



Summary of Farmworker Provisions in Senate Immigration Bill, S. 744¹

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 represent a detailed compromise that resulted from intense negotiations between 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 a top 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 for agricultural visa workers. 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 for Farmworkers

The earned legalization program would allow certain agricultural workers and their immediate family members to obtain legal immigration status leading to citizenship. Undocumented farmworkers and recent H-2A guestworkers wishing to become immigrants would have to complete a two-step process.

Step One: Apply for "Blue Card" Temporary Resident Status. If this proposal passes, a farmworker could apply for a "blue card" (temporary residency) through a government-approved organization, a licensed attorney or a recognized immigration practitioner. A farmworker's spouse and children who have been present in the U.S. since December 31, 2012 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. In order to qualify, eligible workers must

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

¹ The following description summarizes the agricultural provisions of S. 744 as approved by the Senate Judiciary Committee on May 21, 2013.

While in “blue card” status, farmworkers and their family members with derivative “blue card” status may travel outside of and return to the U.S. The blue card holder and his/her spouse are authorized to work and may work in any occupation, but in order to earn lawful permanent residency, the blue card farmworker must satisfy the future agricultural work requirement described below.

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 each of 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;
- and continue to meet other admissibility requirements

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 agricultural 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 visas 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 in the U.S. in between jobs to locate new employment with a qualifying employer, and they may also leave the U.S. for up to 60 days per year. With limited exceptions for injury or a natural disaster, workers failing to locate new employment within this time period will lose their visa status.

Employer 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, in consultation with DOL, 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. Recruitment will begin 60 days before the date of need and last for 45 days. 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 for 2016 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.
- Employers must provide or reimburse the contract worker for the cost of daily transportation from the contract worker's living quarters to the contract worker's place of employment.
- Under the three-quarters minimum work guarantee, employers would provide 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 most 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.
- The compromise provides for the continuation of the special job terms for the sheepherding industry and other special procedures industries, such as custom combining industries and commercial beekeeping.

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.