U.S. CHAMBER OF COMMERCE

Just The Facts

Wages for a Less Skilled Work Visa Program

One sticking point in developing the parameters of a new visa program for lesser-skilled workers is the wage calculation that should control. Our position paper, developed with others in the business community, has always stated[1] that wages should be determined by the well-established concept that participating workers should be paid "the greater of actual or prevailing wages"[2] to ensure that wages paid to foreign workers do not adversely affect the wages of similarly situated U.S. workers. These are settled immigration principles that have worked well in the high-skilled visa program. Under this program, prevailing wage determinations are made by the Department of Labor in accordance with wage levels consistent with education, experience, and supervision, using private wage surveys as an alternative when they are the best information available. The wage levels (currently there are four levels for each occupation) are based on the Occupational Employment Statistics (OES) survey conducted by BLS on wages paid in over 900 occupations across the nation's 374 metropolitan statistical areas.

The Senate negotiations regarding wages for the less skilled work visa program were dominated for a few weeks by discussions of when the government might mandate certain wage levels based on OES data. Proposals were floated as to when level 2 to 4 wages could be mandated to kick-up the wages of immigrant workers who would participate in this program over those of U.S. workers in the same job and locality, regardless of what the actual wages the employer was paying or the wage level determined to be prevailing for the job. Sometimes the mandated wage level was proposed to be keyed off of unemployment rates and at other times tied to tiered levels of recruitment efforts by the employer. During negotiations, some proposals discussed could have resulted in American workers being paid less than immigrant workers. The Chamber steadfastly resisted that approach, although looking for compromises, on the basis that it was simply illogical to pay these temporary workers more than the comparable U.S. workers.

We were surprised and disappointed when some labor and advocacy groups mischaracterized in the press and elsewhere that the U.S. Chamber of Commerce was advocating that employers offer "poverty level wages," minimum wages, or a similar construct. Nothing could be further from the truth. The U.S. Chamber of Commerce (nor the Republicans involved in this effort) never took such a position, or anything close to it.

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[1] The business community position paper outlining a Less Skilled Worker Visa Program was the subject of congressional testimony on March 14, 2013 before the House Education and Workforce Subcommittee on Workforce Protections, http://edworkforce.house.gov/uploadedfiles/reiff_supplemental_-_testimony.pdf (see Wages For Participating Workers, p. 9-10). This proposal was given to labor groups on February 5, 2013 and very clearly lays out our position on wages to be paid foreign workers. The business community position regarding wages has not changed.

[2] §212(n)(1)(A) of the Immigration and Nationality Act, added by Congress in the 1990 Act amending the immigration laws, codified the "greater of actual or prevailing" standard. This has been the controlling standard for all high-skilled immigration since 1990. In 1998, Congress added §212(p)(4) of the Immigration and Nationality Act, to control how the prevailing wages should be set. This has been the controlling standard for calculating prevailing wages for high-skilled temporary workers and green card processing and for all lesser-skilled green card processing since 1998.

It has also been suggested that the Chamber opposes setting wages "as current law requires," never specifying whether this is a claim related to the greater of actual and prevailing standard that we agree with or other provisions. The Chamber would not find acceptable the most recent wage methodology finalized by the Obama Administration's Department of Labor for the H-2B program for temporary need, and largely seasonal, workers, which is a radical departure from past practice regarding how prevailing wages should be determined (See 76 Federal Register 3452, January 19, 2011). In a nutshell, this wage methodology would impose the greater of the OES mean, Service Contract Act (SCA), or Davis-Bacon Act (DBA) wage for the occupation even where there is no federal contract and regardless of the experience or supervision required for the job. Where there is a collective bargaining agreement (CBA), the greater of the CBA, OES mean, SCA, or DBA wage rate for the occupation is required under this approach. Fortunately, the Congress, on a bipartisan basis, has blocked these arbitrary and capricious regulations from moving forward, and have been barred by the appropriations laws for both fiscal year 2012 and 2013.

Our position has not changed: we believe employers should be required to pay foreign workers the greater of actual wages paid to similarly situated American workers and the prevailing wage determined by the Department of Labor in accordance with levels commensurate with experience, training, and supervision required for the job duties.

The construct for the new W-visa for lesser skilled workers provides that:

(1) No alien may be admitted or provided status as a W nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Homeland Security an application stating that the employer:

(A) Is offering and will offer during the period of authorized employment to aliens admitted or provided status as a W nonimmigrant wages that are at least—

• The actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or
• The prevailing wage level for the occupational classification in the area of employment, based on the best information available as of the time of filing the application.

(B) Will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

(2) The "best information available" for determining the prevailing wage for the W nonimmigrant shall be defined as:
(A) The wage level commensurate with the experience, training, and supervision required for the job based on Bureau of Labor Statistics data; or
(B) If no Bureau of Labor Statistics Data is available, a legitimate, recent private survey of the occupation in the Metropolitan Statistical area; or
(C) A controlling collective bargaining agreement or federal contract wage if applicable.