

H-2B OR NOT H-2B

Contractors across the country are battling
Department of Labor changes to the H-2B visa program
that if implemented could cripple their businesses.

That sigh of relief you might have heard late last month was the collective exhalation from contractors across the country expressing their relief that two rule changes that would drastically alter the H-2B visiting worker program were put on hold until later this year.

On December 16, Congress included language as part of its spending bill that delayed the change in the Department of Labor's (DOL) wage methodology that would have dramatically increased the hourly rate contractors are required to pay their H-2B visa workers. The delay pushes the rule changes to Sept. 30 of this year. Contractors are still waiting to hear the rulings on two separate lawsuits tied to the DOL changes.

"It's great we've got that long extension, but we would have preferred to get the ruling on our lawsuit," says Tom Delaney, government affairs director for the Professional Landcare Network (PLANET). "At least everybody knows for the next eight months where they're at. The judge really has until September to rule, but we think she'll rule well before September."

The current uncertainty leaves some contractors with an unpleasant nagging feeling in the back of their brains.

"When are they going to say, 'It's not going to happen. You don't have to worry about this anymore,'" asks Bill Gordon, owner of Signature Landscape, Olathe, KS. "I don't think it's going to happen. I don't think legislators are willing to push hard enough to eliminate the stupidity they've come up with."

The delay allows contractors to move ahead with their plans for 2012.

"It buys us the spring and the summer, but the same problem rears its head (in the fall)," says Fred Haskett, managing partner/operations for U.S. Lawns, Defiance, MO. "We're going to spend a huge amount of our time going back to Congress again and spending a lot of time that we could be devoting to building our businesses, taking care of our clients, taking care of

our employees and creating jobs into fighting the federal government on a continuous level."

According to Delaney, senators and members of the House of Representatives are finally beginning to realize this is a small business issue and not an immigration issue.

"People in Congress understand what we're dealing with now and are becoming more empathetic to us," Delaney says. "It's a result of our lobbyists and our members. They finally understand what impact the DOL would have."

The lawsuits and rule changes are just as important to contractors who don't use the H-2B program.

"If we lose our H-2B workforce and are looking for replacement workers at the local level, we're going to aggressively advertise and look for people, and guess who we're going to be recruiting," Haskett says. "We're going to look for the guys that have some experience."

continued on page 32



BY **DAN JACOBS**
EDITOR-IN-CHIEF

We're practically tripping them on the street and dragging them in the building. And we can't get them to work. We've never had more than one or two people (in 7 years) show up for an interview properly. We've had one person show up for work. They lasted for two days.

— **FRED R. HASKETT**
*Managing Partner/
Operations, U.S. Lawns*

Haskett's temporary workers usually arrive in mid-March and leave near the end of November.



continued from page 30

The problem

The H-2B program is necessary, contractors argue, because they cannot fill positions any other way. Contractors recite story after story about hiring applicant after applicant who never shows up. And the few who do rarely stay beyond the first day.

“Yes, I’ve relied on the program because the program has brought me a group of professional work ethic-oriented guys who have made us what we are,” says Josh Denison, president of Denison Landscaping, Fort Washington, MD. “There are no call outs; there are no no-shows. They come here to earn a living for their families, make money to send home, live a good life and come back the next year.”

It’s not for a lack of trying to find domestic workers.

“I’ve had 170 guys walk out the door with the season here,” Denison says.

As of late December — with his

H-2B workers back across the border for several weeks — the weather was still good enough for landscaping work to continue.

“All of our contractors are still making that big end-of-the-year push,” Denison says. “They want to get work in the ground; they want to get work done. We are a seasonal need company, but with the weather the way it’s been, we’ve stayed busy. My (H-2B) guys have left, and I would normally hire 25-35 (domestic workers). That would have gotten me through the winter, but I can’t even get those guys in the door.”

“In the last 25 days, I have hired 29 people of whom (only) four are left — that’s hired and came to work.”

“I feel I could have given those guys \$35 an hour and those guys wouldn’t have shown up for work,” Denison continues. “I talked to a gentleman last week who said, ‘Why should I come bust my ass and break my back when I can sit at home and collect unemployment? Why should I go to work?’”

It seems, in less than a generation, landscaping has gone from a good way to make some money to a job no Americans want.

“The culture of America is different than it was 25 years ago,” Gordon says. “Hard labor, seasonal work is something Americans just don’t want — especially young Americans. They’d rather work fast food.”

It hasn’t always been that way.

“My dad grew up — if he didn’t work, they didn’t eat,” Haskett says. “That’s gone in this country and we are the worse for it, unfortunately. By trying to be good, we’re hurting our work ethic.”

“The safety net in this country has gotten so elaborate with government assistance,” Haskett continues. “You don’t go hungry; you don’t go without clothing; you don’t go without shelter. You can live a basic existence without having to work.”

H-2B means American jobs

The irony for many contractors is that

HOW BAD IS IT

Josh Denison, president of Denison Landscaping, Fort Washington, MD, spoke with one applicant who hadn't worked in two years. At his last job he was making \$18 an hour as a foreman.

"I offered him \$12 for (the first) two weeks and after that, if he was good, we could sit down and renegotiate and talk about his salary," Denison recalls. "The guy hasn't had a job in two years."

He told the applicant, "'Here's a job that's going to pay you \$12/hour for two weeks at time-and-a-half over 40 hours, and we're working a 55-hour workweek. In two weeks we're going to sit down and talk about money. If you can do what you said you can do you'll make somewhere in that \$15-\$17 range."

"You have to have the realization that you were making \$18 (an hour) at a place that you'd worked at for 19 years. You didn't walk in making \$18 an hour there." He hadn't considered that.

"He called me at noon and told me he couldn't accept it. Here's a guy that's been collecting unemployment, his benefits are running out now, I offered him a job and he didn't take the job."

losing the H-2B program (or making it too expensive) would result in the loss of American jobs.

The program can be quite valuable for contractors. Haskett has a workforce of 41, of which 28 are seasonal and 25 are H-2B visa workers.

"Since we started using the program, this company has grown 400%," says Haskett. "Prior to 2005 our annualized turnover rate was north of 250% at the seasonal workers. Today that is between 5% and 7%."

"Every time we bring in three or four of these guys, we add another full-time, year around job with benefits," he continues. "It creates jobs. This action on the government will kill jobs and kill companies."

For most business owners, there seems to be a love-hate relationship with the H-2B visa program. They need the program to grow and maintain their businesses, but they would much prefer to wean themselves off it. "I'd like to think that I have the ability to become

less dependent on the program in the future," Denison says. "That would be a goal — to become less dependent on the program. But how do I become less dependent on a program whose people have become so ingrained in what we've done? They're not guys who just get here on a bus. They're my guys. They all have faces, they all have names; they all have families; they all have needs. If I become less dependent on the program, who doesn't come back next year?"

Gordon finds value in the program as well, but he's also been burned by the experience.

"I've been beat up by the program so many times," he says. "We're continuing to use it but we're trying not to be too dependent on it because it's so undependable."

The lawsuits

While the judges in a pair of lawsuits — one in Florida and another in Louisiana — have yet to rule, contractors who use the temporary visa worker



◆ Signature Landscape's Operations Support Manager, Fernando Cassas hands out visas to the company's temporary workers in Monterrey, Mexico.

◆ After spending the day filling out forms and answering questions at the U.S. consulate in Monterrey, Mexico, Signature Landscape's H-2B workers wait for the bus to arrive that will take them to Kansas.



THE H-2B BATTLE

program are once again able to plan for the 2012 season.

“We’ve been involved in the Florida litigation suit since its inception,” Denison says. “We felt that this suit was our only chance to get someone to listen. We did not step into litigation against a branch of the federal government lightly. It was our last effort, our only hope.”

Before Congress pushed back implementation of the wage rules, it was thought the judges were set to announce their rulings. This delay allows them to spend more time on their decisions. Even if the judges ultimately favor the Green Industry’s position, the rulings are unlikely to end the debate. The pro-union (and seemingly pro-Administration) forces that pushed the DOL to make changes to the wage methodology in the first place will likely urge an appeal if the legal decisions go against them.

But that it’s even gone this far is wrong, according to Delaney.

“Congress changes what the minimum wage is and here’s the DOL coming in and saying how much you have to pay your workers,” Delaney says. “It’s sort of Communistic. We’ll have to keep fighting until some better system comes along that helps those who use and need the program.”

The future

The H-2B situation looks almost exactly as it did at this time last year. Contractors will have the opportunity to petition for their H-2B workers and plan their seasons accordingly. As it stands now, if nothing changes, the wage and hiring provisions will automatically go into effect Sept. 30.

If the provisions do go into effect, most contractors will likely highly curtail their use of or altogether abandon the H-2B program. If decisions are delayed again, contractors might again get stuck in planning limbo.

“How in the hell do I develop a proper business plan to protect my year-round full-time people with all this uncertainty — with our current administration try-

H-2B AFFECTS EVERYBODY

Hispanic leaders and landscape execs say the wage rule impacts Hispanics and Americans alike.

BY BETH GERACI

According to Ralph Egues Jr., executive director of the National Hispanic Landscape Alliance (NHLA), the H-2B visa program has long been an important source of labor for landscape companies. What’s more, he says, it has created for Hispanics an opportunity for upward mobility.

“It has created conditions where U.S. Hispanics have been able to advance more rapidly than they otherwise would have in the landscape industry,” he says.

One big complaint the NHLA has is that H-2B workers are difficult if not impossible to replace by domestic workers.

“We try to hire locals, but it’s very, very hard to train those guys and keep them on,” says Jerry Maldonado, vice president of San Antonio, TX-based Maldonado Nursery Inc. “It’s manual labor, and it’s just not something people here are looking for. We can’t find these

folks in San Antonio. They’re just not available. If they were, maybe we wouldn’t be here talking.”

Jesus “Chuy” Medrano, owner of CoCal Landscape, Denver, CO, and president of the National Hispanic Landscape Alliance, knows that all too well.

In 2008, Medrano wasn’t able to bring in H-2B laborers because all of the 66,000 H-2B jobs allowed by the government had been filled by the time he made his request. Without H-2B workers, Medrano went through 1,300 domestic workers that season.

“It was just a nightmare,” says Medrano. “If you’re going on a long trip and you’re running out of money, it’s kind of like that.”

Being a Hispanic business owner makes for an interesting dynamic when it comes to H-2B issues. The idea of raising H-2B workers’ hourly rate is “kind of like a double-edged sword,” says Medrano. “It not only would make it harder for

us to operate, but it also feels like they’re singling us out as Hispanics.”

If the Department of Labor does rule that landscape companies must raise the hourly wages for their workers, says Maldonado, “it puts us in a position where we can’t use the program and will have to decrease the size of our companies or close them down.”

The DOL should consider the immense ripple effect raising workers’ wages would create, Egues says.

“The H-2B program is very important to the growth of the industry and to maintaining the kinds of jobs that Americans want,” he explains. “Let’s say your job is to supervise workers but you have no workers to supervise. You lose your job, right? And then if your organization is cut by 40% or 50%, do you need the same numbers of human resources representatives? No you don’t. So you see now your whole company is shrinking and you’re laying off jobs that frankly, Americans aspire to.”

But Egues is hopeful about the judge’s decision.

“When I say I’m optimistic for the outcome of our lawsuit, I base it in part on the filing itself, but also on the action that the judge has already taken on related matters,” he says. “So far, so good.”



CoCal Landscape owner and National Hispanic Landscape Alliance President Jesus “Chuy” Medrano (right) talks with Congresswoman Linda Sanchez (center) and another attendee at an NHLA reception.



◆ H-2B workers provide many companies like Signature Landscape a stable and reliable workforce they can't find any other way.

▼ Fred Haskett hosts a cookout at his house at the end of each season before his H-2B visa workers return home to their families.



ing to stick their nose in all these details with small business?" Haskett asks. "I've got enough trouble trying to keep the doors open in a recession. The uncertainty is almost as bad. At least if I knew what was going on, I could pick Plan A or Plan B."

What becomes more interesting is how the situation plays out if the wage and hiring rules go into effect, making the H-2B program very expensive to use.

"There are two groups of contractors in our market," Gordon says. "The ones that are going to completely turn their heads the other way with regards to immigration, which is most contractors. The other ones are going to fight like hell to make sure they have a legal workforce. H-2B is the best way to get that done."

Given this is in an election year, it seems unlikely Congress will act to

make any sweeping changes.

"My greatest hope is that we have a new administration and a new DOL secretary that favors us over some of the labor unions," Delaney says. "We can fix the system, but don't break it. The immigration system is broken and when we try to work on it they look to the H-2B program, which everybody admits that we still have to have. When we fix the immigration system we want a program like the H-2B to work."

The human element

While it's easy to look at the H-2B as a numbers game, it's easy to forget the people involved.

"My guys aren't just my guys," Denison says. "My guys that have been here seven, eight, nine years have become part of this company. They've become part of what makes Denison Landscaping what it is today."

And saying goodbye at the end of the season is difficult.

"It's a bittersweet experience for them and for us," says Haskett, who hosts a cookout at his home at the end of every season.

"We're happy that they're going home, and they're happy that they're going home to see their wives and children," he says. "Ninety-five percent of them are married and have families. That's what motivates them to come here. It's family-oriented. They're going to their wives and children. They have not seen them physically for eight or nine months. It's a tremendous sacrifice they make — to be able to earn a living."

No matter what happens, the goal is to keep the doors open. The H-2B program makes that easier. But for Denison, the mission is clear.

"We're going to survive next year," Denison says. "Our plan for the next couple years is to survive. Our plan is to be here. We're going to do everything necessary to be here. I'm going to continue forward and use the program." LM

Additional reporting done by Senior Editor Beth Geraci