



TRUMP'S H-2B VISA CONFLICT: HOW WE CAN TAKE ADVANTAGE OF IT TO GAIN BROADER IMMIGRATION REFORM

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On July 19, 2017, the Trump administration increased the H-2B cap from 66,000 to 81,000 by promulgating a [final rule](#). H-2B visas are annually capped at 66,000 under the law. Due to an increase in demand of essential workers to serve landscapers, hotels, restaurants and seafood processors each year, the H-2B cap gets hit earlier each year.

Congress provided for a one time increase in FY 2017 through section 543 of the Consolidated Appropriations Act of 2017, signed by President Trump, which allows the Department of Homeland Security and the Department of Labor to increase H-2B visas this fiscal year based on a complex formula. As a result, the DHS and DOL increased the H-2B cap by 15,000 on July 19. The long sought for [increase is too little and is also too late](#) as the 2017 year will be ending by September 30, 2017. The temporary rule also places an onerous standard. Only American businesses that are likely to experience irreparable harm (permanent and severe financial loss) without the ability to employ all of the H-2B workers that they request for this fiscal year may file under this one-time increase in the H-2B cap.

A day later, on Thursday, July 20, President Trump's Mar-a-Lago [filed labor applications](#) with the Department of Labor for 15 housekeepers, 20 cooks and 35 servers. Trump's golf course in Jupiter, FL filed labor applications for 6 cooks. Contrary to media reports, Trump's businesses sought these H-2B visas for the next fiscal year quota and not under the temporary additional 15,000 H-2B increase for the remainder of 2017. Still, it is quite a coincidence that his businesses sought additional H-2B visas when his own administration issued a rule temporarily increasing H-2B visas a day earlier

The DOL that will process and approve these applications reports to Trump. Once the DOL has issued labor certifications, H-2B visa petitions will need to be filed with United States Citizenship and Immigration Services of the DHS. The DHS reports to Trump. Once the USCIS approves the H-2B visa petitions, the foreign workers will apply for H-2B visas at US consulates in their home countries. The US consulates, who will say yea or nay, are under the purview of the Department of State, which also reports to Trump.

If Trump's business files for H-2B visas under the temporary 15,000 H-2B quota for the 2017 year, they will have to demonstrate "irreparable harm (that is permanent and severe financial loss), if cannot employ H-2B nonimmigrant workers in fiscal year 2017." It remains to be seen whether Trump's businesses can credibly make such a case. Will Mar-a-Lago, promoted as the "winter White House", which is frequently used by Trump to conduct business on behalf of the United States, and to also entertain visiting dignitaries, suffer irreparable harm including permanent and severe financial loss if it cannot bring in cooks and housekeepers on H-2B visas? If the DOL approved the case for Mar-a-Lago under this heightened standard, it would be hard to pass the laugh test. The heightened standard may even be ultra vires the statute, and it may be interesting to see Trump consider challenging a rule made by his own administration!

Trump's businesses clearly rely on the H-2B visa. His administration temporarily increased the H-2B visa by 15,000 (even though Trump's businesses have not yet applied for visas under this increase). The government agencies that will more likely approve rather than deny H-2B visa applications all report to Trump. The move to file H-2B visa petitions for foreign workers also defies Trump's America First rhetoric that intends to provide jobs to Americans over foreign workers. Indeed, these H-2B visas were filed in Trump's much publicized "Made in America" week. Just as in every other case where Trump has retained his businesses while serving as president, here too there is a clear conflict of interest if his businesses utilize the H-2B visa program. The conflict will be even more staggering if Trump's businesses use one of the 15,000 H-2B visas under the temporary increase.

Looking at the bright side, Trump realizes the need for foreign workers on H-2B visas to run his businesses. Although H-2B visas are essential, they only represent a narrow slice of the pie. If Trump does not want this to appear as a conflict of interest, and he is already being accused of being the [most conflicted](#)

[president in modern history](#), he should view immigration in the same way that he views the H-2B visa program for his businesses. Just as his businesses benefit from foreign workers, so would other businesses as well as the US economy through an expansion of visas. If his businesses cannot hire foreign cooks and housekeepers, the business will not run as profitably and other American workers cannot be hired to manage the H-2B workers. Therefore, the hiring of foreign H-2B workers can create more jobs for Americans. Foreign workers, rather than replacing domestic workers, compliment them. It is this complementariness between American and foreign workers that keeps businesses ticking and profitable.

There are many businesses that are crying out for higher skilled professional H-1B workers. The H-1B visa program is also annually capped at 65,000, with an additional 20,000 H-1B visas for those who have graduated with advanced degrees from US institutions. There is no flexibility to add another 15,000 H-1B visa numbers as with the H-2B visa program. Only Congress can raise the limit, but Trump can persuade Congress to do so. It makes no sense for our universities to educate and graduate top notch foreign students, who then cannot work in the United States because of an arbitrary H-1B cap. If they are forced to return to other countries, they will compete with the United States instead of contributing to it. US based global corporations must also be given access to tap into pools of global talent so that they can remain competitive, which in turn will benefit consumers in the United States – and ultimately create more jobs for Americans.

There are also entrepreneurs who would love to start up innovative companies in the United States, but there is no startup visa. Instead, the Trump administration just shelved the entrepreneur parole rule that was promulgated by the prior Obama administration. In a [podcast](#) where Professor David Hsu of Wharton and I were the guests, we both wondered why Trump really needed to put this rule on ice. It would have benefitted a small group of entrepreneurs, as the threshold of receiving a \$250,000 investment was high, but the upsides to the United States could have been tremendous. If one of these foreign entrepreneurs succeeded and his or her startup became a Google, it would result in a paradigm shift in terms of job creation and benefitting US competitiveness. A lot of immigrants have dreams and they want to start their own business and make it big in the U.S. The rule provided one pathway for immigrants to do so, and by not having it and freezing it, we are being less

competitive. America needs to realize that it is not the only game in town. There are other countries that want to compete, and we need to be up there — and we are not, unfortunately, by freezing this rule.

In the podcast, now posted on Knowledge@Wharton, Professor Hsu noted that countries like Canada, France and Argentina have provisions that lower the barriers for immigrant entrepreneurs. Immigrants make up about 12% of the U.S. working population, he added. Among STEM (science, technology, engineering and math) workers, immigrants make up 24% of bachelors and 47% of doctorates, he continued. “So are punching above their weight in the talent pool for the workforce that we desire in the U.S.,” he said. He pointed to one [much-cited](#) statistic: foreign-born entrepreneurs make up about half the founders in the so-called “billion dollar club” of startups that are worth at least a billion dollars each.

President Trump ought to also pay attention to the plight of skilled workers who are caught in the employment-based immigrant visa backlogs, mainly those born in India and China. Eliminating the per country limits or not counting derivative family members would go a long way in alleviating their plight, some of whom are trapped in decades long backlogs. Once they get their green cards, they too will be able to unleash far more dynamism in the US economy.

Finally, even undocumented workers are contributing to the United States. Let's first start with Dreamers who have received work authorization under the Deferred Action for Childhood Arrivals (DACA) program. I have personally seen my own clients embark on successful professional careers after they received DACA authorization, and thus contribute to their fields and the US economy. At this time, DACA seems to be imperiled. It would be a tragedy if young people with a bright future are deported. Other undocumented workers also aspire to do well for themselves and their families. Deporting DACA recipients could result in a [loss of \\$433.4 billion to our GDP](#) besides being politically unpopular. Trump should lend his support to the bipartisan DREAM Act of 2017. One simple way for the US economy to achieve a 4% growth rate, as President Trump desires, is to take in more immigrants. Adam Ozimek and Mark Zandi at [Moody's Analytics](#), an independent economics firm, estimated for [ProPublica](#) that for every 1 percent increase in U.S. population made of immigrants, GDP rises 1.15 percent. Therefore, a simple way to get to Trump's 4 percent GDP bump is to take in about 8 million net immigrants per year.

All this might be wishful thinking in the age of Trump, who got an electoral college victory largely because of his rhetoric against immigrants as job stealers and criminals. Trump desires to erect a big wall. He has also imposed a travel ban against countries with mainly Muslim populations. At the same time, Trump has realized the need for the H-2B visa so that his businesses can run more profitably. He obtained the forbidden fruit by raising the H-2B limit from 66,000 to 81,000, which he could do as president of the United States. He also wishes to create more jobs in the United States. What better way to do that is for Trump to realize that more immigration is consistent with his goal for creating more American jobs. Trump changes his mind all the time. At one point, he was against NATO and China, but he is not so today. He should also change his mind about immigrants and immigration, especially now that he has felt the need for H-2B visa workers to benefit his own businesses.