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THE CASE FOR A NON-IMMIGRANT FARM LABOR PROGRAM

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Introduction

As United States agriculture has industrialized, particularly since World War II, an important but little noticed characteristic of this industrialization has been the increasing separation of the management and labor providers in all sectors of industrialized commercial agriculture. This has resulted from both the increasing size of modern farm businesses and from the increased technological and managerial sophistication of agriculture. Hired agricultural work as a route to farming has all but disappeared. What has emerged is a commercial agricultural industry reliant on a non-managerial hired agricultural work force. The availability, productivity and cost of this hired work force is an increasingly significant factor affecting the profitability of domestic agricultural enterprise and its international competitiveness. The realization of this fact is slowly penetrating the public policy-making process.

Although fewer than half of the businesses defined as farms in the Census of Agriculture employ hired labor, these farms produce most of the Nation's agricultural output. In 1987 954,000 farms or 46 percent of all farms hired labor, and accounted for 84 percent of the value of agricultural sales. Hired labor expenses in 1987 accounted for 12 percent of all farm production expenses, more, for example, than fertilizer and other chemical products, interest on indebtedness, or energy inputs. Hired labor is especially important on vegetable, fruit and horticultural specialty farms, where hired labor expenses account for from 35 to 45 percent of farm production expenses. However, the largest share of aggregate farm labor expenses, 60 percent of the total, are incurred on livestock, dairy, poultry and field crop farms.

The number of persons who do hired farm work is difficult to measure because of the measurement complications arising as a result of seasonality of agricultural employment and the large number of multiple job holders who do some work in agriculture. In 1982, the most recent year the Census of Agriculture attempted to enumerate the number of workers hired, the Census enumerated 4.86 million hires on farms. Because many persons who do hired farm work work on more than one farm during the year, USDA

estimates the number of persons doing hired farm work in any given year (the hired farm work force) as a little more than 2 million.

The number of hired workers working in agriculture at any given time is smaller than the number of persons in the hired farm work force throughout the year. In 1991, peak hired farm employment was 1.5 million in July. Of this number, 1.1 million workers were employed directly by farmers and an additional 0.4 million persons who worked on farms were employed by farm labor contractors and other agricultural service employers. Hired farm employment has remained essentially level in the United States for the past 20 years. However the proportion of hired workers has increased while the proportion of self-employed and unpaid family workers has declined. In recent years the impact of labor saving technology and other productivity increases in agriculture has about been offset by the growth in agricultural production, particularly in labor intensive commodities.

Average hourly earnings of hired farm workers in the United States was $5.79 in 1991. Average hourly earnings of hired farm workers increased 23.2 percent from 1986, the year the Immigration Reform and Control Act was passed. In contrast, the average hourly earnings of all private sector production workers increased only 18.0 percent during the same period. This relationship continued even in the most recent period, 1990-91, when farmworker average hourly earnings rose 4.9 percent while nonfarm worker hourly earnings rose only 3.2 percent. While average hourly earnings of hired farmworkers are still far below those of nonfarm workers, there has been a small improvement since 1986.

The H-2A Temporary Agricultural Worker Program

Programs for the temporary admission of nonimmigrant aliens to the United States to perform agricultural labor or services have been a part of U.S. immigration law for more than 70 years. The longest standing of these is the H-2 program which was originally enacted as part of the Immigration and Nationalities Act of 1952. Section 301 of the Immigration Reform and Control Act (IRCA) of 1986 codified much of the H-2 temporary agricultural worker regulatory program and redesignated it the H-2A program. Congress intended to "streamline" the H-2A program to assist growers who encountered labor shortages, including shortages that might arise as a result of the enactment of IRCA.

The H-2A program authorizes the temporary admission of nonimmigrant aliens to perform agricultural labor or services of a temporary or seasonal nature if; (a) there are not sufficient eligible U.S. workers who are able, willing and qualified to perform the labor or services, and who will be available at the time and place needed, and (b) the employment of the alien(s) in such labor or services will not adversely affect the wages and working conditions of similarly employed United States workers.

For these purposes, a "U.S. worker" includes not only citizens and permanent resident aliens, but all other persons who are legally authorized to work in the United States.

The administrative mechanics of the program are complicated. In order to secure the admission of H-2A aliens, an employer who anticipates a shortage of U.S. workers must first file an application for an alien labor certification with the U.S. Department of Labor together with a job offer for U.S. workers. If the job offer meets the criteria of the Labor Department, that is, the wages and terms and conditions of employment are such that it will not adversely affect U.S. workers, the Department will accept the application for consideration and the employer and the Department will attempt to recruit domestic workers for a period of 40 days. To the extent that sufficient qualified U.S. workers are not found to fill the employers jobs during this domestic recruitment period, 20 days before the employer's date of need for workers the Department of Labor will issue a labor certification for sufficient aliens to make up the difference between the employer's need for workers and the number of qualified domestic workers available.

The terms and conditions of employment an employer is required to offer so as not to adversely affect U.S. workers are comprehensive and expensive. The most important are the following: The employer must pay the higher of (a) the prevailing wage in the occupation and area of employment, or (b) an Adverse Effect Wage Rate, which is equivalent to the annual average hourly earnings of field and livestock workers in the state or region as determined in annual surveys of the U.S. Department of Agriculture. The employer must also provide housing that meets Federal OSHA standards at no cost to the worker, must reimburse the inbound transportation costs of workers who complete at least 50 percent of the work contract period and pay return transportation to those who complete the work contract, must provide all necessary tools and equipment at no cost to the worker, and must guarantee the worker employment for at least three-quarters of the contract period. In addition to the pre-certification domestic recruitment requirement, the employer must continue active recruitment of domestic workers until the aliens have started travelling to the employer's jobs, and must continue to accept and employ qualified U.S. workers who apply for the employer's jobs through the first 50 percent of the work contract period.

If an employer receives a labor certification from the Department of Labor, and the employer wishes to employ aliens to fill the employer's unfilled jobs, the employer must file a petition together with the labor certification with the Immigration and Naturalization Service (INS), seeking admission of H-2A aliens. The aliens must be recruited by the employer. The aliens are admitted and authorized to be employed only by the employer filing the petition and only in the occupation and for the period of employment for which the employer has a labor

certification. The employer must comply fully with the terms and conditions of the job offer, both with respect to the aliens and any U.S. workers employed in the certified occupation. At the end of the work contract period, the aliens must either depart the United States or may be approved to be employed on a new H-2A contract for the same or another certified employer if a new labor certification has been issued. A temporary or seasonal job eligible for H-2A certification may last up to one year, though typically they are for a much shorter period. An alien may remain in the United States working on a sequence of H-2A contracts for up to 3 years continuously, though typically H-2A aliens stay in the U.S. for less than a year at a time.

Most agricultural employers participate in the H-2A program through employer associations which act as an agent for their employer members, or occasionally as a joint employer with their employer members. The association will typically handle the substantial paperwork and negotiation involved in the application for labor certification and the INS admission petition, and conduct domestic and foreign worker recruitment on the employers' behalf. The association also frequently coordinates the transportation of workers to and from the H-2A jobs and their transfer to new H-2A petitions. Under most circumstances it is difficult and expensive for individual small employers to successfully access the H-2A program. Even where an association is involved, a critical mass of workers needs to be involved before such a program can be economical for employers.

The Case for A Non-immigrant Alien Admission Program

At the time IRCA was enacted, it was anticipated that there would be a huge increase in the use of H-2A workers over the approximately 20 thousand H-2 aliens who had been employed during the preceding decade. In fact, the program has expanded very little, from 20,682 positions certified in 1985 to 25,412 in 1990. More than 3000 individual employers are represented among the applicants. In 1990, H-2A job opportunities were certified in 36 states, but the preponderance of certifications were on the eastern seaboard. The most common occupations certified are sugar cane cutting, apple and other soft fruit harvesting, tobacco and vegetable harvesting, and irrigating and sheepherding in the western states. The principal expansion in H-2A certification activity since the enactment of IRCA has been in eastern seaboard tobacco and vegetable occupations, and among traditional users of the program.

Programs for the admission of aliens to perform farm work, especially the H-2A program in recent years, have been strongly opposed by farm worker advocates. Since the termination of Public Law 78 -- the "Bracero" program -- in 1964, the H-2 and H-2A programs have been targets of litigation by publicly funded legal service groups. This litigation, and the still widespread availability of illegal aliens, has been a significant factor in keeping the number of H-2A applications and certifications low.

The high cost of the H-2A program and the slow and cumbersome bureaucratic procedures involved in securing labor certification were primary factors fueling the search for an alternative alien agricultural worker program as immigration reform and employer sanctions legislation began to become a political likelihood in the early 1980's.

Will an alien worker admission program continue to be necessary? The answer is, at best, highly uncertain. There is nothing to suggest that the decades long trend toward declining participation of U.S. workers and newly legalized aliens in hired agricultural work will not continue, although the rate of movement of workers out of agriculture is clearly affected by the availability of jobs in the non-agricultural economy. An important question is whether the government will successfully control document fraud and/or illegal border crossing. The likelihood seems low, but there is little doubt that a successful border interdiction program, or a program to verify the authenticity of employment eligibility documents or to replace them with a counterfeit-proof identity and work authorization document, would change the current agricultural labor supply situation overnight from a modest surplus of workers to a severe shortage. Finally there is the reality that increasing worldwide production and trade in labor intensive agricultural commodities, including fruits, vegetables and horticultural specialties, will require U.S. producers to remain competitive in both foreign and domestic markets, precluding significant rises in domestic labor costs for production and distribution.

With regard to admission of alien workers, the public policy choice seems clear. The large and expanding international trade in labor intensive agricultural products has effectively established world markets and world market prices for these commodities. Thus, the policy choices available to the U.S. if we are not going to close our borders to agricultural imports are (1) to admit seasonal alien farm workers under conditions that permit the maintenance or growth of current U.S. production of labor intensive agricultural commodities, or (2) to restrict admission of alien agricultural workers. The later option, assuming effective control of illegal immigration, will entail reducing the domestic production of labor intensive agricultural commodities to that level at which sufficient U.S. farm workers are available to produce competitively at world market prices. That will almost certainly require a significant reduction in domestic production, and a reduction in the employment of U.S. workers on farms and in ancillary services supported by that production. Although policies to restrict alien farm worker admissions are generally argued on the grounds that they will improve the conditions of domestic farm workers, little or no change in the wages or earnings of domestic farm workers is likely because of competitive world markets. That is because international competition will preclude significant increases in labor costs by domestic producers. Thus the principal benefit to the U.S. from continuing to admit alien seasonal farm workers is

to facilitate a larger volume of domestic agricultural production and higher levels of U.S. worker employment in nonseasonal farm and ancillary jobs.