When we compare the top quartile of counties by proportion of approved H-2B visas to labor force, we find that their unemployment rate is about 0.1 percentage point lower and average weekly wages about \$4 higher than counties without H-2B employers. The small difference in wages for counties with a high ratio of H-2B workers to labor force, and the previous finding that counties with H-2B employers in the bottom quartile by labor force have lower average weekly wages, suggests that the difference in wages in our main finding may be partially driven by the counties with larger labor forces.

In our final extension of our analysis, we isolated four selected industries to compare whether the counties with H-2B employers within the

¹ In this analysis we compare the counties with H-2B employers in the top quartile of labor force size to counties without H-2B employers in the top quartile of labor force size and then extend to the other quartiles.

specified industry have higher average weekly wages in that industry than counties without. In this analysis of fiscal year 2018, we found that for each industry (construction, seafood processing, hospitality, and landscaping) the counties with H-2B employers within the industry have higher average weekly wages than counties without H-2B employers in the industry. These higher average weekly wages for counties with H-2B employers in the industry ranged from about \$96 higher for seafood processing to about \$238 higher for landscaping.

Appendix III: Comments from the Department of Homeland Security

U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

March 5, 2020

Cindy Brown Barnes
Director, Education, Workforce and Income Security
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Re: Management Response to Draft Report GAO-20-230, "H-2B VISAS: Additional Steps Needed to Meet Employers' Hiring Needs and Protect U.S. Workers"

Dear Ms. Barnes:

Thank you for the opportunity to comment on this draft report. The U.S. Department of Homeland Security (DHS) appreciates the U.S. Government Accountability Office's (GAO) work in planning and conducting its review and issuing this report.

The Department is pleased to note GAO's recognition of U.S. Citizenship and Immigration Services' (USCIS) collaboration with the Department of Labor (DOL) to identify options to address the challenges some employers have encountered with the statutory cap on H-2B visas. USCIS remains committed to evaluating employer concerns with the H-2B visa allocation process. It is important to note that congressional action is required to enact long-term program changes addressing those concerns.

The draft report contained five recommendations, including two for USCIS, one with which the Department concurs and one with which the Department non-concurs. Attached find our detailed response to each recommendation. DHS previously submitted technical comments under a separate cover for GAO's consideration.

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim H. Crumpacker".

JIM H. CRUMPACKER, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

Attachment

**Attachment: Management Response to Recommendations
Contained in GAO-20-230**

GAO recommended that the Director of USCIS:

Recommendation 1: Work with the Assistant Secretary for the Employment and Training Administration [ETA] to assess options for changing the H-2B visa program, and, as warranted, implement changes or submit proposed legislative changes to Congress. DHS and DOL could consider options included in their June 2019 report to Congress and identify those that may be implemented cost effectively and without adversely affecting U.S. workers.

Response: Concur. As noted in the draft report, USCIS worked with DOL to prepare and submit a June 7, 2019, Fiscal Year (FY) 2018 Report to Congress (June 2019 report) titled “Options for Reforming the H-2B Visa Program and Improving Late Season Employers’ Access to Workers.” Pursuant to the Joint Explanatory Statement which accompanied the FY 2020 DHS Further Consolidated Appropriations Act (P.L. 116-94), USCIS will work with DOL to prepare another report to Congress concerning options to improve the H-2B visa program. It is important to note, however, the options outlined in the June 2019 report require congressional, rather than executive, action to produce long-term changes to the H-2B visa program.

In addition, if USCIS and DOL identify any proposed legislative changes during the process for developing the new report mentioned above, USCIS will forward those to the DHS Office of Strategy, Policy, and Plans for further consideration, as appropriate.
Estimated Completion Date: September 30, 2020.

Recommendation 3: Work with the Assistant Secretary for [ETA] to assess the advantages and disadvantages of considering current economic trends in determining the appropriate number of additional H-2B visas to provide when given this authority by Congress, and as warranted, implement an approach that considers such trends.

Response: Non-concur. USCIS will continue to engage with ETA as it has in the past on behalf of the Secretary of Homeland Security should Congress continue to delegateto the Secretary the authority to increase the number of H-2B visas beyond the statutory cap. It is more appropriate, however, for Congress to determine what increases, if any, may be needed to meet the needs of U.S. businesses consistent with protecting American workers. Congress has the best understanding of its constituencies and the needs of local employers and workers, and therefore is best equipped to make informed decisions concerning the need, if any, for supplemental visa allocations. If Congress decides to pursue legislative changes to the H-2B program, USCIS is available to provide technical assistance and help find solutions to most effectively allocate available H-2B visas throughout the fiscal year.

We request that GAO consider this recommendation resolved and closed.

Appendix IV: Comments from the Department of Labor

U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, D.C. 20210



Ms. Cindy Brown Barnes
Director
Education, Workforce, and Income Security Issues
U.S. Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Dear Ms. Barnes:

Thank you for the opportunity to review and comment on the Government Accountability Office's (GAO) draft report titled, *H-2B Visas: Additional Steps Needed to Meet Employers' Hiring Needs and Protect U.S. Workers* (GAO-20-230). We understand that GAO performed this work after receiving a request to examine the effects of the annual H-2B cap on employers and U.S. workers from then Chairman, Subcommittee on Homeland Security, House Committee on Appropriations, John Carter.

The U.S. Department of Labor's (Department or DOL) Employment and Training Administration (ETA) agrees that rising demand for H-2B visas in recent years has been consistently exceeding the Congressionally established statutory limit of 66,000 visas per Fiscal Year (FY). This increased demand is due, in large part, to an economy that has experienced unprecedented growth and a strong labor market in which the unemployment rate has remained at or below four percent for 21 months in a row. Congress has further recognized this increased demand by authorizing additional H-2B workers through reauthorization of the returning worker cap exemption for FY 2016 and through appropriations riders authorizing the Secretary of Homeland Security, in consultation with the Secretary of Labor, to supplement the cap in each of the last four fiscal years.

Most recently, employer demand for H-2B visas during the first half of FY 2020 was more than double the statutory semi-annual allotment of 33,000. As a result, the U.S. Department of Homeland Security's (DHS) United States Citizenship and Immigration Services (USCIS) announced on November, 20, 2019, that the first half of the annual statutory allocation of H-2B visas for FY 2020 was reached; the earliest date that the first half visa cap was reached since FY 2009. Further, within a few days of January 2, 2020, the Department received more than 5,600 H-2B applications from employers requesting more than 99,300 workers with an employment start date of April 1, 2020, more than triple the second half semi-annual allotment for FY 2020. Although ETA's Office of Foreign Labor Certification (OFLC) continues to accept and process H-2B applications, regardless of the visa cap, ETA acknowledges that intense demand for the limited number of H-2B visas creates uncertainty for many employers who utilize the program.

**Appendix IV: Comments from the Department
of Labor**

The draft report provided by GAO contains five recommendations, three of which were directed to ETA and with which the Department largely concurs. Specifically, GAO recommended the following for ETA:

GAO Recommendation 2: The Assistant Secretary for Employment and Training should work with USCIS to review options for changing the H-2B visa program to decrease uncertainty for H-2B employers and, as warranted, implement changes or submit proposed legislative changes to Congress. DOL and DHS could consider options included in their June 2019 report to Congress and in this report and identify those that may be implemented cost effectively and without adversely affecting U.S. workers.

DOL Response: ETA agrees with this recommendation and is prepared to work with USCIS to consider options for changing the H-2B visa program, including those listed on the June 2019 DHS report to Congress that are responsive to the legitimate demands of U.S. employers for a reliable seasonal workforce while protecting the program from potential abuse and fraud. We believe that Congress is in the best position to determine whether the annual numerical limitations for H-2B workers needs to be modified, by how much, and the standards needed to ensure that enough workers are available to meet employers' temporary needs throughout the year without harming American workers. ETA is also prepared to work directly with Congress to provide any technical assistance needed to help resolve this issue for all employers who have a legitimate demand to use the H-2B program.

GAO Recommendation 4: The Assistant Secretary for Employment and Training should work with USCIS to assess the advantages and disadvantages of considering current economic trends in determining the appropriate number of additional H-2B visas to provide when given this authority by Congress and, as warranted, implement an approach that considers such trends.

DOL Response: ETA agrees with this recommendation. In accordance with authority provided by Congress, the Department's role is to provide consultative advice that assists the Secretary of Homeland Security in making the statutory determination regarding whether the demands of some American business cannot be satisfied for the fiscal year with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor or services. ETA and the Department's Bureau of Labor Statistics maintain a wide array of economic, labor market, and foreign labor application workload data and trends, and are prepared to provide technical assistance, upon request by DHS, in assessing their potential use in determining the appropriate number of supplemental H-2B visas when such authority is enacted by Congress.

GAO Recommendation 5: The Assistant Secretary for Employment and Training should move ahead with developing a system for identifying trends in H-2B employer audit outcomes and use these data to target its audits to employers with the highest likelihood of violating program requirements.

**Appendix IV: Comments from the Department
of Labor**

DOL Response: ETA agrees with this recommendation. As GAO acknowledged, current ETA audit data are limited to recording audit workloads and final audit outcomes. ETA has developed an initial plan for a new module within its new Foreign Labor Application Gateway (FLAG) system that would more accurately track individual violations found in audits, as well as the industry and occupational classifications associated with each employer subject to audit. With this capacity, ETA would be able to initiate a risk-based approach to selecting employers for audits, based on trends in violations by industry and/or job classification. However, further development and implementation of this enhanced audit tracking mechanism within the FLAG system is currently on hold during FY 2020 due to budgetary constraints and other competing technology development priorities.

Additionally, due to appropriations riders enacted in prior years, ETA was prevented from expending appropriated funds to conduct audit examinations under its regulations at 20 Code of Federal Regulations 655.70. This appropriation rider was removed by Congress in FY 2018, and ETA only recently began conducting audit examinations for the first time since promulgating the H-2B Interim Final Rule (IFR) in April 2015. Consequently, data on individual program violations stemming from H-2B audit examinations under the H-2B IFR remains in their nascent stages, and ETA will not have adequate data to determine patterns of program compliance and effectively develop models for targeting audit examinations until the second half of FY 2021.

Note that GAO's first and third recommendations are directed to USCIS and, therefore, are not addressed here.

Again, thank you for the opportunity to review and comment on this draft report and for the GAO's dedication to assisting the Department in improving its programs. Please also find enclosed our technical comments and suggestions to improve the GAO draft report. If you have any questions, please contact Brian D. Pasternak, Administrator, Office of Foreign Labor Certification, at 202-513-7370.

Sincerely,



John Pallasch
Assistant Secretary for Employment and Training

Appendix V: GAO Contact and Staff Acknowledgments

GAO Contact

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Staff Acknowledgments

In addition to the individual named above, Nagla'a El-Hodiri, Assistant Director; Lorin Obler, Analyst in Charge; Genesis Galo, Michael Naretta, Alejandro Oliva, and Sonya Zhu made key contributions to this report. Also contributing to this report were Amy Anderson, Susan Aschoff, James Bennett, Kathryn Bernet, Colleen Candrl, Sherwin Chapman, Pin-En Annie Chou, Pamela Davidson, Rebecca Gambler, Joel Green, Kristy Kennedy, Grant Mallie, Sheila R. McCoy, John Mingus, James Rebbe, Oliver Richard, Margie Shields, Ardith Spence, Almeta Spencer, Kathleen van Gelder, and Jessica Yutzy.

Related GAO Products

Nonimmigrant Visas: Outcomes of Applications and Changes in Response to 2017 Executive Actions. [GAO-18-608](#). Washington, D.C.: August 7, 2018.

H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers. [GAO-15-154](#). Washington, D.C.: March 6, 2015.

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