



Memorandum

February 3, 2004

SUBJECT: Comparison of Pending Bills to Overhaul the H-2A Temporary Agricultural Worker Program with the Existing H-2A Program**FROM:** Andorra Bruno
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The Immigration and Nationality Act (INA) authorizes a program for foreign temporary agricultural workers, known as the “H-2A” program. The program takes its name from the relevant section of the INA, Section 101(a)(15)(H)(ii)(a). Bills proposing significant changes to the H-2A program are before the 108th Congress. The “Agricultural Job Opportunity, Benefits, and Security Act of 2003” (H.R. 3142/S.1645) was introduced by Representative Chris Cannon, for himself and Representative Howard Berman, and by Senator Larry Craig on September 23, 2003. The “Temporary Agricultural Labor Reform Act of 2003” (H.R. 3604) was introduced by Representative Bob Goodlatte, for himself and more than 30 other Members, on November 21, 2003. H.R. 3142 and H.R. 3604 have been referred to the House Judiciary Committee and its Subcommittee on Immigration, Border Security, and Claims; H.R. 3604 also has been referred to the House Agriculture Committee. S. 1645 has been referred to the Senate Judiciary Committee.

H.R. 3142/S.1645 and H.R. 3604 would replace the existing H-2A program with a revised H-2A program. Among other changes to the existing program, both proposals would streamline the process of importing H-2A workers. In addition, H.R. 3142/S.1645 would establish a two-stage, time-limited legalization program for aliens who have worked in agriculture in the United States and who continue to do so for a specified time. H.R. 3604 does not contain a legalization program.

The following table compares *key features* of H.R. 3142/S.1645, H.R. 3604, and current law and regulations. It is not a side-by-side comparison of all provisions in the bills. Current law and regulations include the INA, as well as implementing regulations issued by the Department of Labor (20 CFR 655, Subpart B) and the Department of Justice (8 CFR 214.2(h)).

I hope this information is useful. If you require further assistance, please contact me at 7-7865.

Comparison of Existing H-2A Program with H.R. 3142/S. 1645 and H.R. 3604

Provision	Current law and regulations	H.R. 3142/S. 1645	H.R. 3604
Adjustment to legal status	No provision.	A two-stage, time-limited legalization program would be established for aliens who have worked in agriculture in the U.S. Eligible workers could first apply for temporary resident status. After meeting additional requirements, they could apply to adjust to legal permanent resident (LPR) status. (§101)	No provision.
Initiation of application for H-2A workers	An employer (including an agricultural association) wanting to import H-2A workers files an application for labor certification with the Department of Labor (DOL). The application must include a copy of the job offer to be used to recruit U.S. and H-2A workers. The job offer must meet specified requirements and include various assurances. Labor certification reflects a finding that U.S. workers are not available and that hiring foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. (INA §§218(a)(1), (d)(1); 20 CFR 655.101(a)(1), (b), 655.103)	An employer (including an agricultural association) wanting to import H-2A workers would file an application with DOL. The application, which must include various assurances, would have to be accompanied by a copy of the job offer. Required assurances would differ for job opportunities covered by collective bargaining agreements and those not covered by collective bargaining agreements. (§201(a))	An employer (including an agricultural association) wanting to import H-2A workers would file an application with DOL containing various assurances. (§2(a))

Provision	Current law and regulations	H.R. 3142/S. 1645	H.R. 3604
<p>Deadlines for and review of applications for H-2A workers</p>	<p>DOL may not require applications for labor certification to be filed more than 45 days before date of need for workers. DOL must accept, or request modifications, within seven days of filing. If applicable requirements are met, DOL must issue certification not later than 30 days before date of need. (INA §§218(c)(1)-(3)(A))</p>	<p>DOL would review application only for completeness and obvious inaccuracies. Unless application is incomplete or obviously inaccurate, DOL would certify within seven days of filing that employer has filed application. (§201(a)) <i>Note: Bill does not specify time frame for filing applications with DOL. It does state, however, that employer must submit copy of job offer to local office of state employment agency not later than 28 days before date of need for workers.</i></p>	<p>DOL may not require applications to be filed more than 45 days before date of need for workers. DOL would review application only for completeness and obvious inaccuracies. Unless application is incomplete or obviously inaccurate, DOL would provide certification within seven days of filing. (§2(a))</p>
<p>Recruitment of U.S. workers</p>	<p>Employer must make positive efforts to recruit U.S. workers. DOL also uses employer’s job offer to conduct local, intrastate, and interstate recruitment through its U.S. Employment Service and affiliated state employment agencies. (INA §218(b)(4); 20 CFR 655.103(d), 655.105)</p>	<p>For job opportunities not covered by collective bargaining agreements, employer would have to take steps to recruit U.S. workers. Employer would have to submit copy of job offer to local office of state employment agency and authorize posting of job on electronic job registry, but would not have to file interstate job order. (§201(a))</p>	<p>Employer would have to make positive efforts to recruit U.S. workers. (§2(a))</p>

Provision	Current law and regulations	H.R. 3142/S. 1645	H.R. 3604
Provision of wages and benefits	Employer must provide required benefits, wages, and working conditions to all H-2A workers and all similarly employed U.S. workers. (20 CFR 655.102(b))	Similar provision to current law applicable to job opportunities <i>not</i> covered by collective bargaining agreements. (§201(a)) <i>Note: As the bill is currently written, this provision arguably could also apply to jobs covered by collective bargaining agreements. According to the drafters, however, their intent is to have this provision apply only to uncovered jobs.</i>	Similar provision to current law. (§2(a))
Wages	Wages must be the highest of the adverse effect wage rate (AEWR), the prevailing wage rate, or the federal or state minimum wage rate. The AEWR is equal to the annual weighted average hourly wage rate for field and livestock workers combined for the region as published annually by the Agriculture Department based on its quarterly wage survey. AEWRs for each state are published yearly by DOL. (20 CFR 655.102(b)(9), 655.107(a))	For job opportunities not covered by collective bargaining agreements, wages would have to be the highest of the AEWR, the prevailing wage rate, or the federal or state minimum wage rate. For three years following enactment, the AEWR for a state could not exceed the AEWR in effect on January 1, 2003. GAO would be required to submit a report to DOL and Congress on wage protections. A Commission on Agricultural Wage Standards under the H-2A program would be established. (§201(a))	Wages would have to be the higher of the prevailing wage rate or the applicable state minimum wage. (§2(a))

Provision	Current law and regulations	H.R. 3142/S. 1645	H.R. 3604
Housing	Employer is required to provide free housing for workers not reasonably able to return to their residences within the same day. (INA §218(c)(4); 20 CFR 655.102(b)(1))	For job opportunities not covered by collective bargaining agreements, employer would be required to provide free housing for workers whose residences are beyond normal commuting distance. Employers could provide a housing allowance instead of housing, if the governor of the relevant state certifies that there is adequate housing available. (§201(a))	Similar provisions to H.R. 3142/S. 1645. (§2(a))
Transportation and subsistence	Employer is required to either advance a worker's transportation and subsistence costs to the place of work if this is the prevailing practice, or reimburse such costs after the worker has completed 50% of the work period. After the worker completes the work period, the employer must pay for the worker's transportation and subsistence back to the place from which the worker came to the employer, or to the worker's next place of work, if the subsequent employer has not agreed to pay for these expenses. (20 CFR 655.102(b)(5))	Employer would be required to reimburse a worker's transportation and subsistence costs to the place of work after the worker has completed 50% of the work period. After the worker completes the work period, the employer would be required to reimburse the worker's transportation and subsistence costs back to the place from which the worker came to the employer, or to the worker's next place of work, if the subsequent employer has not agreed to pay for these expenses. No reimbursement would be required if the distance traveled is 100 miles or less, or if the worker is not residing in employer-provided housing or housing secured through a housing allowance. (§201(a))	Similar provisions to H.R. 3142/S. 1645. (§2(a))

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Provision	Current law and regulations	H.R. 3142/S. 1645	H.R. 3604
Petitioning for admission of H-2A workers	After DOL labor certification process, employer petitions the Attorney General [now Department of Homeland Security (DHS)] to import H-2A workers. (INA §214(c)(1))	After DOL certification process, employer would petition DHS to import H-2A workers. DHS would transmit notice of action on petition within seven working days. (§201(a))	Similar provisions to H.R. 3142/S. 1645. (§2(a))
Ineligibility for admission due to unlawful presence	An alien who has been unlawfully present in the U.S. for more than 180 days is barred from return for three years; an alien unlawfully present for at least one year is barred for 10 years. (INA §212(a)(9)(B))	An alien outside the U.S. who is otherwise admissible would not be deemed inadmissible under INA §212(a)(9)(B) due to prior unlawful presence. (§201(a))	Similar provision to H.R. 3142/S. 1645. (§2(a))
Period of admission	Admission is for duration of employer's petition, plus additional days before and after the work period for the alien to, respectively, travel to the worksite, and depart or obtain an extension of stay based on a subsequent offer of employment. An approved H-2A petition is valid through the expiration of the relating certification (which, except in extraordinary circumstances, is not granted for jobs lasting one year or more). Total stay, including any extensions, may not exceed three years. (8 CFR 214.2(h)(5)(iv)(A), (vii), (viii)(B), (viii)(C); 20 CFR 655.101(g))	Admission would be for work period in certified application, not to exceed 10 months, plus additional days before and after the work period for the alien to travel to the worksite, and depart or obtain an extension of stay. Total stay, including any extensions, could not exceed three years. (§201(a))	Similar provisions to H.R. 3142/S. 1645, except that total stay could not exceed two years. (§2(a))

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Provision	Current law and regulations	H.R. 3142/S. 1645	H.R. 3604
Identification and employment eligibility verification	The Attorney General [now DHS] is required to provide for endorsement of H-2A entry and exit documents and to provide notice of employment authorization. (INA §218(h)(1))	Each H-2A worker would be provided with an identification and employment eligibility document. (§201(a))	DHS would be required to provide for endorsement of H-2A entry and exit documents and provide notice of employment authorization. Each H-2A worker would be provided with an identification and employment eligibility document. (§2(a))
Removal of H-2A workers from U.S.	No provision.	DHS would be required to promptly remove any H-2A worker who violates any term or condition of H-2A status. (§201(a))	Similar provision to H.R. 3142/S. 1645. (§2(a))
Enforcement authority	DOL is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief, as may be necessary to assure employer compliance with terms and conditions of H-2A employment. (INA §218(g)(2); 20 CFR 655.110)	DOL would be directed to establish a process for the receipt, investigation, and disposition of complaints regarding an employer's failure to meet a condition for employing H-2A workers or an employer's misrepresentation of facts in an H-2A application. DOL and DHS would be authorized to impose penalties and seek relief if DOL finds that an employer failed to meet a condition of employment or misrepresented a fact in an H-2A application. H-2A workers would have a private right of action to enforce certain H-2A employment requirements. (§201(a))	DOL and DHS would be authorized to impose penalties and seek relief if DOL finds that an employer failed to meet a condition of employing H-2A workers or misrepresented a fact in an H-2A application. (§2(a))