



FEDERATION FOR AMERICAN IMMIGRATION REFORM

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## Summary of S. 744—The Border Security, Economic Opportunity, and Immigration Modernization Act

On April 17, 2013, Senators Chuck Schumer, John McCain, Dick Durbin, Lindsey Graham, Bob Menendez, Marco Rubio, Michael Bennet, and Jeff Flake introduced S.774, entitled the Border Security, Economic Opportunity, and Immigration Modernization Act. If passed, S.744 would grant amnesty to the approximately 12 million illegal aliens currently living in the U.S., create new guest worker programs for agricultural workers and low-skilled workers, and significantly increase legal immigration.

### **Agricultural Guest Workers**

Today's agricultural workforce is primarily made up of illegal immigrant labor despite an uncapped H-2A agricultural guest worker program. S. 744 repeals the H-2A program and amends Sec. 101(a)(15) of the Immigration and Nationality Act to create a new W nonimmigrant visa program for workers to perform agricultural services or labor for a registered agricultural employer in a registered position. Although only 55,000 H-2A visas were issued last year, the cap for this new agricultural visa is 112,333. W nonimmigrants are not permitted to bring their spouses and children unless they independently qualify for a visa.

The following summary covers the provisions in Title II of the bill that would create this new W visa for agricultural workers.

### ***Agricultural Guest Workers (W Visa)***

TITLE II, SUBTITLE B—W NONIMMIGRANT VISA (AGRICULTURAL WORKERS)

#### **Establishment of Nonimmigrant Agricultural Worker Program (Sec. 2232, p. 1079)**

- S. 744 creates a new W agricultural nonimmigrant worker program to replace the current H-2A program.
  - W-3 visa is for contract-based agricultural employment.
  - W-4 visa is for at-will agricultural employment.
- The H-2A program sunsets 1 year after the Secretary issues regulations for the W ag visa program. (sec. 2233, p. 1140)
  - An employer may employ an H-2A worker for the shorter of:
    - 10 months; or
    - The time specified in the position.
- W ag workers are prohibited from doing non-ag work. (p. 1107)
- The Secretary shall issue regulations to carry out the W ag visa program within 1 year after enactment. (p. 1139)

- All other regulations to implement this subtitle must be issued within 6 months of enactment. (sec. 2241, p. 1142)

**Eligibility Requirements** (p. 1087)

An alien is ineligible for a W ag visa if he/she:

- Violated a material term of a previous W ag visa in the past 3 years;
  - This requirement does not apply to contract ag workers who voluntarily abandon employment before the end of the contract or whose employment is terminated by the employer for cause.
- Has not passed the required background checks; or
- Previously departed the U.S. while subject to a removal or voluntary departure order and:
  - Is currently outside the U.S.; or
  - Illegally reentered the U.S. after December 31, 2012.
- DHS may waive the ineligibility after departure provision if the alien:
  - Is the spouse/child of a U.S. citizen or LPR;
  - Is the parent of a child who is a U.S. citizen or LPR;
  - Entered the U.S. before 16, has a high school degree or GED in the U.S.; or
  - Was younger than 16 on the date he/she initially entered the U.S., is 16 years or older on the date of application, and was physically present in the U.S. for at least 3 out of the 6 years prior to enactment.

**Duration of Status and Extension** (Sec. 2232(d)(2), p. 1090)

- W ag visa is valid for 3 years and one 3 year renewal.
- After a W ag worker has worked for two consecutive 3 year periods, he/she is ineligible for another W visa until:
  - Returns home for at least 3 months; and
  - Reapplies.
- W ag workers are authorized to travel outside the U.S. for up to 60 days per fiscal year.

**W Ag Visa Cap** (p. 1082)

- First five fiscal years following enactment of S. 744: 112,333 plus any adjustment (increase/decrease) based on information given to the Secretary of Agriculture by *ag businesses and unions*.
  - The visas must be evenly distributed between the four quarters of the FY unless the *Secretary determines* that an alternative allocation better accommodates seasonal demand.
  - Unused visas from one quarter roll over to the next quarter.
- Fiscal year six and beyond: the Secretaries of Agriculture and Labor set the cap each year based on the following factors:
  - A demonstrated shortage of ag workers;
  - The previous FY's unemployment/underemployment level of ag workers;
  - The number of blue cards applied for and approved;
  - The number of W-ag visas applied for and issued in the previous FY;
  - The number of U.S. workers (including blue card workers) employed in ag;
  - Any growth/contraction of the ag industry; and
  - Any changes in real wages paid to ag workers.

- The Secretary shall issue regulations for immediately adjusting the cap for labor shortages.

#### **Terms and Conditions of W-Visa Status**

- W ag visas: (p. 1094)
  - Shall not limit the geographic area the ag worker may be employed;
  - Shall not limit the type of ag employment the worker may perform; and
  - Shall restrict the ag worker to employment with designated ag employers.
- Spouses and children of W ag workers only receive W visas if they independently qualify for the program. (p. 1094)
- Employers must provide insurance covering injury and disease, at no cost to the worker, equivalent to the State workers' compensation law if the job is not covered under that law. (p. 1106)
- W ag workers are ineligible for Federal financial assistance on the basis of financial need. (p. 1138)

#### **Loss of Status (p. 1091)**

- A W ag worker loses status and must depart the U.S. if he/she:
  - Is not employed in ag after the contract term; or
  - Is an at-will ag worker and not continuously employed in ag
    - 60 day periods of unemployment are exempted (travel outside U.S. does not count towards this time)
- DHS may waive this if the unemployment was due to:
  - Injury; or
  - Natural disaster.

#### **Portability of Status—Contract Ag Workers (p. 1092)**

- Contract ag workers may seek employment with another ag employer but switch employers until the current contract ends.
- Ag workers who voluntarily abandon employment or are terminated for cause:
  - Cannot accept subsequent employment until departing the U.S. and reapplying; and
  - Are not entitled to the 75 percent payment guarantee.
- Contracts terminated by mutual agreement between the ag worker and employer are not treated as voluntary abandonment.

#### **Portability of Status—At-Will Ag Workers (p. 1094)**

- At-will ag workers may seek employment with any designated at-will ag employer.

#### **Employer Requirements (p. 1095)**

- Employers seeking to employ W nonimmigrants must register with the Secretary and pay a registration fee determined by the Secretary.
- The Secretary shall grant designated ag employer status to employers that submit:
  - Documentation that the employer is in the ag industry;
  - Estimated number of W ag workers needed each year;
  - Anticipated work period for W ag workers; and
  - Documentation establishing need for a specified ag occupation.

- Employer designation is valid for 3 years with unlimited 3 year renewals provided the employer remains an ag employer and pays the registration fee.
- The registration fees are deposited in the Examinations Fee Account.

**Petitioning for W Ag Workers** (p. 1098)

- Employers may submit applications for W ag workers to DHS until 45 days before the date of employment.
- Employers must attest the following:
  - The number of contract and at-will ag workers sought;
    - Note: employers may name specified individuals to employ
  - The anticipated period of employment;
  - Evidence that employment terms comply with the Migrant and Seasonal Agricultural Worker Program;
  - Complied with the State workforce agency requirement;
  - Maintain record of U.S. workers who apply; and
  - The employer will comply with the additional program requirements.
- Specifically named workers in the U.S. with lawful status may begin working for that employer after the employer submits the petition to DHS.
- The DHS Secretary shall accept all petitions except those that are incomplete or “obviously inaccurate.” The Secretary shall notify employers within 7 business days of the decision.

**Employment of U.S. Workers** (p. 1101)

- At least 60 days before the start date for W ag workers, employers must post the opening with the local office of the relevant State workforce agency and the Labor Department’s Job Registry.
  - The posting must be up for at least 45 days.
- The employer must keep a record of all eligible, able, willing, and qualified U.S. workers who apply. A U.S. worker means (p. 1081):
  - Citizen;
  - LPR;
  - Refugee/asylee;
  - Blue card holder; or
  - Immigrant “otherwise authorized” for employment in the U.S.
- Employers must offer the job to any equally or better qualified U.S. worker who applies during the 45 day recruitment period.
  - An employer may offer the job to a W nonimmigrant over a blue card alien if:
    - The employer previously employed the worker as an H-2A worker;
    - The worker worked for the employer for 3 of the past 4 years; and
    - The employer pays the adverse effect wage rate (see below).
- Employers cannot displace U.S. workers with W workers during the employment period and 30 days before the W worker starts.
  - Employers cannot use W workers during a labor dispute.
- Employers must offer U.S. workers the same wages and conditions offered to W ag workers. (p. 1122)
  - Employers are not required to provide housing or housing allowance to U.S. workers.

**75 Percent Wage Guarantee for Contract W Visa Workers** (p. 1104)

- The employer must guarantee to offer contract W workers employment for at least 75 percent of the hourly equivalent work hours under the contract.
  - If the employer fails to meet the guarantee, the employer must pay the W worker 75 percent of the total contract wages.
- For determining the 75 percent hour compliance, employers may count:
  - Hours the worker was supposed to work but failed to show up; and
  - All hours actually worked, including voluntary work beyond the normal work hours, and work on Federal holidays and the worker's Sabbath.
- If a natural disaster eliminates the need for a contract ag worker, the employer:
  - May terminate the W worker;
  - Shall pay the worker all wages due from the start of employment until termination;
  - Shall attempt to transfer the worker to comparable employment; and
  - If the transfer does not occur, provide transportation for the worker to return to his/her native country.

**Worksite Transportation for Contract workers** (p. 1112)

- Employers may provide/reimburse contract ag workers for the cost of daily commuting

**Wages** (p. 1114)

- The minimum wage rate employers must pay W ag workers depends on the job category the worker falls under.
- The minimum wage for FY 2014-16 is:
  - First-line supervisors of farming, fishing, and forestry workers: minimum wage
  - Animal breeders: minimum wage
  - Graders and sorters, agricultural products: higher of
    - Minimum wage; or
    - \$9.37 (FY14), \$9.60 (FY15), and \$9.84 (FY16)
  - Agricultural equipment operator: higher of
    - Minimum wage; or
    - \$11.30 (FY14), \$11.58 (FY15), and \$11.87 (FY16)
  - Farmworkers and laborers, crop, nursery, and greenhouse: higher of
    - Minimum wage; or
    - \$9.17 (FY14), \$9.40 (FY15), and \$9.64 (FY16)
  - Farmworkers, farm, ranch and aquacultural animals: greater of
    - Minimum wage; or
    - \$10.82 (FY14), \$11.09 (FY15), and \$11.37 (FY16)
- After FY16 the minimum wage rate for the first 4 categories increases based on a BLS index.
- The Secretaries of Agriculture and Labor shall annually establish the required wage for the following year for the first two job categories.
- The adverse effect wage rate (AEWR) in effect on April 15, 2013 for H-2A workers remains in effect until the H-2A program sunsets.
  - If the Secretary fails to establish the minimum wage for the first two categories after FY16, the AEWR in effect on the date of enactment is the wage rate for those categories and the yearly increase follows the BLS index.
- W ag employers are not required to pay and withhold FICA and FUTA taxes.

- Employers can only make deductions from W worker wages that are authorized by law and are “reasonable and customary” for the position. (p. 1107)

**Housing Requirement (p. 1107)**

- Employers must offer to provide W ag workers with housing (at no cost to the worker) or a housing allowance.
  - The housing requirement does not apply to workers who reside outside the U.S. if:
    - Their residence is within normal commuting distance; and
    - The job site is within 50 miles of a land border.
- Housing
  - The housing must meet:
    - Applicable Federal standards for temporary labor camps; or
    - Applicable local standards for rental/public accommodation housing.
  - If the employer arranges public housing that requires payments from tenants, the employer must directly make those payments.
  - Employers cannot collect deposits for bedding and other related housing from workers.
  - Employers may require workers to pay the reasonable cost of repairing damage caused by the worker.
- Housing allowance
  - Employers may provide a reasonable housing allowance instead of housing.
  - Employers must make a good faith effort to help workers find housing.
  - The housing allowance cannot be used for housing owned/controlled by the employer.
  - Contract ag workers may only receive a housing allowance if the state’s Governor certifies there is adequate housing available in the employment area.
    - The certification expires after 3 years unless renewed by the Governor.

**Special Rules for Certain Agricultural Occupations (p. 1135)**

- The following industries qualify for special procedures relating to housing, pay, and visa applications:
  - Shepherding and goat herding;
  - Itinerant commercial beekeeping and pollination;
  - Open range production of livestock;
  - Itinerant animal shearing; and custom combining industries.
- The Secretary shall allow employers in special industries that do not operate in a single, fixed-site location to provide in the petition a list of anticipated work locations, which:
  - May include an anticipated itinerary; and
  - May be subsequently amended by the employer after notifying the Secretary.
- The Secretary may establish monthly, weekly, or biweekly wage rates for special industry positions. The Secretary will annually determine the wage rate through rulemaking.
- The Secretary shall allow housing or a housing allowance that is suitable for workers in remote locations.
- Employers in beekeeping and pollination may require applicants be free from bee pollen, venom, or other bee-related allergies.

### **Transportation Reimbursement** (p. 1113)

- The W worker's initial employer must reimburse the worker for the cost of transportation and subsistence from the country of origin to the initial job location.
- If a contract W worker works at least 27 months with the same employer, the employer must reimburse the worker for the cost of transportation and subsistence from the place of employment to the country of origin.
- The reimbursement shall not exceed the lesser of the:
  - Actual cost to the worker; or
  - Most economical and reasonable common carrier charges.

### **Worker Protections** (p. 1122)

- W ag workers cannot be denied applicable labor and employment law protections.
- W ag workers are considered migrant ag workers under the Migrant and Seasonal Agricultural Worker Protection Act.
- W ag workers are considered lawfully admitted for permanent residence to establish eligibility under the Legal Services Corporation Act relating to:
  - Wages;
  - Housing;
  - Transportation; and
  - Other employment rights.
- Mediation
  - W ag workers are entitled to free mediation through the Federal Mediation and Conciliation Service.
  - Either party may request mediation within 60 days of a W ag worker filing a lawsuit
    - The mediation cannot exceed 90 days unless the parties agree to an extension.
  - \$500,000 are appropriated per FY for mediation
  - Agreements by W ag workers to waive/modify mediation protections are void.
  - Any settlement reached between a W ag worker and an employer precludes any right of action from the same facts in a civil lawsuit. (p. 1132)
  - Any settlement reached by the Secretary on behalf of a W ag worker precludes any right of action from the same facts in a civil lawsuit. (p. 1132)
- W ag workers are entitled to Whistleblower Protections. (p. 1133)

### **Enforcement Authority** (p. 1126)

- The Secretary of Labor shall establish a process for resolving complaints about an employer's failure to follow the W ag worker program.
- Any aggrieved person or organization may file a complaint within 1 year of the alleged conduct.
- The Secretary shall notify the parties within 30 days if the Secretary finds a reasonable basis exists for the complaint.
  - The parties are entitled to notice and opportunity for a hearing if the Secretary determines a reasonable basis exists.
  - The Secretary must make a final determination with 60 days if the hearing occurs.



- If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of the W visa program, or a material misrepresentation of fact in the petition, the Secretary:
  - May impose other administrative remedies, including civil monetary penalties not exceeding \$1,000; and
  - May disqualify the employer from the program for 1 year.
- If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of the W visa program, or a willful material misrepresentation of a material fact in the petition, the Secretary:
  - May impose other administrative remedies, including civil monetary penalties not exceeding \$5,000;
  - May seek “appropriate legal or equitable relief;” and
  - May disqualify the employer from the program for 2 years.
- If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of the W visa program, or a willful material misrepresentation of a material fact in the petition, and *the employer displaced a U.S. worker*, the Secretary:
  - May impose other administrative remedies, including civil monetary penalties not exceeding \$15,000; and
  - May disqualify the employer from the program for 3 years.
- If the Secretary finds, after notice and opportunity for a hearing, that an employer failed to provide the wages, benefits, and working conditions attested by the employer in the petition, the Secretary will “assess” the amount due any U.S. worker or W ag worker and ensure the worker receives the proper compensation.
- Civil penalties collected under this section are deposited in the Comprehensive Immigration Reform trust fund.
- Civil penalties for a petition cannot exceed \$90,000.
- W ag workers must withdraw an administrative complaint with the Secretary before filing a civil action.

**Roles of Agricultural Associations** (p. 1134)

- A petition for W ag workers may be filed by an association of agricultural employers.
- Treatment of violations:
  - If an individual member violates any condition of an approved W visa petition, the Secretary will only penalize that individual member.
    - Exception: if the Secretary determines that the association or other member participated in, had knowledge of, or had reason to know of the violation, then the Secretary will also penalize that entity.
  - If an association violates any condition of an approved W visa petition, the Secretary will only penalize the association and not any individual member.
    - Exception: if the Secretary determines that the member participated in, had knowledge of, or had reason to know of the violation, then the Secretary will also penalize that entity.

**Monitoring W Ag Workers** (p. 1138)

- The Secretary is required to monitor the movement of W ag workers through:
  - The Employment Verification System described in sec. 274A(b); and



- A new electronic monitoring system modeled on SEVIS and SEVIS II. (Note: SEVIS is a web-accessible database for monitoring information about student visa holders.)