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# Immigration: Policy Considerations Related to Guest Worker Programs

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# Immigration: Policy Considerations Related to Guest Worker Programs

## Abstract

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

A variety of bills have been introduced in recent Congresses to make changes to the H-2A and H-2B programs and the “H” visa category generally, and to establish new temporary worker visas. The 109th Congress revised the H-2B program in the FY2005 Emergency Supplemental Appropriations Act (P.L. 109-13). Among the changes, a temporary provision was added to the Immigration and Nationality Act (INA) to exempt certain returning H-2B workers from the H-2B annual numerical cap of 66,000. The FY2007 Department of Defense authorization bill (P.L. 109-364) extended this exemption through FY2007. The exemption expired on September 30, 2007. A number of bills before the 110th Congress (S. 988, S. 2839, H.R. 1843, H.R. 5233, H.R. 5495, H.R. 5849) would reenact an H-2B returning worker exemption.

Other guest worker bills introduced in the 110th Congress include proposals to reform the H-2A program (S. 237/S. 340/H.R. 371, S. 1639, H.R. 1645, H.R. 1792) and the H-2B program (S. 1639, S. 2094), and to establish new temporary worker visas (S. 330, S. 1639, H.R. 1645, H.R. 2413). Some of these bills also would establish mechanisms for certain foreign workers to become legal permanent residents (LPRs). The Senate debated, but failed to invoke cloture on, S. 1639 in June 2007.

President George W. Bush proposed a new, expanded temporary worker program in January 2004 when he announced his principles for immigration reform, and has since reiterated his support for such a program. In August 2007, following the unsuccessful cloture vote in the Senate on S. 1639, the Bush Administration announced that it would seek to streamline the existing H-2A and H-2B programs within current law. In February 2008, the U.S. Department of Labor (DOL) and the U.S. Department of Homeland Security (DHS) published proposed rules to significantly amend their respective H-2A regulations.

The current discussion of guest worker programs takes place against a backdrop of historically high levels of unauthorized migration to the United States, and one question that often arises about proposals for new guest worker programs is whether they would enable participants to obtain LPR status. Other issues raised in connection with guest worker proposals include how new program requirements would compare with those of the H-2A and H-2B programs and how the eligible population would be defined. This report will be updated as legislative developments occur.

## Keywords

guest worker programs, United States, Department of Labor, labor market, public policy

## Comments

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# CRS Report for Congress

## Immigration: Policy Considerations Related to Guest Worker Programs

Updated May 28, 2008

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Prepared for Members and  
Committees of Congress

# Immigration: Policy Considerations Related to Guest Worker Programs

## Summary

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

A variety of bills have been introduced in recent Congresses to make changes to the H-2A and H-2B programs and the “H” visa category generally, and to establish new temporary worker visas. The 109<sup>th</sup> Congress revised the H-2B program in the FY2005 Emergency Supplemental Appropriations Act (P.L. 109-13). Among the changes, a temporary provision was added to the Immigration and Nationality Act (INA) to exempt certain returning H-2B workers from the H-2B annual numerical cap of 66,000. The FY2007 Department of Defense authorization bill (P.L. 109-364) extended this exemption through FY2007. The exemption expired on September 30, 2007. A number of bills before the 110<sup>th</sup> Congress (S. 988, S. 2839, H.R. 1843, H.R. 5233, H.R. 5495, H.R. 5849) would reenact an H-2B returning worker exemption.

Other guest worker bills introduced in the 110<sup>th</sup> Congress include proposals to reform the H-2A program (S. 237/S. 340/H.R. 371, S. 1639, H.R. 1645, H.R. 1792) and the H-2B program (S. 1639, S. 2094), and to establish new temporary worker visas (S. 330, S. 1639, H.R. 1645, H.R. 2413). Some of these bills also would establish mechanisms for certain foreign workers to become legal permanent residents (LPRs). The Senate debated, but failed to invoke cloture on, S. 1639 in June 2007.

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The current discussion of guest worker programs takes place against a backdrop of historically high levels of unauthorized migration to the United States, and one question that often arises about proposals for new guest worker programs is whether they would enable participants to obtain LPR status. Other issues raised in connection with guest worker proposals include how new program requirements would compare with those of the H-2A and H-2B programs and how the eligible population would be defined. This report will be updated as legislative developments occur.

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# Immigration: Policy Considerations Related to Guest Worker Programs

## Introduction

In 2001, the United States and Mexico began Cabinet-level talks on migration. Although the details of these discussions were not made public, two issues — legalization and a temporary worker program — dominated media coverage. The talks lost momentum after the terrorist attacks of September 11, 2001, as the Bush Administration focused its attention on security-related matters. A temporary worker program (not limited to Mexico), however, remains of interest to some Members of Congress and Administration officials. Various bills to reform existing programs for foreign temporary workers and to create new temporary worker programs have been introduced in recent Congresses. 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. President Bush outlined a proposal for a new temporary worker program in January 2004 and has since reiterated his support for such a program. The temporary worker programs under discussion presumably would cover largely low-skilled workers. 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 February 2008, the U.S. Department of Labor (DOL) and the U.S. Department of Homeland Security (DHS) published proposed rules to significantly amend their respective H-2A regulations.

## 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>

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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.



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)<sup>3</sup> 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>4</sup>

## 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.<sup>5</sup> 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>6</sup>

### H-2A Program

The H-2A program allows for the temporary admission of foreign workers to the United States to perform agricultural work of a seasonal or temporary nature, provided that U.S. workers are not available. An approved H-2A visa petition is generally valid for an initial period of up to one year. 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 six months.

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<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> P.L. 99-603, November 6, 1986.

<sup>4</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.

<sup>5</sup> While H-2B workers are, for the most part, low skilled, the H-2B program is not limited to workers of a particular skill level and has been used to import a variety of workers, including entertainers and athletes.

<sup>6</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.

Employers who want to import H-2A workers must first apply to DOL for a certification that (1) there are not sufficient U.S. workers who are qualified and available to perform the work; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. As part of this labor certification process, employers must attempt to recruit U.S. workers and must cooperate with DOL-funded state employment service agencies (also known as state workforce agencies) in local, intrastate, and interstate recruitment efforts. Employers must pay their H-2A workers and similarly employed U.S. workers the highest of the federal or applicable state minimum wage, the prevailing wage rate,<sup>7</sup> or the adverse effect wage rate (AEWR).<sup>8</sup> They also must provide workers with housing, transportation, and other benefits, including workers' compensation insurance.<sup>9</sup> No health insurance coverage is required.<sup>10</sup>

Both growers and labor advocates criticize the H-2A program in its current form. Growers complain that the H-2A program is overly cumbersome and does not meet their labor needs. Labor advocates argue that the program provides too few protections for U.S. workers. (For a discussion of proposed rules published by DOL and DHS in February 2008 to amend their H-2A regulations, see "Bush Administration Proposals" section below.)

**H-2A Visas Issued.** 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 Department of State (DOS).<sup>11</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, with H-2A visa issuances totaling 50,791 that year, according to preliminary data. The H-2A program, however, remains quite small relative to total hired farm employment,

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<sup>7</sup> The prevailing wage rate is the average wage paid to similarly employed workers in the occupation in the area of intended employment. Additional information about prevailing wages is available at [<http://www.foreignlaborcert.doleta.gov/wages.cfm>], visited May 28, 2008.

<sup>8</sup> The AEWR is an hourly wage rate set by DOL for each state or region, based upon data gathered by the Department of Agriculture in quarterly wage surveys. For 2008, the AEWR ranges from \$8.41 for Arkansas, Louisiana, and Mississippi to \$10.86 for Hawaii. See CRS Report RL32861, *Farm Labor: The Adverse Effect Wage Rate (AEWR)*, by William G. Whittaker.

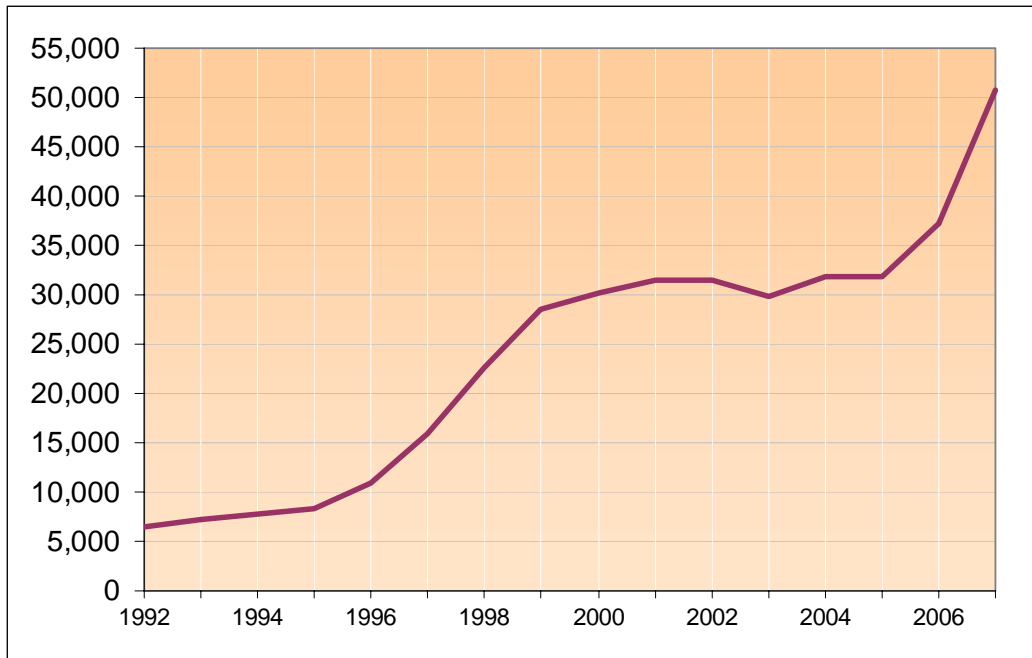
<sup>9</sup> Required wages and benefits under the H-2A program are set forth in 20 C.F.R. §655.102.

<sup>10</sup> H-2A workers, like nonimmigrants generally, are not eligible for federally funded public assistance, with the exception of Medicaid emergency services.

<sup>11</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.

which stood at about 1 million in 2006, according to the Department of Agriculture's National Agricultural Statistics Service.<sup>12</sup>

**Figure 1. H-2A Visas Issued, FY1992-FY2007**



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

## H-2B Program

The H-2B program provides for the temporary admission of foreign workers to the United States to perform temporary non-agricultural work, if unemployed U.S. workers cannot be found. Foreign medical graduates coming to perform medical services are explicitly excluded from the program. An approved H-2B visa petition is valid for an initial period of up to one year. An employer can apply to extend an H-2B worker's stay in increments of up to one year, but an alien's total period of stay as an H-2B worker may not exceed three consecutive years.<sup>13</sup> An alien who has spent three years in the United States in H-2B status 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 six months.

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

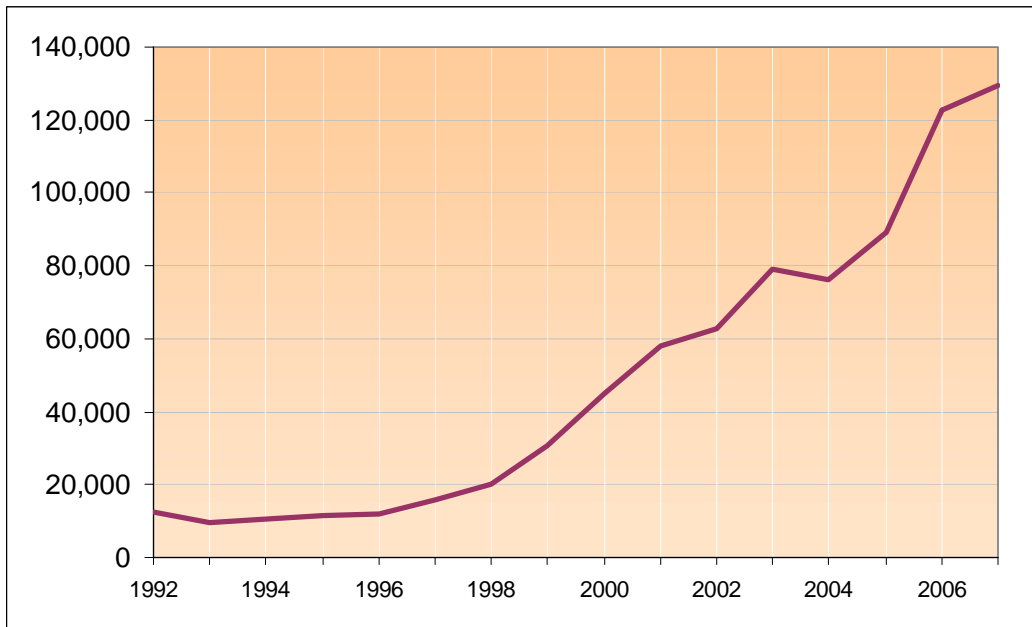
<sup>12</sup> For additional discussion, see CRS Report RL30395, *Farm Labor Shortages and Immigration Policy*, by Linda Levine.

<sup>13</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.

must pay their workers at least the prevailing wage rate. Unlike H-2A employers, they are not subject to the AEWR and do not have to provide housing, transportation,<sup>14</sup> and other benefits required under the H-2A program.

A key limitation of the H-2B visa concerns the requirement that the work be temporary. Under the applicable immigration regulations, work is considered to be temporary if the employer's need for the duties to be performed by the worker is a one-time occurrence, seasonal need, peakload need, or intermittent need.<sup>15</sup> According to DOL data on H-2B labor certifications, top H-2B occupations in recent years, in terms of the number of workers certified, included landscape laborer, maid and housekeeping cleaner, and construction worker.

**Figure 2. H-2B Visas Issued, FY1992-FY2007**



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

**H-2B Visas Issued and the Statutory Cap.** Unlike the H-2A visa, the H-2B visa is subject to a statutory numerical limit. Under the INA, the total number of aliens who may be issued H-2B visas or otherwise provided H-2B status during a fiscal year may not exceed 66,000.<sup>16</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

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

<sup>15</sup> For definitions of these types of need, see 8 C.F.R. §214.2(h)(6)(ii).

<sup>16</sup> See INA §214(g)(1)(B).

steadily.<sup>17</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 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>18</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. According to preliminary data, 129,547 H-2B visas were issued in FY2007, of which 69,320 were issued to returning H-2B workers. The H-2B returning worker exemption expired on September 30, 2007. As of January 2, 2008, USCIS had received a sufficient number of petitions to reach the H-2B cap of 33,000 for the second half of FY2008.<sup>19</sup> Several bills in the 110<sup>th</sup> Congress (discussed below) would reenact an H-2B returning worker exemption.

## Unauthorized Immigration

The current discussion of guest worker programs has been prompted, in part, by the continued high levels of illegal, or unauthorized, immigration to the United States and related deaths along the U.S.-Mexican border. Analyses 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 10.3 million in March 2004, 11.1 million in March 2005, and 11.5 to 12 million in March 2006, and that since 2000, this population has grown at an average annual rate of more than 500,000 per year.<sup>20</sup> DHS's estimates of the unauthorized alien population and its growth are

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<sup>17</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>18</sup> See discussion of S. 352/H.R. 793 in the 109<sup>th</sup> Congress in the **Appendix**.

<sup>19</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS Reaches H-2B Cap for Second Half of Fiscal Year 2008," public notice, January 3, 2008.

<sup>20</sup> Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population*, Pew Hispanic Center, March 21, 2005; Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.; Estimates Based on the March 2005 Current Population Survey*, Pew Hispanic Center, March 7, 2006 (hereafter cited as Passel, *Size and Characteristics of the Unauthorized Migrant Population in the* (continued...))

somewhat lower. Based on data from the 2004 American Community Survey and other sources, DHS estimates that there were 10.5 million unauthorized aliens residing in the United States in January 2005 and that the unauthorized resident population grew at an average annual rate of 408,000 during the 2000-2004 period.<sup>21</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 6.2 million in 2005, comprising 56% of the total unauthorized population. DHS estimates that there were nearly 6 million unauthorized Mexicans residing in the United States in 2005, comprising 57% of the total unauthorized population. With respect to migrant deaths, data from the United States Border Patrol (USBP) indicate that more than 300 migrants died at the U.S.-Mexican border each year from FY2000 through FY2004. In FY2005, there were 472 migrant deaths at the border and in FY2006, there were 441 deaths, according to USBP data.<sup>22</sup>

## Unauthorized Workers

Unauthorized workers are a subpopulation of the total unauthorized alien population. According to the March 2006 report by the Pew Hispanic Center, there were an estimated 7.2 million unauthorized workers in the U.S. civilian labor force in March 2005.<sup>23</sup> These workers represented about 4.9% of the labor force. In some occupations and industries, however, their share of the labor force was considerably higher. The report states:

Unauthorized workers are employed in a variety of occupations throughout the labor force, although the distribution of the unauthorized workforce across occupations differs from that of native-born workers.

Unauthorized workers are notably underrepresented in white-collar occupations.... On the other hand, unauthorized migrants are much more likely to be in major occupation groups that require little education or do not have licensing requirements.<sup>24</sup>

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<sup>20</sup> (...continued)

U.S., March 7, 2006). These reports are available at [<http://pewhispanic.org/topics/index.php?TopicID=16>], visited May 28, 2008.

<sup>21</sup> U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2005*, by Michael Hoefler, Nancy Rytina, and Christopher Campbell, August 2006.

<sup>22</sup> For further information on migrant deaths, see CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by Blas Nuñez-Neto.

<sup>23</sup> Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, March 7, 2006, at [<http://pewhispanic.org/reports/report.php?ReportID=61>], visited May 28, 2008.

<sup>24</sup> *Ibid.*, pp. 10-11.

Unauthorized aliens are also overrepresented in certain industries relative to their share of the overall labor force. **Table 1** presents data from the Pew Hispanic Center report on industries with high concentrations of unauthorized workers. Unauthorized aliens accounted for between 10% and 21% of workers in the industries shown.

**Table 1. Estimates of Unauthorized Employment in Selected Industries, 2005**

Industry Group	Unauthorized Workers (in Industry)
Private Households	21%
Food Manufacturing	14%
Agriculture	13%
Furniture Manufacturing	13%
Construction	12%
Textile, Apparel, and Leather Manufacturing	12%
Food Services	12%
Administrative and Support Services	11%
Accommodation	10%

**Source:** Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, Pew Hispanic Center, March 7, 2006.

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 110<sup>th</sup> Congress

Bills have been introduced in the 110<sup>th</sup> Congress to reform the H-2A and H-2B programs and to establish new temporary worker visas.<sup>25</sup> 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.

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<sup>25</sup> For a discussion of guest worker bills introduced in the 105<sup>th</sup>-109<sup>th</sup> Congresses, see the **Appendix**.

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 have held hearings related to guest worker programs.

## H-2B Returning Worker Exemption 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 propose to reenact an H-2B returning worker exemption in different forms. Mirroring the expired exemption, H.R. 5495 and H.R. 5849 would exempt from the FY2008 cap returning H-2B workers who were counted against the cap in FY2005, FY2006, or FY2007. H.R. 5233 would exempt 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 includes a provision (§2) that would exempt 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 propose 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 exempt 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 revise the exemption and would make it a permanent INA provision.

## S. 1639

S. 1639, introduced by Senator Kennedy, is 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>26</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 repeal the H-2B program, reform the H-2A program, and establish new guest worker programs.

**Agricultural Workers.** The H-2A reform provisions are in Title IV, Subtitle B, of S. 1639. These provisions are 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>

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<sup>26</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 (discussed in the **Appendix**).



Congress (discussed in the **Appendix**). Section 404 of S. 1639 would streamline the process of importing H-2A workers, particularly for jobs covered by collective bargaining agreements. Prospective H-2A employers would have to file applications with DOL containing certain assurances. In the case of a job covered by a collective bargaining agreement, the employer would have to ensure, among other things, that there is an applicable union contract and that the bargaining representatives of the employer's employees have been notified of the filing of the application for H-2A workers. An employer interested in filling a job not covered by a collective bargaining agreement would be subject to a longer list of required assurances. Among these, the employer would have to ensure that he or she will take specified steps to recruit U.S. workers and will provide workers with required benefits, wages, and working conditions. Both groups of employers would have to ensure that the job is temporary or seasonal and that the employer will offer the job to any equally qualified, available U.S. worker who applies. Unless an employer's application is incomplete or obviously inaccurate, DOL would 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.

Section 404 of S. 1639 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 2003 level for three years after the date of enactment, and employers would be permitted to provide housing allowances, in lieu of housing, to their workers if the governor of the relevant state certifies that adequate housing is available. 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 be 10 months. The worker could not again apply 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 proposes a legalization process for agricultural workers in Title VI, Subtitle C. Under Section 622, the Secretary of DHS would grant 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 meets other requirements, including payment of a \$100 fine. No more than 1.5 million Z-A visas could be issued. Spouses or minor children of Z-A nonimmigrants would be eligible for Z-A dependent visas, which would not be subject to a numerical limit. Not later than eight years after enactment, Z-A nonimmigrants would have 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 adjust the status of a Z-A alien to that of an LPR if specified requirements are met. The alien would have 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>27</sup> The other requirements would include payment of a \$400 fine and payment of applicable

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<sup>27</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.

federal taxes. The Z-A nonimmigrant would have to file the application for adjustment of status in person with a U.S. consulate abroad. Existing numerical limits under the INA would not apply to adjustments of status of Z-A or Z-A dependent aliens under the bill.<sup>28</sup>

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

Y-1 nonimmigrants would be granted a period of admission of two years. This period could be extended for two additional two-year periods.<sup>29</sup> Between each two-year period of admission, however, the alien would have to be physically present outside the United States for 12 months. Y-2B nonimmigrants<sup>30</sup> would be granted a period of admission of 10 months. Following this period, they would need to be physically present outside the United States for two months before they could be readmitted to the country in Y status. There would be no limit on the number of times a Y-2B nonimmigrant could be so readmitted.

Section 409 of S. 1639 proposes annual numerical limits on the Y visas. The annual cap on the Y-1 visa would be 200,000. The Y-3 visa would be capped at 20% of the Y-1 visa annual limit. The Y-2 visa would be capped at 100,000 for the first fiscal year. In subsequent years, the cap would increase or decrease based on demand for the visas, subject to a maximum cap of 200,000. In addition, §409 would establish an exemption from the Y-2B cap for workers who have 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 establish another new nonimmigrant category (the Z category) for certain alien workers in the United States. Although the Z category would not be a traditional nonimmigrant worker category and would

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<sup>28</sup> For a discussion of the U.S. system of permanent admissions, including numerical limits, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem. (Hereafter cited as CRS Report RL32235.)

<sup>29</sup> Y-1 nonimmigrants who are accompanied by family members in Y-3 status would be limited to one additional two-year period.

<sup>30</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.”

provide a mechanism for certain unauthorized aliens to legalize their status,<sup>31</sup> aliens granted Z status would have work authorization (and some Z aliens would be required to be employed full-time) and may perform the same type of lower-skilled work as guest workers. Under Section 601 of S. 1639, the Secretary of DHS could permit Z aliens to remain lawfully in the United States under specified conditions. The Z-1 classification would cover aliens who have been continuously physically present in the United States since January 1, 2007, and are employed. The Z-2 and Z-3 classifications would cover specified family members of Z-1 aliens, where the family members have been continuously physically present in the United States since January 1, 2007. An alien making an initial application for Z-1 status would have 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 provide 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 be four years. Provided that the Z nonimmigrant continued to be eligible for nonimmigrant status and met additional specified requirements, the alien could seek an unlimited number of four-year extensions of the period of admission. There would be no limitation on the number of aliens who could be granted Z-1, Z-2, or Z-3 status.

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

### **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) proposes to overhaul the H-2A agricultural worker program. The Senate bills were introduced by Senator Feinstein and have a bipartisan group of cosponsors. The House companion was introduced by Representative Berman and also has bipartisan cosponsorship. The provisions of the AgJOBS Act of 2007 are similar to those included in S. 2611, as passed by the Senate in the 109<sup>th</sup> Congress (discussed in the **Appendix**).

The AgJOBS Act of 2007 would streamline the process of importing H-2A workers, particularly for jobs covered by collective bargaining agreements. Prospective H-2A employers would have to file applications with DOL containing certain assurances. In the case of a job covered by a collective bargaining agreement, the employer would have to ensure, among other things, that there is an applicable

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<sup>31</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.

union contract and that the bargaining representatives of the employer's employees have been notified of the filing of the application for H-2A workers. An employer interested in filling a job not covered by a collective bargaining agreement would be subject to a longer list of required assurances. Among these, the employer would have to ensure that he or she will take specified steps to recruit U.S. workers and will provide workers with required benefits, wages, and working conditions. Both groups of employers would have to ensure that the job is temporary or seasonal and that the employer will offer the job to any equally qualified, available U.S. worker who applies. Unless an employer's application is incomplete or obviously inaccurate, DOL would 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.

The AgJOBS Act of 2007 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 2003 level for three years after the date of enactment, and employers would be permitted to provide housing allowances, in lieu of housing, to their workers if the governor of the relevant state certifies that adequate housing is available. 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.

The AgJOBS Act of 2007 also proposes 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 (see the **Appendix**). Under the program, 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, 2006, and who meets other requirements. No more than 1.5 million blue cards could be 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 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>32</sup> Existing numerical limits under the INA would not apply to adjustments of status under the bill.<sup>33</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 includes provisions to streamline the H-2A program like those in the AgJOBS bill, but contains different wage provisions. Unlike the AgJOBS bill,

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<sup>32</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>33</sup> For information on numerical limits, see CRS Report RL32235.

the Feinstein amendment would not enable foreign agricultural workers to become LPRs. Instead, it would establish 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 be 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 to perform at least 100 work days of agricultural employment each year. The emergency agricultural worker program would be 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, includes the AgJOBS Act of 2007 (see above) as Title VI, Subtitle C. In addition, Title IV of H.R. 1645 proposes to establish a new H-2C temporary worker program. The new H-2C visa would cover 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 to file a petition with DOL. In the petition, the employer would have to attest to various items, including that the employer is offering wages to H-2C workers that are 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 are 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 to make efforts to recruit U.S. workers, as specified in the bill. To be eligible for H-2C status, the alien would need to have evidence of employment and meet other requirements.

An H-2C worker's initial authorized period of stay would be three years and could be extended for an additional three years. H-2C nonimmigrants in the United States could apply to adjust to LPR status. Petitions for employment-based *immigrant* visas could be 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.

## **S. 330**

The Border Security and Immigration Reform Act of 2007 (S. 330), introduced by Senator Isakson, would establish a new W temporary worker program for agricultural or nonagricultural workers. The guest worker provisions are in Title III, §302, of the bill. An employer interested in importing W workers would first apply to DOL for labor certification. After receiving certification, the employer would file an application with DHS, as required by DHS. Aliens who have been unlawfully employed in the United States since January 1, 2007, could participate in the new program if they apply for registration and meet other requirements, as set forth in §301 of the bill. W visas would be issued for an initial period of up to two years and could be renewed for an unlimited number of two-year terms. The guest worker and

registration provisions in S. 330 would not take effect, however, until after the Secretary of DHS certifies that specified border security and enforcement-related measures authorized under other titles of the bill are 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, proposes to overhaul the H-2A agricultural worker program. Like the AgJOBS Act of 2007 (see above), H.R. 1792 would streamline the process of importing H-2A workers. It, however, would do 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 (discussed in the **Appendix**), prospective H-2A employers would not first file applications with DOL. Instead, they would include specified attestations in the petitions they file with DHS. These attestations would include that the employer is seeking to employ workers on a temporary basis; will provide workers with required benefits, wages, and working conditions; has made efforts to recruit U.S. workers; and will offer the job to any equally qualified, available U.S. worker who applies. Under H.R. 1792, H-2A employers would be required to verify the identity and employment eligibility of all individuals they hire, through an employment verification program to be established by DHS.

H.R. 1792 would make 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 be subject to the adverse effect wage rate (discussed above). Instead, they would be required to pay workers the greater of the prevailing wage rate or the applicable state minimum wage. H.R. 1792 also would not require employers to provide workers with housing or a housing allowance.

Under H.R. 1792, an H-2A worker would be admitted for an initial period of employment not to exceed 10 months. The worker's stay could be extended in increments of up to 10 months each, but the worker's total continuous period of stay, including any extensions, could not exceed 20 months. H.R. 1792 does 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, includes provisions in Section 5 to establish a new W seasonal agricultural worker program. H.R. 2413 would direct the Secretary of Agriculture, in consultation with the Secretary of Labor, to establish the program, and prospective W employers would submit applications to the Secretary of Agriculture. The new program would include monthly and annual numerical limitations on the issuance of W visas by agricultural employment region. Among the program requirements, W employers would have to offer the job to any equally qualified, available U.S. worker who applies and would have to offer to provide eligible workers with housing or a housing allowance. Aliens in W status would be 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 make various changes to current law regarding the H-2B program. Among these changes, it would set forth recruitment requirements applicable to prospective H-2B employers and would change the wage rates that these employers have to offer to their alien and U.S. workers. The bill would further grant enforcement authority to DOL under the H-2B program. Title II of S. 2094 would place requirements on employers and foreign labor contractors who engage in foreign labor contracting and establish penalties for violations.

## Bush Administration Proposals

On January 7, 2004, President Bush outlined an immigration reform proposal, at the center of which was a new temporary worker program.<sup>34</sup> The President featured this proposal in his 2004 and subsequent State of the Union addresses. According to a 2004 White House fact sheet on the proposal, the temporary worker program would “match willing foreign workers with willing U.S. employers when no Americans can be found to fill the jobs.” The program, which would grant participants legal temporary status, would initially be open to both foreign workers abroad and unauthorized aliens within the United States. At some future date, however, it would be restricted to aliens outside the country. The temporary workers’ authorized period of stay would be three years and would be renewable for an unspecified period of time. Temporary workers would be able to travel back and forth between their home countries and the United States, and, as stated in the background briefing for reporters, would “enjoy the same protections that American workers have with respect to wages and employment rights.” The proposal also called for increased workplace enforcement of immigration laws.

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

The U.S. will work with other countries to allow aliens working in the U.S. to receive credit in their nations’ retirement systems and will support the creation

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<sup>34</sup> The Administration did *not* offer a detailed legislative proposal. Some materials on the Administration proposal, however, are available on the White House website, visited May 28, 2008. The President’s January 7, 2004, remarks on the proposal are available at [<http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>]. A fact sheet on the proposal, entitled *Fair and Secure Immigration Reform* is available at [<http://www.whitehouse.gov/news/releases/2004/01/20040107-1.html>]. The transcript of a January 6, 2004, background briefing for reporters is available at [<http://www.whitehouse.gov/news/releases/2004/01/20040106-3.html>].

of tax-preferred savings accounts they can collect when they return to their native countries.

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

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

At the October 2005 Senate Judiciary Committee hearing on comprehensive immigration reform, Labor Secretary Elaine Chao reiterated the Administration’s support for the immigration reform ideas that President Bush outlined in January 2004.<sup>35</sup> She did not offer a detailed legislative proposal and did not take a position on any of the pending immigration reform bills. Secretary Chao described the Administration’s plan as having three components — border security, interior enforcement, and a temporary worker program — and not allowing “amnesty.” She maintained that “an improved temporary worker program will enhance border security and interior enforcement by providing a workable and enforceable process for hiring foreign workers.”

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

In May 2006, during Senate consideration of immigration reform legislation,<sup>36</sup> President Bush gave a national address on immigration. He voiced support for comprehensive immigration reform that accomplished five objectives, including creation of a temporary worker program. The President maintained that a temporary

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<sup>35</sup> Secretary Chao’s written testimony is available at [<http://judiciary.senate.gov/hearing.cfm?id=1634>], visited May 28, 2008.

<sup>36</sup> See discussion of S. 2611 in the 109<sup>th</sup> Congress in the **Appendix**.



worker program was needed to secure U.S. borders, another of his five objectives. The President outlined the type of program he favored, as follows:

I support a temporary worker program that would create a legal path for foreign workers to enter our country in an orderly way, for a limited period of time. This program would match willing foreign workers with willing American employers for jobs Americans are not doing. Every worker who applies for the program would be required to pass criminal background checks. And temporary workers must return to their home country at the conclusion of their stay.<sup>37</sup>

During the first half of 2007, DHS Secretary Michael Chertoff and Commerce Secretary Carlos Gutierrez participated in Senate negotiations over a comprehensive immigration reform bill. In May and June of 2007, during Senate debate on comprehensive immigration reform proposals,<sup>38</sup> the White House and President Bush consistently expressed support for immigration reform and the Senate legislation. In remarks to the Associated Builders and Contractors organization in June 2007, the President specifically addressed the need for a new temporary worker program:

The reality is, in America, that the construction industry and other sectors depend on foreign workers to fill jobs Americans are not doing. . . . So once our border security and work site enforcement measure is in place, this bill will create a new temporary worker program. The program will establish a lawful and orderly process for foreign workers to come to America on a temporary basis. This will help reduce the number of people trying to sneak across our border. If you're truly interested in border security, it makes sense to give people a legal way to come to do work Americans aren't doing, on a temporary basis.<sup>39</sup>

In August 2007, in the aftermath of the Senate's unsuccessful cloture vote on S. 1639 (which, as discussed above, would have established new guest worker programs), the Bush Administration announced that it would take steps to streamline the existing H-2A and H-2B programs within current law.<sup>40</sup> Among the first of these steps with respect to the H-2A program, USCIS established a special unit at its California Service Center to process H-2A petitions.<sup>41</sup>

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<sup>37</sup> U.S. President (Bush), "President Bush Addresses the Nation on Immigration Reform," transcript of remarks, May 15, 2006, at [<http://www.whitehouse.gov/news/releases/2006/05/20060515-8.html>], visited May 28, 2008.

<sup>38</sup> See above discussion of S. 1639 in the 110<sup>th</sup> Congress.

<sup>39</sup> U.S. President (Bush), "President Bush Discusses Comprehensive Immigration Reform with Associated Builders and Contractors," transcript of remarks, June 14, 2007, at [<http://www.whitehouse.gov/news/releases/2007/06/20070614-1.html>], visited May 28, 2008.

<sup>40</sup> See U.S. President (Bush), "President Bush Addresses Border Security and Immigration Challenges," news release, August 10, 2007, at [<http://www.whitehouse.gov/news/releases/2007/08/20070810-2.html>], visited May 28, 2008.

<sup>41</sup> See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS Announces Centralized Filing Location for the H-2A Temporary Agricultural Worker Program," press release, October 17, 2007, at [[http://www.uscis.gov/files/press\\_release/H2AUpdate17Oct07.pdf](http://www.uscis.gov/files/press_release/H2AUpdate17Oct07.pdf)], visited May 28, 2008.

In February 2008, DOL and DHS proposed extensive changes to their H-2A program regulations.<sup>42</sup> The DOL proposed rule would “re-engineer” the process through which an agricultural employer can apply for a temporary labor certification to employ H-2A workers. Under the DOL proposal, the current certification process would be replaced by an attestation-based process, in which employers would attest in their applications, under threat of penalties, that they have complied with program requirements. Prospective H-2A employers would have to begin recruiting U.S. workers to fill the job openings before filing a labor certification application, as specified, and would have to submit a preliminary recruitment report as part of that application. DOL also would establish a new auditing process to determine whether employers are complying with program requirements. The DOL rule further proposes to change the methodology for determining the adverse effect wage rate (discussed above) with the goal of “more accurately measur(ing) market-based wages by occupation, skill level, and geographic location.” It suggests using a new data source, the Bureau of Labor Statistics Occupational Employment Survey, to determine the AEWR. In addition to these proposed changes to the H-2A labor certification process, the DOL proposed rule includes amendments to other DOL H-2A related regulations. For example, DOL proposes to increase existing civil money penalties and to establish new penalties for certain violations related to H-2A work contracts.

DHS’s proposed rule would likewise make a number of changes to its H-2A regulations. Among these amendments, the proposed rule would modify existing limitations on an H-2A worker’s period of stay. As mentioned above, an H-2A worker who has spent three years in the United States must remain outside the country for six months before he or she can again be granted H-2A status. The DHS proposed rule would reduce this waiting period from six months to three months. In addition, under current regulations, an H-2A worker may remain in the United States for up to 10 days 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. The DHS proposed rule would extend this post-petition period of stay to 30 days. Another proposed amendment would enable 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. Under current regulations, the alien cannot begin the new job until the petition is approved and the extension of stay is granted. This ability to begin working for the new H-2A employer before the extension of stay is granted, however, would apply only if the new employer is a registered user in good standing of E-Verify, a largely voluntary

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<sup>42</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* 8538-8585, February 13, 2008; U.S. Department of Homeland Security, “Changes to Requirements Affecting H-2A Nonimmigrants,” *73 Federal Register* 8230-8247, February 13, 2008.

electronic employment eligibility verification system administered by USCIS.<sup>43</sup> According to the proposed rule:

USCIS believes that this proposed employment authorization provision will create an incentive for agricultural employers to enroll in the E-Verify program, thereby reducing opportunities for aliens without employment authorization to work in the agricultural sector and helping protect the integrity of the H-2A program.

## 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, they must pay their workers the highest of the minimum wage, the prevailing wage rate, or the AEW. 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

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<sup>43</sup> For further information on E-Verify and related legislative proposals in the 110<sup>th</sup> Congress, see CRS Report RL34204, *Immigration Legislation and Issues in the 110th Congress*, coordinated by Andorra Bruno.

if the program enabled some participants to obtain LPR status. The option of excluding unauthorized aliens has raised another set of concerns. Some observers maintain that a large guest worker program limited to new workers could leave unauthorized aliens in the United States particularly vulnerable to exploitation by unscrupulous employers. More generally, many who view a guest worker program as a means of addressing the unauthorized alien problem see the inclusion of unauthorized aliens as integral to any proposal.

Another eligibility question is whether the program would be limited to nationals of certain countries. The Bush Administration began discussion of a guest worker program with Mexico in 2001 as part of binational migration talks, and some immigration experts maintain that “there are very good reasons for crafting a special immigration relationship with Mexico, given its propinquity, its historical ties and NAFTA.”<sup>44</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>45</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>46</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 (IRCA) of 1986: (1) a general program for unauthorized aliens who had been continually resident in the United States since before January 1, 1982, and (2) a special agricultural worker (SAW) program for aliens who had worked at least 90 days in seasonal agriculture during a designated year-long period.<sup>47</sup> Approximately 2.7 million individuals have adjusted to LPR status under these programs.

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<sup>44</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>45</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>46</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>47</sup> P.L. 99-603, November 6, 1986. The general legalization program is at INA §245A, and the SAW program is at INA §210.

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 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>48</sup> To partially address the increased demand for visa numbers, the Immigration Act of 1990<sup>49</sup> 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>50</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

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<sup>48</sup> See CRS Report RL32235.

<sup>49</sup> P.L. 101-649, November 29, 1990.

<sup>50</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.

a system of worker registries.<sup>51</sup> Another option suggested by some in H-2A reform debates is to adopt the more streamlined labor market test used in the temporary worker program for professional specialty workers (H-1B program). That test, known as labor attestation, requires employers to attest to various conditions.<sup>52</sup> 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.

## 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.

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

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<sup>51</sup> See discussion of legislation in the 105<sup>th</sup>-107<sup>th</sup> Congresses in the **Appendix**.

<sup>52</sup> See CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*, by Ruth Ellen Wasem.

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>53</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 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

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<sup>53</sup> INA §218(g)(2).



screening of participants, monitoring while in the United States, and issuance of fraud-resistant documents.

## **Conclusion**

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

## Appendix. Guest Worker Legislation in the 105<sup>th</sup>-109<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>54</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>55</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

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<sup>54</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>55</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.

existing wage requirements, while S. 1313/H.R. 2736 would have mandated a study of the wage issue. No action beyond committee referral occurred on either proposal.

## Legislation in the 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>56</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,

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

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

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

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

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

**S. 2010.** The Immigration Reform Act of 2004: Strengthening America's National Security, Economy, and Families (S. 2010), introduced by Senator Hagel for himself and Senator Daschle, would have reformed the H-2B nonimmigrant visa. The bill would have eliminated the current restriction that H-2B workers can perform only temporary service or labor, and instead would have required that they perform "short-term service or labor, lasting not more than 9 months." S. 2010 also proposed a new H-2C visa for temporary workers coming to perform "labor or services, other than those occupation classifications" covered under the H-2A, H-2B, or specified high-skilled visa categories, if qualified U.S. workers 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-ID visa for temporary workers coming to perform "labor or services, other than those occupation classifications" covered under the H-2A or specified high-skilled visa categories, if qualified U.S. workers 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>57</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.

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

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<sup>57</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.

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>58</sup> introduced respectively by Senator

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<sup>58</sup> Although S. 352 and H.R. 793 are not identical, they are treated as companion bills here (continued...)

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 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

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<sup>58</sup> (...continued)

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.

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>59</sup> on 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, 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>60</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.

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<sup>59</sup> The blue card status proposed under this bill is different than the blue card status proposed in S. 2087 (discussed below).

<sup>60</sup> For information on numerical limits, see CRS Report RL32235.

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 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>61</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, 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

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<sup>61</sup> For information on numerical limits, see CRS Report RL32235.

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>62</sup> and that at least 80% of aliens who overstayed their nonimmigrants visas were removed within one year of overstaying.

**S. 1033/H.R. 2330.** The Secure America and Orderly Immigration Act (S. 1033/H.R. 2330) was introduced, respectively, by Senator McCain and Representative Kolbe for themselves and bipartisan groups of cosponsors. It was discussed at the Senate Judiciary Committee hearings on comprehensive immigration reform held in July 2005 and October 2005. Its guest worker and legalization provisions 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.

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<sup>62</sup> For background information on the entry-exit system issue, see CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and Stephen R. Viña.

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>63</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>64</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 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

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<sup>63</sup> For an explanation of INA §245(i), see CRS Report RL31373, *Immigration: Adjustment to Permanent Resident Status Under Section 245(i)*, by Andorra Bruno.

<sup>64</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.

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.