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How to Make Guest Worker Visas Work

by Alex Nowrasteh

Executive Summary

President Obama and a bipartisan group of eight senators have begun to push for immigration reform. Speaker of the House John Boehner (R-OH) likewise said he supports an immigration overhaul as a “top priority” for 2013. The Texas Republican Party even called for an expanded and effective guest worker visa program to link American employers with skilled and low-skilled foreign workers.

The three components of politically feasible immigration reform are legalization for some unauthorized immigrants, border and workplace enforcement to impede the entry and hiring of unauthorized immigrants, and increased numbers of guest workers and legal immigrants. The costs and benefits of legalization, security, and employee verification have been debated elsewhere in detail but the costs and benefits of

guest worker visas and how to create them have not been similarly explored.

An expanded and lightly regulated guest worker visa program is an essential part of any immigration reform proposal. A guest worker visa program should efficiently link foreign workers with American employers and function with a minimum of government interference. Market forces as well as security, criminal, and health concerns should be the factors that determine which workers acquire visas. A successful guest worker visa would also divert most unauthorized immigration into the legal system, shrink the informal economy, be easily enforceable, support economic growth in the United States, and narrow the government’s role in immigration. Below are numerous suggestions that would achieve such reform and expand America’s current guest worker visa programs.

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History of Guest Worker Visas

Guest worker programs are not a recent policy development. The ancient Greek city-state of Athens had a similar program where workers were called *metics* and had to pay a special tax called a *metoikion*.¹ *Metics* were not allowed to own real estate or participate in politics but they could work, amass wealth, and be productive members of the Athenian economy.² Aristotle and Cephalus, whose mansion Socrates visits at the beginning of the *Republic*, are two of the most famous *metics*.³

During the Middle Ages and Renaissance foreign skilled workers were often allowed to live and work in designated neighborhoods in major European cities. Foreigners living in these zones had certain legal protections, could rent or own property, and lived with fewer rights and responsibilities than other subjects and citizens. For example, King Edward I of England granted a zone in London to Italian goldsmiths as part of his merchant law reforms so they could live, own property, and ply their trade in the city.⁴ The area eventually became known as Lombard Street, named after the area of Italy where the goldsmiths originated, and it attracted other financial institutions and insurance companies into the present day.

In the 18th century the British Empire revived a special legal designation called a “denizen” to allow immigrants to own property before becoming citizens. Denization was vital during the British settlement of North America because the 18th century British common law allowed only British citizens to own real estate. To attract settlers to the American colonies from different nations, the British created the legal category of denizens to allow immigrants to own property before becoming citizens.⁵ Denizen rights were limited, but they only lasted one generation. Birthright citizenship extended to all born of free parentage in the British Empire, so the children of denizens were born as British citizens.⁶

From American independence until 1882, the United States had a nearly open borders

policy where only criminals, the ill, and people with a high probability of harming Americans were barred from immigrating. During the 19th century successive and overlapping waves of immigrants from Ireland, Italy, Poland, Russia, Germany, China, and Japan arrived in the United States. Their descendants assimilated culturally, economically, and politically with little trouble. In the middle of the assimilative process, the 1882 Chinese Exclusion Act barred the immigration of most East Asians. Gradually, the U.S. Congress restricted immigration so much that during the Great Depression virtually all immigration was illegal.⁷

When the United States entered World War I in 1917, low-skilled immigration from Europe halted. Coupled with the mobilization of millions of American men into the armed forces and the Immigration Act of 1917, which virtually ended free Mexican immigration, some American industries were faced with large manpower shortfalls.⁸ The Immigration Act of 1917 allowed the secretary of Labor to engage in contract labor with temporary guest workers in limited conditions, like the emergency caused by World War I.⁹ The program lasted from 1917 to 1921 and brought in 80,000 Mexicans, along with small numbers of Bahamians and Canadians, to work farming sugar beets, cotton fields, and as railway workers.¹⁰ Under pressure from Samuel Gompers’ American Federation of Labor, a small number of migrants who worked in railways were removed at the end of the war while the rest of the program was terminated in 1921.¹¹

The labor demands of World War II prompted the U.S. government to create a modern guest worker visa through the Emergency Farm Labor Supply Program in 1942, popularly known as the Bracero Program.¹² The program set out rules for the temporary employment of Mexican farm workers by U.S. farmers who employed them so long as they did not displace American workers.

The government regulated the wages, duration of employment, age of workers, migrant health care, and transportation from Mexico to U.S. farms.¹³ Transportation to

the farm, housing, and meals were sold by the employers for a low price.¹⁴ Importantly, the Bracero Program did not limit the number of migratory workers as long as the government's conditions were met, making the system relatively flexible. Increased lawful migration, flexibility, and smart enforcement funneled workers into the Bracero Program and reduced unauthorized immigration by an estimated 90 percent.¹⁵

From its humble beginnings in September, 1942, when the first group of 500 Braceros arrived at a farm outside of Stockton, California, until the program's cancellation in 1964, nearly five million Mexicans worked legally in the United States.¹⁶ From 1955 to 1960, annual Bracero migration fluctuated between 400,000 and 450,000.¹⁷ By the time of its cancellation, increasing regulations and restrictions whittled their numbers down to just 168,000.¹⁸ Those regulations raised costs for farmers and migrants, incentivizing migrants to move into the informal, underground economy.¹⁹ By making lawful employment of migrants so expensive, the government created unauthorized immigration.

Pressure from unions, especially Cesar Chavez's United Farm Workers (UFW), persuaded Congress to cancel the Bracero Program in 1964.²⁰ The great grape strike of 1965, which was the UFW's first major success, was only possible after Congress cancelled the Bracero Program and Mexican laborers were denied legal work opportunities on American farms.²¹

After cancellation of the Bracero Program, the H-2 guest worker visa became the source of legal foreign agricultural workers. The H-2 was underused relative to the Bracero Program because of complex rules, numerical restrictions, and the cost of sponsoring migratory workers.²² The H-2 visa was initially created through the Immigration and Nationality Act of 1952 for "other temporary workers" not covered by the Bracero Program.²³ From 1964 until 1986, mostly temporary unauthorized Mexican migration filled the gap left by the repeal of the Bracero Program and unfilled by the H-2 visa.²⁴

The 1986 Immigration Reform and Control Act separated the H-2 visa into the H-2A for temporary agricultural workers and the H-2B for seasonal nonagricultural workers.²⁵ Over time, the Department of Labor created even more extensive regulations for the H-2A visa.²⁶ Although the H-2A visa faces no numerical limit, the complexity of federal regulations has made the visa too expensive for most farmers.²⁷ The H-2B visa, although less complex, is numerically capped.²⁸ The Immigration Act of 1990 created what we now know as the H-1 visa for highly skilled workers.²⁹ There are other infrequently used temporary guest worker visas for those with extraordinary abilities in the sciences, arts, education, business, athletics, and entertainment.³⁰

The American guest worker system divides migrants into visa categories based on their skills and occupation. It then creates differing regulatory burdens through inspection, wage controls, employee benefit mandates, country-of-origin restrictions, worker mobility, numerical quotas, and numerous other limitations on the employment and number of guest workers. Since World War I the level of control and restrictiveness of quotas has increased, creating an environment where unauthorized immigration can thrive.

Why Do They Migrate?

Migrants are drawn to economic opportunity in the United States. Wages for identical workers in the United States are on average 2.53 times as high as in Mexico, providing a powerful magnet for Mexican immigrants.³¹ More important for future immigrants, wage disparities between identical Asian and American workers are even greater.³² Workers in India, Vietnam, and the Philippines, three large immigrant source countries, can expect to see their wages increase by about 6, 6.5, and 4 times, respectively, by moving to the United States.³³

Wages for observably identical workers vary so much across countries for two major reasons. The first is that the United States

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has far better economic policies and institutions than most of the rest of the world. Free markets, the rule of law, relative peace, and a host of other factors have created an environment where capital, education, and other improvements have been allowed to multiply and increase worker productivity and wages.

The second reason is that American immigration restrictions prevent most immigrants from coming to the United States. The wages for native born Americans would not decrease much from increased lawful immigration, but the wages for people remaining in developing nations would rise tremendously because of remittances and other transfers from migrants.³⁴

Immigrants are able to come to the United States because American employers want to hire them. The labor force of industries at both the high and low ends of the market, from agriculture and construction to technology and engineering, would be gutted if migration were halted. Labor-intensive agriculture, for instance, would no longer exist in the United States without a constant stream of lower-skilled workers willing to work for wages that most Americans consider too low. Noneconomic factors, such as risk diversification, the friends and relatives effect,³⁵ linguistic and historical ties,³⁶ and others³⁷ also influence immigration decisions.

Lawful permanent immigration is virtually impossible, with the exception of a few highly skilled workers lucky enough to find employer sponsors, migrants closely related to American citizens or legal permanent residents, winners of the limited diversity visa lottery, or refugees. As explained above, temporary migration via guest worker visas is heavily restricted. The only other alternative for would-be lawful migrants or permanent immigrants is unauthorized immigration.

Migrant Flows

Migration is not a unidirectional phenomenon nor does it overwhelmingly result in permanent settlement. During the height

of American immigration in the early 20th century, return migration from the United States was equal to about one third of the inflow.³⁸ Italian return migration as a percentage of inflows was about 50 percent during that time for all countries in the Western hemisphere.³⁹ Migration became more temporary when the price of international travel fell relative to expected migrant income.⁴⁰

In the late 20th century, the price of international travel was even lower relative to migrant income. Low-skilled Mexican migrants, for example, often made numerous trips back and forth between their home country and the United States. There were an estimated 26.7 million entries of unauthorized Mexican migrants into the United States from 1965 to 1985 and 21.8 million departures to Mexico, yielding a net increase of just 4.9 million over 20 years.⁴¹ For lawful migrants, the return rate was lower but fluctuated between 20 percent and 30 percent in the 1970s and 1980s.⁴² A comprehensive and accessible guest worker program would complement the temporary nature of modern migrant flows.

Failed Immigration Policy

The U.S. government has struggled to enforce its restrictive immigration policy ever since it was created. Mexico, the largest source country for lawful and unauthorized immigrants since the 1960s,⁴³ shares a 2,000-mile land border with the United States.⁴⁴ Around 11.5 million unauthorized immigrants are currently residing in the United States, and approximately 6.8 million of them are from Mexico.⁴⁵

Immigration restrictionists claim that the government simply needs to enforce the immigration laws in order to prevent unauthorized immigration.⁴⁶ The 1986 Immigration Reform and Control Act aimed to do just that by ramping up workplace and internal enforcement regulations. This was done by creating employer sanctions for hiring unauthorized workers. For the first time in history,

American employers were required to check documentation of all prospective employees through the I-9 form (used by employers to verify employee identities and establish the worker's eligibility to accept employment in the United States). The act authorized fines for firms that knowingly or intentionally hired unauthorized immigrants.⁴⁷ The goal was to make employment of unauthorized immigrants more difficult so fewer of them would immigrate in the first place.

Employer sanctions and workplace regulations have steadily increased since the Immigration Reform and Control Act. The Illegal Immigrant Reform and Immigration Responsibility Act (IIRIRA) of 1996 created tougher penalties for unauthorized workers⁴⁸ and a pilot program for the electronic employment eligibility verification system that became E-Verify.⁴⁹ It was designed to complement the I-9 form and be used by employers to check employee identity information to exclude unauthorized immigrants from the workplace.⁵⁰ It is currently mandatory for all employers in a handful of states and for some contractors.⁵¹ Some politicians are promoting E-Verify as a national program⁵² but its high rate of inaccuracy,⁵³ its cost,⁵⁴ and its bureaucratic problems⁵⁵ make it ineffective at enforcing employment-related immigration laws.

In 2009 Immigration and Customs Enforcement (ICE) began rapidly expanding the number of inspections and audits of business owners' I-9 records.⁵⁶ ICE is able to investigate over 1,000 businesses at a time, many of them remotely.⁵⁷ The amount of fines levied on American businesses for administrative violations of immigration laws was \$10,463,988 in 2011—almost 16 times that of 2008.⁵⁸

The federal government has also roped local and state law enforcement agencies into enforcing federal immigration laws. IIRIRA created a voluntary federal training program called 287(g) so local law enforcement could enforce immigration laws if they so chose, but it was ultimately unsuccessful and only partnered with 68 police departments at its peak.⁵⁹ Secure Communities (SCOMM),

created in March 2008, is a mandatory program⁶⁰ that links fingerprints from arrestees with government immigration and criminal databases. If the Department of Homeland Security suspects an arrestee is an unauthorized immigrant, it issues a detainer notice to hold the arrestee and release him or her into ICE custody.⁶¹ In October 2008 SCOMM was piloted in 14 police jurisdictions⁶² but has since grown to over 3,000 in the United States and is largely responsible for the increase in deportations since 2008.⁶³

Immigration enforcement on the border was also ramped up after 1986. The size of the Border Patrol's budgets, staff, and infrastructure expanded rapidly. From 1986 to 2012, Border Patrol appropriations increased almost eightfold in real terms.⁶⁴ At least four laws have been passed since 1986 authorizing specific off-budget increases in the size of the Border Patrol.⁶⁵ The number of agents on the southern border increased more than ninefold, from 1,975 in 1980 to 18,506 in late 2011.⁶⁶

Those increases in personnel and funding do not include the construction of tactical infrastructure, which includes border security fencing, transportation, communication equipment, and new technology.⁶⁷ Tactical infrastructure appropriations started at a mere \$25 million in 1996 and increased to over \$1.5 billion in 2007 to comply with the Secure Fence Act of 2006 that ordered the construction of a roughly 700-mile long fence along the Southwest border.⁶⁸ Construction on the border fence was completed by early 2012.⁶⁹

Those increases in personnel and infrastructure were accompanied by numerous different border enforcement strategies over the decades. Shortly after taking office in 1993, President Bill Clinton's administration began to emphasize "prevention through deterrence" by focusing Border Patrol security assets on major entry points along the U.S.–Mexico border.⁷⁰ That strategy spawned local operations like Operation Blockade in 1993, Operations Gatekeeper and Safeguard in 1994, and Operation Rio Grande in 1997.⁷¹

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Some of the worst abuses of guest workers have occurred at the hands of government employees.

President George W. Bush began the Secure Border Initiative (SBI) in 2005 to incorporate more personnel, infrastructure, and technological improvements into border security.⁷² Obama expanded SBI to include aerial drones for border surveillance.⁷³

Since 2006 the U.S. military has played a supporting role in border enforcement. Over the course of Operation Jump Start from 2006 to 2008, more than 30,000 National Guard troops were deployed along the southern border because of requests for aid from the governors of Arizona, California, New Mexico, and Texas.⁷⁴ Responding to a similar request in 2010, President Obama stated that he was sending 1,200 National Guard troops to the southern border as “a basic step in securing the border before other reforms are implemented through legislation.”⁷⁵

Harsher punishments like jail time, bans on lawful entry, and deportations deeper into Mexico have also escalated in recent years.⁷⁶ Operation Streamline is a sector-specific enforcement strategy that applies those harsher punishments against unauthorized immigrants apprehended in heavily trafficked areas.⁷⁷ Started in the Del Rio border sector of Texas by the Bush administration in 2005, it has since expanded and is using vast judicial resources in prosecuting first-time immigration offenders instead of just returning them to Mexico.⁷⁸

Unauthorized immigration to the United States has diminished since 2006 mainly because of the faltering economy. Increased deportations because of Secure Communities and the voluntary return of some unauthorized immigrants have stabilized their population at around 11.5 million.⁷⁹ But even if the land border with Mexico were totally secure, unauthorized immigrants would find other means of entry once the economy improved. Recent estimates indicate that between 31 percent and 57 percent of all unauthorized immigrants overstayed visas, meaning that they entered legally but currently reside illegally.⁸⁰ Crossing the southern land border without a visa is not the only means of unauthorized residence.

By the early 1950s many unauthorized migrants were entering alongside Braceros to work, mainly in Texas.⁸¹ The government responded with the now infamous Operation Wetback that removed almost 2 million unauthorized Mexicans in 1953 and 1954.⁸² Unlike today’s removals and deportations, the migrants were only required to step over the border into Mexico and could then step back in and lawfully sign up for the Bracero program.⁸³ As a result, the number of removals in 1955 was barely 3 percent of the previous year’s numbers and those who previously would have entered unlawfully instead signed up to become Braceros, which was the intended purpose of Operate Wetback.⁸⁴ The government did not tolerate unlawful entry but made it very easy for migrants to get a guest worker visa and used Border Patrol to funnel unauthorized migrants and potential unauthorized migrants into the legal system.

A real and long-term solution to unauthorized immigration requires less law enforcement but instead provides a legal, cheap, and open guest worker visa for foreign workers to temporarily work in the United States. The informal economy will only recede when a legal option for temporary employment is open for the vast majority of would-be unauthorized immigrants. These immigrants will then finally be able to join a larger, wealthier, and more transparent legal market.

Components of Successful Guest Worker Visas and Reform Options

A successful guest worker visa program must do several things. It must be flexible and large enough to supply American firms with the laborers they demand, so as to virtually eliminate unauthorized immigration. It must provide a legal temporary migration alternative for lower-skilled migrants, and, realistically, it must also contain some protectionist measures to satisfy political constituencies that are skeptical of the benefits of guest

workers. Analyzed below are key components of successful guest worker visas that should be incorporated into any immigration reform.

Numerical Quotas

The H-2 visa for temporary agricultural workers has no quota⁸⁵ but only 2 percent of the agricultural workforce uses that visa because inspections, fees, paperwork, employer job search requirements, and minimum wages make it too expensive for most farmers.⁸⁶ The more flexible and affordable H-2B visa for seasonal nonagricultural workers has an annual quota of 66,000.⁸⁷ For private firms, H-1B visas for highly skilled workers are annually limited to 85,000,⁸⁸ of which 65,000⁸⁹ must come from abroad, while 20,000 are for foreign nationals who graduate with advanced degrees from American universities.⁹⁰

This low H-1B visa cap has been reached every year of its existence. In 2008 it was reached within one day of the start of the visa application process.⁹¹ During poor economic times, the visa cap can take months to fill, but it does do so without fail. From 2001 to 2003 the cap was increased to 195,000 annually and did not fill during those years.⁹² This is in stark contrast to the highly successful World War I guest worker and Bracero programs, which did not put a government quota on the number of applications.⁹³ As a result, U.S. farmers could expand and contract their employment of guest workers on the basis of market conditions.

Instead of Congress or a committee changing the quota every year in a vain attempt to guess how many visas employers will demand, the market should determine the number. The government should not limit the number of guest worker visas it issues. An uncapped system allows the number of visas to expand and contract on the basis of ebbs and flows of the market. Guest workers should be limited by market demand, which is far more binding and realistic than any numerical limitation.

Duration of Visa

Guest worker visas are designed to be temporary. Immigration authorities do not want

most guest workers to become lawful permanent residents. Seasonal or short-term jobs only require temporary migration to satisfy demand. For instance, many farm workers are in demand for harvest and plantings, but fewer are demanded between. For other sectors, visas like the H-1B are used temporarily to supply skilled workers for firm expansion or to fill skill gaps before enough Americans can be educated.⁹⁴ According to the federal government, migrants are supposed to perform a temporary, specific, and pre-approved job and then depart.

A new guest worker visa could limit the length of migrants' employment in the United States without imposing undue costs on employers or migrants. Reforming rigid start and end times for visas is a good place to begin. Workers and businesses should be able to apply for visas long before they enter the country. The visa's time limit should not begin to count until the worker crosses the border. Dates for guest worker visas should have flexible end times.

Rigid start and end times can cause serious economic harm and headaches for businesses. The H-2A visa has rigid start and end times, but Mother Nature does not obey the dictates of bureaucrats and lawmakers.⁹⁵ Harvests that run late or planting seasons that must begin early end up producing bureaucratic headaches and economic losses.⁹⁶ The drought of 2012 prompted an early harvest for Midwest grain and corn, but luckily those crops are machine harvested so bureaucratic delays did not cause much damage.⁹⁷ Flexibility in start and end times could prevent a similar early harvest from affecting crops harvested by hand.

The second area to reform is the duration of the guest worker visa. For example, the H-1B visa runs for three years and can be renewed once for a total of six years. Many new H-1B visa workers are hired to replace those that had to leave after their H-1B visas ended, so new reforms that would extend the duration of work visas and reduce turnover would effectively increase the number of visas available. The current H-1B, H-2A, and

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H-2B visas can also be temporarily extended, but the process is difficult and subject to burdensome constraints.⁹⁸ Firms should be able to easily extend the duration of the visa by paying a fee.

These extensions make good economic sense. Migrants accumulate firm- and country-specific knowledge as they work and so become more productive over time. American firms should be able to harness some of that productivity. Making the length of the visa variable and extendable, within limits, allows Americans and migrants to capture some of the benefit of migrants' American-acquired skills. Many firms employing guest workers have to hire other guest workers to replace them when their visas run out. Lengthening the time period for visas would relieve firms of the burden of replacing present guest workers with other guest workers, thus diminishing turnover and favoring more assimilated and experienced guest workers.

Measures that seek to ensure workers return to their home countries should also be reformed. Three mechanisms have been proposed to deal with this aspect. The first is requiring the migrant to pay a bond to the U.S. government upon entry, which he will receive back when he exits. If the migrant fails to leave by the end of his visa term (or a reasonable amount of time afterward) then his bond is forfeited. The second proposed measure is making employers of migrant workers liable for guaranteeing that their migrant employees return. Current employers of H-2A migrants, for instance, must pay for the transportation of migrants between their home countries and farms. The third option is to deduct a portion of the migrant's income into an interest bearing account that he will receive upon exit. This third method was used with some success during World War I.⁹⁹

It is impractical to use immigration enforcement authorities to monitor the exit of every guest worker. Monetary incentives to encourage exit will be the most successful at deterring a guest worker from absconding and entering the informal economy at any point while he holds his guest worker visa. A

small up-front bond paid by the worker combined with a deduction from the migrant's pay, both placed into an interest bearing account that is inaccessible to the migrant during his time working, and which he forfeits if he absconds into the informal labor market, would provide an excellent deterrent to violating the visa restrictions. The deduction would have to be large enough to discourage illegally entering the labor market but small enough so that his take-home pay is noticeably greater than it would be in his home country. Both the bond and deduction might be necessary to ensure widespread migrant compliance so workers do not abscond early in their employment, before they have accrued sufficient deducted wages to disincentivize absconding.

A government guarantee that guest workers can return to the United States each and every season as long as they obey the laws and leave at the end of their term would also incentivize obedience to the guest worker visa's rules. Combining that requirement with bonds and wage deductions would make it firmer. From 1965 to 1985, return Mexican migrations were frequent because the border was relatively unguarded. Migrants could work in the United States for short lengths of time and return home to their families secure in the knowledge that they could return in the future if the Mexican economy worsened. Family and permanent migration picked up after 1986 because increased border security, implemented by IRCA, made repeated cross border movement more difficult.¹⁰⁰

If the punishment for absconding from a guest worker visa is the forfeiture of a bond, accumulated deductions from the worker's pay, and the ability to reenter the United States with a visa, then informal economy wages would have to be high to entice unauthorized immigrants to incur such penalties. Unauthorized immigrants currently convince American employers to hire them, and thus incur legal risks, by offering below market wages for their services. In such a system as outlined above, migrants would not have an incentive to work in an informal economy when they have the option to work in the legal economy.¹⁰¹

Native Wage and Employment Protection

Complaints that immigrants lower American wages and “take American jobs” have dominated the chorus of opposition to immigration since the 19th century. From Francis A. Walker,¹⁰² the inaugural president of the American Economic Association, to Kansas secretary of state Kris Kobach,¹⁰³ protecting American wages and employment options has been at the center of immigration and guest worker visa debates. Consequently, much of the regulation of guest worker visas has been motivated by concern for keeping American wages unaffected and jobs available for Americans before migrants can fill them. Yet this is wholly unnecessary.

The World War I guest worker program required employers to “pay the current rates of wages for similar labor in the community in which the admitted aliens are to be employed.”¹⁰⁴ The Bracero Program required similar wage rates that were initially negotiated between the Mexican and U.S. governments, to the criticism that the American government was practicing “socialistic” policies by setting prices.¹⁰⁵ Eventually the wage controls required the payment of the “prevailing wages in the area” in an attempt to prevent the fall of native wages.¹⁰⁶

The current process of certifying that guest workers are not affecting the labor market outcome of natives is complex and bureaucratic. The Labor Condition Application (LCA) or prevailing wage determination must be filed by employers seeking to hire guest workers through the H-1B and H-2B¹⁰⁷ visas, respectively.¹⁰⁸ For the H-1B visa,¹⁰⁹ the LCA forces the firm to attest that it is paying at least the prevailing wage level in the area of employment, or the actual wage level at the place of employment, whichever is greater, and that the job, salary, time length, and geographic location of employment do not adversely affect Americans employed in that industry.¹¹⁰

Until recently, firms could file a single LCA for all of their hires, but new regulations are going to limit each LCA to just 10 H-1B petitions.¹¹¹ The updated regulations

require even more information about the applicants, such as previous immigration application reference numbers, to more accurately monitor H-1B wages.¹¹² But it is unnecessary to monitor wages because firms petition for H-1Bs when they are expanding and there is increased quantity demanded for workers across the sector,¹¹³ not when they are seeking to lower wages during a period of economic or firm contraction,¹¹⁴ and they have to pay very high fees to obtain the visas (see next section).

LCAs are fraught with problems. The first is determining local prevailing wages and actual wage levels. Those vary tremendously over geographical areas and result in strict bureaucratic rules to measure, in real time, a very fluid economic process.¹¹⁵

The second problem is the difficulty of matching job descriptions with the minimum legislative requirements for hiring a guest worker. According to Boston immigration attorney Danielle Huntley, the process “is like fitting a square peg into a round hole.”¹¹⁶ Labor markets are flexible and ever adapting to new conditions, while the LCA does not adapt so quickly. The entire LCA process is cumbersome, expensive, prone to allegations of fraud, and nonresponsive to changing market conditions.

That said, LCAs do not seem to have a significant degree of fraud or error problems. Citizenship and Immigration Services claims that 13.4 percent of H-1B petitions were fraudulent, that is there was a willful misrepresentation, falsification, or omission of a material fact.¹¹⁷ That rate is suspect because it includes incidents like an H-1B worker leaving work early one day, with his boss’ permission, so he could take his conference call at home. Because the worksite address for the worker was not properly recorded, he violated the LCA.¹¹⁸ Since other recent studies reported fraud rates at just above 0 percent, Citizenship and Immigration Services’ estimates of fraud are likely massively exaggerated.¹¹⁹

H-2A visas are subject to a different set of regulations. Instead of a complex LCA that must be filed by every employer, the

The current guest worker visa system is hampered by expensive regulations, restrictive laws, and an uncaring bureaucracy.

If we must go this route, we could accomplish it by replacing current bureaucracy and regulations with an employer fee for hiring guest workers.

Department of Labor created a minimum wage system that varies by state.¹²⁰ For the H-2A, bureaucratic complexity was replaced by centrally administered wage controls.

The perception is nonetheless that guest workers displace native workers and lower the wages for Americans, so a politically successful guest worker program may have to address those concerns without causing undue harm to the economy.

If we must go this route, we could accomplish it by replacing current bureaucracy and regulations with an employer fee for hiring guest workers. Employers could pay an extra fee for each pay period for employing guest workers to incentivize the hiring of Americans first. For instance, an American farmer who employs a guest worker would pay \$50 per paycheck. The incidence of the fee would likely be split between the guest worker and employer but it would incentivize the hiring of Americans first. A fee is cheaper to enforce, easier to monitor, and simple to comply with compared to complex regulations.

Fears that immigrants take jobs from natives are based on what economists call the “lump of labor fallacy,” the notion that there is a fixed amount of work to be done regardless of other factors.¹²¹ There is not a fixed number of jobs available for American workers. Forcing immigrants out of a job will not automatically make it available for native-born workers, and just because an immigrant is employed does not mean that he pushed an American out of the labor market. Changing economic factors, not some kind of exogenous need, determine the number and types of jobs available in an economy. As a result, the number of jobs in an economy is constantly in flux. In addition to doing valuable work, immigrants are also a *source* of employment and production because they demand goods and services produced by natives and other immigrants.¹²²

Fears that immigrants lower American wages are also vastly overblown. Immigrants have different skills, experiences, and comparative advantages compared to natives, so they complement rather than compete with native workers.¹²³ Because of their different skills,

natives and immigrants both can make higher incomes because they are able to specialize in different tasks. That degree of specialization would be impossible without the deepening of the labor market created by immigration. If immigrants were to disappear from the labor market, far from raising American wages, it would decrease them because Americans would no longer be as specialized.¹²⁴

The most pessimistic expert account of immigrant impacts on native wages comes from Harvard economist George Borjas. He claims that immigration during the 1980s and 1990s has lowered the wages of American workers with less than a high school education by 8.9 percent while leaving the wages of other educational groups largely unaffected.¹²⁵ To put that in perspective, around 11.8 percent of the American adult workforce has less than a high school education.¹²⁶ More recent research has found that native wages during the immigration surge from 1990 to the mid-2000s increased slightly due to the large inflows of lower-skilled foreign workers.¹²⁷ Regardless, the amount of wage increase or decrease for natives is small in either direction. Ironically, the group whose wages are most affected by newer low-skilled immigrants are previous immigrants because their skill sets are the most similar.¹²⁸

Regardless of the real economic impact of immigration, many policymakers seem convinced that immigration and guest workers would negatively affect the wages of natives. A simple and nonintrusive regulatory framework like that described above would placate the worries of many policymakers, if we must, and allow the market to accommodate guest workers with only small effects on native wages.

Fees and Nonpecuniary Compensation

Fees are a complex part of any guest worker visa system. Fees can either be levied to cover the costs of administration or as protectionism. Fees for the lower-skilled H-2A and H-2B guest worker visas are designed to cover administrative costs.¹²⁹

The base filing fee of \$325 for the H-1B visa is supposed to cover administrative costs

of visa processing.¹³⁰ Another \$5,175 in fees can be levied for a fast-tracked H-1B petition for firms that employ many visa workers.¹³¹ These high fees punish Indian firms who hire large numbers of H-1B workers in the United States, to protect American workers, and to funnel the money raised by the fees toward augmenting border enforcement.¹³² On top of government fees, firms typically have to pay \$1,000 to \$3,000 in legal fees for processing the petitions.¹³³ After all of those government and legal fees there is still no guarantee that the worker will successfully obtain the visa.¹³⁴ Fees are so high that for some firms, like Indian-based information technology and consulting firm Infosys, subcontracting costs for H-1B visas doubled to 3 percent of its revenues in the first quarter of 2012.¹³⁵ When the cost of hiring skilled workers for these firms increases, they hire fewer American workers and scale back production in other areas to make up for the high bureaucratic costs.

In any future guest worker program, simple visa processing fees should be separated from protectionist fees levied on guest worker visas. The costs of processing visas should be reduced by limiting bureaucratic oversight, but the cost should still be borne by the migrant or the firm sponsoring the migrant, as they were under the Bracero Program.¹³⁶

Nonpecuniary compensation for guest workers is a mainstay of American and foreign guest worker visas, especially for lower-skilled workers. Housing and healthcare were required for migrants during World War I and the Bracero Program.¹³⁷ Employers also had to provide transportation for workers during the Bracero Program.¹³⁸ Yet Braceros were treated poorly while in transit and could not choose the particular routes they wanted to take, so sometimes spent weeks longer traveling to their worksites than they would have liked.¹³⁹ Braceros should have been able to choose how to travel into the United States and pay for it themselves, as should future, similarly situated workers.

Employer requirements are similar under the H-2A visa. Employers must provide transportation to their farms as well as to the next workplace after the fulfillment of the contract;

federally inspected and adequate housing, meals, and/or facilities for migrants to prepare their own meals; and workers' compensation insurance.¹⁴⁰ Employers do not have to supply those nonpecuniary forms of compensation to guest workers on an H-2B visa.¹⁴¹

A reformed guest worker program would preferably eliminate the nonpecuniary compensation requirements of any visa or at least limit them as much as possible. Guest workers and employers are able to negotiate benefits or reject them outright without government direction or oversight. Citizen workers routinely negotiate with employers over pecuniary and nonpecuniary compensation, and without government interference they reach more rewarding outcomes for both parties. Guest workers should be free to negotiate and choose benefits instead of having the government pick their particular nonpecuniary forms of compensation for them.

Employer Sponsorship, Bureaucracy, and Migrant Mobility

Most guest worker programs require employer sponsorship of each visa. During the World War I and the Bracero programs, employers had to submit written evidence to the U.S. Employment Service showing there was insufficient local supply and then sponsor the individual workers.¹⁴²

Modern guest worker visas make switching jobs difficult for migrants and a bureaucratic annoyance for employers. For the World War I program, switching jobs was relatively simple, as the new employer had to be authorized to hire the guest worker and the Immigration Services only had to be notified of the change by the new employer after the fact.¹⁴³ Current H-1B visa employees can change employers after a transfer is filed with USCIS. If the worker loses his job and finds a new employer, the employer has to file an I-129 form with the government to switch employers. After the I-129 is approved the worker has to leave the United States to get the new visa.¹⁴⁴

When guest workers are legally tied to employers, abuses can occur. In a free labor market, employees who experience or fear abuse

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Past guest worker visa programs like those used during World War I and the Bracero Program provide examples of somewhat better-functioning programs.

can leave their employer and seek a job elsewhere. But due to bureaucratic hurdles and the threat of being removed from the United States, some workers stay with bad bosses. This problem is entirely created by guest worker programs that restrict worker mobility. A portable guest worker visa solves this problem.

Abuse is not confined to firms. Some of the worst abuses of guest workers have occurred at the hands of government employees. During the Bracero Program, Department of Labor (DOL) inspectors often slapped, berated, and cursed at Braceros for asking questions.¹⁴⁵ According to one eyewitness: “Nobody had any patience. Immigration, Public Health, Labor Department—it’s all the same. Everybody curses at the Braceros and shoves them around.”¹⁴⁶ Violence and abuse perpetrated by government inspectors and bureaucrats was endemic. The Braceros were frequently humiliated, but as one observer recalled, “migrants usually just stood there and took the abuse—what else could they do—they felt pretty bad about it. I must have seen a lot of Braceros cry after they were talked to in this way.”¹⁴⁷

Abuse by government bureaucrats has diminished over the years or become stealthy,¹⁴⁸ but the entire problem could be removed by contracting out, licensing, or just relying upon private companies to carry out inspections, recruitment, health checks, and other guest worker functions.¹⁴⁹ Visa portability that lets guest workers change jobs with a minimum of paperwork or notice to employers as long as the worker notifies the government after the fact deprives abusive employers of employees, incentivizes good behavior, and acts as an enforcement mechanism that punishes employers who do not treat employees as well as competing firms. Visa portability allows workers to regulate their own work environment or change it at will.

Conclusion

Congress will consider how to create a new guest worker program as part of immigration reform. Other analysts have spilled much ink on enforcement, amnesty, and legalization, so

this policy analysis focuses on reform ideas for creating an effective guest worker visa.

Past guest worker visa programs like those used during World War I and the Bracero Program provide examples of somewhat better-functioning programs. They were less regulated, required fewer legal steps to hire guest workers, were more efficient, and placed a lower burden on migrants as well. Expanding similar updated guest worker programs into nonagricultural work and higher skill levels would provide an alternative migration path for many migrants who would otherwise consider unlawful entry. The current guest worker visa system is hampered by expensive regulations, restrictive laws, and an uncaring bureaucracy that makes the system unworkable for most American employers and migrants who would like to work together.

Specifically, Congress should incorporate these features into any new guest worker program:

- Remove numerical quotas for temporary guest worker visas.
- Increase the duration of guest worker visas.
- Allow guest workers to switch employers without legal penalty.
- Introduce flexible start and end times for visas.
- Remove or streamline complex bureaucracy regulating wages and working conditions of guest workers, like the Labor Condition Application, in favor of a fee-based approach and increased visa portability.
- Remove requirements for worker-provided housing, transportation, and other nonpecuniary benefits. Allow workers and employers to negotiate for benefits like other workers.
- Use bonds or reimbursements of mandatory accumulated guest worker deductions to incentivize guest workers to return to their home countries at the end of their visa.
- Allow the same worker to return year after year if there is demand for him. Only bar workers who are criminals, terrorists, or have serious communicable diseases.

The mistake of the 1986 Immigration Reform and Control Act, which amnestied approximately 3 million unauthorized immigrants, was that it did not create a large and flexible guest worker program. As a result, in the 27 years since then, unauthorized immigrants continued to enter. Only a timely, cheap, and lawful way to enter and work in the United States will stanch unauthorized immigration and grow our economy.

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