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Immigration: Policy Considerations Related to Guest Worker Programs

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Immigration: Policy Considerations Related to Guest Worker Programs

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 visa program, and other guest workers enter through the H-2B visa program. Employers interested in importing workers under either program must first apply to the U.S. Department of Labor 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.

The 109th Congress has enacted language as part the FY2005 Emergency Supplemental Appropriations Act (P.L. 109-13) to revise the H-2B program. Other bills before the 109th Congress propose to make changes to the H-2A program (S. 359/H.R. 884, H.R. 3857), the H-2B program (S. 278, H.R. 1587, S. 1438, S. 1918), and the "H" visa category generally (H.R. 3333), and to establish new temporary worker visas (S. 1033/H.R. 2330, S. 1438, S. 1918, H.R. 4065). S. 359/H.R. 884, S. 1033/H.R. 2330, and S. 1918 also would establish mechanisms for certain foreign workers to become U.S. legal permanent residents (LPRs). Other legislation regarding guest workers is expected to be introduced later in this Congress. Various guest worker measures were introduced in the 108th Congress, but they saw no action beyond committee referrals. President George W. Bush proposed a new, expanded guest worker program in January 2004 when he announced his principles for immigration reform. The President featured his proposal in his 2004 and 2005 State of the Union addresses.

The current discussion of guest worker programs takes place against a backdrop of historically high levels of unauthorized migration 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 migration.

The consideration of any proposed guest worker program raises various issues, including the following: how new program requirements would compare with those of the H-2A and H-2B programs; program eligibility; inclusion of a program mechanism for participants to obtain LPR status; how family members of eligible individuals would be treated; what labor market test, if any, the program would employ; whether the program would be numerically limited; how the rules and requirements of the program would be enforced; and what security-related provisions, if any, would be included.

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Introduction

In 2001, the United States and Mexico began Cabinet-level talks on migration. Although 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. Various bills to reform existing programs for foreign temporary workers and to create new temporary worker programs have been introduced in recent Congresses. Several such bills are before the 109th Congress. In January 2004, the Bush Administration outlined a proposal for a new temporary worker program. The new programs under discussion 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 or other seasonal employment. 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

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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, codified at 8 U.S.C.§1101 *et seq.* The INA is the basis of current immigration law.

admitted to the United States for a temporary period of time and a specific purpose 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

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[3] P.L. 99-603, November 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.

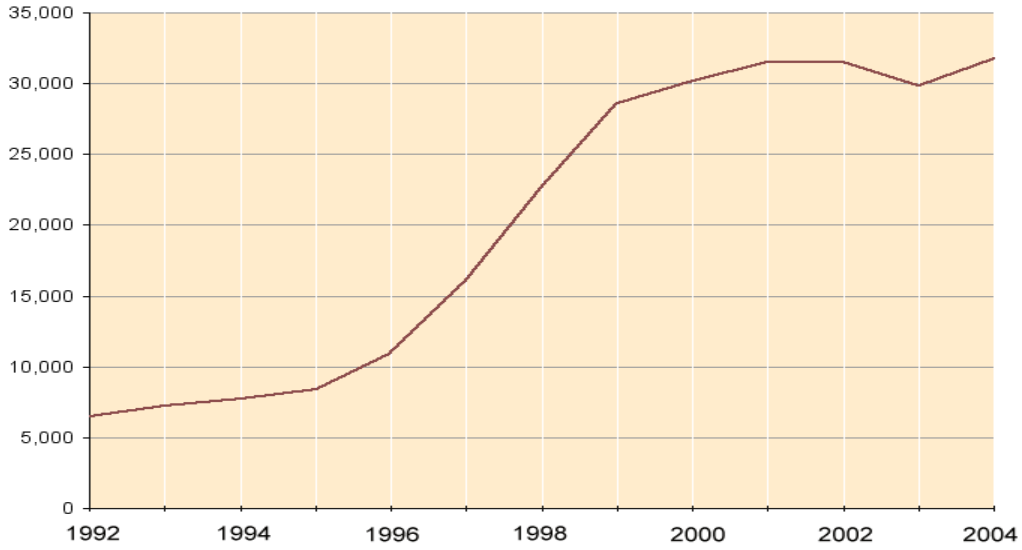
[6] Prior to Mar. 1, 2003, the H-2A and H-2B programs were administered by ETA and the Immigration and Naturalization Service (INS) of the Department of Justice. The Homeland Security Act of 2002 (P.L. 107-296, November 25, 2002) abolished INS and transferred most of its functions to DHS as of Mar. 1.

[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. 2, pp. 86-87.

agencies (also known as state workforce agencies) in local, intrastate, and interstate 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-FY2004



Source: CRS Presentation of data from U.S. Department of State, Bureau of Consular Affairs.

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[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 2004, the AEWR ranges from $7.38 for Arkansas, Louisiana, and Mississippi to $9.60 for Hawaii. See CRS Report RL32861, *Farm Labor: The Adverse Effect Wage Rate (AEWR)*, 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 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 FY2004, DOS issued 31,774 H-2A visas. According to preliminary data, 31,892 H-2A visas were issued in FY2005. 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.

USCIS recently proposed regulations aimed at streamlining the H-2B petitioning process, which would significantly alter procedures.[15] Among other changes, the proposed rule, published in the *Federal Register* on January 27, 2005, would eliminate the requirement that prospective H-2B employers file for a labor certification from DOL in most cases. Instead, employers seeking H-2B workers in areas other than logging, the entertainment industry, and professional athletics would include certain labor attestations as part of the H-2B petition they file with USCIS.

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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.

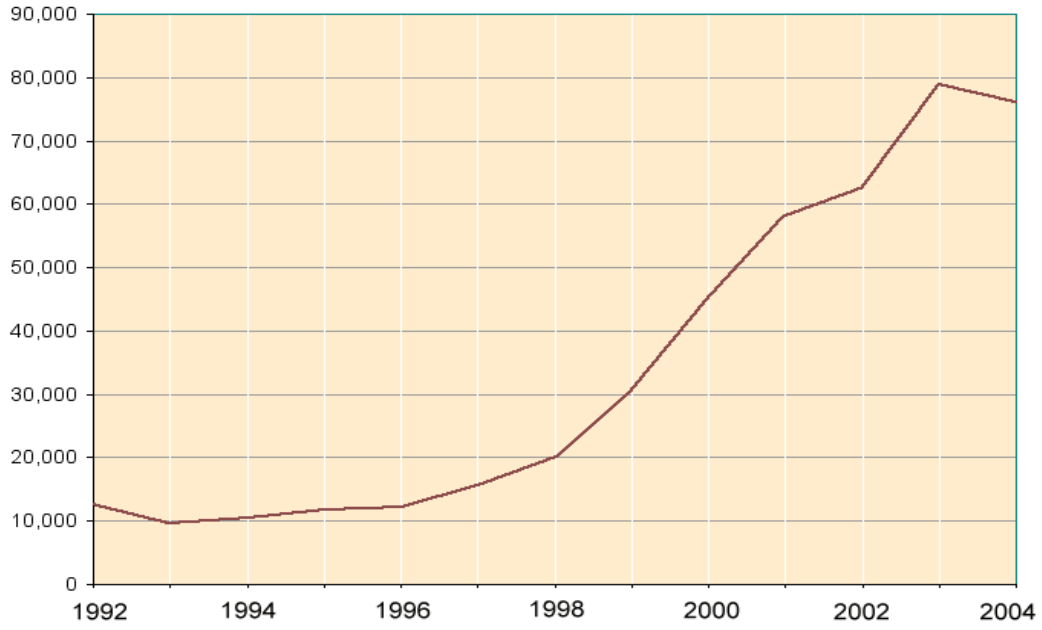
[14] While not subject to the broader transportation requirements of the H-2A program, H-2B employers are required by law to pay the reasonable costs of return transportation abroad for an H-2B worker who is dismissed prior to the end of his or her authorized period of stay.

[15] The proposed USCIS rule is available at [http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-1240.htm]. DOL has published a companion proposal, which is available at [http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-1222.htm].

According to the proposed rule, this H-2B attestation process would be similar to the process currently used for H-1B professional specialty workers.[16]

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.[17] According to DOL data on H-2B labor certifications, the top five H-2B occupations in FY2004, in terms of the number of workers certified, were: (1) landscape laborer, (2) forestry worker, (3) maids and housekeeping cleaners, (4) construction worker, and (5) stable attendant.

Figure 2. H-2B Visas Issued, FY1992-FY2004



Source: CRS Presentation of data from U.S. Department of State, Bureau of Consular Affairs.

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 fiscal year may not exceed 66,000.[18] This cap does not apply to all H-2B petitions. 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 then began to increase steadily.

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[16] For information on the H-1B nonimmigrant classification, see CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*, by Ruth Ellen Wasem.

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

[18] See INA §214(g)(1)(B).

In FY2003, DOS issued 78,955 H-2B visas, and in FY2004, it issued 76,169 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 acknowledged that the H-2B 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. On January 4, 2005, it announced that the FY2005 cap had been reached. It indicated that it would process all petitions received by January 3, 2005, but would not accept any new H-2B petitions subject to the FY2005 cap after that date.[19]

Following the enactment of new H-2B provisions as part of the FY2005 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (P.L. 109-13) (see discussion below of S. 352/H.R. 793 in the 109th Congress), USCIS announced that on May 25, 2005, it would start accepting additional petitions for H-2B workers for FY2005.[20] Under P.L. 109-13, for FY2005 and FY2006, returning H-2B workers counted against the annual 66,000 cap during any one of the three prior fiscal years cannot be counted again. USCIS determined that approximately 35,000 previously approved H-2B workers for FY2005 qualified as returning workers who, under P.L. 109-13, were exempt from that year's cap, opening up 35,000 slots for other H-2B workers. Employers were able to file FY2005 petitions for new H-2B workers to fill those slots, as well as for cap-exempt returning H-2B workers. According to preliminary data, 87,492 H-2B visas were issued in FY2005.

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. Analyses based on data from the Current Population Survey (CPS) and other sources estimate that the unauthorized resident alien population totaled 9.3 million in March 2002 and 10.3 million in March 2004, and that between 2000 and 2004, this population grew at an average annual rate of about 485,000 per year.[21] DHS has not published a recent estimate of the unauthorized alien population. The former INS estimated that in January 2000

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[19] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS Reaches H-2B Cap," press release, Jan. 4, 2005.

[20] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS to Accept Additional H-2B Filings for FY2005 and FY2006," public notice, May 23, 2005.

[21] Jeffrey S. Passel, Randy Capps, and Michael Fix, "Undocumented Immigrants: Facts and Figures," Urban Institute, Jan. 12, 2004; Jeffrey S. Passel, "Estimates of the Size and Characteristics of the Undocumented Population," Pew Hispanic Center, Mar. 21, 2005. Also see CRS Report RS21938, *Unauthorized Aliens in the United States: Estimates Since 1986*, by Ruth Ellen Wasem.

there were about 7.0 million unauthorized aliens residing in the United States based on data from the 2000 census of the U.S. population and other sources.[22]

Mexico remains the largest source country for unauthorized immigration. According to the recent estimates, the unauthorized Mexican population was about 5.3 million in 2002 and about 5.9 million in 2004, in both cases comprising 57% of the corresponding total unauthorized population. With respect to migrant deaths, data from the DHS indicate that more than 300 migrants died at the U.S.-Mexican border each year from FY2000 through FY2004.[23]

Unauthorized Workers

Unauthorized workers are a subpopulation of the total unauthorized alien population. In a June 2005 report, the Pew Hispanic Center estimated that there were about 6.3 million unauthorized workers in the U.S. labor force in March 2004.[24] These workers represented about 4% of the civilian labor force. In some occupations and industries, however, their share of the labor force was considerably higher. According to the report:

> [U]nauthorized migrants are much more likely [than native workers] to be in broad occupation groups that require little education or do not have licensing requirements. The share of unauthorized [sic] who work in agricultural occupations and construction and extractive occupations is about three times the share of native workers in these types of jobs.[25]

Table 1 presents data from the Pew Hispanic Center report on industries with high concentrations of unauthorized workers. Unauthorized aliens accounted for between 10% and 14% of the work force in the industries shown.

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[22] 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]. 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.

[23] For further information on migrant deaths, see CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by Blas Nuñez-Neto.

[24] Jeffrey S. Passel, "Unauthorized Migrants: Numbers and Characteristics," Pew Hispanic Center, June 14, 2005, at [http://pewhispanic.org/reports/report.php?ReportID=46]. According to the report, no adjustments were made in the analysis for persons omitted from the CPS and thus the 6.3 million figure is likely an underestimate.

[25] Ibid., p. 26.

Table 1. Estimates of Unauthorized Employment in Selected Industries, 2004

Industry Group	Unauthorized Workers
Construction	10%
Textile, Apparel, and Leather Manufacturing	10%
Food Services and Drinking Places	10%
Agriculture	11%
Administrative and Support Services	11%
Food Manufacturing	13%
Accommodation	13%
Private Households	14%

Source: Jeffrey S. Passel, "Unauthorized Migrants: Numbers and Characteristics," Pew Hispanic Center, June 14, 2005.

In a separate Pew Hispanic Center study, Philip Martin, an agricultural labor economist, estimated that there were 1.2 million unauthorized agricultural workers in crop and livestock production in 2002. This figure represented 47% of an estimated total hired farm work force of 2.5 million.[26]

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.

Legislation in the 105th - 107th Congresses

Major guest worker legislation introduced in the 105th, 106th, and 107th Congresses was limited to the H-2A program.[27] No major H-2B reform bills were offered.[28] In the 105th Congress, for example, a Senate-approved amendment to S. 2260, an FY1999 Departments of Commerce, Justice, and State Appropriations bill,

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

[27] 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.

[28] During the 107th Congress, former Senator Phil 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.

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[29] 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 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, the H-2B program, and the "H" visa category generally, as well as bills to establish new guest worker programs, were introduced in the 108th Congress. Some of these bills would have enabled certain workers to obtain LPR status. No action beyond committee referral occurred on any of the bills.

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[29] Although 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.

Congressional committees held related hearings during the 108th Congress. The House Agriculture Committee held a hearing on the potential impact of recent guest worker proposals on the agricultural sector, and 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 hearings on evaluating a guest worker proposal and on border security under a guest worker program.

S. 1645/H.R. 3142 and S. 2823

The "Agricultural Job Opportunity, Benefits, and Security Act of 2003" (AgJOBS bill; S. 1645/H.R. 3142) would have overhauled the H-2A agricultural worker program. It was introduced, respectively, by Senator Craig for himself and a bipartisan group of cosponsors 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 have streamlined the process of importing H-2A workers, particularly for jobs covered by collective bargaining agreements. Under S. 1645/H.R. 3142, prospective H-2A employers would have had to file applications with DOL containing certain assurances. In the case of a job covered by a collective bargaining agreement, the employer would have had to assure, among other things, that there was an applicable union contract and that the bargaining representatives of the employer's employees had 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 have been subject to a longer list of required assurances. Among these, the employer would have had to assure that he or she would take specified steps to recruit U.S. workers and would provide workers with required benefits, wages, and working conditions. Both groups of employers would have had to assure that the job was temporary or seasonal and that the employer would offer the job to any equally qualified, available U.S. worker who applied. Unless an employer's application was incomplete or obviously inaccurate, DOL would have certified within seven days of the filing date that the employer had filed the required application.

S. 1645/H.R. 3142 further proposed 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 have remained at the January 2003 level for three years after the date of enactment, and employers would have been permitted to provide housing allowances, in lieu of housing, to their workers if the governor of the relevant state certified that adequate housing was available.

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

In addition to these H-2A reform provisions, S. 1645/H.R. 3142 would have established a two-stage legalization program for agricultural workers. To obtain temporary resident status, the alien worker would have had 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 had 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 have applied to adjustments of status under the bill.[30]

On September 21, 2004, Senator Craig introduced a modified version of S. 1645 for himself and Senator Kennedy. The revised bill, S. 2823, was very similar to S. 1645, but there were substantive differences in the two bills' legalization provisions. Among these differences, S. 2823 contained a new provision stating that aliens acquiring temporary resident status under the bill would not be eligible for certain federal public benefits until five years after they obtained permanent resident status.[31]

H.R. 3604

Like S. 1645/H.R. 3142, the "Temporary Agricultural Labor Reform Act of 2003" (H.R. 3604) proposed 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 have streamlined the process of importing H-2A workers. Prospective H-2A employers would have had to file applications with DOL containing certain assurances, including that the job was temporary or seasonal; the employer would provide workers with required benefits, wages, and working conditions; the employer had made positive efforts to recruit U.S. workers; and the employer would offer the job to any equally qualified, available U.S. worker who applies. Unless an employer's application was incomplete or obviously inaccurate, DOL would have certified within seven days of the filing date that the employer had filed the required application.

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

Under H.R. 3604, an H-2A worker's initial period of employment could not have exceeded 10 months. The worker's stay could have been extended in increments of up to 10 months each, but the worker's total continuous period of stay,

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[30] 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.

[31] For information on noncitizen eligibility for federal public benefits, see CRS Report RL31114, *Noncitizen Eligibility for Major Federal Public Assistance Programs: Policies and Legislation*, by Ruth Ellen Wasem.

including any extensions, could not have exceeded two years. H.R. 3604 would not have established a mechanism for agricultural workers to obtain LPR status.

S. 2185

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

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

S. 2185 did not contain provisions regarding the period of admission, extension of stay, or maximum period of stay of H-2A workers. It also would not have established 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 have reformed the H-2B nonimmigrant visa. The bill would have eliminated the current restriction that H-2B workers can perform only temporary service or labor, and instead would have required that they perform "short-term service or labor, lasting not more than 9 months." S. 2010 also proposed 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 have been numerically limited. In each of the five fiscal years following issuance of final implementing regulations, the H-2B program would have been capped at 100,000. The cap would have then reverted back to the current 66,000 level. The H-2C program would have been 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 have terminated.

S. 2010 would have subjected 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 had 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 had to offer the job to any qualified, available U.S. worker who applies. In the application to DOL, the employer would have had to attest to various items. Among these are that the employer was 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 would abide by all applicable laws and regulations relating to the rights of workers to organize. DOL would have reviewed the application and required documentation for completeness and accuracy, and issued a determination not later than 21 days after the filing date.

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

S. 2010 would have enabled H-2B and H-2C nonimmigrants to obtain LPR status. Employment-based *immigrant* visas would have been made available to these nonimmigrants without regard to existing numerical limits under the INA. An employment-based petition could have been filed by an employer or any collective bargaining agent of the alien, or after the alien had been employed in H-2B or H-2C status for at least three years, by the alien. In addition, S. 2010 would have established 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 have reformed the H-2B nonimmigrant visa. It would have eliminated the current restriction that H-2B workers can perform only temporary service or labor, and instead would have required that they perform "short-term service or labor, lasting not more than 9 months." S. 2381/H.R. 4262 also proposed 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 have been numerically limited. The H-2B program would have been capped at 100,000 annually, an increase from the current annual limit of 66,000. The H-1D program would have been capped at 250,000 annually.

S. 2381/H.R. 4262 would have subjected 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 had 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 had to offer the job to any qualified, available U.S. worker who applied. In the application to DOL, the employer would have had to attest to various items. Among these are that the employer was offering to H-2B or H-1D workers the prevailing wage, to be determined as specified in the bill. The employer also would have had to abide by all applicable laws and regulations relating to the rights of workers to organize. DOL would have reviewed the application and required documentation for completeness and accuracy, and issued a determination not later than 10 working days after the filing date.

The initial period of admission for an H-2B worker could not have exceeded nine months in a one-year period. An H-2B worker's total period of admission could not have exceeded 40 months in the aggregate. The initial period of admission for an H-1D worker could not have exceeded 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 have exceeded six years.

S. 2381/H.R. 4262 would have enabled H-2B and H-1D nonimmigrants to obtain LPR status. Employment-based *immigrant* visas would have been made available to these nonimmigrants without numerical limitation. An employment-based petition could have been 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 have established 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, proposed to amend the INA's "H" visa category generally. It would have eliminated the current subcategories, including the H-2A and H-2B visas, and replaced them with a single category covering aliens coming temporarily to the United States to perform skilled or unskilled work if qualified U.S. workers were not available.

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

H nonmimmigrants could have only been admitted from abroad. They would have applied to be added to a database of workers and would have remained in their home countries until an approved employer wanted to hire them. Their period of authorized admission could not have exceeded 365 days in a two-year period. After

the two-year period, H nonimmigrant visas could have been renewed. H nonimmigrants would not have been permitted to change or adjust to any other nonimmigrant or immigrant status.

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

S. 1387

The "Border Security and Immigration Reform Act of 2003" (S. 1387), introduced by Senator Cornyn, would have authorized new temporary worker programs under the INA for seasonal and nonseasonal workers. S. 1387 would have established a new "W" nonimmigrant visa category for these workers, which would not have been subject to numerical limits. The W-1 visa would have covered seasonal workers, and the W-2 visa would have covered nonseasonal workers. Under the proposal, the Secretary of Homeland Security and the Secretary of State would have jointly established and administered guest worker programs with foreign countries that enter into agreements with the United States. The bill would have directed 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 had to file an application with DOL. As part of the application, the employer would have had to request an attestation from DOL that there were not sufficient U.S. workers who were qualified and available to perform the work, and that the hiring of alien workers would not adversely affect the wages and working conditions of similarly employed U.S. workers. The employer also would have needed to provide various assurances in the application, including that the employer would offer the job to any equally qualified, available U.S. worker who applied; would advertise the job opening in a local publication; and would pay workers at least the higher of the federal or applicable state minimum wage. Unless an employer's application was incomplete or obviously inaccurate, DOL would have certified within 14 days of the filing date that the application had been filed. Beginning 12 months after enactment, employers would have been subject to increased penalties for knowingly employing unauthorized aliens.

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

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

Under S. 1387, guest workers could have applied for U.S. legal permanent residency only once they returned to their home countries. Their applications would have been evaluated based on a point system to be established by the Secretary of Homeland Security. The bill did not propose a legalization mechanism for guest workers outside of existing channels, and according to Senator Cornyn's office, guest workers would have had to meet all the relevant requirements under current law.[32]

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 have established two new temporary worker visas under the INA — the H-4A and H-4B visas. It would have placed no limit on the number of H-4A or H-4B visas that could have been issued.

The H-4A visa would have covered aliens coming to the United States to perform temporary full-time employment. An employer interested in importing H-4A workers would have had to file a petition with DHS. DHS could only have approved the petition once it determined that the employer had 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 applied through the registry. The employer also would have had to attest in the petition that he or she would use the employment eligibility confirmation system established by the bill to verify the alien workers' identity and employment authorization; would provide the alien workers with the same benefits, wages, and working conditions as other similarly employed workers; and did not and would not displace U.S. workers during a specified 180-day period. Aliens granted H-4A status would have been issued machine-readable, tamper-resistant visas and other documents containing biometric identifiers.

An H-4A worker's initial authorized period of stay would have been three years, and could have been extended for an additional three years. S. 1461/H.R. 2899 also would have enabled H-4A nonimmigrants to adjust to LPR status. Petitions for employment-based *immigrant* visas could have been 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 have been made available to H-4A workers adjusting status without numerical limitation.

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[32] 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 have covered aliens unlawfully present and employed in the United States since before August 1, 2003. An H-4B alien's authorized period of stay would have been three years. The alien could have applied to change to H-4A status or another nonimmigrant or immigrant category, but such a change of status could not have taken place until the end of the three years. H-4B employers would have been 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 have authorized a new "W" nonimmigrant visa category under the INA for unauthorized aliens. The category would have covered 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 have been eligible for W status, the alien would first have had to register with DHS. Employment would not have been a strict requirement for W status, but the alien would have had to demonstrate an adequate means of financial support. The new category would have sunset six years after the first alien was granted W status.

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

Legislation in the 109th Congress

Bills have been introduced in the 109th Congress to reform the H-2A and H-2B programs, to reform the "H" visa category, and to establish new temporary worker visas. An amendment based on one of the H-2B bills (S. 352/H.R. 793) was enacted as part of the FY2005 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (P.L. 109-13). The 109th Congress has held a number of hearings on immigration issues relevant to a guest worker program. The House Judiciary Committee's Subcommittee on Immigration, Border Security, and Claims has held hearings on employment eligibility verification and work site enforcement. The Senate Judiciary Committee's Subcommittee on Immigration, Border Security, and Citizenship has held hearings on immigration reform issues, including the establishment of a new guest worker program. The full Senate Judiciary Committee has held two hearings on comprehensive immigration reform, at which two major reform proposals (S. 1033/H.R. 2330 and S. 1438) were discussed. During consideration of the "Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005" (H.R. 4437) by the House Judiciary Committee and on the House floor, efforts were made to add guest worker programs and

language expressing support for a guest worker program, but they were unsuccessful. H.R. 4437, as passed by the House, does not contain any guest worker provisions.

S. 352/H.R. 793

The "Save Our Small and Seasonal Businesses Act" (S. 352/H.R. 793),[33] introduced respectively by Senator Mikulski and Representative Gilchrest for themselves and bipartisan groups of cosponsors, proposed to revise the H-2B program. During Senate consideration of the FY2005 Emergency Supplemental Appropriations bill (H.R. 1268) in April 2005, Senator Mikulski offered a floor amendment based on S. 352/H.R. 793. On April 19, the Senate adopted the Mikulski Amendment, as modified, by a vote of 94 to 6, and the amendment was included in the enacted measure (P.L. 109-13) as Division B, Title IV.

The H-2B title of P.L. 109-13 contains a provision that keeps aliens who have been counted toward the H-2B cap in any of the past three years from being counted again. This provision expires at the end of FY2006. The title also caps at 33,000 the number of H-2B slots available during the first six months of a fiscal year. In addition, it requires DHS to submit specified information to Congress on the H-2B program on a regular basis, imposes a new fraud-prevention and detection fee on H-2B employers, and authorizes DHS to impose additional penalties on H-2B employers in certain circumstances.

S. 359/H.R. 884

The "Agricultural Job Opportunities, Benefits, and Security Act of 2005" (S. 359/H.R. 884) proposes to overhaul the H-2A agricultural worker program. The bills were introduced, respectively, by Senator Craig and Representative Cannon for themselves and bipartisan groups of cosponsors. S. 359/H.R. 884 is very similar to the AgJOBs bills before the 108th Congress (S. 1645/H.R. 3142, S. 2823). Like these bills, S. 359/H.R. 884 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 and 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,

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[33] Although S. 352 and H.R. 793 are not identical, they are treated as companion bills here because they are nearly identical and none of their differences are substantive. The full short title of S. 352 is "Save Our Small and Seasonal Businesses Act of 2005."

DOL would certify within seven days of the filing date that the employer has filed the required application.

S. 359/H.R. 884 would 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. 359/H.R. 884, 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. 359/H.R. 884 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 December 31, 2004, 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 during the six years following the date of enactment, and meet other requirements. Existing numerical limits under the INA would not apply to adjustments of status under the bills.[34] Like S. 2823 in the 108th Congress, S. 359/H.R. 884 contains a provision concerning eligibility of legalization beneficiaries for certain federal public benefits. The current bills would delay eligibility for such benefits until five years after an alien acquires temporary resident status. S. 2823 in the 108th Congress would have delayed eligibility until five years after an alien acquired LPR status.

H.R. 3857

The "Temporary Agricultural Labor Reform Act of 2005" (H.R. 3857), an H-2A reform bill introduced by Representative Goodlatte on behalf of himself and a group of cosponsors, revises a bill that he introduced by the same name in the 108th Congress. H.R. 3857 would streamline the process of importing H-2A workers. Prospective H-2A employers would have to file petitions with DHS containing certain attestations; they would not file applications with DOL. They also would have to attest that the job is temporary or seasonal; that the employer will provide workers with required benefits, wages, and working conditions; that the employer has made efforts to recruit U.S. workers; 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, DHS would have to adjudicate the petition within seven days of the filing date.

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[34] 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. 3857 would change current H-2A requirements regarding minimum benefits, wages, and working conditions. Under the bill, H-2A employers would have to pay workers the higher of the prevailing wage rate or the applicable state minimum wage; employers would not be subject to the adverse effect wage rate (discussed above). With respect to housing, employers could provide allowances, in lieu of housing, to their workers if the governor of the relevant state certifies that adequate housing is available.

Under H.R. 3857, an H-2A worker's initial period of admission 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 20 months. H.R. 3857 would not establish a mechanism for agricultural workers to obtain LPR status.

S. 278

The "Summer Operations and Seasonal Equity Act of 2005" (S. 278), introduced by Senator Collins, would make changes to the numerical limits under the H-2B program. It would require that at least 12,000 of the total number of H-2B slots available annually (currently, 66,000) be made available in each quarter of each fiscal year. It would exempt an alien who has been counted toward the annual H-2B numerical limit within the past three years from being counted again. Both of these provisions would expire at the end of FY2007. S. 278 also would require DHS to submit specified information to Congress on the H-2B program on a regular basis.

H.R. 1587

H.R. 1587, introduced by Representative Tancredo for himself and several cosponsors, would raise the H-2B cap and place new requirements on the H-2B program. It would increase to 131,000 the number of aliens who could be issued H-2B visas or otherwise provided H-2B status annually. Not more than half of these slots, or 65,500, would be available during the first six months of a fiscal year. H.R. 1587 would add new recruitment-related requirements for prospective H-2B employers, and would mandate H-2B employer participation in the Basic Pilot program, an electronic employment eligibility verification system. H.R. 1587 also would impose new requirements on H-2B nonimmigrants. Among them, these aliens could no longer be accompanied by family members.

S. 1918

The "Strengthening America's Workforce Act of 2005" (S. 1918), introduced by Senator Hagel, contains guest worker provisions similar to those in the bill he introduced in the 108th Congress. S. 1918 would revise the H-2B visa and eliminate the current restriction that H-2B workers can perform only temporary service or labor. Instead, the bill would require workers to perform "short-term service or labor, lasting not more than nine months." S. 1918 also would establish 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. The H-2B visa would be capped at 100,000 annually, and the H-2C visa would be capped at 250,000 annually.

S. 1918 would subject the H-2B and H-2C programs to a broad set of requirements concerning 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 a national online job registry called America's Job Bank and on local job banks. Employers also 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 that the employer would abide by all applicable laws and regulations relating to the rights of workers to organize. DOL would review the application 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 made available to nonimmigrants without regard to existing numerical limits under the INA. An employment-based petition could be filed by an alien's employer or collective bargaining agent or by the alien, after the alien has been employed in H-2B or H-2C status for at least three years.

H.R. 3333

The "Rewarding Employers that Abide by the Law and Guaranteeing Uniform Enforcement to Stop Terrorism Act of 2005" (H.R. 3333), introduced by Representative Tancredo, contains temporary worker provisions similar to those in the bill he introduced in the 108th Congress. H.R. 3333 would eliminate all the current "H" visa subcategories, including the H-2A and H-2B visas, and replace them with a single "H" visa covering aliens coming temporarily to the United States to perform skilled or unskilled work. There would be no cap on the H visa.

An employer interested in employing H nonimmigrants would have to recruit U.S. workers by posting the job opportunity on America's Job Bank and would have to offer the job to any equally qualified U.S. worker who applies. The employer would have to file an application with DOL containing certain assurances, including that he or she has complied with the recruitment requirements.

Prospective H nonimmigrants, who could only be admitted from abroad, would apply to be included in a database of workers, which DOL would be tasked with

establishing and maintaining. Once an employer's application was approved, DOL would provide the employer with a list of aliens from the database who may be able to fill the position. Aliens admitted on H visas could not change to another nonimmigrant status or adjust to LPR status in the United States.

Under H.R. 3333, the new H visa program could not be implemented until the Secretary of Homeland Security makes certain certifications to Congress, including that a congressionally mandated automated entry-exit system is fully operational[35] and that at least 80% of aliens who overstay their nonimmigrants visas are removed within one year of overstaying.

S. 1033/H.R. 2330

The "Secure America and Orderly Immigration Act" (S. 1033/H.R. 2330) was introduced, respectively, by Senator McCain and Representative Kolbe for themselves and bipartisan groups of cosponsors. It was discussed at the Senate Judiciary Committee hearings on comprehensive immigration reform held in July 2005 and October 2005. Its guest worker and legalization provisions are similar in some respects to provisions in bills from the 108th Congress, including S. 1461/H.R. 2899, S. 2010, and S. 2381/H.R. 4262. S. 1033/H.R. 2330 would establish two new temporary worker visas under the INA — the H-5A and H-5B visas. It would cap the H-5A visa initially at 400,000, and would establish a process for adjusting the cap in subsequent fiscal years based on demand for the visas. It would place no cap on the H-5B visa.

The H-5A visa would cover aliens coming temporarily to the United States *initially* to perform labor or services "other than those occupational classifications" covered under the H-2A or specified high-skilled visa categories. Prospective H-5A nonimmigrants would file visa applications on their own behalf. Employers would not file petitions with DHS for them, as they currently do to employ other nonimmigrant workers. Under S. 1033/H.R. 2330, the Secretary of State may grant an H-5A visa to an alien who demonstrates an intent to perform work covered by the visa. To be eligible for H-5A status, the alien would need to have evidence of employment, among other requirements. Before hiring a prospective H-5A worker, an employer would have to post the job opportunity on a DOL electronic job registry to recruit U.S. workers. H-5A employers also would be required to comply with all applicable federal, state, and local laws, and to use an employment eligibility confirmation system, to be established by the Social Security Administration, to verify the employment eligibility of newly hired H-5A workers.

An H-5A worker's initial authorized period of stay would be three years, and could be extended for an additional three years. Under S. 1033/H.R. 2330, H-5A nonimmigrants in the United States could adjust to LPR status. Petitions for employment-based *immigrant* visas could be filed by an H-5A worker's employer or, if the H-5A worker had maintained H-5A status for a total of four years, by the worker.

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[35] For information on the entry-exit system issue, see CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and Stephen R. Viña.

The H-5B visa established by the bill would cover aliens present and employed in the United States since before May 12, 2005. Aliens lawfully present in the United States as nonimmigrants on that date would not be eligible for H-5B status. An H-5B alien's authorized period of stay would be six years. At the end of that six-year period, the alien could apply to adjust to LPR status, subject to various requirements. Such adjustments of status would not be subject to numerical limitations.

S. 1438

The "Comprehensive Enforcement and Immigration Reform Act of 2005" (S. 1438) was introduced by Senator Cornyn for himself and Senator Kyl. Like S. 1033/H.R. 2330, it was discussed at the Senate Judiciary Committee hearings on comprehensive immigration reform held in July 2005 and October 2005. It would establish a new "W" temporary worker visa under the INA. S. 1438 would not place a cap on the W visa, but would authorize DOL to do so in the future based on the recommendations of a task force the bill would establish. In addition, S. 1438 would amend the INA to authorize DHS to grant a new status — Deferred Mandatory Departure (DMD) status — to certain unauthorized aliens in the United States. It would place no limit on the number of aliens who could receive that status.

The W visa would cover aliens coming temporarily to the United States to perform temporary labor or service other than that covered under the H-2A or specified high-skilled visa categories. S. 1438 would repeal the H-2B visa category. Prospective W nonimmigrants would file applications on their own behalf. Employers would not file petitions with DHS on behalf of W workers, as they currently do to employ other nonimmigrant workers. Under S. 1438, the Secretary of State may grant a W visa to an alien who demonstrates an intent to perform eligible work. To be eligible for W status, the alien would need to have evidence of employment, among other requirements. An employer interested in hiring a W nonimmigrant would have to apply for authorization to do so through an Alien Employment Management System to be established by DHS. Before an employer could be granted such authorization, he or she would have to post the position on a DOL electronic job registry and offer the position to any equally qualified U.S. worker who applied. S. 1438 would make it mandatory for all employers, including W employers, to verify the employment eligibility of new hires through an electronic system. Current electronic employment eligibility verification is conducted through the largely voluntary basic pilot program.

A W nonimmigrant's authorized period of stay would be two years, and could *not* be extended. After residing in his or her home country for one year, however, an alien could be readmitted to the United States in W status. An alien's total period of admission as a W nonimmigrant could not exceed six years. These stay limitations would not apply to aliens who spend less than six months a year in W status, or who commute to the United States to work in W status but reside outside the country. S. 1438 would make W nonimmigrants ineligible to change to another nonimmigrant status and would not provide them with any special mechanism to obtain LPR status. Furthermore, a W nonimmigrant who did not depart the United States when required to do so would be ineligible for any immigration benefit or relief, except for specified forms of humanitarian relief.

Aliens present in the United States since July 20, 2004, and employed since before July 20, 2005, could apply to DHS for Deferred Mandatory Departure (DMD) status. Aliens lawfully present in the United States as nonimmigrants would not be eligible. DHS could grant an alien DMD status for a period of up to five years. Employers interested in employing aliens granted DMD status would have to apply for authorization through the Alien Employment Management System mentioned above. Aliens in DMD status could not apply to change to a nonimmigrant status or, unless otherwise eligible under INA §245(i), to adjust to LPR status.[36] Aliens who comply with the terms of DMD status and depart prior to its expiration date would not be subject to the INA provision that bars previously unlawfully present aliens from being admitted to the United States for 3 or 10 years, depending on the length of their unlawful stay.[37] If otherwise eligible, these aliens could immediately seek admission as nonimmigrants or immigrants. However, they would not receive any special consideration for admission. Aliens granted DMD status who failed to depart prior to the expiration of that status would be ineligible for any immigration benefit or relief, except for specified forms of humanitarian relief, for 10 years.

H.R. 4065

The "Temporary Worker Registration and Visa Act of 2005" (H.R. 4065), introduced by Representative Osborne, would establish a process for registering aliens who have been continuously unlawfully present and employed in the United States since January 1, 2005. Eligible aliens would apply for this registration, which would be valid for six months. Registered aliens would be given work authorization and would be eligible for a new "W" temporary worker visa established by the bill. To obtain a W visa, a registered alien would have to apply at a consular office in his or her home country during a six-month registration period. H.R. 4065 would place no numerical limit on the W visa.

The initial period of authorized admission for a W nonimmigrant would be three years and could be extended in three year increments without limit. H.R. 4065 would require that W nonimmigrants be continuously employed but would place no restriction on the type of work they could perform.

W nonimmigrants would not be prohibited from changing to another nonimmigrant classification or adjusting to LPR status. H.R. 4065, however, would make no special provision enabling them to do so.

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[36] For an explanation of INA §245(i), see CRS Report RL31373, *Immigration: Adjustment to Permanent Resident Status Under Section 245(i)*, by Andorra Bruno.

[37] INA §212(a)(9)(B). This ground of inadmissibility, known as the "3 and 10 year bars," applies to aliens who have been unlawfully present in the United States for more than 180 days and who then depart or are removed.

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.[38] The President featured his proposal in the 2004 and 2005 State of the Union addresses. 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 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.

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[38] 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.

At the October 2005 Senate Judiciary Committee hearing on comprehensive immigration reform, Labor Secretary Elaine Chao reiterated the Administration's support for the immigration reform ideas that President Bush outlined in January 2004.[39] She did not offer a detailed legislative proposal and did not take a position on any of the pending immigration reform bills. Secretary Chao described the Administration's plan as having three components — border security, interior enforcement, and a temporary worker program — and not allowing "amnesty." She maintained that "an improved temporary worker program will enhance border security and interior enforcement by providing a workable and enforceable process for hiring foreign workers."

Both in her written testimony and in responses to Senators' questions, Secretary Chao made some general statements about the type of temporary worker program the Administration favors. She made reference to "streamlining the process so that willing workers can efficiently be matched with employers ... [when] there are no willing U.S. workers." Although she did not describe this streamlined process, she did state that private for-profit or nonprofit organizations could play a role in matching employers and workers. She also explained that under the President's temporary worker program, prospective employers would be subject to labor certification, as they currently are under the H-2A and H-2B programs. In describing how the President's program would overcome problems in existing guest worker programs, Secretary Chao referred generally to "a technologically advanced new system" through which "workers will have visa documentation that clearly establishes their eligibility to work" and "employers will have access to a verification system that enables them to quickly check the eligibility and verify the identity of potential employees."

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. It is widely reported that guest worker legislation will be introduced in the 109th Congress.

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.

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[39] Secretary Chao's written testimony is available at [http://judiciary.senate.gov\hearing .cfm?id=1634].

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."[40] 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.[41]

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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[40] 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.

[41] 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,[42] 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.[43] Approximately 2.7 million individuals have adjusted to LPR status under these programs.[44]

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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[42] 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."

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

[44] 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.[45] To partially address the increased demand for visa numbers, the Immigration Act of 1990[46] 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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[45] 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.

[46] 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.[47] 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.[48]

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.[49] 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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[47] 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.

[48] 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.

[49] 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 ...[50]

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 workers' home countries in the guest worker program. Another option is to create

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[50] INA §218(g)(2).

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.