1-1-1987

Foreign Farm Workers in the U.S.: The Impact of the Immigration Reform and Control Act of 1986

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FOREIGN FARM WORKERS IN THE U.S.: THE IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

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The enactment of the Immigration Reform and Control Act of 1986 ("IRCA"),[1] popularly known as the Simpson-Rodino Act, was in large part spurred by Congressional desire to exercise more effective control over the influx of foreign farm workers in this country. This is not a new issue; the U.S. has admitted temporary foreign agricultural workers since 1917,[2] and their entry has always been the subject of heated debate. Between 1942 and 1964 the "bracero" program allowed Mexicans to work temporarily in U.S. agriculture, but this program resulted in massive civil rights and labor violations and depressed wages in the Southwest.[3] Since 1964, the U.S. has continued to admit foreign agricultural workers under the "H-2" program of the Immigration and Nationality Act to perform temporary labor where a shortage of domestic workers exists.[4]

1. Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

2. *See generally* G. KISER & M. KISER, MEXICAN WORKERS IN THE UNITED STATES: HISTORICAL AND POLITICAL PERSPECTIVES, ch. 1 (1979); Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. Rev. 615 (1981).

3. National Center for Immigrants' Rights, Memorandum: Hard Facts and Policy Decisions on Retaining or Expanding the U.S. Temporary Worker (H-2) Program, *reprinted in* Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest, Appendix F to the Staff Report 76 (1981).

4. Immigration and Nationality Act ("INA") § 101(a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii) (1986). Although it has been frequently amended since its enactment in 1952, the INA remains the major compilation of statutory law in the immigration field. The statute is codified in 8 U.S.C., using a numbering scheme that corresponds erratically to the numbering of the INA. Because immigration practitioners usually use INA section numbers rather than the U.S.C. scheme and because the regulations are also numbered to correspond to INA numbers, this article provides citations to both the INA, as currently amended, and to 8 U.S.C.

Knowledgeable estimates of the number of such aliens working in U.S. agriculture ranged from 300,000 to 1.2 million.[5] Despite the magnitude of effect aliens have on the labor supply, disputes between growers and organized labor organizations contributed to the failure of immigration legislation in 1984 and its near derailment in 1986. In support of allowing the entry of foreign agricultural workers into the U.S., growers have contended that many American workers do not want to work in seasonal agriculture or to live in rural areas. If employer sanctions were to be instituted under the proposed legislation, growers wanted some assurance that they lawfully could obtain sufficient numbers of workers. Organized labor and farm worker rights organizations disputed the growers' assertions by pointing to high unemployment rates among domestic farm workers. These organizations charged that growers were seeking to preserve a cheap labor force that had few legal rights.

The Simpson-Rodino Act attempts to reconcile these competing claims by providing for the treatment of farm workers in three ways. First, it revises the existing H-2 temporary worker program as it applies to agricultural workers. Second, the new law provides temporary resident status for aliens who can prove they worked ninety days in U.S. agriculture between May 1, 1985 and May 1, 1986. These "special agricultural workers" ("SAWs") later can become permanent residents. Third, the law allows additional "replenishment agricultural workers" ("RAWs") to enter the U.S. as temporary resident aliens between 1990 and 1993 if there is a shortage of farm workers at the time. These replenishment workers also may eventually become permanent resident aliens if they work at least ninety days in U.S. agriculture for three consecutive years.[6]

This article analyzes each of the major provisions of IRCA that affect foreign farm workers. The article examines IRCA's language and implementing regulations; points out ambiguities, gaps and unanswered questions; and provides practical pointers for immigration practitioners.

I.
THE H-2A PROGRAM

A. Summary

IRCA revises the current H-2 program.[7] The new law divides H-2 workers into two categories: temporary workers to perform agricultural labor or

5. N.Y. Times, Apr. 6, 1987, at A1, col. 3.

6. The special agricultural workers and replenishment workers are sometimes called Schumer-Berman-Panetta workers, or Schumer workers for short, after the Congressmen who co-authored these controversial provisions, Reps. Charles E. Schumer (D-NY), Howard L. Berman (D-CA), and Leon E. Panetta (D-CA).

7. IRCA, Pub. L. No. 99-603, § 301(c), 100 Stat. 3359, 3411-16 (creating INA § 216) (codified at 8 U.S.C. § 1186). Note that both Pub. L. No. 99-603 and Pub. L. No. 99-639, 100 Stat. 3537, the "Immigration Marriage Fraud Amendments of 1986," create an INA § 216. The former is for H-2A workers, the latter for marriages between aliens and U.S. citizens or permanent resident aliens. The Law Revision Council has resolved this problem by assigning 8

services (H-2A) and all other temporary H-2 workers (H-2B).[8] As of May 1986, the annual admissions under the entire H-2 program totalled approximately 30,000,[9] most of whom are farm workers. The law makes no changes in the admission of temporary workers for non-agricultural employment.[10] The goals of the H-2A program are the same as for the overall H-2 program: to try to find domestic workers if possible and, if none can be found, to make sure that the introduction of foreign workers into the agricultural work force will not adversely affect the wages and the working conditions of similarly employed U.S. workers.[11] The H-2A program took effect on June 1, 1987, when the Department of Labor and the Immigration and Naturalization Service ("INS") both issued interim regulations to implement the program.[12]

The H-2A program may well play an increasingly important and controversial role in U.S. agriculture in the near future. The Department of Labor, the main government agency responsible for administering the temporary alien farm worker program, has predicted that the number of aliens on H-2A visas will skyrocket to 250,000 annually by 1991.[13] Farm worker advocates have severely criticized past abuses in the H-2 program and have called for the program's elimination.[14] It remains to be seen whether the statutory changes in IRCA will correct these ills.

B. Test for Admissions

A grower wishing to employ an H-2A worker must first file a petition with the Department of Labor.[15] The Department of Labor will grant this petition if (1) "there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the [agricultural] labor or services involved in the petition," and (2) there will be no adverse effect "on the wages and working conditions of workers in the

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U.S.C. § 1186 to the H-2A provisions in the IRCA and 8 U.S.C. § 1186a to § 2 of the marriage fraud bill.

8. IRCA, Pub. L. No. 99-603, § 301(a), 100 Stat. 3359, 3411.

9. H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 80 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5684; *Proposed Foreign-Worker Rules Hit*, Wash. Post, May 8, 1987, at A21, col. 1.

10. H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 8 (1986).

11. *Id.*

12. IRCA, Pub. L. No. 99-603, § 301(d), (e), 100 Stat. 3359, 3416, 8 U.S.C. § 1186 (1986). *See* 52 Fed. Reg. 20,554-57 (1987) (INS interim rule); 52 Fed. Reg. 20,496-533 (1987) (DOL interim rule). The interim regulations are summarized and analyzed in 64 INTERPRETER RELEASES, No. 21, at 645-47 (June 1, 1987).

13. *Proposed Foreign-Worker Rules Hit*, Wash. Post, May 8, 1987, at A21, col. 1.

14. Farmworker Justice Fund, Inc., "The H-2 Foreign Labor Program: The Record of Employer and US DOL Abuses Justifies Its Elimination" (May 17, 1984) (submitted as testimony to House Comm. on Education and Labor Subcomm. on Labor Standards) (copy on file with the author).

15. INA § 216(a)(1), 8 U.S.C. § 1186(a)(1) (1986); 52 Fed. Reg. 20,509 (1987) (interim regulation to be codified at 20 C.F.R. § 655.100(a)(1)).

United States similarly employed."[16]

As required by the statute, the Department of Labor's interim regulations define "agricultural labor or services" by incorporating similar definitions from the Internal Revenue Code and the Fair Labor Standards Act.[17] IRCA defines "qualified" domestic workers as those who meet only those qualifications imposed by non-H-2A employers in the same or comparable occupations and crops.[18]

In reviewing potential domestic workers, growers need only consider those applicants who are not authorized aliens.[19] This means that alien farm workers who have applied SAW status and have received interim or permanent work authorization from the INS are to be considered domestic U.S. workers for purposes of the H-2A program.[20]

The Department of Labor cannot require growers to file H-2A applications more than sixty days in advance of their need for such workers.[21] Growers must be notified within seven days of filing if the application is not acceptable for consideration.[22] The Department of Labor must state the reasons why the application cannot be approved, and must allow the grower promptly to resubmit a modified application.[23] Assuming the grower meets the criteria for certification and no domestic workers have applied or been referred, the Department of Labor must approve the application no later than twenty days before the date of need.[24]

IRCA authorizes the Department of Labor to charge the growers a fee for processing H-2A applications.[25] The fees, set by the Department of La-

16. INA § 216(a)(1)(A), (B), 8 U.S.C. § 1186(a)(1)(A), (B) (1986). *See also* 52 Fed. Reg. 20,507-08 (1987) (interim regulation to be codified at 20 C.F.R. § 655.90(b)(1)).

17. *See* 52 Fed. Reg. 20,510-11 (1987) (interim regulation to be codified at 20 C.F.R. § 655.100(c)).

18. INA § 216(c)(3), 8 U.S.C. § 1186(c)(3) (1986). *See* 52 Fed. Reg. 20,516 (1987) (interim regulation to be codified at 20 C.F.R. § 655.102(c)).

19. INA § 216(i)(1), 8 U.S.C. § 1186(i)(1) (1986). *See also* 52 Fed. Reg. 20,509-10 (1987) (interim regulation to be codified at 20 C.F.R. § 655.100(b) (definition of U.S. worker)).

20. *See* 52 Fed. Reg. 20,497 (1987) (supplementary information part of rule).

21. INA § 216(c)(1), 8 U.S.C. § 1186(c)(1) (1986). *See also* 52 Fed. Reg. 20,512 (1987) (interim regulation to be codified at 20 C.F.R. § 655.101(c)). The interim regulations encourage employers to file H-2A applications in advance of the 60-day statutory minimum. 52 Fed. Reg. 20,512 (1987) (interim regulation to be codified at 20 C.F.R. § 655.101(c)(3)). *Cf.* 20 C.F.R. § 655.201(c) (1986), which urged agricultural employers to file H-2 labor certification applications at least 80 days before they needed the foreign workers.

22. INA § 216(c)(2)(A), 8 U.S.C. § 1186(c)(2)(A) (1986). This statutory requirement is implemented in 52 Fed. Reg. 20,512 (1987) (interim regulation to be codified at 20 C.F.R. § 655.101(c)).

23. INA § 216(c)(2)(B), 8 U.S.C. § 1186(c)(2)(B) (1986). *See* 52 Fed. Reg. 20,512 (1987) (interim regulation to be codified at 20 C.F.R. § 655.101(c)(2)). The interim regulations give an employer five calendar days in which to submit an amended application. *Id.*

24. INA § 216(c)(3), 8 U.S.C. § 1186(c)(3) (1986); 52 Fed. Reg. 20,512 (1987) (interim regulation to be codified at 20 C.F.R. § 655.101(c)).

25. INA § 216(a)(2), 8 U.S.C. § 1186(a)(2) (1986).

bor's interim regulations, range from $110 to $1,000.[26] Growers and some western senators criticized these fees as too high.[27] Until now, growers have paid no application fee.

IRCA continues the practice of allowing growers associations to file H-2 applications on behalf of their individual members.[28] If an association is a joint or sole employer of H-2A workers, the certifications granted to the association may be used by any of the producer members, and the H-2A workers may be transferred among the members if the workers continue to perform the kind of labor for which the certification was granted.[29]

C. *Emergency Applications*

The interim regulations create a waiver of all time deadlines and recruitment periods for, "any employer which has good and substantial cause (which may include unforeseen changes in market conditions)."[30] The Senate version of the H-2A program contained an analogous emergency exception to the normal application procedures, but it was ultimately replaced with the House of Representative's language, which contains no such provision.[31] Congress has thus explicitly rejected the emergency exception.

Similarly, the provision allowing "market conditions" to be a reason for waiving recruitment flouts the intent of the statute. The H-2A program is not a program to assure that growers can maximize profits by importing cheap foreign labor to meet optimum conditions for marketing a crop. H-2A workers can only be admitted after a thorough search for U.S. workers, and only under conditions that assure that the wages and working conditions of U.S. workers will not be adversely affected. Protection of U.S. workers is the paramount statutory command.[32]

D. *Recruitment Efforts*

The statute requires the employer to make positive recruitment efforts "within a multi-state region of traditional or expected labor supply" if the Department of Labor determines a "significant" number of qualified U.S.

26. 52 Fed. Reg. 20,519 (1987) (interim regulation to be codified at 20 C.F.R. § 655.106 (b)(2)).

27. *Proposed Foreign-Worker Rules Hit*, Wash. Post, May 8, 1987, at A21, col. 1; 64 INTERPRETER RELEASES, No. 21, at 646-47 (June 1, 1987).

28. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 82 (1986). *See* 20 C.F.R. § 655.206(b)(2), (3) (1986) (prior H-2 regulations).

29. INA § 216(d)(2), 8 U.S.C. § 1186(d)(2) (1986). *See also* 52 Fed. Reg. 20,519 (1987) (interim regulation to be codified at 20 C.F.R. § 655.106(c)(2)). *Cf.* 20 C.F.R. § 655.206(b)(3) (1986) (prior H-2 regulations).

30. 52 Fed. Reg. 20,513 (1987) (interim regulation to be codified at 20 C.F.R. § 655.101(f)(2)).

31. *Cf.* S. 1200, § 216(e)(4)(C), 131 Cong. Rec. S11,756 (daily ed. Sept. 19, 1985) *with* IRCA, Pub. L. No. 99-603, § 301, 100 Stat. 3359, 3411-17.

32. Farmworker Justice Fund, Inc., Comments on Proposed H-2A Regulations 20 (May 15, 1987) [hereinafter FJF Comments] (copy on file with the author).

workers can be found there.[33] These efforts are to be in addition to use of the interstate employment service system.[34] The relevant legislative history indicates that this extra recruitment effort should not be imposed haphazardly. The extra recruitment should be cost effective, and the Department of Labor is to consider the recruitment efforts by non-H-2A employers as a guide for H-2A employers.[35]

Nevertheless, the Department of Labor's interim implementing regulations fail to advance Congress's positive recruitment requirement. For example, the regulations fail to require growers to make efforts to attract U.S. workers that are no less than the efforts made to recruit H-2A workers. The prior regulations specifically required this, and the legislative history of IRCA also mentions this as one of the standards by which positive recruitment is to be measured.[36]

As a result, agricultural employers now make extensive effort to attract H-2A aliens but make little or no effort to recruit domestic farm workers. Growers send agents overseas months in advance of the need for workers to negotiate with foreign governments and to select the alien help they want. They also have a travel system to move foreign workers to the jobs. No efforts are made to send agents to Florida to recruit any of the hundreds of unemployed U.S. farm workers there or to tell them about the travel system.[37] Growers in Idaho and Montana have hired consultants to help them obtain H-2A workers.[38] They should be required to employ similar consultants to attract U.S. workers.

E. Grounds for Denying Labor Certification Applications

IRCA prohibits the Department of Labor from issuing a labor certification if any of four conditions are not met. First, a labor certification cannot be granted if there is a strike or lockout in the course of a labor dispute.[39] Sec-

33. INA § 216(b)(4), 8 U.S.C. § 1186(b)(4) (1986). *See* 52 Fed. Reg. 20,516-18 (1987) (interim regulation to be codified at 20 C.F.R. §§ 655.102(d), 655.103(f), 655.105(a)).

34. *Id.*

35. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 81 (1986). The Labor Department's interim regulations seem to follow this mandate. *See, e.g.*, 52 Fed. Reg. 20,517-18 (1987) (interim regulation to be codified at 20 C.F.R. § 655.105(a)) ("the RA [Regional Administrator] will attempt to avoid requiring employers to futilely recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations.").

36. 20 C.F.R. § 655.203(d)(5) (1986) (prior H-2 regulations); H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 81 (1986).

37. FJF Comments, *supra* note 32, at 15.

38. *A Question of Fairness: America's Expanding Guest-Worker Program*, Wash. Post, May 25, 1987, at A1, col. 1 (part one of three part series); Wash. Post, May 26, 1987, at A1, col. 5 (part two of three part series); Wash. Post, May 27, 1987, at A13, col. 1 (part three of three part series).

39. INA § 216(b)(1), 8 U.S.C. § 1186(b)(1) (1986). *Cf.* 20 C.F.R. § 655.203(a)(1), (2) (1986) (prior H-2 regulations). *See also* 8 C.F.R. § 214.2(h)(11) (1987).

The Department of Labor's interim implementing regulations virtually assure that no H-2A labor certification will be denied because of a strike or lockout. *See* 52 Fed. Reg. 20,519 (1987) (interim regulation to be codified at 20 C.F.R. § 655.106(b)(1)(v)). This interim regula-

ond, a labor certification is impossible if the Labor Department finds that the H-2A employer has "substantially violated a material term or condition of the labor certification" within the previous two years.[40] There is a three year limit on how long such an employer may be prohibited from receiving H-2A certifications.[41] Third, a labor certification will be denied if a grower fails to provide the Department of Labor with sufficient assurances that the aliens will be covered by workers' compensation or its equivalent.[42] Finally, a labor certification application will be denied if the employer fails to comply with the extra recruitment efforts required in a particular case.[43]

F. Appeals of Labor Certification Denials

The agricultural worker provisions require establishment of an expedited procedure for reviewing denials or revocations of labor certifications.[44] If the Department of Labor denied certification because of the availability of domestic workers and the grower asserts that U.S. workers are not available, Department of Labor must provide a redetermination within seventy-two hours of the grower's request for a redetermination.[45] Although the statute fails to mention the possibility of further review, judicial review is available.

G. The Fifty Percent Rule

Under a prior Department of Labor regulation, commonly known as the "fifty percent rule," a grower who was granted certification to bring in alien H-2 workers still was required to hire qualified domestic workers who applied for the same job during the first half of the contract period.[46] The agricultural worker provisions of IRCA will continue the fifty percent rule until November

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tion allows the Department to reduce one H-2A worker for every striking U.S. worker, but only after the state employment agency has investigated the strike and has written a report to the Department of Labor's Regional Administrator. The problem with this is that state agencies are biased in favor of growers and therefore refuse to perform any enforcement functions. For example, the Virginia Employment Commission has refused to hold the hearings required by law on complaints against H-2 growers. Local Employment Service office employees repeatedly deny they have any enforcement responsibilities despite the requirements of the Job Service regulations. *See* 20 C.F.R. § 658.416 (1986). As one farm worker advocacy organization stated, "[m]aking the state offices the arbiters of when there is labor activity dooms any effective assertion of organized worker rights." FJF Comments, *supra* note 32, at 19.

40. INA § 216(b)(2)(A), 8 U.S.C. § 1186(b)(2)(A) (1986). *See also* 52 Fed. Reg. 20,521 (1987) (interim regulation to be codified at 20 C.F.R. § 655.110(a)).

41. INA § 216(b)(2)(B), 8 U.S.C. § 1186(b)(2)(B) (1986).

42. INA § 216(b)(3), 8 U.S.C. § 1186(b)(3) (1986). *Cf.* 20 C.F.R. § 655.202(b)(2) (1986) (prior H-2 regulations).

43. INA § 216(b)(4), 8 U.S.C. § 1186(b)(4) (1986). *See also* 52 Fed. Reg. 20,518 (1987) (interim regulation to be codified at 20 C.F.R. § 655.105(d)).

44. INA § 216(e)(1), 8 U.S.C. § 1186(e)(1) (1986). *See also* 52 Fed. Reg. 20,523-4 (1987) (interim regulation to be codified at 20 C.F.R. § 655.112).

45. INA § 216(e)(2), 8 U.S.C. § 1186(e)(2) (1986). *See also* 52 Fed. Reg. 20,520 (1987) (interim regulation to be codified at 20 C.F.R. § 655.106(h)(1)).

46. 20 C.F.R. § 655.203(e) (1986).

1989.[47] By that time, either Congress must have enacted a new provision on this issue, or the Department of Labor must promulgate a regulation that takes into account a preference for domestic workers.[48]

In continuing the fifty percent rule, the law specifies that if an H-2A worker is displaced by a domestic worker arriving later, the employer is not required to pay the terminated worker for the time she did not actually work.[49] The statute also makes it unlawful for any person to willfully and knowingly withhold domestic workers before H-2A workers arrive in order to force both the hiring of domestic workers and the layoffs of the alien farm workers.[50] Finally, small employers who use fewer than 500 man-days of agricultural labor and who do not associate with any other employer entity to obtain H-2A workers are exempt from compliance with the fifty percent rule.[51]

H. Terms of Employment

In addition to workers' compensation, IRCA requires growers to furnish housing for their H-2A workers.[52] This continues the same basic policy of the prior regulations, but with some modifications.[53] Employers are permitted at their option to provide housing that meets applicable federal standards for temporary labor camps or to secure housing that meets the local standards for rental or public accommodations (or both) or for other substantially similar class of habitation. If there are no local standards, state standards apply. If no state standards exist, federal temporary labor camp standards apply. The

47. INA § 216(c)(3)(B)(i), 8 U.S.C. § 1186(c)(3)(B)(i) (1986); 52 Fed. Reg. 20,516 (1987) (interim regulation to be codified at 20 C.F.R. § 655.103(e)). *See also* H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 81 (1986).

48. INA § 216(c)(3)(B)(iii), 8 U.S.C. § 1186(c)(3)(B)(iii) (1986).

49. INA § 216(c)(3)(B)(vi), 8 U.S.C. § 1186(c)(3)(B)(vi) (1986). *See also* 52 Fed. Reg. 20,520 (1987) (interim regulation to be codified at 20 C.F.R. § 655.106(f)(2)).

50. INA § 216(c)(3)(B)(vii)(I), 8 U.S.C. § 1186(c)(3)(B)(vii)(I) (1986). *See also* 52 Fed. Reg. 20,520 (1987) (interim regulation to be codified at 20 C.F.R. § 655.106(g)).

51. INA § 216(c)(3)(B)(ii), 8 U.S.C. § 1186(c)(3)(B)(ii) (1986). *See also* 52 Fed. Reg. 20,520 (1987) (interim regulation to be codified at 20 C.F.R. § 655.106(f)(1)).

52. INA § 216(c)(4), 8 U.S.C. § 1186(c)(4) (1986). Because the purpose of the H-2A program is to try to find domestic farm workers, or at least to make sure foreign farm workers do not adversely affect the working conditions of similarly employed U.S. workers, growers should be required to provide housing for local domestic workers. The interim implementing regulation, however, only requires housing to be provided to, "workers who are not reasonably able to return to their residence within the same day." 52 Fed. Reg. 20,513 (1987) (interim regulation to be codified at 20 C.F.R. § 655.102(b)(1)). This is particularly inequitable in states like Florida, where domestic sugar cane workers pay up to $50 a week for crowded, dilapidated housing with inadequate shower and toilet facilities. Meanwhile, foreign H-2A workers live next door for free in housing that is supposedly inspected and meets Department of Labor Occupational Safety and Health Administration standards. FJF Comments, *supra* note 32, at 16. Farmers will be able to continue this inequity under the regulations because the U.S. workers live nearby most of the year, even though they do not and cannot afford to own any housing. These domestic workers' real earnings are lower because of housing costs. The regulatory provision adversely affects them as compared to their foreign competition.

53. *Cf.* 20 C.F.R. § 655.202(b)(1) (1986) (prior H-2 regulations).

law also requires free family housing to be provided to those who request it whenever such housing is the prevailing practice in the area and in the occupation of intended employment.[54]

Growers also must guarantee not to retaliate against H-2A workers for certain acts they might take to protect their rights, one of which is consulting with an attorney.[55]

I. Length of Employment

IRCA authorizes the admission of H-2A workers only to perform agricultural labor or services "of a temporary or seasonal nature."[56] The Department of Labor has defined "temporary" for H-2A workers as those who are employed for less than twelve months.[57] In other words, an alien can normally be admitted on an H-2A visa for up to a year; an extension must be granted for any stay beyond that. Under the supplementary part of the interim rules,[58] the Department of Labor evaluates the employer's need to fill a job opportunity on a temporary basis; the nature of the duties of the position would be irrelevant. This accords with the INS view on the same issue.[59]

J. Pay to H-2A Workers

The Department of Labor requires agricultural employers to pay U.S. and alien farm workers the highest of the applicable wage rates that might be the prevailing wage for the occupation in the relevant labor market, the state or federal minimum wage, or an hourly adverse effect wage rate ("AEWR").[60] The purpose of an AEWR is to offset the depressing effect on wages that alien agricultural workers create.[61]

IRCA did not make any changes in the wages to be paid temporary farm workers. Nonetheless, the Department of Labor decided to revise significantly the methodology for setting AEWRs.[62] The new methodology sets the annual

54. INA § 216(c)(4), 8 U.S.C. § 1186(c)(4) (1986). *See also* 52 Fed. Reg. 20,513 (1987) (interim regulation to be codified at 20 C.F.R. § 655.102(b)(1)).

55. 52 Fed. Reg. 20,517 (1987) (interim regulation to be codified at 20 C.F.R. § 655.103(g)).

56. IRCA, Pub. L. No. 99-603, § 301(a), 100 Stat. 3359, 3411.

57. 52 Fed. Reg. 20,511 (1987) (interim regulation to be codified at 20 C.F.R. 655.100 (c)(2)(iii)).

58. 52 Fed. Reg. 20,497-98 (1987).

59. *See, e.g.*, Matter of Artee Corp., 18 I&N Dec. 366 (Comm'r 1982). The INS interim definition of "temporary" for purposes of the H-2A regulations is almost identical to the Department of Labor's definition. *See* 52 Fed. Reg. 20,566 (1987) (interim regulation to be codified at 8 C.F.R. § 214.2(h)(3)(iv)(A)) ("Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.").

60. 52 Fed. Reg. 20,515 (1987) (interim regulation to be codified at 20 C.F.R. § 655.102 (b)(9)(i)). For a summary of the tortured history of AEWRS, *see* 52 Fed. Reg. 20,502-04 (1987).

61. *See* Williams v. Usery, 531 F.2d 305, 306 (5th Cir.), *cert. denied*, 429 U.S. 1000 (1976).

62. 52 Fed. Reg. 20,521 (1987) (interim regulation to be codified at 20 C.F.R. § 655.107).

AEWRs at a level equal to the previous year's annual regional average hourly wage rates for field and for livestock workers combined as computed from United States Department of Agriculture ("USDA") quarterly wage surveys.[63] The interim rule also sets AEWRs for every state except Alaska. Previously, only fourteen states were subject to AEWRs.

The effect of the new methodology is to decrease the wages paid to H-2A workers by about twenty percent overall. The impact is more dramatic in some states. For example, if the prior methodology had applied to Alabama, the 1987 AEWR for that state would have been $7.11/hour. Under the new methodology, farmers in that state have to pay H-2A workers just $3.73/hour, 48 percent less than under the old methodology.[64]

Some farm workers are paid by the number of pieces of fruits or vegetables they collect rather than by an hourly wage. For some crops, apples for example, the piece rate can be the most important factor in determining a worker's real wages. Under the interim Department of Labor regulations, growers who pay at piece rates must ensure that the amount paid is equivalent to what the worker would have earned had she been paid at the appropriate hourly wage.[65]

The methodology for setting AEWRs and piece rates has been the subject of almost constant litigation for the last ten years, and the latest changes continue the controversy.[66] One lawsuit already has been filed challenging the latest revisions.[67] The plaintiffs in the case allege that the new AEWR and piece rate regulations are arbitrary, capricious and contrary to the Immigration and Nationality Act as amended by IRCA. The complaint charges that the lower rates set by the new regulations "perpetuate the very wage depression they are intended to eliminate."

In an order agreed upon by the parties in the case and signed by U.S. District Judge Stanley Sporkin on June 30, 1987, the government is temporarily enjoined from granting H-2A labor certifications and from issuing H-2A visas except if an employer seeking certification agrees to pay all H-2A workers, retroactive to the beginning of the 1987 season, the difference between the current wages and the wages required by any new piece rate or AEWR regulations the government may be required to issue. The Department of Labor also agreed to include in all H-2A clearance orders a notice stating that this action is pending and that if plaintiffs win, workers may be paid, retroactive to the start of the 1987 season, wages at piece rates or at hourly rates higher than those now advertised. The order has nationwide effect.[68]

63. 52 Fed. Reg. 20,521 (1987) (interim regulation to be codified at 20 C.F.R. § 655.107 (a)).

64. 52 Fed. Reg. 16,777 (May 5, 1987) (proposed H-2A regulations).

65. 52 Fed. Reg. 20,515 (1987) (interim regulation to be codified at 20 C.F.R. § 655.102 (b)(9)(ii)). *Cf.* 20 C.F.R. § 655.207(c) (1986) (prior H-2 regulations).

66. Some of the various cases are mentioned in 52 Fed. Reg. 20,503 (1987).

67. AFL-CIO v. Brock, No. 87-1683-SS (D.D.C. filed June 19, 1987).

68. The order is reported in 64 INTERPRETER RELEASES, No. 25, at 792 (July 6, 1987).

K. Violations of the Labor Certification

IRCA sets forth several rules regarding the legal responsibility of agricultural associations and their members when a violation of the H-2A provisions occurs. First, if a member of a joint employer association commits an act that results in a labor certification denial, the denial applies only to that member unless the Department of Labor finds that the association or another member "participated in, had knowledge of, or reason to know of, the violation."[69] Second, if a joint employer association commits a violation, the disqualification applies only to the association unless any member participated in, knew or had reason to know of the violation.[70] Third, if an association that is a sole employer violates the agricultural worker provisions, individual members of that association may obtain H-2A workers while the denial is in force only if they agree to be the workers' sole or joint employer.[71]

The test for attributing liability of one to another is broad, especially the "reason to know" standard. Congress adopted this language in an effort to encourage growers to police themselves concerning the obligations of the H-2A program.[72] However, Congress did not intend to burden the grower with an affirmative obligation to actively investigate mere rumor or innuendo concerning other grower or association activity.[73] When does a rumor ripen into a reason to know? It will be difficult for growers to know in a given situation because the interim regulations fail to define "reason to know."

Alien workers who violate the terms of the H-2A certification under which they entered the U.S. may not be readmitted as H-2A workers for five years.[74] The statute does not prohibit such aliens from entering the U.S. in another non-immigrant or immigrant category during that time.

L. Enforcement

The Department of Labor may impose penalties on both grower and workers and may seek injunctive relief, including specific performance, to ensure compliance with the H-2A program.[75] The law also authorizes $10 million in appropriations each year for recruiting domestic workers and for

69. INA § 216(d)(3)(A), 8 U.S.C. § 1186(d)(3)(A) (1986). *See also* 52 Fed. Reg. 20,522 (1987) (interim regulation to be codified at 20 C.F.R. § 655.110(d)).

70. INA § 216(d)(3)(B)(i), 8 U.S.C. § 1186(d)(3)(B)(i) (1986). *See also* 52 Fed. Reg. 20,522 (1987) (interim regulation to be codified at 20 C.F.R. § 655.110(e)).

71. INA § 216(d)(3)(B)(ii), 8 U.S.C. § 1186(d)(3)(B)(ii) (1986). *See also* 52 Fed. Reg. 20,522 (1987) (interim regulation to be codified at 20 C.F.R. § 655.110(f)).

72. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 83 (1986).

73. *Id.*

74. INA § 216(f), 8 U.S.C. § 1186(f) (1986). *See also* 52 Fed. Reg. 20,556 (1987) (interim regulation to be codified at 8 C.F.R. § 214.2(h)(3)(viii)(A)) (INS interim regulations implementing the H-2A provisions).

75. INA § 216(g)(2), 8 U.S.C. § 1186(g)(2) (1986). *See also* 52 Fed. Reg. 20,527-53 (1987) (interim regulation to be codified at 20 C.F.R. Part 501) (Department of Labor's Wage and Hour Division enforcement regulations).

enforcing the statute.[76]

M. The Department of Labor and the INS

After receiving H-2A certification from the Department of Labor, an alien seeking to enter the U.S. as a temporary agricultural worker must file a petition with the INS and receive its approval. The interim INS rule implementing IRCA's H-2A changes grants greater deference than before to the Department of Labor in its review of H-2A certification applications. Under the old system the Department of Labor's denial of an H-2 temporary labor certification did not always preclude the INS from approving the H-2 petition; under IRCA, the INS may now review a labor certification denial only to determine whether qualified U.S. workers really are available.[77]

The interim rule also reduces the INS' discretion to decide whether a given kind of employment is seasonal or temporary. Because the INS and the Department of Labor share the same view of what constitutes temporary employment, the INS will accept the Department of Labor's certification unless there is "substantial evidence" in the record that the employment is not really temporary or seasonal.[78] Most employers are unlikely to put evidence of a position's permanent nature in an application for temporary labor certification. As a practical matter, this means growers only have to convince the Department of Labor that a given job is temporary.

N. Preemption

The new H-2A provisions preempt any state or local laws regulating the admissibility of nonimmigrant workers.[79]

O. Presidential Report

IRCA requires the President to report to Congress every two years on the implementation of the H-2A program.[80] The first report is due in November of 1988.[81] The reports must include: (1) the number of H-2A workers admitted each year, (2) the status of employer and worker compliance with the program, (3) the impact of the program on employers' labor needs and on the wages and working conditions of U.S. agricultural workers, and (4) recommendations to increase the timeliness of certification decisions, to remove economic disincentives to hiring domestic workers, to end the dependence on temporary foreign workers, and to consider the relative benefits and burdens

76. INA § 216(g)(1), 8 U.S.C. § 1186(g)(1) (1986).

77. 52 Fed. Reg. 20,556 (1987) (interim regulation to be codified at 8 C.F.R. § 214.2(h)(3)(ii)).

78. 52 Fed. Reg. 20,556 (1987) (interim regulation to be codified at 8 C.F.R. § 214.2(h)(3)(iv)(B)).

79. INA § 216(h)(2), 8 U.S.C. § 1186(h)(2) (1986).

80. IRCA, Pub. L. No. 99-603, § 403, 100 Stat. 3359, 3442.

81. IRCA, Pub. L. No. 99-603, § 403(b), 100 Stat. 3359, 3442.

in continuing the fifty percent rule.[82]

P. Conclusion

Congress' aim in revising the temporary foreign agricultural worker program was to streamline the application process without reducing protections for farm workers. The Department of Labor's implementing regulations, however, subvert congressional intent. The interim regulations expedite the application process, though not as much as growers would like. More important, the regulations provide fewer protections overall for agricultural workers. The wage rates have been reduced, and the system favors foreign workers over domestic. Given the procedure that the Department of Labor has established, its prediction that the number of aliens on H-2A visas will skyrocket to 250,000 annually by 1991 seems realistic, though not what Congress intended.[83]

II.
SPECIAL AGRICULTURAL WORKERS

A. Summary

Section 302(a) of IRCA creates a new INA § 210. Section 210 establishes a special legalization program for "special agricultural workers" or "SAWs": undocumented aliens who have worked harvesting perishable crops in the U.S. The SAW legalization program has two key aspects. First, it permits up to 350,000 aliens who have lived in the U.S. for the last three years and who have worked in seasonal agriculture for at least ninety days during each of those three years to apply for temporary resident status. These aliens will become permanent residents by about 1989. Second, aliens who have worked in perishable agriculture for at least ninety days during the one year period ending May 1, 1986 may also apply for temporary resident status and may thus receive an adjustment to permanent resident status by about 1990. Both groups of farm workers will be treated as regular lawful permanent residents of the U.S., though they will be subject to restrictions on government benefits.

B. Test of Admissibility for Residence Status

Any alien who can establish that she (1) resided in the U.S. and (2) performed "seasonal agricultural services" in this country for at least "90 man-days" during the twelve month period ending May 1, 1986 is eligible for temporary resident status.[84] Section 210 divides these aliens into two groups. "Group 1" includes up to 350,000 aliens: those who can prove that they worked in seasonal U.S. agriculture for at least ninety man-days during each

82. IRCA, Pub. L. No. 99-603, § 403(a), 100 Stat. 3359, 3441-42.
83. Wash. Post, May 8, 1987, at A21, col. 1.
84. INA § 210(a)(1)(B), 8 U.S.C. § 1160(a)(1)(B) (1986).

of the three years ending May 1, 1984, 1985, and 1986.[85] Group 1 SAWs will become permanent residents one year after (1) they were granted temporary resident status or (2) the end of the eighteen month application period, whichever occurs later.[86] "Group 2" SAWs include those aliens who would have qualified as Group 1 SAWs but for the 350,000 cap on Group 1 SAWs and all other farm workers who gain temporary resident status through § 210.[87] Group 2 SAWs will become permanent residents one year later than Group 1 SAWs.[88]

Whether the 350,000 cap for Group 1 SAWs will be filled is unclear. The INS originally estimated that up to 800,000 aliens might apply for SAW status,[89] but the program got off to a very slow start, with only 16,767 farm workers applying to the INS for SAW status in June 1987.[90] But by July 30, 1987, the number of applications had increased significantly: 49,520 aliens had applied to the INS for SAW status, and 225 Mexican farm workers had received SAW visas from U.S. consulates in Mexico.[91] At that rate, about 450,000 foreign farm workers will apply for SAW status over the course of the eighteen month application period. Thus, foreign agricultural workers who can prove they have worked in U.S. agriculture for the last three years should apply early for temporary resident status under § 210, allowing them to be adjusted to permanent resident status in late 1989, before the 350,000 cap most likely is filled.

C. The Types of Crops Included

Only aliens who have performed "seasonal agricultural services" are eligible to apply for SAW status. IRCA defines that term as "the performance of field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture."[92] The legislative history elaborates that the term is intended to include perishable horticultural commodities such as flowers and fruits and vegetables such as raisins and prunes that, although picked fresh, are later dried or otherwise processed before consumption.[93] "The term does not cover work in packing houses or canneries or the transportation of farm produce other than that nor-

85. INA § 210(a)(2), 8 U.S.C. § 1160(a)(2) (1986).

86. INA § 210(a)(2)(A), (C), 8 U.S.C. § 1160(a)(2)(A), (C) (1986). *See* Adjustment of Status for Special Agricultural Workers, 52 Fed. Reg. 16,195, 16,204 (1987) (to be codified at 8 C.F.R. § 210.5(a)(1)).

87. INA § 210(a)(2)(B), (C), 8 U.S.C. § 1160(a)(2)(B), (C) (1986).

88. *Id. See also* 52 Fed. Reg. 16,204 (1987) (to be codified at 8 C.F.R. § 210.5(a)(2)).

89. Minutes of March 11, 1987, meeting between State Department Bureau of Consular Affairs and American Immigration Lawyers Association ("AILA"), reprinted as Exhibit 12 to AILA Monthly Mailing 1000-01 (June 1987) (copy on file with the author).

90. 64 INTERPRETER RELEASES, No. 29, at 894 (Aug. 3, 1987).

91. *Id.*

92. INA § 210(h), 8 U.S.C. § 1160(h) (1986).

93. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 85 (1986).

mally involved in field work, nor does it include crops that are not traditionally associated with labor-intensive field operations."[94]

IRCA does not indicate whether "seasonal agricultural services" is limited to crops. Livestock and poultry theoretically could be included. The statute also fails to define "perishable." Those definitions are contained in regulations issued June 1, 1987 by the USDA.[95] The regulation defines "other perishable commodities" as those commodities other than fruits and vegetables that are produced as a result of seasonal field work and that have critical and unpredictable labor demands.[96] The list includes Christmas trees, cut flowers, herbs, hops, nursery products, spanish reeds, spices, sugar beets, and tobacco. Among the excluded commodities are dairy products, livestock, poultry and poultry products, sugar cane, and trees.[97]

The definition of perishable commodities has been criticized as too narrow. Representative Howard L. Berman (D-CA), one of the authors of SAW legalization program, found the exclusion of sugar cane "particularly galling."[98] He accused the USDA of excluding sugar cane from the list as a response to pressure from growers, who want to continue to exploit H-2 workers.[99] In a letter to Agriculture Secretary Richard E. Lyng, nine legislators, including House Judiciary Committee chairman Peter W. Rodino, Jr. (D-NJ), said that the exclusion of sugar cane was a "particularly egregious" evasion of congressional intent to protect foreign farm workers.[100]

As a result of the exclusion of sugar cane, more than 10,000 alien sugar cane workers will not be able to apply for SAW legalization. According to the USDA, it omitted sugar cane because it did not meet the tests of critical harvest time and perishability. The Agriculture Department distinguished cases such as *Maneja v. Waialua Agricultural Co.*[101] and *Wirtz v. Osceola Farms Co.*,[102] which specifically held that sugar cane is perishable, by stating that those cases held only that sugar cane is perishable after harvesting. According to the USDA, "[i]f that standard [post-harvest perishability] were to be used to determine perishability under the Act, all crops would be considered perishable and thus defeat congressional intent to limit the eligibility of commodities to certain standards."[103]

Most agricultural growers lobbied hard to have their particular commod-

94. *Id. See also* 52 Fed. Reg. 16,199 (1987) (to be codified at 8 C.F.R. § 210.1(n)) (definition of "qualifying agricultural employment").

95. 52 Fed. Reg. 20,372 (1987).

96. 52 Fed. Reg. 20,376 (1987) (to be codified at 7 C.F.R. § 1d.7).

97. *Id.*

98. *USDA Lists Farm Work Leading to Legal Status*, Wash. Post, Apr. 22, 1987, at A17, col. 4.

99. The controversy is reported in 64 INTERPRETER RELEASES, No. 16, at 489-90 (Apr. 27, 1987); No. 21, at 644-45 (June 1, 1987).

100. *USDA Resolves to Exclude Aliens*, Wash. Post, May 28, 1987, at A4, col. 4.

101. 349 U.S. 254, 257 (1955).

102. 372 F.2d 584, 586 (5th Cir. 1967).

103. 52 Fed. Reg. 20,375 (1987) (supplementary information part of rule).

ities included on the USDA's list[104] because a large number of undocumented immigrants work on U.S. farms. The American Farm Bureau Federation estimates that as many as 500,000 undocumented aliens work on the nation's 2 million farms and the INS believes that up to 300,000 of those workers may apply for legalization.[105] Growers are not interested in helping their employees, however. Under IRCA, employers of workers performing seasonal agricultural services may lawfully continue to use undocumented aliens until December 1, 1988, the end of the SAW application period.[106] All other employers, including growers of crops excluded from the USDA's definition of perishable commodities, can be fined beginning June 1, 1987 if they violate the new law's employer sanctions provisions.

A lawsuit challenging the USDA's definition was filed the same day the final rule was promulgated.[107] The plaintiffs, including the Federation for American Immigration Reform ("FAIR"), a forestry association, and several U.S. citizen forestry and tobacco workers, claim that the USDA's definition of "perishable" commodities exceeds both the statute's language and its legislative history. According to the complaint, the USDA's modification was an unreasonable and illegal response to public and political pressure. The plaintiffs also argue that only fresh fruits and vegetables should be included in the regulations. The USDA had rejected this view in its final rule, stating that the "unambiguous language of the statute" required the inclusion of all fruits and vegetables, not just perishable ones.[108]

The complaint seeks a declaratory judgment stating that the USDA's regulations exceed the limits established by Congress and a mandatory injunction against the INS to revoke or to terminate any grants of amnesty made pursuant to those portions of the regulations declared illegal. Organizations representing sugar cane workers have intervened on the opposite side of the case, claiming that the USDA's regulations are too narrow, not too broad.[109] Alien cotton field workers have brought a separate class action, arguing that the USDA unlawfully excluded cotton from its list of perishable crops.[110]

D. Residency Requirements

As in the main legalization program, the INS must grant temporary and permanent resident status to all special agricultural workers who meet the eligibility requirements of the SAW program. The INS has no discretion to

104. *Growers, Needing Help, Seek Perishable Status*, L.A. Times, Apr. 4, 1987, Part I, at 19, col. 1.

105. *Farmhand Legal Status Proof Scarce*, L.A. Times, June 1, 1987, Part I, at 5, col. 1.

106. INA § 274A(i)(3)(A), 8 U.S.C. § 1324A(i)(3)(A) (1986).

107. Northwest Forest Workers Ass'n v. Lyng, No. 87-1487-H (D.D.C. filed June 1, 1987).

108. 52 Fed. Reg. 20,373, 20,375 (1987).

109. *See* 64 INTERPRETER RELEASES, No. 29, at 895-97 (Aug. 3, 1987).

110. Valencia v. Lyng, No. 87-630 TUC RMB (D. Ariz. filed Aug. 26, 1987).

deny legalization to a SAW applicant who is otherwise qualified.[111]

The U.S. residency test for SAWs is more liberal than for applicants under the IRCA's main legalization program. The House-Senate conference report states that a prospective special agricultural worker does not have to prove continuous residence in the U.S. Instead, Group 1 SAWs need only prove they resided "6 months per year, in the aggregate."[112] How long Group 2 SAWs must show they resided in the U.S. was left unclear in the legislation. The conference report states a figure of six months in the eighteen month period between May 1, 1985 and November 6, 1986, the date of enactment.[113] Subsequent colloquies on the House and Senate floors, however, indicate that this was a mistake and that the conferees really only intended a three month residency requirement for Group 2 SAWs.[114] The INS's regulations effectively follow the more liberal alternative by not explicitly requiring any U.S. residency at all.[115] By working in U.S. agriculture for ninety days, such workers necessarily will have resided in this country for the required length of time.

The statute does not define "man-day" for purposes of the special agricultural workers provisions. The implementing regulations define the term as at least one hour of qualifying agricultural employment in a given day.[116] Section 210 declares that farm workers who work for more than one grower the same day will only have one man-day counted for that day's work.[117] The legislative history states that if an agricultural worker only has piece rate evidence of work on a given day, that will be sufficient to satisfy the man-day requirement.[118] The regulations follow this view.[119]

E. The Application Process

Most aliens must apply for SAW status between June 1, 1987 and November 30, 1988.[120] Applications may be filed within the U.S., either directly with the INS or through a designated volunteer organization, on INS Form I-700

111. H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 86 (1986).

112. H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess. 96 (1986). *See also* 52 Fed. Reg. 16,199 (1987) (to be codified at 8 C.F.R. § 210.1(f)).

113. H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess. 96 (1986).

114. 132 CONG. REC. H10,591 (daily ed. Oct. 17, 1986) (statements of Reps. Panetta, Lungren and Rodino); *id.* S16,910 (daily ed. Oct. 17, 1986) (statements of Sens. Wilson and Simpson).

115. *See* 52 Fed. Reg. 16,199 (1987) (to be codified at 8 C.F.R. § 210.1(g)) (definition of Group 2 SAWs without any residency requirement).

116. 52 Fed. Reg. 16,199 (1987) (to be codified at 8 C.F.R. § 210.1(i)). *Cf.* the later replenishment provisions, which define the same term as "the performance during a calendar day of at least 4 hours of seasonal agricultural services." INA § 210A(g)(4), 8 U.S.C. § 1161(g)(4) (1986).

117. INA § 210(a)(1)(B), 8 U.S.C. § 1160(a)(1)(B) (1986). *See also* 52 Fed. Reg. 16,199 (1987) (to be codified at 8 C.F.R. § 210.1(i)).

118. H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess. 97 (1986).

119. 52 Fed. Reg. 16,199 (1987) (to be codified at 8 C.F.R. § 210.1 (i)).

120. INA § 210(a)(1)(A), 8 U.S.C. § 1160(a)(1)(A) (1986). *See also* 52 Fed. Reg. 16,199 (1987) (to be codified at 8 C.F.R.. § 210.1(b)).

or from outside the U.S. at a consular post.[121]

The ability of special agricultural workers to apply for legalization from outside the U.S. is another example of the greater liberality of the SAW legalization program over the statute's main legalization program. Aliens who have resided unlawfully in the U.S. since before 1982 but who left the country after IRCA's enactment date and did not return or who reentered the U.S. without INS permission after May 1, 1987 are ineligible for IRCA's main legalization program.[122] By contrast, SAW-eligible aliens have their choice of applying in the U.S. or at a consulate outside the country if they either have remained in the country since the new law's enactment or have left the U.S. but reentered before June 26, 1987. Any reentries made before that date did not require advance permission from the Service. Alien farm workers outside the U.S. as of June 26, 1987 who have not received advance permission from the INS to reenter the country may apply for the SAW program only through a U.S. consulate.[123]

Some aliens had thirty days to apply for SAW status. An alien apprehended by the INS between November 6, 1986 and June 1, 1987 who had a nonfrivolous claim to SAW eligibility had to file an application before June 30, 1987.[124] Unlike the main legalization regulations, an alien who becomes the subject of a deportation proceeding sometime during the eighteen month application period is not required to file a claim for legalization within thirty days of the order to show cause.[125]

Applications for SAW status must be filed on new INS Form I-700.[126] Each application must be accompanied by proof of identity, evidence of qualifying employment and U.S. residence for the required period, and proof of financial responsibility.[127] Each SAW applicant must be interviewed, fingerprinted, and given a medical examination.[128] Under a rule established by the Public Health Service, the medical examination for SAW applicants, as for other aliens, must include a test to determine whether the individual has been exposed to Human Immunodeficiency Virus ("HIV"), the virus causing AIDS.[129]

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121. INA § 210(b)(1), 8 U.S.C. § 1160(b)(1) (1986).

122. *See* 52 Fed. Reg. 16,208-09 (1987) (to be codified at 8 C.F.R. § 245a.1(f), (g)). This issue is discussed in greater detail in 64 INTERPRETER RELEASES, No. 17, at 517-18 (May 4, 1987).

123. Statement of INS Commissioner Alan C. Nelson, June 29, 1987, reproduced in 64 INTERPRETER RELEASES, No. 25, at 801-08 (July 6, 1987).

124. INA § 210(d)(1), 8 U.S.C. § 1160(d)(1) (1986); *see also* 52 Fed. Reg. 16,200 (1987) (to be codified at 8 C.F.R. § 210.2(b)(2)).

125. *Cf.* 52 Fed. Reg. 16,200 (1987) (to be codified at 8 C.F.R. § 245a.2(a)(2)(ii) (alien who is the subject of an order to show cause filed during the 12 month main legalization period must file a legalization application within 30 days after the issuance of the order to show cause)).

126. 52 Fed. Reg. 16,200 (1987) (to be codified at 8 C.F.R. § 210.2(c)(1)).

127. 52 Fed. Reg. 16,201 (1987) (to be codified at 8 C.F.R. § 210.3(c)).

128. 52 Fed. Reg. 16,201 (1987) (to be codified at 8 C.F.R. § 210.2(c)(iv), (d)).

129. The final rule adding HIV to the list of dangerous contagious diseases that render an

IRCA requires the INS to designate qualified voluntary agencies and other organizations, including farm labor organizations and agricultural employers associations, to receive applications for SAW status.[130] The files of the designated organizations are confidential.[131] No information may be released to the INS without the applicant's consent.[132] Maintaining the confidentiality of the records is designed to assure applicants that the legalization process is serious and is not merely a ruse to invite undocumented farm workers to come forward, only to be ensnared by the INS. The same penalties are provided for violating the confidentiality requirements in the SAW legalization program as in the main legalization program.[133]

F. Penalties for False Statements

Like the main legalization provisions, § 210 imposes criminal penalties on agricultural workers who knowingly and willfully make false statements in their applications for SAW status or who conceal a material fact. Such aliens can be fined and/or jailed for up to five years.[134] Moreover, SAW aliens convicted of knowing and willful false statements or concealment will be excludable under INA § 212(a)(19).[135]

Although the statute authorizes only criminal prosecution of SAW-eligible aliens who commit fraud, the INS' regulations allow administrative deportation proceedings if a U.S. Attorney declines to prosecute.[136] The regulatory provision for deportation proceedings might be ultra vires because it would violate criminal and statutory protections available to criminal defendants.

G. Proof of Eligibility

The documentation that will be required to establish eligibility for SAW status is probably the most important issue in this part of IRCA. While the

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alien inadmissible to the U.S. under INA § 212(a)(6), 8 U.S.C. § 1182(a)(6) (1986), is published in 52 Fed. Reg. 32,540 (Aug. 28, 1987). The INS telex confirming that all legalization applicants must be tested for AIDS is reproduced in 64 INTERPRETER RELEASES No. 28, at 888-89 (July 27, 1987). For more on AIDS testing of aliens generally, see 64 INTERPRETER RELEASES No. 28, at 873-75 (July 27, 1987); No. 33, at 988-89 (Aug. 31, 1987).

130. INA § 210(b)(2), 8 U.S.C. § 1160(b)(2) (1986). *See also* 52 Fed. Reg. 16,200 (1987) (to be codified at 8 C.F.R. § 210.1(m)) (definition of "qualified designated entity").

131. INA § 210(b)(5), 8 U.S.C. § 1160(b)(5) (1986). *See also* 52 Fed. Reg. 16,201 (1987) (to be codified at 8 C.F.R. § 210.2(e)).

132. INA § 210(b)(4), 8 U.S.C. § 1160(b)(4) (1986). *See also* 52 Fed. Reg. 16,201 (1987) (to be codified at 8 C.F.R. § 210.2(e)(2)).

133. INA § 210(b)(6), 8 U.S.C. § 1160(b)(6) (1986); *cf.* INA § 245A(c)(5), 8 U.S.C. § 1255a(c)(5) (1986).

134. INA § 210(b)(7)(A), 8 U.S.C. § 1160(b)(7)(A) (1986); *cf.* INA § 245A(c)(6), 8 U.S.C. § 1255a(c)(6) (1986).

135. INA § 210(b)(7)(B), 8 U.S.C. § 1160(b)(7)(B) (1986).

136. 52 Fed. Reg. 16,199, 16,201 (1987) (to be codified at 8 C.F.R. § 210.1(d), 210.2(e)(4)).

statute contemplates a liberal burden of proof, the implementing regulations are needlessly restrictive.

Section 210 requires the alien to prove by a preponderance of evidence that she has worked the requisite number of days in seasonal agriculture and has resided in the U.S.[137] To help the alien fulfill the burden of proving the required work history, the regulations include a provision for securing employment records from growers.[138] Growers are not compelled to assist SAW-eligible aliens, however, and if "such corroborating evidence [i.e., from growers] is not available and the evidence provided is deemed insufficient, the application may be denied."[139] This forces the alien to bear the burden of an employer's reluctance, refusal, or inability to produce employment verification and reduces the alien to a victim of the employer's power. A lawsuit has been filed challenging the INS' refusal to compel growers to assist foreign farm workers applying for SAW legalization.[140]

According to the statute, even if employment records are unavailable, the alien can still meet the burden of proof by producing sufficient other "reliable documentation" that establishes the alien's work history "as a matter of just and reasonable inference."[141] The relevant legislative history expands on the statutory test. The conference report states that Congress intended the standards enunciated in Fair Labor Standards Act case law to govern when disputes arise about a farm worker's claim of eligibility to SAW status.[142] Because the problem of lost or destroyed documentation is compounded in agriculture, the conferees opted for "a presumption in favor of worker evidence, unless disproved by specific evidence adduced by the Attorney General."[143]

The Fair Labor Standards Act cases cited by the conferees, which govern the documentation issue for the SAW program, highlight the problem of lost, destroyed, or falsified documentation. In many cases, determinations of whether a given farm worker was employed were based solely on the testimony of the applicant and her co-workers. For example, in *Beliz v. W.H. McLeod & Sons Packing Co.*,[144] the Court of Appeals relied on oral testimony

137. INA § 210(a)(1)(B), 210(b)(3)(B), 8 U.S.C. § 1160(a)(1)(B), 1160(b)(3)(B) (1986). *See also* 52 Fed. Reg. 16,202 (1987) (to be codified at 8 C.F.R. § 210.3(b)(1)).

138. 52 Fed. Reg. 16,202 (1987) (to be codified at 8 C.F.R. § 210.3(b)(3)).

139. *Id.* One California grower has publicly stated that he is not sure he will dig through old records to aid legalization applicants. "I don't have the help to do it, and I am not going to hire extra people to help do it." Wall St. J., Nov. 26, 1986, at 13, col. 1.

140. United Farm Workers of Am. v. INS, Cv. No. S-87-1064-MLS-EM (E.D. Cal. filed July 22, 1987). The case is reported in 64 INTERPRETER RELEASES, No. 29, at 895-97 (Aug. 3, 1987).

141. INA § 210(b)(3)(A), (B)(iii), 8 U.S.C. § 1160(b)(3)(A), (B)(iii) (1986).

142. H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. 97 (1986).

143. *Id.*

144. 765 F.2d 1317, 1331 (5th Cir. 1985). *See also* Hodgson v. Okada, 472 F.2d 965, 969 (10th Cir. 1973) (absence of adequate wage records justified district court in calculating minimum wage violations for a crew of cucumber pickers based on deposition testimony that constituted "a maze of total and complete confusion"); Reeves v. ITT, 616 F.2d 1342, 1352 (5th Cir.

to conclude that a prima facie case had been established that thirteen of the plaintiffs had worked for the defendant grower and to establish the amount of their work.

The implementing regulations ignore Congress' intent. According to the INS, uncorroborated personal testimony by a SAW-eligible alien "will not serve to meet an applicant's burden of proof."[145] This corroboration requirement is now being challenged in a national class action.[146]

While some growers may be unwilling to produce available pay and work records to SAW-eligible aliens, other growers may consider it in their own interest to help SAW applicants. As explained in more detail below, the greater the number of legalized SAWs, the greater the number of replenishment agricultural workers who will be allowed to enter the U.S. between 1990 and 1993. Growers who hope to use replenishment workers later will want to legalize now as many special agricultural workers as possible.

The statute also requires the INS to credit an alien's work performed under an assumed name.[147] The regulatory provision places the burden on the alien to prove that the applicant is in fact the person who used that name.[148] The most persuasive evidence of common identity is a document issued in the assumed name that identifies the applicant by photograph, fingerprint or detailed physical description.[149] The INS will also consider affidavits by others regarding use of the assumed name.[150]

H. Admissibility as an Immigrant

The special agricultural worker must establish that she is admissible as an immigrant,[151] but certain grounds of exclusion are inapplicable or are waived.[152] These grounds are the same as those in IRCA's main legalization provisions.[153] The inapplicable grounds of exclusion are INA §§ 212(a)(14), (20), (21), (25) and (32).[154] The INS may waive any other provision of § 212(a) for a SAW applicant on humanitarian grounds, to assure family unity, or to promote the public interest.[155] The only grounds listed in the

1980) *cert. denied*, 449 U.S. 1077 (1981) (plaintiff established his claim for FLSA violation with estimates of hours based upon "the rough computations of his subconscious mind").

145. 52 Fed. Reg. 16,202 (1987) (to be codified at 8 C.F.R. § 210.3(b)(3)).

146. United Farm Workers of Am. v. INS, Cv. No. S-87-1064-MLS-EM (E.D. Cal. filed July 22, 1987). The case is reported in 64 INTERPRETER RELEASES No. 29, at 895-97 (Aug. 3, 1987).

147. INA § 210(b)(3)(A), 8 U.S.C. § 1160(b)(3)(A) (1986).

148. 52 Fed. Reg. 16,200 (1987) (to be codified at 8 C.F.R. § 210.3(c)(2)(i)).

149. 52 Fed. Reg. 16,201 (1987) (to be codified at 8 C.F.R. § 210. 3(c)(2)(ii)).

150. *Id.*

151. INA § 210(a)(1)(C), 8 U.S.C. § 1160(a)(1)(C) (1986).

152. INA § 210(c)(2), 8 U.S.C. § 1160(c)(2) (1986).

153. *Cf.* INA § 245A(d)(2), 8 U.S.C. § 1255a(d)(2) (1986).

154. INA § 210(c)(2)(A), 8 U.S.C. § 1160(c)(2)(A) (1986). *See also* 52 Fed. Reg. 16,203 (1987) (to be codified at 8 C.F.R. § 210.3(e)(1)).

155. INA § 210(c)(2)(B)(i), 8 U.S.C. § 1160(2)(B)(i) (1986). *See also* 52 Fed. Reg. 16,203 (1987) (to be codified at 8 C.F.R. § 210.3(e)(2)).

IRCA that may not be waived are cases involving §§ 212(a)(9) and (10) (criminals); (23) (drug convictions), except for a single offense of simple possession of 30 grams or less of marijuana; (27), (28) and (29) (national security and membership in proscribed organizations); and (33) (Nazi collaborators).[156]

The major grounds of exclusion that will affect SAW applicants and that may be waived under IRCA are INA §§ 212(a)(16) (those who have been excluded from admission and deported within the past five years) and (a)(17) (those who have been arrested and deported within the past five years). INS statistics show that 76,956 aliens apprehended in FY 1985 worked in agriculture.[157] Over the past five fiscal years, more than 400,000 Mexican aliens working in U.S. agriculture have been apprehended by the Service.[158] For this reason, the waiver process will be crucial for many SAW applicants.

Unfortunately, neither IRCA nor the INS' regulations defines "humanitarian purposes" or "public interest" for the purpose of waiver. The SAW regulations do not define "family unity," but the regulations for the main legalization program define the term as, "maintaining the family group without deviation or change. The family group shall include the spouse, unmarried minor children under 18 years of age who are not members of some other household, and parents who reside regularly in the household of the family group." [159] The INS presumably will apply the same definition to the SAW program.

This narrow interpretation of the family unit is unrealistic and inconsistent with Congress's intent to have a liberal legalization program. The Supreme Court has recognized that extended families are common in our society.[160] A better definition of "family group" would include all blood relatives with whom there is either substantial financial or clear emotional dependence.[161]

INA § 212(a)(15) renders an alien excludible if she is likely to become a "public charge." This provision screens out aliens who appear unable to support themselves in the U.S. Household income statistics indicate that perhaps thirty to forty percent of all legalization applicants may fit this criterion.

IRCA contains a special rule to allow SAW applicants to overcome the

156. INA § 210(c)(2)(B)(ii), 8 U.S.C. § 1160(c)(2)(B)(ii) (1986); 52 Fed. Reg. 16,203 (1987) (to be codified at 8 C.F.R. § 210.3(e)(3)).

157. INS, 1985 Statistical Yearbook of the Immigration and Naturalization Service 185 (1986).

158. *Id.* at 209.

159. 52 Fed. Reg. 16,209 (1987) (to be codified at 8 C.F.R. § 245a.1(m)).

160. Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977) ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally as venerable and equally deserving of constitutional recognition.") (footnote omitted).

161. *Cf.* Vergel v. INS, 536 F.2d 755, 757 (8th Cir. 1976) (family nurse caring for mentally retarded child allowed to appeal to INS for discretionary stay of deportation).

public charge problem. A foreign farm worker will not be inadmissible under § 212(a)(15) if she demonstrates a work history in the U.S. "evidencing self-support without reliance on public cash assistance."[162] The legislative history indicates that this requirement is to be construed very liberally. An alien who meets the ninety day work requirement for SAW status will be deemed to have shown a sufficient history of U.S. employment.[163] Aliens with such a work history should not be ineligible for SAW status even if their income is well below the poverty line.

The INS' regulations restrict this intended liberality. The ninety day work requirement is not enough; an alien must produce documentation of a "consistent employment history" throughout her residence in the U.S.[164] Moreover, the "length of time an applicant has received public cash assistance will constitute a significant factor" in determining whether there may be a public charge problem under § 212(a)(15).[165]

The definition of "public cash assistance" includes income or needs-based monetary assistance.[166] It does not include unemployment compensation or certain types of medical help. It does include cash received by immediate family members as well as by the alien applicant. There is no basis for this in the statute, and it seems unnecessarily harsh. In many cases, the family members most likely to have received cash assistance would be children under the Aid to Families with Dependent Children ("AFDC") program. Excluding SAW applicants because one or more of their family members received public cash assistance renders ineligible persons with the strongest ties to the U.S.: those with minor U.S. citizen children.[167]

The SAW provisions' admissibility requirements are also more liberal than those in the statute's main legalization provisions in another respect.

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162. INA § 210(c)(2)(C), 8 U.S.C. § 1160(c)(2)(C) (1986). *Cf.* INA § 245A(d)(2)(B)(iii), 8 U.S.C. § 1255a(d)(2)(B)(iii) (1986), which requires an applicant under IRCA's main legalization provisions to demonstrate self-support without "receipt" of public cash assistance in order to overcome the public charge exclusion of INA § 212(a)(15). That appears to be a stricter standard than the "reliance" test used in the SAW provisions. One may receive public cash assistance without necessarily relying on it. The implementing regulations retain this distinction. *Cf.* 52 Fed. Reg. 16,203-04 (1987) (to be codified at 8 C.F.R. § 210.3(e)(4)) *with* 52 Fed. Reg. 16,212 (1987) (to be codified at 8 C.F.R. § 245a.2(k)(4)).

163. H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess. 96 (1986).

164. 52 Fed. Reg. 16,203-04 (1987) (to be codified at 8 C.F.R. § 210.3(e)(4)).

165. *Id.*

166. 52 Fed. Reg. 16,200 (1987) (to be codified at 8 C.F.R. § 210.1(l)).

167. The INS justifies its inclusion of public cash assistance received by immediate family members as follows:

> [I]f the dependents, including U.S. citizens, of an applicant qualify for such assistance based on the applicant's inability to adequately provide for their support, and if the assistance received by these persons is required for the maintenance of the applicant's household or subsistence of its members, the Service may regard receipt of such assistance as constituting reliance on public cash assistance on the applicant's part dependent on the amount of assistance received and/or the length of the period of time over which it is received.

52 Fed. Reg. 16,196 (1987) (supplementary information part of rule).

Under the main legalization program, an alien who has been convicted of a felony or three or more misdemeanors in the U.S. is ineligible to apply for legalization.[168] Moreover, even if a § 245A legalization applicant only has two misdmeanor convictions now, she may lose temporary resident status and become ineligible for permanent residence by a conviction that occurs after being granted temporary residence.[169] No such bar exists in the SAW program.

I. Work Authorization and Temporary Stay of Deportation and Exclusion

The statute grants a temporary stay of deportation and exclusion, as well as work authorization, to apprehended aliens who have a "nonfrivolous" claim of eligibility for SAW status.[170] For aliens apprehended before June 1, 1987, the stay of deportation and exclusion and the work authorization lasted until June 30, 1987. For aliens apprehended between June 1, 1987 and December 1, 1988, the benefits are valid until a final determination on the application has been made—presumably until all avenues of administrative and judicial review have been exhausted. Under the INS implementing regulations, any interim work authorization is valid only in six month increments.[171]

The House-Senate conference report limits INS discretion in determining whether an alien has made a nonfrivolous case of eligibility for SAW status. The conferees intended the INS to allow aliens to make a declaration under penalty of perjury (1) attesting that they have in fact worked the requisite number of man-days in U.S. agriculture, (2) identifying the type or nature of documentation they intend to produce to back up their claim, (3) acknowledging that false statements concerning their eligibility constitute a violation of U.S. law and may make them ineligible for the SAW program, and (4) identifying their current or immediate past employer(s).[172] The INS may not go beyond these criteria because to do otherwise might undermine the purposes of the section: to encourage undocumented workers to come forward and obtain legal status.[173]

The INS has established a bifurcated concept of "frivolous." The agency distinguishes between new INA § 210(d)(1) and new INA § 210(d)(2). Subsection (d)(1) provides a temporary stay of exclusion or deportation and work authorization for alien farm workers apprehended before the SAW application period began on June 1 who could establish a "nonfrivolous case of eligibility." Subsection (d)(2) provides the same relief for aliens apprehended during the eighteen month application period who present a "nonfrivolous application." According to the INS, the conference managers' statement defined

168. INA § 245A(a)(4)(B), 8 U.S.C. § 1255a(a)(4)(B) (1986). *See also* 52 Fed. Reg. 16,210 (1987) (to be codified at 8 C.F.R. § 245a.2(c)(1)).

169. INA § 245A(b)(1)(C)(ii), 8 U.S.C. § 1255a(b)(1)(C)(ii) (1986); 52 Fed. Reg. 16,215 (1987) (to be codified at 8 C.F.R. § 245a.3(b)(3)).

170. INA § 210(d), 8 U.S.C. § 1160(d) (1986).

171. 52 Fed. Reg. 16,204 (1987) (to be codified at 8 C.F.R. § 210.4(b)(2)).

172. H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess. 96-97 (1986).

173. *Id.* at 97.

"nonfrivolous" only as it applied to subsection (d)(1). INS claimed to have complied with that definition during the pre-application period.[174] Arizona farm workers successfully challenged the INS interpretation, convincing a federal district court to issue a temporary restraining order requiring the Border Patrol to comply with the INS' internal guidelines for determining whether a foreign farm worker possessed a nonfrivolous claim of eligibility for SAW status during the pre-application period.[175] The INS' regulations of June 1, 1987 define "nonfrivolous application" for purposes of new INA § 210(d)(2) much more stringently than the conferees intended. The INS required documentary evidence to be submitted with an alien's claim of eligibility for SAW status before it could be considered nonfrivolous; an applicant's uncorroborated testimony, by itself, was insufficient.[176]

The purported distinction between "nonfrivolous case of eligibility" and "nonfrivolous application" is unsupportable, but the distinction was inevitable because of the very nature of the time periods involved. When discussing relief for aliens apprehended before the application period in § 210(d)(1), the legislative drafters could not have used the word "application" because the application period had not yet started. Their use of the phrase "case of eligibility" in subsection (d)(1) was simply a logical choice. Similarly, because subsection (d)(2) refers to relief for aliens apprehended during the application period, using the word "application" was only natural.

Contrary to the assertions of the Service, the liberal language of the House-Senate conferees is not limited to subsection (d)(1). The relevant paragraph of the conference report begins with a reference to "subsection (d) of new section 210." This reference includes both § 210(d)(1) and § 210(d)(2).[177] Similarly, the paragraph concludes that a more restrictive view of "nonfrivolous" may undermine the purposes of both subsection (d)(1) and subsection (d)(2).[178]

The INS had to retreat partially from its definition of "nonfrivolous" because not enough foreign farm workers applied for SAW legalization in the first month of the program. Responding to complaints that an acute shortage of alien farm workers threatened huge crop losses on the West Coast, the government agreed in late June 1987 to several changes in the INS regulations to allow more aliens to enter the country as SAWs.[179] As part of that package of

174. 52 Fed. Reg. 16,196 (1987) (supplementary information part of final SAW rule). The INS' interim internal guidelines for the pre-application SAW period are reported and reproduced in 63 INTERPRETER RELEASES, No. 46, at 1076, 1087-98 (Nov. 24, 1986) (legalization cable no. 1); Vol. 64, No. 1, at 8-10 (Jan. 5, 1987) (legalization cable no. 9).

175. Romero-Romero v. Meese, No. 87-407 PHX RCB (D. Ariz. Mar. 12, 1987). The case is reported in 64 INTERPRETER RELEASES, No. 12, at 381 (Mar. 26, 1987).

176. 52 Fed. Reg. 16,199-200 (1987) (to be codified at 8 C.F.R. § 210.1(j)) (definition of "nonfrivolous application").

177. H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. 96 (1986).

178. *Id.* at 97 (emphasis added).

179. The changes are reported in 64 INTERPRETER RELEASES No. 24, at 776-77 (June 29, 1987); No. 25, at 791, 801-08 (July 6, 1987).

reforms, the INS temporarily eased the standards for determining whether an alien had made a nonfrivolous application for classification as a SAW worker.[180] Until November 1, 1987, aliens applying for SAW classification from outside the country or at special INS border stations did not have to submit documentatary proof that they worked in U.S. agriculture for the requisite ninety days; a simple statement on I-700, the SAW application form, was sufficient.[181] Workers who met this temporary admission test were to be admitted for ninety days with work authorization. During this time, they were supposed to gather the documentary proof of their eligibility and to submit it to an INS legalization office, where it will be adjudicated under the normal standards.[182]

The INS has not explicitly acknowledged that these temporary measures alter its definition of "nonfrivolous," but the difference is clear. The revisions also created an anomaly: alien farm workers applying at the U.S. border or in Mexico for SAW status did not have to show any documentary proof to gain admission to the country and interim work authorization, but aliens already in the U.S. who are applying for SAW status must have documentatary proof of their eligibility to be granted the same interim employment authorization. This disparity is one of the issues now being challenged in a lawsuit.[183]

J. Reentries

IRCA does not specify whether an alien agricultural worker who left the U.S. after November 6, 1986, the date of IRCA's enactment, and who is apprehended at the border trying to reenter the country should be allowed to establish a nonfrivolous case of eligibility for SAW status before being turned back. IRCA also does not distinguish between aliens apprehended at the border and those apprehended in the interior. Moreover, by explicitly granting a temporary stay of exclusion and deportation, it could be argued that Congress considered this issue and decided to include such aliens. It could also be argued that Congress intended the stays of exclusion and deportation to apply only to those already involved in such proceedings as of the date of enactment, not to those apprehended later. The latter argument is more persuasive because the statute allows aliens to apply for SAW status from outside the U.S.

The INS initially instructed the Border Patrol to turn back any aliens caught at the border without inquiring whether they might be eligible for SAW status.[184]

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180. *See* 64 INTERPRETER RELEASES, No. 25, at 806 (July 6, 1987) (statement of INS Commissioner Alan C. Nelson); 52 Fed. Reg. 28,660-64 (July 31, 1987) (to be codified at 8 C.F.R. § 210.6 to implement transitional admission program for SAW applicants).

181. 52 Fed. Reg. 28,663 (1987) (to be codified at 8 C.F.R. § 210.6(c)(1)).

182. 52 Fed. Reg. 28,664 (1987) (to be codified at 8 C.F.R. § 210.6(c)(3)).

183. United Farm Workers of Am. v. INS, Cv. No. S-87-1064-MLS-EM (E.D. Cal. filed July 22, 1987). The case is reported in 64 INTERPRETER RELEASES, No. 29, at 895-97 (Aug. 3, 1987).

184. *See* INS legalization cable nos. 1, 9, *supra* note 174, at 9.

The instructions also stated that aliens who entered the country after the date of enactment were not eligible for a stay of deportation or for exclusion under the SAW provisions and could only apply for SAW classification from outside the U.S.[185] A U.S. District Court issued a temporary restraining order prohibiting the INS from continuing this practice, but the Ninth Circuit stayed and then reversed that order.[186] Members of the House Immigration Subcommittee criticized the INS' position, claiming it was contrary to Congress's intent. The INS continued to adhere to its stance, arguing that to do otherwise would create chaos on the borders.[187]

The INS abruptly reversed course in its May 1, 1987 SAW regulations. According to those regulations, any alien physically present in the U.S. before that date could apply for SAW status from within the country.[188] Aliens not in the U.S. by May 1 were required to file their SAW applications at a State Department post overseas.[189]

The new date meant that aliens who ignored the INS' previous statements and surreptitiously reentered the U.S. between November 6, 1986, and May 1, 1987 benefitted by being able to remain in the country to collect their documentary proof of eligibility as a SAW alien and to file their application here. Other aliens who were either caught and turned back as they attempted to reenter the country between November 6, 1986, and April 30, 1987, or who did not attempt to reenter, relying on the Service's now erroneous advice that they would be ineligible for SAW legalization, were not so fortunate. They not only were required to attempt to collect documentation proving their eligibility from abroad but also to file their claims overseas.

The INS' new cutoff date of May 1, 1987 did not last long. A U.S. District Court immediately entered a preliminary injunction against the agency that effectively lengthened the cutoff date to June 1, 1987.[190] Two months later, in response to pressure from growers and legislators to do more to encourage alien farm workers to apply for SAW status, the INS once again revised the date, this time to June 26, 1987.[191] The INS justified the change in the cutoff date and the continuation of any cutoff date at all as follows:

The establishment of a cutoff date to avert a potential flow of illegal

185. INS legalization cable no. 1, *supra* note 174, at 1089.

186. Catholic Social Serv., Inc. v. Meese, 664 F.Supp. 1378 (E.D. Cal. 1987), *rev'd*, 813 F.2d 1500 (9th Cir. 1987). The Ninth Circuit later vacated its order as moot in light of the INS' May 1 SAW regulations. Catholic Social Serv., Inc. v. Meese, 820 F.2d 289 (9th Cir. 1987). *See also* 64 INTERPRETER RELEASES, No. 28, at 878-79 (July 27, 1987).

187. *See* 63 INTERPRETER RELEASES, No. 50, at 1180-83 (Dec. 24, 1986) (summarizing December 17, 1986 House Immigration Subcommittee oversight hearing on implementation of IRCA).

188. 52 Fed. Reg. 16,200 (1987) (to be codified at 8 C.F.R. § 210.2(c)(1)).

189. *Id.*

190. Catholic Social Serv., Inc. v. Meese, 664 F. Supp. 1378 (E.D. Cal. 1987), *rev'd*, 813 F.2d 1500 (9th Cir. 1987).

191. 52 Fed. Reg. 16,200 (1987) (to be codified at 8 C.F.R. § 210.2(c)(1)) (as amended at 52 Fed. Reg. 28,663).

> immigrants was a responsible and reasonable policy in support of the primary purpose of IRCA. There is no contradiction if the date is adjusted in furtherance of another IRCA objective, the maintenance of agricultural production through legalization of the work force. By making the cutoff date coincident with the date of announcement both objectives are met since there is no inducement to unlawful entry and needed agricultural workers are not required to leave the country.[192]

The latest cutoff date was challenged. Plaintiffs claimed that the new date is just as arbitrary and capricious as its predecessors.[193]

K. Characteristics of SAWs While Temporary Residents

In most respects the new law treats SAWs in temporary resident status the same as permanent resident aliens. Unlike replenishment workers, SAWs do not have to continue to work in agriculture to achieve permanent resident status.[194] Special agricultural workers who have temporary resident status can work, travel outside the U.S., and return in the same manner as permanent resident aliens.[195] Indeed, SAWs do not have to continue to reside in the U.S. The law specifically states they can commute to the U.S. from a foreign residence.[196] Temporary resident SAWs are subject to some entitlement restrictions, but fewer than those imposed on aliens granted temporary resident status under IRCA's main legalization program.[197] The U.S. residency of SAWs is also somewhat more secure than that granted by IRCA's main legali-

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192. 52 Fed. Reg. 28,661 (1987).

193. Catholic Social Serv., Inc. v. Meese, No. CIV-S-86-1343-LKK (E.D. Cal. May 1, 1987) (motion to file third amended complaint), *reported in* 64 INTERPRETER RELEASES No. 27, at 848-49 (July 20, 1987). Based on the facts that the cutoff date has now been revised three times in less than three months, and that a previous court challenge to an earlier cutoff date was successful, the latest court challenge should have a good chance of success.

Note that the cutoff date for regular legalization applicants is May 4, 1988. 52 Fed. Reg. 16,209 (1987) (to be codified at 8 C.F.R. § 245a2(a)(1)). The existence of a cutoff date is even more critical for § 245A amnesty seekers than it is for SAW applicants. Unlike foreign farm workers, who can at least apply for legalization outside the U.S. if they are not present in the U.S. by the cut off date, regular legalization applicants cannot apply for amnesty unless they are in this country. *Cf.* INA § 245A(a)(3), 8 U.S.C. § 1255a(a)(3) (1986) (requiring regular legalization applicants to prove they have been continuously physically present in the U.S. since the date of enactment, except for brief, casual, and innocent absences) *with* INA § 210(b)(1), 8 U.S.C. § 1160(b)(1) (1986) (allowing SAW-eligible aliens to apply either in or out of the U.S., and containing no continuous physical presence requirement).

194. INA § 210(a)(5), 8 U.S.C. § 1160(a)(5) (1986); *cf.* INA § 210A(d)(5), 8 U.S.C. § 1161(d)(5) (1986).

195. INA § 210(a)(4), 8 U.S.C. § 1160(a)(4) (1986). *See also* 52 Fed. Reg. 16,204 (1987) (to be codified at 8 C.F.R. § 210.4(b)(3)).

196. INA § 210(a)(4), 8 U.S.C. § 1160(a)(4) (1986). *See also* 52 Fed. Reg. 16,204 (1987) (to be codified at 8 C.F.R. § 210.4(b)(3)).

197. *Cf.* INA § 210(f), 8 U.S.C. § 1160(f) (1986) *with* INA § 245A(h), 8 U.S.C. § 1255a (h) (1986). For a chart comparing the eligibility and limitations on eligibility of temporary legalized aliens and SAW aliens, see 64 INTERPRETER RELEASES, No. 2, at 30-31, 48 (Jan. 12, 1987).

zation provisions. Under IRCA the INS may terminate a SAW's temporary resident status only upon a determination that the alien is deportable.[198] The implementing regulations follow this requirement.[199] By contrast, temporary residence based on the main legalization provisions can be terminated on several grounds, such as for committing an act that makes the alien excludable.[200] These grounds are broader in some respects than deportation grounds.

L. Permanent Resident Status

Once a special agricultural worker has attained temporary resident status, adjustment to permanent resident status should be routine. An alien must fill out (1) an affidavit stating that she has maintained status as a temporary resident, and (2) the paperwork to allow issuance of a green card.[201] A temporary resident SAW will be maintaining status as long as she did nothing to make her deportable.[202] Assuming this requirement is met, a Group 1 SAW will become a lawful permanent resident of the U.S. one year after either (1) the date she was granted temporary resident status or (2) December 1, 1988, whichever is later.[203] Group 2 SAWs will become permanent residents one year later.[204] The normal numerical limitations of INA §§ 201 and 202 do not apply here.[205]

The statute states that for all essential purposes, SAWs adjusted to permanent resident status are to be considered aliens lawfully admitted for permanent resident under INA § 101(a)(20).[206] This language makes it clear that from the point they are granted permanent resident status, special agricultural workers will have the entire range of rights associated with permanent residence, including visa petition rights. Permanent resident SAWs are banned for five years from receiving Aid to Families With Dependent Children ("AFDC").[207] Here, as with the main legalization program, exceptions will be made for emergency services and for aid to pregnant women.[208]

M. Administrative and Judicial Review

The agricultural worker provisions establish a single level of administra-

198. INA § 210(a)(3), 8 U.S.C. § 1160(a)(3) (1986).
199. 52 Fed. Reg. 16,204 (1987) (to be codified at 8 C.F.R. § 210.4(d)(1)).
200. 52 Fed. Reg. 16,214 (1987) (to be codified at 8 C.F.R. § 245a.2(u)(1)).
201. 52 Fed. Reg. 16,204 (1987) (to be codified at 8 C.F.R. § 210.05(b)).
202. 52 Fed. Reg. 16,204-05 (1987) (to be codified at 8 C.F.R. § 210.5(b)(2)).
203. INA § 210(a)(2)(A), 8 U.S.C. § 1160(a)(2)(A) (1986). *See also* 52 Fed. Reg. 16,204 (1987) (to be codified at 8 C.F.R. § 210.5(a)(1)).
204. INA § 210(a)(2)(B), 8 U.S.C. § 1160(a)(2)(B) (1986). *See also* 52 Fed. Reg. 16,204 (1987) (to be codified at 8 C.F.R. § 210.5(a)(2)).
205. INA § 210(c)(1), 8 U.S.C. § 1160(c)(1) (1986).
206. INA § 210(g), 8 U.S.C. § 1160(g) (1986).
207. INA § 210(f), 8 U.S.C. § 1160(f) (1986).
208. *Id.*; *cf.* INA § 245A(h)(2), (3), 8 U.S.C. § 1255a(h)(2) (1986). For a discussion and summary of public benefit eligibility and limitations for both the main legalization and the special agricultural worker provisions of the Act, see 64 INTERPRETER RELEASES, No. 2, at 30-31, 48 (Jan. 12, 1987).

tive review.[209] Like general legalization application denials, SAW application denials can be appealed to the INS' Administrative Appeals Unit.[210] Administrative review is to be based on the administrative record and on any additional evidence that may not have been available at the time of the original determination.[211] Judicial review of a denial is limited to cases in which a final order of deportation or exclusion has been lodged under INA § 106.[212] This presents the same problems as judicial review under the main legalization program,[213] although the standard for judicial review differs somewhat from that prescribed in INA § 106(a). Under both the SAW and main legalization provisions, the administrative determination "shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole."[214] This novel test for immigration law raises questions of interpretation that courts will have to resolve.

A critical difference between the two legalization programs in this area concerns administrative and judicial review of a denial of adjustment of status based on a late application. The statute's general legalization provisions prohibit review of such denials;[215] no such bar exists in the SAW program.

N. Benefits of SAW Legalization Compared to § 245A Legalization

As indicated above, the SAW legalization program is more favorable for those aliens who qualify for it than IRCA's main legalization program. First, a prior deportation will break the continuous residence required for § 245A applicants, making them ineligible.[216] Under the SAW provisions, a prior deportation only will be a ground of inadmissibility for which a waiver can be sought. Second, aliens applying for SAW status are not required to have registered under the Military Selective Service Act, but § 245A legalization applicants between eighteen and twenty-six must have registered or are required to register at the time of application.[217] Third, the six month residency test for SAWs is much more relaxed than the almost five year requirement for legalization applicants under the main program.[218]

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209. INA § 210(e)(2)(A) (1986), 8 U.S.C. § 1160(e)(2)(A) (1986).

210. 52 Fed. Reg. 16,192, 16,201 (1987) (to be codified at 8 C.F.R. §§ 103.3(a)(2), 210.2(f)).

211. INA § 210(e)(2)(B), 8 U.S.C. § 1160(e)(2)(B) (1986).

212. INA § 210(e)(3)(A), 8 U.S.C. § 1160(e)(3)(A) (1986).

213. *Cf.* INA § 245A(f)(4), 8 U.S.C. § 1255a(f)(4) (1986).

214. INA § 210(e)(3)(B), 8 U.S.C. § 1160(e)(3)(B) (1986); *see also* INA § 245A(f)(4)(B), 8 U.S.C. § 1255a(f)(4)(B) (1986).

215. INA § 245A(f)(2), 8 U.S.C. § 1255a(f)(2) (1986).

216. INA § 245A(g)(2)(B)(i), 8 U.S.C. § 1255a(g)(2)(B)(i) (1986); 52 Fed. Reg. 16,208 16,212 (1987) (to be codified at 8 C.F.R. §§ 245a.1(c)(1)(iii), 245a.2(h)(1)(iii)).

217. 52 Fed. Reg. 16,211-12 (1987) (to be codified at 8 C.F.R. § 245a.2(g)). For more on this issue, see 64 INTERPRETER RELEASES, No. 13, at 411-12 (Apr. 6, 1987).

218. *Cf.* H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. 96 (1986) (six month residency requirement for SAWs) *with* INA § 245A(a)(2)(A), 8 U.S.C. § 1255a(a)(2)(A) (1986) (requiring continuous unlawful residence in the U.S. since January 1, 1982).

O. Advice for Practitioners

Many immigration practitioners rarely deal with alien farm workers and may not be fully aware of the benefits of SAW legalization. Attorneys counseling aliens who contemplate applying for legalization should be sure to ask them whether they worked in perishable commodities agriculture for ninety days or more between May 1985 and May 1986. Attorneys should even ask this question of aliens who now reside in urban areas. Aliens who qualify for both the general and SAW legalization programs may prefer to seek legalization under the latter.

Practitioners should also consider contacting farm worker advocates for ideas on how to establish the necessary work documentation for legalization under the SAW program. Because such groups deal with farm workers on a regular basis, they will know what alternative documents may exist when work records from an employer are unavailable. School records for a farm worker's children or requests for legal assistance to a rural legal aid society are examples of documents that may help prove that an alien worked in seasonal agriculture during the relevant time period.

III.
REPLENISHMENT WORKERS

A. Summary

Section 303(a) of IRCA creates a new INA § 210A to allow the admission of "replenishment agricultural workers" ("RAWs") into the U.S. if the Secretaries of Labor and Agriculture jointly determine there is a shortage of agricultural workers. The replenishment program will last only between fiscal years 1990-1993. The maximum number of replenishment workers admissible in any of those years will be based on a complicated formula that takes into account the number of special agricultural workers originally adjusted.

Replenishment workers will receive three years of temporary resident status and must work at least ninety days in seasonal agricultural services in each of those years. Such workers will then be eligible to apply for adjustment to lawful permanent resident status. To become naturalized U.S. citizens, replenishment workers will have to work an additional two years in seasonal agricultural services.

B. Calculating the Shortage Number

RAWs may be admitted only if the Secretaries of Labor and Agriculture jointly determine that "there will not be sufficient able, willing, and qualified workers available to perform seasonal agricultural services required in the fiscal year involved."[219] Determining the shortage number, if any, will be a complicated process. Section 210A defines the shortage number as the differ-

219. INA § 210A(a)(3), 8 U.S.C. § 1161(a)(3) (1986).

ence between the anticipated need for agricultural workers and the anticipated supply of such workers divided by the annual average number of "man-days" of work per worker.[220] The law defines "man-day" as "the performance during a calendar day of at least 4 hours of seasonal agricultural services."[221]

In determining need and supply, the Secretaries are to start with the number of man-days worked in seasonal agricultural services in the previous year and then are to make various adjustments for such factors as crop loss from unavailability of labor, changes in the size of the industry, mechanization, retirement and movement of SAWs out of agriculture, the effect of improved wages and working conditions, and the effect of enhanced recruitment of domestic workers.[222] Special emergency increase and decrease procedures are also provided.[223]

To help in the calculations, growers who employ SAWs or RAWs must report the number of man-days worked by each such worker.[224] The Census Bureau will then estimate the number of SAWs and RAWs in U.S. agriculture and the average number of man-days they have worked.[225]

The law places numerical limits on the number of replenishment workers that can be admitted in any given year. For fiscal year 1990, the maximum number of RAWs will be equal to ninety-five percent of the number of SAWs originally adjusted minus the number of SAWs who worked in perishable agriculture in fiscal year 1989.[226] For fiscal years 1991-1993, the maximum number is equal to ninety percent of the previous year's ceiling minus the number of agricultural workers (both SAWs and RAWs) who worked in perishable agriculture the previous year.[227] As indicated earlier, because the number of RAW workers is tied to the number of SAWs, growers who anticipate using replenishment workers will want to see as many agricultural workers as possible receive SAW status.

No replenishment workers will be admitted after fiscal year 1993. This time limit was included at the insistence of domestic farm workers, who were concerned about the potentially large number of alien agricultural workers entering under the RAW program.

C. Admission of RAWs

The statute instructs the INS to admit or to adjust as temporary residents a sufficient number of replenishment workers to equal the shortage number for that year, if any.[228] Aliens will have to file a petition to be classified as a

220. INA § 210A(a)(2), 8 U.S.C. § 1161(a)(2) (1986).
221. INA § 210A(g)(4), 8 U.S.C. § 1161(g)(4) (1986).
222. INA § 210A(a)(4), (5), 8 U.S.C. § 1161(a)(4), (5) (1986).
223. INA § 210A(a)(7), 8 U.S.C. § 1161(a)(7) (1986).
224. INA § 210A(b)(2), 8 U.S.C. § 1161(b)(2) (1986)).
225. INA § 210A(b)(3), 8 U.S.C. § 1161(b)(3) (1986).
226. INA § 210A(b)(1)(A), 8 U.S.C. § 1161(b)(1)(A) (1986).
227. INA § 210A(b)(1)(B), 8 U.S.C. § 1161(b)(1)(B) (1986).
228. INA § 210A(c)(1), 8 U.S.C. § 1161(c)(1) (1986).

replenishment worker, but they will not have to prove they ever worked in the U.S. before. RAWs are subject to the same exclusionary grounds and waivers as SAWs.[229] Also like SAWs, RAWs can overcome the public charge problem of INA § 212(a)(15) by showing a history of U.S. employment,[230] an easier task for RAWs than for SAWs because RAWs only need to prove they have employment in this country.[231]

D. Treatment of RAWs as Temporary Residents and Adjustment of Status

Replenishment workers are tied to agriculture for three years. They must perform ninety man-days of seasonal agricultural services each year for three consecutive years to avoid deportation.[232] IRCA creates a new ground for deportation for RAWs who fail to fulfill this requirement.[233]

In most other respects, replenishment workers in temporary resident status are to be treated the same as permanent resident aliens. They may travel abroad like permanent resident aliens and still be granted work authorization.[234] Like SAWs, the INS may terminate a RAW's temporary resident status only upon a determination that the alien is deportable.[235] Finally, RAWs are disqualified from most of the same welfare benefits as regular legalization applicants.[236] However, replenishment workers may obtain legal aid assistance and housing.[237]

E. Employment Terms

IRCA provides RAWs with certain protections and also imposes some duties on employers. If a grower supplies transportation for RAWs, she must provide the same transportation benefits to similarly employed SAWs and domestic workers.[238] Employers are prohibited from knowingly providing false or misleading information to RAWs.[239] The anti-retaliation provisions of the Migrant and Seasonal Agricultural Worker Protection Act ("MASAWPA") also apply to replenishment workers.[240] Enforcement of these protections is through MASAWPA.[241]

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229. *Cf.* INA § 210A(e)(2), 8 U.S.C. § 1161(e)(2) (1986) *with* INA § 210(c)(2), 8 U.S.C. § 1160(c)(2) (1986).

230. *Cf.* INA § 210A(e)(2)(C) (1986), 8 U.S.C. § 1161(e)(2)(C) (1986) *with* INA § 210 (c)(2)(C), 8 U.S.C. § 1160(c)(2)(C) (1986).

231. H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. 96 (1986).

232. INA § 210A(d)(5)(A), 8 U.S.C. § 1161(d)(5)(A) (1986).

233. IRCA, Pub. L. No. 99-603, § 303(b), 100 Stat. 3359, 3431 (creating INA § 241(a) (20), 8 U.S.C. § 1251(a)(20) (1986)).

234. INA § 210A(d)(3), 8 U.S.C. § 1161(d)(3) (1986).

235. INA § 210A(d)(2), 8 U.S.C. § 1161(d)(2) (1986); *see also* INA § 210(a)(3), 8 U.S.C. § 1161(a)(3) (1986).

236. INA § 210A(d)(6), 8 U.S.C. § 1161(d)(6) (1986).

237. *Id.*

238. INA § 210A(f)(1), 8 U.S.C. § 1161(f)(1) (1986).

239. INA § 210A(f)(2), 8 U.S.C. § 1161(f)(2) (1986).

240. INA § 210A(f)(3), 8 U.S.C. § 1161(f)(3) (1986).

241. INA § 210A(f)(4), 8 U.S.C. § 1161(f)(4) (1986).

The legislative history shows that growers are not required to pay any adverse effect wage rate or to provide wages and working conditions that may not adversely affect other individuals similarly situated. Thus, growers may pay their replenishment workers less than the adverse effect wage rate normally applicable in their jurisdiction.[242]

F. Permanent Residence and Naturalization

Section 210A requires the INS to grant permanent resident status to RAWs three years after they have been granted temporary resident status.[243] Like the SAW and the main legalization provisions, this adjustment to permanent resident status is mandatory if the criteria for adjustment are met.[244] Permanent resident RAWs may become naturalized U.S. citizens only if they can show they have performed ninety man-days of seasonal agricultural services for five years since coming to the U.S. as RAWs.[245] To meet this requirement, an alien may submit the same type of documentation accepted from SAW legalization applicants.[246] There is no requirement that the five years be consecutive. An alien theoretically could obtain citizenship status by working for three consecutive years in perishable agriculture to avoid deportation, taking a break from that type of work for a few years, and returning to work in seasonal agricultural services for two more years.

G. Administrative and Judicial Review

Section 210A has no provision explicitly delineating administrative and judicial review for replenishment workers. Presumably, RAWs who are alleged to be deportable for failing to meet the minimum work requirements will be able to appeal a deportation finding to the Board of Immigration Appeals and then to a U.S. Circuit Court of Appeals under INA § 106(a). The courts will have to decide the appropriate standard to review such findings: the traditional test of § 106(a) or the new convoluted standard created in the SAW and main legalization provisions of IRCA.

H. Advice for Practitioners

Like SAW status, replenishment worker status is a relatively easy way to become legalized. An alien has to work in seasonal agriculture a total of 270 days in three years. Practitioners may wish to advise their clients who do not qualify for SAW status to consider becoming a replenishment worker if the program begins in late 1989. There may be a big demand for such workers, and an alien could conceivably obtain permanent resident status more quickly

242. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 87 (1986).
243. INA § 210A(d)(1), 8 U.S.C. § 1161(d)(1) (1986).
244. *Id.*; *see also* INA § 210(a)(2), 8 U.S.C. § 1160(a)(2) (1986); INA § 245A(b)(1), 8 U.S.C. § 1255a(b)(1) (1986).
245. INA § 210A(d)(5)(B), 8 U.S.C. § 1161(d)(5)(B) (1986).
246. INA § 210A(d)(5)(C), 8 U.S.C. § 1161(d)(5)(C) (1986).

through the RAW program than by applying through one of the normal preference categories. For example, the current backlog for fifth preference visas from Mexico is ten years, with little hope for improvement. A replenishment worker from that country might be able to obtain permanent resident status in 1993.

IV.
OTHER PROVISIONS AFFECTING AGRICULTURAL WORKERS

A. Legal Services

SAWs and RAWs who are granted temporary resident status are eligible for legal assistance from the Legal Services Corporation ("LSC").[247] The conferees limited legal aid assistance to H-2A workers. Such workers can seek LSC help only "on matters relating to wages, housing, transportation, and other employment rights as provided in the worker's specific contract."[248] Because this provision refers only to workers admitted under the new H-2A category, it probably is prospective only. The conferees explained that legal services for H-2A workers are not meant to be an organizing tool and should not be used to harass growers.[249] The conferees also stipulated that H-2A contracts cannot violate the INA or implementing regulations.[250]

The controversy surrounding legal services for H-2A workers continued after the House-Senate conference. When the House of Representatives debated whether to accept the conference substitute for the House bill, Representative Bill McCollum (R-FL) asserted that the conference language "strictly limited" legal assistance "to the parameters of the specific contract."[251] Representative Peter W. Rodino (D-NJ), chairman of the House Judiciary Committee, strongly disagreed, stating that the conferees "obviously intended" to permit H-2A workers to use LSC attorneys "to sue not only to enforce breaches of their contract but also, obviously, when those contracts violated the act or regulations."[252] According to Rodino, to allow a grower to offer an illegal contract but permit suits only if the employer violated the terms of that contract would completely vitiate Congress' intent.[253]

Even under Representative Rodino's more generous interpretation, legislative history indicates that LSC attorneys will not be able to assist H-2A workers in such matters as civil rights matters, consumer claims, and immigration cases. Such representation does not relate to the contract under which an H-2A worker entered the country.

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247. *See* INA § 210(a)(5), 8 U.S.C. § 1160(a)(5) (1986); INA § 210A(d)(4), (6), 8 U.S.C. § 1161(d)(4), (6) (1986).
248. IRCA, Pub. L. No. 99-603, § 305, 100 Stat. 3359, 3434.
249. H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. 94 (1986).
250. *Id.*
251. 132 CONG. REC. H10,588 (daily ed. Oct. 15, 1986).
252. *Id.* at H10,590.
253. *Id.*

B. Agricultural Workers Commission

IRCA creates a twelve member commission to review various aspects of the agricultural worker provisions, including: (1) the impact of SAWs on the wages and working conditions of domestic workers; (2) the extent to which SAWs and RAWs stay in agriculture; (3) the impact of general legalization and employer sanctions on worker supply; (4) the need, if any, for additional foreign agricultural workers; and (5) the extent of unemployment among U.S. citizen and permanent resident alien farm workers.[254] The commission is authorized to hold hearings and to hire staff. The commission is to report its findings to Congress by November 1991, after which it is supposed to disband.[255]

C. Other Provisions

Other provisions of the Simpson-Rodino Act that will affect farm workers include the following. Employer sanctions do not apply to employment of an alien performing "seasonal agricultural services" until December 1, 1988, the end of the SAW application period.[256] During that time of exemption, growers are prohibited from recruiting undocumented aliens outside the U.S. to enter and to perform seasonal agricultural services.[257] The INS must obtain a search warrant before raiding a farm.[258] Agricultural workers are eligible for IRCA's general legalization provisions if they have resided continuously in the U.S. since before January 1, 1982.[259] Agricultural workers who are citizens or intending citizens are also protected under IRCA's antidiscrimination provisions.[260]

CONCLUSION

Overall, the agricultural worker provisions of IRCA create three ways to admit foreign agricultural workers into the U.S. and to adjust their residency status. These provisions are supposed to meet U.S. growers' needs in perishable crops for the next seven years. The SAW program legalizes already existing agricultural workers, but those aliens are not required to continue to work in agriculture. For the next three years, the H-2A program will be the only legal way to admit aliens to work temporarily in U.S. agriculture, but growers will not be penalized for continuing to use undocumented workers for most of that time. Between 1990 and 1993, growers will have a choice between

254. IRCA, Pub. L. No. 99-603, § 304(a), (b), 100 Stat. 3359, 3431-32.

255. IRCA, Pub. L. No. 99-603 § 304(c), (i), 100 Stat. 3359, 3432, 3434.

256. INA § 274A(i)(3)(A), 8 U.S.C. § 1324a(i)(3)(A) (1986). For a discussion of the definition of "seasonal agricultural services," *see supra* text accompanying notes 92-110.

257. INA § 274A(i)(3)(B), 8 U.S.C. § 1324a(i)(3)(B) (1986).

258. IRCA, Pub. L. No. 99-603, § 116, 100 Stat. 3359, 3384.

259. *See generally* INA § 245A, 8 U.S.C. § 1324a (1986).

260. *See generally* INA § 274B, 8 U.S.C. § 1324b (1986).

the H-2A program and the RAW program to satisfy their temporary foreign agricultural worker needs, assuming the RAW program begins.

These statutory changes create new opportunities for alien farm workers. The SAW legalization program is certainly more favorable for those aliens who qualify than IRCA's main legalization provisions. The RAW program is better than a guest worker program because replenishment workers will not be tied to one employer or to a group of employers in one area. Whether this freedom of movement and legal status will help deter abuses and will eliminate U.S. growers' continued reliance on undocumented aliens in seasonal agriculture remains to be seen. Given the controversies that have already developed since enactment of the 1986 reform law, the problems concerning alien farm workers in U.S. agriculture seem far from over. IRCA's agricultural worker provisions can help solve these problems only if the INS and the Department of Labor interpret the statute in a way that conforms with Congress' intent to give alien farm workers real opportunities to become citizens or to work lawfully in the United States.