



Preliminary Summary of Farmworker Provisions of Senate Immigration Bill

On April 17, 2013, a bipartisan group of eight U.S. Senators introduced a bill, the Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, intended to reform the nation's broken immigration system. Two major components of the bill would have profound impacts on farmworker families. These components are the result of intense negotiations that resulted in a detailed compromise among Senators Feinstein (D-Cal.), Bennet (D-Col.), Rubio (R-Fla.), and Hatch (R-Ut.), agribusiness representatives and the United Farm Workers.

If enacted, the compromise would accomplish our number one priority: providing undocumented farmworkers and their family members an opportunity to obtain legal immigration status leading to permanent residency and the opportunity to become U.S. citizens. The compromise also includes a new agricultural worker visa program that would replace the H-2A temporary foreign agricultural worker program. The new system would end or weaken certain longstanding H-2A labor protections but also would provide important new rights. The compromise reflects efforts to win filibuster-proof support of at least 60 Senators for comprehensive immigration reform. It contains concessions on immigration and labor issues that were difficult for all parties.

The Earned Legalization Program

The earned legalization program would allow certain agricultural workers and their immediate family members residing in the U.S. to obtain legal immigration status leading to citizenship.

Step One: Apply for “Blue Card” Temporary Resident Status. A farmworker could apply for a “blue card” (temporary residency). A farmworker's spouse and minor children would also be eligible for blue card status. The application period would begin after the final regulations are published and would last 1 year, unless extended. Eligible workers are those who

- have worked in U.S. agriculture for at least 100 work days or 575 hours during the 24-month period ending December 31, 2012;
- are not excluded by certain immigration laws;
- complete national security and law enforcement clearances;
- have not been convicted of a felony, 3 or more misdemeanors, or certain other crimes; and
- pay an application fee and a \$100 fine.

Step Two: Earn Legal Permanent Resident Status: Prospective Work Requirement. The blue card holder must fulfill the following requirements to earn a “green card.” Immediate family members may also apply for and receive permanent resident status when the farmworker does, so long as they continue to meet the admissibility requirements.

- perform agricultural work for at least

- 100 work days per year for each of 5 years during the 8-year period beginning on the date of enactment of the Act; OR
- 150 work days per year for 3 years during the 5-year period beginning on the date of enactment of the Act
- pay a \$400 fine and application fee; and demonstrate that they have paid applicable federal tax liability.

The earliest that an agricultural worker would be able to obtain a green card is 5 years after the date of enactment of this act. If a blue card worker is unable to fulfill the agricultural work requirement, s/he may seek adjustment to registered provisional immigrant status under the general legalization program.

The Future Flow: A New Nonimmigrant Agricultural Visa Program

The bill would create a new nonimmigrant agricultural worker visa program that would replace the current H-2A program, which would sunset one year after the new program becomes effective. The program would offer two types of visas, a contract-based visa (W-3 visa) and a portable, “at-will” employment-based visa (W-4 visa). Agricultural work would include year-round work in agriculture, such as dairying and shepherding.

For the first time, nonimmigrant agricultural visa workers would be offered a limited portability to switch employers: agricultural W-3 contract workers who complete their contract and W-4 portable-visa workers would be able to work for any agricultural employer that has registered with U.S. Department of Agriculture (USDA) and has filed a petition with Department of Homeland Security (DHS). To enter the U.S. initially, the nonimmigrant workers would need to have a job offer from a participating employer. Workers under both programs would be entitled to remain in the U.S. for up to three years and be able to renew their period of admission for an additional 3-year period before being required to return to their residence abroad for at least 3 months. Workers would have up to 60 days to locate new employment with a qualifying employer before being required to depart the country.

Application Process: To hire W-3 and W-4 visa workers, employers would first be required to register with the USDA as a Designated Agricultural Employer (DAE). Subsequently, DAEs must submit an application to DHS not later than 45 days prior to date of need. There would not be a “labor certification” process, but the application must include attestations regarding program requirements, protections, and obligations.

Cap: During the first five years, the new program could issue a maximum of 112,333 W-3 and W-4 visas per year for three years, amounting to a cumulative maximum of 337,000 visas. The cap could be increased or decreased by USDA during the first 5 years based on certain circumstances, such as a shortage of agricultural workers or the level of unemployment. After the first 5 years, USDA, in consultation with DOL, will establish the cap based on certain factors.

Recruitment of U.S. Workers: The program requires that employers recruit and hire U.S. workers who are equally or better qualified than nonimmigrant workers. Employers must provide U.S. workers the same wages and working conditions as nonimmigrant workers, with the exception of housing, as noted below.

Wage Requirements: Employers would have to offer nonimmigrant agricultural workers the highest of a new statutory wage or the federal or state minimum wage. Wage rates would be established for each of 6 occupational categories. The wage levels would begin in 2016 (the expected first year of the program) and would be adjusted annually based on the Employment Cost Index (ECI) of the Bureau of Labor Statistics with a minimum annual increase of 1.5% and a maximum of 2.5%. The levels are as follows: crop workers - \$9.64; graders and sorters - \$9.84; livestock and dairy - \$11.37; and equipment operators - \$11.87. Levels for agricultural supervisors and animal breeders would be set by USDA.

Other Program Requirements:

- Workers in the both new visa programs must be provided workers' compensation coverage.
- Workers in both the contract and portable at-will programs would be provided, or reimbursed for, in-bound transportation to the place of employment, with contract workers receiving outbound transportation if they complete $\frac{3}{4}$ of a three year contract.
- Under the three-quarters minimum work guarantee, employers would provide W-3 visa contract workers with employment opportunities for at least three-quarters of the number of hours in the job offer or pay for any shortfall.
- Employers must provide housing or a housing allowance to nonimmigrant agricultural workers, except that they may offer contract workers an allowance only if the governor of the state in which the employment is located certifies that adequate housing is available in the local area for migrant farm workers. The program also includes a "border commuter" provision, which creates an exception from the housing requirement for workers whose residence is within normal commuting distance and whose job site is within 50 miles of an international border.

Enforcement: Administration of the process would primarily lie with USDA and DHS. However, DOL is granted authority to conduct compliance investigations for labor protections and must establish a complaint procedure for victimized workers to obtain back wages and other remedies. In addition, for the first time, nonimmigrant workers will be covered by the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), which allows workers to file a federal lawsuit to enforce their contract rights and other requirements of the law.

Prevention of Trafficking in Persons and Abuses Involving Workers Recruited Abroad

For farmworkers and other internationally recruited workers, the issue of international recruitment protections is critically important. The rampant discrimination, fraud, and recruitment fees that are commonplace during the recruitment process drastically impact the experience of workers during recruitment and once they are in the U.S. If workers are indebted or fearful in the U.S., they are very reluctant to challenge illegal workplace actions and can end up in very exploitative situations. We are pleased to see the inclusion in the comprehensive immigration reform bill of provisions aimed at curbing the abuses in international labor recruitment across all visa categories. The provisions would provide for increased regulation and oversight of international labor recruiters, including a prohibition on charging recruitment fees, a fraud and misrepresentation provision, and disclosure, registration and bond requirements for foreign labor recruiters. It would also create a private right of action for aggrieved workers.

*This preliminary analysis occurred prior to expected corrections in the bill's language.