



Summary of the Agricultural Job Opportunities, Benefits, and Security Act ("AgJOBS")

Congress has moved closer to resolving conflict over federal policy on farmworkers' immigration and labor issues. During the 1990's, a stalemate developed. Major agribusiness groups unsuccessfully lobbied for a new guestworker program that farmworker groups vigorously opposed. Farmworkers could not pass the immigration and labor proposals that they sought. In 2000, the principal parties to these disputes reached a compromise. A large coalition of agricultural employers, working with Senator Larry Craig (R.-Idaho) and Rep. Chris Cannon (R.-Utah), and farmworker advocates led by the United Farm Workers (UFW), collaborating with Rep. Howard Berman (D.-Cal.) and Sen. Edward Kennedy (D.-Mass.), negotiated the Agricultural Job Opportunities, Benefits and Security Act, known as "AgJOBS" (the current bills are numbered S.359 and H.R. 884). No agreement would have been reached without difficult compromises by each side and recognition of a new reality in this country regarding immigration issues. The UFW, the Farm Labor Organizing Committee (FLOC), Pineros y Campesinos Unidos del Noroeste (PCUN - Oregon's farm labor union), Farmworker Justice and numerous other farmworker advocates endorsed this bipartisan compromise, as did a multitude of civil rights, Latino, labor, and agricultural employer organizations.

The AgJOBS "strange bedfellows" coalition came close to passing AgJOBS in the Senate several times but each time was thwarted, until May 2006. In March 2006, the Senate Judiciary Committee approved a comprehensive immigration bill that included AgJOBS. This breakthrough was made possible partly by negotiations that led to support by Sen. Dianne Feinstein (D.-Cal.), a key member of the Judiciary Committee who had earlier demanded harmful changes to AgJOBS. As part of the negotiations, Sen. Feinstein won additional changes to AgJOBS but the basic provisions remained intact. After the Judiciary Committee's bill moved to the Senate floor in late March, a new compromise on the overall bill was reached in negotiations led by Senators Hagel, Martinez, McCain, Kennedy, and Specter. AgJOBS remained in the bill, which became S. 2611. Sen. Saxby Chambliss (R.-Ga.), the chair of the Agriculture Committee, introduced amendments to weaken substantially the AgJOBS labor protections and immigration-status provisions, but as a result of much effort, these amendments were defeated. The Senate included the modified version of AgJOBS in the bipartisan, comprehensive immigration bill, S. 2611, passed in May 2006. Ordinarily, the next step in the Congressional process would be a House-Senate Conference Committee to resolve the differences between S. 2611 and the Sensenbrenner immigration bill, H.R. 4437, passed by the House. The House bill, HR 4437, passed in December, does not include AgJOBS or other earned legalization programs. HR 4437 would not ensure an adequate, stable agricultural farm labor force; instead it would criminalize hard-working people, tear apart families, and threaten our agricultural economy and food security. As of this writing, no conference committee meetings were scheduled. The likely outcome is not predictable.

The AgJOBS legislation is quite complex but essentially contains two parts: (1) a two-step "legalization" or "earned adjustment" program under which undocumented farmworkers

who have been performing work in agriculture in the United States may gain *temporary* resident immigration status and then earn *permanent* resident immigration status upon completing additional employment in U.S. agriculture during the next three or five years; (2) the H-2A agricultural guestworker program, which allows agricultural employers to employ foreign workers on temporary nonimmigrant visas based on claims of labor shortages, will be revised substantially.

Adjustment of Undocumented Agricultural Workers to Temporary-Resident and Permanent-Resident Immigration Status

A majority of migrant and seasonal farmworkers in the U.S. lack authorized immigration status. The undocumented farmworkers are vulnerable to exploitation by labor contractors and growers, and the wages of all farmworkers are depressed by the presence of so many employees who lack any meaningful bargaining power. The legislation's earned legalization program would grant many undocumented farmworkers the chance to adjust to legal immigration status. The earned legalization program also would apply to farmworkers who have been employed as temporary nonimmigrant workers in the H-2A guestworker program and wish to become immigrants.

Step One - Applying for "Blue Card" Temporary Resident Status

The first step would be submitting an application for "blue card" temporary resident status. The application period would begin seven months after the legislation is enacted and would last eighteen months. The applicants would need to demonstrate that they performed at least 150 or more days of agricultural work in the U.S. during the 24-month period ending on December 31, 2005. Applicants would also have to pay a \$100 fine and the application costs. Such workers would be granted "blue card" temporary resident status, an immigration status (not a mere nonimmigrant guestworker status). Several immigration-law "bars" against gaining immigration status (e.g., due to unlawful presence in the U.S.) would be waived, but bars based on criminal convictions and most other immigration-law standards would remain.

The procedures for proving past farm employment were written with recognition of the informal, sometimes nonexistent, record-keeping of many agricultural employers and the difficulties experienced by undocumented farmworkers. Ordinarily, employment records from farmers and labor contractors would suffice. When employment records are not available, other forms of evidence, such as affidavits, would be acceptable to help workers prove their employment "by a preponderance of the evidence." The Department of Homeland Security would be obligated to write regulations describing the nature of the allowable evidence and enabling farmworkers to gain access to records. Farmworkers should be advised, even though the legislation has not and may not be passed, to maintain their employment records and consider how they could obtain other forms of evidence, such as affidavits of former employers or co-workers that could substantiate their claims of work experience.

Farmworker with "blue card" temporary resident immigrant status could work in any occupation, at any employer, could travel abroad and reenter the United States, and otherwise to be treated as a lawful immigrant. However, temporary residents under this program who do not fulfill the prospective agricultural work requirement on time would be terminated from the program and required to leave the country. In addition, temporary residents who submit fraudulent applications, who commit an act that would make them inadmissible under immigration law, or who are convicted of a felony, 3 or more misdemeanors, or an offense an element of which involves bodily injury, threats of serious bodily injury, or harm to property in

excess of \$500 would lose their “blue card” and would be denied adjustment to permanent resident alien status and be subject to removal (deportation).

During the period of temporary resident status, the “blue card” holder’s spouse and minor children could remain in the U.S. and the spouse could obtain a work permit. The spouse and minor children could also travel outside of and return to the U.S. Once the worker fulfills the requirements to receive permanent resident status, his/her spouse and minor children also would be granted permanent immigration status as long as they meet other requirements under immigration law. (Minor children who become adults during the process would be covered, too.)

Step Two - Applying for Permanent Resident Status

To gain permanent residency (a “green card”), the temporary resident farmworker would need to fulfill a prospective agricultural-work requirement. He or she would need to perform agricultural work for at least 100 work days per year or 575 hours per year (but not less than 575 hours) for five years during the five-year period beginning on the date of enactment of the Act; OR 150 work days per year or 863 hours per year (but not less than 863 hours) for 3 years during the five-year period beginning on the date of enactment of the Act. (A “work day” is one in which at least 5.75 hours of work has been performed.) Employers would be required to provide evidence of employment, but workers would have other methods to prove work experience when employers fail to provide records. In addition to the work requirements, “blue card” holders wanting to adjust to permanent residence must also pay a \$400 fine and application fees and would have to establish payment of applicable federal tax liability (or that the blue card holder has entered into an agreement with the IRS for the payment of all outstanding liabilities) by the date of adjustment to lawful permanent status.

A temporary resident worker who is fired by an employer without “just cause” could file an administrative complaint with the government to gain credit toward the prospective work requirement for the work days that were improperly lost. (No back pay would be available in that proceeding, but other laws may offer additional remedies.) Workers injured on the job also would be given credit for lost work days.

The adjustment program for both temporary resident status and lawful permanent residency would be funded through application fees. The applications could be filed with a “Qualified Designated Entity” (an organization approved by the U.S. Department of Homeland Security (DHS), which can include labor unions, nonprofit groups, employer organizations, etc.). Applications could also be filed directly with the DHS, but to reduce unauthorized practice of law and fraudulent immigration consulting, only if the applicant is assisted by a licensed attorney or an individual or organization recognized by the Bureau of Immigration Appeals. Information in the applications is confidential. Legal aid programs funded by the federal government would be permitted to represent applicants for purposes of applying for temporary resident status. Upon receiving temporary resident status, workers would be eligible for legal services generally.

The earned legalization program limits eligibility to those farmworkers who were employed in the U.S. during the 24-month period ending December 31, 2005. The earned legalization program does not continue on an ongoing basis and does not apply to future farmworkers. Farmworker advocates believe that employers must take steps to retain the pool of newly-legalized workers by improving wages and working conditions and modernizing labor practices. Government should create incentives for employers to stabilize the agricultural workforce. Many employers, however, expect that the newly-legalized workers will leave

agriculture after five or ten years and that the labor force will then be hired through the H-2A guestworker program.

Reform of the H-2A Temporary and Seasonal Alien Agricultural Worker Program

AgJOBS would modify the existing H-2A temporary foreign agricultural worker program, which permits employers to hire guestworkers to fill temporary or seasonal agricultural jobs that last no longer than ten months.

Application Process for the H-2A Guestworker Program

The H-2A program's application process would be streamlined to become a "labor attestation" program similar to the H-1B program, rather than the current "labor certification" program. This change would reduce paperwork for employers and limit the government's oversight of the employer's application. The process also would be sped up.

An employer (or an association or agent of employers) seeking guestworkers would file with the Secretary of Labor an application containing "assurances" that it will comply with specific H-2A program obligations. The application must be accompanied by a job offer. The job offer (but not the application) must be filed at least 28 days before the first day of work with a local job service office; the employer must authorize the job service office to post the job offer on America's Job Bank or another electronic job registry. The bill also specifically says that the employer need not circulate the job offer through the interstate job clearance process. No more than 14 days before the job begins, the employer must advertise in newspapers likely to be read by farmworkers. The employer also must disclose the information at its work site and to a collective bargaining representative if one exists. The Secretary of Labor must issue a "certification" to the employer within 7 days of receiving an application after reviewing the application only for completeness and obvious inaccuracies. The employer, which would have been engaged in recruitment abroad beforehand, would then seek issuance of the visas for the selected foreign workers at the U.S. consulate abroad. H-2A guestworkers would continue to be tied to the one employer that obtained the visa for them and they must leave the U.S. when the job ends (with some exceptions for shepherders, goatherders and dairy workers). They also remain dependent on the employer to request a visa for the worker in the following season; the H-2A program has no "recall rights" (rights for the workers to be rehired the next year), except when a union contract imposes them.

Most important H-2A worker protections would continue, although some that were in the Department of Labor's H-2A regulations would now appear in the statute itself.

- The employer must guarantee the opportunity to work for at least three quarters of the stated period of employment or pay compensation for any shortfall (the "three-fourths minimum work guarantee").
- Qualified U.S. workers (including the newly-legalized farmworkers) must be hired as long as they apply during the first half of the season. Thus, the H-2A program's "50% rule" continues to provide U.S. workers with a job preference.
- H-2A employers must provide workers' compensation insurance coverage.
- No job may be filled by an H-2A worker that is vacant because the previous occupant is on strike or involved in a labor dispute.
- The employer must reimburse inbound and return transportation costs to workers who complete the season (but only if they travel more than 100 miles for the job).

- Employers may not discriminate in favor of guestworkers.
- Workers must be given a copy of the work contract and pay receipts.

The bills would modify some current H-2A requirements in important ways.

Housing: Currently, an H-2A employer must provide housing at no cost (to non-local workers). Under AgJOBS, an employer could provide a monetary housing allowance (set by a formula based on subsidized housing rents) instead of housing, but only where the Governor of a State has certified that there is sufficient farmworker housing available in the local area.

Wages: The H-2A employer, by statute (and not just regulation), would be required to pay at least the highest of the state or federal minimum wage rate, the local “prevailing wage” for the particular job, or an Adverse Effect Wage Rate (AEWR). Currently, the DOL issues an AEWR for each state; they are based on USDA regional surveys of average hourly wage rates in the previous year for nonsupervisory field and livestock workers combined. Most farmworker advocates believe the H-2A wage rates are too low; most growers strongly disagree. This bill would **freeze the adverse effect wage rates for three years** at the levels which were in effect in 2002, resulting in an average pay reduction of about 10%. Studies and recommendations would be issued by the U.S. Government Accountability Office (GAO) and a special commission. If Congress fails to enact a law about H-2A wages within 3 years, the AEWRs would be adjusted at the end of the three years and at the beginning of each year thereafter, based on the previous one year’s change in the consumer price index, with a maximum increase of 4% per year. Examples of the 2002 AEWRs are \$6.77 per hour in Louisiana, \$7.53 in North Carolina (where several thousand H-2A workers are hired), \$8.02 in California and \$8.60 in Oregon.

The bill would authorize employers and bona fide unions, through collective bargaining agreements, to change certain job terms required by the H-2A program to give workers and employers greater flexibility to meet their needs.

Year-Round Employment: Workers employed as goatherders or dairy workers would join sheepherders in being eligible to participate in the H-2A program even when they are year-round workers. These workers would be able to work up to three consecutive years, at which time they would be eligible to apply to adjust status to lawful permanent residency subject to the availability of employment-based visas. Other H-2A workers would continue to hold temporary work permits with no opportunity to become permanent residents through the H-2A program.

Federal Cause of Action to Enforce H-2A Rights: For the first time, H-2A guestworkers would have the right to go to federal court to enforce their rights under the H-2A program. Currently, H-2A workers lack such a right and are forced into local state courts under state contract law. H-2A guestworkers are excluded from the Migrant and Seasonal Agricultural Worker Protection Act of 1983 (known as “AWPA” or “MSPA”), which provides U.S. workers (including those who become legalized under this legislation) with certain protections and remedies in federal court. That H-2A exclusion would continue. The continuing exclusion of H-2A guestworkers from AWPA deprives them of several protections, for example, the right to a disclosure of job terms at the time of recruitment and an employer’s obligation to utilize only federally-licensed farm labor contractors. The bill, however, would require compliance with transportation safety standards when H-2A farmworkers are transported, similar to the protections that U.S. workers have under the AWPA. The bill also specifies that H-2A workers would be permitted to file a federal lawsuit to enforce their wages, housing benefits, transportation cost reimbursements, minimum-work guarantee, motor vehicle safety protections,

and other terms the written H-2A job offer. Any party to such a lawsuit could insist on non-binding, free mediation, which could not delay the litigation beyond ninety days. The bill states that this right to file a legal action would supersede (“preempts”) a claim under state contract law, but that all other state labor law rights remain in force. Workers could not waive their rights under the Act and employers could not retaliate against workers for exercising those rights.

Administrative Complaint Mechanism: The Secretary of Labor would be required to establish an administrative complaint mechanism with specified time frames to resolve farmworkers’ complaints of H-2A employers’ violations of their rights, and would have authority to impose back pay and civil money penalties, and to bar employers from the program if they violate the law.

Currently, the H-2A program does not have a maximum number of allowable visas each year, and the program would remain uncapped. Presently, the Department of Labor approves about 50,000 H-2A jobs per year, although the number of guestworkers actually hired is significantly lower.

The H-2A changes would take place one year after the bill is enacted, except that the wage changes begin immediately.

In conclusion, if the legislation is enacted, the earned legalization program should enable the large majority of the undocumented farmworkers presently contributing to the economy to begin the process of gaining legal status. There will be many challenges in helping such farmworkers overcome obstacles in gathering evidence of both their past employment experience and compliance with the prospective agricultural work requirement. Moreover, the mere fact of holding legal status does not guarantee that farmworkers’ wages and working conditions will improve; nor does legal status eliminate the discrimination that agricultural workers continue to face in federal and state labor laws. Government and employers should take steps to stabilize this workforce by making agricultural work more attractive and productive. With a large number of legal-immigrant farmworkers in the country, there should be no need for H-2A guestworkers during the several years after the legalization program begins. The changes to the H-2A guestworker program necessitate great vigilance on the part of farmworker advocates and government agencies to prevent unscrupulous employers from taking advantage of vulnerable guestworkers. Like many compromises on controversial issues, this legislation contains some painful concessions, but the result is far better than the status quo and will help many farmworkers far into the future. It should be supported.

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For more information about AgJOBS and other immigration bills affecting farmworkers, please visit our webpage at www.farmworkerjustice.org.