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The H-2A Non-Immigrant Visa Program: Weakening Its Provisions Would Be A Step Backward for America's Farmworkers

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COMMENT

THE H-2A NON-IMMIGRANT VISA PROGRAM: WEAKENING ITS PROVISIONS WOULD BE A STEP BACKWARD FOR AMERICA'S FARMWORKERS

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I. INTRODUCTION

The federal H-2A non-immigrant temporary visa program, which was established by the Immigration and Nationality Act of 1952, as amended by the Immigration Reform and Control Act of 1986, allows employers who are unable to find sufficient domestic agricultural labor to apply for permission to recruit and employ foreign workers, usually from Mexico and the Caribbean, for temporary employment in the United States.¹ H-2A workers are temporarily admitted to the United States under 8 U.S.C. § 1101(a)(15)(H)(ii)(a), which classifies these workers as aliens "having a residence in a foreign country which [they have] no intention of abandoning who [are] coming temporarily to the United States to perform agricultural labor or services."² Agricultural employers who anticipate a labor shortage may petition the United States Attorney General for permission to temporarily import foreign workers.³ The Attorney General may not approve an employer's petition to import foreign workers unless there is an insufficient number of domestic migrant workers available and unless the employment of an alien for the particular job will not adversely affect the wages and working conditions of similarly employed domestic workers.⁴

Once the Secretary of Labor certifies "that there are no domestic workers ready, willing, and able to perform the work and that there are no potentially adverse effects on domestic workers that would result from hiring temporary foreign labor,"

1. *Orengo Caraballo v. Reich*, 11 F.3d 186, 190 (D.C. Cir. 1993).

2. 8 U.S.C. § 1101 (1994).

3. *Jean v. Dep't of Labor*, No. CIV.A.89-0611-OG, 1990 WL 515163, at *1 (D.D.C. Jan. 9, 1990).

4. *Id.*

the Attorney General may then issue the visas.⁵ According to federal law, H-2A employers must provide certain benefits to all temporary agricultural laborers, including, for example, housing and transportation.⁶ They are also required to pay workers for at least three-quarters of the season at a rate higher than the prevailing average rate paid for that type of work.⁷ Growers using H-2A labor are also required to hire any domestic farmworkers who apply for the job during the first half of the season.⁸ Many United States farmers do not want to use the H-2A program to recruit foreign labor. They claim the program is too restrictive and too costly.

This Comment examines the federal H-2A non-immigrant visa program and several proposals that have recently been presented to Congress in an attempt to weaken the provisions of this program. This Comment argues that weakening the H-2A program would worsen the already poor conditions that domestic farmworkers must face everyday and would also remove the minimal protections afforded to temporary foreign workers who come to the United States under this program.

Part II of this Comment focuses on the historical background that led to the creation of the H-2A visa program. Part III examines problems faced by domestic farmworkers, problems stemming from the H-2A visa provisions, and farmers' preferences for illegal agricultural laborers. Part IV discusses various proposals to amend the H-2A program, including the Gallegly Amendment, the H-2C visa program, and the Agricultural Job Opportunity Benefits and Security Act. This Comment concludes that any weakening of an already weak H-2A visa program would be extremely detrimental to both domestic and temporary foreign farmworkers.

5. *Martinez v. Reich*, 934 F.Supp. 232, 234 (S.D. Tex. 1996).

6. *Farmer v. Employment Sec. Com'n of N.C.*, 4 F.3d 1274, 1276 (4th Cir. 1993).

7. *See id.*

8. Lisa Shuchman, *Florida's Next Mexican Import Could Be More Farmworkers*, PALM BEACH POST, Mar. 10, 1996, at 1E.

II. HISTORICAL BACKGROUND

A. *The Bracero Accord*

The H-2A temporary foreign worker program has its roots in programs such as the Bracero Accord, a temporary agricultural worker program, which was established more than thirty years ago between Mexico and the United States and was "designed to fulfill the increasing labor demand in the [United States] and provide an outlet for the abundant labor supply in rural Mexico."⁹ The Bracero Program was created to counteract World War II labor shortages; it "brought over 400,000 temporary Mexican workers to the United States to work in agricultural areas."¹⁰ Basically, Mexico supplied the labor to the United States, and the United States established standards for wages and working conditions of temporary guestworkers.¹¹ In 1964, the Bracero Accord was no longer in effect.¹² By this point, 4.5 million Mexicans worked as braceros in the United States and by the late 1950s, more than 400,000 had migrated each year.¹³

B. *The Immigration and Nationality Act of 1952*

The Immigration and Nationality Act of 1952 delegated regulation of the importation of foreign workers to the Attorney General and authorized the Attorney General to approve visas to temporary foreign workers if unemployed persons capable of performing agricultural or non-agricultural labor could not be found in the United States.¹⁴ This process was called the H-2

9. Victoria Lehrfeld, Comment, *Patterns of Migration: The Revolving Door from Western Mexico to California and Back Again*, 8 LA RAZA L.J. 209, 218-19 (1995). The Spanish term "bracero" means "arm man" in English.

10. Edward J. Williams, Ph.D., *The Maquiladora Industry and Environmental Degradation in the United States-Mexico Borderlands*, 27 ST. MARY'S L.J. 765, 771 (1996).

11. Lehrfeld, *supra* note 9, at 219.

12. Leah B. Ward, *Desperate Harvest: N.C. Growers' Trade in Foreign Farm Workers Draws Scrutiny*, THE CHARLOTTE OBSERVER, Oct. 30, 1999, available at <http://charlotte.com/obsesrver/special/immigrant/103fuentes.htm> (last visited Jan. 14, 2000) ("Congress shut down the bracero program in 1964 after Edward R. Murrow's legendary 'Harvest of Shame' television documentary exposed squalid living conditions and abuse in Florida.")

13. Lehrfeld, *supra* note 9, at 219.

14. AFL-CIO v. Brock, 835 F.2d 912, 913 (D.C. Cir. 1987).

program.¹⁵ Domestic employers were prohibited from paying temporary foreign workers below an hourly adverse effect wage rate (AEWR).¹⁶ This wage level was designed to approximate the rates that would have existed if there had not been an increase in labor supply from foreign labor.¹⁷ Employers were permitted to hire foreign labor only if no domestic workers applied for positions at these rates.¹⁸

C. *The Immigration and Reform Control Act*

The United States government was pressured by powerful lobby groups, such as the Federation for American Immigration Reform to restrict immigration in the 1970s, and this resulted in the 1986 Immigration Reform and Control Act (IRCA).¹⁹ The Act, which "crystallized the distinction between agricultural and non-agricultural workers," divided the H-2 program into two parts: the H-2A program for agricultural workers and the H-2B program for non-agricultural workers.²⁰ The H-2A program was designed "to assure [employers] an adequate labor force on the one hand and to protect the jobs of citizens on the other."²¹

IRCA, however, has proven difficult to enforce, namely against employers benefiting from undocumented migrant labor.²² Some employers, in order to avoid fines imposed by IRCA for hiring undocumented workers, have relied on farm labor contractors who recruit foreign workers and vouch for their documented status.²³ Because contractors have to bear the burden of any fines imposed, it makes no difference to domestic employers if the workers are documented or not.²⁴

Under 20 C.F.R. §§ 655.100-655.101, an agricultural employer must submit its application for H-2A certification no less than sixty days prior to the first day on which the employer

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Lehrfeld, *supra* note 9, at 219-20.

20. *Martinez v. Reich*, 934 F.Supp. 232, 237 (S.D. Tex. 1996).

21. *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977).

22. Lehrfeld, *supra* note 9, at 220.

23. *Id.*

24. *Id.*

requires the services of H-2A workers.²⁵ The application must include a job offer that sets forth all of the material terms and conditions of the proposed employment, including those relating to wages, working conditions, and other benefits.²⁶ The offer must also include the dates for which employment is required and the number of workers needed.²⁷ The Regional Administrator will notify the applicant, within seven days, whether the application is accepted for consideration.²⁸ If the applicant is informed that the application does not comply with the regulations, the applicant will have five days in which to file an amended application.²⁹ A copy of the application must also be submitted to the employer's local public employment office, which will use the job offer portion of the application to prepare a local job order and begin recruiting domestic workers in the area of intended employment.³⁰ Following the acceptance of the employer's application for consideration, domestic workers are recruited through an interstate system.³¹ Only if no domestic workers are available is an employer's application for H-2A workers certified.³²

Workers arrive expecting a guaranteed wage set by the government and payment of at least three-quarters of their contract.³³ "Workers can earn more by accepting a piece rate, and most do."³⁴ The longest contracts extend from April through November.³⁵ Workers can earn \$9,600 if they stay until the end of the contract, although many earn a lot less because work is not consistently available.³⁶

25. Employees' Benefits, 20 C.F.R. §§ 655.100-655.101 (1999).

26. Employees' Benefits, 20 C.F.R. § 655.100(a)(1) (1999).

27. Employees' Benefits, 20 C.F.R. § 655.101(b)(1) (1999).

28. Employees' Benefits, 20 C.F.R. § 655.101(c)(2) (1999).

29. *Id.*

30. Employees' Benefits, 20 C.F.R. § 655.101(c)(4) (1999).

31. Employees' Benefits, 20 C.F.R. § 655.101(c)(2) (1999).

32. Employees' Benefits, 20 C.F.R. § 655.100(a)(4)(ii) (1999).

33. Ward, *supra* note 12. In 1999, the hourly rate was set at \$6.54 per hour. Many workers have no choice but to apply for H-2A jobs; they earn about \$20 per week in their countries, as compared to about \$300 per week in the United States.

34. *Id.* Piece rate tomato pickers, for example, would get paid by the bucket, rather than by the hour.

35. *Id.*

36. *Id.* Many also do not finish their contracts.

III. ANALYSIS OF THE H-2A NON-IMMIGRANT VISA PROGRAM

A. *Problems Faced By Domestic Farmworkers*

Most domestic farmworkers face deplorable working conditions. Many of these workers are not paid decent wages and lack proper healthcare and retirement benefits; others live in sub-standard housing, work with dangerous machinery, handle hazardous chemicals, and work long hours.³⁷ Farmworkers have also endured lack of job security, isolation from the rest of the community, lack of access to community services, and “a powerlessness to change the conditions in which they work and live.”³⁸ Even worse, Congress has excluded agricultural laborers from protection by the National Labor Relations Act, legislation based on a policy of equalized bargaining power between employees and their employers.³⁹ Many times then, agricultural workers are at the mercy of their employers, and some are even placed in abusive situations from which it is difficult to escape.⁴⁰ Many farmworkers ultimately enter the employment relationship in a condition of dependency on their employers.⁴¹

Albeit many studies have demonstrated a surplus of agricultural workers in the United States, a large number of domestic workers are not recruited for agricultural jobs for which foreign H-2A laborers have been requested.⁴² Thus, domestic

37. Michael H. LeRoy & Wallace Hendricks, *Should “Agricultural Laborers” Continue to be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489 (1999).

38. Vivian Patino, *Legal Regulation of Farm Work in the United States*, 3 KAN. J.L. & PUB. POLY 37 (1994).

39. LeRoy & Hendricks, *supra* note 37, at 490-91. The exclusion of farm laborers was meant to benefit a vulnerable fixture in the American economy—the family farmer.

40. See *U.S. v. Booker*, 655 F.2d 562, 562-64 (4th Cir. 1981). Two domestic migrant workers who worked in a labor camp in North Carolina were taken to a camp in Florida having been promised free transportation and continuous work. When they arrived in Florida, they discovered that the employment was intermittent and that they would be charged for their meals and for their transportation from Florida. Their wages were withheld, and they were forbidden to leave the camp until they had paid any debts allegedly owed to the camp operator. The operator repeatedly threatened workers at the camp with serious injury or death if they attempted to leave without paying their debts, and he followed up his threats with severe beatings and assaults with firearms. The two workers were able to escape. The camp operator and his two lieutenants were convicted of kidnapping and carrying away two persons with the intent to hold them as slaves.

41. LeRoy & Hendricks, *supra* note 37, at 503.

42. *Guest Farm Worker Program Ineffective in Stemming Illegal Immigration*, IG

workers are left competing with H-2A workers for jobs, with domestic workers being passed over in favor of H-2A workers who are less costly to farmers.

B. Problems with the H-2A Visa Program

The H-2A visa program provides only minimal protections and affords only some benefits to foreign workers issued temporary visas. For example, farmers are required to provide these workers with housing and pay for transportation to the job site, and are required to pay them for at least three-quarters of the season at a rate higher than the prevailing average rate paid for that type of work.⁴³ However, farmers participating in the H-2A program must provide family housing to their temporary agricultural laborers only when such free housing is the "prevailing practice in the area and occupation of intended employment."⁴⁴ The prevailing practice among North Carolina farmers, for example, is to offer free housing only to workers. The farmers generally do not offer free housing to non-working family members, whether these persons are spouses, children, or anyone else who is related to the worker.⁴⁵ Foreigners who legally come to the United States under the H-2A visa program are exploited even more than those who come illegally.⁴⁶ They are bound by the H-2A visas, which allow them to work only for the growers who recruited them.⁴⁷ If they are fired, they cannot switch jobs and are deported.⁴⁸

In exchange for work on an H-2A farm, temporary foreign workers give up considerable control over their lives.⁴⁹ Most of these workers do not see their contracts until they arrive in the states where they will work.⁵⁰ Unlike migrant workers, H-2A

Says, 64 DAILY LABOR REPORT NEWS (BNA), Apr. 3, 1998, at A-4 ("Only two percent (252 out of 10,134) of the agricultural job openings for which growers had requested foreign workers were filled by domestic workers.").

43. *Farmer v. Employment Sec. Com'n of N.C.*, 4 F.3d 1274, 1276 (4th Cir. 1993).

44. *Id.*

45. *Id.* at 1282.

46. *New York's Harvest of Shame/First of a Two-Part Series on the Plight of Farm Workers*, N.Y. DAILY NEWS, Aug. 1, 1999, available at 1999 WL 17239765.

47. *Id.*

48. *Id.* H-2A workers can be fired without cause. The author of this article compares the conditions of H-2A workers to that of indentured servants.

49. Ward, *supra* note 12.

50. *Id.*

workers are not able to choose their employers.⁵¹ Also, H-2A provisions do not let these workers negotiate wages and hours.⁵² Furthermore, they must depend on their employers for everyday transportation and for loans when they run low on cash.⁵³

Congress, after recognizing farmworkers' need for basic protection from exploitation, enacted the Migrant and Seasonal Worker Protection Act ("AWPA" or "the Act") in 1983.⁵⁴ The Act affords "whistleblower protection" to migrant farmworkers who are retaliated against for complaining about substandard conditions; it offers a more effective remedy than administrative enforcement.⁵⁵ H-2A workers are not even offered this basic protection. Unlike migrant workers, they are not covered by the Act.⁵⁶

Many domestic farmers complain that the H-2A visa program is too restrictive. Some have tried to avoid the process of recruiting domestic workers by altering job terms so that no domestic workers apply. Others continue to import illegal, or undocumented workers. In fact, part of the labor market competition comes from the 600,000 farmworkers who are currently illegal aliens; fifty-seven percent of all migrant farmworkers in the United States are illegal aliens.⁵⁷ Therefore, legal farmworkers are being passed over in favor of illegal workers in an already crowded labor market, and illegal farmworkers, because of their unlawful presence in the United States, are being exposed to severe exploitation.⁵⁸ Some illegal farmworkers have faced, for example, extreme working conditions, have been forced to work against their will, have been enslaved, and have been forced into prostitution.⁵⁹

51. *Id.* They are assigned to employers by growers' associations in each state.

52. *Id.*

53. *Id.* Transportation in this sense means going from the farm to places like church and stores.

54. Jane Y. Lapp, *The Migrant and Seasonal Agricultural Worker Protection Act: "Rumors of My Death Have Been Greatly Exaggerated,"* 3 SANJALR 173 (1993).

55. *Id.* at 174.

56. Ward, *supra* note 12.

57. LeRoy & Hendricks, *supra* note 37, at 500.

58. *Id.*

59. See Jacque Crouse, *Plea Made in Slave Labor Case*, SAN ANTONIO EXPRESS-NEWS, Sept. 9, 1997, at 2B, available at 1997 WL 13204077 (having threatened to beat farmworkers and forcing them to work to pay off debts, defendants pleaded guilty to conspiracy, harboring undocumented immigrants, and willful failure to maintain employment); Mike Clary, *Sixteen Charged with Forcing Women into Prostitution*, L.A.

C. *The 1997 GAO Report*

In 1997, the United States General Accounting Office (GAO) conducted a study to review various aspects of the H-2A program. It addressed the likelihood of a widespread agricultural labor shortage and its impact on the need for non-immigrant guestworkers as well as the H-2A program's ability to meet the needs of agricultural employers while protecting both domestic and foreign agricultural workers.⁶⁰

GAO concluded that "[a] sudden widespread farm labor shortage requiring the importation of large numbers of foreign workers is unlikely to occur in the near future."⁶¹ Those farmers who have sought workers through the H-2A program have been generally successful in obtaining foreign agricultural workers on both a regular and an emergency basis.⁶² It also found that the Department of Labor does not always process applications on time, which makes it difficult to ensure that employers will be able to obtain workers when they need them.⁶³ Further, the Department of Labor does not collect the data necessary to meet regulatory and statutory deadlines for both regular and emergency applications.⁶⁴ Farmers complain to the Department of Labor that the weather and other factors make it hard to

TIMES, April 24, 1998, at A-4, available at 1998 WL 2421104 (forcing illegal immigrant women and girls to work as prostitutes in Florida and South Carolina).

60. *H-2A Agricultural Guestworker Program—Changes Could Improve Services to Employers and Better Protect Workers*, (U.S. GAO Rep. Dec. 31, 1997), 1997 WL 835214, at *3.

61. *Id.* at *4 ("Although many farmworkers—an estimated 600,000—are not legally authorized to work in the United States, INS does not expect its enforcement activities to significantly reduce the aggregate supply of farmworkers. INS expects limited impact from its enforcement activities because of the presence of fraudulently documented farmworkers and INS' competing enforcement priorities. In fiscal year 1996, less than five percent of the 4,600 INS worksite enforcement efforts were directed at agricultural workplaces." Only if INS decided to target the illegal farmworkers would there be a sudden farm labor shortage in the United States.)

62. *Id.* at *5 ("During fiscal year 1996 and the first nine months of fiscal year 1997, the [Department of] Labor approved ninety-nine percent of all H-2A applications.")

63. *Id.* at *6-7 (explaining that both employers and Department of Labor officials have difficulty meeting time frames specified by law and regulation).

64. *Id.* at *7 (explaining that because the Department of Labor does not collect key program management information, it is unable to determine the extent and cause of missed time frames. In addition, the multiple agencies and levels of government implementing the program could result in redundant oversight and confusion for both employers and workers).

estimate sixty days in advance when workers will be needed.⁶⁵

GAO found that the Department of Labor's handbook on the H-2A labor certification process includes information that is outdated, hard to understand, and incomplete.⁶⁶ It concluded that H-2A worker protection provisions are difficult to identify and hard to enforce.⁶⁷ H-2A guestworkers may, for example, be less aware of United States laws and protections than domestic workers, and they are unlikely to complain about worker protection violations, such as the three-quarter guarantee.⁶⁸ They may fear they will lose their jobs or will not be hired in the future if they complain.⁶⁹ Also, "the three-quarter guarantee is only applicable at the end of the contract period, and H-2A workers must leave the country soon after the contract ends."⁷⁰ Therefore, monitoring the three-quarter guarantee is difficult because workers cannot be interviewed after they return to their homelands in order to confirm their work hours and earnings.⁷¹ This could possibly create an incentive for some employers to request contract periods longer than necessary.⁷² Finally, the Department of Labor regulations guarantee wages for the first week of work to domestic workers who are referred to employers through the interstate clearance system unless the employers inform the state employment service of a delay in the date of need at least ten days in advance; "however, no provisions are made to provide the same treatment to H-2A workers."⁷³ This results in a potential for personal hardship for foreign H-2A workers.⁷⁴

65. *Id.* at *8.

66. *Id.*

67. *Id.*

68. *Id.* at *9 (describing that the three-quarters requirement refers to the fact that guestworkers must be guaranteed wages equivalent to at least three-quarters of the amount specified for the entire contract period).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* The employer is not obligated to honor the three-quarter guarantee or pay for the worker's transportation home if a worker leaves the worksite before the contract period ends. Also, "if a worker abandons the contract, it can be very difficult to determine whether he or she has left the country or is instead remaining and taking jobs from domestic workers."

73. *Id.*

74. *Id.*

D. *Farmers' Perspectives*

United States farmers continue to prefer an illegal workforce over both domestic and H-2A visa workers.⁷⁵ The Department of Labor conducted a study from 1995 to 1996 to determine the department's effectiveness in ensuring that United States agricultural workers fill jobs before farmers are allowed to hire temporary foreign workers.⁷⁶ The Department of Labor's Inspector General found that only 18,000 H-2A crop workers were certified to work in the United States during 1996, while 600,000 workers were illegal immigrants.⁷⁷ The Inspector General concluded that the H-2A certification process is ineffective, as "[i]t is characterized by extensive administrative requirements, paperwork and regulations that often seem dissociated with [the Department of Labor's] mandate of providing assurance that American workers' jobs are protected."⁷⁸

Farmers prefer to hire temporary foreign agricultural workers over domestic workers because they are less expensive, easier to manage, and it is more probable that they will not sue their employers.⁷⁹ Temporary foreign farmworkers generally do not travel with their families; therefore, they are easier to house and supervise.⁸⁰ Also, because of their extreme economic needs, they tend to endure more manipulation and worse working conditions than do domestic workers.⁸¹

IV. PROPOSED AMENDMENTS TO THE H-2A PROGRAM

United States farmers argue that the H-2A program puts an economic strain on the farm industry.⁸² They also argue that there are not enough domestic agricultural workers available to fill their needs.⁸³ However, studies indicate that there are more

75. *Guest Farm Worker Program Ineffective in Stemming Illegal Immigration*, IG Says, *supra* note 42.

76. *Id.*

77. *Id.* This means that thirty-seven percent of the agricultural workforce is made up of undocumented workers.

78. *Id.*

79. Gail S. Coleman, Note, *Overcoming Mootness in the H-2A Temporary Foreign Farmworker Program*, 78 GEO. L.J. 197 (1989).

80. *Id.* at 199.

81. *Id.* at 199-200.

82. See Shuchman, *supra* note 8.

83. See *id.*

than enough legal farmworkers in the United States to meet farmers' needs.⁸⁴ Many farmers have tried to circumvent the process of recruiting domestic workers altogether. Some farmers have proposed amending the H-2A non-immigrant visa program to ease the restrictions set by the program.⁸⁵ In essence, they want what has been termed the "H-2A lite" program, which would allow growers to simply attest that there is a shortage of labor, and foreign workers would be granted work visas; it would also allow growers to declare the prevailing average wage for the work being offered.⁸⁶

A. *The Gallegly Amendment*

Several proposals have been made to amend the H-2A provisions. One proposal was the Gallegly Amendment of 1995.⁸⁷ This amendment would have established a new foreign worker program for agriculture without any of the protections contained in the H-2A program.⁸⁸ The Gallegly Amendment had the support of many agriculture businesses in different states.⁸⁹ However, it was defeated in 1996 in the United States House of Representatives.⁹⁰

84. *See id.*

85. *See Evelyn Mattern, The Farmworkers' Struggle Leads to Mt. Olive*, NEWS AND OBSERVER, Apr. 8, 1999, at A19, available at 1999 WL 2745918 (stating that Mt. Olive, Co. is one of the many United States farms whose owners have lobbied to weaken what worker protections the current H-2A program provides).

86. Shuchman, *supra* note 8.

87. *Rural Communities: House Rejects Guest Workers*, RURAL MIGRATION NEWS, (Philip Martin, J. Edward Taylor, & Michael Fix, eds., Apr., 1996), at http://migration.ucdavis.edu/Rural-Migration-News/Rural_MN_April_96.html ("In February 1995, the National Council of Agricultural Employers released a proposal for a supplementary foreign worker program to fill temporary or seasonal U.S. jobs."). The following year, Representative Elton Gallegly unveiled the proposal as the Temporary Agricultural Worker Amendments of 1995, which were supposed to provide a less bureaucratic alternative for the admission of temporary agricultural workers.

88. *Id.* The proposal, also referred to as the Pombo-Gallegly proposal after Representative Richard Pombo, another proponent of the amendment, was an effort to extend the procedure used to admit H-1B temporary foreign professionals to agriculture. "Under the H-1B program, nonfarm U.S. employers 'attest' that they are paying prevailing wages and satisfying other conditions so as to have no adverse effects on similar U.S. workers with at least a B.A. degree or equivalent. . . . [T]he U.S. Department of Labor relies on complaints from U.S. workers and other employers to investigate charges that employers are violating their attestations. H-1B foreign workers can remain in the U.S. for up to six years."

89. *Id.*

90. *Id.* Some representatives argued that the plan would basically allow all foreign

B. *The H-2C Proposal*

Another proposal is the H-2C program, which would create a two-year pilot, non-immigrant work program that would admit foreign agricultural workers to perform temporary or seasonal agriculture services lasting less than ten months.⁹¹ Under this program, there would be no detailed requirements for employer job orders, and the orders could be filed as late as five days before the date the workers are needed.⁹² The program would also create a trust fund, where employers would pay Social Security Tax (FICA) and Federal Unemployment Tax (FUTA), plus twenty-five percent of workers' wages into this fund, which would be used to pay expenses of the H-2C program.⁹³

Many farmers have supported the H-2C program, since it imposes fewer costs and obligations and provides farmers with more flexibility.⁹⁴ However, farmworker advocates have opposed the program, even on a pilot basis; they argue that this program would increase the number of foreign workers in the United States, which would lead to a critical shortage of jobs for domestic workers.⁹⁵ Also, because no labor shortage would exist, farmers would not be forced to increase wages; depressed wages would be maintained for all farmworkers.⁹⁶

C. *The Agricultural Job Opportunity Benefits and Security Act*

A third fairly recent proposal to amend the H-2A visa provisions is the Agricultural Job Opportunity Benefits and Security Act, which would replace the H-2A program with a

workers to come to the United States. The Clinton administration also opposed the program; it feared that it would increase illegal immigration, reduce job opportunities and depress wage and work standards for domestic workers.

91. *H.R. 2377, Other Guest Worker Issues*, LATINO NEWS, Feb. 27, 1998, available at <http://www.jsri.msu.edu/commconn/latnews/feb98.html>. The bill was introduced by Senator Gordon Smith of Oregon.

92. *Id.*

93. *Id.* The policy behind this was to encourage workers to return to their countries of origin.

94. *Id.*

95. *Id.*

96. Vicki Nichols, *Bills Threaten U.S. Workers*, PRESS JOURNAL, Jan. 10, 1998, at D4.

program that advocates claim gives top priority to filling jobs with domestic workers.⁹⁷ If the bill was adopted, the H-2A visa program would be phased out over five years; it would be replaced with a computerized registry of legal domestic farmworkers.⁹⁸ Foreign workers would only receive visas after all available domestic workers within an area had been employed, and the waiting list for visas would be reduced from sixty days to twenty-one days.⁹⁹ "The bill would eliminate the current wage rate set by the Labor Department and replace it with a wage rate of the higher of the minimum wage or [five] percent above the average prevailing wage in the area."¹⁰⁰ It would also eliminate the requirement that growers provide housing for guestworkers, replacing it with vouchers that would help workers pay for housing.¹⁰¹

The bill has enormous support from organizations that represent growers and farmers, but it is vehemently opposed by farmworkers and farmworker advocates who warn that it will result in a reduction in farmworkers' wages.¹⁰² The GAO also maintains that this proposed bill would hurt domestic and foreign farmworkers in various ways.¹⁰³ Aside from depressing wages, it would eliminate provisions that prevent farmers from firing workers based on improper productivity standards.¹⁰⁴ Farmers would be able to adopt their own standards, giving them the ability to fire workers who after a three-day trial do not meet these standards.¹⁰⁵ The bill also gives growers no incentive to transport workers or to give them direct transportation allowances.¹⁰⁶

97. Larry Lipman, *Senate Passes Farm Worker Plan*, PALM BEACH POST, July 24, 1998, at 8D (stating that main proponents of the bill include Senator Bob Graham of Florida); Eric Gorski, *Smith-Wyden Farm Labor Bill has Employers Watching*, THE OREGONIAN, Aug. 13, 1998, at 5 (also called the Smith-Wyden plan, named after two key Senators who proposed it).

98. Lipman, *supra* note 97.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. See Bill M. Scripps, *Bill Spites Farm Laborers*, PRESS JOURNAL, Aug. 1, 1998, at A8.

104. *Id.* (requiring a certain number of buckets of tomatoes from each farmer during a specific period of time is one example of a productivity standard).

105. *Id.*

106. *Id.*

Farmworker advocates have pointed out that the trust fund idea has been used unsuccessfully in the Florida sugar industry, as more than thirty percent of first-time temporary foreign workers remained in the United States illegally following the harvest.¹⁰⁷ This bill, they claim, would encourage many illegal workers to stay in the United States, further limiting the number of jobs available to domestic workers.¹⁰⁸

This proposed amendment did not survive a House-Senate conference committee after President Clinton threatened a veto, and a number of senators decried it.¹⁰⁹ However, more bills proposing to amend the H-2A non-immigrant visa program are expected to be introduced this year.¹¹⁰

Another very recent bill is the McConnell amendment to the FY 2000 Agricultural Appropriations bill.¹¹¹ It would eliminate domestic farmworkers' access to jobs and make it easier for growers to hire foreign guestworkers even when domestic workers are available.¹¹² This proposal would amend the H-2A program by changing the time between filing of an H-2A application and the start of work from sixty days to forty-five days.¹¹³ It would also move up the Secretary of Labor's deadline for issuing certification under the H-2A program from twenty days to thirty days.¹¹⁴

Farmworker advocates vigorously oppose this proposal. They state that it would drastically shorten the period of time to recruit domestic workers before the Department of Labor determines whether there is a shortage of farmworkers available for the job.¹¹⁵

107. *Id.*

108. *Id.*

109. Michael Carlin, *Even Tougher on Farm Labor?*, NEWS AND OBSERVER, July 28, 1999, at A13.

110. *Id.*

111. Farmworker Justice Fund, *H-2A Action Alert*, <http://www.nfwm.org/H2A0621.htm> (last visited Mar. 25, 2000).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* The proposed McConnell amendment would leave only three to eight days for recruitment of U.S. migrant farmworkers. This, farmworker advocates argue, will cause domestic workers to continue to be passed over in favor of H-2A workers.

D. The GAO Recommendations

In its 1997 report, GAO made several recommendations to Congress, the Attorney General, and the Secretary of Labor on how they could improve the H-2A program's ability to meet the needs of agricultural employers while protecting the wages and working conditions of farmworkers.¹¹⁶ Employers would have to request workers forty-five days in advance of need rather than sixty days; this shorter time period could be met by both removing Immigration and Naturalization Services (INS) from the petition approval process and by having the Department of Labor monitor its performance in meeting deadlines more closely.¹¹⁷

GAO claims its recommendations would protect domestic workers by keeping the same number of days allowed for recruitment of domestic workers prior to certification of a labor shortage and would also protect H-2A workers by extending to them the same guarantee of first-week wages that applies to domestic workers in similar employment and by revising the regulations that deal with the three-quarter guarantee.¹¹⁸ Also, GAO recommended providing better information about the program to employers and workers and consolidating enforcement responsibilities within the Department of Labor in order to improve service to both.¹¹⁹

E. The Department of Labor Inspector General's Recommendations

In the Inspector General's report following the Department of Labor's 1995 study concerning H-2A visas, the Inspector

116. *H-2A Agricultural Guestworker Program—Changes Could Improve Service to Employers and Better Protect Workers*, *supra* note 60, at *1.

117. *Id.* at *37. After receiving the Department of Labor's certification, INS must approve an employer's petition for H-2A visas before workers can apply to the State Department for visas, a procedure that can add up to three weeks for processing. INS officials agreed that the INS petition approval adds little value to the process because petitions for H-2A visas, unlike other visa petitions, do not generally identify individual workers. Therefore, INS examiners only check to make sure that the Department of Labor has issued a certification and that the employer has submitted the correct fees for petition.

118. *Id.*

119. *Id.*

General recommended diverting resources from the H-2A certification process to increased enforcement of the program's requirements regarding working conditions, wages, and recruitment.¹²⁰ It concluded that employers should be forced to maintain evidence that they actually attempted to recruit domestic workers, and it recommended that the Department of Labor should consolidate within its Wage and Hour Division responsibility for determining whether employers comply with H-2A recruitment, working conditions, and wage assurances.¹²¹

F. *Farmers versus Farmworkers*

Public opinion about foreign workers in the United States varies tremendously. Some people feel guilty about the wages and conditions under which they work; others feel anger toward the employers because employers are the ones who benefit most from keeping farmworkers in these conditions; still others feel resentment toward domestic jobs that are lost to foreign workers and the latter's effect in keeping wages and work standards lower for all farmworkers.¹²²

Farmer and grower lobby groups have been extremely successful in "getting their way" with federal and state governments.¹²³ United States growers and farmers have always been able to rely on inexpensive foreign labor, with the full complicity of the United States government, regardless of the political party that has controlled any particular branch or level of government.¹²⁴ Farmworker advocates have been less

120. See discussion *supra* Part III.C; *Guest Farm Worker Program Ineffective in Stemming Illegal Immigration*, *IG Says*, *supra* note 42.

121. *Id.* The Department of Labor concurred with most of the Inspector General's findings. The Department agencies that commented on the report suggested that its employment-based immigration responsibilities might be better considered together with a broader set of reforms for all such programs.

122. *Meeting Workforce Needs: Hearing on "Meeting the Workforce Needs of American Agriculture, Farm Workers, and the U.S. Economy" Before the Immigration Subcomm. of Senate Comm. on the Judiciary*, 106th Cong. (1999), available at 1999 WL 16947630 (statement of Demetrios Papademetriou, Senior Associate and Co-Director International Migration Policy Program, Carnegie Endowment for International Peace).

123. *Id.* The lobby groups' power stems from the fact that agriculture is a critical industry in the United States. The market value of agricultural products sold in 1992 was \$162 billion and increased to \$197 billion by 1997. Further, agriculture employs approximately 3.5 billion people. In July of 1998, the United States Department of Agriculture reported that there were 1.45 million hired farmworkers.

124. *Id.*

successful politically.¹²⁵ They have succeeded, however, in defeating the series of recent attempts in the United States Congress to introduce new or significantly different variations of the existing H-2A program.¹²⁶

Farmworker advocates claim that weakening the H-2A provisions would create a “huge pool of impoverished, desperate workers,” and would reduce “the work force [sic] to a state of peonage.”¹²⁷ The lawmakers’ solution seems to be to bow to the demands of the farmers “while sticking it to American and migrant workers.”¹²⁸ The proposed Senate provisions would place “no limit on the number of workers who could be brought in, virtually assuring a flood of migrants, many of whom, having also lost the current guarantee of transportation back to the border, would remain in the United States when their term of legal residency ended.”¹²⁹ Agribusiness should not determine United States immigration policy, allowing it to do so hurts domestic and foreign workers.¹³⁰ A new guestworker program will not help anyone besides the farmers and growers; it will only eliminate the jobs and wages of United States agricultural workers and impose hardships on temporary foreign guestworkers.¹³¹

125. *Id.* Farmworker advocates make up what they lack in raw political power with hard work and extraordinary zeal. They “use legal tools and popular guilt about and aversion to the conditions under which much farmwork takes place—and indirectly, the axiomatic, if putative, relationship between such programs and unauthorized immigration and employment—as the means for ensuring that growers will use such programs sparingly. As a result, when a program is authorized, farmworker advocates employ a barrage of legal and political actions usually directed at the Department of Labor. The unambiguous purpose of these actions is to ‘motivate’ the Department to use rigorous regulation and vigorous enforcement to deter many growers from using the legislated programs, even in the face of bona fide shortages of qualified workers.”

126. *Id.* Farmworker advocates have also been successful in keeping the size of the H-2A program on a very slight upward trend over the past decade.

127. Shuchman, *supra* note 8, at 1E.

128. *Inviting Migrant Abuse*, THE COURIER-JOURNAL, Aug. 9, 1998, at 2D.

129. *Id.*

130. Raul Yzaguirre, *Guest-Work Program Would Hurt U.S. Foreign Workers*, THE MIAMI HERALD, Aug. 7, 1998, at 25A.

131. *Id.*

V. CONCLUSION

Any weakening of the H-2A non-immigrant visa program would, in effect, create slave-like conditions for foreign workers. New legislation of this type would destroy any protection that temporary foreign workers are afforded in the United States. It would also hurt American farmworkers by taking jobs that are rightfully theirs away from them. If any of the amendments proposed by farmer and grower lobby groups becomes law, farmers will be practically guaranteed a limitless supply of foreign labor at extremely low cost. This would eliminate any of the pressure placed on farmers to improve the miserable, desolate conditions under which many domestic laborers work. All competitive incentives would be removed for farmers to improve wages and benefits for farmworkers, domestic and foreign.

The conditions in the fields for H-2A workers are already deplorable. Any ease of the restrictions in the H-2A non-immigrant visa program would worsen an already problematic program and practically all protections that these workers are currently afforded under the program. This is not an appropriate or acceptable solution to the problem of the shortage of domestic workers, if it actually ever occurs.

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