

LESS-SKILLED WORKER VISA PROGRAM

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I. OVERVIEW

Of the many inadequacies of the existing immigration system, few are as damaging – with worse consequences for immigrants or for the U.S. economy – than the lack of a visa program for less skilled immigrants seeking to enter the country legally and work in the United States.

Employers who hire less skilled immigrants have developed a proposal to fill this void: a provisional visa program designed to reflect market dynamics, expanding in good times when U.S. labor needs intensify and contracting in downturns when U.S. labor needs subside.

In contrast with other, existing U.S. temporary worker programs, under this proposal, employers would not sponsor workers for visas, and workers would not be tied to specific jobs or specific employers, but rather would be free to change jobs at will, working for any employer who is registered to participate in the program.

TWO APPLICATION TRACKS. One track is for employers who demonstrate they have tried and failed to find U.S. workers and are given permission to hire less-skilled foreign workers for specific, “registered jobs.” The other track is for foreign workers who are granted visas based on initial job offers, but then are free to change jobs in the U.S., accepting work from any employer who has demonstrated a labor need and been registered with the program.

COMPLETE PORTABILITY. The foreign worker is not tied to a specific job for a specific employer but rather is free to work for any employer who has tested the market and been registered with the program.

OCCUPATIONS COVERED. Any nonfarm, low-skilled job that does not require a college degree as standard preparation, including year-round employment.

DUAL INTENT. The initial visa is temporary: two years, renewable twice. But just as high-skilled H-1B temporary visa holders can eventually transition to permanent visas, so low-skilled workers in this program can eventually earn the right to get in line for a green card. Who can make the transition will be determined by an evaluation of the newcomer’s rootedness, assimilation and personal success in the U.S.

LABOR MARKET TEST. Attestation-based with back-end audits. Before they can be registered, employers must test the labor market, making a good faith effort to recruit U.S. workers, and every two years, they must reapply, demonstrating their continued labor need and keeping their registration current.

NUMBER OF VISAS AVAILABLE. The number of visas issued each year will float up and down in response to U.S. labor needs – need demonstrated and quantified by the employer attestation process. Employers who have tried and failed to find U.S. workers will attest to their job openings and recruitment efforts. The government will approve a given number of registered job openings, and the annual visa quota will be adjusted to meet this demand using a mathematical formula.

WAGES. Participating foreign workers will receive the actual wage paid to similarly situated U.S. workers in the same location OR an agreed upon prevailing wage, whichever is greater. The prevailing wage will be determined by any relevant collective bargaining agreement, applicable Davis-Bacon and Services Contract Act requirements, the Bureau of Labor Statistics-determined wage for that occupational classification or a private wage survey that meets standards specified by the Secretary of Homeland Security.

E-VERIFY and an ELLIS MONITORING SYSTEM. Movement of workers from job to job will be tracked electronically by a government monitoring system and through E-Verify, and the two systems will be coordinated.

II. PARALLEL TRACKS: SUPPLY & DEMAND

THE PROBLEM

Both existing U.S. temporary worker programs for less skilled laborers are based on the same concept – employer sponsorship of foreign workers. An employer petitions for a worker, proves he can find no U.S. workers for the job, sponsors the foreign worker's entry into the U.S. and guarantees his or her employment for the term of a visa, during which the employer and employee are tied irrevocably together, for better or worse.

AN ALTERNATIVE

An alternative model would create a situation more like a market, in which a supply of foreign workers interacts in a flexible, responsive, real-time way with employer demand.

How to accomplish this: by creating two parallel processes, one that grants visas to foreign workers and another, entirely separate, that gives employers who can prove a legitimate labor need permission to hire foreign workers.

HOW IT WOULD WORK

Who can participate. The program will be open to employers seeking low-skilled workers for jobs that do not require a college degree, as determined by the Bureau of Labor Statistics. Participants will be nonfarm employers and those with year-round labor needs. The program will not replace existing H-2A and H-2B seasonal temporary worker programs.

Registered employers. Employers will establish their need for workers with a process based on attestation up front and monitored by back-end audits. Those who meet the program's standards will be given permits to hire foreign workers and will be known as "registered" employers. The jobs for which an employer is permitted to hire foreign workers will be specified in his permit and will be known as "registered openings."

Separate visa track. Workers will obtain visas through a visa-application process that is not job-specific and is independent of the employer-attestation track.

Recruitment. Government-accredited intermediaries working in sending countries – Mexico, Central America, etc. – will recruit workers to participate in the program. Intermediaries will include private staffing companies, government agencies and union affiliates, among others – a range of options for employers and employees. Recruits will be required to pass a criminal background check and commit to taking only jobs that do not require a college degree.

Jobs bank. Some registered employers and visa-holding workers will connect for the first time via a USCIS electronic database. The system will be run for the government by a private company. (The precedent for this: the federal E-Verify system managed for USCIS by the Computer Services Corporation.)

Hiring from abroad. In some cases, the worker will be outside the country, approved for a visa but still waiting for a job. No worker will be permitted to enter the U.S. unless they have connected with an employer and a job is waiting.

Hiring domestically. In other cases, the worker will already be in the U.S. and will just have left the employ of another registered U.S. employer.

Portability from Day One. Workers will not be required to stay with their initial U.S. employer for any specified period. Those who are unsatisfied with their employment may leave at any time.

Finding another job. A visa-holding worker who is terminated or quits a job with a registered employer will be free to move to another registered employer – and as long as the new employer is registered, may move to another industry.

Real-time hiring. A registered employer who loses a visa-holding worker, whether because he is terminated or quits, will be free to hire another visa-holding worker, regardless of where else and in what sector the person worked since entering the country.

Promotion. Registered employers may promote visa-holding workers in their employ, but only to registered openings – jobs for which the employer has attested he cannot find willing and able U.S. workers.

Here to work. Workers who are unemployed for more than 60 days will lose their visas.

Monitoring. The government will monitor the movement of workers from job to job through E-Verify and a new electronic monitoring system modeled on the SEVIS tracking system for foreign students – and the new system would be coordinated with E-Verify for greater efficiency.

Demand-based quota. The number of visas issued each year will float up and down in response to employer demand – demand proven through the attestation process and quantified as the number of employer hiring permits issued that year. Employers who have tried and failed to find U.S. workers will attest to their job openings and recruitment efforts. The government will approve a given number of registered job openings, and the annual visa quota will be adjusted to meet this demand using a mathematical formula.

III. A DEMAND-BASED VISA CAP

The number of visas available the first year the program is operational will be determined legislatively. At regular intervals thereafter, the number will be permitted to rise or fall, depending on demonstrated labor demand.

A mathematical formula will adjust the number of visas issued so that it reflects bona fide labor needs as ascertained by the Department of Homeland Security.

Labor demand will be established by the number of employer attestations approved by the agency in a given visa period.

The result will be a floating cap designed to reflect true U.S. labor needs. The number of visas issued will float upward in good years when the U.S. economy needs foreign workers. In down years, when labor demand decreases, the number of visas issued will decrease.

In the first fiscal year that the program is operational, the number of visas issued will be capped at 400,000, with 200,000 visas becoming available on October 1 and another 200,000 made available beginning on April 1.

THE REGULATOR

Using the baseline of 400,000 visas as a starting point, a mathematical formula known as the "regulator" will adjust the number of visas issued during subsequent periods.

The critical variable in the mathematical formula will be the number of employer job slots approved in the previous six months – a strong indicator of real market need, or lack of need, for additional foreign workers, as ascertained and certified by DHS.

The mathematical formula will work as follows in years when the number of approved attestations exceeds the number of visas issued:

- If the initial six-month visa cap is hit within 90 days, the cap for that six-month period and the following one will be adjusted upward by 20 percent.

In periods when the visa cap is not hit – when the number of approved slots is smaller than the number of visas available – the number of visas available subsequently will be reduced.

In that case, the mathematical formula will work as follows:

- The relevant time period will be the fiscal year.
- If at the end of the fiscal year, the visa cap for that year has not been met, the number of visas available in the subsequent year will go down by the exact number of visas that went unused the year before.

There will be no limit on the number of consecutive periods that the visa cap may be raised or lowered. After all, the number of visas issued will be based on a mathematical formula that reflects proven U.S. labor demand.

Adjustments to the visa cap will occur automatically, based on the mathematical formula in the regulator. This will ensure that the annual quota reflects bona fide U.S. labor needs and not arbitrary political winds that could interfere with the intent of the program, holding down the number of visas when the economy is in need of workers or preventing the program from contracting during an economic downturn.

IV. LABOR MARKET TEST

In order to participate in the proposed program, the employer must register for a slot or slots by attesting to labor market protections.

The employer must be able to show that he is unable to find a sufficient number of qualified and available U.S. workers for the slots he seeks to fill with foreign workers. U.S. workers who respond to recruitment efforts but do not stay on the job will not be considered ready and willing for slots employers are looking to fill.

The employer is subject to back-end audits to confirm his compliance with attestation requirements.

The employer must attest to:

- The wages paid for the job – and that the wages offered to any foreign worker are fair wages, equivalent to those paid to similarly situated U.S. workers,
- That the conditions of employment, including benefits, offered to any foreign worker are equivalent to those offered to similarly situated U.S. workers at the same location,
- That there is no strike or lockout at the job site,
- That a notice of the open job and its terms and conditions has met with no response from the employer's similarly situated employees, and
- That the employer has made a good-faith effort to recruit U.S. workers first through a labor market test.

THE ELEMENTS OF THE LABOR MARKET TEST

An employer seeking to participate in the program must test the labor market by making a good-faith effort to recruit U.S. workers during the six months before filing an attestation. The labor market test must include at least three of the following means of recruitment:

1. Job fairs.
2. The employer's external website.
3. Job-search websites.
4. Presentations or postings at vocational, career technical schools, community colleges, high schools or other educational or training sites.
5. Posting with trade associations.
6. Use of search firms.
7. Recruitment programs with placement offices at vocational schools, career technical schools, community colleges, high schools or other educational or training sites.
8. Ads or postings with local libraries, journals or newspapers.
9. Employee referral program with incentives.
10. Radio or TV ads.
11. Ads, postings or presentations with ethnic newspapers, websites, job fairs or community events.
12. Career-day presentations at local high schools or community organizations.
13. In-house training provided for new recruits.
14. Third-party training provided for new recruits (including through or in cooperation with a community college or local career technical school).

15. Recruitment, educational or other cooperative programs offered by the employer and a local economic development authority.
16. Two Sunday ads in the primary daily circulation newspaper in the area.

BACK-END AUDITS

A back-end audit will require the employer to produce evidence confirming his compliance with each of the five attestation elements at the time he filed his attestation. No penalties will accrue unless the government can show that the employer committed a willful violation or a pattern or practice of misbehavior.

DEMONSTRATING EXTRAORDINARY NEED WHEN THE VISA CAP HAS BEEN HIT

An employer who is still unable to fill empty jobs even after the semi-annual visa cap has been hit may initiate the attestation process if he pays a recruitment fee or takes extraordinary steps to recruit U.S. workers.

- 1) The employer agrees to double his efforts to recruit U.S. workers, completing not three but six of the possible recruitment steps required for attestation.

Completing these additional steps will change none of the other obligations the employer must fulfill as part of the attestation process.

The employer's willingness to double his recruitment efforts is designed to demonstrate his bona fide labor need. Failure to find a U.S. worker after trying six different recruitment efforts should be clear and convincing evidence of the employer's need to hire a foreign worker. **Or,**

- 2) The employer pays a recruitment fee to the government equal to 5% of the worker's annual wage.

Payment of this fee will change none of the other obligations the employer must fulfill as part of the attestation process.

Payment of a fee is designed to demonstrate that the employer has a bona fide need for a foreign worker. The fee will also serve as additional protection for U.S. workers, creating a financial disincentive for employers to overlook willing and able, qualified U.S. workers who are interested in the job.

V. WAGES FOR PARTICIPATING WORKERS

Employers are committed to ensuring that immigrant workers are treated in the same manner – with the same wages, benefits and protections – as similarly situated U.S. workers in the same location. Employers also understand that the unique nature of a temporary worker program requires special consideration for how wages will be determined.

THE GREATER OF TWO OPTIONS

Under the proposed program, a visa-approved worker hired by an approved employer would be paid the **greater** of **either**:

- The actual wage paid by the employer to other similarly situated employees at the same location, **or**,
- The prevailing wage for that occupational classification in that industry, taking into account the experience and skill level of the worker.

DETERMINING THE PREVAILING WAGE

The prevailing wage would be defined as the prevailing wage at the time of the employer's application to hire a foreign worker and would be determined by one of the following means:

- If the employer is part of a current collective bargaining agreement, that agreement would determine the prevailing wage, **or**,
- If the job is **not** part of a current collective bargaining agreement, but **is** part of a project currently covered by the requirements of Davis-Bacon or the Services Contract Act, the prevailing wage would be the appropriate Davis-Bacon or Services Contract Act wage rate, **or**,
- If the job is **not** part of a current collective bargaining agreement and **not** part of a current Davis-Bacon or Services Contract Act project, the prevailing wage would be the wage determined for that occupational classification by the Bureau of Labor Statistics Occupational Employment Statistics survey **or** a wage based on data provided by a private wage survey approved by the Secretary of Homeland Security.

PRIVATE WAGE SURVEYS

Private wage surveys shall be accepted by the Secretary of Homeland Security if they meet the following criteria:

- (i) The data must have been collected within the last 24 months.
- (ii) If a published survey, the survey must have been published within the last 24 months.
- (iii) The survey must reflect the industry or occupation of intended employment.
- (iv) The employer job description must be similar to the survey job description.
- (v) The survey must be across industries that employ workers in the occupation.
- (vi) The wage determination must be based on an arithmetic mean (not the median) of relevant wage levels.
- (vii) The survey must identify a statistically valid methodology that was used to collect the data.

SIMILAR WAGES FOR SIMILAR WORKERS

The business community believes that immigrant workers should have the same wages, benefits and workplace protections as U.S. workers. U.S. workers should never be at a wage or benefits disadvantage compared with immigrant workers at the same location. And employers should be required to treat immigrant workers in the same manner as U.S. workers. The employer community strongly supports requiring employers to pay immigrant workers at the same wage rate as similarly situated U.S. workers at the same location.

VI. ELLIS MONITORING SYSTEM

(Essential and Less-Skilled Legal Immigration System)

What. A new information system and database to monitor and track workers who have received approval for provisional visas.

The ELLIS monitoring system will track the movement of foreign workers as they enter the country, enter into employment relationships, change jobs, change addresses, travel in and out of the U.S. and eventually transition out of the program, either because they return home or are granted permanent resident status.

Registered employers who have tested the market and been approved to hire foreign workers will use the system to transmit information via the Internet to agencies overseeing the program: the Department of Homeland Security (DHS) United States Citizenship and Immigration Services (USCIS), Customs and Border Patrol (CBP), Immigration and Customs Enforcement (ICE) and the Department of State (DOS). Employers will inform the government about the arrival and departure of employees. Workers will notify the system when they change address or travel in and out of the country.

Government agencies overseeing the program will also enter data into the system and notify it of developments – for example, the issuance of a visa. Different agencies will use the system to exchange information and track workers as they move from job to job and through the visa process.

The ELLIS monitoring system is NOT a recruitment tool, and it is NOT where willing employers and willing workers will connect for the first time. Some employers will recruit workers through an electronic JOBS BANK sponsored by USCIS and maintained by a private company. (The precedent for this: the federal E-Verify system managed for USCIS by the Computer Services Corporation.) Other employers will use other means – government-accredited private staffing companies, government agencies and union affiliates, among others – to recruit workers, then register them in the JOBS BANK.

But once employers and employees have connected for the first time, they will use the ELLIS system to track workers' movement during their stay in the United States:

- The system will begin tracking a worker as soon as he or she is approved by DHS to fill a registered job in the United States.
- At that time, the employer will notify the system that a job has been approved and a worker recruited and will enter the worker's information into the database.
- During the visa screening process, the relevant DOS officer will have access to ELLIS data to help verify the worker's eligibility information and also verify that the worker is indeed scheduled to start work at an approved job.
- Once a visa is approved, DOS will notify the database.
- Customs and Border Patrol officials will notify the system when the worker arrives at a port of entry and is admitted to the United States. This information will be available in real time to the employer, alerting him or her that the visa holder will soon be reporting for work.
- The employer will notify the system when the worker arrives on the job, completes an employment orientation process, fills out a Form I-9 and when his or her employment eligibility is confirmed by E-Verify.

- If a foreign worker fails to report for employment, the employer will alert the system. The worker's ELLIS record will then indicate that he or she is out of status, and the system will automatically notify the relevant DHS investigative and enforcement authorities.
- The employee will notify the system if the employee changes his or her name, or changes addresses.
- The employer will notify the system if the worker is promoted, moving up to another registered job within the company, or is transferred across county lines to a different work location
- The employer will notify the system if a worker quits or is terminated.
- The employer will notify the system if and when he or she hires a new foreign worker to fill a vacated registered job.
- If the worker finds another job with another registered employer, the new employer will notify the system, informing it that the worker has arrived and his or her work eligibility has been confirmed by E-Verify.
- If the worker does not find a new job within 60 days of leaving his or her original U.S. job, the system will automatically notify the relevant DHS investigative and enforcement authorities.
- The system will notify the worker's current employer 30 days before the worker's visa is scheduled to expire.
- Employers will notify the system when their job registrations are renewed.
- Customs and Border Patrol will notify the system when a worker with a provisional visa leaves the United States and returns to his or her home country.
- USCIS will notify the system if the worker is approved for legal permanent residence, ending any need for tracking by the system, and the worker's records will be removed from the database.

VII. FROM PROVISIONAL TO PERMANENT

AN ACCOMPLISHMENT-BASED ASSESSMENT

The proposed program would admit workers initially on a temporary basis to meet short- to medium-term workforce needs, but then allow those migrants who succeed in the U.S. and meet certain criteria, measured by a performance-based assessment, to stay on permanently, earning legal permanent residence.

Concept. The worker's initial stint on a short-term visa would serve as a kind of trial period. Some immigrants would do well in the U.S., others wouldn't. Some would find the lifestyle appealing, others would be impatient to return to their native lands. When their visas expire, many provisional workers will choose to go home, but under the proposed program, they would have the option of applying for permanent visas, and this is when the assessment would come into play.

A two-year renewable visa. The term of the provisional visa would be two years, and it would be renewable twice, providing visa holders with a possible six years of work in the U.S. before they face the choice to return home or apply to stay.

Rewarding behavior. The assessment system would 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.

How to earn permanent status. Workers would earn credit toward permanent status for a variety of activities and accomplishments. The most important would be learning English – essential for succeeding in the workplace and integrating into the fabric of American life. Some criteria would gauge personal responsibility: paying taxes, staying on the right side of the law, supporting yourself and your family without supplemental income from the government. Others would measure efforts to put down roots – from learning American history and civics to buying a home. And many criteria would be employment-related, including but not limited to:

- 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 a relevant trade association or other recognized industry group
- Enrollment in an employer-sponsored educational program (English or other)
- Participation in an on-the-job program to train other workers
- Employment in an occupation with a chronic, recognized labor shortage

Employer petitions. The employer would be able to petition for a worker to make the transition from temporary to permanent status – indeed, an employer petition would count significantly toward the credit needed to earn legal permanent residency.

What happens if the transition is delayed. The employee would 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.