FAIR
FEDERATION FOR AMERICAN IMMIGRATION REFORM

LEGISLATIVE ANALYSIS

Agricultural Job Opportunities, Benefits and Security Act of 2009 ("AgJOBS" H.R. 2414/S. 1038)

Summary Prepared: June 17, 2009

The Agricultural Job Opportunities, Benefits and Security (AgJOBS) Act of 2009 creates an amnesty program for illegal aliens who have worked in the agricultural industry. This bill consists of two-parts: "Part I" of the legislation gives illegal alien agricultural workers a two-step amnesty to transition from unlawful status to green card holding, legal permanent residence; and "Part II" of the bill "reforms" the H-2A temporary agricultural guest worker program to allow large agribusinesses easier access to cheap foreign labor.[1]

PART I: THE TWO-STEP AMNESTY

Initially, AgJOBS confers a temporary "blue card" amnesty to illegal alien agricultural workers. If these blue card recipients meet several requirements, they can then apply for a green card and become legal permanent residents. Green card holders are generally eligible to apply for full United States citizenship after five years.

Step 1 — The "Blue Card" Amnesty

Eligibility for Blue Card Status

- The bill requires the Department of Homeland Security (DHS) to grant blue card status to any alien who:
    - Has either: (A) worked in agricultural employment for either 863 hours or 150 days during the two-year period ending December 31, 2008, or (B) earned at least $7,500 from agricultural employment in the United States during the two-year period ending December 31, 2008. (§101(a)(1)(A)&(B)).[2] The bill defines a work day as "any day in which the individual is employed 5.75 or more hours in agricultural employment." (§2(6)).
    - Applies for the blue card during an 18-month application period beginning 6 months after the bill's enactment. (§101(a)(2)).
    - Has not been convicted of an offense that involved bodily injury, threat of serious bodily injury, or property damage over $500. (§101(a)(4)).
    - Pays a fine of $100. (§101(g)).

- Under the bill, DHS is allowed to waive certain provisions of the Immigration and Nationality Act (INA) that would normally make an alien inadmissible when considering whether an alien is eligible for a blue card. (§105(b)). The provisions and acts that may be waived include:
    - Failure to meet labor certification standards;

[1] Except as otherwise noted, this summary describes the provisions of the House bill, H.R. 2414.
[2] Only the House bill contains the $7,500 earnings alternative to qualify for blue card status. This alternative is not present in the Senate bill.

- Illegal presence;
- Failure to meet documentation requirements (§105(b)(1)); and
- Certain other provisions of the INA. These provisions may be waived in order to ensure family unity, for humanitarian purposes, or if otherwise "in the public interest." (§105(b)(2)(A)).

- There are several provisions of inadmissibility that DHS may NOT waive when considering whether an alien is eligible for a blue card, as well. These provisions include inadmissibility due to certain criminal convictions, national security concerns, or dependence as a public charge. (§105(b)(2)(B)). NOTE: The bill creates a "special rule" for determining who qualifies as a public charge. (§105(b)(3)).

- DHS may issue no more than 1.35 million blue cards during the five-year period beginning on the date of the bill's enactment. (§101(h)).

Blue Card Application Process

- A blue card application may be submitted:
  - Directly to DHS if the applicant is represented by an attorney or a nonprofit organization (§104(a)) or
  - To a "qualified designated entity," meaning a farm organization or other organization approved by DHS as being experienced and competent in preparing and submitting certain immigration-related applications. (§104(b)).

- The bill establishes an 18-month blue card application period that would begin six months after the bill is enacted. (§101(a)(2)). If an illegal alien is apprehended after the date of the bill's enactment but before the beginning of the application period, and the alien can establish a "nonfrivolous" case of blue card eligibility, DHS may not deport the illegal alien until he or she has had an opportunity (during the first 30 days of the application period) to apply for blue card status. (§105(c)(1)(A)). Additionally, the bill requires DHS to grant this alien work authorization. (§105(c)(1)(B)).

- If an illegal alien is apprehended during the aforementioned 18-month blue card application period and presents a "nonfrivolous" blue card application, DHS is again barred from deporting the alien and is required to grant the alien work authorization status until a final determination is made on the application. (§105(c)(2)).

Benefits of Blue Card Status

Blue card status would give illegal alien agricultural workers more than just an amnesty; it would also convey a number of prospective benefits. These benefits include:

- *Work Authorization* — The bill would grant blue card holders an "employment authorized endorsement or other appropriate work permit" in the same manner as those provided to legal permanent residents. (§101(c)).

- *Blue Card Status for Spouses and Children* — AgJOBS requires DHS to grant "derivative" blue card status to the spouse and children of a blue card holder. Additionally, DHS may not remove this status as long as the primary alien maintains blue card status (§103(e)(2)(A)) — with certain exceptions. (§103(e)(3)). These "derivative" cards are exempted from counting toward the 1.35 million blue cards DHS is allowed to grant during the five-year period beginning on the date of the bill's enactment. (§103(e)(2)(A)). Additionally:
    - The bill grants these "derivative" spouses and children permission to travel to and from the United States in the same manner as legal permanent residents. (§103(e)(2)(B)).
    - "Derivative" spouses are permitted to apply to DHS for a work permit. (§103(e)(2)(C)).

- *Identification Cards* — AgJOBS requires DHS to grant every alien who receives a blue card — and their spouses and children — an identity card. (§101(f)). These cards must contain:
    - An encrypted, machine-readable, electronic identification strip that is unique to the alien to whom the card is issued (§101(f)(1));
    - Biometric identifiers, including fingerprints and a digital photograph (§101(f)(2)); and
    - Security features designed to prevent tampering, counterfeiting, or duplication of the card for fraudulent purposes. (§101(f)(3)).

- *Treatment as a Legal Permanent Resident* — The bill requires that blue card holders be treated as legal permanent residents (green card holders) for purposes of any law other than the Immigration and Nationality Act (INA). (§102(a)). Additionally, blue card holders are permitted to travel to and from the United States as if they were legal permanent residents. (§101(b)).

- *Amnesty for Social Security Crimes* — The bill grants amnesty to blue card recipients for all Social Security related-crimes, including for crimes related to identity theft where an illegal alien steals the Social Security number belonging to someone else. (§111). (Citizens and any other aliens convicted of similar Social Security-related crimes could face up to five years in prison). **NOTE:** Nothing in this Act would prevent illegal aliens who have committed felony identity theft, by stealing the Social Security number of another person, from claiming Social Security benefits based on illegal, fraud-based work. Illegal aliens will be able to use the administrative process provided in the Social Security Act to go back to the Social Security Administration and ask them for credit for his or her illegal work.

Termination of Blue Card Status

DHS may terminate an alien's blue card status if it determines that the:

- Alien is deportable (§101(d)(1));

- Blue card was obtained through fraud or willful misrepresentation (§101(d)(2)(A));

- Alien has committed an act that makes him/her inadmissible. Note: DHS may waive certain acts that would otherwise make an alien inadmissible under section 105(b) of the bill (see above) (§101(d)(2)(B)(i));

- Alien has been convicted of a felony or 3 or more misdemeanors committed in the United States (§101(d)(2)(B)(ii));

- Alien has been convicted of an offense that involves bodily injury, threat of serious bodily injury, or property damage over $500 (§101(d)(2)(B)(iii));

- Alien has failed to perform 5 continuous years of agricultural work consisting of at least 100 work days (one work day is equivalent to 5.75 hours or more) per year, beginning on the date of the bill's enactment. (§101(d)(2)(A)(iv)).

- Alien has failed to perform 3 continuous years of agricultural work consisting of at least 150 work days (one work day is equivalent to 5.75 hours or more) per year, beginning on the date of the bill's enactment (§101(d)(2)(A)(iv));

- Alien has failed to perform 4 continuous years of agricultural work consisting of at least 150 work days (one work day is equivalent to 5.75 hours or more) per year for 3 years and at least 100 work days per year for 1 year, beginning on the date of the bill's enactment (§101(d)(2)(A)(iv)); or

Step 2 — From Blue To Green

DHS is required to confer a green card upon any blue card holder who meets certain requirements.

Eligibility for Adjustment from Blue Card to Green Card Status

In order to receive a green card (and thus become a legal permanent resident), a blue card holder must:

- Satisfy certain work requirements. (§103(a)). A blue card holder can meet these requirements in one of three ways:
    - By performing 5 continuous years of agricultural work consisting of at least 100 work days (one work day is equivalent to 5.75 hours or more) per year, beginning on the date of the bill's enactment. (§103(a)(1)(A)(i)).
    - By performing 3 continuous years of agricultural work consisting of at least 150 work days (one work day is equivalent to 5.75 hours or more) per year, beginning on the date of the bill's enactment (§103(a)(1)(A)(ii));
    - By performing 4 continuous years of agricultural work consisting of at least 150 work days (one work day is equivalent to 5.75 hours or more) per year for 3 years and at least 100 work days per year for 1 year, beginning on the date of the bill's enactment (§103(a)(1)(B)); or
        - Note: DHS may grant an extra period of up to 12 months to allow a blue card holder to meet these work requirements if certain "extraordinary circumstances" exist,

including: pregnancy; disabling injury; disease of the alien or the alien's child; severe weather conditions that prevent the alien from working for "a significant period of time"; or termination from agricultural employment, if DHS is able to determine that the alien was first terminated "without just cause" and then "unable to find alternative agricultural employment after a reasonable job search." (§103(a)(3)).

- Apply within seven years of the bill's enactment. (§103(a)(4)).

- Pay a $400 fine. (§103(a)(5)).

- Establish that he/she "does not owe any applicable Federal tax liability." (§103(d)(1)). However, the bill provides a blue card holder with tax liability an opportunity to overcome this requirement by allowing the alien to enter "into an agreement for payment of all outstanding liabilities with the Internal Revenue Service." (§103(d)(1)(C)). AgJOBS limits "applicable Federal tax liability" to liability for Federal taxes — including penalty and interest — owed for any year during the period of employment the alien must meet as a requirement to have his/her status adjusted from blue card status to green card status. Additionally, "applicable Federal tax liability" only applies to years "for which the statutory period for assessment of any deficiency for such taxes has not expired." (§103(d)(2)). **NOTE:** There is no requirement that the alien demonstrate that they have paid all applicable state and local taxes that they may owe.

- NOTE: AgJOBS would make the spouses and any minor children of blue card holders granted legal permanent residence eligible for green cards, as well. (§103(e)(1)).

- NOTE: Under the bill, any blue card holder who fails to apply for a green card within the application period (seven years from the date of the bill's enactment) is deportable and may be removed from the United States. Additionally, any blue card holder who fails to meet the requirements listed above by the end of the application period is deportable, as well. (§103(c)).

PART II: H-2A "REFORM"

AgJOBS seeks to replace the current H-2A agricultural guest worker program with a scheme that would make it easier for employers to bring cheap foreign labor into the United States. In general, the bill would accomplish this by:

- Reducing impediments to employers seeking to import H-2A workers;
- Reducing the amount of oversight the Department of Labor (DOL) has over the program;
- Diminishing labor protections for both U.S. and alien workers under the program;
- Limiting the ability of both U.S. and alien workers to enforce contractual and legal rights against employers; and
- Creating an ongoing amnesty program for illegal aliens who qualify as sheepherders, goat herders and dairy workers.

H-2A Labor Certification

Current law requires that any employer seeking H-2A workers must first obtain a labor certification. An employer's application for this certification must include: (1) a statement of the number of workers needed; (2) a copy of the job offer; and (3) written assurances that the employer will meet certain minimum labor standards. DOL then reviews the application and determines whether the H-2A jobs created by the employer will adversely affect U.S. workers and provides certification based off of its determination. AgJOBS, however, seeks to modify this labor certification process as follows:

- *Employer Assurances* — AgJOBS seeks to modify regulations relating to the assurances employers are required to give DOL when they file their application for an H-2A labor certification. (§201, revising §218(b)(2)(D) of the Immigration and Nationality Act (INA).[3] Under the bill, employers seeking an H-2A labor certification would need to assure DOL that they will:
    - Not displace an existing U.S. worker with an H-2A worker. (§201, revised §218(b)(2)(D)). NOTE: This modification would relax a previous requirement that employers assure DOL that no U.S. worker will be rejected or terminated for a non-job-related reason.
    - Make reasonable recruitment efforts to hire U.S. workers first. At a minimum, the employer must:
        - File the job offer with the local office of the state employment security agency. (§201, revised §218(b)(2)(H)(i)(II)). NOTE: This modification would mean that employers would no longer be required to use the "interstate clearance system."
        - Contact previous U.S. workers who, in the past, had filled the position the employer now wishes to fill with an H-2A worker. (§201, revised §218(b)(2)(H)(i)(I)). NOTE: This modification would reduce informal recruitment efforts employers are required to use under current H-2A labor certification regulations.
        - Advertise the job opportunity "in a publication in the local labor market that is likely to be patronized by potential farm workers." (§201, revised §218(b)(2)(H)(i)(III)).
    - Comply with the existing "50 percent rule," which requires the employer to hire any equally-qualified U.S. worker for the job within the first half of an H-2A worker's contract period. (§201, revised §218(b)(2)(H)(iii)). Additionally, AgJOBS would require DOL to refer qualified U.S. workers *away* from an employer during this time period, presumably to avoid displacing the H-2A worker. (§201, revised §218(b)(2)(H)(iii)(III)).

- *Job Offer Requirements* — Under current law and DOL practice, employers are required to include certain minimum benefit, wage and working condition provisions with their application for H-2A labor certification. AgJOBS modifies the minimum benefit, wage and working conditions in a blatant attempt to make the hiring of H-2A workers cheaper and more appealing to prospective American employers. These changes include:
    - Allowing employers to provide a housing allowance in lieu of free housing if the state governor certifies that adequate local housing exists. (§201, revised §218A(b)(1)(G)). Currently, employers must provide free housing to all H-2A employees.

[3] Section 201 of the AgJobs bill replaces Section 218 of the INA with two new sections, 218 and 218A. References to Section 218 or 218A in this summary refer to the new sections of the INA as provided in Section 201 of the Act.

- Requiring an employer to reimburse an H-2A worker for only the minimum costs associated with relocating from his/her home country to the work site, if the worker works 50% of the contract period. Under current law, employers are required to reimburse H-2A workers for the *actual* cost of transportation from their home countries to the work site. AgJOBS would adjust this to allow employers to choose between the actual cost or "the most economical and reasonable common carrier transportation charges and subsistence costs for the distance involved." (§201, revised §218A(b)(2)(A)&(C)(i)(I)&(II)).
- Eliminating the requirement that employers pay the relocation costs for any H-2A worker who lives less than 100 miles from the work site. (§201, revised §218A(b)(2)(A),(B)&(C)(ii)).
- Revising the method for which the wages of H-2A workers are calculated. While AgJOBS does maintain the requirement that the employer pay the greater of (1) the minimum wage, (2) the prevailing wage, or (3) the adverse effect wage rate (AEWR), the bill limits the AEWR by:
  - Resetting the AEWR to its January 1, 2009 level for the three years following the bill's enactment. (§201, revised §218A(b)(3)(B)).
  - Limiting any subsequent AEWR increase to the lesser of 4 percent or the percentage increase in the consumer price index for the previous year. (§201, revised §218A(b)(3)(C)(i)&(ii)).
- Eliminating provisions in current law that require employers to provide H-2A workers with customary tools at no cost to the employees and meals at a maximum set rate or free cooking facilities.

- *DOL H-2A Certification Process* — AgJOBS seeks to reduce DOL's ability to review an employer's application for H-2A certification (and thereby allow more employers to gain such a certification and hire H-2A workers over Americans) by:
  - Removing the requirement that employers must file an application for H-2A certification at least 45 days before the first date of the work period. NOTE: It is unclear whether this would completely remove the limitation on when an H-2A certification application may be filed or provide DOL complete discretion to regulate a deadline.
  - Limiting the time DOL has to issue an H-2A certification to an applicant employer to seven days. (§201, revised §218(e)(2)(B)). Currently, DOL is required to promptly determine whether an employer's application for H-2A certification meets the requirements and provide notice of the decision within seven days of the application. However, DOL is not currently required to actually *issue* the H-2A certification until 30 days before the first date of the work period. This means that DOL currently has a minimum of at least 15 days to issue the H-2A certification. AgJOBS would reduce the time DOL has to review an employer's application for H-2A certification *and* issue the certification to a maximum of seven days.
  - Requiring DOL to issue H-2A certification to any employer whose application is not "incomplete or obviously inaccurate." (§201, revised §218(e)(2)(B)).

DHS Processing of H-2A Visa Petitions

Once DOL certifies an employer's H-2A application, the employer may then petition DHS for visas on behalf of the requested H-2A workers. (§201, revised §218B(a)). AgJOBS makes it easier for employers to receive visas for their prospective H-2A workers by impacting the DHS review process of H-2A visa petitions in the following ways:

- Requiring DHS to "establish a procedure for expedited adjudication" of H-2A visa petitions. (§201, revised §218B(b)).

- Reducing to seven days the time DHS has to process an employer's petition and notify the employer and the relevant officer at the consulate or port of entry where the H-2A worker will apply for a visa. (§201, revised §218B(b)). Currently, DHS can take up to 21 days just to approve the requested number of H-2A visas.

- Maintaining the current provision of law that allows DHS to grant an unlimited number of H-2A visas.

H-2A Worker Admissibility Requirements

AgJOBS seeks to make it easier for H-2A workers to enter the United States by eliminating or relaxing many of the bars to admissibility for H-2A workers contained in current law. These modifications include:

- Limiting admissibility grounds for H-2A workers to those expressly set forth in the bill. (§201, revised §218B(c)(1)).

- Current law prohibits a prospective H-2A worker from entering the United States if he/she is (or has recently been) unlawfully present in the United States. AgJOBS provides for a one-time waiver of this ineligibility due to unlawful presence, as long as the alien touches-back to his or her country of origin to apply for the H-2A visa. (§201, revised §218B(c)(3)).

Work Identity and Verification Requirements and Documentation

AgJOBS requires DHS to provide H-2A aliens with eligibility and identity documents that are:

- Resistant to counterfeiting and tampering (§201, revised §218B(g)(2)(B)) and

- Compatible with DHS and law enforcement databases. (§201, revised §218B(g)(2)(C)).

H-2A Worker Period of Admission

AgJOBS would establish requirements relating to the extension of an H-2A worker's stay in the U.S., seemingly in an effort to make it less difficult for such workers to remain in the country with work authorization. These requirements include:

- Permitting extensions of an H-2A alien's stay in the U.S. for up to 3 years (as in current law). (§201, revised §218B(h)(2)&(5)(A)).

- Providing for instant, 60-day work authorization for an H-2A worker upon the certified mailing of an employer's petition for extension. NOTE: The employer and H-2A worker need only use a copy of the petition (along with employment verification materials provided by DHS) to prove work authorization. (§201, revised §218B(h)(3)).

- Requiring an H-2A worker in the U.S. for more than 10 months to remain outside of the U.S. for 1/5 of the time he or she was in the U.S. (§201, revised §218B(h)(5)(B)(i)). However, the bill allows an employer to immediately reapply for an alien's admission if the H-2A worker was inside the U.S. for 10 months or less and if he or she was outside of the U.S. for a total of 2 months in the preceding year. (§201, revised §218B(h)(5)(B)(ii)). NOTE: This second provision could potentially allow for unlimited renewals.

In addition to the above requirements, AgJOBS creates special rules for sheepherders, goat herders and dairy workers. The legislation does not define the terms "sheepherder," "goat herder" or "dairy worker," nor does it give any guidance regarding what percentage of employment time an H-2A worker must spend performing any of these three jobs to count as one of these workers. What's most troubling about these special rules, however, is that they would create an ongoing amnesty program for illegal aliens who qualify in one of these three categories by doing the following:

- Permitting these workers to stay in the U.S. on contracts lasting 12 months, for a period of up to 3 years maximum. (§201, revised §218B(i)(1)&(2)).

- Exempting these workers from the requirement to remain outside of the U.S. for any amount of time before reapplying for re-entry. (§201, revised §218(i)(3)).

- Giving these workers a path to lawful permanent status as a skilled or other professional worker after 3 years in the U.S. While awaiting their adjustment to lawful permanent status, these workers would receive a stay of deportation, which would be annually extended by DHS. The H-2A workers would not be required to remain employed as in H-2A status during this period, and could therefore compete with Americans in other employment arenas. (§201, revised §218B(j)).

Labor Standard Enforcement

AgJOBS makes it more difficult for current employees' (both U.S. and H-2A workers) to enforce labor standards against H-2A employers. Again, these changes would make participation in the H-2A guest worker program more appealing to employers. These changes include:

- Limiting U.S. workers and H-2A workers to filing a complaint with DOL against an H-2A employer for three reasons: (1) If the employer fails to meet an assurance requirement; (2) If the employer makes a "misrepresentation of material facts" in its application for H-2A labor certification; and (3) If the employer retaliates against any employee for filing a complaint. (§201, revised §218C(a)(1)).

- Limiting the maximum fine for an employer who makes misrepresentations in the application for H-2A labor certification to only $90,000. (§201, revised §218C(a)(1)(F)).

- Stripping employees of the recourse provided to them by the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA) against an employer who fails to comply with assurances to abide by federal, state and local labor laws. NOTE: This may include not only an employer's assurances to abide by health, safety and other local labor laws, but also the labor laws made under the H-2A program. If so, these assurances would be rendered unavailable as a source for a federal action for statutory damages under the aforementioned MSAWPA for the failure (for example) to adhere to the 50 percent rule.

- Requiring U.S. and H-2A workers to pursue all breach of contract claims against an employer arising out of the job offer (such as failure to pay wages or provide housing allowance) through a complaint procedure with DOL. AgJOBS strips DOL of the ability to award injunctive relief to U.S. and H-2A workers who can prove a breach of contract by limiting the awards DOL can force an employer to pay a worker to back wages or other benefits required to be in a job offer. (§201, revised §218C(a)(1)(G)).

- Providing a private right of action in federal court to H-2A workers, but only for enforcement of the job offer or to prevent discrimination. (§201, revised §218C(b)). AgJOBS also:
    - Preempts any state law remedies for breach of contract (§201, revised §218C(c)(4);
    - Allows employers to force H-2A workers into private, non-binding mediation within 60 days of filing suit (§201, revised §218C(c)(1)); and
    - Forces the H-2A worker to elect between filing a complaint and suing the employer under this section of the bill. (§201, revised §218C(c)(3)).