



1000 Vermont Avenue, NW • Suite 300 • Washington DC 20005-4914
Tel: 202/ 789-2900 • Fax: 202/ 789-1893 • www.anla.org

To: ANLA Members and Lighthouse Program Participants

From: Monte Lake, Labor and Immigration Counsel
Craig Regelbrugge, ANLA Sr. Director of Government Relations
John Farner, ANLA Director of Legislative Relations

Subject: Analysis of Key Provisions of S. 2611, With a Focus on Their Impact on Green Industry Employers. Comparison of Senate and House Employer-Related Enforcement Provisions. Summary of Implications for Green Industry Employers.

On May 25, 2006, the U.S. Senate passed comprehensive immigration reform legislation that addresses issues of border enforcement, interior enforcement, unauthorized workers and worksite enforcement, non-agricultural guest workers, and earned adjustment for undocumented non-agricultural workers, among other provisions.

Significantly for many ANLA members and all agricultural employers, the Senate bill includes the AgJOBS H-2A reform and earned adjustment of status provisions for agricultural employers that were included in the Senate Judiciary Committee mark-up. AgJOBS supporters successfully defeated efforts to amend it through floor amendments that either would have been detrimental to agricultural employers or would have destroyed the bipartisanship that enabled AgJOBS to succeed in being included in the Senate-passed bill.

Also significant for many green industry employers is the inclusion of a provision that would extend for three years the H-2B guest worker program's "temporary cap fix" that allows experienced returning workers to receive a visa without counting against the program's 66,000 visa cap. This provision, if enacted into law, would benefit many landscape industry users of the H-2B program.

Agriculture Uniquely and Favorably Treated in Senate Bill. The following components of the Senate-passed bill are among those that clearly demonstrate that through inclusion of AgJOBS, American agriculture – including nursery and greenhouse growers – fared very well:

- Agriculture received its own comprehensive temporary worker and earned legalization program, tailored to the specific needs of the industry;
- AgJOBS provided the model for the earned adjustment program that was included for all other industries; however, it has more generous provisions that, unlike the general earned

legalization program, require that experienced agricultural workers work in agriculture for up to 5 years in the future in order to qualify for permanent legal residency;

- AgJOBS contains a significantly reformed H-2A guest worker program that streamlines the application process, reforms the adverse effect wage rate and limits litigation. Moreover, under the reformed H-2A provisions, workers are contractually obligated to remain with the petitioning employer, while under the new H-2C program, workers can move freely from employer to employer, as long as each employer that hires H2C workers has complied with the requirements necessary to participate in the program;
- AgJOBS is the only nonimmigrant guest worker program without an annual cap on the number of visas.

Following is an analysis of the key provisions of the Senate-passed immigration reform legislation, focusing on the AgJOBS provisions contained in the Senate bill, as well as a summary of the border and interior enforcement, employer sanctions and work-site enforcement, general guest worker and earned adjustment of status provisions. A comparison of the Senate and House employment authorization verification systems also is provided.

AgJOBS is in the Senate-Passed Bill

The provisions of AgJOBS would apply to agricultural employers, including those engaged in nursery, greenhouse, and Christmas tree production. While most AgJOBS supporters are familiar with its provisions, we have briefly summarized them here, and noted the few, but very favorable changes that were made in the Senate Judiciary Committee and that are included in S. 2611, as passed by the Senate. AgJOBS is included in Title VI of S. 2611. Prior to the favorable modifications made in S. 2611, AgJOBS has remained unchanged since it was first introduced in 2003, containing two broad components: H-2A guest worker reform and earned adjustment of status for experienced undocumented agricultural workers.

Summary of H-2A Reforms. New beneficial provisions were added in the Senate Judiciary Committee that provide special rules for H-2A workers employed as dairy, sheep or goat workers. They allow workers in those occupations to remain in the U.S. for 12 months working for the same employer for up to 3 continuous years, rather than the 10-month limit that applies to other more seasonal workers under the H-2A program. These workers can extend for another continuous 3-year period. After 36 months of cumulative work in these occupations, workers or employers may apply for permanent resident status and extend their H-2A status in 1-year increments, pending a decision on that application.

The remaining H-2A provisions are the same as S. 359, the AgJOBS bill reintroduced in 2005. The current labor certification process that often results in delays and arbitrary denial of applications by U.S. Department of Labor (DOL) officials has been replaced with a simplified labor condition application, often called an attestation, that must be accepted by DOL within 7 days of its filing if it is complete and there are no obvious inaccuracies. Applicants must agree to abide by the labor standards applicable to the H-2A program. Unlike the current H-2A program, AgJOBS expressly sets forth all of the applicable labor standards and precludes DOL

and others from expanding them based on the broad term “adversely affect” U.S. workers. In cases where employers have a union contract, the employer and union can bargain over the labor standards, and the agreed upon standards replace those otherwise applicable under the reformed program.

While most of the current labor standards are retained, the option of providing a housing allowance is afforded, if housing is available in the area of employment. The current adverse effect wage rate (AEWR) is defined in statute to be the 2002 AEWR, frozen for 3 years after enactment. If, after congressionally-mandated studies, Congress does not replace the frozen AEWR, it remains frozen at the 2002 level permanently, subject to annual consumer price index (CPI) increases, capped at no higher than 4% annually. While not a statutory prevailing wage rate, the reformed AEWR will achieve a prevailing wage standard over time.

Litigation reform also is contained in AgJOBS through a prohibition on state-court contract claims based on the H-2A job offer, which is a current problem. The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) protections are not applicable to H-2A workers in AgJOBS. H-2A workers have a limited federal right to sue for breach of promises made in the job offer and for violation of transportation safety requirements; however, employers can force suing workers into a minimum of 90 days of mediation before a lawsuit goes forward. An alternative administrative enforcement scheme exists through DOL; however, workers must elect which course to pursue—they cannot pursue both.

In sum, the H-2A provisions in AgJOBS are vastly superior to the current program. In addition to the improvements discussed above, AgJOBS is over 100 pages of statutory language—the purpose of which is to tightly tie DOL’s hands and leave little discretion to the rule-making process through which DOL in the past has imposed arbitrary and unreasonable obligations upon employers.

Earned Adjustment of Status. The Senate Judiciary Committee, through the leadership of Senator Dianne Feinstein (D-CA), made some very beneficial changes to AgJOBS that benefit agricultural employers. The earned adjustment program was termed the “blue card” program. Previously, workers in blue card status were in temporary resident status. For all practical purposes, blue card workers are in temporary resident status until they qualify for permanent resident status. The agricultural work experience requirement to adjust to blue card status was changed from 100 days in 12 consecutive months during the 18 months prior to December 31, 2004 to the lesser of 863 hours or 150 work days during the 24 month period prior to December 31, 2005. Blue card applicants must pay a \$100 fine as a condition of obtaining such status.

Most beneficially for agricultural employers, the Senate bill lengthened the future agricultural work obligation to 100 work days, but no less than 575 hours per year in each of 5 years beginning on the date of enactment, or 150 work days, but no less than 863 per year in 3 years, during the 5 year period following enactment. The prior language required 360 days of agricultural work during a period of between 3 and 6 years after enactment. The Senate amendment also capped blue card visas at 1.5 million during the 5 year period beginning on the date of enactment.

Prior to adjusting to permanent resident status, blue card holders must pay a \$400 fine and establish that they have paid all federal income taxes during the period they were employed in blue card status. Spouses of blue card holders also are given the right to work in the U.S., whereas under S. 359 they could remain legally in the U.S. but not work. Spouses and minor children may seek to adjust to permanent resident status once the qualifying blue card holder spouse/parent qualifies.

The Senate bill also disqualifies workers from participation in the blue card program if they committed one offense which involved a threat of or actual bodily injury or harm to property in excess of \$500.

The remaining terms of the earned adjustment program remain essentially as they were in S. 359. Workers have mobility to work for any employer they choose, and can travel back and forth from their country of origin. As long as they satisfy their annual agricultural work obligation, they can work outside of agriculture, including in packing, processing, landscaping, and all other occupations. Workers who fail to meet their future agricultural work obligations are deportable.

Amendments to AgJOBS Defeated.

Senator Saxby Chambliss offered two sets of amendments to AgJOBS during the Senate debate on S. 2611. Both were defeated. The first amendment would have replaced the definition of AEWR in AgJOBS with a prevailing wage standard that applied not only to H-2A occupations, but also to persons in blue card status. Thus, had the amendment passed, all workers who obtained earned legal status would have to be paid the prevailing wage, which would be higher in many instances than the applicable state or federal minimum wage that otherwise would have been applicable. The amendment would have had a significant inflationary impact on agricultural wages. Had this amendment passed, an effort would have been made to place a cap, for the first time, on the number of H-2A visas.

The second Chambliss amendment would have radically altered the earned adjustment of status blue card program by substantially increasing the agricultural work qualification standard. It would have required proof of 150 work days in each of the 2 years prior to December 31, 2005. A work day was defined as 8 or more hours. No credit would have been given for hours worked less than 8. Thus a person who worked a 7 hour day would get no credit toward the work day obligation. Had the amendment succeeded, few workers would have qualified under the earned adjustment program.

Border Enforcement

Title I of the bill includes numerous provisions intended to stem the flow of undocumented aliens from entering the U.S. These include authorization of a 375 mile fence on the U.S.-Mexico border, in addition to an expansion in the usage of high-tech alien detection devices along the border. The Secretary of the Department of Homeland Security (the Secretary and DHS) also is authorized to maintain temporary or permanent checkpoints on roadways in border patrol sectors that are located in proximity to the U.S.-Mexico border.

An amendment by Senator John Ensign (R-NV) was adopted that authorizes parts of the President's plan to make members of the National Guard temporarily available to assist the Department of Homeland Security in maintaining the integrity of the U.S.-Mexico border. In addition, authorization was provided to expand the number of customs and border protection officers, as well as port of entry inspectors and staff dedicated to controlling alien smuggling. All documents used to establish immigration status would be required to be machine-readable, tamper-proof and include a biometric identifier.¹

Unlawful Employment of Aliens

Title III of the Senate-passed bill addresses perhaps the most critical issue to employers with regard to their hiring, recruitment and referral of workers, as well as their use of labor contractors to provide workers. The heart of this process is known to many as the I-9 Form process, where employers are required to verify the authority of job applicants to work in the U.S. through a review of specified work authorization and identity documents and through completion of the government-required I-9 Form to document work authorization. Title III contains some significant changes to the existing employer sanctions provisions enacted under the Immigration Reform and Control Act of 1986 (IRCA).

Hiring, Recruiting and Referring for a Fee. As under current law, the Senate bill would require employers and those who recruit and refer workers for a fee to determine that they are authorized to work in the U.S. Currently, this is done by the employer or recruiter through a visual examination of identity and work authorization documents provided by the applicant or recruited or referred worker. Employers must accept them as genuine if they appear so on their face. The required document information is recorded on the I-9 Form.

Under the Senate and House bills, employers, recruiters and referrers would have to verify the work authorization status of all hires and workers recruited and referred through an electronic verification process that eliminates a visual document authenticity determination by the employer, recruiter or referrer. This would impose a tremendous verification burden on the new electronic verification system at three possible points: recruitment, referral and actual hiring. It is possible that one worker could be verified three times in the process. Farm labor contractors (FLC), commonly used in agriculture, would have to electronically verify all workers they recruit and/or refer to a grower. Under the Senate bill, the grower also will have to electronically verify the worker, regardless of whether the worker is legally the FLC's employee, rather the grower's employee.²

Use of Labor Contractors. The Senate bill contains provisions, as noted above, that require labor contractors to verify workers they recruit, refer and hire. It also requires that they

¹ Titles I, III, V and X of H.R. 4437, the House-passed immigration reform bill, also address border security issues.

² Section 705 of H.R. 4437 provides a broader definition of recruit and refer than S. 2611. Any act, direct or indirect, that has the intent of obtaining employment for an individual is subject to the recruit and refer obligations. Also, labor services agencies, whether public or private, regardless of whether they receive a fee, that recruit, refer or otherwise facilitate employment, are subject to liability if they do not comply with the employment verification procedures of the bill.

furnish to employers who use their contract workers the employer identification number assigned to the contractor upon verifying the work authorization of the worker supplied to the employer. The employer in turn must submit the employer identification number given by the contractor to the employer to the verification system and keep records of the information given by the contractor and of the results of the employer's independent verification.³

Electronic Employment Verification System. The bill requires the Secretary of DHS and the Commissioner of the Social Security Administration (SSA) to cooperate in developing an electronic system for determining whether the identity of individuals being verified is compatible with the database developed by DHS and SSA and whether the individual is eligible for employment in the U.S. All employers, recruiters and referrers will be required to use the system 18 months after \$400 million has been appropriated to implement it. Prior to that time, employers may voluntarily participate in the system or can be required to do so by the Secretary if he or she has reasonable cause to believe that an employer has failed to comply with the employment authorization verification requirements. In addition, the Secretary may certify that certain employers or classes of employers are critical employers with respect to national or homeland security matters and require that they participate in the system prior to the general effective date.⁴

The required data from identity and employment authorization documents would have to be placed into the electronic system not later than 3 days after the date of hiring, recruiting or referring of the individual, unless an earlier time was required of a critical employer.⁵ DHS would be required to send a response confirming or non-confirming an individual's identity and work authorization information. If a confirmation is received, the employer receives a code from DHS that it must record on the required I-9 like Form. If a non-confirmation is received, the individual must contest it within 10 days after its receipt, otherwise it will result in a final non-confirmation and the worker must be terminated by the employer.⁶ A final determination must be issued within 30 days after an individual files an appeal. An individual may not be terminated until the employer receives a final non-confirmation notice.

Role of Social Security Administration. The Senate bill authorizes the Commissioner of the SSA to turn over to DHS, upon request by DHS, the identity of all employers who have filed Social Security tax statements during years 2006-2008 which contain more than 100 names and taxpayer identifying numbers of employees that did not match the records of SSA, or which

³ By contrast, H.R. 4437 imposes no similar obligation and even protects an employer from liability if it uses an undocumented worker provided by a contractor, unless the employer knew that the supplied worker was undocumented.

⁴ Section 709 of H.R. 4437 requires all employers, unless otherwise specified, to use the electronic verification system for all new hires and referred and recruited workers 2 years after enactment. Unlike the Senate bill, H.R. 4437 requires that employers verify all employees, regardless of when they were hired, if they have not previously been subject to electronic verification, no later than 6 years after enactment. If the employer is a governmental entity or one engaged at a site considered critical infrastructure, the verification of previous hire must be made within 3 years after enactment.

⁵ Section 702 of H.R. 4437 also requires employers to use the electronic verification system by no later than 3 working days from the date of hire of an individual.

⁶ The House electronic verification system has similar response time-frames.

contained more than 10 names of employees with the same taxpayer identifying number. Information also may be turned over that indicates that an employer is not participating in the electronic verification system. This information may be turned over to DHS for the purpose of enforcing employer participation in the electronic verification system and seeking legal remedies under the provisions of the new law. Undoubtedly, it also will provide the basis for DHS to establish a reasonable basis that an employer has not complied with the new law and to require that the employer participate in the electronic verification system before it universally applies to all employers.

Employer Knowledge of Undocumented Status. Current law requires that an employer or a recruiter or referrer of a worker for a fee must have knowledge that a person is not authorized to work to incur liability. The current DHS regulations define knowledge to include constructive knowledge, an element of which is a “reckless and wanton disregard” of the law. The Senate bill places greater emphasis on the more relaxed legal standard by including it in statutory language. By adding the reckless disregard standard into the statute, the Senate bill provides an alternative standard that is less than an actual knowledge standard and arguably allows DHS to more easily prove employer liability through the use of circumstantial evidence such as Social Security mismatch letters or other evidence of the failure to comply with the document verification process.⁷

Investigation Authority. DHS has primary enforcement authority with regard to the employer sanctions provisions and DOL appears to be given broader power to investigate compliance with the employment verification provisions than under current law.

Record Retention Requirements. The Senate bill lengthens the record retention requirement for I-9 type Forms to the later of 5 years after hire, recruitment or referral or 1 year after the worker terminates employment. Records may be kept in paper, microfiche, microfilm or electronic form.⁸ In addition, it requires that employers retain copies of all documents provided by individuals to establish work authorization, as well as all other documents and correspondence relating to an individual’s work eligibility.

Employer Defenses. Employers that can show that they complied with the employment verification system requirements of the Senate bill will have an affirmative defense to allegations that they violated the law. Also, if employers properly comply with the verification system that will have a defense to any third party suits against them.⁹

Penalties for Non-compliance. Employers who fail to comply with employment verification procedures of the Senate bill face escalating penalties, that are somewhat elevated

⁷ Regulations implementing the current standard state that an employer with “constructive knowledge” of the hiring of undocumented workers is liable. They further state that reckless and wanton disregard of legal consequences is a form of constructive knowledge and may lead to employer liability. 8 C.F.R. § 274a.1(l).

⁸ Section 702 of H.R. 4437 retains the current requirement of retaining records for the later of 3 years or 1 year after the termination of employment and also allows for paper, microfiche, microfilm and electronic record retention.

⁹ Section 701 of H.R. 4437 provides similar insulation from liability if an employer relies upon the employment verification system.

over current law. This contrasts with very large increases in the House-passed bill, H.R. 4437.¹⁰ Violations related to the hiring or continued employment of unauthorized workers range from \$500 to \$4,000 per alien, \$4,000 to \$10,000 per alien, and \$6,000 to \$20,000 per alien for first and second violations, respectively, during certain timeframes. Failure to comply with the recordkeeping requirements would result in fines ranging from \$200 to \$2,000 per violation, \$400 to \$4,000 per violation, and \$600 to \$6,000 per violation for first, second and third violations, respectively, during certain timeframes. The Secretary of DHS is given the discretion under certain circumstances to mitigate the above-described penalties where he/she determines that it is reasonable and just. Employers found to have engaged in a pattern and practice of discrimination may be subject to criminal penalties, including fines of up to \$20,000 per unauthorized alien and a three year prison sentence, or both.

Debarment from Federal Contracts and Grants. Employers without a federal government contract or grant, as well as those with them, may be debarred from obtaining or maintaining them if they are found to be repeat violators of the employer sanctions provisions.

Employer Compliance Fund. Fines paid by employers for violating the employer sanctions provisions would be deposited in a fund which would be dedicated to the enforcement of the employer work authorization verification provisions.

Authorization for Additional Enforcement Personnel. The Senate bill authorizes the hiring of 2,200 agents by the Bureau of Immigration and Customs enforcement for each of the 5 years following enactment, for the purpose of enforcing the employer sanctions provisions.

Anti-discrimination Protections. Employers are subjected to increased civil money penalties if they use the electronic verification system to discriminate against protected aliens. The definition of protected aliens is expanded to include nonimmigrant aliens under the newly created H-2C program. It is considered discriminatory if any employer terminates an employee after a tentative non-verification; screens out an employee through the electronic verification system prior to making a job offer; using the verification system to screen out an employee after the first three days of employment or to reverify the status of an employ who already has satisfied the verification process; or to make an individual make an inquiry under the self-verification procedures of the new verification process.

H-2C Guest Worker Program

S. 2611 contains guest worker provisions called the H-2C program that allow nonimmigrants to come to the U.S. to work on a temporary visa in jobs that require few or no skills. The H-2C program excludes workers whose work would qualify as temporary and

¹⁰ Section 706 of H.R. 4437 greatly increases penalties for employment verification violations. The minimum penalty per alien for a first offense is between \$5,000 and \$7,500; between \$10,000 and \$15,000 for a second offense; and between \$25,000 and \$40,000 for a third offense. These penalties may be mitigated between 60 and 20 percent. Smaller employers (less than 26 employees) may receive the largest mitigation and large employers (between 101 and 250 employees) the smallest. Criminal penalties also are increased to \$50,000 per illegal alien and a jail sentence of not less than a year per illegal alien or both. Paperwork violations for failing to keep records the required period of time, as well as failure to use the new electronic verification system, could result in a fine of between \$1,000 and \$25,000 per violation.

seasonal work under the agricultural H-2A or nonagricultural H-2B programs. Arguably, nursery and landscape occupations that are neither temporary nor seasonal, as defined under the H-2A and H-2B programs, might qualify under the H-2C program. The H-2C program would not take effect until 18 months after \$400 million is appropriated to implement the electronic employment authorization verification system.

Employers seeking to employ H-2C workers must file a petition and undertake domestic recruitment at least 90 days prior to the date its petition is filed by using, among other things, DOL's "America's Job Bank" and the interstate clearance system, unless the Secretary of Labor certifies that there are insufficient workers available in occupation and the area of intended employment. Workers seeking jobs must show the availability of a job and pay a \$500 fee in addition to other application fees. H-2C workers also would have portability and could work for employers who have complied with the program requirements.

An annual cap of 200,000 visas is placed on the H-2C program. The H-2C visa would be valid for 3 years and could be renewed one time for a combined 6 years. Thereafter, the worker would have to return home or could seek permanent resident status. An employer could petition for permanent resident status at any time or the worker could petition if the worker could show that he or she had worked a cumulative 4 years in H-2C status.

The H-2C program has tough labor standards and enforcement measures. Interestingly, it has several provisions that relate to the registration of foreign labor contractors (those who recruit guest workers) and the written disclosures they are required to provide alien H-2C workers. Employers who use foreign contractors would be liable for the contractors' acts and omissions. Moreover, the Fair Labor Standards Act definition of employ is used, invoking potential joint employer liability between contractors and employers. H-2C workers would be protected by all applicable U.S., state and local employment laws. An administrative hearing scheme is provided to adjudicate alleged program violations, and a complaining H-2C worker who prevails at a hearing may recover attorneys' fees and costs.

Earned Adjustment of Status under Title VI of the Senate Bill

Title VI of S. 2611 borrows the earned adjustment of status concept first developed in AgJOBS. It would allow persons in undocumented status who have continuously resided (excluding brief and casual departures) in the U.S. for at least 5 years (since April 5, 2001) to seek to adjust to permanent resident status. Persons who participated in a nonimmigrant program, such as H-2A, as of April 5, 2006, would not be eligible to adjust. To adjust, an applicant also must have worked a minimum of 3 years in the U.S. during the 5-year period ending on April 5, 2006. In addition, individuals would have to work 6 years after the date of enactment. The work requirements are aggregate and can be satisfied by showing work for a number of employers.

There is no limitation on the type of work that the individual performed during the qualifying period, including agriculture. Unlike AgJOBS, future work after enactment could be performed in any industry. The workers have complete portability and employers need not petition or obtain government approval to hire workers with status under this program.

In addition to the residency and work requirements described above, applicants to adjust status must pass criminal and national security background checks, pay all federal and state taxes, register for military Selective Service, demonstrate knowledge of the English language and American civics and pay a \$2,000 fine, in addition to application fees. Also, they would be required to go to the back of the line to await the availability of a permanent resident visa.

Title VI provides for deferred mandatory departure (DMD) status for persons who cannot satisfy the 5-year residency and 3-year work obligations. If individuals can show that they have been continuously employed in the U.S., either full-time, part-time or seasonally prior to January 7, 2004 and have been continuously employed in the U.S. since that date, except for periods of unemployment less than 60 days, they could achieve DMD status. Under such status, workers could remain in the U.S. in legal status for 3 years and could apply to work in the U.S. under a nonimmigrant or permanent resident program either during the 3-year period of their visa or after they have departed the U.S.

Among the programs they could apply for is the new H-2C guest worker program, but under different conditions than others. Unlike the regular H-2C program, DMD workers would have complete portability and employers hiring DMD workers under the H-2C program would not be subject to domestic recruitment obligations. In any event, DMD workers would have to depart the U.S. and reenter before taking advantage of a new visa, including the H-2C visa. DMD workers could eventually seek permanent resident status under certain limitations.

Summary of Implications for Green Industry Employers

If S.2611 were enacted into law, green industry employers would be affected in the following ways:

- Growers would have access to a reformed H-2A agricultural temporary worker program;
- Many experienced but undocumented nursery and greenhouse workers would have the ability to earn legal status if they make a commitment to continued farm work for three to five years and meet other conditions;
- A partial exemption for many returning workers from counting against the artificially low cap on H-2B program visas would benefit many in the green industry, especially landscape installation and maintenance firms;
- Green industry employers would have access to a new H-2C guest worker program for year-round positions;
- Many experienced but undocumented workers employed in the landscape, landscape distribution, retail, or other sectors of the green industry could participate in an earned legalization program with specific conditions based on how long they have been in the country.
- All employers would be affected by new employer obligations to verify the employment eligibility of the workforce.