

Major Immigration Proposals in the 110th Congress

■ Bush-Kennedy Compromise (S.1348)

On May 17, 2007, Senators Ted Kennedy (D-Mass.), Dianne Feinstein (D-Calif.), Mel Martinez (R-Fla.), Lindsey Graham (R-S.C.), Johnny Isakson (R-Ga.), Saxby Chambliss (R-Ga.), Ken Salazar (D-Colo.), Senator Arlen Specter (R-Penn.), Jon Kyl (R-Ariz.), and others announced that Senate negotiators had reached a “compromise” on immigration reform. This compromise, similar to the White House proposal, would legalize the estimated 12-20 million illegal aliens through a “Z” visa, create two new guest worker programs through a “Y” visa, dramatically increase the number of green cards, and alter the way green cards are issued by transitioning from a family-based system to what is generally called a “merit-based” system.

Guest Worker Amnesty. The Bush-Kennedy Compromise grants amnesty to illegal aliens by granting them legal status through Z visas. Under this proposal, illegal aliens will get probationary status immediately, based only upon the submission of an application for a Z visa and a one-day wait for any grounds for ineligibility to surface through a background check. Once granted, probationary status will entitle illegal aliens to work authorization, protection from removal, and a social security card. These benefits are not subject to the trigger in Title I (see below); they take effect immediately, regardless of whether the federal government ever takes any action to secure the border or implement an employment eligibility verification system.

With probationary status, an illegal alien may live and work in the United States while waiting for his or her Z visa application to be adjudicated. The eligibility requirements for a Z nonimmigrant visa are relatively few. In general, an alien must:

- not be inadmissible as the result of certain criminal activity (numerous waivers apply);
- be illegally present in the U.S. on January 1, 2007 and on the date of application;
- be employed on the date of application;
- pay processing fees (no greater than \$1,500);
- pay required penalties (\$1,000 for Z-1; \$500 for Z-2 or Z-3);
- pay a state impact assistance fee of \$500 (Z-1 only);
- appear to be interviewed (does not say by whom); and
- register for the Selective Service, if required.

No medical examination is required. No knowledge of English is required until the first renewal (four years later), and even then, only an attempt to learn English is required. No showing of good moral character is required. No payment of back-taxes is required. [Note McCain Amendment may alter the tax provisions.]

Illegal aliens who obtain Z visas will be able to renew their visas indefinitely, will be required to pay a fee, a \$1,000 penalty (heads of households only), and a \$500 state impact fee (heads of

households only). However, they will not be required to learn English until eight years after the Z visa is granted. Under the Senate bill, Z visas are unlimited in number.

Z nonimmigrants will also be allowed to apply for legal permanent resident status (green cards). Like the Flake-Gutierrez bill, the plan incorporates a "touchback" requirement for green card applicants but only heads of households would have to make the token trip to file the application and the Z visa would guarantee them the right to immediately re-enter the U.S. In addition, Z nonimmigrants will have their green card applications put on par with all those who have filed applications since May 1, 2005. They will be evaluated for green cards based on the new merit system (see below), but will receive points for having extended family in the United States. Heads of households applying for green cards would be required to pay a \$4,000 penalty; all aliens will be required to pay processing fees.

In addition to the Z nonimmigrant program, the Bush-Kennedy Compromise creates two new guest worker programs through the addition of a new "Y" visa. These Y guest worker programs are in addition to the current H-2A agricultural guest worker program, which is uncapped in number, and are intended to cover a broad set of workers not necessarily in the country illegally.

The **Y-1 visa** permits foreign workers to enter the U.S. for two years, and renew them for a total of six years. Between each two-year period, these workers would be required to return to their home countries for one year. The Senate bill caps Y-1 visas at 400,000 per year, but has an escalation clause that allows the number to increase to 600,000 per year. [Note the Bingaman Amendment has reduced the cap to 200,000 and eliminated the escalation clause.] The **Y-2** guest worker program targets the admission of seasonal non-agricultural workers. These guest workers would be allowed to work in the U.S. for ten months, and would then be required to return to their home countries for two months, with unlimited renewals. The Senate bill caps Y-2 visas at 100,000 annually, but has an escalation clause that allows the number to increase to 200,000 annually.

Legal Immigration. The Senate bill shifts the way green cards are issued from a family-based system to a "merit-based" system. In the merit-based system, points would be granted to green card applicants based on employment, education, language skills, and extended family members in the U.S. To absorb the massive numbers of people contemplated by this bill—the 12-20 million illegal aliens and the millions of green card applicants who are waiting in the so-called "backlog"—the Senate bill increases the number of green cards by hundreds of thousands.

In addition to adding green cards, the Senate bill also makes changes to certain categories of nonimmigrant (temporary) visas. The annual cap for H-1B (high-tech) visas is increased from 65,000 to 115,000 annually with an escalator clause that allows the cap to reach 180,000. Other changes to the H-1B program are made to reduce fraud by sponsoring employers. In addition to these H-1B changes, the bill also creates two new student visas, under the categories F-4 and F-5. The new F-4 visa is for aliens who have been accepted to a U.S. graduate program in math and sciences. The new F-5 visa is for aliens who maintain their actual residence abroad, but take a distance learning program, for which the alien visits the United States for no more than 30 days.

Enforcement. The Bush-Kennedy Compromise over the next five years adds 2,500 Customs and Border Protection officers, 4,000 Border Patrol Agents, 250 Deputy U.S. Marshals, 1,000

Immigration and Customs Enforcement (ICE) agents for INA violations, and an additional 1,000 ICE agents to combat alien smuggling. It also requires DHS to procure unmanned aerial vehicles, cameras, poles, sensors, and other technologies necessary to achieve operational control of the border, subject to available appropriations.

Like the Flake-Gutierrez bill, the Bush-Kennedy Compromise has a “trigger” for the commencement of the guest worker amnesty programs and the Z nonimmigrant visa. Before the Y guest worker programs and the Z nonimmigrant program may be implemented, Homeland Security must certify that certain border security measures are “funded, in place, and in operation.” These include the hiring (but not necessarily training or deploying) of 18,000 agents—an increase of about 6,000 from current levels; installation of at least 370 miles of fencing and other related infrastructure; the detention of all removable aliens apprehended crossing the southern border plus additional detention space; the establishment and use of “secure and effective identification tools” to prevent employers from hiring illegal aliens; and the timely processing of Z nonimmigrant visa applications. [Note that this trigger has been changed by the adoption of the Gregg Amendment]. ***Importantly, this trigger does NOT affect the granting of probationary legal status to applicants for Z visas. Thus, illegal aliens will become legal and will be allowed to stay in the United States whether or not any of the border security provisions in the “trigger” are implemented.***

■ **Flake-Gutierrez (H.R. 1645)**

Representatives Jeff Flake (R-Ariz.) and Luis Gutierrez (D-Ill.) introduced H.R. 1645, or the STRIVE Act (Security Through Regularized Immigration and a Vibrant Economy), on March 22, 2007. The bill aims to legalize the estimated 12-20 million illegal aliens in the United States and provide a future flow of cheap foreign labor by both offering a guest worker program with a path to citizenship and increasing existing employment-based visa programs.

Guest Worker Amnesty. Title IV of the bill creates a new form of worker visa, called an H-2C visa, that allows illegal aliens to live and work in the U.S. for up to 6 years. To qualify for an H-2C visa, an alien must:

- establish an offer of employment;
- pass a background check;
- pass a medical examination; and
- pay a \$500 fee.

The H-2C program also allows these “guest workers” and their dependents to apply for permanent residency status and eventual citizenship. The program has an annual cap of 400,000 with an escalator clause that can automatically inflate the annual number of guest workers to as many as 600,000.

Title VI of the legislation allows illegal aliens to apply for “conditional nonimmigrant status” by establishing that he or she was present and employed in the U.S. on or before June 1, 2006. The alien must also submit fingerprints, undergo a background check, and pay a \$500 fine. After six years as a conditional nonimmigrant, the alien may obtain permanent residence status if the alien:

- establishes employment;

- pays taxes (but only taxes owed for legal work);
- pays \$2,000 in fees and fines;
- passes a background check;
- meets the citizenship requirements under current law (INA § 312); and
- touches the border (see below).

This last requirement, called a “touchback” provision, only requires that sometime during the six-year period of conditional nonimmigrant status the alien crosses the border and reenters as a conditional nonimmigrant—the status they already have. There is no requirement that the alien actually return to his or her home country, undergo any new scrutiny, obtain any new documentation, or spend any meaningful time outside of the U.S. Indeed, Congressman Gutierrez was quoted in *CongressDaily* as saying the touchback provision could be accomplished “in a day”. Spouses, dependents, and certain other aliens are excluded from the touchback requirement.

H.R. 1645 also includes the AGJOBS bill, which grants amnesty to agricultural workers, and the DREAM Act, which grants amnesty to certain illegal alien students and allows them to receive in-state tuition at U.S. colleges and universities.

Legal Immigration. The STRIVE Act increases the number of H-1B visas from 65,000 to 115,000, and has a 20% escalator clause that may automatically raise the cap to 180,000. It also exempts aliens who have received graduate degrees, granted from either U.S. or foreign universities, from the H-1B cap. The bill increases the annual number of employment-based immigrant visas from 140,000 to 290,000 while exempting spouses and children (up to 800,000 annually) from the cap. The legislation also exempts aliens who come to take positions in what the Department of Labor certifies as a “shortage occupation” from the employment-based cap.

Enforcement. H.R. 1645 creates a mandatory employment eligibility verification system (EEVS), but allows the Department of Homeland Security to waive or exempt employers from participation in the program. The bill increases civil and criminal penalties for employers who hire illegal aliens, but gives Homeland Security the discretion to reduce the civil penalties. The STRIVE Act does require that social security cards be biometric and made of durable plastic.

The STRIVE Act adds 5,600 new Border Patrol Agents and 250 new Deputy U.S. Marshals. It also adds 1,000 new ICE investigators and 1,000 ICE agents to investigate alien smuggling. The bill requires the Department of Homeland Security (DHS) to construct or acquire at least 20 additional detention facilities with a combined capacity of at least 20,000 beds. It also has several provisions regarding cooperation with Canada, Mexico and other countries in North America, and requires DHS to consult with Mexico on the construction of “border structures.”

Finally, H.R. 1645 has a trigger for the commencement of the guest worker amnesty programs. Before those provisions may be implemented, Homeland Security must certify that improvements in border surveillance technology are being implemented; that the systems and infrastructure necessary to improve document security are ready; and that the first phase of the employment eligibility verification system (requiring only the participation of “critical infrastructure” employers) has been implemented.

■ White House Immigration Reform Plan

Following weeks of negotiations with Senate Republicans in March, the White House began to circulate a new immigration plan (dated March 28, 2007) with the hope of gaining substantial support from Senate Republicans. The proposal is meant to provide an overhaul of current U.S. immigration policy, but in reality only creates a complex and deceptive scheme to import hundreds of thousands of guest workers and grant amnesty to millions of illegal aliens.

Guest Worker Amnesty. The White House immigration reform plan creates three guest worker programs. The **first guest worker program** gives amnesty to illegal aliens by first granting them legal status through "Z" visas. Illegal aliens who obtain Z visas will be able to renew their visas indefinitely, will be required to pay \$2,000 every three years they work in the country, and will be allowed to apply for green cards. Like the Flake-Gutierrez bill, the plan incorporates a "touchback" requirement for green card applicants but only heads of households would have to make the token trip and the Z visa would guarantee them the right of re-entry. Green cards will be prioritized for those with higher skill levels, but all illegal aliens obtaining Z visas would still be eligible to apply and, if turned down on merit, would be given points for the presence of family members in the U.S. Those who decide to seek green cards through this program would be required to pay an initial \$2,000 fee, then an additional \$8,000 upon receipt of their green card.

The second and third guest worker programs, intended to cover a broad set of workers not necessarily in the country illegally, would both use "Y" visas to admit foreign workers to United States, where they would eventually be able to apply for green cards. The **second guest worker program** awards visas to guest workers for two years and permits renewal for a total of six years. Between each two-year period, these workers would be required to return to their home countries for six months. The **third guest worker program** targets the admission of low-skilled workers and would combine the current agricultural (H-2A) and unskilled (H-2B) guest worker programs. These guest workers would be allowed to work in the U.S. for nine months, and would then be required to return to their home countries for three months, with unlimited renewals. The White House plan does not set a cap for the number of Y visas to be issued, but provides that the Administration will set the cap based on "market need"—essentially meaning as many as can be employed.

Legal Immigration. The White House proposal would at least double the number of green cards issued per year, while also restructuring the categories for awarding green cards. The proposal would eliminate the sibling and adult children preference categories for family-based green cards and would redirect 50,000 visas set aside for parents to merit-based and "national-need" categories. It would also eliminate the visa lottery.

Enforcement. Regarding employment verification, the Administration's proposal generally calls for mandatory verification for new hires, but does not detail a system for doing so. The plan does call for "much bigger fines" for employers, but does not state what these are and does not mention any increase in criminal penalties. Finally, the White House proposes giving DHS authority to cross check records with the Social Security Administration, but does not mention granting the Social Security Administration and the IRS the authority to inform DHS when information submitted indicates fraud.

The Administration's proposal does not describe any additional efforts it would take or resources it would commit to secure the border. It merely lists "Secure U.S. Borders" as one of its principles.

Finally, the White House plan has a trigger to commence the so-called "temporary worker programs" (i.e. the Y visas, but apparently not the Z visas), which consists of several border security provisions, including the addition of more border patrol agents and the construction of 370 miles of fencing (only about half of what the Secure Fence Act requires). The trigger, however, only requires partial implementation of the new documentation requirements and partial implementation of the employment eligibility verification system before the new guest worker amnesty plan begins.