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Immigration: Policy Considerations Related to Guest Worker Programs

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Summary

At present, the United States has two main programs for temporarily importing low-skilled workers, sometimes referred to as guest workers. Agricultural guest workers enter through the H-2A program and other guest workers enter through the H-2B program. Employers interested in importing workers under either program must first apply to the U.S. Labor Department for a certification that U.S. workers capable of performing the work are not available and that the employment of alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Other requirements of the programs differ.

Legislation to overhaul the H-2A program (S. 1645/H.R. 3142, H.R. 3604, S. 2185), the H-2B program (S. 2010, S. 2381/H.R. 4262), and the "H" temporary worker category generally (H.R. 3534) has been introduced in the 108th Congress. Other bills (S. 1387, S. 1461/H.R. 2899, H.R. 3651, S. 2010, S. 2381/H.R. 4262) and a Bush Administration immigration proposal would create new guest worker programs. Presumably, these proposed programs would cover largely low-skilled workers. In addition to their guest worker provisions, S. 1645/H.R. 3142, S. 1461/H.R. 2899, S. 2010, and S. 2381/H.R. 4262 would establish mechanisms for certain foreign workers to become U.S. legal permanent residents (LPRs).

The current discussion of guest worker programs takes place against a backdrop of historically high levels of unauthorized immigration to the United States. Supporters of a large-scale temporary worker program argue that such a program would help reduce unauthorized immigration by providing a legal alternative for prospective foreign workers. Critics reject this reasoning and instead maintain that a new guest worker program would likely exacerbate the problem of illegal immigration.

The consideration of any proposed guest worker program would appear to raise a variety of issues. Among them are the following: how would the requirements of any new program compare to the requirements of the H-2A and H-2B programs; who would be eligible for the program; would the program include a mechanism for participants to obtain LPR status; how would family members of eligible individuals be treated; what labor market test, if any, would the program employ; would the program be numerically limited; how would the rules and requirements of the program be enforced; and what security-related provisions, if any, would be included.

This report aims to provide an analytical framework for evaluating low-skilled guest worker proposals. It is not intended to serve as a legislative tracking report. If warranted by legislative developments, the tracking of relevant bills in the 108th Congress will be handled in a separate product.

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Introduction

In 2001, the United States and Mexico began Cabinet-level talks on migration. While the details of these discussions were not made public, two issues — legalization and a temporary worker program — dominated media coverage. The talks lost momentum after the terrorist attacks of September 11, 2001, as the Bush Administration focused its attention on security-related matters. A temporary worker program (not limited to Mexico), however, remains of interest to some Members of Congress and Administration officials. Bills to reform existing programs for foreign temporary workers and to create new temporary worker programs have been introduced in the 108th Congress. In addition, the Bush Administration has outlined a proposal for a new temporary worker program. The new programs presumably would cover largely low-skilled workers.

Background

The term *guest worker* has typically been applied to foreign temporary low-skilled laborers, often in agriculture. In the past, guest worker programs have been established in the United States to address worker shortages during times of war. During World War I, for example, tens of thousands of Mexican workers performed mainly agricultural labor as part of a temporary worker program. The Bracero program, which began during World War II and lasted until 1964, brought several million Mexican agricultural workers into the United States. At its peak in the late 1950s, the Bracero program employed more than 400,000 Mexican workers annually.[1]

The Immigration and Nationality Act (INA) of 1952, as originally enacted,[2] authorized a temporary foreign worker program known as the H-2 program. It covered both agricultural and nonagricultural workers who were coming temporarily to the United States to perform temporary services (other than services of an exceptional nature requiring distinguished merit and ability) or labor. Aliens who are admitted to the United States for a temporary period of time and a specific purpose

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[1] For additional information on these historical programs, see U.S. Congress, Senate Committee on the Judiciary, *Temporary Worker Programs: Background and Issues*, committee print, 96th Cong., 2nd sess., Feb. 1980.

[2] Act of June 27, 1952, ch. 477; 8 U.S.C. 1101 *et seq.* The INA is the basis of current immigration law.

are known as nonimmigrants. The 1986 Immigration Reform and Control Act (IRCA)[3] amended the INA to subdivide the H-2 program into the current H-2A and H-2B programs and to detail the admissions process for H-2A workers. The H-2A and H-2B visas are subcategories of the larger "H" nonimmigrant visa category for temporary workers.[4]

Current Programs

The United States currently has two main programs for importing temporary low-skilled workers. Agricultural workers enter through the H-2A program and other temporary workers enter through the H-2B program.[5] The programs take their names from the sections of the INA that established them — Section 101(a)(15)(H)(ii)(a) and Section 101(a)(15)(H)(ii)(b), respectively. Both programs are administered by the Employment and Training Administration (ETA) of the U.S. Department of Labor (DOL) and U.S. Citizenship and Immigration Services (USCIS) of the U.S. Department of Homeland Security (DHS).[6]

H-2A Program

The H-2A program allows for the temporary admission of foreign workers to the United States to perform agricultural work of a seasonal or temporary nature, provided that U.S. workers are not available. An approved H-2A visa petition is generally valid for an initial period of up to one year.[7] An alien's total period of stay as an H-2A worker may not exceed three consecutive years.

Employers who want to import H-2A workers must first apply to DOL for a certification that (1) there are not sufficient U.S. workers who are qualified and available to perform the work; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. As part of this labor certification process, employers must attempt to recruit U.S. workers and must cooperate with DOL-funded state employment service agencies (also known as state workforce agencies) in local, intrastate, and interstate

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[3] P.L. 99-603, Nov. 6, 1986.

[4] For an overview of the INA's nonimmigrant visa categories, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

[5] The H-2B program is not limited to workers of a particular skill level and has been used to import a variety of workers, including entertainers and athletes.

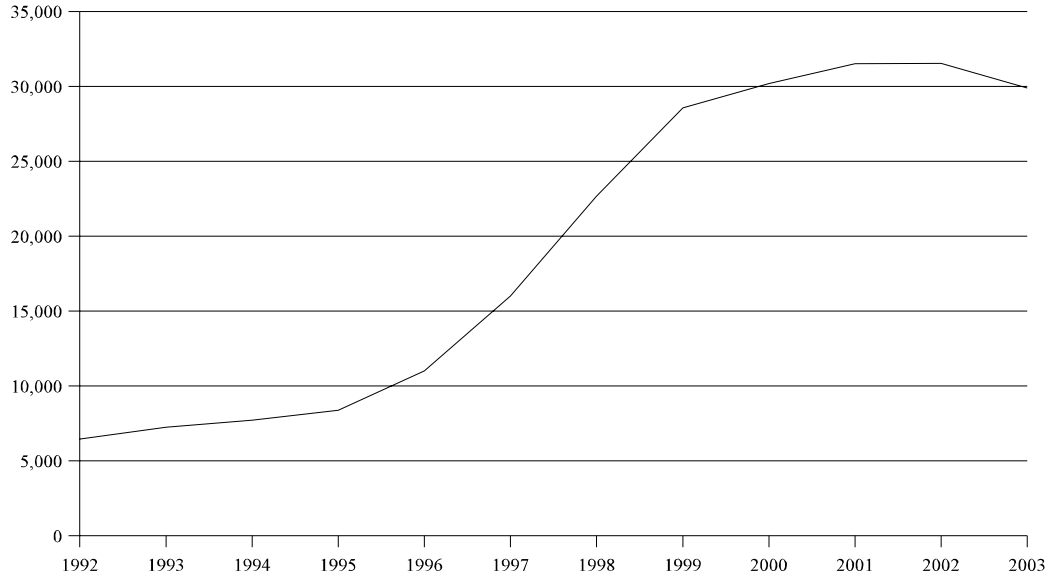
[6] Prior to Mar. 1, 2003, the H-2A and H-2B programs were administered by ETA and the Immigration and Naturalization Service (INS) of the Department of Justice. The Homeland Security Act of 2002 (P.L. 107-296, Nov. 25, 2002) abolished INS and transferred most of its functions to DHS as of Mar. 1.

[7] See 8 C.F.R. §214.2(h)(5)(iv)(A). According to *Immigration & Nationality Law Handbook, 2001-02 Edition*, however, "both DOL and INS take a very restrictive approach regarding the length of time for which a [H-2A or H-2B] petition can be approved." See Donna L. Lipinski, "The H-2s — A Class of Their Own," *Immigration & Nationality Law Handbook, 2001-02 Edition*, vol. II, pp. 86-87.

recruitment efforts. Employers must pay their H-2A workers and similarly employed U.S. workers the highest of the federal or applicable state minimum wage, the prevailing wage rate,[8] or the adverse effect wage rate (AEWR).[9] They also must provide workers with housing, transportation, and other benefits, including workers' compensation insurance.[10] No health insurance coverage is required.[11]

Both growers and labor advocates criticize the H-2A program in its current form. Growers complain that the H-2A program is overly cumbersome and does not meet their labor needs. Labor advocates argue that the program provides too few protections for U.S. workers.

Figure 1. H-2A Visas Issued, FY1992-FY2003



Source: CRS presentation of data from Department of State Bureau of Consular Affairs.

[8] The prevailing wage rate is the average wage paid to similarly employed workers in the occupation in the area of intended employment. Additional information about prevailing wages is available at [http://www.ows.doleta.gov/foreign/wages.asp].

[9] The AEWR is an hourly wage rate set by DOL for each state or region, based upon data gathered by the Department of Agriculture in quarterly wage surveys. For 2003, the AEWR ranges from $7.13 for Arkansas, Louisiana, and Mississippi to $9.42 for Hawaii. See CRS Report RS21015, *The Adverse Effect Wage Rate*, by William G. Whittaker.

[10] Required wages and benefits under the H-2A program are set forth in 20 C.F.R. §655.102.

[11] H-2A workers, like nonimmigrants generally, are not eligible for federally funded public assistance, with the exception of Medicaid emergency services. For further information on alien eligibility for federal benefits, see CRS Report RL31114, *Noncitizen Eligibility for Major Federal Public Assistance Programs: Policies and Legislation*, by Ruth Ellen Wasem and Joe Richardson; and CRS Report RL31630, *Federal Funding for Unauthorized Aliens' Emergency Medical Expenses*, by Alison M. Siskin.

H-2A Visas Issued. The H-2A program, which is not subject to numerical limits, has grown almost fivefold over the last decade. As illustrated in **Figure 1**, the number of H-2A visas, which are issued abroad by the Department of State (DOS), increased from 6,445 in FY1992 to 30,201 in FY2000, and has remained at about 30,000 annually since then. In FY2003, DOS issued 29,882 H-2A visas. The H-2A program, however, remains quite small relative to total U.S. agricultural employment, which stood at 3.2 million in 2002, according to DOL's Bureau of Labor Statistics.

H-2B Program

The H-2B program provides for the temporary admission of foreign workers to the United States to perform temporary non-agricultural work, if unemployed U.S. workers cannot be found. Foreign medical graduates coming to perform medical services are explicitly excluded from the program. An approved H-2B visa petition is valid for an initial period of up to one year.[12] An alien's total period of stay as an H-2B worker may not exceed three consecutive years.[13]

Like prospective H-2A employers, prospective H-2B employers must first apply to DOL for a certification that U.S. workers capable of performing the work are not available and that the employment of alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. H-2B employers must pay their workers at least the prevailing wage rate. Unlike H-2A employers, they are not subject to the AEWR and do not have to provide housing, transportation,[14] and other benefits required under the H-2A program.

A key limitation of the H-2B visa concerns the requirement that the work be temporary. Under the applicable immigration regulations, work is considered to be temporary if the employer's need for the duties to be performed by the worker is a one-time occurrence, seasonal need, peakload need, or intermittent need.[15] According to DOL data on H-2B labor certifications, the top five H-2B occupations in FY2003, in terms of the number of workers certified, were: (1) landscape laborer, (2) forestry worker, (3) maids and housekeeping cleaners, (4) stable attendant, and (5) construction worker.

H-2B Visas Issued and the Statutory Cap. Unlike the H-2A visa, the H-2B visa is subject to a statutory numerical limit. Under the INA, the total number of aliens who may be issued H-2B visas or otherwise provided H-2B status during a

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[12] See 8 C.F.R. §214.2(h)(9)(iii)(B).

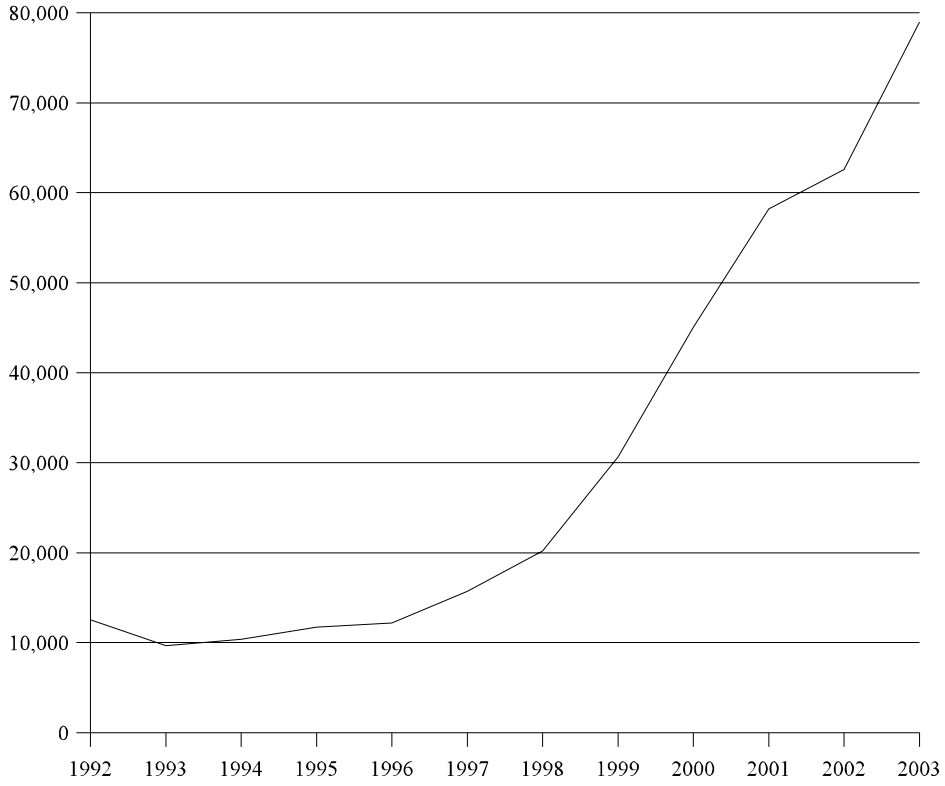
[13] Included in this three-year period is any time an H-2B alien spent in the United States under the "H" (temporary worker) or "L" (temporary intracompany transferee) visa categories.

[14] While not subject to the broader transportation requirements of the H-2A program, H-2B employers are required by law to pay the reasonable costs of return transportation abroad for an H-2B worker who is dismissed prior to the end of his or her authorized period of stay.

[15] For definitions of these types of need, see 8 C.F.R. §214.2(h)(6)(ii).

fiscal year may not exceed 66,000.[16] This cap applies only to petitions for new H-2B workers. Petitions for current H-2B workers to extend their stay, change their terms of employment, or change or add employers do not count towards the cap. As shown in **Figure 2**, the number of H-2B visas issued by DOS dipped from 12,552 in FY1992 to 9,691 in FY1993 and has increased steadily since then. In FY2002, DOS issued 62,591 H-2B visas, and in FY2003, it issued 78,955 H-2B visas. While for various reasons not all visas issued during a fiscal year necessarily count against that year's cap or, in some cases, any year's cap, USCIS, which has responsibility for enforcing the H-2B cap, has acknowledged that the cap was exceeded in FY2003. With respect to the FY2004 cap, USCIS announced on March 10, 2004, that it had received a sufficient number of H-2B petitions to meet that cap. It indicated that it would process all petitions received by March 9, 2004, but would not accept any petitions subject to the FY2004 cap after that date.[17]

Figure 2. H-2B Visas Issued, FY1992-FY2003



Source: CRS presentation of data from Department of State Bureau of Consular Affairs.

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[16] See INA §214(g)(1)(B).

[17] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS Announces H-2B Procedures — Reaches Cap," press release, Mar. 10, 2004; Department of Homeland Security, Bureau of Citizenship and Immigration Services, "Information Regarding the H-2B Numerical Limitation for Fiscal Year 2004," 69 *Federal Register* 12340-12341, Mar. 16, 2004.

Unauthorized Immigration

The current discussion of guest worker programs has been prompted, in part, by the continued high levels of illegal, or unauthorized, immigration to the United States and related deaths along the U.S.-Mexican border. Using data from the 2000 Census of the U.S. population and immigration data, the former INS estimated that in January 2000 there were about 7.0 million unauthorized aliens residing in the United States.[18] This figure compares to a revised INS estimate of about 5.8 million for October 1996. INS estimated that during the 1990s, unauthorized immigration grew at an average rate of about 350,000 per year. INS's previous estimate of average annual growth during the decade was about 275,000. Mexico was the largest source country for unauthorized immigration. According to the INS estimates, there were about 4.8 million unauthorized Mexicans in the United States in January 2000, comprising 69% of the total unauthorized population. INS's estimate of the unauthorized Mexican population in 1990 was about 2.0 million, or 58% of the total unauthorized population at the time. With respect to migrant deaths, data from the Department of Homeland Security indicate that more than 300 migrants died at the U.S.-Mexican border each year from FY2000 through FY2002.

Unauthorized Workers

Unauthorized workers are a subpopulation of the total unauthorized alien population. The Pew Hispanic Center estimates that there were about 5.3 million unauthorized workers in the U.S. labor force, excluding agriculture, in 2001.[19] Both employed and unemployed persons are included in that figure. **Table 1** presents Pew Hispanic Center estimates disaggregating this total by industry. As indicated in the table, unauthorized workers represented about 4% of the work force in 2001. In some industries, however, their share of the labor force was considerably higher. Notably, they accounted for about one in four workers in private household services (e.g., in-home babysitting) and about one in six workers in business services (e.g., building cleaning and maintenance).

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[18] U.S. Department of Justice, Immigration and Naturalization Service, Office of Policy and Planning, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, Jan. 2003. Available at [http://www.uscis.gov/graphics/shared/aboutus/statistics/illegals.htm], visited July 8, 2003. Note: Other estimates of the unauthorized alien population in Jan. 2000 are higher. These disparities are accounted for, in part, by INS's narrower definition of unauthorized alien. For a discussion of these issues, see pp. 13-14 of the INS report.

[19] B. Lindsay Lowell and Roberto Suro, *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks*, Pew Hispanic Center Report, Mar. 21, 2002. (Hereafter cited as Lowell and Suro, *How Many Undocumented*.) Note: This estimate of the unauthorized work force is based on a total 2001 unauthorized population estimate of 7.8 million. For additional information on the unauthorized worker estimates, see B. Lindsay Lowell and Richard Fry, *Estimating the Distribution of Undocumented Workers in the Urban Labor Force: Technical Memorandum to "How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks*," Pew Hispanic Center Study, Mar. 21, 2002.

Table 1. Estimates of Unauthorized Workers in the Labor Force, by Industry

(in thousands)

Industry	Unauthorized workers	Total workers	Percentage unauthorized workers
Construction	620	9,670	6.4%
Manufacturing	1,190	20,830	5.71%
— Durable	580	12,670	4.58%
— Non-durable	610	8,150	7.48%
Wholesale and Retail Trade	1,410	29,850	4.72%
— Restaurants	700	7,720	9.07%
— Other	720	22,130	3.25%
Services	1,320	41,960	3.15%
— Business	390	2,350	16.60%
— Private Household	250	1,050	23.81%
— Other	690	38,570	1.79%
Other Industries	350	37,990	0.92%
Totals	**5,300**	**143,640**	**3.69%**

Source: *How Many Undocumented*, p. 7; last column added by CRS.

In a separate Pew Hispanic Center study, Philip Martin, an agricultural labor economist, estimates that there were 1.2 million unauthorized agricultural workers in both crop and livestock production in 2002. This figure represents 47% of an estimated total hired farm work force of 2.5 million.[20]

Supporters of a large-scale guest worker program contend that such a program would help reduce unauthorized immigration by providing a legal alternative for prospective foreign workers. Critics reject this reasoning and instead maintain that a guest worker program would likely exacerbate the problem of illegal immigration; they argue, for example, that many guest workers would fail to leave the country at the end of their authorized period of stay.

[20] Philip Martin, *Guest Workers: New Solution, New Problem?*, Pew Hispanic Center Study, Mar. 21, 2002.

Legislation in Past Congresses

Major guest worker legislation introduced in the 105th, 106th, and 107th Congresses was limited to the H-2A program.[21] No major H-2B reform bills were offered.[22] In the 105th Congress, for example, a Senate-approved amendment to S. 2260, an FY1999 Departments of Commerce, Justice, and State Appropriations bill, would have replaced the existing labor certification process with a new set of procedures for importing H-2A workers. It would have established a system of agricultural worker registries containing the names of eligible U.S. agricultural workers. Employers interested in importing H-2A workers would first have applied to DOL for the referral of U.S. workers through a registry search. If a sufficient number of workers were not found, the employer would have been allowed to import H-2A workers to cover the shortfall. The Senate measure also would have changed wage and other requirements. The provision was not enacted.

Provisions to establish a system of worker registries and to change existing H-2A-related requirements were likewise included in two H-2A reform proposals introduced in the 106th Congress (S. 1814/H.R. 4056[23] and H.R. 4548). In addition, S. 1814/H.R. 4056 would have established a two-stage legalization program, under which farm workers satisfying specified work requirements could have obtained temporary resident status and then legal permanent resident (LPR) status. Although formal congressional consideration was limited to a Senate Immigration Subcommittee hearing on S. 1814, S. 1814/H.R. 4056 became the basis of a bipartisan compromise on foreign agricultural workers. That agreement, however, fell apart at the end of the 106th Congress. H.R. 4548, the other reform bill before the 106th Congress, differed from S. 1814/H.R. 4056 in that it sought to establish a pilot H-2C alien agricultural worker program to supplement, rather than replace, the H-2A program. H.R. 4548 also did not include a legalization program. H.R. 4548 was reported by the House Judiciary Committee in October 2000, but saw no further action.

Like S. 1814/H.R. 4056 in the 106th Congress, key bills before the 107th Congress coupled significant H-2A reform with legalization. S. 1161 and S. 1313/H.R. 2736 would have streamlined the process of importing H-2A workers, particularly for jobs covered by collective bargaining agreements. With respect to legalization, both proposals would have allowed foreign agricultural workers who met specified work requirements to adjust to LPR status through a two-stage process like that in S. 1814/H.R. 4056. As detailed below, the requirements for adjustment of status in S. 1313/H.R. 2736 differed from those in S. 1161, with the latter being

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[21] For additional information about recent legislative proposals on the H-2A program, see CRS Report RL30852, *Immigration of Agricultural Guest Workers: Policy, Trends, and Legislative Issues*, by Ruth Ellen Wasem and Geoffrey K. Collver.

[22] During the 107th Congress, former Sen. Gramm released a preliminary proposal for a new U.S.-Mexico guest worker program that would have covered both agricultural and nonagricultural workers, but he did not introduce legislation.

[23] Even though S. 1814 and H.R. 4056 are not identical, they are treated as companion bills for the purposes of this discussion because they are highly similar.

more stringent. Among the other major differences between the proposals, S. 1161 would have eased existing wage requirements, while S. 1313/H.R. 2736 would have mandated a study of the wage issue. No action beyond committee referral occurred on either proposal.

Legislation in the 108th Congress

Bills to reform the H-2A program (S. 1645/H.R. 3142, H.R. 3604, S. 2185), the H-2B program (S. 2010, S. 2381/H.R. 4262), and the "H" visa category generally (H.R. 3534), as well as bills to establish new guest worker programs (S. 1387, S. 1461/H.R. 2899, H.R. 3651, S. 2010, S. 2381/H.R. 4262), have been introduced in the 108th Congress. S. 1645/H.R. 3142, S. 1461/H.R. 2899, S. 2010, and S. 2381/H.R. 4262 also would enable certain workers to obtain LPR status. The six Senate bills have been referred to the Senate Judiciary Committee. H.R. 3142, H.R. 3651, and H.R. 4262 have been referred to the House Judiciary Committee. H.R. 2899 has been referred to the House Judiciary Committee and the House Education and the Workforce Committee. H.R. 3604 has been referred to the House Judiciary Committee and the House Agriculture Committee. H.R. 3534 has been referred to the House Judiciary Committee, the House Ways and Means Committee, the House Government Reform Committee, the House Education and the Workforce Committee, and the House International Relations Committee. No action beyond committee referral has occurred on any of the bills. Congressional committees, however, have held related hearings. On January 28, 2004, the House Agriculture Committee held a hearing on the potential impact of recent guest worker proposals on the agricultural sector. On March 24, 2004, the House Judiciary Committee's Subcommittee on Immigration, Border Security and Claims held a hearing on the impact of guest workers on U.S. workers. In the Senate, the Judiciary Committee's Subcommittee on Immigration, Border Security and Citizenship held a hearing on evaluating a guest worker proposal on February 12, 2004, and a hearing on border security under a guest worker program on April 1, 2004.

S. 1645/H.R. 3142

The "Agricultural Job Opportunity, Benefits, and Security Act of 2003" (S. 1645/H.R. 3142) would overhaul the H-2A agricultural worker program. It was introduced, respectively, by Senator Craig for himself and a bipartisan group of co-sponsors and by Representative Cannon for himself and Representative Berman. Like the major H-2A reform bills before the 107th Congress, S. 1645/H.R. 3142 would streamline the process of importing H-2A workers, particularly for jobs covered by collective bargaining agreements. Prospective H-2A employers would have to file applications with DOL containing certain assurances. In the case of a job covered by a collective bargaining agreement, the employer would have to assure, among other things, that there is an applicable union contract and that the bargaining representatives of the employer's employees have been notified of the filing of the application for H-2A workers. An employer interested in filling a job not covered by a collective bargaining agreement would be subject to a longer list of required assurances. Among these, the employer would have to assure that he or she will take specified steps to recruit U.S. workers, including submitting a copy of the job offer

to the local office of the state workforce agency and authorizing the posting of the job on an electronic job registry, and that he or she will provide workers with required benefits, wages, and working conditions. Both groups of employers would have to assure that the job is temporary or seasonal and that the employer will offer the job to any equally qualified, available U.S. worker who applies. Unless an employer's application is incomplete or obviously inaccurate, DOL would certify within seven days of the filing date that the employer has filed the required application.

S. 1645/H.R. 3142 further proposes to make changes to the H-2A program's requirements regarding minimum benefits, wages, and working conditions. Among these proposed changes, the adverse effect wage rate (discussed above) would remain at the January 2003 level for three years after the date of enactment, and employers would be permitted to provide housing allowances, in lieu of housing, to their workers if the governor of the relevant state certifies that adequate housing is available.

Under S. 1645/H.R. 3142, an H-2A worker's initial period of employment could not exceed 10 months. The worker's stay could be extended in increments of up to 10 months each, but the worker's total continuous period of stay, including any extensions, could not exceed three years.

In addition to these H-2A reform provisions, S. 1645/H.R. 3142 would establish a two-stage legalization program for agricultural workers. To obtain temporary resident status, the alien worker would have to establish that he or she performed at least 575 hours, or 100 work days, of agricultural employment in the United States during 12 consecutive months in the 18-month period ending on August 31, 2003, and meet other requirements. To be eligible to adjust to LPR status, the alien would have to perform at least 2,060 hours, or 360 work days, of agricultural work in the United States between September 1, 2003, and August 31, 2009, and meet other requirements. Existing numerical limits under the INA would not apply to adjustments of status under the bill.[24]

H.R. 3604

Like S. 1645/H.R. 3142, the "Temporary Agricultural Labor Reform Act of 2003" (H.R. 3604) proposes to overhaul the H-2A agricultural worker program. It was introduced by Representative Goodlatte for himself and more than 30 co-sponsors. H.R. 3604 would streamline the process of importing H-2A workers. Prospective H-2A employers would have to file applications with DOL containing certain assurances, including that the job is temporary or seasonal; the employer will provide workers with required benefits, wages, and working conditions; the employer has made positive efforts to recruit U.S. workers; and the employer will offer the job to any equally qualified, available U.S. worker who applies. Unless an employer's application is incomplete or obviously inaccurate, DOL would certify within seven days of the filing date that the employer has filed the required application.

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[24] For an introduction to the U.S. system of permanent admissions, including numerical limits, see CRS Report RS20916, *Immigration and Naturalization Fundamentals*, by Ruth Ellen Wasem.

H.R. 3604 would make changes to current H-2A requirements regarding minimum benefits, wages, and working conditions. Under H.R. 3604, H-2A employers would have to pay workers the higher of the prevailing wage rate or the applicable state minimum wage; they would not be subject to the adverse effect wage rate (discussed above). With respect to housing, employers could provide housing allowances, in lieu of housing, to their workers if the governor of the relevant state certifies that adequate housing is available.

Under H.R. 3604, an H-2A worker's initial period of employment could not exceed 10 months. The worker's stay could be extended in increments of up to 10 months each, but the worker's total continuous period of stay, including any extensions, could not exceed two years. H.R. 3604 would not establish a mechanism for agricultural workers to obtain LPR status.

S. 2185

Another H-2A reform bill, introduced by Senator Saxby Chambliss, is the "Temporary Agricultural Work Reform Act of 2004" (S. 2185). It is similar, but not identical, to H.R. 3604. S. 2185 would streamline the process of importing H-2A workers. Prospective H-2A employers would have to file applications with DOL containing certain assurances, including that the job is temporary or seasonal; the employer will provide workers with required benefits, wages, and working conditions; the employer has attempted to recruit U.S. workers using the state workforce agency; and the employer will offer the job to any equally qualified, available U.S. worker who applies. Unless an employer's application is incomplete or obviously inaccurate, DOL would certify within 15 days of the filing date that the employer has filed the required application.

S. 2185 proposes to change current H-2A requirements concerning minimum benefits, wages, and working conditions. Under S. 2185, H-2A employers would have to pay workers the higher of the prevailing wage rate or the applicable state minimum wage. In lieu of offering housing, they could provide housing allowances if the governor of the relevant state certifies that adequate housing is available.

S. 2185 does not contain provisions regarding the period of admission, extension of stay, or maximum period of stay of H-2A workers. It also would not establish a mechanism for agricultural workers to obtain LPR status.

S. 2010

The "Immigration Reform Act of 2004: Strengthening America's National Security, Economy, and Families" (S. 2010), introduced by Senator Hagel for himself and Senator Daschle, would reform the H-2B nonimmigrant visa. The bill would eliminate the current restriction that H-2B workers can perform only temporary service or labor, and instead would require that they perform "short-term service or labor, lasting not more than 9 months." S. 2010 also proposes a new H-2C visa for temporary workers coming to perform "labor or services, other than those occupation classifications" covered under the H-2A, H-2B, or specified high-skilled visa categories, if qualified U.S. workers cannot be found.

Both the H-2B and H-2C categories would be numerically limited. In each of the five fiscal years following issuance of final implementing regulations, the H-2B program would be capped at 100,000. The cap would then revert back to the current 66,000 level. The H-2C program would be capped at 250,000 in each of the five fiscal years following issuance of final implementing regulations. After these five years, the H-2C program would terminate.

S. 2010 would subject both the H-2B and H-2C programs to a broad set of requirements covering recruitment, application procedures, and worker protections, among other issues. Prior to filing an application with DOL for H-2B or H-2C workers, prospective employers would have to take specified steps to recruit U.S. workers, including posting the job on DOL's "America's Job Bank" and with local job banks, and would have to offer the job to any qualified, available U.S. worker who applies. In the application to DOL, the employer would have to attest to various items. Among these are that the employer is offering wages to H-2B or H-2C workers that are the greater of the prevailing wage rate or the actual wage paid by the employer to other similarly employed and qualified workers, and will abide by all applicable laws and regulations relating to the rights of workers to organize. DOL would review the application and required documentation for completeness and accuracy, and issue a determination not later than 21 days after the filing date.

The initial period of admission for an H-2B worker could not exceed nine months in a one-year period. An H-2B worker's total period of admission could not exceed 36 months in a four-year period. The initial period of admission for an H-2C worker could not exceed two years and could be extended for an additional period of up to two years. An H-2C worker's total period of admission could not exceed four years.

S. 2010 would enable H-2B and H-2C nonimmigrants to obtain LPR status. Employment-based *immigrant* visas would be available to these nonimmigrants without regard to existing numerical limits under the INA. An employment-based petition could be filed by an employer or any collective bargaining agent of the alien, or after the alien has been employed in H-2B or H-2C status for at least three years, by the alien. In addition, S. 2010 would establish a legalization program for certain unauthorized aliens in the United States.

S. 2381/H.R. 4262

The "Safe, Orderly, Legal Visas and Enforcement Act of 2004" (S. 2381/H.R. 4262) was introduced, respectively, by Senator Kennedy for himself and Senators Feingold and Clinton and by Representative Gutierrez for himself and a group of cosponsors. Known as the "S.O.L.V.E. Act," the measure would reform the H-2B nonimmigrant visa. It would eliminate the current restriction that H-2B workers can perform only temporary service or labor, and instead would require that they perform "short-term service or labor, lasting not more than 9 months." S. 2381/H.R. 4262 also proposes a new H-ID visa for temporary workers coming to perform "labor or services, other than those occupation classifications" covered under the H-2A or specified high-skilled visa categories, if qualified U.S. workers cannot be found.

Both the H-2B and H-1D categories would be numerically limited. The H-2B program would be capped at 100,000 annually, an increase from the current annual limit of 66,000. The H-1D program would be capped at 250,000 annually.

S. 2381/H.R. 4262 would subject both the H-2B and H-1D programs to a broad set of requirements covering recruitment, application procedures, and worker protections, among other issues. Prior to filing an application with DOL for H-2B or H-1D workers, prospective employers would have to take specified steps to recruit U.S. workers, including posting the job on DOL's "America's Job Bank" and with local job banks, and would have to offer the job to any qualified, available U.S. worker who applies. In the application to DOL, the employer would have to attest to various items. Among these are that the employer is offering to H-2B or H-1D workers the prevailing wage, to be determined as specified in the bill. The employer also would have to abide by all applicable laws and regulations relating to the rights of workers to organize. DOL would review the application and required documentation for completeness and accuracy, and issue a determination not later than 10 working days after the filing date.

The initial period of admission for an H-2B worker could not exceed nine months in a one-year period. An H-2B worker's total period of admission could not exceed 40 months in the aggregate. The initial period of admission for an H-1D worker could not exceed two years and could be extended for two additional periods of up to two years each. An H-1D worker's total period of admission could not exceed six years.

S. 2381/H.R. 4262 would enable H-2B and H-1D nonimmigrants to obtain LPR status. Employment-based *immigrant* visas would be available to these nonimmigrants without numerical limitation. An employment-based petition could be filed by an employer, or after the alien has been employed in H-2B or H-1D status for at least two years, by the alien. In addition, S. 2381/H.R. 4262 would establish a legalization program for certain unauthorized aliens in the United States.

H.R. 3534

The "Border Enforcement and Revolving Employment to Assist Laborers Act of 2003" (H.R. 3534), introduced by Representative Tancredo for himself and several cosponsors, proposes to amend the INA's "H" visa category generally. It would eliminate the current subcategories, including the H-2A and H-2B visas, and replace them with a single category covering aliens coming temporarily to the United States to perform skilled or unskilled work if qualified U.S. workers are not available.

An employer interested in importing "H" workers would file an application with DOL. Prior to doing so, the employer would be required to post a job announcement on an Internet-based job bank the bill would direct DOL to create. Among other requirements of the program, the employer would have to offer wages at least equal to the prevailing wage rate and would have to provide "H" workers with health insurance.

H nonmimmigrants could only be admitted from abroad. They would apply to be added to a database of workers and would remain in their home countries until an

approved employer wanted to hire them. Their period of authorized admission could not exceed 365 days in a two-year period. After the two-year period, H nonimmigrant visas could be renewed. H nonimmigrants would not be permitted to change or adjust to any other nonimmigrant or immigrant status.

Under H.R. 3534, however, the proposed guest worker program would not be implemented until the Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, makes certain certifications to Congress. These include that all noncitizens legally in the United States and all aliens authorized to enter the country have been issued biometric, machine-readable travel or entry documents, and that the number of aliens who overstay nonimmigrant visas, but are not removed from the United States, is less than 5,000.

S. 1387

The "Border Security and Immigration Reform Act of 2003" (S. 1387), introduced by Senator Cornyn, would authorize new temporary worker programs under the INA for seasonal and nonseasonal workers. S. 1387 would establish a new "W" nonimmigrant visa category for these workers, which would not be subject to numerical limits. The W-1 visa would cover seasonal workers, and the W-2 visa would cover nonseasonal workers. Under the proposal, the Secretary of Homeland Security and the Secretary of State would jointly establish and administer guest worker programs with foreign countries that enter into agreements with the United States. The bill would direct the Secretary of Homeland Security, in cooperation with the Secretary of State and the participating foreign governments, to establish a database to monitor guest workers' entry into and exit from the United States and to track employer compliance.

In order to import workers through the new programs, employers would have to file an application with DOL. As part of the application, the employer would have to request an attestation from DOL that there are not sufficient U.S. workers who are qualified and available to perform the work, and that the hiring of alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The employer also would need to provide various assurances in the application, including that the employer will offer the job to any equally qualified, available U.S. worker who applies; will advertise the job opening in a local publication; and will pay workers at least the higher of the federal or applicable state minimum wage. Unless an employer's application is incomplete or obviously inaccurate, DOL would certify within 14 days of the filing date that the application has been filed. Beginning 12 months after enactment, employers would be subject to increased penalties for knowingly employing unauthorized aliens.

The authorized period of stay for a W-1 seasonal worker could not exceed 270 days per year. Such a worker could reapply for admission to the United States each year. The initial authorized period of stay for a W-2 nonseasonal worker could not exceed one year, but could be extended in increments of up to one year each; a W-2 worker's total period of stay could not exceed three consecutive years. Unauthorized workers in the United States would have 12 months from enactment to apply for the program.

Among the other provisions, the bill would create investment accounts for the guest workers, into which the Social Security taxes paid by them and by their employers on their behalf would be deposited. The investment accounts would be the sole property of the guest workers. In most cases, however, distributions of account funds could be made only after the workers permanently leave the guest worker program and return to their home countries.

Under S. 1837, guest workers could only apply for U.S. legal permanent residency once they return to their home countries. Their applications would be evaluated based on a point system to be established by the Secretary of Homeland Security. The bill does not propose a legalization mechanism for guest workers outside of existing channels, and according to Senator Cornyn's office, guest workers would need to meet all the relevant requirements under current law.[25]

S. 1461/H.R. 2899

The "Border Security and Immigration Improvement Act" (S. 1461/H.R. 2899), introduced, respectively, by Senator McCain and by Representative Kolbe for himself and Representative Flake, would establish two new temporary worker visas under the INA — the H-4A and H-4B visas. It would place no limit on the number of H-4A or H-4B visas that could be issued.

The H-4A visa would cover aliens coming to the United States to perform temporary full-time employment. An employer interested in importing H-4A workers would file a petition with DHS. DHS could only approve the petition once it determines that the employer has satisfied recruitment requirements, including advertising the job opportunity to U.S. workers on an electronic job registry established by DOL and offering the job to any equally qualified U.S. worker who applies through the registry. The employer also would have to attest in the petition that he or she will use the employment eligibility confirmation system established by the bill to verify the alien workers' identity and employment authorization; will provide the alien workers with the same benefits, wages, and working conditions as other similarly employed workers; and did not and will not displace U.S. workers during a specified 180-day period. Aliens granted H-4A status would be issued machine-readable, tamper-resistant visas and other documents containing biometric identifiers.

An H-4A worker's initial authorized period of stay would be three years, and could be extended for an additional three years. S. 1461/H.R. 2899 also would enable H-4A nonimmigrants to adjust to LPR status. Petitions for employment-based *immigrant* visas could be filed by an H-4A worker's employer, or by the H-4A worker, if he or she had maintained H-4A status for at least three years. Employment-based immigrant visas would be available to H-4A workers adjusting status without numerical limitation.

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[25] This description of S. 1837 is based on both the bill text and clarifications provided by Sen. Cornyn's office by telephone on July 22, 2003. Some clarifying language may need to be added to the bill.

The H-4B visa established by the bill would cover aliens unlawfully present and employed in the United States since before August 1, 2003. An H-4B alien's authorized period of stay would be three years. The alien could apply to change to H-4A status or another nonimmigrant or immigrant category, but such a change of status could not take place until the end of the three years. H-4B employers would be required to use the employment eligibility confirmation system mentioned above and to comply with specified requirements applicable to H-4A employers, including the provision of benefits, wages, and working conditions to H-4B workers equal to those provided to other similarly employed workers.

H.R. 3651

The "Alien Accountability Act" (H.R. 3651), introduced by Representative Issa, would authorize a new "W" nonimmigrant visa category under the INA for unauthorized aliens. The category would cover aliens unlawfully present in the United States on December 8, 2003, as well as aliens residing in foreign contiguous territory who were habitually unlawfully present in the United States during the six-month period ending on December 8, 2003. In order to be eligible for W status, the alien would first have to register with DHS. Employment would not be a strict requirement for W status, but the alien would have to demonstrate an adequate means of financial support. The new category would sunset six years after the first alien is granted W status.

The initial period of authorized admission of a W nonimmigrant would be one year and could be renewed up to five times in one-year increments. H.R. 3651 would not establish a special mechanism for W nonimmigrants to adjust to LPR status. It, however, would not preclude them from doing so if they satisfied the applicable requirements under current law.

Bush Administration Proposal

On January 7, 2004, President Bush outlined an immigration reform proposal, at the center of which is a new temporary worker program.[26] According to the White House fact sheet on the proposal, the temporary worker program is intended "to match willing foreign workers with willing U.S. employers when no Americans can be found to fill the jobs." The program, which would grant participants legal temporary status, would initially be open to both foreign workers abroad and

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[26] The Administration did *not* offer a detailed legislative proposal. Some materials on the Administration proposal, however, are available on the White House website. The President's Jan. 7, 2004 remarks on the proposal are available at [http://www.whitehouse.gov/news/releases/2004/01/print/20040107-3.html], visited Jan. 8, 2004. A fact sheet on the proposal, entitled *Fair and Secure Immigration Reform*, is available at [http://www.whitehouse.gov/news/releases/2004/01/print/20040107-3.html], visited Jan. 8, 2004. The transcript of a Jan. 6, 2004 background briefing for reporters is available at [http://www.whitehouse.gov/news/releases/2004/01/print/20040106-3.html], visited Jan. 8, 2004.

unauthorized aliens within the United States. At some future date, however, it would be restricted to aliens outside the country. The temporary workers' authorized period of stay would be three years and would be renewable for an unspecified period of time. Temporary workers would be able to travel back and forth between their home countries and the United States, and, as stated in the background briefing for reporters, would "enjoy the same protections that American workers have with respect to wages and employment rights." The proposal also calls for increased workplace enforcement of immigration laws.

The proposal would not establish a special mechanism for participants in the temporary worker program to obtain LPR status. According to the fact sheet, the program "should not permit undocumented workers to gain an advantage over those who have followed the rules." Temporary workers would be expected to return to their home countries at the end of their authorized period of stay, and the Administration favors providing them with economic incentives to do so. As stated in the fact sheet:

> The U.S. will work with other countries to allow aliens working in the U.S. to receive credit in their nations' retirement systems and will support the creation of tax-preferred savings accounts they can collect when they return to their native countries.

Although it does not include a permanent legalization mechanism, the program would not prohibit temporary workers from applying for legal permanent residency under existing immigration law.

According to the Administration, the proposed temporary worker program should support efforts to improve homeland security by controlling the U.S. borders. The fact sheet states that "the program should link to efforts to control our border through agreements with countries whose nationals participate in the program," but does not elaborate further on this issue.

Policy Considerations

Issues raised in connection with temporary worker programs — such as U.S. economic development, Mexican economic development, law enforcement, and worker protections — coupled with the U.S. experience with the H-2A and H-2B programs, suggest policy issues likely to arise in the evaluation of guest worker proposals.

Comparison of Program Requirements

A new guest worker program could include agricultural workers or nonagricultural workers or both. It could replace or supplement one or both of the existing H-2A and H-2B programs. The assessment of any proposed program would likely include a comparison of the requirements of the proposed and existing programs, especially in the case of a new program covering both agricultural and nonagricultural workers since current H-2A and H-2B requirements vary considerably.

The area of wages provides an example. Under the H-2B program, employers must pay their workers at least the prevailing wage rate. Employers importing agricultural workers through the H-2A program are subject to potentially higher wage requirements. As explained above, they must pay their workers the highest of the minimum wage, the prevailing wage rate, or the AEWR. Therefore, a new guest worker program that covered both agricultural and nonagricultural workers and included a unified wage requirement would represent a change in existing wage requirements for employers.

Eligible Population

A guest worker program could be limited to aliens within the country (many of whom presumably would be unauthorized aliens) or to aliens outside the country or could include both groups. The possible participation of illegal aliens in a guest worker program is controversial. Some parties would likely see their inclusion as rewarding lawbreakers and encouraging future unauthorized immigration, especially if the program enabled some participants to obtain LPR status. The option of excluding unauthorized aliens has raised another set of concerns. Some observers maintain that a large guest worker program limited to new workers could leave unauthorized aliens in the United States particularly vulnerable to exploitation by unscrupulous employers. More generally, many who view a guest worker program as a means of addressing the unauthorized alien problem see the inclusion of unauthorized aliens as integral to any proposal.

Another eligibility question is whether the program would be limited to nationals of certain countries. The Bush Administration began discussion of a guest worker program with Mexico in 2001 as part of binational migration talks, and some immigration experts maintain that "there are very good reasons for crafting a special immigration relationship with Mexico, given its propinquity, its historical ties and NAFTA."[27] Some immigrant advocacy groups, however, have argued that it would be unfair to single out Mexicans for special treatment, especially if legalization were part of the agreement.[28]

Legalization of Program Participants

The issue of whether to include a legalization or *earned adjustment* program as part of a guest worker proposal is controversial. *Earned adjustment* is the term used to describe legalization programs that require prospective beneficiaries to "earn" LPR status through work and/or other contributions. Some see permanent legalization as

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[27] Comment of T. Alexander Aleinikoff, Migration Policy Institute. Quoted in Eric Schmitt, "The Nation: Separate and Unequal; You Can Come In. You Stay Out," *New York Times*, July 29, 2001, Section 4, p. 5.

[28] President Bush was asked in July 2001 whether an immigration proposal under consideration at the time to legalize the status of some unauthorized Mexicans would be expanded to cover immigrants from other countries. The President responded, "We'll consider all folks here," but did not provide further details. See Edwin Chen and Jonathan Peterson, "Bush Hints at Broader Amnesty," *Los Angeles Times*, July 27, 2001, Part A, part 1, p. 1.

an essential element of a guest worker proposal,[29] while others oppose the inclusion of any type of LPR adjustment program. In the current debate, reference is often made to two legalization programs established by the Immigration Reform and Control Act (IRCA) of 1986: (1) a general program for unauthorized aliens who had been continually resident in the United States since before January 1, 1982; and (2) a special agricultural worker (SAW) program for aliens who had worked at least 90 days in seasonal agriculture during a designated year-long period.[30] Approximately 2.7 million individuals have adjusted to LPR status under these programs.[31]

Recent H-2A reform bills suggest a willingness on the part of some policymakers to establish an earned adjustment program, at least for agricultural workers. A key set of questions about any legalization mechanism proposed as part of a guest worker program would concern the proposed legalization process and associated requirements. Major H-2A reform proposals introduced in the 107th Congress (S. 1313/H.R. 2736 and S. 1161), for example, would have established similarly structured earned adjustment programs for agricultural workers. Under both proposals, workers who had performed a requisite amount of agricultural work could have applied for temporary resident status. After satisfying additional work requirements in subsequent years, they could have applied for LPR status. The applicable requirements in the proposals, however, differed significantly. For temporary resident status, S. 1313/H.R. 2736 would have required the alien to have performed at least 540 hours, or 90 work days, of agricultural work during a 12-month period. S. 1161 would have required at least 900 hours, or 150 work days, of agricultural work during a similar period. To qualify for adjustment to LPR status, S. 1313/H.R. 2736 would have required at least 540 hours, or 90 work days, of agricultural work in each of three years during a four-year period. S. 1161 would have required at least 900 hours, or 150 work days, of agricultural work in each of four years during a specified six-year period.

Various issues and concerns raised in connection with such earned adjustment proposals for agricultural workers may be relevant in assessing other guest worker legalization programs. Among these issues is the feasibility of program participants' meeting the applicable requirements to obtain legal status. S. 1161, for example, was criticized for incorporating work requirements for legalization that, some observers said, many agricultural workers could not satisfy. It also has been argued that multi-year work requirements could lead to exploitation, if workers were loathe to complain about work-related matters for fear of being fired before they had worked

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[29] For example, in an Aug. 2001 letter to President Bush and Mexican President Vicente Fox setting forth the Democrats' immigration principles, then-Senate Majority Leader Thomas Daschle and then-House Minority Leader Richard Gephardt stated that "no migration proposal can be complete without an earned adjustment program."

[30] P.L. 99-603, Nov. 6, 1986. The general legalization program is at INA §245A, and the SAW program is at INA §210.

[31] Certain individuals who had not legalized under the general program and were participants in specified class action lawsuits were given a new time-limited opportunity to adjust to LPR status by the Legal Immigration Family Equity Act (LIFE; P.L. 106-553, Appendix B, Title XI, Dec. 21, 2000) and the LIFE Act Amendments (P.L. 106-554, Appendix D, Title XV, Dec. 21, 2000).

the requisite number of years. A possible countervailing set of considerations involves the continued availability of workers for low-skilled industries, such as agriculture, meat packing, and services industries. Some parties have expressed a general concern that a quick legalization process with light work requirements could soon deprive employers of needed workers, if some newly legalized workers were to leave certain industries to pursue more desirable job opportunities.

Treatment of Family Members

The treatment of family members under a guest worker proposal is likely to be an issue. Currently, the INA allows for the admission of the spouses and minor children of alien workers on H-2A, H-2B and other "H" visas who are accompanying the worker or following to join the worker in the United States. In considering any new program, one question would be whether guest workers coming from abroad could be accompanied by their spouses and children.

If the guest worker program in question were open to unauthorized aliens in the United States, the issue of family members would become much more complicated. Relevant questions would include the following: Would the unauthorized spouse and/or minor children of the prospective guest worker be granted some type of legal temporary resident status under the program? If not, would they be expected to leave, or be removed from, the country? If the program had a legalization component, would the spouse and children be eligible for LPR status as derivatives of the guest worker?

The treatment of family members became a significant issue in the 1986 legalization programs described above. As enacted, IRCA required all aliens to qualify for legalization on their own behalf; it made no provision for granting derivative LPR status to spouses and children. Legalized aliens, thus, needed to file immigrant visa petitions on behalf of their family members. These filings were primarily in the family preference category covering spouses and children of LPRs (category 2A) and had the effect of lengthening waiting times in this category.[32] To partially address the increased demand for visa numbers, the Immigration Act of 1990[33] made a limited number of additional visa numbers available for spouses and children of IRCA-legalized aliens for FY1992 through FY1994. It also provided for temporary stays of deportation and work authorization for certain spouses and children of IRCA-legalized aliens in the United States.

As suggested by the experience of the IRCA programs, the treatment of family members in any guest worker program with a legalization component could have broad implications for the U.S. immigration system. Even in the absence of a legalization component, however, the treatment of family members in a guest worker program could have important ramifications. With respect to the program itself, for example, it could affect the willingness of aliens to apply to participate.

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[32] For an overview of the preference categories and the U.S. immigration system generally, see CRS Report RS20916, *Immigration and Naturalization Fundamentals*, by Ruth Wasem.

[33] P.L. 101-649, Nov. 29, 1990.

Labor Market Test

A key question about any guest worker program is the type of labor market conditions that would have to exist, if any, in order for an employer to import alien workers.[34] Under both the H-2A and H-2B programs, employers interested in hiring foreign workers must first go through the process of labor certification. Intended to protect job opportunities for U.S. workers, labor certification entails a determination of whether qualified U.S. workers are available to perform the needed work and whether the hiring of foreign workers will adversely affect the wages and working conditions of similarly employed U.S. workers. As described above, recruitment is the primary method used to determine U.S. worker availability. While there is widespread agreement on the goals of labor certification, the process itself has been criticized for being cumbersome, slow, and ineffective in protecting U.S. workers.[35]

A proposed guest worker program could retain some form of labor certification or could establish a different process for determining if employers could bring in foreign workers. As described above, past legislative proposals to reform the H-2A program sought to overhaul current labor certification requirements by, for example, establishing a system of worker registries. Another option suggested by some in H-2A reform debates is to adopt the more streamlined labor market test used in the temporary worker program for professional specialty workers (H-1B program). That test, known as labor attestation, requires employers to attest to various conditions. Some argue that labor attestation is inadequate for unskilled jobs without educational requirements.[36] Assuming that protecting U.S. workers remained a policy priority, the labor market test incorporated in any guest worker program would need to be evaluated to determine whether it would likely serve this purpose.

Numerical Limits

Related to the issues of labor market tests and U.S. worker protections is the question of numerical limitations on a guest worker program. A numerical cap provides a means, separate from the labor market test, of limiting the number of foreign workers. Currently, as explained above, the H-2A program is not numerically limited, while the H-2B program is capped at 66,000 visas per year. Like the H-2B program, other capped temporary worker programs have fixed statutory numerical limits. By contrast, a guest worker program that was outlined by former Senator Phil Gramm during the 107th Congress, but never introduced as legislation, included a different type of numerical cap — one that would have varied annually based on

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[34] Questions about the existence of industry-wide labor shortages are outside the scope of this report. For a discussion of the shortage issue with respect to agriculture, see CRS Report RL30395, *Farm Labor Shortages and Immigration Policy*, by Linda Levine. Also see CRS Report 95-712, *Immigration: The Labor Market Effects of a Guest Worker Program for U.S. Farmers*, by Linda Levine.

[35] See U.S. Department of Labor, Office of Inspector General, *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*, Report Number 04-98-004-03-321, Mar. 31, 1998.

[36] See CRS Report RL30852, *Immigration of Agricultural Guest Workers: Policy, Trends, and Legislative Issues*, by Ruth Ellen Wasem and Geoffrey K. Collver.

regional unemployment rates. According to the program prospectus released by Senator Gramm:

> Except for seasonal work, the number of guest workers permitted to enroll would be adjusted annually in response to changes in U.S. economic conditions, specifically unemployment rates, on a region-by-region basis.

Numerical limitations also are relevant in the context of unauthorized immigration. Some view a temporary worker program as a way to begin reducing the size of the current unauthorized alien population and/or future inflows. In light of the estimated current size and annual growth rate of the unauthorized population, it could be argued that a guest worker program would need to be sizeable to have any significant impact. On the other hand, critics contend that a guest worker program, especially a large one, would be a counterproductive means of controlling unauthorized immigration. In their view, temporary worker programs serve to increase, not reduce, the size of the unauthorized population.

Enforcement

Another important consideration is how the terms of a guest worker program would be enforced. Relevant questions include what types of mechanisms would be used to ensure that employers complied with program requirements. With respect to the H-2A program, for example, the INA authorizes the Labor Secretary to —

> take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment ...[37]

A related question is whether the enforcement system would be complaint-driven or whether the appropriate entity could take action in the absence of a specific complaint.

Another enforcement-related question is what type of mechanism, if any, would be used to ensure that guest workers departed the country at the end of their authorized period of stay. Historically, the removal of aliens who have overstayed their visas and thereby lapsed into unauthorized status, but have not committed crimes, has not been a priority of the U.S. immigration system. Some have suggested that a large scale guest worker program could help address the problem of visa overstaying and unauthorized immigration generally by severely limiting job opportunities for unauthorized aliens. Others doubt, however, that large numbers of unauthorized residents would voluntarily leave the country; as explained above, they argue instead that a new guest worker program would likely increase the size of the unauthorized alien population as many guest workers opted to overstay their visas.

Other ideas have been put forth to facilitate the departure of temporary workers at the end of their authorized period of stay. One suggestion is to involve the

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[37] INA §218(g)(2).

workers' home countries in the guest worker program. Another option is to create an incentive for foreign workers to leave the United States by, for example, withholding or otherwise setting aside a sum of money for each worker that would only become available once the worker returned home. In evaluating any such financially based incentive system, it may be useful to consider, among other questions, how much money would be available to a typical worker and whether such an amount would likely provide an adequate incentive to return home.

Homeland Security

A final consideration relates to border and homeland security, matters of heightened concern since the terrorist attacks of September 11, 2001. Supporters of new temporary worker programs argue that such programs would make the United States more secure. They cite security-related benefits of knowing the identities of currently unknown individuals in the country and of legalizing the inflow of alien workers and thereby freeing border personnel to concentrate on potential criminal and terrorist threats. Opponents reject the idea that guest worker programs improve homeland security and generally focus on the dangers of rewarding immigration law violators with temporary or permanent legal status. Security concerns may affect various aspects of a temporary worker program. Possible security-related provisions that may be considered as part of a new guest worker program include special screening of participants, monitoring while in the United States, and issuance of fraud-resistant documents.

Conclusion

The question of a new guest worker program is controversial. A key reason for this is the interrelationship between the recent discussion of guest worker programs and the issue of unauthorized immigration. The size of the current resident unauthorized alien population in the United States, along with continued unauthorized immigration and related deaths at the U.S.-Mexico border, are major factors cited in support of a new temporary worker program. At the same time, the importance of enforcing immigration law and not rewarding illegal aliens with any type of legalized status are primary reasons cited in opposition to such a program. It would seem that some bridging of this gap on the unauthorized alien question — perhaps in some of the areas analyzed above — would be a prerequisite to gaining broad support for a guest worker proposal.