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LEGAL IMMIGRATION POLICIES FOR LOW-SKILLED FOREIGN WORKERS*

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US Immigration Reform

THE ISSUE: The current US legal immigration system includes few visas for low-skilled workers, and employers have relied heavily on an unauthorized workforce in many low-skilled occupations. The issue of "future flow" of legal workers at the low-skilled level — its size, wage and labor protections, and conditions for temporary or permanent residency has been a major point of debate as bipartisan Senate and House groups craft separate immigration reform proposals. In particular, it has been the focus of lengthy talks between labor unions and the US Chamber of Commerce, resulting initially in a shared statement of principles and later an accord for a new visa category (named the W visa). This issue brief explains the questions that policymakers must grapple with when designing programs for admission of low-skill workers, for temporary as well as permanent entry. It focuses on visas for nonagricultural work; agricultural employment is the subject of a separate issue brief.

I. Low-Skilled Workers: Limited Channels under Current System

Current policies for admitting foreign workers in low-wage or low-skilled jobs[1] in the United States have been widely criticized. Restrictions on the legal channels to recruit low-skilled foreign workers in both temporary and permanent positions, coupled with businesses' continued ability to employ unauthorized workers undetected, are often held responsible for the enormous growth in the unauthorized population during the 1990s and 2000s until the recent economic crisis. This gives low-skilled employment-based immigration — a component of what is often referred to as the "future flow" of foreign workers — an important position in the current debate about comprehensive immigration reform.

Both historically and in the current debate, the discussion about low-skilled visa programs has focused primarily on the balance between the need to protect the interests of foreign workers and US workers[2] employed alongside them, and the need to create a system that meets employers' legitimate demand for labor. Perennial disagreements over the shape of low-skilled employment-based immigration have produced numerous regulatory changes and legislative proposals in the past decade, and were the subject of talks between the US Chamber of Commerce and the AFL-CIO that resulted in a tentative agreement in late March for a new temporary visa — the W visa — that would offer a path to permanent residence.

* An earlier version of this brief was prepared for the Regional Migration Study Group convened by the Migration Policy Institute and the Latin American Program of the Woodrow Wilson International Center for Scholars.

II. Current Policies and Flows

Today, US employers can hire foreign workers for temporary positions in agriculture and, within numerical limits, other industries. Employers must demonstrate that their need is by nature temporary, one-off, or seasonal — this could include additional maids or waiters hired during peak seasons, for example. Most low-skilled jobs are ongoing and do not have a defined end date, however.[3] Options for recruiting foreign workers for these jobs are extremely limited. Workers on low-skilled temporary visas — through the H-2A (agricultural) and H-2B (nonagricultural) programs — are not eligible to apply for permanent residence while they are in the country.

Meanwhile, permanent visas for ongoing, non-temporary positions are heavily oversubscribed and employers and the workers they seek to sponsor for such visas face wait times of several years.[4]

III. Major Policy Issues for Low-Skilled Work Visas

All low-skilled visa programs, whether strictly temporary or designed for ongoing employment, must balance several goals. These include the need to: 1) guard against exploitation of foreign workers; 2) maintain appropriate wage and working conditions for US and foreign workers; and 3) make the legal employment-based immigration system sufficiently attractive to employers to discourage illegal employment.

Table 1. Temporary and Permanent Low-Skilled Visas

Duration	Visa Type	Skill Requirements	Visa Cap
Temporary Visas			
Up to 1 year, renewable to 3 years	H-2A (temporary agricultural workers)	No individual education/training requirement. Individual must be from one of 59 eligible countries.	No cap
Up to 10 months, renewable to 3 years	H-2B (temporary nonagricultural workers)	No individual education/training requirement. Individual must be from one of 59 eligible countries.	66,000 per year
Permanent Visas			
Permanent	EB-3 (other workers)	Less than 2 years of experience or training.	5,000 per year

Source: Immigration and Nationality Act.

A. Requirements for Employers

Employers sponsoring foreign workers are subject to a range of conditions designed to ensure that these workers are not exploited and that work visas are not used as an alternative to recruiting any willing and available members of the US workforce. These conditions are among the most contested features of the current H-2A and H-2B temporary work programs. Debates over their structure often take on the character of a zero-sum game between worker advocates seeking greater protections and safeguards, and employers seeking less burdensome regulations and wage requirements. Many of these requirements are determined through regulations, but they have also been the subject of legislative proposals. Some of the major issues on the table include:

- ***The wage levels and working conditions employers must provide.*** Different methodologies for calculating the required "prevailing wages" can substantially affect their levels, and there is no analytically obvious approach on which stakeholders can broadly agree.[5] Other regulations govern the share of contracted work hours that employers must guarantee, the provision of transportation expenses, and housing.
- ***The efforts that employers must make to recruit US workers before gaining access to foreign workers.*** These can range from the simple requirement to post a job vacancy online or with a state workforce agency to much more extensive recruiting requirements and more or less intrusive monitoring of the reasons local candidates were rejected. There is little evidence in either direction on whether these requirements genuinely encourage employers to hire US workers rather than simply go through the motions of recruiting before successfully applying for a visa to admit the foreign worker.[6]
- ***The wages and working conditions of US workers employed alongside temporary visaholders.*** Programs may require employers to offer the same benefits to US workers as they offer to foreign workers (such as housing and transportation expenses). These requirements are designed to prevent employers from actively discouraging US applications because they find foreign worker programs more convenient, although industry groups argue that such rules simply raise the cost and complexity of participating in legal visa programs and thus encourage unauthorized employment.
- ***The agencies responsible for setting and enforcing rules.*** Some past proposals have sought to strengthen the role of the Department of Labor — a position favored by worker advocates — while others would have eliminated its role and consolidated responsibilities in the Department of Homeland Security (or, in the case of agricultural workers, shifted them to the Department of Agriculture).

In each of these cases, it is difficult to find an "optimal" policy balance. Higher wages and stricter regulations alleviate concerns about competition with US workers, but they also increase the risk that employers will find the legal system too expensive or burdensome and opt for hiring unauthorized workers.

B. Numerical Limits

Numerical limits on visas are seen as a means to contain the risk of competition between foreign workers and their US counterparts. However, oversubscribed caps also make the system unpredictable and unresponsive to employer needs, since visas may be unavailable for periods of several months.

Major issues concerning numerical limits include:

- ***How to determine the appropriate number of visas.*** In practice, this is both a political and an economic exercise, as there is no single level of immigration that can guarantee a good balance between meeting employers' needs and avoiding the risk of substantially expanding reliance on temporary foreign workers.

- ***How to ensure that limits adjust to changing labor market needs.*** The Migration Policy Institute since 2006 has recommended creation of a permanent, independent, nonpartisan body that could help overcome the inertia that has plagued the setting of numerical limits, by regularly advising Congress on sensible adjustments and building analytical capacity to support future reforms.[7] (A version of this proposal was in the 2007 immigration reform bill debated in the Senate, in subsequent major comprehensive bill drafts, and in the business-labor plan agreed to in March 2013.) Other proposals for adjusting limits include automatic changes tied to unemployment rates or the speed with which employers exhaust existing limits.

C. Maintaining Employment Standards

The prevalence of labor-standards violations in current low-skilled visa programs has not been accurately quantified, although there is a strong sense among government investigators, as well as labor and migrant advocates, that violations are a persistent problem.

1. Making Low-Skilled Visas Portable

The most basic means of maintaining and improving employment standards — moving to another job — is currently denied to most holders of H-2 visas, who are tied to their sponsoring employer. This feature of the visa system would become more problematic still, if visas lasted for several years under a new program. The primary proposal designed to address the risk of exploitation is the "portable" visa, under which:

- Workers would be tied to their sponsoring employer for an initial period unless the conditions of their contract were violated. After this period, they would be eligible to move to another employer.[8]
- Workers would be given a reasonable period of time to search for a new job (in effect, creating a new "job search" status for some low-skilled visaholders).

2. Addressing Violations of Labor Standards

While visa portability for temporary foreign workers is likely to reduce the risk of labor-standards violations, language barriers and geographic isolation can make it hard for workers both to move between employers and to defend their employment rights. Other enforcement mechanisms to address this problem include:

- ***Rewarding employers who play by the rules.*** "Registered" or "precleared" employers might be rewarded with simplified application procedures or similar benefits if they could demonstrate their credentials as responsible corporate citizens. Since most employers of low-skilled workers hire multiple workers year after year, registered employer status could take into account their track

record of compliance with US labor and immigration laws. The policy is designed to create room to focus enforcement resources on employers who do not have a track record of compliance and present higher risks.

- ***Providing legal remedies for foreign workers.*** Some proposals would extend foreign workers' rights to sue their employers and their ability to return to or remain in the country while pursuing legal action.
- ***Dedicating resources to labor standards enforcement.*** Enforcing employment standards and, more generally, the terms and conditions of the employment contract, means stretching inevitably limited resources far enough to create a real deterrent effect against violations. Increased monitoring could be funded with a combination of fines from enforcement actions, employer fees, and (at least initially) government appropriations.
- ***Regulating the use of immigration intermediaries.*** Non-transparent contracts and unreasonably high fees are a frequently reported consequence of the use of labor recruiters in countries of origin. Proposed measures to make the recruitment process more transparent include a licensing requirement for foreign labor contractors, provisions that hold employers accountable for violations by labor recruiters, model contracts including a regulated division of travel and recruitment costs between employers and workers, the provision of information on rights in workers' own language, and improved redress mechanisms for victims of labor violations.

IV. A New Future Flow: Visas for Long-Term or Permanent Employment

The absence of a meaningful employment-based visa system for year-round employment — with only 5,000 permanent visas reserved annually for low-skilled workers — is one of several drivers of illegal immigration. In recent years, several legislative proposals have sought to provide legal options to meet this demand. Beyond the policy issues already discussed, a visa program of this kind would raise several additional questions, including who should be eligible, the conditions under which workers could move between jobs and between employers, the duration of the visa, and criteria for access to permanent residence.

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The US Chamber of Commerce and AFL-CIO have agreed in principle to a new visa program that would allow workers to move between employers and to petition for permanent residence after a certain period working in the country. Within this framework, several variables will shape the character of the proposed program.

A. Eligibility for Initial Entry

Under the current system, employers must demonstrate that the proposed employment is strictly temporary to qualify for sponsoring a foreign worker under one of the temporary visa categories. A program that allowed long-term employment would need an alternative definition of eligible work, for example:

- ***Jobs not eligible for skilled temporary work visas***, such as the H-1B. This would cover most jobs that require

less than a bachelor's degree. Within this category, specific exclusions might be made for some occupations. For example, the H-2B program explicitly excludes registered nurses, and initial reports from the business-labor negotiations suggest that some skilled construction occupations, for example, may be excluded from a new W visa.

- ***Jobs that do not require postsecondary education or long-term work experience.***[9] This would include a range of low-skilled positions such as construction laborers, hospitality industry workers, and home health aides, but would exclude middle-skilled practitioners such as electricians or registered nurses.
- ***A more tailored list of occupations.*** A long-term low-skilled visa could potentially be limited to occupations thought to experience significant demand. In practice, the mechanisms for determining these occupations in an objective and accurate way are limited, and the choice of occupations may need to be political, rather than data-driven.[10]

The eligibility for a long-term low-skilled visa program would depend in part on its objectives. A program designed first and foremost to reduce employers' reliance on unauthorized workers might, for example, focus on the least skilled occupations, in which illegal employment is most widespread and which are considered least desirable for US workers because of the limited potential for upward mobility. A program designed to meet employers' skills needs in years of high demand might be somewhat broader and perhaps also include middle-skilled occupations.

B. Duration of the Visa and Eligibility for Permanent Residence

A new visa for long-term employment could be: a) strictly temporary but last for a number of years; b) indefinitely renewable with no path to permanent residence; or c) temporary for some, but convertible into permanent residence for those who meet certain criteria — a policy proposed by the Migration Policy Institute's 2006 Independent Task Force on Immigration and America's Future.[11]

Visas with no path to permanent residence are often favored at the low-skilled level because of concerns that the immigrants they admit will not be able to remain in employment sustainably, support their families without relying on public funds, and integrate into US society. On the other hand, sending home migrants who have shown aptitude at their work and have had time to acculturate, and replacing them with a new cohort of workers who have not, is inherently wasteful of human capital and may discourage employers and workers from investing in workforce development.[12]

A compromise option is to allow only those applicants with the best prospects for successful long-term integration to remain permanently.

A compromise option is to allow only those applicants with the best prospects for successful long-term integration to remain permanently. This would address a commonly held philosophical principle that the United States should not separate the right to work from the right to earn permanent residence (a principle that is easy to overlook when the work is seasonal but becomes much more difficult to ignore once the visa is for multiple years).

A program of this kind would raise a number of design questions:

- ***How workers can earn permanent residence.*** Criteria that might be used to select workers with good integration prospects include: a) progress towards English language proficiency; b) a good employment track record; and c) the attainment of a certain level of occupational skill, responsibilities, or earnings.[13] Employer support for green card applications could be encouraged, but not compulsory, in the screening process.[14]
- ***How long workers can stay before they must either successfully apply for permanent residence or go home*** (previous legislative proposals have included periods of up to six years). Allowing workers to stay in the country for longer periods gives them more time to meet the criteria for permanent residence and creates a more extensive track record on which to judge their application; however, longer periods delay the acquisition of a stable immigration status and may increase the risk that those who do not qualify will have set down deep roots and become unwilling to return home.
- ***How to regulate multiple entries.*** Workers who do not meet the criteria for permanent residence would be required to return home, but become eligible for another temporary visa after a certain period outside of the country.[15] The program might also encourage circular migration by allowing multiple entries or reducing barriers to re-entry for workers who have previously participated.
- ***Addressing numerical limits.*** The current allocation of permanent visas for workers in low-skilled jobs is extremely small; to be effective, a program allowing some low-skilled temporary workers access to permanent residence would, in practice, require additional green cards. If this cap were oversubscribed (as most caps in the US immigration system are), workers would either have to return home — thus undermining the principle of allowing a transition to permanent residence — or be permitted to extend their temporary status while waiting for a green card. Note that in the latter case, a cap on transitions to permanent residence would simply increase the number of renewal applications that the government must process, while delaying access to permanent residence for immigrants who are already in the country.[16]

IV. Conclusion

Visa programs for low-skilled workers, whether temporary, provisional, or permanent, have been one of the major sticking points in the comprehensive immigration reform debate, and were a principal driver behind the failure to enact legislation in 2007. The recent agreement between business and labor organizations — the traditional adversaries in this field — represents a significant departure; even if the details will continue to be debated in coming months and business groups remain cautious about some of its provisions, the agreement certainly puts new momentum behind the principle of a visa that is portable between employers and allows some foreign workers to petition for permanent residence.

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Endnotes

1 The terms "low-wage" and "low-skilled" are often used interchangeably but are not exactly the same. Workers who perform low-wage work tend to have low levels of formal education, on average. Nonetheless, some low-wage jobs rely heavily on a range of important tacit skills acquired through experience on the job.

2 "US workers" are defined as US citizens, legal permanent residents, and other individuals authorized to work in the United States without employer sponsorship.

3 An exception to the requirement for positions to be temporary is made for sheepherders in the H-2A program; these workers can be employed for up to three years in an ongoing job. The dairy industry has also pushed for exemptions from the requirement for positions filled with foreign workers to be temporary in nature, since jobs in this industry tend to last all year.

4 Workers applying for positions requiring less than two years of experience (categorized as "unskilled") can receive up to 5,000 green cards per year under the EB-3 visa category. Workers whose jobs require at least two years of work experience are eligible for a larger, but equally oversubscribed category of EB-3 visas. Workers currently receiving EB-3 visas had waited more than six years since applying, and longer if they came from China, India, or the Philippines.

5 A major point of contention is whether employers calculating prevailing wages in the H-2B program should be permitted to offer lower wages to workers with less experience. The Department of Labor recently finalized a rule that would eliminate this clause and thus raise required wages for many H-2B employers, but Congress withheld funding for enforcing the rule in fiscal year (FY) 2013. Meanwhile, a court injunction against using the old methodology led to a suspension of new applications for many H-2B visas in April 2013. Other debates on the prevailing wage methodology include whether the occupational average should be calculated as the median wage or the (higher) mean wage; and to what extent wage data should reflect the local vs. national labor market.

6 Demetrios G. Papademetriou and Stephen Yale-Loehr, *Balancing Interests: Rethinking US Selection of Skilled Immigrants* (Washington, DC: Carnegie Endowment for International Peace, 1996), www.eric.ed.gov/PDFS/ED406482.pdf.

7 Doris Meissner, Deborah W. Meyers, Demetrios G. Papademetriou, and Michael Fix, *Immigration and America's Future: A New Chapter* (Washington, DC: Migration Policy Institute, 2006), www.migrationpolicy.org/ITFIAF/finalreport.pdf; Demetrios G. Papademetriou, Doris Meissner, Marc Rosenblum, and Madeleine Sumption, *Harnessing the Advantages of Immigration for a 21st Century Economy: A Standing Commission on Labor Markets, Economic Competitiveness, and Immigration* (Washington, DC: Migration Policy Institute, 2009), www.migrationpolicy.org/pubs/StandingCommission_May09.pdf.

8 While some requirements would likely apply to the move, such as the new employer applying to hire the worker, paying fees, and/or trying to recruit local workers, the more restrictive this process, the less meaningful the legal right to switch employers becomes in practice.

9 The Bureau of Labor Statistics (BLS) provides a classification of occupations by the level of education or training required for entry. See the National Center for O*NET Development, *Procedures for O*NET Job Zone Assignment* (Raleigh, NC: National Center for O*NET Development, 2008), www.onetcenter.org/dl_files/JobZoneProcedure.pdf.

10 For a discussion, see Madeleine Sumption, "Filling Labor Shortages through Immigration: An Overview of Shortage Lists and their Implications" *Migration Information Source*, February 2011, http://migrationinformation.org/Feature/display.cfm?ID=828.

11 See Meissner et al, *Immigration and America's Future: A New Chapter.*

12 Demetrios G. Papademetriou, Doris Meissner, Marc Rosenblum, and Madeleine Sumption, *Aligning Temporary Immigration Visas with US Labor Market Needs: The Case for a New System of Provisional Visas* (Washington, DC: Migration Policy Institute, 2009), www.migrationpolicy.org/pubs/provisional_visas.pdf.

13 Criteria could be made flexible so that there would be several different ways to qualify. For example, an individual might be able to qualify despite low English proficiency if they could demonstrate a very good employment and earnings history.

14 Requiring employer sponsorship may make workers more dependent on their employers, raising the risk of exploitation.

15 The rationale for this requirement is for workers to maintain ties with their families and communities at home, and encourage circularity. Currently, H-2A workers must spend three months outside of the United States before returning

to employment; H-1B skilled workers who have not applied for permanent residence must spend one year abroad before reapplying; and some J-1 cultural exchange visa holders have a two-year home residence requirement.

16 This is currently the case for (highly skilled) H-1B workers waiting for a green card, who can indefinitely extend their H-1B visas. The size of the cap in this case affects the amount of time these individuals remain on temporary visas, but does not directly affect the number of immigrants who remain in the country (except to the extent that the long wait time makes staying in the United States less attractive and thus encourages some people to leave voluntarily).

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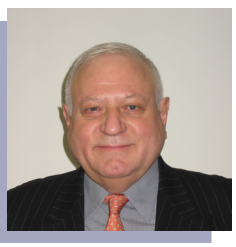

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