



# Immigration: Policy Considerations Related to Guest Worker Programs

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March 16, 2010

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

RL32044

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**CRS Report for Congress**  
*Prepared for Members and Committees of Congress*

R11172008

# Report Documentation Page

Form Approved  
OMB No. 0704-0188

Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

1. REPORT DATE <b>16 MAR 2010</b>		2. REPORT TYPE		3. DATES COVERED <b>00-00-2010 to 00-00-2010</b>	
4. TITLE AND SUBTITLE <b>Immigration: Policy Considerations Related to Guest Worker Programs</b>				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) <b>Congressional Research Service, Library of Congress, 101 Independence Ave., SE, Washington, DC, 20540-7500</b>				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT <b>Approved for public release; distribution unlimited</b>					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT <b>unclassified</b>	b. ABSTRACT <b>unclassified</b>	c. THIS PAGE <b>unclassified</b>			

## Summary

The United States has two main programs for temporarily importing low-skilled workers, or guest workers. Agricultural guest workers enter through the H-2A visa program, and other guest workers enter through the H-2B visa program. Before an employer can file a petition with the U.S. Department of Homeland Security (DHS) to import workers under either program, the employer must apply to the U.S. Department of Labor (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. Other requirements of the programs differ.

In December 2008, DHS and DOL published final rules to significantly amend their H-2A and H-2B regulations. The new rules became effective on January 17, 2009. Under the Obama Administration, DOL proposed a new H-2A rule to replace the 2008 rule. This rule was published in final form in February 2010 and went into effect on March 15, 2010. The Administration left intact the 2008 H-2A rule issued by DHS and the 2008 H-2B rules issued by DHS and DOL.

The DHS 2008 H-2A and H-2B rules modify previous limitations on H-2A and H-2B workers' periods of stay in the United States. The rules also establish new requirements under both visas. They prohibit payments by prospective H-2A or H-2B workers to employers, recruiters, or other employment service providers where the payments are a condition of obtaining H-2A or H-2B employment, and provide for the denial or revocation of petitions in the event of petitioner violations. Among the other new requirements applicable to both programs, the DHS rules limit participation in the H-2A and H-2B programs to nationals of designated countries.

DOL's 2008 H-2B rule replaces the labor certification process with an attestation-based process, in which employers attest in their applications, under threat of penalties, that they have complied with program requirements. Among other changes to DOL's H-2B regulations, the new rule establishes a system of post-certification audits of H-2B employer applications.

DOL's 2010 H-2A rule reverses some major changes to the H-2A program that were included in its 2008 rule. Under the new rule, prospective H-2A employers must go through the traditional labor certification process and are subject to the adverse effect wages rate, as calculated prior to the 2008 rule. In addition, the 2010 rule calls for the creation of a new electronic registry for H-2A job opportunities, and retains a system of post-certification audits of H-2A employer applications that was included in the 2008 rule.

Various bills have been introduced in recent years to make changes to the H-2A and H-2B programs and to establish new temporary worker visas. In the 111<sup>th</sup> Congress, AgJOBS bills (H.R. 2414, S. 1038) propose to reform the H-2A program and establish a legalization program for agricultural workers, and H-2B bills variously seek to reform the H-2B program (H.R. 4381, S. 2910) and to reenact, in different forms, an expired provision to exempt certain returning workers from the H-2B cap of 66,000 (H.R. 1136, H.R. 1934, S. 388).

The current discussion of guest worker programs takes place against a backdrop of high levels of unauthorized migration to the United States, leading to various questions, such as whether new guest worker proposals would enable participants to obtain legal permanent resident (LPR) status. This report will be updated as legislative developments occur.

## **Contents**

Introduction .....	1
Background .....	1
Current Programs .....	2
H-2A Program.....	2
H-2A Visas Issued.....	3
DHS and DOL H-2A Regulations.....	4
H-2B Program.....	6
H-2B Visas Issued and the Statutory Cap.....	7
DHS and DOL H-2B Regulations.....	8
Unauthorized Immigration .....	9
Legislation in the 111 <sup>th</sup> Congress .....	11
AgJOBS Bills .....	11
H-2B Bills .....	12
Policy Considerations .....	13
Comparison of Program Requirements .....	13
Eligible Population.....	14
Legalization of Program Participants .....	14
Treatment of Family Members .....	15
Labor Market Test.....	16
Numerical Limits .....	17
Enforcement .....	17
Homeland Security.....	18
Conclusion.....	18

## **Figures**

Figure 1. H-2A Visas Issued, FY1992-FY2009 .....	3
Figure 2. H-2B Visas Issued, FY1992-FY2009 .....	8

## **Tables**

Table 1. Estimates of Unauthorized Employment in Selected Occupations, 2008 .....	10
Table 2. Estimates of Unauthorized Employment in Selected Industries, 2008 .....	11

## **Appendixes**

Appendix. Guest Worker Legislation in the 105 <sup>th</sup> -110 <sup>th</sup> Congresses.....	19
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## **Contacts**

Author Contact Information ..... 43

## Introduction

Immigration programs for foreign temporary workers have been the subject of much discussion among policymakers over the past decade. Various bills to reform existing programs and to create new temporary worker programs have been introduced in recent Congresses. Comprehensive immigration reform bills that would have established new guest worker programs were considered in the Senate in the 109<sup>th</sup> and 110<sup>th</sup> Congresses, but none of these proposals were enacted into law. In the absence of legislation authorizing a new temporary worker program, the Bush Administration announced in August 2007 that it would seek to streamline existing guest worker programs within current law. In December 2008, the U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL) published final rules to significantly amend their respective regulations on the H-2A temporary agricultural worker program and the H-2B temporary nonagricultural worker program. These new rules went into effect in January 2009. In February 2010, under the Obama Administration, DOL published a new H-2B final rule to replace the December 2008 rule. The February 2010 rule became effective on March 15, 2010. Against the backdrop of these new rules, legislation on the H-2A and H-2B visas has again been introduced in the 111<sup>th</sup> Congress.

## 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.<sup>1</sup>

The Immigration and Nationality Act (INA) of 1952, as originally enacted,<sup>2</sup> authorized a temporary foreign worker program known as the H-2 program. It covered both agricultural and nonagricultural workers who were coming temporarily to the United States to perform temporary services (other than services of an exceptional nature requiring distinguished merit and ability) or labor. Aliens who are admitted to the United States for a temporary period of time and a specific purpose are known as nonimmigrants. The 1986 Immigration Reform and Control Act (IRCA; P.L. 99-603) 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.<sup>3</sup>

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

<sup>2</sup> 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.

<sup>3</sup> For an overview of the INA’s nonimmigrant visa categories, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Chad C. Haddal and Ruth Ellen Wasem.

## 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. 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 DOL and U.S. Citizenship and Immigration Services (USCIS) of DHS.<sup>4</sup>

As discussed below, bills have been introduced in the last several Congresses to reform the H-2A and H-2B programs and establish new temporary worker visas. In the spring of 2007, during the 110<sup>th</sup> Congress, the Senate debated comprehensive immigration reform legislation that included provisions to reform the H-2A program and to create new guest worker programs. Following the failure of that legislative effort, the former Bush Administration proposed rules to reform the H-2A and H-2B visa programs within existing law. In December 2008, DOL and DHS issued final H-2A and H-2B rules that made extensive changes to both programs. In September 2009, under the Obama Administration, DOL proposed a new H-2A rule to replace the December 2008 rule. This rule was published as a final rule in February 2010 and became effective on March 15, 2010.

### H-2A Program

The H-2A program allows for the temporary admission of foreign workers to the United States to perform agricultural labor or services of a seasonal or temporary nature, provided that U.S. workers are not available. In general, for purposes of the H-2A program, work is of a temporary nature where the employer's need for the worker will last no longer than one year. Thus, an approved H-2A visa petition is generally valid for an initial period of up to one year. An employer can apply to extend an H-2A worker's stay in increments of up to one year, but an alien's total period of stay as an H-2A worker may not exceed three consecutive years. An alien who has spent three years in the United States in H-2A status may not seek an extension of stay or be readmitted to the United States as an H-2A worker until he or she has been outside the country for a specified period of time.

An employer who wants 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. Prospective H-2A employers must attempt to recruit U.S. workers and must cooperate with DOL-funded state employment service agencies (also known as state workforce agencies (SWAs)) in local, intrastate, and interstate recruitment efforts. They must provide a three-fourths guarantee; that is, they must guarantee to offer workers employment for at least three-fourths of the contract period. As discussed below, H-2A employers must pay their H-2A workers and similarly employed U.S. workers the highest of several wage rates and also must provide workers with housing, transportation, and other benefits, including workers' compensation insurance. No health insurance coverage is required.<sup>5</sup>

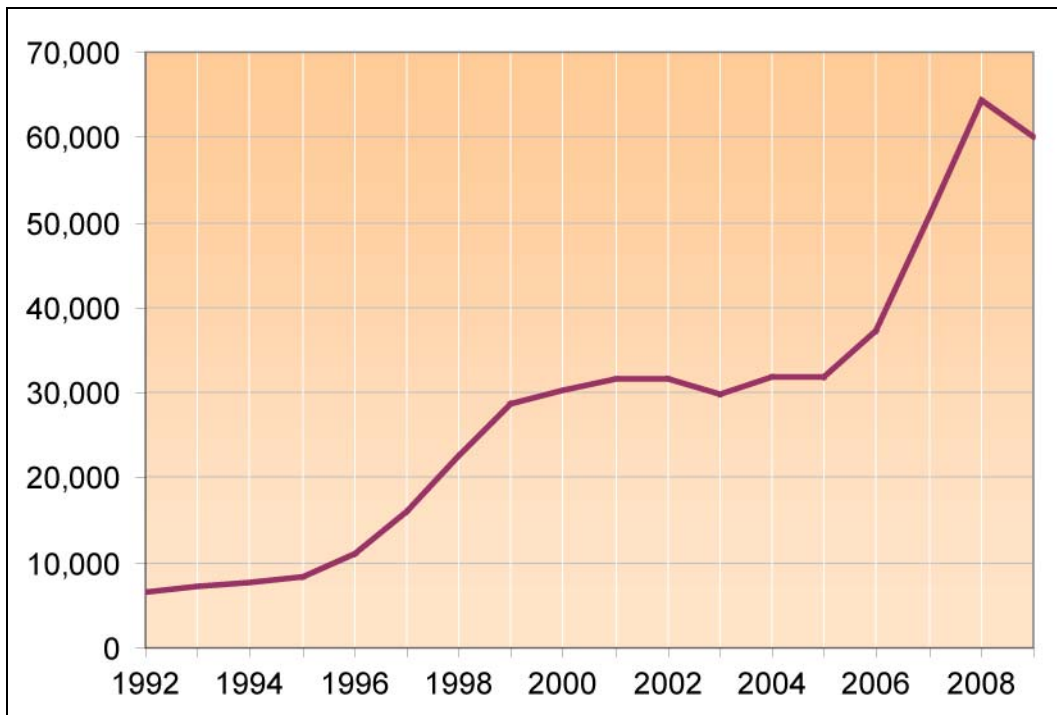
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<sup>4</sup> Prior to March 1, 2003, the H-2A and H-2B programs were administered by ETA and the Immigration and Naturalization Service (INS) of the Department of Justice. The Homeland Security Act of 2002 (P.L. 107-296, November 25, 2002) abolished INS and transferred most of its functions to DHS as of March 1, 2003.

<sup>5</sup> H-2A workers, like nonimmigrants generally, are not eligible for federally funded public assistance, with the (continued...)

## H-2A Visas Issued

Figure 1. H-2A Visas Issued, FY1992-FY2009



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

The H-2A program, which is not subject to numerical limits, has grown significantly since 1992. One way to measure the program's growth is to consider changes in the number of H-2A visas issued annually by the DOS.<sup>6</sup> As illustrated in **Figure 1**, the number of H-2A visas issued increased from 6,445 in FY1992 to 30,201 in FY2000. H-2A visa issuances remained at about 30,000 annually until FY2006, when 37,149 H-2A visas were issued. The growth of the H-2A program continued in FY2007 and FY2008, with H-2A visa issuances totaling 50,791 and 64,404, respectively. In FY2009, H-2A visa issuances dipped to 60,112. Despite growth over the years, the H-2A program remains quite small relative to total hired farm employment, which stood at about 1 million in 2008, according to the Department of Agriculture's National Agricultural Statistics Service.<sup>7</sup>

(...continued)

exception of Medicaid emergency services.

<sup>6</sup> There is no precise measure available of the number of the aliens granted H-2A status in any given year. While visa data provide an approximation, these data are subject to limitations, among them that not all H-2A workers are necessarily issued visas and not all aliens who are issued visas necessarily use them to enter the United States.

<sup>7</sup> For additional discussion, see CRS Report RL30395, *Farm Labor Shortages and Immigration Policy*, by Linda Levine.



## DHS and DOL H-2A Regulations

The final H-2A rules issued by DHS and DOL in December 2008<sup>8</sup> came after many years of criticism of the H-2A program by growers, who found the program to be overly cumbersome and ineffective in meeting their labor needs, and by labor advocates, who faulted the program for providing too few protections for U.S. workers. DHS summarized the purpose of its H-2A final rule as being “to provide agricultural employers with an orderly and timely flow of legal workers, thereby decreasing their reliance on unauthorized workers, while protecting the rights of laborers.”<sup>9</sup> The DHS and DOL H-2A rules became effective on January 17, 2009.<sup>10</sup> Under the Obama Administration, in February 2010, DOL published a new H-2A final rule to replace the December 2008 rule.<sup>11</sup> The new DOL H-2A final rule took effect on March 15, 2010.

DHS’s 2008 H-2A rule<sup>12</sup> modifies previous limitations on an H-2A worker’s period of stay in the United States. Under prior regulations, an H-2A worker who had spent three years in the United States had to remain outside the country for six months before he or she could again be granted H-2A status. The DHS rule reduces this waiting period from six months to three months. It also extends the period of time that an H-2A worker can remain in the United States after the H-2A petition expires in order to prepare to depart or to seek an extension of stay based on a subsequent job offer, from 10 days to 30 days. In another change that facilitates continued H-2A employment, the DHS rule permits an H-2A worker who is awaiting an extension of stay based on a petition filed by a new employer (and accompanied by an approved labor certification) to begin the new job before the extension of stay is granted, provided that the new employer is a registered user in good standing of E-Verify, an electronic employment verification system administered by USCIS.<sup>13</sup>

The DHS rule establishes various new requirements under the H-2A program. It institutes a prohibition on payments by prospective H-2A workers to employers, recruiters, or other

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<sup>8</sup> U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement,” *73 Federal Register* 77110-77262, December 18, 2008 (hereafter cited as 2008 DOL H-2A rule); U.S. Department of Homeland Security, “Changes to Requirements Affecting H-2A Nonimmigrants,” *73 Federal Register* 76891-76914, December 18, 2008 (hereafter cited as 2008 DHS H-2A rule).

<sup>9</sup> DHS final H-2A rule, December 2008, p. 76891.

<sup>10</sup> Under the DOL final H-2A rule, the new DOL procedures were to apply fully to all employers with a date of need for workers on or after July 1, 2009. A hybrid of old and new procedures, as specified in rule, would apply during a transition period (dates of need between the January 2009 effective date and July 1, 2009). DOL subsequently published an interim final rule to extend this transition period to applications with a date of need for workers on or before January 1, 2010. See U.S. Department of Labor, Employment and Training Administration, “Temporary Agricultural Employment of H-2A Aliens in the United States,” *74 Federal Register* 17597-17601, April 16, 2009.

<sup>11</sup> U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Temporary Agricultural Employment of H-2A Aliens in the United States,” *75 Federal Register* 6884-6995, February 12, 2010 (hereafter cited as 2010 DOL H-2A rule). The Obama Administration had tried in 2009 to temporarily suspend the 2008 DOL H-2A rule. See U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Temporary Employment of H-2A Aliens in the United States,” *74 Federal Register* 25972-26015, May 29, 2009, and U.S. Department of Labor, Employment and Training Administration, “U.S. Department of Labor Proposes to Suspend H-2A Rule,” news release, March 13, 2009. On June 29, 2009, the scheduled effective date of the rule suspension, the U.S. District Court for the Middle District of North Carolina issued a preliminary injunction against DOL’s suspension of its December 2008 final H-2A Rule, <http://www.foreignlaborcert.doleta.gov>.

<sup>12</sup> For a summary of the DHS rule, see DHS final H-2A rule, December 2008, pp. 76891-76892.

<sup>13</sup> For information on E-Verify, see CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

employment service providers where the payments are a condition of obtaining H-2A employment, and provides for the denial or revocation of H-2A petitions in the event of petitioner violations. The DHS H-2A rule limits participation in the H-2A program to nationals of countries designated by DHS, with the concurrence of the Department of State (DOS). The list of eligible countries is to be published annually.<sup>14</sup> In addition, the DHS rule outlines a new Temporary Worker Visa Exit Program Pilot, under which an H-2A worker admitted to the United States at a participating port of entry must depart the country through a participating port and show designated biographic and/or biometric information.<sup>15</sup> As discussed below, DHS subsequently expanded the pilot program to include both H-2A and H-2B workers.

DOL's 2010 H-2A rule reestablishes the type of H-2A labor certification process in effect prior to the 2008 rule. It reverses changes in the 2008 rule that established an attestation-based labor certification process for H-2A employers.<sup>16</sup> At the same time, the 2010 rule retains some of the changes to the labor certification process included in the 2008 rule. Under the 2010 rule, prospective H-2A employers are required to submit a job order to the state workforce agency (SWA) serving the area of intended employment before filing a labor certification application. The job order must be submitted between 60 and 75 days before the employer's date of need for workers, and must include the job qualifications and requirements as well as the required minimum benefit and wage provisions. Either the SWA or DOL may require the employer to submit documentation in support of any job qualification specified in the job offer. Once reviewed and cleared by the SWA, the job order becomes the basis for recruiting U.S. workers to fill the employer's job openings. The employer then must file the labor certification application with DOL at least 45 days before the date of need.

The 2010 DOL rule amends the H-2A wage provisions to require that H-2A employers pay their workers the highest of four wage rates: the federal or applicable state minimum wage, the prevailing wage rate,<sup>17</sup> the adverse effect wage rate (AEWR),<sup>18</sup> or the agreed-upon collective

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<sup>14</sup> In January 2010, DHS published a notice, effective on January 18, 2010, identifying 39 countries whose nationals are eligible to participate in the H-2A and H-2B programs. The countries are: Argentina; Australia; Belize; Brazil; Bulgaria; Canada; Chile; Costa Rica; Croatia; Dominican Republic; Ecuador; El Salvador; Ethiopia; Guatemala; Honduras; Indonesia; Ireland; Israel; Jamaica; Japan; Lithuania; Mexico; Moldova; the Netherlands; New Zealand; Nicaragua; Norway; Peru; Philippines; Poland; Romania; Serbia; Slovakia; South Africa; South Korea; Turkey; Ukraine; United Kingdom; and Uruguay. See U.S. Department of Homeland Security, "Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Visa Programs," *75 Federal Register* 2879, January 19, 2010. The notice discusses the factors taken into account in designating eligible countries.

<sup>15</sup> In a notice published the same day as the DHS rule, DHS's U.S. Customs and Border Protection announced the establishment of the pilot program and detailed its requirements. The designated ports of entry are San Luis, Arizona, and Douglas, Arizona. H-2A workers admitted to the United States through either port on or after August 1, 2009, are subject to the program. See U.S. Department of Homeland Security, U.S. Customs and Border Protection, "Notice of H-2A Temporary Worker Visa Exit Program Pilot," *73 Federal Register* 77049-77050, December 18, 2008. As discussed below, DHS subsequently expanded the pilot program to include both H-2A and H-2B workers.

<sup>16</sup> Under this attestation-based process, prospective H-2A employers had to attest in their applications, under threat of penalties, that they complied with H-2A program requirements.

<sup>17</sup> The prevailing wage rate is the average wage paid to similarly employed workers in the occupation in the area of intended employment. Prevailing wage rates are based on DOL-funded surveys conducted by the states. See archived CRS Report RL34739, *Temporary Farm Labor: The H-2A Program and the U.S. Department of Labor's Proposed Changes in the Adverse Effect Wage Rate (AEWR)*, by Gerald Mayer (hereafter cited as archived CRS Report RL34739).

<sup>18</sup> The AEWR is set by DOL for each state or region, based upon data gathered by the Department of Agriculture in its quarterly Farm Labor Survey. For 2009, the AEWR ranged from \$8.77 for Alabama, Georgia, and South Carolina to \$11.06 for Hawaii. 2009 AEWRs for all states are available in U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Labor Certification Process for the Temporary Employment of Aliens in (continued...)"

bargaining wage. Reversing changes made by the 2008 rule to the methodology for calculating the AEWR, the 2010 rule reinstates the pre-2008 wage requirement with the addition of the agreed-upon collective bargaining wage.<sup>19</sup> Explaining the addition of the collective bargaining wage, the 2010 rule states:

This amendment requires employers to use a collective bargaining wage if it is the highest wage, thus avoiding the potential payment of a collective bargaining wage that is less than the other wages. At the same time, it acknowledges the role of the collectively bargained wage as a potential legitimate wage.

The 2010 rule reinstates the fifty-percent rule, which generally requires an H-2A employer to hire any qualified U.S. worker who applies for a position until 50% of the work contract under which the H-2A workers are employed has elapsed. The 2008 rule would have phased out this requirement.

Among its other provisions, the 2010 rule includes a system of post-certification audits of H-2A employer applications, a revised version of the system in the 2008 rule, and expands DOL's debarment authority. It also retains the expansion of the definition of agricultural labor or services for H-2A program to include logging employment, which was included in the 2008 rule.

## **H-2B Program**

The H-2B program provides for the temporary admission of foreign workers to the United States to perform temporary non-agricultural service or labor, if unemployed U.S. workers cannot be found. Foreign medical graduates coming to perform medical services are explicitly excluded from the program. In order for work to qualify as temporary under the H-2B visa, the employer's need for the duties to be performed by the worker must be a one-time occurrence, seasonal need, peak load need, or intermittent need.<sup>20</sup> As discussed below, the new H-2B rules amend other aspects of the definition of temporary work for H-2B purposes. An alien's total period of stay as an H-2B worker may not exceed three consecutive years.<sup>21</sup> An H-2B alien who has spent three years in the United States may not seek an extension of stay or be readmitted to the United States as an H-2B worker until he or she has been outside the country for a specified period.

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

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Agriculture and Logging in the United States: 2009 Adverse Effect Wage Rates, Allowable Charges for Agricultural and Logging Workers' Meals, and Maximum Travel Subsistence Reimbursement," *75 Federal Register* 26016, May 29, 2009.

<sup>19</sup> Under pre-2008 regulations, H-2A employers were required to pay workers the highest of the federal or state minimum wage, the prevailing wage rate, or the AEWR. The 2008 rule retained this language, but changed the methodology for calculating the AEWR, which, according to DOL, had the effect of setting the AEWRs at prevailing wage rates. For a discussion of the wage provisions in the 2008 rule, see DOL final H-2A rule, December 2008, pp. 77167-77168, and archived CRS Report RL34739.

<sup>20</sup> For definitions of these types of need, see 8 C.F.R. §214.2(h)(6)(ii)(B).

<sup>21</sup> 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.

wage rate. Unlike H-2A employers, they are not subject to the AEW and do not have to provide housing, transportation,<sup>22</sup> and other benefits required under the H-2A program.

H-2B workers are, for the most part, low skilled, but the H-2B program is not limited to workers of a particular skill level. Over the years, the H-2B visa has been used to import a variety of workers, including entertainers and athletes. According to DOL labor certification data, top H-2B occupations in recent years, in terms of the number of workers certified, have included landscape laborer, forest worker, housekeeping cleaner, and construction worker.

## **H-2B Visas Issued and the Statutory Cap**

Unlike the H-2A visa, the H-2B visa is subject to a statutory numerical limit. Under the INA, the total number of aliens who may be issued H-2B visas or otherwise provided H-2B status during a fiscal year may not exceed 66,000.<sup>23</sup> This cap does not apply to petitions for current H-2B workers to extend their stay, change their terms of employment, or change or add employers. 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.<sup>24</sup> 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, the agency responsible for implementing the cap, acknowledged that the H-2B cap was exceeded in FY2003.

H-2B provisions enacted as part of the FY2005 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (P.L. 109-13),<sup>25</sup> divided the annual 66,000 cap on the H-2B visa into two separate six-month caps of 33,000 covering the first and second halves of the fiscal year. P.L. 109-13 also included a temporary provision for FY2005 and FY2006, under which returning H-2B workers who had been counted against the H-2B cap during any one of the three prior fiscal years were not to be counted again. A total of 89,135 H-2B visas were issued in FY2005 and 122,541 H-2B visas were issued in FY2006. The John Warner National Defense Authorization Act for FY2007 (P.L. 109-364) extended through FY2007 the provision exempting returning H-2B workers from the H-2B annual cap. In FY2007, DOS issued 129,547 H-2B visas, of which 69,320 were issued to returning H-2B workers. The H-2B returning worker exemption expired on September 30, 2007. In FY2008, the H-2B cap was exceeded with H-2B visa issuances totaling 94,304. According to USCIS, the cap was exceeded because a greater percentage than expected of H-2B workers on approved petitions applied for and received H-2B visas.<sup>26</sup> In FY2009, H-2B visa issuances fell to 44,847, the lowest level since 2000.

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<sup>22</sup> While not subject to the broader transportation requirements of the H-2A program, H-2B employers are required 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.

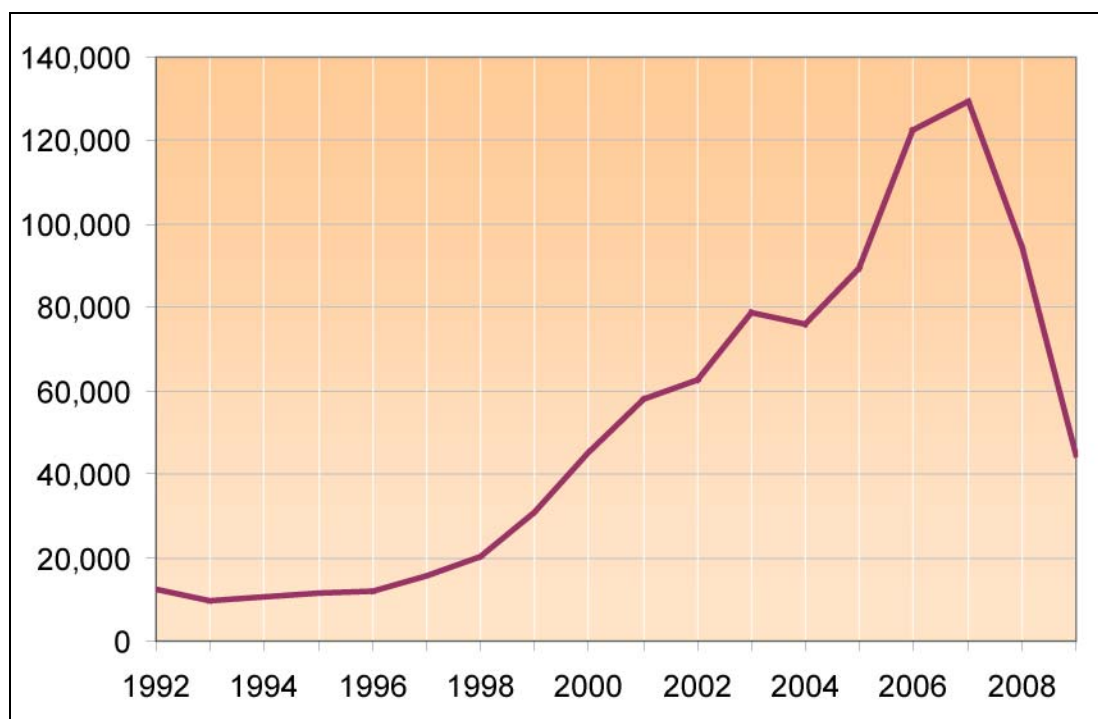
<sup>23</sup> See INA §214(g)(1)(B).

<sup>24</sup> There is no precise measure available of the number of the aliens granted H-2B status in any given year. While visa data provide an approximation, these data are subject to limitations, among them that not all H-2B workers are necessarily issued visas and not all aliens who are issued visas necessarily use them to enter the United States.

<sup>25</sup> See discussion of S. 352/H.R. 793 in the 109<sup>th</sup> Congress in the **Appendix**.

<sup>26</sup> Telephone conversation with USCIS, March 17, 2009.

Figure 2. H-2B Visas Issued, FY1992-FY2009



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

## DHS and DOL H-2B Regulations

The DHS and DOL December 2008 final rules on the H-2B visa<sup>27</sup> make various changes to the H-2B program. The DHS rule changes the definition of temporary employment for H-2B purposes. It requires the prospective H-2B employer to establish that his or her need for the worker will end in the “near, definable future.” While the new rule states, as did the prior regulation, that the employer’s need will generally be for a period of one year or less, it also provides that in the case of a one-time occurrence, the employer’s need could last up to three years.<sup>28</sup> The DOL final rule requires, however, that in cases of need lasting more than 18 months, the H-2B employer must re-test the labor market to determine whether qualified U.S. workers are available.

Other changes to DHS’s H-2B regulations mirror changes to its H-2A regulations. The 2008 DHS H-2B rule institutes a prohibition on payments by prospective H-2B workers to employers, recruiters, or other employment service providers where the payments are a condition of obtaining H-2B employment, and provides for the denial or revocation of H-2B petitions in the event of petitioner violations. DHS’s H-2B rule, like its H-2A rule, limits participation in the H-

<sup>27</sup> U.S. Department of Homeland Security, “Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers,” 73 *Federal Register* 78104-78130, December 19, 2008 (hereafter cited as DHS final H-2B rule, December 2008); U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes,” 73 *Federal Register* 78020-78069, December 19, 2008 (hereafter cited as DOL final H-2B rule, December 2008).

<sup>28</sup> The DOL final rule further clarifies that except in the case of a one-time occurrence, an H-2B labor certification application based on an employer’s need lasting more than 10 months will be denied, absent unusual circumstances.



2B program to nationals of countries to be designated annually by DHS, with the concurrence of DOS.<sup>29</sup> In addition, DHS's rule provides for the inclusion of H-2B workers in the new Temporary Worker Exit Visa Program Pilot (discussed above).<sup>30</sup>

DHS's 2008 H-2B rule further amends prior regulations to require that employers have an approved labor certification before they can submit a petition for H-2B workers. Previously, an employer whose H-2B labor certification application was denied by DOL could submit an H-2B petition to DHS containing countervailing evidence. In response to this new requirement for an approved certification, DOL has established an appeals process in cases of H-2B labor certification denials.

Under DOL's 2008 H-2B rule, the H-2B labor certification process is now an attestation-based process. Prospective H-2B employers attest in their applications, under threat of penalties, that they have complied with program requirements. They are required to begin recruiting U.S. workers to fill their job openings before filing a labor certification application and to submit a recruitment report as part of that application. DOL's H-2B rule also establishes a system of post-certification audits.

DOL's H-2B rule includes new enforcement measures. It provides for the Wage and Hour Division (WHD) of the department's Employment Standards Administration to enforce H-2B program requirements, pursuant to an agreement with DHS. Under the rule, WHD is responsible for conducting investigations and assessing civil money penalties for violations. The rule establishes a separate mechanism for the debarment of employers from the H-2B program.

## Unauthorized Immigration

The current discussion of guest worker programs has been prompted, in part, by the high levels of illegal, or unauthorized, immigration to the United States and related deaths along the U.S.-Mexican border. Analyses by the Pew Hispanic Center based on data from the Current Population Survey (CPS) and other sources estimate that the unauthorized resident alien population totaled 11.9 million in March 2008.<sup>31</sup> DHS's estimates of the unauthorized alien population are somewhat lower. Based on data from the American Community Survey and other sources, DHS

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<sup>29</sup> In January 2010, DHS published a notice, effective on January 18, 2010, identifying 39 countries whose nationals are eligible to participate in the H-2A and H-2B programs. The countries are Argentina; Australia; Belize; Brazil; Bulgaria; Canada; Chile; Costa Rica; Croatia; Dominican Republic; Ecuador; El Salvador; Ethiopia; Guatemala; Honduras; Indonesia; Ireland; Israel; Jamaica; Japan; Lithuania; Mexico; Moldova; the Netherlands; New Zealand; Nicaragua; Norway; Peru; Philippines; Poland; Romania; Serbia; Slovakia; South Africa; South Korea; Turkey; Ukraine; United Kingdom; and Uruguay. See U.S. Department of Homeland Security, "Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Visa Programs," 75 *Federal Register* 2879, January 19, 2010. The notice discusses the factors taken into account in designating eligible countries.

<sup>30</sup> In a notice published on December 19, 2008, DHS's U.S. Customs and Border Protection announced expansion of the pilot program to cover H-2B workers. As expanded, H-2A or H-2B workers admitted to the United States through either the San Luis, Arizona, or Douglas, Arizona, port of entry on or after August 1, 2009 must depart the country through either port and show designated biographic and biometric information. See U.S. Department of Homeland Security, U.S. Customs and Border Protection, "Notice of Expansion of Temporary Worker Visa Exit Program Pilot to Include H-2B Temporary Workers," 73 *Federal Register* 77817-77818, December 19, 2008.

<sup>31</sup> Jeffrey S. Passel and D'Vera Cohn, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow*, Pew Hispanic Center, October 2, 2008.

estimates that the unauthorized resident population totaled 11.6 million in January 2008 and 10.8 million in January 2009.<sup>32</sup>

Mexico remains the largest source country for unauthorized immigration. According to the Pew Hispanic Center, the unauthorized Mexican population in the United States stood at about 7.0 million in 2008, comprising 59% of the total unauthorized population. DHS estimates that there were 6.7 million unauthorized Mexicans residing in the United States in 2009, comprising 62% of the total unauthorized population. With respect to migrant deaths, data from the United States Border Patrol (USBP) indicate that more than 300 migrants have died at the U.S.-Mexican border each year since FY2000. In FY2009, there were 423 migrant deaths at the border.<sup>33</sup>

Unauthorized workers are a subpopulation of the total unauthorized alien population. According to an April 2009 report by the Pew Hispanic Center, there were an estimated 8.3 million unauthorized workers in the U.S. civilian labor force in March 2008.<sup>34</sup> These workers represented about 5.4% of the labor force. In some occupations and industries, however, their share of the labor force was considerably higher. The report states:

Disproportionately likely to be less educated than other groups, unauthorized immigrants also are more likely to hold low-skilled jobs and less likely to be in white-collar occupations. Consequently, undocumented immigrants are overrepresented in several sectors of the economy, including agriculture, construction, leisure/hospitality, and services.<sup>35</sup>

**Table 1** presents data from the Pew Hispanic Center report on occupations with high concentrations of unauthorized workers. Unauthorized aliens accounted for between 10% and 25% of workers in the occupations shown.

**Table 1. Estimates of Unauthorized Employment in Selected Occupations, 2008**

Occupation	Unauthorized Workers (in Occupation)
Farming	25%
Building, Groundskeeping & Maintenance	19%
Construction	17%
Food Preparation & Serving	12%
Production	10%

**Source:** Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Pew Hispanic Center, April 14, 2009.

<sup>32</sup> U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009*, by Michael Hoefler, Nancy Rytina, and Bryan C. Baker, January 2010.

<sup>33</sup> See CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by Chad C. Haddal

<sup>34</sup> Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Pew Hispanic Center, April 14, 2009.

<sup>35</sup> *Ibid.*, p. 14.

Unauthorized aliens are similarly overrepresented in certain industries relative to their 5.4% share of the overall labor force. **Table 2** presents data from the Pew Hispanic Center report on industries with high concentrations of unauthorized workers.

**Table 2. Estimates of Unauthorized Employment in Selected Industries, 2008**

Industry	Unauthorized Workers (in Industry)
Construction	14%
Agriculture	13%
Leisure & Hospitality	10%
Professional & Business Services	7%
Manufacturing	7%

**Source:** Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Pew Hispanic Center, April 14, 2009

According to the Pew Report, unauthorized workers represent an even larger share of the workforce in certain subsets of major industries. For example, “they represent 28% of workers in the landscaping industry, 23% of those in private household employment and 20% of those in the dry cleaning and laundry industry.”<sup>36</sup>

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 111<sup>th</sup> Congress

Several bills related to guest worker programs have been introduced in the 111<sup>th</sup> Congress. They include bills known as the AgJOBS Act of 2009 to reform the H-2A program and establish a legalization program for certain agricultural workers, as well as bills to make various changes to the H-2B program.<sup>37</sup>

### AgJOBS Bills

Bills entitled the Agricultural Job Opportunities, Benefits, and Security Act of 2009 (AgJOBS Act; H.R. 2414, S. 1038) propose to overhaul the H-2A agricultural worker program. The House bill was introduced by Representative Berman and has a bipartisan group of cosponsors. The highly similar, but not identical, Senate bill was introduced by Senator Feinstein and also has bipartisan cosponsorship. An AgJOBS title is also included in the Comprehensive Immigration Reform ASAP Act of 2009 (H.R. 4321).

<sup>36</sup> *Ibid.*, p. 16.

<sup>37</sup> For guest worker bills introduced in earlier Congresses, see the **Appendix**.



Both H.R. 2414 and S. 1038 would streamline the process of importing H-2A workers, particularly for jobs covered by collective bargaining agreements. Under these bills, 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 ensure, 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 be subject to a longer list of required assurances. Among these, the employer would have to ensure 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 to ensure 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 to certify within seven days of the filing date that the employer had filed the required application. The employer could then file a petition with DHS for H-2A workers.

Both H.R. 2414 and S. 1038 would likewise 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 2009 level for three years after the date of enactment, and employers could provide housing allowances, in lieu of housing, to their workers if the governor of the relevant state certified that adequate housing was available. 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.

Both AgJOBS bills also propose a legalization program for agricultural workers. Under both bills, the Secretary of DHS would grant "blue card status" to an alien worker who had performed at least 863 hours, or 150 work days, of agricultural employment in the United States during the 24-month period ending on December 31, 2008, and who met other requirements. Under the House bill, as an alternative to performing the requisite amount of work, an alien could instead show that he or she had earned at least \$7,500 from agricultural employment during that same 24-month period. No more than 1,350,000 blue cards could be issued during the five-year period beginning on the date of enactment. To be eligible to adjust to LPR status, an alien in blue card status would have to, among other requirements, perform either (1) at least 100 work days of U.S. agricultural work per year for the five years after enactment, (2) at least 150 work days of U.S. agricultural work per year for the three years after enactment, or (3) at least 150 work days of U.S. agricultural work per year for three of the four years after enactment and at least 100 work days of U.S. agricultural work for one of the four years after enactment.<sup>38</sup> Existing numerical limits under the INA would not apply to adjustments of status under the bill.<sup>39</sup>

## **H-2B Bills**

Several H-2B bills have been introduced in the House and Senate. Some propose to significantly reform the H-2B visa, which currently operates under the 2008 DHS and DOL rules discussed

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<sup>38</sup> A "work day" is defined in the legislation as a day in which the individual is employed for at least 5.75 hours in agricultural employment.

<sup>39</sup> For information on numerical limits, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem (hereafter cited as CRS Report RL32235).

above. The H-2B Program Reform Act of 2009 (H.R. 4381), introduced by Representative Lofgren, and the Increasing American Wages and Benefits Act of 2010 (S. 2910), introduced by Senator Sanders, would amend the INA to add requirements for the admission of H-2B workers. Under H.R. 4381, prospective H-2B employers would have to register with DOL, which would set the number of H-2B positions that each employer could use. Expected start dates for H-2B employment by registered employers would be used by DHS to apportion H-2B positions among quarters of the fiscal year. H.R. 4381 would also establish new wage requirements for the H-2B program. S. 2910 would likewise set new H-2B wage requirements (different from those under H.R. 4381) and would only permit the hiring of H-2B workers in occupational classifications with a specified level of wage growth over the previous year. Among the other new requirements in S. 2910, H-2B employers would be subject to a three-fourths guarantee, as currently applies under the H-2A program, in which employers must guarantee to offer workers employment for at least three-fourths of the contract period. The provisions of S. 2910 are also incorporated in H.R. 4321.

Other H-2B bills seek to reenact an H-2B returning worker provision (discussed above). Representative Kratovil and Senator Mikulski have introduced bills (H.R. 1934 and S. 388, respectively) to temporarily reinstate the H-2B returning worker provision that expired at the end of FY2007. Representative Stupak's H-2B bill (H.R. 1136) proposes to enact a revised version of the expired H-2B returning worker exemption. This bill would exempt from the H-2B cap workers who were *present* in the United States as H-2B nonimmigrants in any one of the prior three fiscal years, but who were not necessarily counted against the cap in any of those years. Under H.R. 1136, this exemption would be permanent.

## Policy Considerations

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

## Comparison of Program Requirements

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

The area of wages provides an example. Under the H-2B program, employers must pay their workers at least the prevailing wage rate. Employers importing agricultural workers through the H-2A program are subject to potentially higher wage requirements, as explained above. 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 former 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.”<sup>40</sup> 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.<sup>41</sup>

## 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 a 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 an essential element of a guest worker proposal,<sup>42</sup> 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 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.<sup>43</sup> Approximately 2.7 million individuals have adjusted to LPR status under these programs.

Recent H-2A reform bills suggest a willingness on the part of some policy makers 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

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<sup>40</sup> 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.

<sup>41</sup> 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.

<sup>42</sup> For example, in an August 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.”

<sup>43</sup> The general legalization program is at INA §245A, and the SAW program is at INA §210.

legalization process and associated requirements. Major H-2A reform proposals introduced in the 107<sup>th</sup> Congress (S. 1313/H.R. 2736 and S. 1161) (discussed in the **Appendix**), for example, would have established similarly structured earned adjustment programs for agricultural workers. Under these 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 multiyear 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 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.<sup>44</sup> To partially address the increased demand for visa numbers, the Immigration Act of 1990 (P.L. 101-649) 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.

## **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.<sup>45</sup> 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.

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. For example, some past legislative proposals to reform the H-2A program sought to overhaul current labor certification requirements by establishing a system of worker registries.<sup>46</sup> Another option suggested by some is to adopt a form of a more streamlined labor market test known as labor attestation, in which employers attest to various conditions. As discussed above, DOL published final rules in December 2008 to amend its H-2A and H-2B regulations to adopt an attestation-based labor certification process. Some argue that labor attestation is inadequate for unskilled jobs without educational requirements. 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.

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<sup>44</sup> See CRS Report RL32235.

<sup>45</sup> 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, *The Effects on U.S. Farm Workers of an Agricultural Guest Worker Program*, by Linda Levine.

<sup>46</sup> See discussion of legislation in the 105<sup>th</sup>-107<sup>th</sup> Congresses in the **Appendix**.



## 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 annually. 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 107<sup>th</sup> Congress, but never introduced as legislation, included a different type of numerical cap—one that would have varied annually based on 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.

Some more recent guest worker proposals, such as the Y-2 visa proposed in S. 1639 in the 110<sup>th</sup> Congress, include numerical caps that would vary based on demand for the visa.<sup>47</sup>

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....<sup>48</sup>

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

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<sup>47</sup> See discussion of S. 1639 in the 110<sup>th</sup> Congress in the **Appendix**.

<sup>48</sup> INA §218(g)(2).

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 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 become available only 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**

New guest worker programs have not been the subject of much discussion in the 111<sup>th</sup> Congress. In the area of guest workers, attention has been focused on the new H-2A and H-2B rules and possible legislative changes to these existing programs. It remains to be seen whether any major proposals for new guest workers will emerge.

## **Appendix. Guest Worker Legislation in the 105<sup>th</sup>-110<sup>th</sup> Congresses**

### **Legislation in the 105<sup>th</sup>-107<sup>th</sup> Congresses**

Major guest worker legislation introduced in the 105<sup>th</sup>, 106<sup>th</sup>, and 107<sup>th</sup> Congresses was limited to the H-2A program. No major nonagricultural guest worker bills were offered.<sup>49</sup> In the 105<sup>th</sup> Congress, for example, a Senate-approved amendment to S. 2260, an FY1999 Departments of Commerce, Justice, and State appropriations bill, would have replaced the existing labor certification process with a new set of procedures for importing H-2A workers. It would have established a system of agricultural worker registries containing the names of eligible U.S. agricultural workers. Employers interested in importing H-2A workers would first have applied to DOL for the referral of U.S. workers through a registry search. If a sufficient number of workers were not found, the employer would have been allowed to import H-2A workers to cover the shortfall. The Senate measure also would have changed wage and other requirements. The provision was not enacted.

Provisions to establish a system of worker registries and to change existing H-2A-related requirements were likewise included in two H-2A reform proposals introduced in the 106<sup>th</sup> Congress (S. 1814/H.R. 4056<sup>50</sup> 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, 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 106<sup>th</sup> Congress. H.R. 4548, the other reform bill before the 106<sup>th</sup> 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 106<sup>th</sup> Congress, key bills before the 107<sup>th</sup> 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. 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.

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<sup>49</sup> During the 107<sup>th</sup> 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.

<sup>50</sup> 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.



## **Legislation in the 108<sup>th</sup> 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 108<sup>th</sup> 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.

Congressional committees held related hearings during the 108<sup>th</sup> 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 Act; 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 107<sup>th</sup> 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.<sup>51</sup>

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.

### **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 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.

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, 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.

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<sup>51</sup> For information on numerical limits, see CRS Report RL32235.

## **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 could not 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 online "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, including that he or she was offering wages to H-2B or H-2C workers that were the greater of the prevailing wage rate or the actual wage paid by the employer to other similarly employed and qualified workers, and that he or she 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-1D 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 could not 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 were 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 have been 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 had 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 that 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 nonimmigrants could only have been admitted from abroad. They would have applied to be added to a database of workers and would have had to remain 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, had made certain certifications to Congress. The Secretary of Homeland Security would have had to certify, among other items, 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 overstayed 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 entered 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 had 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 after they had 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.<sup>52</sup>

### **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. S. 1461/H.R. 2899 would have placed no numerical limit on the H-4A or H-4B visas.

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<sup>52</sup> This description of S. 1387 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-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.

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 providing 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 had been habitually unlawfully present in the United States during the six-month period ending on December 8, 2003. In order to be eligible for W status, the alien would first have 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 109<sup>th</sup> Congress**

As in the 108<sup>th</sup> Congress, bills were introduced in the 109<sup>th</sup> 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). Subsequently, the John Warner National Defense Authorization Act for FY2007 (P.L. 109-364) extended one of the temporary H-2B provisions in P.L. 109-13.

As discussed below, the Comprehensive Immigration Reform Act of 2006 (S. 2611), as passed by the Senate, would have reformed the H-2A program and established a new guest worker program for nonagricultural workers. 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, did not contain any guest worker provisions.

The 109<sup>th</sup> Congress also 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 held hearings on employment eligibility verification and work site enforcement. The Senate Judiciary Committee’s Subcommittee on Immigration, Border Security, and Citizenship held hearings on immigration reform issues, including the establishment of a new guest worker program. The full Senate Judiciary Committee held hearings on comprehensive immigration reform, at which two major reform proposals (S. 1033/H.R. 2330 and S. 1438) were discussed.

### **S. 352/H.R. 793 and Related H-2B Legislation**

The Save Our Small and Seasonal Businesses Act (S. 352/H.R. 793),<sup>53</sup> 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, 2005, 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 caps at 33,000 the number of H-2B slots available during the first six months of a fiscal year. It also 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. In addition,

the H-2B title of P.L. 109-13 contained a temporary provision, initially scheduled to expire at the end of FY2006, that kept aliens who had been counted toward the H-2B cap in any of the past three years from being counted again. The John Warner National Defense Authorization Act for

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<sup>53</sup> 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 of 2005.



FY2007 (P.L. 109-364; §1074) extended this returning H-2B worker exemption through FY2007. Thus, aliens who had been counted toward the H-2B cap in FY2004, FY2005, or FY2006 were not to be counted toward the FY2007 cap.

## **S. 2611**

In March 2006, the Senate Judiciary Committee considered an immigration measure by Chairman Specter, known as the Chairman's mark. Among its many provisions, this measure, as amended and approved by the Committee, proposed to reform the H-2A program and establish a new guest worker program for nonagricultural workers. The Committee-approved measure evolved into the Comprehensive Immigration Act of 2006 (S. 2611), which the Senate passed, as amended, on May 25, 2006 on a vote of 62 to 36.

Title VI, Subtitle B of S. 2611 contained provisions on agricultural workers. These provisions were similar to those in the Agricultural Job Opportunities, Benefits, and Security Act of 2005 (AgJOBS Act; S. 359/H.R. 884), discussed below. Like S. 359/H.R. 884, Title VI, Subtitle B of S. 2611 would have streamlined the process of importing H-2A workers, particularly for jobs covered by collective bargaining agreements. 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.

Title VI, Subtitle B of S. 2611 would have made 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. 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.

Title VI, Subtitle B of S. 2611 also proposed a legalization program for agricultural workers. This program followed the basic design of the legalization program in S. 359/H.R. 884, but included different work and other requirements and used different terminology. Under the program in S. 2611, the Secretary of DHS would have conferred "blue card status" (akin to S. 359/H.R. 884's temporary resident status)<sup>54</sup> on an alien worker who had performed at least 863 hours, or 150

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<sup>54</sup> The blue card status proposed under this bill is different than the blue card status proposed in S. 2087 (discussed below).

work days, of agricultural employment in the United States during the 24-month period ending on December 31, 2005, and met other requirements. No more than 1.5 million blue cards could have been issued during the five-year period beginning on the date of enactment. To be eligible to adjust to LPR status, the alien in blue card status would have had to, among other requirements, perform either at least 575 hours of U.S. agricultural work per year for the five years after enactment, or at least 863 hours of U.S. agricultural work per year for three of the five years after enactment. Existing numerical limits under the INA would not have applied to adjustments of status under the bill.<sup>55</sup>

Title IV, Subtitle A of S. 2611 proposed to establish a new H-2C nonagricultural guest worker visa, which, as amended on the Senate floor, would have been capped at 200,000 annually. The H-2C visa would have covered aliens coming temporarily to the United States to perform temporary labor or services other than the labor or services covered under the H-2A visa or other specified visa categories. A prospective H-2C employer would have had to file a petition with DHS. In the petition the employer would have had to attest to various items, including that the employer was offering wages to H-2C workers that were the greater of the prevailing wage rate for the occupational classification in the area of employment or the actual wage paid by the employer to other similarly employed and qualified workers; and that there were not sufficient qualified and available U.S. workers to perform the work. Prior to filing the petition, the prospective employer also would have been required to make efforts to recruit U.S. workers in accordance with DOL regulations. To be eligible for H-2C status, the alien would have needed to have evidence of employment and meet other requirements.

An H-2C worker's initial authorized period of stay would have been three years, and could have been extended for an additional three years. H-2C aliens could not have changed to another nonimmigrant visa category. As in S. 1438 (discussed below), an H-2C alien who failed to depart the United States when required to do so would have been ineligible for any immigration relief or benefit, except for specified forms of humanitarian relief. At the same time, H-2C nonimmigrants in the United States could have applied to adjust to LPR status. Petitions for employment-based *immigrant* visas could have been filed by an H-2C worker's employer or, if the H-2C worker had maintained H-2C status for a total of four years, by the worker.

### **S. 359/H.R. 884**

The Agricultural Job Opportunities, Benefits, and Security Act of 2005 (AgJOBS Act; S. 359/H.R. 884) proposed 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 was very similar to the AgJOBS bills before the 108<sup>th</sup> Congress (S. 1645/H.R. 3142, S. 2823). Like these bills, S. 359/H.R. 884 would have streamlined the process of importing H-2A workers, particularly for jobs covered by collective bargaining agreements. 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

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<sup>55</sup> For information on numerical limits, see CRS Report RL32235.

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. 359/H.R. 884 would have made 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. 359/H.R. 884, an H-2A worker would have been admitted for an initial period of employment not to exceed 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. 359/H.R. 884 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 had 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 had 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 have applied to adjustments of status under the bills.<sup>56</sup>

## **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, was a revision of a bill of the same name that he had introduced in the 108<sup>th</sup> Congress. H.R. 3857 would have streamlined the process of importing H-2A workers. Prospective H-2A employers would have had to file petitions with DHS containing certain attestations; they would not have filed applications with DOL as they currently do. Employers would have had to attest that the job was temporary or seasonal; that they would provide workers with required benefits, wages, and working conditions; that they had made efforts to recruit U.S. workers; and that they would offer the job to any equally qualified, available U.S. worker who applied. Unless an employer's application was incomplete or obviously inaccurate, DHS would have provided a decision on the petition within seven days of the filing date.

H.R. 3857 would have changed current H-2A requirements regarding minimum benefits, wages, and working conditions. Under the bill, H-2A employers would have had to pay workers the higher of the prevailing wage rate or the applicable state minimum wage; employers would not have been subject to the adverse effect wage rate (discussed above). With respect to housing,

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<sup>56</sup> For information on numerical limits, see CRS Report RL32235.

employers could have provided allowances, in lieu of housing, to their workers if the governor of the relevant state certified that adequate housing was available.

Under H.R. 3857, an H-2A worker would have been admitted for an initial period of employment not to exceed 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 20 months. H.R. 3857 would not have established a mechanism for agricultural workers to obtain LPR status.

## **S. 2087**

The Agricultural Employment and Workforce Protection Act of 2005 (S. 2087), introduced by Senator Chambliss, would have reformed the H-2A program. It would have eliminated the current limitation that H-2A nonimmigrants can perform only temporary or seasonal work and would have broadened the definition of agricultural labor or services for purposes of the H-2A visa to cover labor or services relating to such activities as dairy, forestry, landscaping, and meat processing. Like S. 359/H.R. 884 and H.R. 3857, S. 2087 proposed to streamline the process of importing H-2A workers. As under H.R. 3857, a prospective H-2A employer would have filed a petition with DHS containing certain attestations. Among them, the employer would have had to attest that he or she: would provide workers with required benefits, wages, and working conditions; had made efforts to recruit U.S. workers; and would offer the job to any equally qualified, available U.S. worker who applied. Unless the petition was incomplete or obviously inaccurate, DHS would have approved or denied it not later than seven days after the filing date.

Also like S. 359/H.R. 884 and H.R. 3857, S. 2087 would have changed current H-2A requirements regarding minimum benefits, wages, and working conditions. Under S. 2087, H-2A employers would have had to pay workers the higher of the prevailing wage rate or the applicable state minimum wage; employers would not have been subject to the adverse effect wage rate (discussed above). As under S. 359/H.R. 884 and H.R. 3857, 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 S. 2087, an H-2A worker would have been admitted for an initial period of employment of 11 months. The worker's stay could have been extended for up to two consecutive contract periods.

Unlike S. 359/H.R. 884 and H.R. 3857, S. 2087 would have established subcategories of H-2A nonimmigrants. It would have defined a "Level II H-2A worker" as a nonimmigrant who had been employed as an H-2A worker for at least three years and worked in a supervisory capacity. The bill would have made provision for an employer of a Level II H-2A worker, who had been employed in such status for not less than five years, to file an application for an employment-based adjustment of status for that worker. Such a Level II H-2A worker could have continued working in such status until his or her application was adjudicated. Under the bill, an "H-2AA worker" would have been defined as an H-2A worker who participated in the cross-border worker program the bill would have established. These H-2AA workers would have been allowed to enter and exit the United States each work day in accordance with DHS regulations.

In addition, the bill would have established a blue card program through which the Secretary of DHS could have conferred "blue card status" upon an alien, including an unauthorized alien, who had performed at least 1,600 hours of agricultural employment for an employer in the United States in 2005 and met other requirements. An alien could have been granted blue card status for a period of up to two years, at the end of which the alien would have had to return to his or her

home country. Aliens in blue card status would not have been eligible to change to a nonimmigrant status or adjust to LPR status.

### **S. 278**

The Summer Operations and Seasonal Equity Act of 2005 (S. 278), introduced by Senator Collins, would have made changes to the numerical limits under the H-2B program. It would have required 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 have exempted an alien who had been counted toward the annual H-2B numerical limit within the past three years from being counted again. Both of these provisions would have expired at the end of FY2007. S. 278 also would have required 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 have raised the H-2B cap and placed new requirements on the H-2B program. It would have increased 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 have been available during the first six months of a fiscal year. H.R. 1587 would have added new recruitment-related requirements for prospective H-2B employers, and would have mandated H-2B employer participation in the Basic Pilot program, an electronic employment eligibility verification system known now as E-Verify. H.R. 1587 also would have imposed new requirements on H-2B nonimmigrants. Among them, these aliens could no longer have been accompanied by family members.

### **S. 1918**

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

S. 1918 would have subjected 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 had to take specified steps to recruit U.S. workers, including authorizing DOL to post the job on the online America's Job Bank and on local job banks. Employers also 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 were that the employer would offer wages to H-2B or H-2C workers that were 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 have reviewed the application 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. 1918 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 alien's employer or collective bargaining agent or, after the alien had been employed in H-2B or H-2C status for at least three years, by the alien.

### **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, contained temporary worker provisions similar to those in the bill he had introduced in the 108<sup>th</sup> Congress. H.R. 3333 would have eliminated all the current "H" visa subcategories, including the H-2A and H-2B visas, and replaced them with a single "H" visa covering aliens coming temporarily to the United States to perform skilled or unskilled work. There would have been no cap on the H visa.

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

Prospective H nonimmigrants, who could only have been admitted from abroad, would have had to apply to be included in a database of workers, which DOL would have been tasked with establishing and maintaining. Once an employer's application had been approved, DOL would have provided the employer with a list of possible job candidates from the database. Aliens admitted on H visas could not have changed to another nonimmigrant status or been adjusted to LPR status in the United States.

Under H.R. 3333, the new H visa program could not have been implemented until the Secretary of Homeland Security made certain certifications to Congress, including that a congressionally mandated automated entry-exit system was fully operational<sup>57</sup> and that at least 80% of aliens who overstayed their nonimmigrants visas were removed within one year of overstaying.

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<sup>57</sup> For background information on the entry-exit system issue, see archived CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and Stephen R. Vina.

## **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 were similar in some respects to provisions in bills from the 108<sup>th</sup> Congress, including S. 1461/H.R. 2899, S. 2010, and S. 2381/H.R. 4262. S. 1033/H.R. 2330 would have established two new temporary worker visas under the INA—the H-5A and H-5B visas. It would have capped the H-5A visa initially at 400,000, and established a process for adjusting the cap in subsequent fiscal years based on demand for the visas. It would have placed no cap on the H-5B visa.

The H-5A visa would have covered 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 have filed visa applications on their own behalf. Employers would not have filed petitions with DHS for them, as they currently do to employ other nonimmigrant workers. Under S. 1033/H.R. 2330, the Secretary of State could have granted an H-5A visa to an alien who demonstrated an intent to perform work covered by the visa. To be eligible for H-5A status, an alien would have needed to have evidence of employment and to meet other requirements. Before hiring a prospective H-5A worker, an employer would have had to post the job opportunity on a DOL electronic job registry to recruit U.S. workers. H-5A employers also would have been 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 have been three years, and could have been extended for an additional three years. Under S. 1033/H.R. 2330, H-5A nonimmigrants in the United States could have adjusted to LPR status. Petitions for employment-based *immigrant* visas could have been filed by an H-5A worker’s employer or, if the worker had maintained H-5A status for a total of four years, by the worker.

The H-5B visa established by the bill would have covered 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 have been eligible for H-5B status. An H-5B alien’s authorized period of stay would have been six years. At the end of that six-year period, the alien could have applied to adjust to LPR status, subject to various requirements. Such adjustments of status would not have been 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 have established a new “W” temporary worker visa under the INA. S. 1438 would not have placed a cap on the W visa, but would have authorized DOL to do so in the future based on the recommendations of a task force the bill would have established. In addition, S. 1438 would have amended 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 have placed no limit on the number of aliens who could have received that status.

The W visa would have covered 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 have repealed the H-2B visa category. Prospective W nonimmigrants would have filed applications on their own behalf. Employers would not have filed petitions with DHS on behalf of W workers, as they currently do to employ other nonimmigrant workers. Under S. 1438, the Secretary of State could have granted a W visa to an alien who demonstrated an intent to perform eligible work. To be eligible for W status, the alien would have needed to have evidence of employment, among other requirements. An employer interested in hiring a W nonimmigrant would have had to apply for authorization to do so through an Alien Employment Management System to be established by DHS. Before an employer could have been granted such authorization, he or she would have had 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 have made 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 have been two years, and could *not* have been extended. After residing in his or her home country for one year, however, an alien could have been readmitted to the United States in W status. An alien's total period of admission as a W nonimmigrant could not have exceeded six years. These stay limitations would not have applied to aliens who spent less than six months a year in W status, or who commuted to the United States to work in W status but resided outside the country. S. 1438 would have made W nonimmigrants ineligible to change to another nonimmigrant status and would not have provided 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 have been 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 have applied to DHS for Deferred Mandatory Departure (DMD) status. Aliens lawfully present in the United States as nonimmigrants would not have been eligible. DHS could have granted an alien DMD status for a period of up to five years. Employers interested in employing aliens granted DMD status would have had to apply for authorization through the Alien Employment Management System mentioned above. Aliens in DMD status could not have applied to change to a nonimmigrant status or, unless otherwise eligible under INA §245(i), to adjust to LPR status.<sup>58</sup> Aliens who complied with the terms of DMD status and departed prior to its expiration date would not have been 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.<sup>59</sup> If otherwise eligible, these aliens could immediately have sought admission as nonimmigrants or immigrants. However, they would not have received any special consideration for admission. Aliens granted DMD status who failed to depart prior to the

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<sup>58</sup> For an explanation of INA §245(i), see archived CRS Report RL31373, *Immigration: Adjustment to Permanent Resident Status Under Section 245(i)*, by Andorra Bruno.

<sup>59</sup> 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.



expiration of that status would have been 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 have established a process for registering aliens who had been continuously unlawfully present and employed in the United States since January 1, 2005. Eligible aliens would have applied for this registration, which would have been valid for six months. Registered aliens would have been given work authorization and would have been eligible for a new “W” temporary worker visa established by the bill. To obtain a W visa, a registered alien would have had to apply at a consular office in his or her home country not later than six months after his or her registration was approved. H.R. 4065 would have placed no numerical limit on the W visa.

The initial period of authorized admission for a W nonimmigrant would have been three years and could have been extended in three year increments without limit. H.R. 4065 would have required that W nonimmigrants be continuously employed but would have placed no restriction on the type of work they could perform. W nonimmigrants would not have been prohibited from changing to another nonimmigrant classification or adjusting to LPR status. H.R. 4065, however, would have made no special provision for them to do so.

## **Legislation in the 110<sup>th</sup> Congress**

Bills were introduced in the 110<sup>th</sup> Congress to reform the H-2A and H-2B programs and to establish new temporary worker visas. In May and June 2007, the Senate debated comprehensive immigration reform legislation that included provisions to reform the H-2A program and to create new guest worker programs. On June 28, 2007, the Senate failed to invoke cloture on the final reform bill (S. 1639) and that bill was pulled from the floor. In the House, the Judiciary Committee’s Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law and several other committees held hearings related to guest worker programs.

### **H-2B Returning Worker Bills**

As discussed above, a temporary provision, which was in effect for FY2005, FY2006, and FY2007, exempted from the annual H-2B cap returning H-2B workers who had been counted against the H-2B cap in any one of the three prior fiscal years. This provision expired on September 30, 2007, and several bills proposed to reenact an H-2B returning worker exemption in different forms. Mirroring the expired exemption, H.R. 5495 and H.R. 5849 would have exempted from the FY2008 cap returning H-2B workers who were counted against the cap in FY2005, FY2006, or FY2007. H.R. 5233 would have exempted from the FY2008 and FY2009 caps returning workers who were counted against the H-2B cap in any one of the three preceding fiscal years. S. 2839 included a provision (§2) that would have exempted from the FY2008, FY2009, and FY2010 H-2B caps returning workers who were counted against the cap in FY2005, FY2006, FY2007, or FY2008.

Other bills proposed to revise the expired H-2B returning worker exemption to cover workers who were *present* in the United States as H-2B nonimmigrants in any one of the prior three fiscal years, but who were not necessarily counted against the cap in any of those years. S. 988 would

have exempted from the H-2B cap for each fiscal year through FY2012 workers who were present in the United States in H-2B status in any one of the three years preceding the year at issue. H.R. 1843 would similarly have revised the exemption and would make it a permanent INA provision.

## **S. 1639**

S. 1639, introduced by Senator Kennedy, was based on S.Amdt. 1150 to S. 1348, as S.Amdt. 1150 was amended on the Senate floor in late May and early June 2007.<sup>60</sup> The Senate debated S. 1639 in late June 2007. The debate ended on June 28, 2007, when the Senate failed to invoke cloture on the bill by a vote of 46 to 53. Among its many provisions, S. 1639 would have repealed the H-2B program, reformed the H-2A program, and established new guest worker programs.

## **Agricultural Workers**

The H-2A reform provisions were in Title IV, Subtitle B, of S. 1639. These provisions were similar to those in S. 237/S. 340/H.R. 371 before the 110<sup>th</sup> Congress (see below), and in S. 2611, as passed by the Senate in the 109<sup>th</sup> Congress. Section 404 of S. 1639 would have streamlined the process of importing H-2A workers, particularly for jobs covered by collective bargaining agreements. 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 ensure, 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 ensure 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 ensure 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 had to certify within seven days of the filing date that the employer had filed the required application. The employer could then have filed a petition with DHS for H-2A workers.

Section 404 of S. 1639 would likewise have made 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. Unlike in S. 237/S. 340/H.R. 371 in the 110<sup>th</sup> Congress and in S. 2611, as passed by the Senate in the 109<sup>th</sup> Congress, an H-2A worker's maximum continuous period of authorized status would have been 10 months. The worker could

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<sup>60</sup> S.Amdt. 1150, the bipartisan compromise proposal for immigration reform, was proposed by Senator Kennedy as an amendment in the nature of a substitute to S. 1348. (The text of S.Amdt. 1150 appears in "Text of Amendment Submitted Monday, May 21, 2007," *Congressional Record*, daily edition, vol. 153 [May 24, 2007], pp. S6625-S6687.) S. 1348, the Comprehensive Immigration Reform Act of 2007, was introduced by Senate Majority Leader Reid as the marker for Senate debate on comprehensive immigration reform; it is based on S. 2611, as passed by the Senate in the 109<sup>th</sup> Congress.

not again have applied for admission to the United States as an H-2A worker until he or she had been outside the country for a period of time, as specified.

In addition to these H-2A reform provisions, S. 1639 proposed a legalization process for agricultural workers in Title VI, Subtitle C. Under Section 622, the Secretary of DHS would have granted a Z-A nonimmigrant visa to an alien worker who had performed at least 863 hours, or 150 work days, of agricultural employment in the United States during the 24-month period ending on December 31, 2006, and who met other requirements, including payment of a \$100 fine. No more than 1.5 million Z-A visas could have been issued. Spouses or minor children of Z-A nonimmigrants would have been eligible for Z-A dependent visas, which would not have been subject to a numerical limit. Not later than eight years after enactment, Z-A nonimmigrants would have had to either renew their Z visa status or apply to adjust to legal permanent resident (LPR) status. With respect to the latter option, the Secretary of DHS would have adjusted the status of a Z-A alien to that of an LPR if specified requirements were met. The alien would have had to perform either at least 100 workdays of U.S. agricultural work per year for the five years after enactment, or at least 150 workdays of U.S. agricultural work per year for the three years after enactment.<sup>61</sup> The other requirements would have included payment of a \$400 fine and payment of applicable federal taxes. The Z-A nonimmigrant would have had to file the application for adjustment of status in person with a U.S. consulate abroad. Existing numerical limits under the INA would not have applied to adjustments of status of Z-A or Z-A dependent aliens under the bill.<sup>62</sup>

## **Y Nonimmigrants**

Title IV, Subtitle A, of S. 1639 proposed to establish a new Y temporary worker visa category. The Y-1 visa would have covered aliens coming temporarily to the United States to perform temporary labor or services other than the labor or services covered under specified nonimmigrant visas for high-skilled workers and others. The Y-1 visa program would have sunset after five years. The Y-2 visa would have covered aliens coming temporarily to the United States to perform seasonal nonagricultural labor or services. The Y-3 visa would have covered the spouses or children of Y-1 or Y-2 aliens. A prospective employer of Y nonimmigrants would have had to file an application for labor certification with DOL that included attestations regarding U.S. worker protections, wages, and other items. The employer would have had to make efforts to recruit U.S. workers prior to filing the labor certification application. After receiving certification from DOL, the employer would have had to file a petition with DHS to import Y workers.

Y-1 nonimmigrants would have been granted a period of admission of two years. This period could have been extended for two additional two-year periods.<sup>63</sup> Between each two-year period of admission, however, the alien would have had to be physically present outside the United States for 12 months. Y-2B nonimmigrants<sup>64</sup> would have been granted a period of admission of 10 months. Following this period, they would have needed to be physically present outside the

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<sup>61</sup> A “work day” is defined in the legislation as a day in which the individual is employed for at least 5.75 hours in agricultural employment.

<sup>62</sup> For a discussion of the U.S. system of permanent admissions, including numerical limits, see CRS Report RL32235.

<sup>63</sup> Y-1 nonimmigrants who are accompanied by family members in Y-3 status would be limited to one additional two-year period.

<sup>64</sup> S. 1639 §403(a) would define an alien admitted to the United States under the new Y-2 nonimmigrant classification as a “Y-2B nonimmigrant” or “Y-2B worker.”

United States for two months before they could be readmitted to the country in Y status. There would have been no limit on the number of times a Y-2B nonimmigrant could be so readmitted.

Section 409 of S. 1639 proposed annual numerical limits on the Y visas. The annual cap on the Y-1 visa would have been 200,000. The Y-3 visa would have been capped at 20% of the Y-1 visa annual limit. The Y-2 visa would have been capped at 100,000 for the first fiscal year. In subsequent years, the cap would have increased or decreased based on demand for the visas, subject to a maximum cap of 200,000. In addition, §409 would have established an exemption from the Y-2B cap for workers who had been present in the United States as Y-2B aliens in any one of the three fiscal years preceding the start date of the new petition.

## **Z Nonimmigrants**

S. 1639 also would have established another new nonimmigrant category (the Z category) for certain alien workers in the United States. Although the Z category would not have been a traditional nonimmigrant worker category and would have provided a mechanism for certain unauthorized aliens to legalize their status,<sup>65</sup> aliens granted Z status would have had work authorization (and some Z aliens would have been required to be employed full-time) and may have performed the same type of lower-skilled work as guest workers. Under Section 601 of S. 1639, the Secretary of DHS could have permitted Z aliens to remain lawfully in the United States under specified conditions. The Z-1 classification would have covered aliens who had been continuously physically present in the United States since January 1, 2007, and were employed. The Z-2 and Z-3 classifications would have covered specified family members of Z-1 aliens, where the family members had been continuously physically present in the United States since January 1, 2007. An alien making an initial application for Z-1 status would have had to pay a \$1,000 penalty, as well as a \$500 penalty for each alien seeking Z-2 or Z-3 status as the Z-1 applicant's derivative. Section 601 of S. 1639 would have provided for certain applicants for Z status to receive probationary benefits in the form of employment authorization pending final adjudication of their applications. The period of admission for a Z nonimmigrant would have been four years. Provided that the Z nonimmigrant continued to be eligible for nonimmigrant status and met additional specified requirements, the alien could have sought an unlimited number of four-year extensions of the period of admission. There would have been no limitation on the number of aliens who could be granted Z-1, Z-2, or Z-3 status.

The Secretary of DHS could have adjusted the status of a Z nonimmigrant to LPR status if specified requirements were met. Among the requirements for a Z-1 nonimmigrant to adjust status, the alien would have needed to: have an approved immigrant petition; file an adjustment of status application in person at a U.S. consulate abroad; and, if the alien was a head of household, pay a \$4,000 penalty at the time of submission of the immigrant petition.

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<sup>65</sup> While Z status would be available to otherwise eligible unauthorized aliens in the United States, unlawful status would not be an explicit requirement for Z status. Instead, to be eligible for Z status under §601, an alien could *not* have been lawfully present in the United States on January 1, 2007, or on the date of application for Z status, under any nonimmigrant classification or any other immigration status made available under a treaty or other multinational agreement ratified by the Senate.

## **S. 237/S. 340/H.R. 371**

The Agricultural Job Opportunities, Benefits, and Security Act of 2007 (AgJOBS Act; S. 237/S. 340/H.R. 371) proposed to overhaul the H-2A agricultural worker program. The Senate bills were introduced by Senator Feinstein and had a bipartisan group of cosponsors. The House companion was introduced by Representative Berman and also had bipartisan cosponsorship. The provisions of the AgJOBS Act of 2007 were similar to those included in S. 2611, as passed by the Senate in the 109<sup>th</sup> Congress.

The AgJOBS Act of 2007 would have streamlined the process of importing H-2A workers, particularly for jobs covered by collective bargaining agreements. 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 ensure, 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 ensure 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 ensure 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 had to certify within seven days of the filing date that the employer had filed the required application. The employer could then have filed a petition with DHS for H-2A workers.

The AgJOBS Act of 2007 would likewise have made 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. 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.

The AgJOBS Act of 2007 also proposed a legalization program for agricultural workers similar to that included in S. 2611, as passed by the Senate in the 109<sup>th</sup> Congress. Under the program, the Secretary of DHS would have granted "blue card status" to an alien worker who had performed at least 863 hours, or 150 work days, of agricultural employment in the United States during the 24-month period ending on December 31, 2006, and who met other requirements. No more than 1.5 million blue cards could have been issued during the five-year period beginning on the date of enactment. To be eligible to adjust to LPR status, the alien in blue card status would have had to, among other requirements, perform either at least 100 workdays of U.S. agricultural work per year for the five years after enactment, or at least 150 workdays of U.S. agricultural work per year



for the three years after enactment.<sup>66</sup> Existing numerical limits under the INA would not have applied to adjustments of status under the bill.<sup>67</sup>

A modified version of the AgJOBS Act of 2007 was approved by the Senate Appropriations Committee in May 2008 as an amendment to its version of the supplemental appropriations bill. This language on foreign agricultural workers, which was offered in committee by Senator Feinstein, was subsequently dropped from the Senate version of the supplemental bill (H.R. 2642). The committee-approved language included provisions to streamline the H-2A program like those in the AgJOBS bill, but contains different wage provisions. Unlike the AgJOBS bill, the Feinstein amendment would not have enabled foreign agricultural workers to become LPRs. Instead, it would have established an emergency agricultural worker program through which aliens who had performed at least 863 hours or 150 work days of agricultural employment in the United States or earned at least \$7,000 from agricultural employment, during the four-year period ending on December 31, 2007, among other requirements, could have been granted a legal temporary resident status (to be known as emergency agricultural worker status) for up to five years. To maintain this status, the worker would have had to perform at least 100 work days of agricultural employment each year. The emergency agricultural worker program would have been capped at 1,350,000 during the five-year period beginning on the date of enactment.

## **H.R. 1645**

The Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (STRIVE Act; H.R. 1645), introduced by Representative Gutierrez for himself and a bipartisan group of cosponsors, included the AgJOBS Act of 2007 (see above) as Title VI, Subtitle C. In addition, Title IV of H.R. 1645 proposed to establish a new H-2C temporary worker program. The new H-2C visa would have covered aliens coming temporarily to the United States to initially perform temporary labor or services other than the labor or services covered under the H-2A visa or other specified visa categories. A prospective H-2C employer would have had to file a petition with DOL. In the petition, the employer would have had to attest to various items, including that the employer was offering wages to H-2C workers that were the greater of the prevailing wage rate for the occupational classification in the area of employment or the actual wage paid by the employer to other similarly employed and qualified workers, and that there were not sufficient qualified and available U.S. workers to perform the work. In most cases, prior to filing the petition, the prospective employer also would have had to make efforts to recruit U.S. workers, as specified in the bill. To be eligible for H-2C status, the alien would have needed to have evidence of employment and to meet other requirements.

An H-2C worker's initial authorized period of stay would have been three years and could have been extended for an additional three years. H-2C nonimmigrants in the United States could have applied to adjust to LPR status. Petitions for employment-based *immigrant* visas could have been filed by an H-2C worker's employer or, if the alien had been employed as an H-2C worker for a total of five years, by the worker.

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<sup>66</sup> A "work day" is defined in the legislation as a day in which the individual is employed for at least 5.75 hours in agricultural employment.

<sup>67</sup> For information on numerical limits, see CRS Report RL32235.



### **S. 330**

The Border Security and Immigration Reform Act of 2007 (S. 330), introduced by Senator Isakson, would have established a new W temporary worker program for agricultural or nonagricultural workers. The guest worker provisions were in Title III, §302, of the bill. An employer interested in importing W workers would have first applied to DOL for labor certification. After receiving certification, the employer would have filed an application with DHS, as required by DHS. Aliens who had been unlawfully employed in the United States since January 1, 2007, could have participated in the new program if they applied for registration and met other requirements, as set forth in §301 of the bill. W visas would have been issued for an initial period of up to two years and could have been renewed for an unlimited number of two-year terms. The guest worker and registration provisions in S. 330 would not have taken effect, however, until after the Secretary of DHS certified that specified border security and enforcement-related measures authorized under other titles of the bill were fully operational.

### **H.R. 1792**

The Temporary Agricultural Labor Reform Act of 2007 (H.R. 1792), introduced by Representative Goodlatte for himself and several cosponsors, proposed to overhaul the H-2A agricultural worker program. Like the AgJOBS Act of 2007 (see above), H.R. 1792 would have streamlined the process of importing H-2A workers. It, however, would have done so differently than AgJOBS. Under H.R. 1792, as under earlier versions of this bill introduced in the 108<sup>th</sup> and 109<sup>th</sup> Congresses, prospective H-2A employers would not have first filed applications with DOL. Instead, they would have included specified attestations in the petitions they filed with DHS. These attestations would have included that the employer: was seeking to employ workers on a temporary basis; would provide workers with required benefits, wages, and working conditions; had made efforts to recruit U.S. workers; and would offer the job to any equally qualified, available U.S. worker who applied. Under H.R. 1792, H-2A employers would have been required to verify the identity and employment eligibility of all individuals they hired, through an employment verification program to be established by DHS.

H.R. 1792 would have made changes to the H-2A program's requirements regarding minimum benefits, wages, and working conditions. Among these proposed changes, H-2A employers would no longer have been subject to the adverse effect wage rate (discussed above). Instead, they would have been required to pay workers the greater of the prevailing wage rate or the applicable state minimum wage. H.R. 1792 also would not have required employers to provide workers with housing or a housing allowance.

Under H.R. 1792, an H-2A worker would have been admitted for an initial period of employment not to exceed 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 20 months. H.R. 1792 did not propose any type of legalization program for agricultural workers.

### **H.R. 2413**

The Border Security and Immigration Reform Act of 2007 (H.R. 2413), introduced by Representative Lungren, included provisions in Section 5 to establish a new W seasonal agricultural worker program. H.R. 2413 would have directed the Secretary of Agriculture, in consultation with the Secretary of Labor, to establish the program, and prospective W employers

would have submitted applications to the Secretary of Agriculture. The new program would have included monthly and annual numerical limitations on the issuance of W visas by agricultural employment region. Among the program requirements, W employers would have had to offer the job to any equally qualified, available U.S. worker who applied and would have had to offer to provide eligible workers with housing or a housing allowance. Aliens in W status would have been prohibited from changing to another nonimmigrant status or adjusting to LPR status in the United States.

## **S. 2094**

Title I of the Increasing American Wages and Benefits Act of 2007 (S. 2094), introduced by Senator Sanders, would have made various changes to current law regarding the H-2B program. Among these changes, it would have set forth recruitment requirements applicable to prospective H-2B employers and would have changed the wage rates that these employers have to offer to their alien and U.S. workers. The bill would further have granted enforcement authority to DOL under the H-2B program. Title II of S. 2094 would have placed requirements on employers and foreign labor contractors who engage in foreign labor contracting and would have established penalties for violations.

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