



Research Paper

The Legislative History of State-Based Guest Worker Programs

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Executive Summary

For decades, the United States Congress has failed to repair America's broken immigration system with comprehensive reform. In the absence of federal reform to guest worker programs, a number of states introduced various immigration reform proposals of their own.

Federal guest worker programs allow employers to hire agricultural or nonagricultural foreign workers on a temporary basis. However, the federal program is restrictive, overly bureaucratic, and fails to effectively or efficiently respond to specific state labor shortages.^[2] To facilitate a more efficient response to the demands of local businesses for temporary workers, thirteen states proposed measures that would provide them with local control over federal guest worker visa decisions.^[3]

State-based guest worker reform programs allow governors and state legislatures to utilize visas as part of their own legislative toolkit to improve economic growth, add jobs, bolster population growth, revitalize crumbling cities, and target certain sectors for enhanced labor reliability. Strict limits on agricultural and nonagricultural workers produce labor shortages that hurt labor reliability.^[4] State-based guest worker programs provide options for states to tailor visas to promote growth in their state and meet the needs of specific sectors.

For example, California may prefer to use more agricultural, seasonal workers to work in fields, whereas Wisconsin may prefer fewer, longer-term, more experienced nonagricultural workers to work on dairy farms. By tailoring immigration policies to each state's unique needs, their local economies can operate more efficiently. In fact, we see those outcomes in both Canada and Australia who rely on similar federalist programs with success.^[5]

Local efforts to launch guest worker visa programs have been met with significant federal resistance. For example, in 2011, the U.S. Department of Justice (DOJ) threatened a lawsuit against the state of Utah for

its state-based guest worker program, which offered state work permits to undocumented immigrants and sheltered them from deportation.^[6] No lawsuit was ever filed, but the threat of federal action dampened other states' enthusiasm for this type of legally uncertain reform.

The federal government's broad power over immigration policy is well-established by the courts. Thus, if the federal government pursued the lawsuit, the courts may well have found Utah's policy in violation of current federal law. However, it is within Congress' power to accommodate these state-based guest-worker programs through federal legislation.^[7]

Smart legislative language protecting the limited power of the states as part of a scheme of cooperation with the federal government can thoroughly address concerns about state encroachment on federal power. The unique political circumstances now—with a Republican President, Congress, and Senate—make state-based visa programs particularly appealing as a part of the Republican immigration reform agenda.

Introduction

It's been more than two decades since the United States Congress mustered the political will to pass meaningful immigration reform. In the absence of federal reform, other actors—states, cities, counties, and towns—have sought to enact their own policy changes on a range of immigration related issues. Much attention is paid to the jurisdictions that pursued various restrictive immigration policies, but little focus is placed on jurisdictions pursuing visa reforms.

In total, thirteen states considered state-based reform proposals over the last two decades, showcasing the widespread appetite for visa policies better tailored to state needs. Specifically, state-based guest worker programs are an innovative new idea proposed to transcend standard reform proposals and better address the needs of individual states. Even though demands exist, the idea is met with significant resistance from the federal government; but Congress can accommodate these programs.

This paper reviews the legislative history of such innovative proposals in the leading thirteen states, and explores why states have pursued reform, including the increased need for seasonal farm laborers, specialized high-skilled workers, and better foreign recruitment, and why state-based efforts have failed so far. The recent push for state-level involvement in immigration reform deserves further attention in the immigration debate.

State-Based Reform Legislation

Arizona

In 2007, several Arizona state senators and representatives introduced bills urging the federal government to approve a guest worker program allowing Arizona employers to hire temporary Mexican workers for two years.^[8] Moreover, contingent on federal government authorization, Arizonian employers could register with the state's Industrial Commission to allow them to recruit workers out of Mexico through the U.S. Consulate.^[9]

The bill did not get much traction in 2007 and did not get much attention. However, when a small group of bipartisan proponents reintroduced it in 2008, they garnered support from the leadership of both parties, including then-Governor Janet Napolitano (D),^[10] U.S. representative John Shadegg (R-AZ-4),^[11] and the Arizona Chambers of Commerce.^[12]

Although the bill was accompanied by a concurrent memorial urging federal authorization^[13] and had wide support, it was not guaranteed to pass and the Senate adjourned before it came to a vote.^[14]

California

In 2012, legislation was introduced to create a state-run guest worker program for undocumented immigrants called the California Agricultural Jobs and Industry Stabilization Program. The program allowed the state Employment Development Department to issue work permits for open agricultural and service industry jobs to undocumented aliens, in exchange for a fee. Successful participants and their families were also protected from deportation.^[15]

The bill was referred by the Committee on Appropriations to the floor, but it died after pro-immigrant groups argued that it would only raise and subsequently disappoint the hopes of undocumented families if it passed, but was not authorized.^[16]

In 2015, the California state assembly considered another bill that proposed forming a working group to consult with the federal government on an agreement allowing the state to pass a guest worker program of its own. The bill mandated that the governor make a formal request to the federal government to authorize a guest worker program for undocumented Californians, and outlined a system of fees, background checks, permit eligibility requirements, and family coverage rules to be recommended after securing federal authorization.^[17]

The bill won widespread support, even from labor and immigrant rights groups who opposed the 2012 legislation. They believed that the collaboration with federal government proposed in the new bill might prove fruitful. Although the bill was endorsed by more than fifteen business and agricultural groups,^[18] it nonetheless died in the appropriations committee.

Colorado

Faced with chronic shortages of seasonal workers, Colorado established the Colorado Nonimmigrant Agricultural Seasonal Worker Pilot Program in 2008. The pilot program sought to increase the flow of seasonal workers by expediting the H-2A visa application process legally required for seasonal workers to work in the U.S.^[19]

The pilot program detailed an expedited process that relied heavily on federal cooperation. The Colorado Department of Labor and Employment planned to issue H-2A labor certifications on behalf of the U.S. Labor Department, and help employers who enrolled in the program find agents pre-registered with the state to match with foreign workers, coordinate applications, and handle transportation. The pilot program also proposed withholding a portion of guest worker wages that were to be repaid only after workers returned to Mexico following the expiration of their visas.

Colorado was unable to secure federal cooperation needed for the state to implement parts of the pilot program, like helping with the recruitment of Mexican workers and expediting visa approval, that would have enticed businesses to enroll. Instead, employers began using the list of pre-registered agents to find available workers without enrolling in the pilot program. Without federal cooperation, there was little reason to pay a steep enrollment fee for a program that offered little-to-no benefit beyond the information about agents that was made publicly available. Thus, not a single employer opted to enroll in the program.^[20]

The initial expectation was that the program would bring up to 15,000 guest workers into Colorado over the five-year lifetime of the pilot. However, benefits to employers never materialized due to a lack of federal cooperation, and the program quietly expired on January 1, 2014 without the entrance of any guest workers.

Florida

In 2011, Florida business groups began researching and discussing possible state-based guest worker programs. The Florida Chamber of Commerce and the Associated Industries of Florida were able to gain the support for the idea from the Florida Conference of Catholic Bishops, which advocates for immigrant justice in the state.^[21]

Lawmakers were reportedly interested in drafting legislation for a Florida-based guest worker program, but were ultimately put off by the federal government's threat of legal action against Utah's program.

Many of the legislators who had entertained a state-based guest worker program were facing reelection and declined to spearhead legislative efforts for fear it could cost them their seats.

Georgia

Aimed at increasing state-level enforcement of federal immigration laws, Georgia Governor Nathan Deal (R) signed the Illegal Immigration Reform and Enforcement Act in May 2011.

The legislation also directed the Georgia Department of Agriculture to issue a report on the feasibility of a state-based guest worker program and to provide recommendations for federal reform that would empower the state to implement a state-based visa program for guest workers.^[22]

In that report, the Department of Agriculture documented interest in a state-based guest worker program by employers in the state and concluded that a state-based program was economically feasible, but could not address Georgia's labor shortages without federal reform.^[23] When the Georgia Attorney General shared the report with the DOJ to try to get approval, he was advised that the federal government would not permit implementation of the program because it violated current federal immigration law.

In February 2012, the Georgia Senate unanimously passed a resolution urging the U.S. Congress to authorize state-administered low-skilled guest worker programs monitored by the federal government. The resolution never went before the Georgia House.^[24]

Kansas

Kansas labor shortages and a concern for the undocumented residents in the state spurred the introduction of the 2012 Kansas Business Workers and Community Partnership Act.

The bill had broad support from a bipartisan coalition of lawmakers, business leaders, and community leaders. The Act laid out a program encouraging undocumented residents to complete a background check, pay a fee, show proof of employment with a business certified in the program, and agree to learn English. In return, the undocumented residents and their families would be eligible for work permits.

Kansas businesses could take part in the program by demonstrating proof of a labor shortage and paying a number of fees. The program would then let businesses hire undocumented workers without fear of legal repercussions.^[25]

A coalition of businesses, spearheaded by the Kansas Farm Bureau and the Kansas Chamber of Commerce—which together represent dairies, feedlots, landscapers, roofers, and construction companies—widely supported the bill. They argued that the legislation fell within the scope of then-current law, but still would need a federal waiver from standard visa rules.^[26]

The Kansas Agriculture Secretary, who favored the program, met with multiple federal officials and attempted to request a waiver from the U.S. Department of Homeland Security (DHS) while the bill was still under consideration. Ultimately, DHS indicated they could not grant a waiver without new legislation from Congress, and the bill subsequently died in committee.^[27]

Massachusetts

In 2014, a pilot program to recruit and retain foreign entrepreneurs was tucked in a state bill aimed at spurring economic growth in Massachusetts.

The three-year pilot offered promising foreign graduates of Massachusetts universities and colleges the ability to remain in the state to build new companies while working part-time at a state university. In return, the student entrepreneurs received a cap-exempt H-1B visa through the university.^[28] This way, the entrepreneur was guaranteed a visa instead of hoping to win the H-1B lottery before their student visa expired. It also allowed more time to build their business than they may have with outside, full-time employment that would require private investment.

The pilot program began at two Massachusetts universities—UMass Boston and UMass Lowell—and relied entirely on state funding for students' entrepreneurial efforts. Over time, however, the program attracted the support of private investors and philanthropists, shifting to a private-public partnership, and requiring only modest public funding.

The initial success of the pilot programs recently led to its adoption at Babson College, a private college known for its prestigious entrepreneurship program. Today, several universities around the country participate in similar Global Entrepreneur in Residence programs, resulting in the sponsorship of dozens of graduates. The program has been successfully replicated in New York, Colorado, California, Missouri, and Alaska and has raised millions of dollars in investments.^[29]

Michigan

In 2014, Michigan Governor Rick Snyder (R) kicked off an initiative to revitalize Detroit through high-skilled immigration reform. He pushed for legislation requiring the federal government to grant 50,000 employment-based visas over five years to workers with advanced degrees who were willing to commit to living and working in Detroit for the duration of their visas.

As part of his plan, Governor Snyder also established the Michigan Office for New Americans, which uses language training programs and other programs to attract and retain entrepreneurs and skilled immigrants.

However, Snyder's proposal required coordination between the state and federal government to stand a chance of success. Some members of Congress expressed interest in supporting the federal reforms needed to get the program off the ground, but legislation was not deemed a priority, and the program stalled.^[30]

New Mexico

With the commercial chile industry in New Mexico shrinking drastically because of worker shortages, farmers began pressing hard for more guest workers. In 2012, State Senator Stephen H. Fischmann (D) introduced the Guest Worker Act, which provided for a guest worker program allowing undocumented New Mexican residents to apply for a guest worker permit for themselves and their immediate family members.

In exchange, the previously undocumented worker could remain in New Mexico and work without fear of deportation. Each applicant was subject to a criminal background check, and was required to pay a small fee to cover the cost of administering the program, unlike many other proposed guest worker

programs, which require larger, punitive fees penalizing undocumented migrants for violating immigration laws.^[31]

The law accompanied similar proposals ensuring guest workers could get driver's licenses and identification cards,^[32] and another urging the federal government to allow implementation of future state-based programs.^[33]

Opponents of the bill argued it would never get the necessary federal cooperation, pointing to efforts in other states that failed to get federal approval. With those arguments in mind, committee action on the bill was indefinitely postponed.

Oklahoma

After a 2007 state-level immigration law designed to crack down on illegal immigration exacerbated state-level worker shortages, especially in agriculture, energy, and construction, the Oklahoma Senate considered legislation introduced by Senator Harry Coates (R) in 2012.

The bill allowed undocumented immigrants in Oklahoma to remain and work in the state, provided that they declare their undocumented status, submit to a background check, purchase a guest worker permit for \$2,000, and find an employer sponsor. The program also offered protection against deportation to the immediate family members of a guest worker for an additional fee of \$500 per person.^[34]

The editorial board of the *Tulsa World* endorsed the idea, but noted the introduction was poorly timed. An impending election ultimately convinced lawmakers to distance themselves from the program to pacify constituents who favored Oklahoma's controversial anti-immigrant bill.^[35] The bill never received a vote in committee.

Texas

The Texas State Legislature considered two pieces of legislation creating guest worker programs in 2011. One bill allowed undocumented residents to declare their unlawful presence, pay a \$4,000 fine, and undergo a background check. In exchange, they could receive a Texas residency card granting them renewable work authorization and resident status in Texas for eight years.^[36] The second bill, the Texas Commission on Immigration and Migration Act, was introduced by Rep. Aaron Peña (R), establishing a pilot guest worker program.^[37]

Both bills received support from various groups including center-right organizations, such as the conservative Hispanic Alliance for Prosperity Institute,^[38] but received little media attention. Neither, however, was deemed a priority, and both bills died in committee.

However, in 2015, Peña's bill was reintroduced to create a commission studying state-level immigration opportunities and to establish a pilot program allowing Texas businesses to employ migrant workers—subject to background checks—from states in Mexico working with the Governor of Texas. If successful, Texas intended to expand the pilot program to allow migrant workers from other countries to work in the state.^[39]

Additionally, Peña's Texas Commission on Immigration and Migration Act was accompanied by twin bills in each house urging the federal government to authorize the pilot program established by the main bill, the Texas Needs Workers Act and the Texas Immigration Procedure Trade and Development Act.^[40]

As in many other states, legislators ultimately concluded that the federal government would not authorize the program and therefore did not prioritize the legislation. None of the 2015 guest worker bills received a vote to make it out of committee.

Utah

On March 15th, 2011, Utah Governor Gary Herbert (R) signed into law a package of bills implementing state-level immigration laws. One bill adopted new enforcement provisions, while a series of three bills established a state-based guest worker system.^[41]

First, the Utah Pilot Sponsored Resident Immigrant Program Act allowed Utah citizens the right to sponsor foreigners to live, work, and study in the state by assuming financial responsibility for any liabilities the resident incurred or any other financial needs (equivalent to dependent status).^[42]

The second bill, the Utah Commission on Immigration and Migration Act, established a pilot program allowing Utah employers to recruit migrant workers from Nuevo Leon, Mexico.^[43] Legislators envisioned establishing a known place for employers and employees to meet that would make it easier and faster for businesses to find workers from Mexico to fill immediate job needs.

Finally, the Utah Immigration Accountability and Enforcement Act provided undocumented immigrants the opportunity to apply for work permits after declaring their undocumented presence, paying fines, and passing a background check. The program also provided work permits for members of their immediate families.^[44]

Enactment of the four bills required the federal government to approve the programs, but that approval never came. Following detailed discussions between state officials and federal officials, the federal government determined that the Utah bill, and all similar state-based attempts at immigration reform, violated federal law. The federal government threatened to sue Utah should it attempt to implement the law.^[45]

Thus, Utah has repeatedly pushed back the implementation date—the latest delay would not require implementation until 2027—to avoid a federal challenge. However, Utah continues to claim that the bill is consistent with federal law, and that the state law is implementable at any time.

Recently, State Senator Curt Bramble (R), who initially supported Utah's bill and similar bills in other states, attempted to repeal the Utah law on the grounds that the chance of federal authorization had all but disappeared.^[46] Other Utahns were less pessimistic and the repeal effort failed. Ultimately, the law remains in a state of limbo—on the books, but not implemented.

Vermont

In 2012, a bill was introduced in the Vermont State Senate to establish a state-based farm guest worker program, which allowed undocumented Vermont residents to register with the state and receive identification, work authorization, and eligibility for all state benefits provided to legal permanent residents.^[47]

The Senate Agricultural Committee was not convinced that Vermont could legally set up a program, but heard testimony on the bill, which was amended to merely expand driving privileges in the state and not to establish a guest worker program at all. Later, the bill was amended further, to establish a committee

to study the possibility of expanding driving privileges. The legislature eventually passed that version of the bill and it was signed by the governor.^[48]

Ultimately, the outcome of the legislation was far removed from its original purpose. The guest worker program proposal failed to gain support after lawmakers shared concerns about federal government opposition.

Moving Forward

There is a great deal of demand in the states for more efficient, responsive guest worker programs. The fact that thirteen states have considered reform proposals illustrates the appetite for visa policy better suited to local needs—whether those needs are for more seasonal farm laborers, non-seasonal farm workers, workers in the energy or construction sectors, or specialized high-skilled workers.

The need for visa policy better tailored to state needs is underscored by the fact that much, if not most, of the debate in these states turns on whether reform is worth pursuing in the face of legal obstacles, not whether it was a good policy.

That many of these proposals failed is not evidence of low political demand or the technical infeasibility of state-based solutions. It is evidence of the urgent need for federal consent and cooperation. If there had been greater federal cooperation, not only would more of these proposals have passed, more states would have introduced proposals.

Federal cooperation under the new Republican administration is now a real possibility. Promoting states' rights has long been a tenet of the Republican Party, and state-based guest worker programs are consistent with the party's opposition to "one-size-fits-all" federal policies. Improving economic outcomes and helping immigrants in the states can also help Republican electoral prospects and may help garner support from Democrats for other Republican-led immigration reforms.

Some allies of the Trump administration are hostile to state guest worker programs.^[49] However, such programs are not inconsistent with stricter immigration enforcement priorities. Georgia's proposal, for instance, considered a guest worker program as a way to reduce illegal immigration into the state. By offering businesses and migrants legal avenues to fill labor shortages, it reduces the attractiveness of migrating illegally or overstaying one's visa.

Executive branch agencies are reluctant to lead on this issue, and are unwilling to grant waivers or authorization without express congressional approval. The ultimate responsibility lies with Congress, working in conjunction with state legislatures, to consider federal legislation that establishes a framework for limited state discretion over guest worker visas. States have tried in vain for the last half-decade to urge an obstinate federal government to allow them to exercise some control over guest worker policy. Now is the time for Congress to move on this issue.

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