

A Suggested Compromise for Immigration Labor Reform

By Christopher Pawelski

Many of the key concepts of this proposal have been talked about by both sides. The difference here is that I have attempted to flesh out these concepts and combine them into one coherent policy. This proposal is not based on a particular ideology but is instead based upon a very real need: How can immigration policy be reformed to meet the needs of the agricultural community (and potentially other employers) and still have a realistic chance of passing both houses of Congress.

The agricultural community in some ways mirrors the larger ideological debate with the two sides split over the earned adjustment status/amnesty issue. Larger operators and those that employ workers year round prefer having an earned adjustment status option. Many producers that employ mostly seasonal workers are opposed to earned adjustment status, some adamantly. As for myself, I employ seasonal workers. Being the great grandson of immigrants, in principle I support the notion of eventual earned adjusted (green card) status for those that desire it, but I understand and accept the current social and political realities. Fundamentally, I'm a pragmatist. This proposal, like any good compromise, will anger both sides yet satisfy both sides sufficiently enough that the proposal will be found to be (grudgingly) acceptable - one hopes.

The Proposal

1. Initially, there is one title: Agricultural Employment.

This visa would include all forms of employment related to agricultural production, from field work to processing. If it involves some segment or portion of agricultural production, it would fit under this visa designation. This visa designation is for employment in the agricultural sector only. Employment in the agricultural industry would be in the following areas.

Related Agricultural Activities:

- Farm activities related to field crops such as alfalfa, broomcorn, flax, hops, peanuts and sugar beets.
- Orchard activities related to fruit and nut trees and vines including sorting and picking.
- Farm activities related to the production of vegetables including sorting, freezing, canning, processing.
- Farm activities engaged in the production of milk and other dairy products.
- Farm activities related to the production of livestock and livestock products.

- Farm activities related to horticultural crops such as bulbs, flowers, plants, shrubbery, trees, herbs, mushrooms, seeds and sod crops.
- Fishery activities.
- Farm activities related to the harvesting and cultivating of trees.

2. There are two distinct sub classes: Bluecard S & Bluecard Y.

Bluecard S: Any agricultural related employment of a seasonal nature.

Visa period: Maximum of 10 months. (Emergency extensions, say due to a natural weather disaster, would be available.) At the end of each period the visa holder must return to their native land until the next period begins. The agricultural employer pays all transportation costs.

Renewal: Visa designation would be for a 3 year period. There would be no limit on renewals. Currently, under the H2-A program, there are workers that have returned to the same employer, year after year, for 2 or 3 decades or more. Why limit the worker to 9 years? If that is sufficient to the employee, if they like working 8 months per year on the Pawelski onion farm, year after year, and going home for 4 months to spend time with their family, why limit them to returning for only 9 years, as long as they return to their home country for a period of time, each year?

Adverse Effect Wage Rate (AEWR), 50% rule, the _ Guarantee: All eliminated. The employee would be subject to the state and federal labor laws of the state they occupy, including Migrant Seasonal Worker Protection Act (MSPA) and if the employer engages in interstate commerce, Fair Labor Standards Act (FLSA). This is what the undocumented worker currently falls under anyway under the current dysfunctional system.

Housing: Again, employers would be subject to the state and federal laws of the state they occupy. The employer would only do what they do currently. If they provide housing then they would continue to do so. If they provide a stipend as an alternative, then they would continue to do so as well. If they do neither, and they can't attract employees, then it's up to the employer to address the situation. The "market," as it were, would dictate what to do, versus the federal government trying to impose some sort of rule which cannot possibly equally and fairly apply to the various different regions, commodities, etc....

Bluecard Y: Any agricultural related employment of a year round nature. This would include dairy farms, processors and packers, etc....

Visa Period: Year round. The agricultural employer pays transportation costs. If the visa is terminated, the employer pays transportation costs back to the employee's native land.

Renewal: Like the Bluecard S this visa designation would be for a 3 year period, with no limits on renewals.

AEWR, 50% Rule, the 3/4 Guarantee: Same as Bluecard S, all eliminated. The employee would be subject to the same state and federal labor laws of the state they occupy, (which is what the current undocumented worker currently falls under anyway under the current dysfunctional system), including MSPA and if the employer engages in interstate commerce, FLSA.

Housing: Same as Bluecard S, employers would be subject to the state and federal laws of the state they occupy.

Option for Adjusted Status: After the end of the second renewal period (or at the end of 6 years) the employee would be able to apply for green card or adjusted status. This would be a joint application with the sponsoring employer. The sponsoring employer as well as the employee would have to jointly pay a significant yet reasonable application fee. The funds generated by this fee would be specifically earmarked for border security and/or other forms of immigration law enforcement. Also, there would be no numerical limit on the number of persons that could apply for this earned adjusted status.

Advantages of Bluecard Y

Bluecard Y is going to generate the most attention, with both sides having problems with it. Here are the pros:

- Unlike the AgJobs proposal, the bulk of the entire agricultural labor workforce that is currently undocumented would not be applying for this status. A relatively small number of persons would be eligible and apply for this earned adjusted status.
- Past "illegal activities" (ie, coming over the border illegally) would not be "rewarded." The applicant would have to work for 6 years as a legal Bluecard Y visa holder before they would be eligible to apply for green card status. They will be "rewarded" for hard work and clean living and doing a job others don't want to do for a six period after this new law is implemented. (This option would not be available to Bluecard S visa holders)
- The type of employer that this will appeal to are the employers that support earned adjustment status, like the year round chicken or other

food processor, or dairy farmer, or large scale, year round nursery operation. And this will require them to "put their money where their mouths are" and co-pay a significant yet reasonable fee to obtain this status for their employee.

- Obviously employers are only going to sponsor someone (and pay money out of their own pockets which will back that belief) that they firmly believe is committed to a long-term career working for them. So, unlike the amnesty program of the mid 1980's, the sponsored employee will not likely quickly leave the employment of their sponsoring employer and move into employment in another (non agricultural) field.

Implementation

All agricultural related employees currently in the United States would be placed in either the Bluecard S or Bluecard Y program. No one would be sent home (with one proviso/exception). Based on how many years the employee has worked for their current employer would determine which year of the first renewal period the employee falls under (that way there will be a staggering versus everyone falling under the first year). Legitimate documents from the visa applicant home countries would have to be provided in a reasonable time period. These documents would be the basis for providing a new, legitimate security id card, which would be required for employment, driver's licenses, travel, etc... If no documents establishing identity can be provided by the employee in a reasonable time period then they would be sent home and required to apply from their native country.

All Bluecard S and Bluecard Y employers would be required to pay an administrative fee to the federal government, which would equal a yet to be determined percentage of the wages earned by the Bluecard S or Bluecard Y employee, either at the end of the visa period or year (depending on whether it is a S or Y employee). The funds generated by this fee would also be specifically earmarked for administration as well as border security and/or other forms of immigration law enforcement.

Neither Bluecard visa workers would have a social security deduction taken from their paychecks. Conversely, all Bluecard visa holders would be eligible for the various state and federally funded programs (like the federal migrant education program) earmarked specifically for the farmworker community.

Responses to Potential Objections

Now, here are the objections from both sides and how those objections should be addressed (some of this is a repetition of what's stated above):

1. "This program will give amnesty to millions of people here illegally!"

Response: Only a small percentage of persons will ever eventually apply for this adjusted status.

2. "You are rewarding illegal behavior!"

Response: Persons will have to build a six year record, post implementation of this new immigration law, to be eligible to apply for earned adjusted status.

3. "You are rewarding employers who want cheap labor!"

Response: This proposal recognizes the fundamental reality that there are virtually no domestic workers willing to do any of the various forms of agricultural related labor. By co-paying a significant yet reasonable fee, said sums generated being earmarked for increased immigration security, employers that require this sort of labor will be required to invest in their employees.

4. "You are going to allow people that broke U.S. immigration law and illegally crossed U.S. borders to stay as their visa application is processed!"

Response: Yes. And what is the alternative, the realistic alternative? How do persons propose U.S. Immigration authorities round-up and deport hundreds of thousands of individuals over a relatively short period of time? Further, are persons like Rep. Tancredo prepared for the ramifications to the U.S. agricultural industry if that ever did happen? Much of the agricultural sector, especially dairy, and year round processing and packing operations would grind to a halt. Isn't the goal getting persons identified and codified in our immigration system?

5. "The majority of farmworkers will continue to be exploited by not being allowed to earn green card status!"

Response: The majority of farmworkers, as a recent Pew Hispanic Center survey of Mexican migrants reports, don't necessarily want to earn adjusted status. By a 4-to-1 margin (71% vs. 18%), survey respondents said they would participate in a program that would allow them to work in the United States and cross the border legally on the condition that they eventually return to Mexico. Respondents who said they had no form of U.S.-issued photo ID were even more positive (79% vs. 16%). Among respondents who said they intended to stay in the United States for "as long as I can" or for "the rest of my life," a clear majority-68 percent-said they would participate in a temporary immigration program that would require them to return to Mexico. Acceptance of the idea of a temporary program was even higher-80 percent-among those who stated an intention to return to Mexico within five years. For those that do desire it a legitimate pathway to earn adjusted status would be available.

Further, all workers will "come out of the shadows" and be subject to the plethora of rules, laws and regulations, on the state, federal and local level, that already currently exist in connection with the living and working conditions of agricultural employment. There will be no "special" standard or exception for the Bluecard S and/or Y employee versus a domestically born, U.S. citizen farmworker.

In this compromise proposal the path to earned adjusted status is, admittedly, difficult, but it is present. And it is a realistic possibility, a possibility that one would hope both sides can find acceptable.

Expanding the Program

Whatever proposal is eventually passed in regards to agricultural immigration law will be a touchstone or provide the framework for broader immigration law reform. I believe this proposal can accomplish that.

All immigration work visas would follow the Bluecard S and Bluecard Y pattern. Each industry would have a different card color designation. For example:

Redcard S/Y	Hospitality
Yellowcard S/Y	Non-agricultural Manufacturing
Orange S/Y	Construction
Brown S/Y	Entertainment/Restaurant

... and so on. All of the visa rules set out by the Bluecard example would apply to the various other industries or employment sectors: S cards would be limited to 10 months; both and S & Y card holders would fall under applicable local, state and federal labor laws; Y card holders would be eligible after 6 years to obtain earned adjusted status, etc....

Regarding the issue of switching employers, neither S nor Y employees would be locked in to one employer for the visa contract period. If an employer/employee relationship does not work out (for whatever reason, apart from violating the law) the employee would not necessarily be sent home. If USDOL can find an alternate employer then the visa card holder could switch their employment to the other employer.

One important point, that switch has to be within that industry, not outside it. In other words, if a Bluecard S visa holder doesn't want to work for the Pawelskis they can work for another agricultural employer. They cannot switch to working at a hotel, or theme park, or in construction. To switch industries the employee would have to return and apply from their home country for a visa in a different field.

Another additional point regarding this proposal, since ALL S and Y visa card employers would be required to pay an administrative fee to the federal government, which would equal a yet to be determined percentage of the wages earned by the S or Y employee, either at the end of the visa period or year (depending on whether it is a S or Y employee), you would significantly reduce, if not eliminate, employees being paid off the books.

There is another potential benefit with this proposal regarding realistic security and enforcement. Obviously though these new, color coded, photo visa cards will be state of the art there will still be attempts to produce forgeries. To effectively counter that reality each visa card employee, at the start of the contract work period, will have to open a valid savings account at a local bank, with the color coded visa card being the form of identification. The bank, obviously, will be wired into the INS database of visa card holders. All pay or compensation made by the employer to the employee will be direct deposited into their bank account (again, no cash being paid off the books).

There has been some talk, regarding enforcement, that the farmer (or other employers) may be required to purchase eye retina scan devices as a means of enhanced security identification of their employees (to prove that the visa card holder is who the card states they are and is properly codified in the national database system). The employers would not need to purchase it if banks were required to have them for purposes of opening up these accounts. Whatever costs these devices will entail will be far offset by the fees generated by the literal millions of new bank accounts to be opened by these visa card holders. Further, currently foreign workers are being ripped off by various wire transfer services when they attempt to send money back to their home countries. Banks have in the past and will continue in the future to provide that service at a far less expensive cost.

Analysis

The biggest benefit of this proposal is that it would remove the primary rhetorical argument/weapon of opponents to this sort of reform. Once agricultural workers are designated as either Bluecard S or Bluecard Y visa holders, documented and codified in a national database system designed to enhance immigration security, then opponents will no longer have the illegal aspect of this immigration issue to complain about. Opponents to immigration reform often don't seem to understand or care that the agricultural industry needs these workers, that there are virtually no domestic workers available, willing and/or able to do the work. It is possible that objections to immigration reform may run even deeper, objecting to the immigration of these workers, legal as well as illegal. The public, on the other hand, is a different matter. Though the public may be concerned about border and national security issues (as farmers are also), I don't think the public, on the whole, would support a xenophobic, anti-immigration (legal immigration) position.

The various stakeholders in the immigration issue can be divided into three basic groups or camps: employers and business interests, employees and advocates, anti-immigration and security hawks. Obviously, these three camps aren't entirely monolithic in beliefs and positions (and there are intersections of agreement between the three groups), but their basic positions are staked out and can be established. In this proposal all three groups would be able to claim victories while making acceptable concessions.

The Victories:

Employers and business interests

- Both seasonal and long term employees would have a large employment pool to find willing workers.
- Virtually the entire workforce would become legal.
- The special employment rules associated with the H-2A program would be scrapped.
- Larger business interests desiring workers with citizenship status would have that option available to them.
- Workers within a visa sector would not be able to leave for employment in another visa sector.
- No longer would employers have to worry about social security issues.
- Identification and verification would be properly codified and simplified.
- No longer would employers following the law have to unfairly compete with employers paying workers "off the books."
- If current employees can obtain and present valid id documents from their home countries they would not have to leave the U.S. during the initial application and phase in process of implementation of this new law.

Employees and advocates

- All workers would be part of the employment system, identified and tracked, thereby they would be significantly less vulnerable for exploitation.
- All workers would fall under current local, state and federal labor laws, with no special exemptions applying for these workers.
- All workers would have the freedom to move from employer to employer within the visa sector, providing that move (facilitated by USDOL) can be tracked.
- All workers would have U.S. bank accounts and their wages will be directly deposited into those accounts, ensuring that the wages received are the proper amount and they can more easily and cost effectively wire money to their home countries.
- Workers desiring U.S. citizenship can work towards that goal under the Y visa designation.

- Workers desiring to travel home and back to the U.S. freely, to spend time with their families during the off-season, will be able to do that, freely, without risking their lives and at great expense via the crossing of the border illegally.

Anti-immigration and security hawks

- People currently working in the United States would be required to enroll in either the S or Y visa designation.
- The new employment visa system would create a new id card and method of identifying and tracking who is here and where they are.
- Most employees would be in the S designation, keeping the number of persons obtaining citizenship or adjusted status to a minimum.
- Since employees would be required to present a valid visa id card, which would be validated at a local banking institution, and a person could not get employment without the proper color card, illegal border crossing would be significantly reduced.
- If current employees cannot obtain and present valid id documents from their home countries they would have to leave the U.S. during the initial application and phase in process of implementation of this new law and apply from their home countries.
- Employers requiring immigrant labor will have to "pay for it," via the administrative fee assessed by and paid to the federal government, which would equal a yet to be determined percentage of the wages earned by the Bluecard S or Bluecard Y employee, either at the end of the visa period or year (depending on whether it is a S or Y employee).

The Concessions:

Employers and business interests

- All workers would fall under current local, state and federal labor laws, with no special exemptions applying for these workers.
- All workers would have the freedom to move from employer to employer within the visa sector, providing that move (facilitated by USDOL) can be tracked.
- If current employees cannot obtain and present valid id documents from their home countries they would have to leave the U.S. during the initial application and phase in process of implementation of this new law and apply from their home countries.
- No longer could an employer pay an employee "off the books."

Employees and advocates

- Most employees would be in the S designation, keeping the number of persons obtaining citizenship or adjusted status to a minimum.

- Workers within a visa sector would not be able to leave for employment in another visa sector, without traveling back to their home country to apply for the new designation.
- If current employees cannot obtain and present valid id documents from their home countries they would have to leave the U.S. during the initial application and phase in process of implementation of this new law and apply from their home countries.

Anti-immigration and security hawks

- Some workers desiring U.S. citizenship can work towards that goal under the Y visa designation.
- There would be no mass deportation of workers in the implementation phase of this new immigration law.

Though this compromise doesn't address all of the various issues, I think it's a good starting point in trying to solve the most contentious issue surrounding the current immigration law debate. As I stated at the outset, this proposal, like any good compromise, will anger both sides yet hopefully satisfy both sides sufficiently enough that the proposal will be found to be (grudgingly) acceptable.