

New bill would legalize agricultural labor (but E-Verify is still a disaster)

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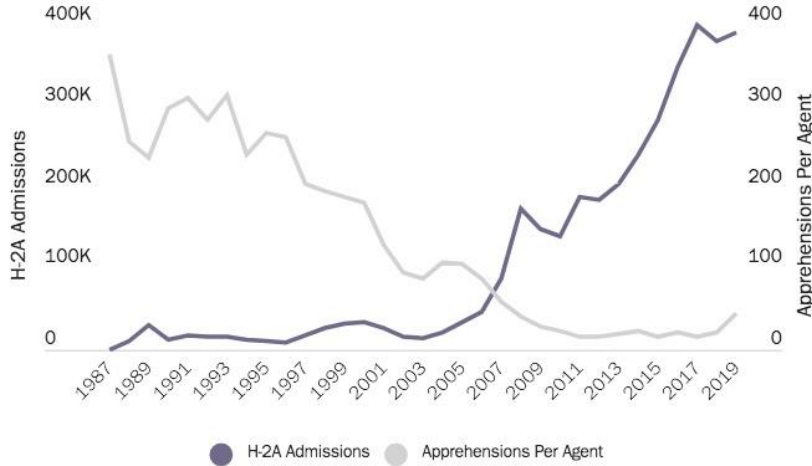
A bipartisan group of about 50 House members, equally divided between both parties, introduced legislation today that expands both permanent and temporary migration for agriculture, while legalizing illegal farmworkers. The Farm Workforce Modernization Act will be the most significant effort to reform legal immigration since the 2013 comprehensive reform bill in the Senate, and it will likely pass the House on a broad bipartisan vote before Thanksgiving. This legislation will significantly reduce the illegal market in farm labor and provide reliable a legal supply for workers for farms going forward.

The legislation does not construct the ideal system for farmers or workers because it maintains and incorporates into statute the stilted bureaucratic regulatory structure of the existing H-2A program that harms employers and undermines the rights of H-2A workers. It also mandates the hopelessly flawed and ineffective E-Verify employment surveillance system for agricultural employers and their employees, legal or otherwise.

Nonetheless, the Farm Workforce Modernization Act improves the legal migration process significantly, aligns incentives for workers to comply with the law, and expands eligibility for farmers and workers to participate in the legal system. I have written in favor of many of these changes on several occasions. The H-2A program has helped to direct would-be illegal immigrants from Mexico into the legal channels, resulting in far fewer illegal crossings in recent years.

Figure 1

H-2A Admissions and Border Patrol Apprehensions Per Agent, 1987-2019



Sources: Department of Homeland Security, "Yearbooks"; Department of State, "Nonimmigrant Visa Statistics," 2019, Customs and Border Protection, "Enforcement Actions"; Border Patrol, "Apprehensions"; Border Patrol, "Staffing"; TRAC, "Agents".

Note: Admissions in 2019 estimated using 2019 visa issuances based on ratio of visas to admissions in 2018; Admissions were interpolated 1997 and 2005.

Improving The Legal System

Increases green cards for permanent agricultural workers:

- *Creates 40,000 new green cards for agricultural workers.* Current law only allows for just 5,000 green cards for non-college grads. These new green cards would be reserved for agricultural workers unless they would otherwise go unused, but would go a long way to create a way for permanent farmworkers to receive permanent legal status. This creates a very strong incentive for H-2A workers not to overstay and comply with the law.
- *Allows H-2A workers to be sponsored for green cards:* Current law prohibits granting temporary visas or status to those who intend to abandon their foreign residence (i.e. become a permanent immigrant). The purpose of this provision is to allow temporary workers the possibility of transitioning to permanent employment.
- *Allows H-2A workers to apply directly after 10 years.* Current law requires an employer to sponsor H-2A workers. This legislation would allow them to apply directly for these green cards after 10 years in H-2A status. Again, this gives them a reason not to overstay and continue to participate in the program. It also moves the cost and risk associated with applying for a green card to the worker, rather than the employer (which may feel that it has no reason to spend money to sponsor them if they could immediately leave after receiving permanent resident status).
- *Allows for indefinite extensions of H-2A status for those waiting for a green card.* This punches a big hole in the green card limit by allowing workers to stay and work based on a petition that is filed but cannot be adjudicated due to the backlog. The H-1B program has a similar provision. Current regulation places a hard limit of 3 years on H-2A status.

Allows year-round workers: Another reason H-2A workers generally cannot receive green cards is because the current H-2A program only allows employers to hire workers for “temporary or seasonal” services. This excludes about a third of all farm labor jobs, mainly animal farming and dairies that need assistance throughout the year. The most significant change from Farm Workforce Modernization Act is that it allows agricultural employers that have year-round needs to participate in the program. Workers would receive the same H-2A visa and status valid for 3 years but could work in nonseasonal positions. Applicants for green cards could also maintain H-2A status until the green card becomes available.

Unfortunately, year-round employers will face an absurdly low cap of 20,000 annual visas in the first three years. The regular H-2A program has no cap. This discrimination is baseless and arbitrary, and members of Congress should remove it by amendment. For the seven years after that, the cap could increase up to 12.5% based on the recommendation of the Departments of Labor and Agriculture, which would also create “emergency procedures” to admit workers above the cap in those years. After 10 years, the two departments would jointly decide either: 1) not to set a cap or 2) set the cap, which could not be lower than the highest number admitted in any year during the first 10 years of the program, and set emergency procedures to admit above the cap. Half of the visas under the cap would be reserved for dairy farmers in every year.

The discretionary changes in the cap and emergency increases makes it impossible to know how this will play out in practice. Table 1 provides some indication of the range of options available. If the departments decide not to lift the cap, the program will have an annual flow of 20,000 forever and, after 3 years, about 60,000 total participants (i.e. stock) with an unknown number of H-2A workers waiting for green cards. If the departments max out the increases, it would—by year 2029—40,546 annual flow and about 108,623 total participants (stock) plus an unknown number of emergency admissions and an unknown number of H-2A workers waiting for green cards. After 2029, the cap could be eliminated, so it’s even more difficult to predict what the numbers might look like.

Table 1: Flow and Estimated Stock of Year-Round H-2A Workers Under Farm Workforce Modernization Act

	No Increases				Max Increases			
	Annual Flow (Normal)	Total Stock (Normal)	Emergency Flow	Green Card Wait List	Annual Flow (Normal)	Total Stock (Normal)	Emergency Flow	Green Card Wait List
2020	0	0	0	0	0	0	0	0
2021	20,000	20,000	0	No Cap	20,000	20,000	No Cap	No Cap
2022	20,000	40,000	0	No Cap	20,000	40,000	No Cap	No Cap
2023	20,000	60,000	0	No Cap	20,000	60,000	No Cap	No Cap
2024	20,000	60,000	0	No Cap	22,500	62,500	No Cap	No Cap
2025	20,000	60,000	0	No Cap	25,313	67,813	No Cap	No Cap
2026	20,000	60,000	0	No Cap	28,477	76,289	No Cap	No Cap
2027	20,000	60,000	0	No Cap	32,036	85,825	No Cap	No Cap
2028	20,000	60,000	0	No Cap	36,041	96,553	No Cap	No Cap
2029	20,000	60,000	0	No Cap	40,546	108,623	No Cap	No Cap
2030	20,000	60,000	0	No Cap	40,546-No Cap	117,132- No Cap	No Cap	No Cap
2031	20,000	60,000	0	No Cap	40,546-No Cap	121,637- No Cap	No Cap	No Cap
2032	20,000	60,000	0	No Cap	40,546-No Cap	121,637- No Cap	No Cap	No Cap

While the cap is a major drawback from this new program, the creation of the program is movement in the right direction. Most likely, neither extreme will prevail, and a middle of the road approach would greatly improve the status quo for year-round agriculture.

Improves the existing H-2A system (for the most part)

- *Freezes minimum wage in 2020, prohibits increases in the middle of contracts, and limits annual increases to no more than 3.25 percent.* This reform is critical for H-2A employers because the Adverse Effect Wage Rate—the mandated H-2A wage—can fluctuate wildly based on the government survey data it’s based on. The average increase was 6 percent this year, and some states this year saw wage inflation of 23 percent.
- *Mandates the creation of a new minimum wage calculation.* After 2030, the Departments of Agriculture and Labor will replace the Adverse Effect Wage Rate with a new way to calculate the minimum wage. The Adverse Effect Wage Rate uses the statewide average wage based on the Farm Labor Survey. The statewide average doesn’t consider the skill level or area differences, and the Farm Labor Survey may not have a realistic sample in many cases.
- *Create a single online portal for H-2A employers to file job orders, labor certifications, and H-2A petitions.* Currently, employers have to file separate applications for job orders with State Workforce Agencies, labor certifications with the Department of Labor, and H-2A visa petitions with Department of Homeland Security, sending in duplicative

information that is verified and reviewed multiple times by different agencies. This bill would allow the submission of this information one time with each issue resolved by a single agency.

- *Longer grace period for H-2A workers to find another employer.* Current regulation limits H-2A workers to 30 days to find another job or leave the country. This bill would give them 45 days to find another job. A grace period is an important protection for workers to exercise their rights to bargain fairly with their employers and leave abusive ones. It also increases the efficiency of the program by making it easier to hire H-2A workers already in the country.
- *Pilot program for “portable” H-2A workers.* The bill creates a 6-year pilot program that allows up to 10,000 H-2A workers to receive “portable H-2A status.” This status would allow them to freely transfer between “registered” H-2A employers without the employer needing to file a petition on their behalf or follow the other requirements of the H-2A bureaucratic approval process. They would only have to pay the minimum wage. These workers would have 60 days to find employers after their initial job expires. Hopefully, an amendment could remove this cap.
- *Reduces the 50 percent rule to 33 percent of the job period.* Currently, H-2A regulations require employers to hire U.S. workers who apply through 50 percent of the contract period—in other words, even after the H-2A workers arrive and begin working. This rule is so unreasonable it has no parallel in any other immigration program. Unfortunately, the bill partially includes this provision into the statute, making it mandatory for farm labor contractors. Other farmers would have to accept U.S. workers until the later of 30 days or 33 percent of the job period.
- *Extends visa validity from 1 to 3 years.* Current visa validity is a single year (or the length of the contract), which requires H-2A workers to reapply for visas every single year. This adds needless expense and bureaucracy on top of the program and can delay entry of workers. The bill incorporates into statute many of the requirements under the H-2A program that currently exist only in regulation, meaning that a future administration could not streamline the program much more aggressively than this bill does. That is a potential drawback from this legislation, but the fact that Trump and Obama administrations both showed no interest in fundamentally altering the H-2A structure makes it extremely unlikely any future Democrat or Republican president would. Moreover, the incorporation of this language also limits the damage a future administration could do.

The bill also contains a new and untested regulatory structure for recruiters of H-2A workers operating abroad. It would require that they register and, in some cases, post bonds.

Legalization Of Existing Farmworkers

The National Agricultural Workers estimates that about half of “hired crop workers” were illegal immigrants in 2016. According to the Pew Research Center in 2014, 325,000 immigrants in the

agricultural industry lacked legal status in 2016. This estimate could exclude some potential beneficiaries under the law who were not in the industry at the time of the survey but who have the experience required under the legislation.

- Renewable legal status to illegal farmworkers with 180 days experience: The Farm Workforce Modernization Act would allow any farm worker with at least 180 days of proven farm work in the prior 2 years to adjust their status to a new category Certified Agricultural Worker status. CAW status would be renewable in 5-year and six-month increments as long as the worker maintained farm jobs.
- Renewable legal status to spouses and minor children of legalized farmworkers. This provision likely more than doubles the potential beneficiaries.
- Provides permanent status. If the worker has 10 years of experience on U.S. farms prior to the enactment of the bill, they could adjust to legal permanent residence after 4 years in agriculture after the payment of a \$1,000 penalty. Other workers with the requisite experience could apply after 8 more years and a \$1,000 penalty.
- H-2A status for other illegal workers. Any illegal immigrant who doesn't have 180 days of experience in agriculture could still apply for H-2A status.

E-Verify Electronic Employment Surveillance

Mandating E-Verify electronic employment verification for farmers is the worst section of this legislation from a policy perspective. It is unequivocally negative. An E-Verify mandate will impose new costly requirements on employers. E-Verify doesn't accomplish its goal—that is, preventing illegal employment. Illegal immigrants have defeated the system 80 percent of time that they are run through it since 2006 (the other 20% likely learned how to beat later), and it has caught up three quarters of a million *legal* workers during that time. When employers get their records audited, they often end up having to fire most of their labor force.

Moreover, the system is a massive government surveillance program that collects data on every American worker and stores it for 10 years. It could be used to surveil and control access to almost anything in the future (bank accounts, gun purchases, health insurance, etc.). The bill actually makes this system worse from a privacy perspective because it requires the government to include even more information about each legal worker to “verify their identity.” This is a fundamental shift from verifying that names and Social Security Numbers provided on an I-9 form exists. Now, the goal would be to verify someone's actual *identity*. How this could happen without biometrics or an expansive record on someone's life is left unexplained.

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