



U.S. CHAMBER OF COMMERCE

Lesser-Skilled Work Visas

An Initial Take on the Senate's Comprehensive Immigration Reform Bill

H-2B Reform

- Wages are set as the greater of actual wages paid to similarly situated Americans working for the employer or prevailing wages according to BLS wage data providing a wage level commensurate with experience, training and supervision.
 - Employers are not obligated to pay mean wages, or the greater of the mean wage, Service Contract Act (SCA) wage or Davis-Bacon Act (DBA) wage. SCA and DBA wages only apply if employer is hiring worker for a federal contract.
- Permanent returning worker exemption so that returning H-2B workers do not count toward the annual 66,000 H-2B cap
- Ski instructors may qualify for P-3 visas as athletes, or H-2B classification.

Lesser-Skilled Worker Green Card Reform

- The 10,000 cap is eliminated for lesser-skilled workers (the “other worker” category within EB3) and 60,000 visas will be available annually for individuals working in jobs requiring a university degree, two years of training experience, or any job for which an employer completes the PERM process at DOL.
- Any beneficiary of an approved employment-based immigrant visa petition who has been waiting three years after approval may obtain green card status, during a ten year transition period to reduce existing backlogs.
- In addition to reforms to the current employer-lead employment-based preference system, a new merit-based point system is created that allows both high-skilled and lesser-skilled workers to come to the US without a prior connection to a sponsoring US employer. The merit-based visa system is divided equally between a high-skilled points structure and a points structure that would allow lesser-skilled workers to qualify.

New W-visa

- A new W-nonimmigrant classification is created.
- A W-nonimmigrant may work in any occupation where the typical preparation is less than a four year university degree. In other words, occupations in DOL's Job Zones 1, 2, and 3 are covered by the W-visa while Job Zones 4 and 5 are occupations covered by the H-1B visa.
- An employer may register a position for which it conducts at least three real world recruitment steps and posts a notice on both the State Workforce Agency in the state where the job will be located as well as on a new DOL website to list nationwide job postings.
 - The employer registers with USCIS positions it is unable to fill.
 - The employer must retain documentation verifying each recruitment step completed and its inability to locate sufficient numbers of qualified and available workers. USCIS may audit whether an employer has documentation confirming the recruitment steps the employer has attested it has completed.

- All processing, registration, audits, and monitoring of employers, registered positions, and W-visa holders is through USCIS.
 - USCIS has all legislative rulemaking authority regarding the program.
 - DOL is responsible for establishing a complaint-driven system as part of enforcement.
 - There will be three DHS systems to monitor employers: a DHS Jobs Bank for registered positions, E-Verify which will reflect how many W-visas an employer is registered to hire, and a back-end monitoring system like SEVIS.
- Wages are set as the greater of actual wages paid to similarly situated Americans working for the employer or prevailing wages according to BLS wage data providing a wage level commensurate with experience, training and supervision.
 - Employers are not obligated to pay mean wages, or the greater of the mean wage, Service Contract Act (SCA) wage or Davis-Bacon Act (DBA) wage. SCA and DBA wages only apply if employer is hiring worker for a federal contract.
- Congress has mandated that the first four years of the W-visa program have caps of 20,000, 35,000, 55,000 and 75,000.
- After year four of the program, W-visa numbers would be controlled by a congressionally mandated formula, with a floor of 20,000 and cap of 200,000. The capped W-visa numbers do not include spouses or minor children, positions in meat or poultry trimming or fish cutting, shortage occupation positions, or Special Allocation numbers:
 - Shortage occupation numbers shall be in addition to whatever the W-visa cap is for a given year. Employers will be able to register any occupation for which they are unable to locate sufficient numbers of qualified and available Americans regardless of if or when the bureau identifies shortages.
 - An additional allocation of numbers, to total no more than 10% of the W-visa cap for that year, shall be made for meat trimming, poultry trimming and fish cutting occupations.
 - W-visa registered positions made available in a given year through the Special Allocation shall be in addition to the W-visa cap.
 - A Special Allocation of W-visa registered positions is available for any occupation and any employer who completes at least 7 recruiting steps (instead of just 3), posts the job on both the SWA and DOL websites, and offers a “level four” wage (the mean of the top two-thirds of BLS-surveyed wage data in the occupation in the metropolitan statistical area).
- The W-visa formula will consider four factors in setting the W-visa cap for a particular year: (1) the average rate of change in national unemployment over the last year (30%), (2) the average job openings rate over the last year (30%), (3) the bureau recommendation as to the rate of change to the W-visa cap (20%), and (4) employer demand as measured by the number of registered positions requested as compared to the cap. The formula will determine the percentage rate of change to the W-visa cap.
- A new Bureau of Immigration and Labor Market Research is created within USCIS, staffed by professional economists, demographers and the like, with a politically appointed Bureau Commissioner, appointed by the President and confirmed by the Senate.



- The Bureau has fixed, specified responsibilities:
 - Develop a methodology through APA rulemaking to make an annual bureau recommendation regarding increases or decreases to the W-visa cap.
 - Calculate the W-visa annual cap at the beginning of each year, in accordance with the congressionally mandated formula.
 - Supplement the W-visa program list of acceptable real world recruiting steps, to keep the list updated and modernized.
 - Develop a methodology through APA rulemaking to identify either labor shortages in any occupation covered by the W-visa (those occupations in DOL's Job Zones 1, 2 or 3, encompassing jobs typically requiring less than a four year Bachelors degree).
 - Designate, through APA rulemaking, shortage occupations either at the national level or in any metropolitan statistical area. Any occupation in Job Zones 1, 2 or 3 can be identified as a shortage, and employers can petition the bureau to request designation. The bureau shall identify as part of the rulemaking process the number of W-visas to be allocated to any shortage occupation and the MSAs in which employers may register such shortage occupation positions.
 - Survey unemployment in the construction occupations in each metropolitan statistical area.
 - Study and report to Congress how the immigration laws operate and make non-binding recommendations about how to improve the employment based immigrant and nonimmigrant programs.
- Any employer hiring a W-nonimmigrant must treat the W-visa holder just like its American workers.
- W-visa status is a dual intent classification.
- W-nonimmigrants must initially obtain status by becoming a "certified alien" through a State Department consular post outside the U.S., but may extend status in the U.S., or renew a W-visa, in three year increments. During the three year validity period the W-nonimmigrant may work in the U.S. for any registered employer in a registered position, and is not tied to any one employer or position.
- A W-nonimmigrant's work authorization will not be confirmed through E-Verify if the individual has remained present in the U.S. unemployed for 60 days. The W-nonimmigrant's departure from the U.S. and subsequent reentry during the three year validity of the W-visa will allow the W-nonimmigrant to be confirmed as employment-authorized in E-Verify as long as the individual never remained in the U.S. unemployed for more than 60 days.
- An employer with more than 25 employees may not register a job opening in the W-visa program if more than 30% of its workforce is not U.S. workers, with a fee due when more than 15% but less than 30% of the employer's workforce is not U.S. workers. A small business with 25 or fewer employees may register a job opening for which it cannot locate sufficient numbers of qualified and American workers regardless of the percentage of U.S. workers in its workforce, but must pay a filing fee if more than 50% of its workers are U.S. workers.





Visas for Essential but Less Skilled Immigrants

Why a New Essential and Lesser-skilled Legal Immigration System Best Serves the National Interest

Our current immigration system¹ provides few opportunities for employers to sponsor lesser-skilled immigrants in occupations other than production agriculture.² By “less-skilled,” the reference is to workers who fill jobs where typical vocational preparation is less than a four-year university degree. This includes jobs that can be filled by workers who need only a short demonstration or less than one month of training. And, this also includes jobs requiring certification, some post secondary education, or up to two years of training or experience. In some cases, Americans are not available in sufficient numbers to fill open jobs in the lesser-skilled occupations because of lack of interest or a skills gap.

Under current law, when U.S. employers complete normal, real-world recruitment to locate qualified and willing American lesser-skilled workers, they are unable to make immediate hires of lawful foreign workers in those situations where Americans are unavailable, except where the job offered is a seasonal or temporary need position (and then only up to a capped 66,000 annually³). Moreover, there are virtually no visa numbers available for employers to identify and sponsor foreign lesser-skilled workers for permanent resident status (green card status). This category is capped at no more than 10,000 annually of the approximately 1 million lawful permanent residents we welcome to the United States each year.⁴

Businesses need human capital to provide goods and services. If there are insufficient numbers of both qualified and willing U.S. workers to fill essential and lesser-skilled positions, employers either are unable to respond to consumer demand or move the jobs where there is an adequate supply of workers. For example, home health care, nursing home care, landscaping, and hospitality services, among others, cannot be provided without staff in the geography where the employer provides services to patients, clients, and customers.

The Center for Global Development, among others, has summarized BLS data to conclude that the highest number and percentage of job growth in the U.S. through 2020 is expected in low and moderate skill jobs that cannot be mechanized or outsourced (see attached). There is no reason to deprive our economy of the lesser-skilled workers in the mostly, although not exclusively, service economic sectors, if a prerequisite to a lesser-skilled worker visa program is that any participating U.S. employer must first recruit and then determine whether there are U.S. workers qualified and willing to fill open jobs. As described by George Borjas and other economists, low-skilled immigration greases the wheels of the U.S. labor market.⁵

¹ The Immigration and Nationality Act, Title 8, United States Code.

² The current visa program (H-2A) for production agriculture is unworkable. While there is uncapped access to H-2A visas for temporary seasonal agriculture workers, less than 60,000 such workers are sponsored annually through this legal visa program.

³ H-2B visas for non-agricultural temporary workers are capped annually at 66,000.

⁴ For FY11, DHS reported that 1,377 lesser-skilled workers (in jobs requiring less than two years of prior training or experience) were admitted as new lawful permanent residents; the remaining approximately 3,700 visas went to the spouses and minor children of these workers. See, DHS Yearbook of Immigration Statistics for FY11 published September 2012, Table 7 http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf. Under current law, 5,000 of the 10,000 for lesser skilled are allocated to cover green cards awarded to Central Americans fleeing civil strife in the 1990s.

⁵ George Borjas, “Does Immigration Grease the Wheels of the U.S. Labor Market?” *Brookings Papers on Economic Activity* 1: 69–133 (2001). Some have referred to many of these essential and lesser-skilled positions that “grease the economy” as “3D” jobs – positions that are either dirty, dangerous or difficult.

Further, we need to look at immigration as a tool to allow the United States to address our rapidly aging population by attracting the skills and energies of newcomers, including the lesser-skilled. Lesser-skilled immigration is a key solution to the aging of America and the demographic reality that we now have a dramatically declining number of workers supporting retirees.

The 1986 Act⁶ did not provide for the admission of lesser skilled workers. The 1986 Act was essentially outlined through an earlier Select Commission on Immigration and Refugee Policy. This commission was first established in October 1978, ending its work in May 1981 – the Commission’s efforts lead to the 1980 Act reforming refugee law as well as the 1986 Act. Conceived at a time of high unemployment and high interest rates, the principles underlying the 1986 Act did not anticipate an economy on the rebound or labor mismatches (based on both geography⁷ and skills). This mistake should not be repeated.

Moreover, a lesser-skilled worker visa program is perhaps the only real-world alternative to unauthorized migration and, therefore, is a key component of border control and protecting our national security. It seems obvious to us that that securing our borders is closely connected to legal immigration levels especially for the lesser-skilled, and that larger numerical caps for legal lesser-skilled workers reduce the need for enforcement while smaller quotas increase it.⁸

Further, border enforcement does not exist in a vacuum. While unauthorized immigration to the United States initially declined following the passage of the 1986 Act, that legislation failed to create flexible legal limits on immigration that were capable of responding to ups and downs in future U.S. labor demand. Immigration reform must include meaningful changes to the lesser-skilled employment-based visa system to help prevent future illegal immigration. Prior to the 1986 Act, a circular pattern of migration existed between the U.S. and Latin America. About half of immigrants from Latin America came to the U.S. for short periods of time to work and then return home. Following implementation of the 1986 Act and other immigration reforms thereafter, immigrants feared their ability to reenter the U.S. and they in turn did not depart.⁹

Our national interests, both economic and security, necessitate creation of a new essential and lesser-skilled worker legal immigration system. We hope as Congress works to reform our immigration system, this key component is the subject of solutions that work for the business community and the country.

⁶ Immigration Reform and Control Act of 1986 (IRCA).

⁷ Lesser-skilled U.S.-born workers tend to be immobile across regions. See, e.g., Gordon Hanson, “Immigration and Economic Growth,” Cato (February 2012) citing to Notowidigdo, M. (2010) “The Incidence of Local Labor Demand Shocks.” MIT Working Paper, analyzing how native-born workers in other regions were slow to move to North Carolina when demand for low-skilled labor picked up there.

⁸ See also, Cato Institute, Migration Policy Institute, Immigration Policy Center, Hinckley Journal of Politics for similar views. See, e.g., “Immigration and Border Control” (Cato February 2012)

<http://www.cato.org/sites/cato.org/files/serials/files/cato-journal/2012/1/cj32n1-8.pdf>, “The Case for a New System of Provisional Visas” (MPI July 2009) http://www.migrationpolicy.org/pubs/Provisional_visas.pdf, “Raising the Floor for American Workers” (IPC January 2010, at p. 7, 9)

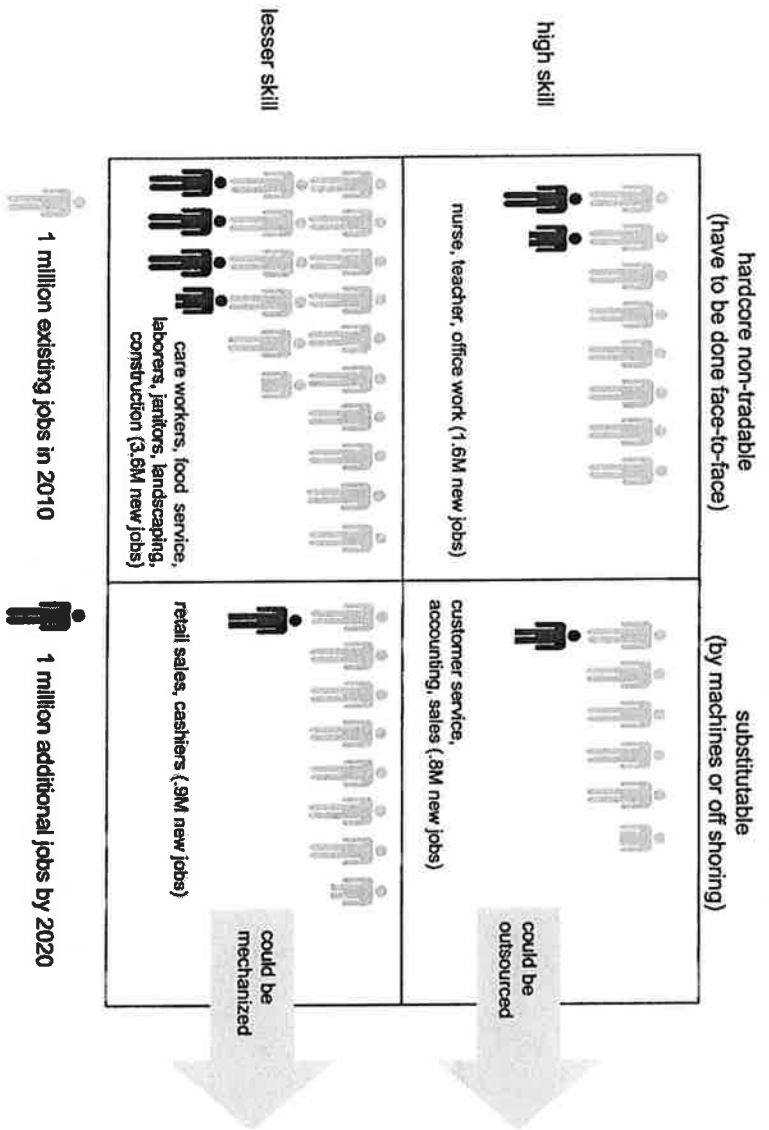
<http://www.immigrationpolicy.org/sites/default/files/docs/Hinojosa%20-%20Raising%20the%20Floor%20for%20American%20Workers%20010710.pdf>, “The Ephemeral IRCA: Its Formation, Failure and Future Implications” (Matt Homer, Hinckley Journal of Politics, 2007 Vol. 8)

<http://content.lib.utah.edu/cdm/singleitem/collection/Hinckley/id/2376/rec/8>.

⁹ Id., paragraph paraphrases views of Cato, MPI, IPC and Hinckley Institute of Politics in cited articles in fn 8.



As Americans' skill up for good jobs there are jobs that people have to do here



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