

PROPOSED LEGISLATIVE OUTLINE

THE WORKFORCE AMERICA NEEDS FOR RECOVERY AND BEYOND

EWIC supports a comprehensive immigration reform package that secures the borders, reinforces the rule of law in the workplace, protects U.S. workers and provides a path to earned legalization for the millions of unauthorized foreigners already living and working in the United States.

But for employers who depend on immigrant workers, the most important element of reform – its *raison d'être* – is a program to supply the U.S. economy with the workers it needs to recover from the downturn and grow in years ahead, replacing the current unlawful influx with a legal flow.

We believe this goal can best be met by a provisional visa program that gives employers, not the government, the primary say in which workers they need to man their businesses and gives the U.S. labor market, not Congress or a commission, the primary say in how many workers enter the country annually in a legal program.

As the experience of recent years shows, the market works in a timely, efficient way to regulate the flow of foreign workers seeking to enter the country. The vast majority of migrants come to the U.S. in search of work. When demand diminishes, fewer seek to enter, legally or illegally, and many who are here already choose to leave. According to Mexican government data, the economic downturn cut the net flow from Mexico to the U.S. by 50 percent last year. And as 2009 draws to a close, existing quotas for temporary workers remain unmet at both the top and bottom of the economy.

The government cannot do a better job than the market at estimating optimum flows or delivering needed workers in a timely, efficient manner. And were Congress to attempt to do so in the months ahead, it could severely hinder economic recovery.

EWIC looks forward to working with Congress to pass a balanced reform package that meets the needs of employers, immigrants, U.S. workers and the U.S. economy. But we cannot and will not support legislation that contains unworkable requirements for employers or fails to create a usable pipeline for needed workers to enter the country legally.

PROVISIONAL AND SEASONAL WORKERS

Provisional visas. We support the general concept of a provisional visa program that admits workers initially on a temporary basis to meet short- to medium-term workforce needs, but then allows those migrants who succeed in the U.S. and meet certain criteria (measured by a performance-based point system) to stay on permanently, earning legal permanent residence.

For this concept to work in practice for employers, it must meet the following conditions:

- The term of the provisional visa should be three years and it should be renewable once, providing visa holders with a possible six years of work in the United States.
- The employer should be required to demonstrate a need for the worker once, in order to justify the granting of the initial visa.
- The employer should not be required to go through a second bureaucratic approval process to demonstrate the same need again – either when the provisional visa is renewed or if and when the worker makes the transition from provisional to permanent.
 - Visa renewal. When an employee’s initial provisional visa expires and that employee seeks a renewal, he or she should be required to re-register with the agency running the program, undergo appropriate security checks and renew his or her work authorization document. The employer should keep track of when employees’ visas expire and be required at that time to check renewed work authorizations (and on doing so, should be absolved of liability for continuing to employ the worker). But there should be no need for the employer to re-petition for the worker.
 - Change of status. Similarly, when and if the employee makes the transition from provisional to permanent, there should be no need for a second recruitment or petition process by the employer.
- After the visa holder has worked for the employer for one year, the visa should be fully portable. The only exceptions to the requirement that the worker stay through an initial year:
 - If the employer violates the terms of the visa. If this occurs, the worker should be free to leave immediately.
 - If circumstances beyond the control of the worker require him or her to move or cease to work. In this case, the employer should be able to hire a replacement worker - another provisional visa holder – without reapplying for the visa, undergoing a second certification process or paying any additional processing or filing fees associated with the visa.
- There can be no prohibition on promotion or advancement on the job during the term of the provisional visa – that would undermine the rationale for a provisional program and a point system that rewards workers’ accomplishments while in the U.S.
- The employer must be able to petition for a worker to make the transition from temporary to permanent status - indeed, an employer petition should count significantly toward the points needed to earn legal permanent residency.
- The employee should be permitted to extend his or her provisional visa and remain on the job until the petition for permanent status clears through the adjudication process.

Seasonal visas. The new provisional visa should not replace existing seasonal visas programs - H2A or H2B.

Seasonal workers and the employers who hire them are a unique group with unique needs. Existing seasonal programs have been much criticized in recent years, and there is room for improvement. But it makes no sense to scrap programs that sustain tens of thousands of American firms and in many regions undergird the local economy, delivering a lawful foreign labor force that allows employers to keep their businesses open and keep Americans at work.

Abolishing the H2B visa program is not a solution and would be unacceptable to the employers EWIC represents.

THE CENTERPIECE OF ANY WORKABLE VISA PROGRAM – AN ECONOMIC NEEDS-BASED REGULATOR

We believe the global labor market corrects itself and works efficiently to regulate the flow of workers seeking to enter the United States. As recent history proves, labor supply rises and falls to meet demand in a timely, efficient manner. And arbitrary, inflexible caps can only impede this self-adjusting flow, to the detriment of the economy.

If visa programs must be capped, we believe limits are best set by an economic needs-based regulator: a statistical formula that can operate untended, in the manner of a thermostat, to adjust quotas in sync with the rise and fall of U.S. labor needs.

- Each visa program that is subject to a cap – whether for high-skilled, lesser-skilled or seasonal workers – should have its own needs-based regulator.
- There need be no exceptions or exemptions to the numerical limits determined by the regulators. Properly designed and implemented, these automatic adjusters will account for shifting labor needs even in usual circumstances such as occupations with chronic labor shortages and high-unemployment areas, making exemptions or exceptions unnecessary.
- The initial limit for the provisional visa program should be determined by Congress and derived empirically – based on what is known about the labor flows, legal and illegal, of recent years and the degree to which demand has diminished during the downturn.
- Based on the Pew Hispanic Center’s October 2008 study of unauthorized immigration during the downturn¹, we believe an appropriate level for 2010 would be 295,000 provisional visas. (This is separate from and in addition to visas for high-skilled and seasonal workers.)
- No one expects the provisional visa program, no matter how well designed, to operate with maximum efficiency in its first year. Employers and workers alike will need time to adjust, and it will be impossible during the first 12 months of operation to assess the true labor demand the program needs to meet.
- Once the program has been in place for a year, the following market-based regulator should kick in:

With respect to the numerical limitation set for the provisional visa program –

if the total number of visas allocated for a given fiscal year is issued during the first six months of that fiscal year, an additional 15 percent of the allocated number shall be made available immediately, and the allocated amount for the following fiscal year shall increase by 15 percent of the original allocated amount in the prior fiscal year;

if the total number of visas allocated for a given fiscal year is issued before the end of that fiscal year, the allocated amount for the following fiscal year shall increase by 10 percent of the original allocated amount in the prior fiscal year; and

if the number of visas issued in a given fiscal year is less than the number of visas allocated for that year and the reason for the shortfall is not processing delays or delays in promulgating regulations, then the allocated amount for the following fiscal year shall decrease by 10 percent of the number allocated in the prior fiscal year.

THE GATEWAY FROM PROVISIONAL TO PERMANENT – AN ACCOMPLISHMENT-BASED POINT SYSTEM

We do not believe any government agency is capable of accurately determining the attributes needed to fill the many, varied and constantly changing jobs in the U.S. economy. We believe employers, not the government, should drive decisions about which workers they need, and when, to maintain and grow their businesses. And we strongly oppose using a point system to decide who should be allowed to enter the country, either as employment-based immigrants or temporary workers.

A point system used to determine which provisional workers could make the transition from temporary to permanent status would be a different matter. We would expect such a point system to measure and reward only a provisional worker's behavior while in the U.S., not his or her abstract suitability or compatibility with U.S. labor needs. And we would oppose any point system designed to interfere with employers' choices about which workers to hire or retain – or one that did not give employers a voice in decisions about which provisional workers are permitted to adjust their status.

As employers, we believe adjusting workers should earn points for a variety of activities and accomplishments, including but not limited to the following:

- An employer petition for permanent residency
- Length of stay with one employer
- Advancement on the job
- Advancement into management
- Consistently superior performance evaluations
- Consistently superior safety record
- Participation in an on-the-job training program
- Participation in a craftsman-training program sponsored by the employer or a relevant trade association
- Participation in an appropriate apprenticeship program
- Certification by an relevant trade association or other recognized industry group
- Enrollment in an employer-sponsored educational program (English and other)
- Participation in an on-the-job program to train other workers
- Employment in an occupation with a chronic, recognized labor shortage

RECRUITMENT, WAGES AND WORKING CONDITIONS

Attestation. Employers should make every reasonable effort to hire Americans before resorting to a foreign workforce. But employers who have tried and failed to hire U.S. workers should have recourse to a streamlined and responsive recruitment process that allows them to attest their efforts to find Americans and have access to provisional workers in a timely, efficient manner.

Job-posting and advertising. The employer should make a good-faith effort to recruit a U.S. worker either by (i) posting the opening on the online job-search and recruitment service, America's Job Exchange, (ii) advertising the opening in two publications widely circulated in the metropolitan statistical area where the worker is to be employed, or (iii)

undertaking other recruitment efforts consistent with the industry. Recruitment may begin 180 days before a worker is needed.

Processing times. The processing of the visa should be streamlined and timely. The employer's petition should be processed by the Department of Labor within 30 days of filing and screened by the Department of Homeland Security within 14 days of approval by DoL.

Processing fees. Employers should be required to pay a single, reasonable fee for the processing of the visa application – a fee that covers operations by all federal agencies involved in the processing. Employers seeking to hire a number of workers in a single job classification on a single worksite should be permitted to file a single petition and pay a single petition fee.

Foreign labor contractors. The Department of State should maintain a list of certified foreign labor contractors, defined as individuals or firms that recruit foreign laborers for two or more unrelated U.S. businesses. (U.S. employers who travel abroad to recruit workers directly do not come under the definition.) U.S. employers who make use of foreign labor contractors certified by the DoS are not liable for the actions of those contractors

Protection of U.S. workers. The employment of a provisional worker must not adversely affect the wages and working conditions of similarly employed U.S. workers at the same worksite.

Wages. The provisional visa holder should be paid no less than (i) the actual wage paid by the employer to other individuals with similar qualifications and experience doing the same work at the same location, or (ii) the prevailing wage paid to workers with similar qualifications and experience in that occupational classification in that metropolitan statistical area – whichever is greater.

Working conditions. A provisional visa holder should be provided with the same benefits and working conditions as U.S. workers with similar qualifications and experience doing the same job at the same worksite.

¹ Passel, Jeffrey S. and Cohn, D'Vera, "Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow," Pew Hispanic Center, October 2, 2008.