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Costly Foreign Farm Replacement Workers and the Need for H-2A Reforms



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Abstract

As undocumented workers have been evicted through immigration control policies and domestic workers have not shown considerable interest in taking on vacated positions, the H-2A Farm Worker Visa Program remains as the legitimate option for hiring replacement foreign farm workers. The program, however, has supplied only about 12 to 18 percent of the U.S. hired labor complement. A recent survey of farmers indicates several patronage issues, such as cost considerations, timing, and processing complexity issues defining the need for changes in H-2A policies and implementation guidelines. Recent legislative reforms were proposed but still await federal authorities' support and final approval.

INTRODUCTION

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The farm labor sourcing issue has been a recurring theme in many discussions among industry stakeholders, academic researchers, and policymakers in the past several years. Assertions on linkages among immigration control, farm labor supply gaps, and farm business sustainability either have been refuted or supported in many discussion circles. Some views assert that immigration policies have rightfully evicted undocumented workers whose jobs were taken over by unemployed domestic residents, especially during the last economic recession. Others, including certain sectors of the farm industry, present contrasting views.

While some farm businesses have adapted quickly and well to immigration policy-induced changes in the demographic profiles of farm labor supply, many farms, most especially the smaller and relatively more capital-constrained agribusinesses, still struggle to employ productive, reliable, and willing workers who are vital to sustaining business viability of these farms. When labor input substitution and other strategies for coping with an impending farm labor supply gap problem are ineffective, what options are available for these farms?

FARMERS' HIRING PREDICAMENT

Before dwelling on farm labor sourcing solutions, the farmer's labor hiring predicament is revisited and substantiated to describe the extent of efforts and exhausted alternatives explored by the farmers to sustain their farm business operations. These discussions will only serve to define the emphatic need to promote legitimate labor hiring remedies and ensure their proper, effective, and efficient implementation.

A 2007 study funded by the Southern Sustainable Agriculture and Research Education (SARE) reported two-thirds of surveyed farmers experiencing difficulty in replacing displaced undocumented farm workers

with those from the domestic labor pool (Santos and Escalante, 2010). This predicament was corroborated then by news reports (Burke, 2010; Preston, 2007; Seid, 2006; Levine, 2004), individual farmers' testimonials (Martin, 2014; Burke, 2010; Santos & Escalante, 2010), industry officials' statements (Carter, 2011; Rivoli, 2011; Escalante, Perkins, & Santos, 2011), and studies on actual and projected crop losses, unfilled farm labor positions, and economic repercussions (Zahnister et. al, 2012; Mckissick & Kane, 2011). In these accounts, farmers described their frustrations in attracting domestic workers into farm employment even after employing costly advertising and aggressive hiring strategies, including higher wage offers. When some local residents actually showed up to work, their productivity levels were much less compared to the highly efficient work performance of former undocumented employees.

Today farmers continue to deal with the same struggles and frustrations. According to Kristi Boswell of the American Farm Bureau, farmers continue to experience huge crop losses among perishable commodities such as blueberries, apples, and melons (Rosenthal, 2016). Farmers in Georgia lament lost opportunities in their inability to harvest their crops and sell in the market while prices were favorable (Sheinin, 2016). As Idaho farmers have articulated, the potentially available domestic workforce remains unreliable as "... local workers fail to show up, work a few days and quit, or perform work in an unsatisfactory manner" (Cockerham, 2012).

A farmer once summed up his disappointment by labeling domestic workers as "lazy" (Cockerham, 2012). While such allegation may be valid in certain situations, it can aptly be clarified that the farm labor sourcing issue is more than just a nationality or race issue. More appropriately, it is an immigration identity issue and its implications on flexibility or freedom to seek employment in all places. The undocumented workers' lack of employment alternatives because of their immigration status compels them to endure the reality of usually unfairly compensated farm work, with all its harsh demands and exposure to more hazards and risks than other employment options. If these immigrants were granted proper legal identities that give them greater employment flexibility, they would undoubtedly prefer to work in non-farm industries with more attractive compensation packages and safer, more tolerable working environments (Luo & Escalante, 2017).

LEGITIMATE FOREIGN LABOR HIRING OPTION UNDER H-2A PROGRAM

For a desperate farm business owner, contractual employment, such as through the H-2A Agricultural Guest Worker Visa Program, remains the only legitimate hiring option for the farm sector. The program allows U.S. farmers to temporarily hire nonimmigrant foreign workers to perform full-time temporary or seasonal farm work when domestic workers are unavailable (GAO, 1997). H-2A employment is governed by regulations that are designed to protect the interests of the foreign workers as well as ensure that such employment decisions do not deprive any able, qualified domestic workers of an employment opportunity. To protect the foreign workers from abusive employers, the H-2A program sets wage requirements as well as minimum standards for the provision of housing, transportation, meals, workers' compensation, and other benefits (Mayer, CRS Report to Congress, 2008).

To ensure that hiring foreign workers through the H-2A program will not result in the displacement of domestic workers, visa approvals by the Department of Homeland Security are granted only when the Department of Labor (DOL) certifies that "there are not sufficient U.S. workers who are able, willing, qualified, and available to perform at the place and time needed (Farmworker Justice, 2010).

The visa program has been revisited and amended in recent years. For instance, H-2A employers are now required to list all tasks that the H-2A workers are expected to perform (Souza, 2010) while state workforce agencies inspect worker housing facilities before H-2A hiring commences (DOL). Wage determination policies also have departed from being based on DOL's Occupational Employment Statistics Survey, which was introduced during the Bush administration and reduced farm wages by an average of \$1/hour (Souza, 2010; DOL). The amended H-2A program now uses the Adverse Effect Wage Rate Index developed by the Department of Agriculture. The new formula ensures that the wages received by U.S. workers in the same occupation working for the same employer are not below those paid to the H-2A workers. However, experts still contend that the new formula actually results in higher H-2A wages that, as Ron Gaskill of the American Farm Bureau predicts, "could price (the H-2A employers) out of the program (Stallman, 2010)."

The growth rates calculated in Figure 1 present a comparison of two data sources: those based on certifications or approvals made by the DOL and those obtained from the Bureau of Consular Affairs, U.S. Department of State. Differences in total approvals indicate the lag in visa approvals related to the additional procedures and time spent by other visa approval offices (domestic and foreign) before prospective H-2A workers are given the final approval to travel to the U.S. to commence work.

The plots in Figure 1 indicate some growth realized in H-2A labor visa approvals in recent years. During the last three years (2015–2017), these growth rates range from approximately 20 percent to 24 percent. In 2017, DOL reported H-2A labor certifications that broke the 200,000 mark for the first time. DOL also reports that its processing efficiency has increased considerably in more recent years, as 95 percent to 97 percent of complete applications were processed timely (i.e., within 30 days before the start date of need).

However, in spite of these encouraging developments, the H-2A program has supplied only about 12 percent to 18 percent of the total hired farm labor in the country during the last three years. As can be gleaned from Figure 1, the proportion of H-2A workers to total hired farmworkers has been increasing steadily during most of the 10-year period, but the expectations for this program's reliability in supplying a more significant proportion of farm employment remain high.

FARMERS' H-2A PATRONAGE ISSUES

A survey was conducted among farmers in late 2015 as part of a project funded by the Southern Sustainable Agriculture and Research Education (SARE) designed to collect the farmers' perspective on the implementation of the H-2A visa program. The survey was directed toward producers in North Carolina and Georgia, two states that consistently ranked in the top five states in H-2A labor applications during the last five years. The survey instrument collected farmers' assessment of their previous H-2A hiring experiences, evaluation of the H-2A workers' quality of work, and effectiveness of the program in meeting their labor demands.

The Waiting Period

Survey results indicate that the documentary preparation phase is the least serious of all timing issues, as about half of the respondents needed only five days or less to complete requirements, while about 20 percent needed a month or two to comply (Figure 2). The

majority have either partially or fully employed the services of external consulting agents who assisted with document preparation, with 77 percent of them requiring the agents' full assistance. Jim Phillips of California validates this practice through his experience of hiring a contractor for 120 Mexican guest workers he needed for his farm businesses — which he describes as “a little bit more expensive” (Harkinson, 2017).

The filing and approval phase takes a little bit longer as the applications of about 70 percent of the respondents were processed for about 30 days before labor certifications were issued (Figure 2). A foreign labor certification decision is actually mandated by law to be issued “no later than 30 days before the employer's start date of need” (Office of Foreign Labor Certification, 2015). According to annual H-2A program reports, compliance rate for this mandate has ranged from 85 percent to 97 percent since 2011, except in 2013 when only 69 percent of the applications were approved in a timely manner (Employment and Training Administration, 2011–2016). A letter written to the DOL from six senators cited specific reasons for denials or delays in approval of applications that include “minor discrepancies related to language or officers applying an unreasonable degree of scrutiny” (Cockerham, 2012).

The foreign workers' arrival in the country, however, was delayed by approximately two more months from the time certifications were issued (Figure 2). As implemented, the DOL approval of the foreign labor certification is only a preliminary step in a complicated procedure involving multiple federal agencies, such as the Department of Homeland Security (DHS) that approves the petition, the Department of State at a U.S. Embassy/Consulate in the foreign workers' home country that approves the H-2A visa, and the U.S. Customs and Border Protection (CBP) that grants admission at a U.S. port of entry (USCIS, 2017).

In an industry that deals with perishable commodities and in which the timing of most tasks is defined by environmental variability, market opportunities, and other risk and uncertainty factors, the availability of the much-needed labor inputs is crucial to business survival and success. As a South Georgia farmer once exclaimed, “A week or two is a delay. Two months is you've lost your crop” (Sheinin, 2016). Georgia Agriculture Commissioner Gary Black sums up the plight of farmers as “abiding by the law (but) our government is failing them” (Sheinin, 2016).

The Costs of Waiting

The hiring of foreign workers to fill the vacated farm positions comes at a high cost that can be broken down into opportunity costs, realized crop losses, and actual incremental expenditures incurred during and after the application process. Approximately 69 percent of the surveyed farmers, for instance, declared that their hiring costs increased their business expenses by at least 25 percent (Figure 3). The itemized costs include job search expenses, application fees, regulatory fees, and benefits that the employers are mandated by law to provide to workers, such as transportation, housing, food, and fringe benefits. These workers' wages are also regulated by minimum rates set by the government. As one farmer complained, "Their pay is often higher than the state's minimum wage. In New York, it's an extra \$2 an hour" (Rosenthal, 2016).

The only tradeoff possibility for these incremental costs lies among the foreign workers employed — on their job performance once they are hired. Survey responses indicate that more than half of the farmers noted increases in labor efficiency and productivity, including 47 percent who acknowledged labor productivity improvements of at least 25 percent (Figure 3). About 34 percent, however, claimed that no labor productivity changes were realized among their H-2A workers.

The farmers' assessment of their overall business condition incorporates cost and labor productivity considerations (Figure 3). One-third of the survey respondents reported overall losses in their farm businesses even after securing the services of H-2A workers. In contrast, about 40 percent realized at least 25 percent growth in their business profits even after enduring the rigorous and costly process of hiring H-2A workers.

THE NEED FOR MORE REFORMS

Some farms may have fortunately endured the challenge of sustaining their business operations with patience, persistence, and adept business management skills to offset the effects of delayed arrival of needed farm workers, missed market opportunities, and other demands of their volatile business environment. But such trend may not persist much longer. The H-2A program's implementation guidelines, once labeled as "confusing and painful" (Rosenthal, 2012), need to be revisited and amended if the program is envisioned to indeed benefit the farm industry. Farmer groups have charged that the current program has been "bureaucratic and insensitive to the (farm) industry's need" and have called for simplification of current procedures (Ong, 2015). Specific requests include suggestions for allowing

the filing and processing of applications to be conducted electronically. Others have also proposed a fast-track evaluation process for workers who have already regularly worked in the country for several years (Sheinin, 2016).

LEGISLATIVE EFFORTS

Some legislators have included this farm labor issue in their agendas. U.S. Rep. Rick Allen of Georgia reintroduced the Better Agriculture Resources Now (BARN) Act that transfers the responsibility of H-2A certification from DOL to the Department of Agriculture, which arguably is more familiar with the farmers and their business conditions and "time-sensitive" operations. The Act also proposes, among other things, to eliminate the 50 percent rule and set wages at no more than 115 percent of the minimum wage. This proposal is still awaiting further legislative action.

Reps. Chris Collins and Elise Stefanik (NY-21) also introduced the Family Farm Relief Act of 2017 that supports Rep. Allen's proposed transfer of the H-2A Agricultural Visa program from DOL to DA. Their proposal also addressed some application issues as they suggested that visa applicants be allowed to fill out H-2A applications on paper or online. They also demanded a more user-friendly online system and the removal of burdensome requirements on advertising and prevailing practice surveys. This proposed legislation is also pending and awaiting further action.

The Congress' Judiciary Committee Chairman Robert Goodlatte of Virginia also proposed the replacement of H-2A with the H2C program. In addition to supporting the move of certification responsibility from DOL to DA, Goodlatte's proposal also would allow workers to stay with employers year-round, with an initial stay of 36 months. This proposed bill would expand the definition of "agricultural labor" to extend visas to workers in industries requiring year-round workers (such as forestry, dairy, and meat-processing industries). This bill also proposes that undocumented farm workers currently in the U.S. should be allowed to apply for H2C visas. It also has some cost-cutting proposals that include the relaxation of the free transportation and housing benefits for workers under the H-2A program. The AEW is proposed to be repealed as wages are proposed to be calculated based on some percentage of the federal or state minimum wage, rather than prevailing wages. This bill was introduced in the House Judiciary Committee in October 2017 and voted on (17 yeas and 16 nays). It is currently being modified as requested during the House committee voting.

WHAT NOW?

Meanwhile, as the farm sector awaits favorable actions on these legislative proposals, farmers must contend with existing guidelines of the program. The economic issues surrounding the hiring of H-2A workers are always two-sided. As farmers clamor for cost reductions to increase the viability potential of their farm businesses, workers and civil rights advocates rally for their retention as they demand that workers' welfare should be ensured and upheld.

There are, however, some neutral issues that need to be resolved to produce favorable consequences both to farmers and workers. Easier, quicker, and more convenient processing requirements that minimize delays and bureaucratic procedures can be less debatable issues to rally for. When these are resolved, then a more deliberate reconciliation of farmers' and workers' economic interests is needed to reach a compromise. Only then will the program be truly reliable and attract higher patronage among farmers.

The reality at the farm level, however, remains clear and unchanged. Even if not all the direct financial costs stipulated under the program can be substantially reduced, farm businesses clamor for program reforms that should address the eradication of opportunity costs associated with postponed production, harvesting, or marketing operations caused by delayed availability of H-2A workers. The survival of sectors in the farm industry most vulnerable to the farm labor gap condition lies in the responsiveness of policymakers to the farmers' appeals for more beneficial changes in the implementation of the H-2A program. After all, if the program falters in meeting the farmers' needs at the most opportune time, where else would farmers turn? How else would farmers and their businesses survive?

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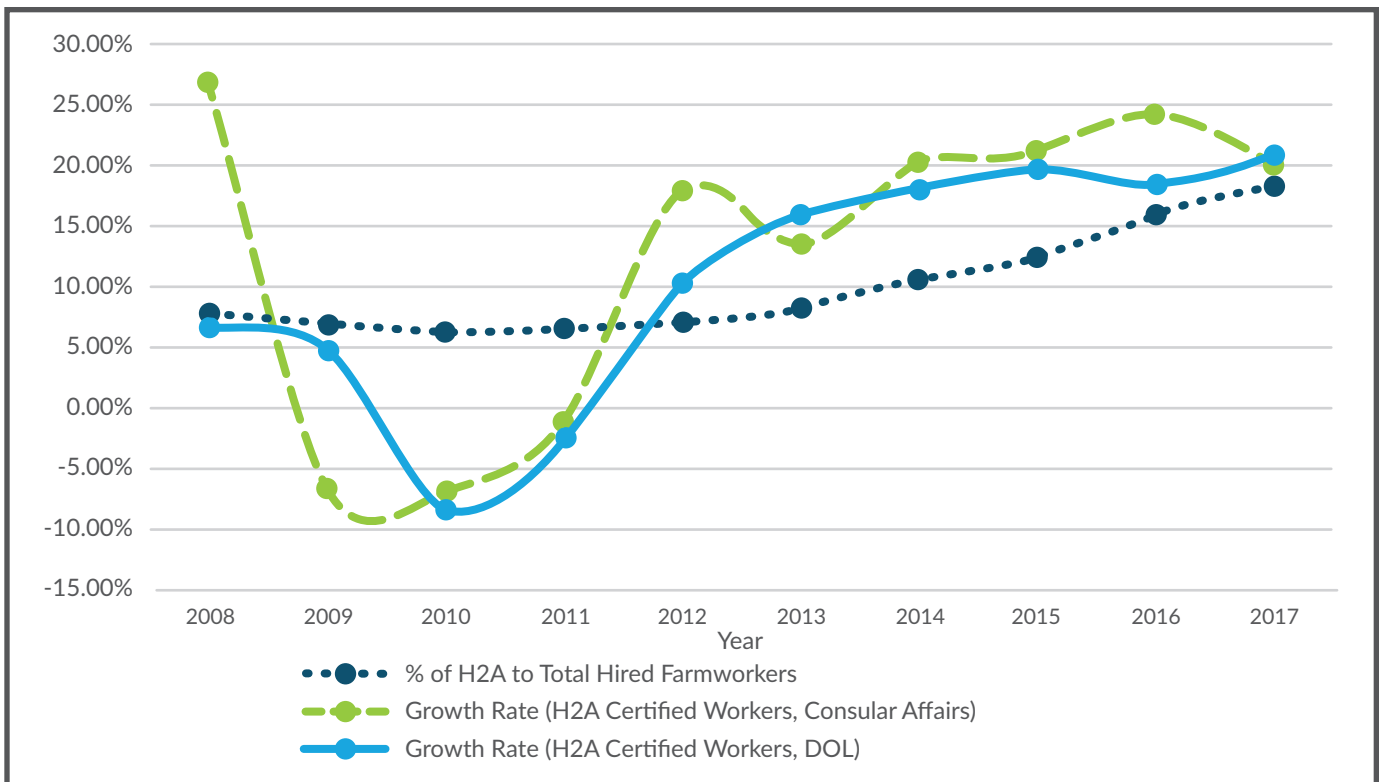


Figure 1. Growth Rates and Proportion of H-2A to National Total Hired Labor, 2008–2017

Sources: Department of Labor (DOL) and Office of Consular Affairs

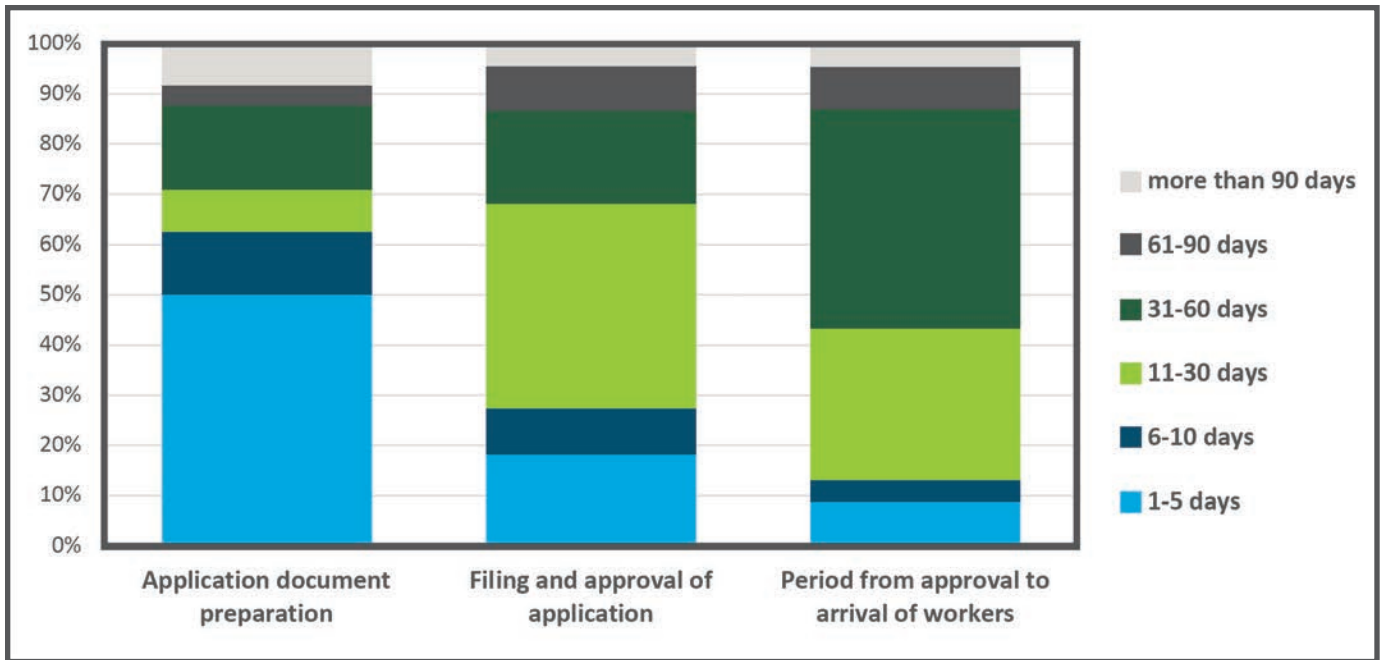


Figure 2. Length of Preparation, Processing, and Approval of H-2A Visa Applications

Source: Rusiana and Escalante, H-2A Outreach Bulletin No. 1, University of Georgia

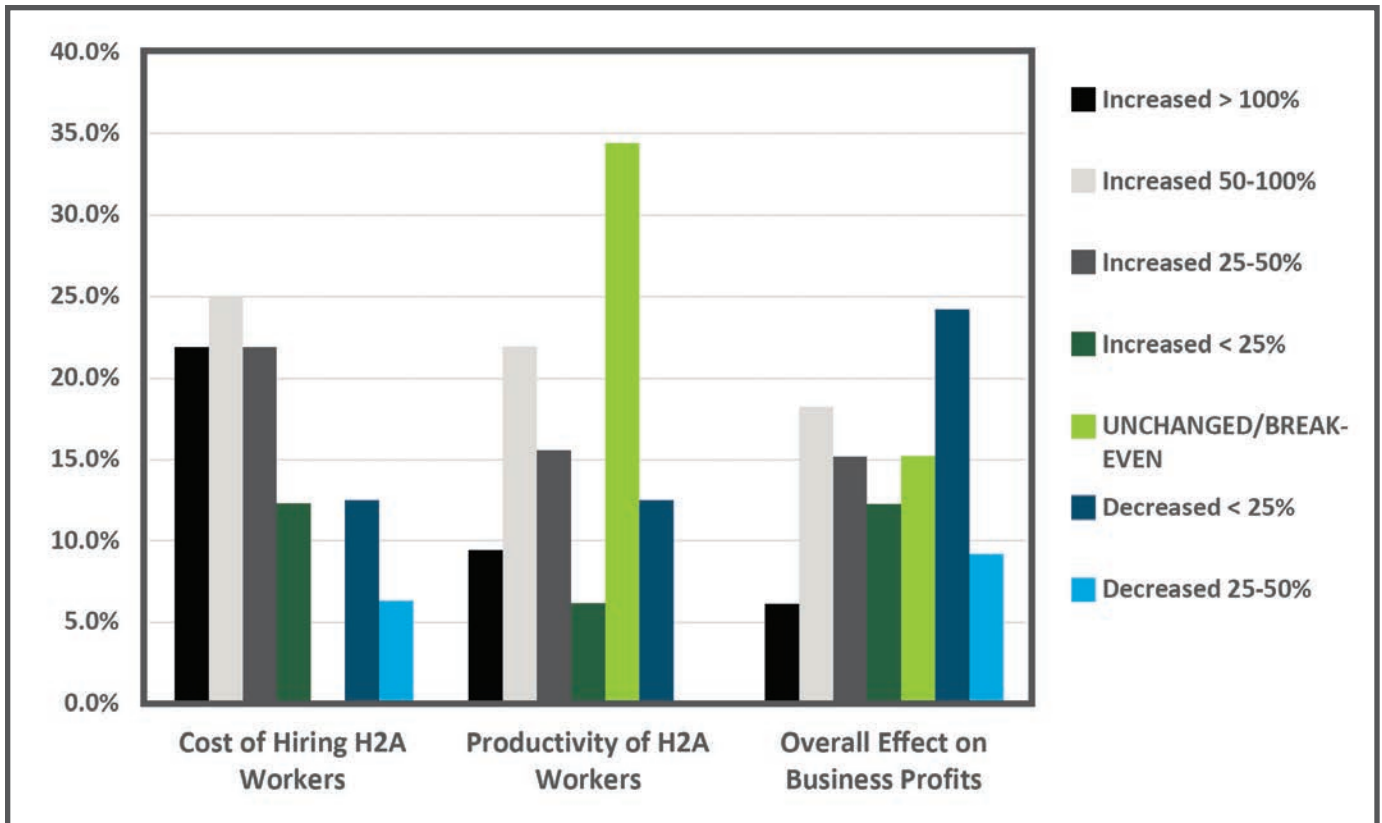


Figure 3. Effects of H-2A Hiring Decisions on Costs, Labor Productivity, and Business Profits

Source: Rusiana and Escalante, H-2A Outreach Bulletin No. 2, University of Georgia