



Immigration at the State Level: An Examination of Proposed State-Based Visa Programs in the U.S.

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State-Based Visa Programs

Executive Summary

The federal government has sole authority to admit immigrants, to determine how many immigrants to admit, and to create criteria for admission. Our current immigration system does not address the needs of the 50 states, which are unique in terms of their populations, economies, and labor market needs. State governments have little ability to direct foreign workers to their state or to specific industries or regions within the state, leading them to express frustration with the current immigration system and Congress' failure to reform it. As a result, some states and policy experts believe that devolving additional immigration decisions to the states is preferable because state governments are in a better position to understand the immigration needs of their own communities.

This paper analyzes the history of immigration federalism in the United States and examines how other countries have created regional immigration systems to address the needs of individual areas. It subsequently looks at the problems with the current immigration system and why it is insufficient to meet states' needs. It then analyzes the multiple solutions that have been proposed. Finally, it looks at the remaining questions that must be addressed before moving forward with a new, state-based immigration program.

Key Findings

- State legislators have expressed concerns that the current immigration system is not serving the needs of their economies, employers, and communities.
- Legislators from many states have offered proposals intended to allow them to partner with the federal government and play a larger role in the distribution of workers within the country and within their states.
 - Since 2007, legislators in at least 16 states have introduced bills, resolutions, or other proposals related to obtaining additional immigrant workers, and four states have passed laws or resolutions.
- Several Members of Congress have taken up the issue of state-based visas.
 - In 2017, the State-Sponsored Visa Pilot Program Act (S. 1040) was introduced by Sen. Ron Johnson (R-WI). Rep. John Curtis (R-UT) reintroduced the bill again in 2019 as H.R. 5174.

- This bill would create a new W visa classification for foreign workers, and visa recipients would be distributed to participating states.
 - The number of W visas could be adjusted in subsequent years using a formula that would consider states' economies as well as their compliance with the program.
 - Congress would set the general rules for the program, but states would have the freedom to create their own visa programs and requirements in a way that would be most beneficial.
- Canada and Australia have already implemented regional immigration systems in which the national government works closely with the provincial, territorial, or regional governments to distribute foreign workers to the areas where they are most needed.
 - In Canada, these regional programs are mandated by the country's constitution while Australian law tracks more closely with that of the United States.
 - In both countries, temporary foreign workers settle in particular regions of the country and may become permanent residents and work anywhere in the country after a period of time.
 - Several issues would need to be addressed in order to create a state-based visa program that is thoughtful, rational, and successful.
 - There will be many issues regarding the characteristics and size of the program as well as the nature of the authority delegated to the states.
 - Similarly, there are issues as to how states would measure their labor needs and design an immigration program that best suits their economies and populations.

As these examples show, the United States has the opportunity to write another chapter in immigration federalism and reform our immigration laws in a way that better serves states and localities. While immigration reform would encompass a range of changes to the federal employment-based system, Congress can legislate a larger immigration role for the states if it chooses to do so. A new law could reform the nation's immigration system by expanding the role for state governments, allowing them to design a system that is tailored to their constituents' needs and generates fiscal and economic gains for their communities.

Introduction

The federal government has sole authority to admit immigrants, to determine how many immigrants to admit, and to create criteria for admission. But immigrants live and work in states and localities that are, in turn, responsible for many of the aspects of everyday life for immigrants and the communities in which they live. Some believe states should have a larger role in determining how many and what types of immigrants live and work within each state's borders.

Just as the U.S. population is not evenly distributed across the 50 states, immigrants are not distributed evenly across the states or even proportionately to state population. Some states are experiencing population loss and labor shortages while others are not. Employers in some states often do not have the workers they need and cannot recruit enough foreign workers through the current legal immigration system.

The Economic Innovation Group, or EIG, a bipartisan public policy organization, found that population growth has fallen to an 80-year low and certain areas of the United States have grown even more slowly.¹ In some regions the population has even declined. An alarming 80% of U.S. counties lost prime working age adults between 2007 and 2017 and additional counties will likely also see declines. Over the next 20 years, EIG predicts many U.S. counties will have fewer working age adults than they did in 1997, even though United States as a whole will add millions of prime working age adults.² Current immigration policy fails these areas of the country.

“States have always shed light on perceived problems, experimented with different solutions, and pressured the federal government to act.

This may very well be the case with state-based visa programs.”

Throughout U.S. history, the states have played an important role in immigration policy. For the first 100 years after the formation of the country, the states were responsible for admitting immigrants, and the federal government remained largely silent. Since the late 19th century, the federal government has asserted its authority over immigration policy, but states have continued to be responsible for many of the policies affecting immigrants who settle in their communities. At times the states have challenged federal supremacy with mixed results.

But the state legislators have heard the concerns of their constituencies, and many have expressed that the current immigration system is not serving the

needs of their economies, employers, and communities. Legislators from many states have offered proposals intended to allow them to partner with the federal government and play a larger role in the distribution of workers within the country and within their states. Since 2007, legislators in at least 16 states have introduced bills, resolutions, or other proposals related to obtaining additional immigrant workers, and four states have passed laws or resolutions. These proposals vary a great deal, offering a smorgasbord of creative ideas. The Cato Institute, a libertarian think tank, agrees, writing that devolving some immigration decisions to the states is preferable because state governments are in a better position to understand the immigration needs of their own communities. Furthermore, it would allow states to “harness additional economic gains from immigration without relying upon the federal government to change immigration policy for the entire nation.”³

Congress can legislate a larger immigration role for the states if it chooses to do so. In fact, several provisions of immigration law already involve state and local governments. For instance, they can designate high-unemployment “targeted employment areas” for EB-5 investor visas and can sponsor doctors to serve in medically underserved areas. A new law could reform the nation’s immigration system by expanding the role for state governments and allowing them to design a system that is more responsive to their constituents’ needs. Doing so could result in a laboratory of ideas from which all states could learn and extract the most useful elements for their own use.

This paper analyzes the history of immigration federalism in the United States and examines how other countries have created regional immigration systems to address the needs of individual areas. It subsequently looks at the problems with the current immigration system and why it is insufficient to meet states’ needs. It then analyzes the multiple solutions that have been proposed. Finally, it looks at the remaining questions that must be addressed before moving forward with a new, state-based immigration program.

Immigration Federalism in the United States, Canada, and Australia

Historically, states have played a variety of roles with respect to immigration policy. Very early in U.S. history, the federal government was virtually silent on immigration matters, leaving control of immigration largely to the states.⁴ It was the maritime states and port authorities that regulated who entered the country; there were state

laws regarding the admission of criminals, paupers, the disabled, individuals with contagious diseases, slaves, and others.⁵ It wasn't until the late 19th century, after a string of Supreme Court decisions invalidating state laws and affirming exclusive federal power over immigration that the federal government enacted the Immigration Acts of 1882 and 1891, took control of U.S. immigration policy, and established a bureaucracy for the purpose of immigration control. In doing so, the federal government nationalized the various state immigration laws.⁶

In the past, states applied pressure on the federal government by passing laws that provided a model for future congressional action. For example, the federal government nationalized multiple state efforts intended to exclude Chinese immigrants when it passed the Chinese Exclusion Act in 1882.⁷ More recently, states continued to play an important role in pushing the federal government to act. In the 1970s, several states enacted legislation prohibiting employers from knowingly hiring unauthorized workers, leading to the federal government finally enacting employer sanctions in 1986.

This trend hit a crescendo in the 1990s when states pressured Congress to take responsibility for an increasing unauthorized immigrant population and what they saw as inadequate enforcement of immigration laws. Voters in California passed Proposition 187, a ballot initiative designed to exclude unauthorized immigrants from a broad range of healthcare, public education, and other services, and require the police to investigate the immigration status of detainees suspected of immigration violations, among other provisions. Other states—including Florida, Arizona, New Jersey, and New York—sued the federal government for “its continuing failure to enforce or rationally administer its own immigration laws since 1980.”⁸ While these measures were eventually thrown out by the courts, the federal government did respond to the states' grievances. In 1996, the Illegal Immigration Reform and

Immigration Responsibility Act, or IIRAIRA, and the Personal Responsibility and Work Opportunity Reconciliation Act became law, increasing federal immigration enforcement and restricting welfare benefits to legal immigrants. Furthermore, Section 287(g) of IIRAIRA created an avenue by which state and local law enforcement agencies could work hand in hand with federal immigration enforcement agencies.

Today, the relationship between the federal government and the states has been described as a “multilayered jurisdictional patchwork.”⁹ While the Supreme Court has continually held that the federal government holds “broad, undoubted power over immigration and alien status,”¹⁰ the states continue to play a critical role in the day-to-day questions of immigrant integration.

“The federal government remains responsible for ‘immigration policy’—who is admitted and deported—while states and localities regulate ‘immigrant policy,’ or how immigrants are treated once they settle in the community.”

However, some states remain interested in playing a larger role with respect to immigration policy. In fact, the states already have narrow authorities within the powers delegated by Congress. Within existing immigration law, the states have at least two delegated roles. First, state and local governments have a role in designating high-unemployment “targeted employment areas” for EB-5 investor visas.¹¹ Second, state public health departments can sponsor doctors to serve in medically underserved areas.¹² Congress has the power to pass new legislation that delegates the states an expanded role in the immigrant admission process.

Models for Immigration Federalism

In Canada, these regional programs are mandated by the country’s constitution, while Australian law tracks more closely with that of the United States. Regardless, the United States could learn from these examples and expand immigration federalism.

Canada’s immigration system is distinct from that of the United States in that jurisdiction over immigration is shared between the national, provincial, and territorial governments under section 95 of the Constitution Act of 1867. The national, provincial, and territorial governments consult one another on immigration issues; Immigration, Refugees, and Citizenship Canada, or IRCC, the federal immigration agency of Canada, has agreements with provinces and territories on their shared responsibilities. Furthermore, several provinces and territories have additional, more comprehensive agreements with IRCC covering a wider range of responsibilities.¹³

For example, Québec has a legal agreement with the national government that gives Québec the authority to establish selection criteria for the immigrants who will live permanently or temporarily in the province. Québec’s consent is also required to admit certain foreign students, temporary workers, and other visitors.¹⁴ Thus, unlike in the United States, immigration in Canada is legally mandated to be a wholly shared project between the national government and the provinces and territories.

Canada’s Provincial Nominee Program, or PNP, was established in 1998 and allows provincial and territorial governments to nominate individuals who wish to immigrate to Canada and settle in a particular province or territory.¹⁵ The Canadian national government sets PNP quotas for each province or territory and conducts security, criminal and health checks. The provinces and territories can then shape the program and create their own criteria for sponsoring workers within the broad parameters set by the national government. There are currently 11 bilateral agreements between IRCC and provinces and territories, which establish their own

Canada and Australia have already implemented regional immigration systems in which the national government works closely with the provincial, territorial, or regional governments to distribute foreign workers to the areas where they are most needed.

objectives for the program as well as their own criteria for provincial nomination. Foreigners may apply to a participating province, which in turn either rejects the applicant or nominates the worker for a visa. PNP nominees receive permanent residency and are not legally restricted to remaining in the nominating province.

While the primary benefit is to increase and distribute the economic benefits of immigration to all areas of the country, other objectives include preserving language minority populations and increasing the social benefits of immigration. A 2017 evaluation of the PNP found the program was achieving its primary objectives with economic outcomes and retention of provincial nominees in the nominating areas of the country. Moreover, the evaluators found provincial nominees had high levels of employment and earnings, and their economic success increased over time.¹⁶

Similar to that of the United States, the Australian constitution gives parliament the “power to make laws for the peace, order, and good government of the Commonwealth with respect to” naturalization and aliens¹⁷ and immigration and emigration.¹⁸ Yet, Australia has a history of sharing immigration authority between the national and regional governments.

Beginning in 1996, Australia has had regional immigration programs intended to ensure foreign workers fill labor market gaps in the regions of the country. The programs underwent changes in late 2019 and two new skilled regional provisional visas are available as of November 16, 2019. The Skilled Work Regional (provisional) Visa allows skilled workers to stay in a designated regional area of Australia for five years.¹⁹ Recipients must be nominated to apply by a state or territory government agency. Eligible relatives can also sponsor their family members. Recipients must work in an occupation listed on the skilled occupation list and have a suitable skills assessment for the occupation. There is no direct path to permanent residency through the provisional visa, although recipients may be able to adjust to another visa option.

The Skilled Employer Sponsored Regional (provisional) Visa allows regional employers to address their labor shortages by sponsoring skilled workers when a qualified Australian worker is not available.²⁰ Visa recipients can live, work and study only in designated regional areas and can apply for permanent residence after three years. Workers must be nominated to work in an occupation found on the relevant skilled occupation list, have three years relevant work experience, be under 45 years old, work only for the sponsor, and meet English proficiency standards.

The States and State-Based Visas

Here in the United States, the 21st century has witnessed an unprecedented wave of immigration-related bills and resolutions in state legislatures. Between 2005 and 2019, 49 of the 50 states enacted a total of more than 2,400 immigration-related laws.²¹ In 2019 alone, 49 state legislatures, the District of Columbia, and Puerto Rico enacted 181 immigration-related laws and 135 resolutions, and 16 additional bills were vetoed by governors.²² Thousands more bills and resolutions have been introduced in state legislatures and have not passed. These bills and resolutions were related to a variety of issues including human trafficking, health and education, occupational licensing, in-state tuition, driver's licenses and state identification documents, and immigration enforcement.

Among these state bills and resolutions were proposals to increase the number of immigrant workers in the states.²³ Since 2007, at least 16 states have introduced bills, resolutions, or other proposals related to obtaining additional immigrant workers, and four states—Colorado, Georgia, Massachusetts, and Utah—have passed laws or resolutions. Policy experts, scholars, and some members of Congress are also exploring the possibility of state-based visas. These proposals vary greatly, and reflect the concerns, needs, and suggested policies of a wide range of legislators and experts from all points along the political spectrum.

Concerns with the Current Legal Immigration System

Under our current immigration system, employers can petition for foreign workers on either a permanent or temporary basis, and U.S. citizens and Lawful Permanent Residents—LPRs, or green card holders—can petition for certain close family members. While not brought to the United States specifically to work, these family members may be of prime working age or possess needed skills. Both the employment- and family-based immigration systems are riddled with obstacles, including eligibility criteria, numerical caps, and processing delays that mean employers are not always able to recruit the workers they need, and family members remain separated for long periods of time.

State-based visa proposals have been in response to multiple concerns including inadequacies of the current immigration system and the failure of the federal government to address these concerns and reform the nation's immigration laws.

State governments do not play a role in this system. If a state experiences a labor shortage, the state government is dependent on employers within the state to petition for needed foreign workers and subsequently must hope that those petitions are accepted and the needed visas are available. If employers within the state are lucky enough to get workers, those workers are often tied to one employer and may not change jobs or move to areas—within the state or in another state—in response to changing labor market needs.

Furthermore, as of 2017, there are approximately 10.5 million unauthorized immigrants in the country who are not legally eligible to work and approximately 7.6 million are in the U.S. civilian labor force.²⁴ In 2017, an estimated 66% of unauthorized immigrant adults had been in the United States for more than 10 years and approximately half had been in the United States for 15 years or more.²⁵ As with the overall immigrant population, the unauthorized population is distributed unevenly across the country. More than half live in just six states: California, Texas, Florida, New York, New Jersey, and Illinois. But states like Louisiana, North Dakota, South Dakota, Maryland, and Connecticut have witnessed increases in their unauthorized populations over the past decade.²⁶ Nationwide, these workers are filling important gaps in the labor force, particularly in the agriculture, construction, and leisure and hospitality industries,²⁷ but have very little or no opportunity to legalize their status under current immigration law.

Agriculture is one area that has received a great deal of attention from state legislators. Traditionally, foreign workers play a critical role in the agricultural sector. Unauthorized immigrants comprise approximately 15% of the agricultural industry's labor force.²⁸ Foreign guest workers make up another large share of the agricultural labor force. When no U.S. workers are available for agricultural work, employers may sponsor foreign agricultural workers through the H-2A nonimmigrant visa classification.²⁹ Given that the H-2A program is targeted to seasonal work, agricultural industries that operate on a yearlong basis, such as dairy farming, are not able to benefit from the program.

There is no statutory numerical cap on the number of H-2A visas issued annually; since 1992 between 9,000 and 130,000 have been issued annually.³⁰ Employers sponsoring H-2A workers must obtain a certification from the Department of Labor determining there are no qualified U.S. workers available to fill the job openings and employing foreign laborers will not adversely affect similarly employed U.S. workers.³¹ Both growers and farmworkers have expressed concerns with the H-2A program. There have been multiple congressional attempts to reform the H-2A program throughout the 2000s, but none have been successful, which likely prompted some state legislators to apply additional pressure on Congress.

However, there have been administrative changes to the H-2A visa classification to address some of these issues. At the end of President George W Bush's second term, the Department of Homeland Security and Labor Department published final rules revising the H-2A regulations following unsuccessful efforts to comprehensively reform the immigration system via legislation. The Labor Department regulations "streamlined" the H-2A process, exchanging the supervised labor certification process

in which federal agencies reviewed an employer's documents for an attestation-based process in which employers under threat of penalty could claim that they complied with the program's requirements.³² These regulatory changes were generally welcomed by growers and the agricultural industry and reviled by farmworker advocates. In 2010, the Labor Department under the Obama administration reversed the 2008 changes, citing concerns about employer noncompliance.³³ In 2019, the Trump administration reversed the Obama administration's changes, once again attempting to liberalize the program for growers.³⁴ The continued back and forth by the executive branch may have led growers to look to state legislators to design state-based solutions.

The H-2B temporary visa classification allows U.S. employers to hire foreign workers from eligible countries to fill seasonal nonagricultural jobs.³⁵ H-2B visas are often used to fill jobs in seasonal hospitality industries, amusement and recreation workers, and food harvesting jobs not considered to be agricultural, such as crab picking. H-2B visas are capped at 66,000 annually and the demand often exceeds availability.³⁶ Similar to the H-2A program, employers sponsoring H-2B workers must obtain a labor certification from the Labor Department determining there are no qualified U.S. workers available to fill the job openings and employing foreign laborers will not adversely affect similarly employed U.S. workers.

There have been multiple bipartisan bills supported by Republican and Democratic presidents that would have created new legal channels for needed workers, reformed the family-based immigration system, addressed the unauthorized immigrant population, secured the borders, and provided for effective immigration enforcement. These bills have all failed to become law.

Some state bills have addressed the federal government's failure head on. For example, a 2015 Texas bill stated, "Due to the decades-long failure by the federal government to solve the undocumented immigration-related problems facing the United States, individual states have been forced to shoulder the consequences of a broken federal immigration system."³⁷ A 2009 Utah resolution declared, "[w]ithout definitive direction from the federal government, states are struggling to adequately address the many issues surrounding illegal immigration within their respective borders."³⁸ Likewise, a 2012 bill from California stated: "Recognizing the significant contributions that unauthorized workers make to California's economy and the need to bring these workers out of the shadows in order to improve worker conditions and at the same time provide a legal workforce for the agricultural and service industries, it is imperative that state policy create an adjustment-of-status program for current unauthorized workers in these industries."³⁹

Worker shortages in specific industries and the insufficiencies of current guest worker programs have been the impetus for several state-based visa proposals. For example,

While there is near universal acknowledgement that the current immigration system is not working well, it has proven incredibly difficult to pass immigration reform in Washington, prompting more states to take action.

legislators in Colorado passed a bipartisan bill in 2008 to create a pilot program giving the state more power to recruit foreign workers to address season labor shortages.⁴⁰

The bill stated:

The Colorado nonimmigrant agricultural seasonal worker pilot program is an effort to save Colorado's agriculture economy from further harm, Colorado's farmers from additional closures due to labor shortages, ... because of the multiple problems with the H-2A visa certification process' ability to provide seasonal workers in a time and manner to meet the needs of producers, the Colorado department of labor and employment and the Colorado commissioner of agriculture should work together and in conformity with existing federal laws to implement a pilot program to meet the temporary employment needs of Colorado producers.⁴¹

Several state proposals are explicit about the inadequacy of H-2A and H-2B visas in their state. For example, a 2009 Texas bill began with: "The purpose of this chapter is to develop and establish, in collaboration with the federal government, a Texas essential workers program to provide an adequate, legal, and stable workforce for employers in this state that are experiencing a critical shortage in the availability of qualified workers, particularly in the industries of ranching, farming, dairy, food

manufacturing, construction, landscaping, and restaurant and hotel services."⁴² Similarly, a 2012 Senate Resolution in Georgia noted: "Whereas, the H-2A guest worker program is only available to producers with work needs of a temporary or seasonal nature, but due to the year-round nature of some industries within agriculture, this provision prohibits these, specifically the dairy, poultry, livestock, and ginning industries from being eligible."⁴³

STATE PROPOSALS

Given these justifications, state legislators have responded to their various constituencies, including Chambers of Commerce, employers, organized labor, and immigrant rights groups, by introducing bills and resolutions that propose an expanded role for the states with respect to immigration. These bills take a variety of forms and contain a plethora of new ideas. Most died early in the legislative process and did not have a chance of becoming law, but legislators in Colorado, Georgia, Massachusetts, and Utah were able to get the support they needed to pass a law that was signed by the governor. The proposals in these four states differ dramatically.

- Colorado passed a law establishing a seasonal worker pilot program in 2008.⁴⁵

State Compacts: Non-legislative state-led proposals have urged the federal government to pass immigration solutions that address the needs of the states' economies, businesses, and workers. In the early 2010s, several states succeeded in creating bipartisan state compacts on immigration that were co-signed by various sectors of society including business, community organizations, faith-based organizations, and elected officials. Arizona, Colorado, Iowa, Indiana, and Utah had state compacts, and the most recent was the Michigan Compact on Immigration, signed by business leaders in February 2020.⁴⁴ They have each included principles for immigration reform and urged federal and state legislators to adopt solutions that would protect our borders, respect the rule of law, champion strong families, and strengthen the economy, among others.

- Georgia passed a law requiring a report on the feasibility of a state-based guest worker program in 2011.⁴⁶ The subsequent report found that such a program was feasible but would require federal cooperation.
- Massachusetts created and funded a program to sponsor immigrant entrepreneurs in 2014.⁴⁷
- Utah passed a series of laws in 2011 that dealt with immigration enforcement, unauthorized immigrants, and guest workers.⁴⁸

These states acknowledged the need for federal cooperation. The Massachusetts program works through the existing H-1B highly skilled worker visa classification, but the other states have not been able to get the federal support necessary to implement a state-based guest worker program.

These bills were introduced during a period of high immigration-related activity by the states and following multiple failures to pass comprehensive immigration reform through Congress. They were likely intended to put additional pressure on the federal government to act. The following section looks at the states' proposals in more detail.

Creating New Federal Programs

Several states have urged the federal government to create new guest worker programs to supplement the state's workforce and fill gaps in the labor market. While several of these bills provided details as to how the new guest worker program should be designed, they clearly acknowledge the federal government alone can create such a program. Notably, these bills focus exclusively on guest worker programs and do not call on Congress to increase the number of permanent residents.

- A 2002 Kentucky House concurrent resolution was introduced urging Congress to “create a guest worker program that would enable undocumented foreign nationals to obtain a nonimmigrant visa status for up to twenty-four months, based upon offers of employment in industries such as health care, agriculture, equine, and computer ...” The visa would be available to current undocumented workers as well as foreign nationals residing outside the United States.⁴⁹
- A 2007 concurrent memorial in Arizona similarly called on Congress to establish a “market-based visa program for essential workers.”⁵⁰

Expansion of H-2A and H-2B Guest Worker Programs

Several states proposed working more closely with the federal government to expand the existing H-2A and H-2B programs to allow for additional seasonal agricultural and nonagricultural workers and would create a role for the state government. Under these schemes, states would take on the traditional employer roles of determining the number of workers needed and petitioning for the workers.

- A 2008 Colorado bill aimed to establish “... a nonimmigrant agricultural seasonal worker pilot program to expedite the seasonal worker application and approval process in compliance with the existing H-2A visa certification process.” In addition to assisting employers with H-2A petitions, the state would be authorized to establish offices in foreign countries and retain local agents to assist in

recruitment, medical screening, travel, and documentation of employee returns.⁵¹ This bill was signed into law in June 2008, but eventually expired in 2014 before any such guest worker program was created.

- A 2009 bill in Texas would establish a commission to study labor shortages and petition for workers under the H-2A and H-2B programs and enter into agreements with foreign countries to recruit foreign workers.⁵²
- In 2012, the Georgia Senate passed a resolution urging Congress to “... allow states to administer their own H-2A guest worker programs through the monitoring of the United States Department of Agriculture.”⁵³ The Georgia House did not take up the resolution.

State-Administered Guest Worker Programs

Legislators in some states have proposed creating their own state-administered visa programs, operating semi-independently of the federal government.

- Proposals introduced in the Texas legislature in 2013 and 2015 would have created a new guest worker program to bring skilled and unskilled workers to the state during labor shortages.⁵⁴ Both bills died in committee.
- In 2009, then Utah Gov. Jon Huntsman, Jr. signed a resolution urging Congress to grant the state a waiver to establish its own employer-sponsored work program.⁵⁵
- A 2009 bill in Washington state urged the federal government to create a new nonimmigrant visa classification for “essential workers” who would perform seasonal, peak need, or project-related work. It would be administered through the state’s Employment Security Department, which would work with foreign governments to recruit workers, petition the federal government for an adequate number of workers, and match employers with foreign workers. Employers would be required to provide housing. In turn, the state would provide English language and civics training “with the goal of making these workers better able to integrate themselves into the workforce.”⁵⁶ The bill died in committee.

Unauthorized Workers

Several state legislators focused their proposals on granting temporary work visas for unauthorized workers in the state.

- A 2012 California proposal would have created a state-administered guest worker program that would allow unauthorized workers to receive permits to work in agriculture and the service industries.⁵⁷ Several years later a 2015 California bill proposed a working group to coordinate with the federal government to agree to pass a state-run guest worker program for unauthorized workers.⁵⁸
- The 2012 “Kansas Business Workers and Community Partnership Act” would have allowed unauthorized immigrants in the state who met certain eligibility requirements to obtain work permits from the state.⁵⁹ To qualify, unauthorized immigrants in Kansas would be required to pay a fee, undergo a background check, and agree to learn English.

- In Texas, a 2011 bill would have allowed unauthorized immigrants who pay \$4,000 and meet other requirements to obtain a Texas residency card and work authorization.⁶⁰
- A 2012 bill in New Mexico would have created a new guest worker program through which unauthorized individuals could obtain work permits if they had worked or lived in the state since Jan 1, 2012 and passed a criminal background check conducted by the FBI. Immediate family members would have been eligible for a family permit.⁶¹
- The “Oklahoma Guest Worker Permit Program Act,” introduced in both 2012 and 2013,⁶² would have also allowed unauthorized immigrant residents to work in the state. To qualify, workers would pay a \$2,000 fee, submit to a background check, and find an employer sponsor. Immediate family members could also be protected from deportation for an additional \$500 per person.
- In 2012, a bill was introduced in Vermont to establish a state-run agricultural guest worker program that would allow unauthorized immigrants to register and receive work authorization.⁶³ While the bill eventually passed, the guest worker provisions had been withdrawn.
- In 2011, Utah passed a law allowing unauthorized workers and their immediate family members in the state to apply for work permits if they paid a fine and passed a background check. The law was never implemented.⁶⁴

Foreign Recruitment

Legislators in some states have sought to allow state agencies, employers, or both to recruit new foreign workers from outside the United States. Several of these proposals likely exceed the constitutional authority of the states to negotiate directly with foreign governments.^a

- In 2008, Arizona legislators considered bills to create a guest worker program that would have allowed Arizona employers to recruit and hire Mexican workers.⁶⁵
- Similarly, a 2011 bill in Texas would have created the “Migrant Worker Visa Pilot Project,” which would have allowed the governor to enter into a Memorandum of Understanding with the Mexican government to obtain foreign workers through the existing U.S. immigration system.⁶⁶
- A 2015 bill in Nevada would have authorized the governor to establish a pilot migrant worker visa program and enter into a memorandum of understanding with a foreign government to provide migrant workers to work in agriculture or other industries.⁶⁷
- As part of Utah’s 2011 package of immigration laws, HB 469 would have allowed citizens in Utah to sponsor foreigners to live and work in the state if they assumed financial responsibility for them. The law was never implemented.⁶⁸

a See *Arizona et. al. v. United States*, 567 U.S. 2012. Justice Kennedy’s opinion stated: “The Federal Government’s broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on... its inherent sovereign power to control and conduct relations with foreign nations.” Also see *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

High-skilled Workers

Very few state proposals have focused exclusively on highly skilled workers. Rather than creating new visa classifications, these states sought to build upon the existing legal immigration system and expand the role of the state government to attract additional workers to the state.

- In 2014, then Michigan Gov. Rick Snyder requested that the federal government issue 50,000 EB-2 visas over five years to workers who would live and work in Detroit for at least five years.⁶⁹ Currently, there are 40,000 EB-2 visas available annually for professionals holding an advanced degree or who can prove “exceptional ability.” In Michigan’s case, these visas would be limited to those with advanced degrees or exceptional abilities in science, business, or the arts. Snyder believed that many of these workers already lived in Michigan. He stated, “We believe the pipeline to fulfill and potentially exceed this ‘Detroit Allocation’ already exists amongst foreign nationals legally studying at and graduating from our Michigan universities and colleges, recently arrived refugees with exceptional skills and education levels, and individuals already legally in Michigan on temporary visas—including entrepreneurs willing to invest and create jobs and high-skilled specialists in key industries—including automotive, IT, manufacturing, agriculture and tourism.” The EB-2 visa classification already provides for a “National Interest Waiver” that puts aside the requirement that a foreign worker have an existing job offer and labor certification from the Department of Labor. Snyder proposed that it would be in the national interest to provide Detroit with a special allocation.
- Global Entrepreneur in Residence, or Global EIR, programs are another way of involving states in recruiting and retaining immigrants.⁷⁰ These programs acknowledge that currently there is no start-up visa available for international entrepreneurs and that potential entrepreneurs attempting to obtain H-1B visas for foreign professionals in “specialty occupations” face numerical caps. If they are self-employed, they may not have an employer eligible to sponsor them for a visa. Global EIR programs allow universities—who have access to uncapped numbers of H-1B workers—to sponsor immigrants who will work for the

State Restrictions on Workers: While the majority of these state-visa proposals are intended to increase the supply of workers into a state, other states proposed moving in a more restrictive direction. For example, in 2008, a bill was introduced in Louisiana that intended to give the state additional vetting powers over immigration. It stated: “Louisiana welcomes only immigrants who will be useful to Louisiana’s society... State officials must ensure that immigrants will be useful elements for the state and that they have the necessary funds for their sustenance and for their dependents. Immigrants may be barred from Louisiana if their presence is deemed detrimental to economic or state interests.”⁷¹ It would have required non-U.S. citizens to obtain a state-issued biometric identification card that would allow them to work in the state. Immigrants deemed “detrimental” to the state’s economy would be barred from obtaining an ID. A substitute bill was later introduced clarifying that this would “not apply to undocumented immigrants who obtain a biometric card for the purposes of working in the state.” In 2007, legislators in Mississippi introduced a similar bill.⁷²

university while also growing their businesses and building their resumes so that they may eventually qualify for other visa classifications. Universities in Alaska, Colorado, Missouri, California, and Massachusetts have established Global EIR programs.⁷³ In 2014, Massachusetts passed legislation that created a pilot Global EIR program at two state universities and provided state funding to support it.⁷⁴

NON-GOVERNMENTAL PROPOSALS

Think tanks have also weighed in on the question of state-based visa programs and immigration federalism. Because they are not bound to one state, these organizations have the benefit of providing a broader view of how all 50 states could benefit from a state-based immigration system.

For example, EIG's "Heartland Visas" proposal is intended to assist regions of the country "confronting chronic population stagnation or loss as a means of boosting economic dynamism and fiscal stability" and "areas currently underserved by existing programs, such as the H-1B."⁷⁵ As such, states or localities could "opt in" on a voluntary basis. According to the EIG proposal, Heartland Visas should be "additive to top-line national skilled immigration quotas," and not taken from existing programs. Under this scheme, workers would not be tied to an employer and would compete on the open labor market. They would be eligible for permanent residency. Their ability to stay would be contingent on finding and maintaining a job in an eligible area for a specified period of time. EIG also recommends additional federal and state funding to "smooth assimilation and job finding."

Under Cato's proposal, the federal government would determine the number of visas available and provide security clearances. The visas would be good for three years, would be renewable, and recipients would be allowed to apply for permanent residency after a period of time. Immediate family members of the primary recipient would also be eligible for visas. Workers with these visas would be allowed to work for any employer in the state. Congress could also give states the option of sponsoring unauthorized immigrants or restricting the visas to new foreign recruits. The states would take the lead on many details including: deciding whether the state will participate or not; determining which immigrants from what source countries would be admitted; who has responsibility for worker recruitment and if workers could work throughout the entire state or be restricted to certain areas of the state; whether to enter into collaborations with other states and allow workers to cross state lines for work or not. "States would work with their towns and cities to determine how many immigrants to sponsor or whether to sponsor any immigrants at all," according to the authors of the proposal. "States would assign the visa-holders to specific regions or cities, allowing them to place applicants in the areas where their skill sets are most needed."⁷⁶

The Congressional Response

In the United States, the proposals coming from state legislatures, governors, think tanks, and members of Congress acknowledge the plenary power of the federal government over immigration laws and propose to work through the existing federal immigration system to target workers for a specific state or industry. Only a few of these state proposals were intended to create new state-administered immigration programs, completely independent of the federal government. However, even the proponents of the state-administered programs acknowledged that they may not move forward without explicit permission from the federal government. Many of the state proposals outlined above would have required approval by the federal government and include language stating that state action is not effective unless the federal government enacts legislation that authorizes a temporary worker program or other similar program. Some requested federal “waivers,” although there is no explicit provision of U.S. law that could be waived to allow such state-administered programs to move forward.

Unlike the Canadian and Australian cases, the executive branch of the U.S. government has not been receptive to immigration authority-sharing arrangements with the states. Governors and state legislators met with federal officials to discuss moving forward with their proposals, but they were unable to find the needed support. In 2011, the executive branch of the federal government went even further. In response to the passage of the three immigration-related laws in Utah, the Justice Department, DHS, and State Department filed a lawsuit challenging the enforcement provisions of Utah’s new immigration laws on the grounds these state laws were clearly preempted by federal law. DOJ asserted that the guest worker provisions were also preempted and it would “not hesitate to take the legal action necessary to vindicate the important federal interests in this matter before the laws go into effect.”⁷⁷ In other words, the executive branch was unwilling to work with the states and unwilling to take up their cause with Congress.

“Several members of Congress...have been far more receptive to creating a larger role for the states and have introduced legislation.”

In 2017, the State-Sponsored Visa Pilot Program Act (S. 1040) was introduced by Sen. Ron Johnson (R-WI).^b The bill was introduced again in 2019 as HR 5174 by Rep. John Curtis (R-UT). This legislation acknowledges the issues raised by the states: an inadequate immigration system, the uneven distribution of foreign workers, and labor shortages. Most importantly, unlike previous immigration reform legislation, the State-Sponsored Visa Pilot Program Act acknowledges states have an important role to play in ensuring the immigration system works for employers

b Representative Ken Buck (R-CO) participated in the development of the bill, but never introduced it in the House.

and industries in the states. As Curtis said, "... each state has unique industries and employment opportunities, and our current immigration system doesn't fully recognize these differences. I am excited to take another step towards fixing our broken immigration system by empowering States with the ability to customize a visa program to fit their unique needs."⁷⁸

Like the Canadian and Australian regional immigration programs, this bill would create a new "W" visa classification for foreign workers, and visa recipients would be distributed to participating states. Each participating state would be initially allotted a base of 5,000 W visas and 245,000 additional W visas would be distributed to states based on the populations of participating states. The number of W visas could be adjusted in subsequent years using a formula that would consider states' economies as well as their compliance with the program. W visa beneficiaries would not be tied to a single employer. No one admitted through the program would be eligible for federal benefits. The W visas would initially be good for three years and would be renewable, and W visa holders could eventually adjust to permanent legal status. The states could choose to apply W visas to unauthorized immigrants, new foreign workers, or some combination of both. Spouses and children of W visa holders could be issued visas that would not be counted against the numerical cap.

In order to maintain their W visa allotment, states must maintain overstay rates below 3%. If they exceed the 3% overstay limit, future W visa holders from that state would be required to pay a \$4,000 bond that would be returned to them after they leave the country. Moreover, the state's allocation would decline 50% the following year. If a state maintained an overstay rate of 3% or higher for three consecutive years, that state would be barred from sponsoring future migrants. Conversely, the numerical cap would increase 10% for each year the overstay rate remains below 3%. Spouses and children of W visa holders would not be counted against the numerical cap.

Within these broad parameters, states would have the authority to create additional criteria for the program, and the plan would have to be approved by state legislatures and then submitted to DHS for final approval. The state plans could include additional incentives for compliance, additional eligibility criteria for both workers and employers, and geographic restrictions on where workers could work. States could also choose to enter into compacts with other states, allowing workers to cross state lines. In other words, the states would have a great deal of discretion to shape the program to meet their own political and economic needs.

Under this legislation, some states would likely choose to focus their plan on unauthorized immigrants in the state. The relatively large initial number of visas, the fact that renewals do not count against the cap, and the potential escalations could result in a significant segment of the unauthorized population being legalized. Others would likely focus on additional agricultural workers, high-tech workers, or some combination of skilled and unskilled labor. Perhaps most importantly, participating states could change the number of new workers and how their share of visas is allocated in response to changes in the economy and labor force, making immigration nimbler than the current system.

Issues to Consider

Despite these past efforts, the legislative appetite for state-based visas seems to have dropped off. There have not been any relevant new bills filed in state legislatures since 2015 and the State Sponsored Visa Pilot Program Act of 2019 has no House or Senate co-sponsors as of May 2020 and appears unlikely to move forward. This may be due to the lack of support from the federal government or any movement on legislation in Congress that would permit such state-based programs to move forward. Further, the overall tone of the national immigration debate has shifted dramatically, as then-candidate Donald Trump ran on a hardline immigration enforcement platform and has made immigration restriction a centerpiece of his presidency. The COVID-19 pandemic has resulted in additional restrictions on immigration, and high unemployment numbers challenge arguments in favor of increases in immigrant workers. Under these circumstances, pressure from the states is unlikely to have a significant impact on Congress's will to take up immigration reform.

If the United States were to move forward with a state-based visa program at some point in the future, the federal government would clearly remain solely responsible for the admission of migrants, and federal laws regarding inadmissibility would apply. However, there remain large outstanding questions about the role of the states in this system.

Canada and Australia offer models from which the United States could draw. Both countries' national immigration systems include a number of visas available for the regions and provinces, and subnational governments in those countries play a significant role determining how they wish to use their allotment of visas and who will be allowed to benefit from the program. Employers and even family members are also able to nominate migrant workers to fill regional needs. Regional immigrants arrive in Canada as permanent residents; regional workers in Australia are on provisional visas, but they are able to adjust to permanent residency after a period of time.

There are numerous examples of the devolution of immigration authority to the states within U.S. law as well. In addition to the visas for investors and doctors described above, welfare reform laws provide another example. While federal welfare reform laws generally restrict certain legal immigrants' eligibility for federal welfare benefits, federal laws have also given states several options to broaden eligibility. States can choose to use federal Children's Health Insurance Program funding to provide prenatal care to pregnant women regardless of immigration status and can choose

whether to provide medical coverage through Medicaid and CHIP to lawfully pregnant women and children. Some states have taken both options, some have taken one, and several have chosen neither option.⁷⁹ In this way, the states choose whether expanding benefits to immigrants is in their best interest.

Outside of immigration policy, there are many examples of how states shape laws and policies to attract individuals, businesses, or industries. The states regularly provide tax benefits to attract business and investment. The recent competition for the new Amazon headquarters provides an example. Two hundred thirty-eight cities submitted proposals to bring Amazon's second headquarters to their communities, with state and local governments willing to make great concessions in return for the benefits created by hosting the Amazon facility. Several cities' bids included tax incentive packages that exceeded \$7 billion.⁸⁰ As Cato has suggested, a state-designed immigration system could lead to similar healthy competition for foreign workers, resulting in economic growth, higher wages, higher tax revenues, and strengthened housing markets.⁸¹

Done poorly, a patchwork of 50 different immigration policies could exacerbate uneven population and economic disparities, particularly if those designing the state policies represent only one sector, such as the business sector, and do not incorporate the voices of labor, environmental groups, faith-based organizations, and other important sectors of civil society.

The United States has the opportunity to write another chapter in immigration federalism and reform our immigration laws in a way that better serves the needs of states and localities. In recent years, immigration reform has seemed impossible, but state-based visas represent a new way forward. Before proceeding, there are several issues that policymakers at national and state levels must tackle to ensure they create a thoughtful, rational, and successful program.

Finding the right balance between state and federal authority will be critical to success, however. At one extreme is the current system, which leaves the states with very little ability to shape an immigration system to be responsive to their individual needs. At the other extreme, too much state independence could result in 50 different immigration policies—a situation that has already proven to be untenable.

QUESTIONS FOR POLICYMAKERS

Creating a new, state-based visa classification would require action from Congress. While there are some proposals currently introduced, there remain many details to be ironed out, especially around which responsibilities will be delegated to the states. These decisions will determine if any potential newly created system is a true partnership between the federal government and participating states.

- **Size of the program:** To date, the state and federal bills and proposals include the creation of a new temporary worker program or the expansion of an existing guest worker program. Several proposals would also allow temporary workers to adjust to permanent residency after a period of time. Each of these options raise questions Congress could address regarding the number of visas available and how they would be allocated.

- If state-based visas will be an additive element to the current immigration system, how many visas will be made available to the states, can the number be adjusted in subsequent years, and how will the federal government allocate the visas among the states?
- If state-based visas are part of the current allotment of temporary or permanent visas, how will current numbers be reallocated or reduced to accommodate state-based visas, and will unused visas be redistributed?
- The current allocation of green cards has already resulted in lengthy backlogs, and new adjustments by state-based visa holders would further oversubscribe the numerical caps in several employment-based priorities unless additional visas are added.
- **Visa characteristics:** There are also numerous details regarding eligibility requirements, visa duration, adjustment to permanent residency, eligibility of family members, fees, and compliance and enforcement to be determined, including whether to mandate these visa characteristics within federal law or grant the states the authority to tailor these criteria to address their needs.
- **Worker recruitment:** Another issue is how to pair workers with employers in the states. The Canadian and Australian systems allow certain entities to nominate workers for the regional visas. In the United States, state government agencies, employers, or nonprofit organizations could be empowered to petition for particular workers. Alternatively, state governments could be allowed to advertise their visa programs in foreign countries and recruit workers who could either apply directly or be matched with an employer who files a petition. Federal lawmakers could prescribe recruitment processes or allow the states to design a worker recruitment scheme that is best suited for their labor market.
- **State compacts:** Will states have the ability to enter into compacts with other states, allowing foreign workers on state-based visas to move across borders within a region? Many metropolitan areas cross state lines and draw from a workforce in multiple jurisdictions. These kinds of compacts could recognize those interstate realities.
- **Compliance and enforcement:** A new state-based visa program might include mechanisms to ensure states, employers, and workers are complying with the program. This could be done through a combination of federal and state data collection and analysis as well as penalties for noncompliance. It will likely be necessary to have a reliable system for tracking visa holders' employment status, state of residency, arrivals and departures from the country, and any other conditions of compliance. Other proposed measures have included requiring workers to pay a bond, or withholding a share of employee's paychecks, and returning it upon timely departure from the United States.
- **Evaluation:** The program should be evaluated periodically to determine if it is meeting its stated objectives for the states. The federal government could work with participating states to create performance metrics, data collection methods, and an evaluation plan. This process could also consider which state government offices would work with the federal government on these issues.

QUESTIONS FOR THE STATES

If a state-based visa program were to be adopted, the states would likely be granted new and unprecedented authorities. Participating states must be prepared to take on a critical new role and address important issues including:

- **Program objectives:** States would need to determine how to use their allotment of visas to benefit the state. Visas could be used to attract additional high-skilled workers, investors, entrepreneurs, lesser-skilled workers to meet agricultural, other labor needs, or some combination of the above. States could decide that population growth, increased diversity, or a stable housing market are key objectives. States could recognize that immigrant workers are already living and working in the states and allow current unauthorized workers to enter the program if they meet the eligibility criteria. States would need to consult multiple constituencies, including business, organized labor, immigrant rights organizations, faith-based organizations, environmental groups, and others with a stake in the program and balance the needs and concerns of the various groups.
- **Labor market needs:** Determining the labor needs of the state is a critical question. As EIG states, “Each community opting in should be able to welcome enough visa holders to meaningfully improve its economic trajectory, while not overwhelming the local community’s ability to integrate newcomers.”⁸² States must determine who will make decisions about how many workers a state needs and where those workers are most needed. They also need to consider what data is needed to make those decisions and how will that data be obtained. Consistent, reliable data collection will be necessary to evaluate each program in order to confirm that it is successfully matching workers to the labor market. States need to determine how to best evaluate their labor needs and whether final decisions will be made by elected officials, state agencies, or a committee or task force.
- **Program design:** Once the objectives and the numbers are clear, there are likely many details regarding the contours of the state’s visa program to be decided, depending on how much authority Congress has delegated to the states. They may choose to include incentives for foreign workers to remain and settle in the state. States may also make decisions regarding the inclusion of integration efforts such as English and civics classes, and if they will charge additional fees.^c Similar to program objectives, states must determine who will be responsible for decisions regarding the design of the program and how the program will be evaluated.

c For example, a 2009 proposal from Washington state (HB 1896) would have offered training programs for essential workers with the goal of “making these workers better able to integrate themselves into the workforce.” A 2012 Kansas bill (HB 2712) would have required the state to develop a program to give grants to community or faith organizations to provide education and outreach to guest workers.

Conclusion

As this report has shown, states' dissatisfaction with the lack of immigration reform in Washington has prompted them to draft their own immigration legislation. In recent decades, various state legislators and several members of Congress have proposed state-based immigration programs that would increase the number of foreign workers available to participating states and give them more authority to design an immigration system that is responsive to their needs. Broad-based immigration reform has proven to be extremely difficult. While policymakers will need to address multiple issues before proceeding, state-based visa can serve as a major component of changing the system.

The potential benefits of such a system make these efforts worthwhile. In addition to meeting the specific needs of each state's labor market and economy, a state-based visa program could also introduce increased flexibility into the broader immigration system. If the country experiences a recession, for instance, a state-based proposal would allow states with specific needs for foreign labor to secure these workers to assist with economic recovery efforts. In contrast, states with significant levels of unemployed workers would not issue more visas, allowing them to focus on helping their existing workers find new employment. As a result, it is incumbent on Congress to overhaul an ossified immigration system and ensure states can play a more active role in shaping their economies through a state-based visa system.

Creating a new state-based visa program will not be easy. Congress must address many issues regarding the characteristics and size of the program as well as the nature and scope of authority delegated to the states. Similarly, the states must determine how to measure their labor needs and design an immigration program that best suits their economies and populations. Given that these changes would likely form part of a broader reform effort, they would have to move through a heavily polarized Congress that has failed to pass immigration reform for multiple decades. Nevertheless, Congress must take this step to ensure that the country has a 21st century immigration system that meets the complex needs of all 50 states.

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