

MEMORANDUM

To: Elena Kagan
Sally Katzen

From: Julie Fernandes

cc: Cecilia Rouse

Date: June 17, 1998

Re: Background memo for Deputy's meeting on H-2A guestworker reform

Agricultural "guestworkers" are admitted on H-2A visas for temporary jobs. In order to be allowed H-2A workers, an employer must prove to the DOL that (a) there are not sufficient U.S. workers able, willing, qualified and available to perform the services; and (b) there will be no adverse effect on the wages and working conditions of similarly-employed U.S. workers. Employers are further required to provide free housing to workers outside the commuting area; reimburse workers inbound transportation if they complete half the contract, outbound also if they complete the contract; guarantee 3/4 of the hours of the contract; and hire any qualified U.S. worker who applies during the first half of the work contract.

The H-2A program is used primarily in the East Coast. Western growers have generally not tried to use the H-2A program and likely rely more heavily on unauthorized workers. There is no cap on the number of H-2A visas granted -- in FY 96, H-2A admissions totaled 9,635. There were 1,930 applications made to DOL in FY96 (each application petitions for multiple workers).

In June 1995, agreeing with the recommendation of the Commission on Immigration Reform, the President stated his opposition to a new guestworker program. He also made clear that if the crackdown on illegal immigration contributes to labor shortages, he would direct the Departments of Labor and Agriculture to work cooperatively to improve and enhance the existing H-2A program. On March 12th of this year, the House Judiciary Subcommittee on Immigration approved legislation, sponsored by Rep. Robert Smith (R-Ore), that provides for a new pilot guestworker program. This legislation establishes a 24-month pilot program to test new procedures for companies to secure approval to employ temporary foreign agricultural workers. The bill proposes the elimination of many of the worker protections in the existing H-2A program, including the housing requirement (only requires the provision of housing if that is the "prevailing practice in the occupation and area"), transportation allotment, and the use of

the adverse effect wage rate.¹ In a March 12, 1998 letter to Chairman Lamar Smith, Secretary Herman stated that if this legislation were presented to the President, she would recommend a veto.

Farmer advocates continue to argue that the crackdown on illegal immigration, coupled with the shortage of U.S. farmworkers, has caused them to have to rely on a dysfunctional H-2A program. However, though it is likely true that the INS is doing a better job at cracking down on the illegal farmworker population, it is also likely true that there is no overall shortage of farmworkers in the U.S. A recent (December 1997) GAO study concluded that agribusiness does not now and will not soon face an agricultural labor shortage. The GAO's finding of a labor surplus echoes the conclusions of the U.S. Commission on Agricultural Workers (1992), the U.S. Commission on Immigration Reform reports (1995 and 1997), and recent academic studies. While the GAO suggests that there could develop localized labor shortages, it noted the widespread belief that employers should respond to the market place by increasing wages, improving recruitment and modernizing their labor practices. Further, GAO cited a study which concluded that substantial wage increases would have little effect on consumer produce prices or international competitiveness.

The farmer advocates want reform of the H-2A program that would essentially legalizes their current workforce, under the current terms. That would mean a guestworker program that does not include the provision of housing or transportation, does not require domestic recruitment, and does not require the paying of the adverse effect wage rate. The farmers are willing to pay a little more to insure a workforce (now that they are getting raided by the INS) but not to go much further. The farmworker advocates are generally in favor of reforms, but will want us to go further to leverage for strengthening worker protections.

Our reform proposal is designed to streamline the H-2A program, to improve the ability of growers to obtain workers when needed and to better protect the wages and working conditions of both domestic and foreign workers. The two key political issues that this presents are: (1) whether our reform package serves as a good defense to new guestworker legislation; and (2) if so, does it go far enough?

I am sending you both copies of the Labor Department's reform proposal. As Fraser indicates, this proposal is the result of a collaborative effort between INS, DOJ and USDA (with a little facilitating from our end).

In advance of the meeting, I will forward you a detailed agenda.

¹ The Department of Labor determines the minimum rate to be paid by employers of H-2A workers, based on wage surveys conducted by USDA. This so-called "adverse effect wage rate" is designed to mitigate any negative effect employment of these workers may have on domestic workers similarly employed.

S 1698 IS

105th CONGRESS

2d Session

S. 1698

To amend the Immigration and Nationality Act to create a new nonimmigrant category for temporary agricultural workers admitted pursuant to a labor condition attestation.

IN THE SENATE OF THE UNITED STATES

March 3, 1998

Mr. COVERDELL introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Immigration and Nationality Act to create a new nonimmigrant category for temporary agricultural workers admitted pursuant to a labor condition attestation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Farmers' Temporary Employment Assistance Act'.

SEC. 2. NEW NONIMMIGRANT H-2C CATEGORY FOR TEMPORARY AGRICULTURAL WORKERS.

(a) ESTABLISHMENT OF NEW CLASSIFICATION- Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(ii)) is amended--

(1) by striking 'or (b)' and inserting '(b)'; and

(2) by adding at the end the following: 'or (c) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States pursuant to section 218A to perform such agricultural labor or services of a temporary or seasonal nature;'.

(b) NO FAMILY MEMBERS PERMITTED- Section 101(a)(15)(H) (8 U.S.C. 1101(a)(15)(H)) is amended by striking 'specified in this paragraph' and inserting 'specified in this subparagraph (other than in clause (ii)(c))'.

SEC. 3. ALTERNATIVE AGRICULTURAL TEMPORARY WORKER PROCESS USING ATTESTATIONS.

(a) IN GENERAL- The Immigration and Nationality Act is amended by inserting after section 218 the following:

'ALTERNATIVE AGRICULTURAL TEMPORARY WORKER PROGRAM

'SEC. 218A. (a) CONDITION FOR THE EMPLOYMENT OF H-2C ALIENS-

'(1) IN GENERAL- No alien may be admitted or provided status as an H-2C alien (as defined in subsection (n)(4)) unless--

'(A) the employment of the alien is covered by a currently valid labor condition attestation which--

'(i) is filed by the employer, or by an association on behalf of the employer, for the occupation in which the alien will be employed;

'(ii) has been accepted by the State employment security agency having jurisdiction over the area of intended employment; and

'(iii) states each of the items described in paragraph (2) and includes information identifying the employer or association and agricultural job opportunities involved;

'(B) the employer is not disqualified from employing H-2C aliens pursuant to subsection (h); and

'(C) the employer has not, during the past 2 years, been found by the Attorney General to have employed any aliens in violation of section 274A(a), including aliens admitted pursuant to this section.

'(2) CONTENTS OF LABOR CONDITION ATTESTATION- Each labor condition attestation filed by, or on behalf of, an employer shall include the following:

'(A) WAGE RATE- The employer will pay H-2C aliens and all other workers in the occupation not less than the prevailing wage for similarly employed workers in the area of employment, and not less than the applicable Federal, State or local statutory minimum wage.

'(B) WORKING CONDITIONS- The employment of H-2C aliens will not adversely affect the working conditions of similarly employed workers in the area of employment.

'(C) LIMITATION ON EMPLOYMENT- An H-2C alien will not be employed in any job opportunity which is not temporary or seasonal, and will not be employed by the employer in any job opportunity for more than 10 months in any 12-consecutive-month period.

'(D) NO LABOR DISPUTE- No H-2C alien will be employed in any job opportunity which is vacant because its former occupant is

involved in a strike, lockout or work stoppage in the course of a labor dispute in the occupation at the place of employment.

'(E) NOTICE- The employer, at the time of filing the attestation, has provided notice of the attestation to workers employed in the occupation in which H-2C aliens will be employed.

'(F) JOB ORDERS- The employer will file one or more job orders for the occupation (or occupations) covered by the attestation with the State employment security agency

no later than the day on which the employer first employs any H-2C aliens in the occupation.

`(G) PREFERENCE TO DOMESTIC WORKERS- The employer will give preference to able, willing, and qualified United States workers who apply to the employer and are available at the time and place needed, for the first 25 days after the filing of the job order in an occupation or until 5 days before the date employment of workers in the occupation begins, whichever occurs later.

`(3) GENERAL ACCOUNTING OFFICE REPORTS- Beginning 1 year after the effective date of this section, and annually thereafter, the Comptroller General shall prepare and transmit to the Congress a report describing the results of a review of the implementation and enforcement of this section during the preceding 12-month period, for the purpose of determining if--

`(A) such provisions have been carried out satisfactorily;

`(B) the program has ensured an adequate and timely supply of qualified, eligible workers at the time and place needed for employers;

`(C) the program has ensured that implementation of the program is not displacing United States agricultural workers or diminishing the terms and conditions of employment of United States agricultural workers; and

`(D) an unnecessary regulatory burden has been created for employers hiring workers admitted under this section.

`(b) FILING A LABOR CONDITION ATTESTATION-

`(1) FILING BY EMPLOYERS- Any employer in the United States is eligible to file a labor condition attestation.

`(2) FILING BY ASSOCIATIONS ON BEHALF OF EMPLOYER MEMBERS- An agricultural association may file a labor condition attestation as an agent on behalf of its members. Such an attestation filed by an agricultural association acting as an agent for its members, when accepted, shall apply to those employer members of the association that the association certifies to the State employment security agency are members of the association and have agreed in writing to comply with the requirements of this section.

`(3) PERIOD OF VALIDITY- A labor condition attestation is valid from the date on which it is accepted by the State employment security agency for the period of time requested by the employer, but not to exceed 12 months.

`(4) WHERE TO FILE- A labor condition attestation shall be filed with the State employment security agency having jurisdiction over the area of intended employment of the workers covered by the attestation. If an employer, or the members of an association of employers, will be employing workers in an area or areas covered by more than one such agency, the attestation shall be filed with each such agency having jurisdiction over an area where the workers will be employed.

`(5) DEADLINE FOR FILING- A labor condition attestation may be filed at any time up to 12 months prior to the date of the employer's anticipated need for workers in the occupation (or occupations) covered by the attestation.

`(6) FILING FOR MULTIPLE OCCUPATIONS- A labor condition attestation may be filed for one or more occupations and cover one or more periods of employment.

`(7) MAINTAINING REQUIRED DOCUMENTATION-

`(A) BY EMPLOYERS- Each employer covered by an accepted labor condition attestation must maintain a file of the documentation required in subsection (c) for each occupation included in an accepted attestation covering the employer. The documentation shall be retained for a period of one year following the expiration of an accepted attestation. The employer shall make the documentation available to representatives of the Secretary during normal business hours.

`(B) BY ASSOCIATIONS- In complying with subparagraph (A), documentation maintained by an association filing a labor condition attestation on behalf of an employer shall be deemed to be maintained by the employer.

`(8) WITHDRAWAL-

`(A) COMPLIANCE WITH ATTESTATION OBLIGATIONS- An employer covered by an accepted labor condition attestation for an occupation shall comply with the terms and conditions of the attestation from the date the attestation is accepted and continuing throughout the period any persons are employed in an occupation covered by such an accepted attestation, whether or not H-2C aliens are employed in the occupation, unless the attestation is withdrawn.

`(B) TERMINATION OF OBLIGATIONS- An employer may withdraw a labor condition attestation in total, or with respect to a particular occupation covered by the attestation. An association may withdraw such an attestation with respect to one or more of its members. To withdraw an attestation the employer or association must notify in writing the State employment security agency office with which the attestation was filed of the withdrawal of the attestation. An employer who withdraws an attestation, or on whose behalf an attestation is withdrawn by an association, is relieved of the obligations undertaken in the attestation with respect to the occupation (or occupations) with respect to which the attestation was withdrawn, upon acknowledgement by the appropriate State employment security agency of receipt of the withdrawal notice. An attestation may not be withdrawn with respect to any occupation while any H-2C aliens covered by that attestation is employed in the occupation.

`(C) OBLIGATIONS UNDER OTHER STATUTES- Any obligation incurred by the employer under any other law or regulation as a result of recruitment of United States workers under an offer of terms and conditions of employment required by the H-2C program is unaffected by withdrawal of a labor condition attestation.

`(c) EMPLOYER RESPONSIBILITIES AND REQUIREMENTS FOR EMPLOYING H-2C NONIMMIGRANTS-

`(1) REQUIREMENT TO PAY THE PREVAILING WAGE-

`(A) EFFECT OF THE ATTESTATION- Employers shall pay each worker in an occupation covered by an accepted labor condition attestation at least the prevailing wage in the occupation in the area of intended employment. The preceding sentence does not require employers to pay all workers in the occupation the same wage. The employer may, in the sole discretion of the employer, maintain pay differentials based on experience, tenure with the employer, skill, or any other work-related factor, if the differential is not based on a criterion for which discrimination is prohibited by the law and all workers in the covered occupation receive at least the prevailing wage.

`(B) PAYMENT OF STATE EMPLOYMENT SECURITY AGENCY DETERMINED WAGE SUFFICIENT- The employer may request and obtain a prevailing wage determination from the State employment security agency. If the employer requests such a determination, and pays the wage determined, such payment

shall be considered sufficient to meet the requirement of this paragraph if the H-2C workers--

`(i) are employed in the occupation for which the employer possesses an accepted labor condition attestation, and for which the employer or association possesses a prevailing wage determination by the State employment security agency, and

`(ii) are being paid at least the prevailing wage so determined.

`(C) RELIANCE ON WAGE SURVEY- In lieu of the procedures of subparagraph (B), an employer may rely on other information, such as an employer generated prevailing wage survey and determination, which meets criteria specified by the Secretary by regulation. In the event of a complaint that the employer has failed to pay the required wage, the Secretary shall investigate to determine if the information upon which the employer relied complied with the criteria for prevailing wage determinations.

`(D) ALTERNATE METHODS OF PAYMENT PERMITTED-

`(i) IN GENERAL- A prevailing wage may be expressed as an hourly wage, a piece rate, a task rate (described in clause (ii)), or other incentive pay system, including a group rate (described in clause (iii)). The requirement to pay at least the prevailing wage in the occupation and area of intended employment does not require an employer to pay by the method of pay in which the prevailing rate is expressed.

However, if the employer adopts a method of pay other than the prevailing rate, the burden of proof is on the employer to demonstrate that the employer's method of pay is designed to produce earnings equivalent to the earnings that would result from payment of the prevailing rate.

`(ii) TASK RATE- For purposes of this subparagraph, a task rate is an incentive payment based on a unit of work performed such that the incentive rate varies with the level of effort required to perform individual units of work.

`(iii) GROUP RATE- For purposes of this subparagraph, a group rate is an incentive payment system in which the payment is shared among a group of workers working together to perform the task.

`(E) REQUIRED DOCUMENTATION- The employer or association shall document compliance with this paragraph by retaining on file the employer or association's request for a determination by a State employment security agency and the prevailing wage determination received from such agency or other information upon which the employer or association relied to assure compliance with the prevailing wage requirement.

`(2) REQUIREMENT TO PROVIDE HOUSING AND TRANSPORTATION-

`(A) EFFECT OF THE ATTESTATION- The employment of H-2C aliens shall not adversely affect the working conditions of United States workers similarly employed in the area of intended employment. The employer's obligation not to adversely affect working conditions shall continue for the duration of the period of employment by the employer of any H-2C aliens in the occupation and area of intended employment. An employer will be deemed to be in compliance with this attestation if the employer offers at least the benefits required by subparagraphs (B) through (D). The previous sentence does not require an employer to offer more than such benefits.

`(B) HOUSING REQUIRED-

`(i) HOUSING OFFER- The employer must offer to H-2C aliens and United States workers recruited from beyond normal recruiting distance housing, or a housing allowance, if it is prevailing practice in the occupation and area of intended employment to offer housing or a housing allowance to workers who are recruited from beyond normal commuting distance.

`(ii) HOUSING STANDARDS- If the employer offers housing to such workers, the housing shall meet (at the option of the employer) applicable Federal farm labor housing standards or applicable local or State standards for rental, public accommodation, or other substantially similar class of habitation.

`(iii) CHARGES FOR HOUSING- An employer who offers housing to such workers may charge an amount equal to the fair market value (but not greater than the employer's actual cost) for utilities and maintenance, or such lesser amount as permitted by law.

`(iv) HOUSING ALLOWANCE AS ALTERNATIVE- In lieu of offering housing to such workers, at the employer's sole discretion on an individual basis, the employer may provide a reasonable housing allowance. An employer who offers a housing allowance to such a worker under this subparagraph shall not be deemed to be a housing provider under section 203 of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1823) merely by virtue of providing such housing allowance.

`(v) SECURITY DEPOSIT- The requirement, if any, to offer housing to such a worker under this subparagraph shall not preclude an employer from requiring a reasonable deposit to protect against gross negligence or willful destruction of property, as a condition for providing such housing.

`(vi) DAMAGES- An employer who offers housing to such a worker shall not be precluded from requiring a worker found to have been responsible for damage to such housing which is not the result of normal wear and tear related to habitation to reimburse the employer for the reasonable cost of repair of such damage.

`(C) TRANSPORTATION- If the employer provides transportation arrangements or assistance to H-2C aliens, the employer must offer to provide the same transportation arrangements or assistance (generally comparable in expense and scope) for other individuals employed by the employer in the occupation at the place of employment who were recruited from beyond normal commuting distance.

`(D) WORKERS' COMPENSATION- If the employment covered by a labor condition attestation is not covered by the State workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the workers' employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

`(E) REQUIRED DOCUMENTATION-

`(i) HOUSING AND TRANSPORTATION- No specific documentation is required to be maintained to evidence compliance with the requirements of subparagraphs (B) and (C). In the event of a complaint alleging a failure to comply with such a requirement, the burden of proof

shall be on the employer to show that the employer offered the required benefit to the complainant, or that the employer was not required by the terms of this paragraph to offer such benefit to the

complainant.

`(ii) WORKERS' COMPENSATION- The employer shall maintain copies of certificates of insurance evidencing compliance with subparagraph (D) throughout the period of validity of the labor condition attestation.

`(3) REQUIREMENT TO EMPLOY ALIENS IN TEMPORARY OR SEASONAL AGRICULTURAL JOB OPPORTUNITIES-

`(A) LIMITATIONS-

`(i) IN GENERAL- The employer may employ H-2C aliens only in agricultural employment which is temporary or seasonal.

`(ii) SEASONAL BASIS- For purposes of this section, labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year.

`(iii) TEMPORARY BASIS- For purposes of this section, a worker is employed on a temporary basis where the employment is intended not to exceed 10 months.

`(B) REQUIRED DOCUMENTATION- No specific documentation is required to demonstrate compliance with the requirement of subparagraph (A). In the event of a complaint, the burden of proof shall fall on the employer to show that the employment meets such requirement.

`(4) REQUIREMENT NOT TO EMPLOY ALIENS IN JOB OPPORTUNITIES VACANT BECAUSE OF A LABOR DISPUTE-

`(A) IN GENERAL- No H-2C alien may be employed in any job opportunity which is vacant because its former occupant is involved in a strike, lockout, or work stoppage in the course of a labor dispute in the occupation at the place of employment.

`(B) REQUIRED DOCUMENTATION- No specific documentation is required to demonstrate compliance with the requirement of subparagraph (A). In the event of a complaint, the burden of proof shall fall on the employer to show that the job opportunity in which the H-2C alien was employed was not vacant because the former occupant was on strike, locked out, or participating in a work stoppage in the course of a labor dispute in the occupation at the place of employment.

`(5) NOTICE OF FILING OF LABOR CONDITION ATTESTATION AND SUPPORTING DOCUMENTATION-

`(A) IN GENERAL- The employer shall--

`(i) provide notice of the filing of a labor condition attestation to the appropriate certified bargaining agent (if any) which represents workers of the employer in the occupation (or occupations) at the place of employment covered by the attestation; or

`(ii) in the case where no such bargaining agent exists, post notice of the filing of such an attestation in at least two conspicuous locations where applications for employment are accepted.

`(B) PERIOD FOR POSTING- The requirement for a posting under subparagraph

(A)(ii) begins on the day the attestation is filed, and continues through the period during which the employer's job order is required to remain active pursuant to paragraph (6)(A).

(C) REQUIRED DOCUMENTATION- The employer shall maintain a copy of the notice provided to the bargaining agent (if any), together with evidence that the notice was provided (such as a signed receipt of evidence of attempt to send the notice by certified or registered mail). In the case where no certified bargaining agent described in subparagraph (A)(i) exists, the employer shall retain a copy of the posted notice, together with information as to the dates and locations where the notice was displayed.

(6) REQUIREMENT TO FILE A JOB ORDER-

(A) EFFECT OF THE ATTESTATION- The employer, or an association acting as agent for its members, shall file the information necessary to complete a local job order for each occupation covered by an accepted labor condition attestation with the appropriate local office of

the State employment security agency having jurisdiction over the area of intended employment, or with the State office of such an agency if workers will be employed in an area within the jurisdiction of more than one local office of such an agency. The job orders shall remain on file for 25 calendar days or until 5 calendar days before the anticipated date of need for workers in the occupation covered by the job order, whichever occurs later. The job order shall provide at least the minimum terms and conditions of employment required for participation in the H-2C program.

(B) DEADLINE FOR FILING- A job order shall be filed under subparagraph (A) no later than the date on which the employer files a petition with the Attorney General for admission or extension of stay for aliens to be employed in the occupation for which the order is filed.

(C) REQUIRED DOCUMENTATION- The office of the State employment security agency which the employer or association provides with information necessary to file a local job order shall provide the employer with evidence that the information was provided in a timely manner as required by this paragraph, and the employer or association shall retain such evidence for each occupation in which H-2C aliens are employed.

(7) REQUIREMENT TO GIVE PREFERENCE TO QUALIFIED UNITED STATES WORKERS-

(A) FILING 30 DAYS OR MORE BEFORE DATE OF NEED- If a job order is filed 30 days or more before the anticipated date of need for workers in an occupation covered by a labor condition attestation and for which the job order has been filed, the employer shall offer to employ able, willing, and qualified United States workers who apply to the employer and who will be available at the time and place needed for the job opportunities covered by the attestation until 5 calendar days before the anticipated date of need for workers in the occupation, or until the employer's job opportunities in the occupation are filled with qualified United States workers, if that occurs more than 5 days before the anticipated date of need for workers in the occupation.

(B) FILING FEWER THAN 30 DAYS BEFORE DATE OF NEED- If a job order is filed fewer than 30 days before the anticipated date of need for workers in an occupation covered by such an attestation and for which a job order has been filed, the employer shall offer to employ able, willing, and qualified United States workers who are or will be available at the time and place needed during the first 25 days after the job order is filed or until the employer's job opportunities in the occupation are

filled with United States workers, whichever occurs earlier, regardless of whether any of the job opportunities may already be occupied by H-2C aliens.

`(C) FILING VACANCIES- An employer may fill a job opportunity in an occupation covered by an accepted labor condition attestation which remains or becomes vacant after expiration of the required preference period specified in subparagraph (A) or (B) of paragraph (6) without regard to such preference.

`(D) JOB-RELATED REQUIREMENTS- No employer shall be required to initially employ a worker who fails to meet lawful job-related employment criteria, nor to continue the employment of a worker who fails to meet lawful job-related standards of conduct and performance, including failure to meet minimum productivity standards after a 3-day break-in period.

`(E) REQUIRED DOCUMENTATION- No specific documentation is required to demonstrate compliance with the requirements of this paragraph. In the event of a complaint, the burden of proof shall be on the complainant to show that the complainant applied for the job and was available at the time and place needed. If the complainant makes such a showing, the burden of proof shall be on the employer to show that the complainant was not qualified or that the preference period had expired.

`(d) REQUIREMENTS OF NOTICE OF CERTAIN BREAKS IN EMPLOYMENT-

`(1) IN GENERAL- The employer (or the association acting as agent for the employer) shall notify the Attorney General within 7 days if an H-2C alien prematurely abandons the alien's employment.

`(2) OUT-OF-STATUS- An H-2C alien who abandons the alien's employment shall be considered to have failed to maintain nonimmigrant status as an alien described in section 101(a)(15)(H)(ii)(c) and shall leave the United States or be subject to deportation under section 237(a)(1)(C)(i).

`(e) ACCEPTANCE BY STATE EMPLOYMENT SECURITY AGENCY- The State employment security agency shall review labor condition attestations submitted by employers or associations pursuant to this section only for completeness and obvious inaccuracies. Unless such an agency finds that the application is incomplete or obviously inaccurate, the agency shall accept the attestation within 7 days of the date of filing of the attestation, and return a copy to the applicant marked 'accepted'.

`(f) PUBLIC REGISTRY- The Secretary shall maintain a registry of all accepted labor condition attestations and make such registry available for public inspection.

`(g) RESPONSIBILITIES OF STATE EMPLOYMENT SECURITY AGENCIES-

`(1) DISSEMINATION OF LABOR MARKET INFORMATION- The Secretary shall direct State employment security agencies to disseminate nonemployer-specific information about potential labor needs based on accepted attestations filed by employers. Such dissemination shall be separate from the clearance of job orders through the Interstate and Intrastate Clearance Systems, and shall create no obligations for employers except as provided in this section.

`(2) REFERRAL OF WORKERS ON STATE EMPLOYMENT SECURITY AGENCY JOB ORDERS- Such agencies holding job orders filed by employers covered by approved labor condition attestations shall be authorized to refer any able, willing, and qualified eligible job applicant who will be available at the time and place needed and who is authorized to work in the United States, including H-2C aliens who are seeking additional work in the United States and whose eligibility to remain in the United States pursuant to subsection (i) has not expired, on job orders filed by holders of accepted attestations.

`(h) ENFORCEMENT AND PENALTIES-

`(1) ENFORCEMENT AUTHORITY-

`(A) INVESTIGATION OF COMPLAINTS- The Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting an employer's failure to meet a condition specified in subsection (a) or an employer's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organizations (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than two years after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this subparagraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

`(B) WRITTEN NOTICE OF FINDINGS AND OPPORTUNITY FOR APPEAL- After an investigation has been conducted, the Secretary shall issue a written determination as to whether or not any violation described in subparagraph (A) has been committed. The Secretary's determination shall be served on the complainant and the employer, and shall provide an opportunity for an appeal of the Secretary's decision to an administrative law judge, who may conduct a de novo hearing.

`(2) REMEDIES-

`(A) BACK WAGES- Upon a final determination that the employer has failed to pay wages as required under this section, the Secretary may assess payment of back wages due to any United States worker or H-2C alien employed by the employer in the specific employment in question. The back wages shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker.

`(B) FAILURE TO PAY WAGES- Upon a final determination that the employer has failed to pay the wages required under this section, the Secretary may assess a civil money penalty up to \$1,000 for each failure, and may recommend to the Attorney General the disqualification of the employer from the employment of H-2C aliens for a period of time determined by the Secretary not to exceed 1 year.

`(C) OTHER VIOLATIONS- If the Secretary, as a result of an investigation pursuant to a complaint, determines that an employer covered by an accepted labor condition attestation has--

 `(i) filed an attestation which misrepresents a material fact; or

 `(ii) failed to meet a condition specified in subsection (a),

the Secretary may assess a civil money penalty not to exceed \$1,000 for each violation. In determining the amount of civil money penalty to

be assessed, the Secretary shall consider the seriousness of the violation, the good faith of the employer, the size of the business of the employer being charged, the history of previous violations by the employer, whether the employer obtained a financial gain from the violation, whether the violation was willful, and other relevant factors.

`(D) PROGRAM DISQUALIFICATION-

 `(i) 3-YEARS FOR SECOND VIOLATION- Upon a second final determination that an employer has failed to pay the wages required under this

section, the Secretary shall report such determination to the Attorney General and the Attorney General shall disqualify the employer from the employment of H-2C aliens for a period of 3 years.

`(ii) PERMANENT FOR THIRD VIOLATION- Upon a third final determination that an employer has failed to pay the wages required under this section, the Secretary shall report such determination to the Attorney General and the Attorney General shall disqualify the employer from any subsequent employment of H-2C aliens.

`(3) ROLE OF ASSOCIATIONS-

`(A) VIOLATION BY A MEMBER OF AN ASSOCIATION- An employer on whose behalf a labor condition attestation is filed by an association acting as its agent is fully responsible for such attestation, and for complying with the terms and conditions of this section, as though the employer had filed the attestation itself. If such an employer is determined to have violated a requirement of this section, the penalty for such violation shall be assessed against the employer who committed the violation and not against the association or other members of the association.

`(B) VIOLATION BY AN ASSOCIATION ACTING AS AN EMPLOYER- If an association filing a labor condition attestation on its own behalf as an employer is determined to have committed a violation under this subsection which results in disqualification from the program under paragraph (2)(D), no individual member of such association may be the beneficiary of the services of an H-2C alien in an occupation in which such alien was employed by the association during the period such disqualification is in effect, unless such member files a labor condition attestation as an individual employer or such an attestation is filed on the employer's behalf by an association with which the employer has an agreement that the employer will comply with the requirements of this section.

`(i) PROCEDURE FOR ADMISSION OR EXTENSION OF H-2C ALIENS-

`(1) ALIENS WHO ARE OUTSIDE THE UNITED STATES-

`(A) PETITIONING FOR ADMISSION- An employer or an association acting as agent for its members who seeks the admission into the United States of H-2C aliens may file a petition with the District Director of the Immigration and Naturalization Service having jurisdiction over the location where the aliens will be employed. The petition shall be accompanied by an accepted and currently valid labor condition attestation covering the petitioner. The petition may be for named or unnamed individual or multiple beneficiaries.

`(B) EXPEDITED ADJUDICATION BY DISTRICT DIRECTOR- If an employer's petition for admission of H-2C aliens is correctly filled out, and the employer is not ineligible to employ H-2C aliens, the District Director (or the Director's designee) shall approve the petition within 3 working days of receipt of the petition and accepted labor condition attestation and immediately (by fax, cable, or other means assuring expedited delivery) transmit a copy of the approved petition to the petitioner and to the appropriate immigration officer at the port of entry or United States consulate (as the case may be) where the petitioner has indicated that the alien beneficiary (or beneficiaries) will apply for a visa or admission to the United States.

`(C) UNNAMED BENEFICIARIES SELECTED BY PETITIONER- The petitioning employer or association or its representative shall approve the issuance of visas to beneficiaries who are unnamed on a petition for admission granted to the employer or association.

“(D) CRITERIA FOR ADMISSIBILITY-

“(i) IN GENERAL- An alien shall be admissible under this section if the alien is

otherwise admissible under this Act and the alien is not debarred pursuant to the provisions of clause (ii).

“(ii) DISQUALIFICATION- An alien shall be debarred from admission or being provided status as an H-2C alien under this section if the alien has, at any time during the past 5 years--

“(I) violated a material provision of this section, including the requirement to promptly depart the United States when the alien's authorized period of admission under this section has expired; or

“(II) otherwise violated a term or condition of admission to the United States as a nonimmigrant, including overstaying the period of authorized admission as such a nonimmigrant.

“(E) PERIOD OF ADMISSION- The alien shall be admitted for the period requested by the petitioner not to exceed 10 months, or the remaining validity period of the petitioner's approved labor condition attestation, whichever is less, plus an additional period of 14 days, during which the alien shall seek authorized employment in the United States. During the 14-day period following the expiration of the alien's work authorization, the alien is not authorized to be employed unless the original petitioner or a subsequent petitioner has filed an extension of stay on behalf of the alien pursuant to paragraph (2).

“(F) ISSUANCE OF IDENTIFICATION AND EMPLOYMENT ELIGIBILITY DOCUMENT-

“(i) IN GENERAL- The Attorney General shall cause to be issued to each H-2C alien a card in a form which is resistant to counterfeiting and tampering for the purpose of providing proof of identity and employment eligibility under section 274A.

“(ii) DESIGN OF CARD- Each card issued pursuant to clause (i) shall be designed in such a manner and contain a photograph and other identifying information (such as date of birth, sex, and distinguishing marks) that would allow an employer to determine with reasonable certainty that the bearer is not claiming the identity of another individual, and shall--

“(I) contain a fingerprint or other biometric identifying data (or both);

“(II) specify the date of the alien's authorization as an H-2C alien;

“(III) specify the expiration date of the alien's work authorization; and

“(IV) specify the alien's admission number or alien file number.

“(2) EXTENSION OF STAY-

“(A) APPLICATION FOR EXTENSION OF STAY- If a petitioner seeks to employ an H-2C alien already in the United States, the petitioner shall file with the Attorney General an application for an extension of the alien's stay. The application for extension of stay shall be accompanied by a currently valid labor condition attestation.

`(B) LIMITATION ON FILING AN APPLICATION FOR EXTENSION OF STAY- An application may not be filed for an extension of an alien's stay for a period of more than 10 months, or later than a date which is 2 years from the date of the alien's last admission to the United States as a H-2C alien, whichever occurs first. An application for extension of stay may not be filed during the pendency of an alien's previous authorized period of employment, nor after the alien's authorized stay in the United States has expired.

`(C) WORK AUTHORIZATION UPON FILING AN APPLICATION FOR EXTENSION OF STAY- An employer may begin employing an alien already in the United States in H-2C status on the day the employer files its application for extension of stay. For the purpose of this requirement, the term 'filing' means sending the application by certified mail via the United States Postal Service, return receipt requested, or delivered by guaranteed commercial delivery which will provide the employer with a documented acknowledgment of the date of sending and receipt of the application. The employer shall provide a copy of the employer's application for extension of stay to the alien, who shall keep the application with the alien's identification and employment eligibility document as evidence

that the extension has been filed and that the alien is authorized to work in the United States. Upon approval of an application for extension of stay, the Attorney General shall provide a new or updated employment eligibility document to the alien indicating the new validity date, after which the alien is not required to retain a copy of the application for extension of stay.

`(D) LIMITATION ON EMPLOYMENT AUTHORIZATION OF H-2C ALIENS WITHOUT VALID IDENTIFICATION AND EMPLOYMENT ELIGIBILITY DOCUMENT- An expired identification and employment eligibility document, together with a copy of an application for extension of stay, shall constitute a valid work authorization document for a period of not more than 60 days from the date of application for the extension of stay, after which time only a currently valid identification and employment eligibility document shall be acceptable.

`(3) LIMITATION ON AN INDIVIDUAL'S STAY IN H-2C STATUS- An alien having status as an H-2C alien may not have the status extended for a continuous period longer than 2 years unless the alien remains outside the United States for an uninterrupted period of 6 months. An absence from the United States may break the continuity of the period for which an H-2C visa is valid. If the alien has resided in the United States 10 months or less, an absence breaks the continuity of the period if it lasts for at least 2 months. If the alien has resided in the United States 10 months or more, an absence breaks the continuity of the period if it lasts for at least one-fifth the duration of the stay.

`(j) TRUST FUND TO ASSURE WORKER RETURN-

`(1) ESTABLISHMENT- There is established in the Treasury of the United States a trust fund (in this section referred to as the 'Trust Fund') for the purpose of providing a monetary incentive for H-2C aliens to return to their country of origin upon expiration of their visas under this section.

`(2) WITHHOLDING OF WAGES; PAYMENT INTO THE TRUST FUND-

`(A) IN GENERAL- Employers of H-2C aliens shall--

`(i) withhold from the wages of their H-2C alien workers an amount equivalent to 25 percent of the wages of each H-2C alien worker and pay such withheld amount into the Trust Fund in accordance with paragraph (3); and

`(ii) pay to the Trust Fund an amount equivalent to the Federal tax on the wages paid to H-2C aliens that the employer would be obligated to pay under the

Federal Unemployment Tax Act and the Federal Insurance Contributions Act.

Amounts withheld under clause (i) shall be maintained in such interest bearing account with such a financial institution as the Attorney General shall specify.

`(3) DISTRIBUTION OF FUNDS- Amounts paid into the Trust Fund on behalf of a worker, and held pursuant to paragraph (2)(A)(i) and interest earned thereon, shall be paid by the Attorney General to the worker if--

`(A) the worker applies to the Attorney General (or the designee of the Attorney General) for payment within 30 days of the expiration of the alien's last authorized stay in the United States as a H-2C alien;

`(B) in such application the worker establishes that the worker has complied with the terms and conditions of this section; and

`(C) in connection with the application, the worker tenders the identification and employment authorization card issued to the worker pursuant to subsection (i)(1)(F) and establishes that the worker is identified as the person to whom the card was issued based on the biometric identification information contained on the card.

`(4) ADMINISTRATIVE EXPENSES- The amounts paid into the Trust Fund and held pursuant to paragraph (2)(A)(ii), and interest earned thereon, shall be paid to the Attorney General, the Secretary of Labor, and the Secretary of State in amounts equivalent to the expenses incurred by such officials in the administration of section 101(a)(15)(H)(ii)(c) and this section.

`(5) REGULATIONS- The Attorney General shall prescribe regulations to carry out this subsection.

`(k) INVESTMENT OF TRUST FUND-

`(1) IN GENERAL- It shall be the duty of the Secretary of the Treasury to invest such portion of the Trust Fund as is not, in the Secretary's judgment, required to meet current withdrawals. Such investments may be made only in interest-bearing

obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose, such obligations may be acquired--

`(A) on original issue at the price; or

`(B) by purchase of outstanding obligations at the market price.

The purposes for which obligations of the United States may be issued under chapter 31 of title 31, United States Code, are hereby extended to authorize the issuance at par of special obligations exclusively to the Trust Fund. Such special obligations shall bear interest at a rate equal to the average rate of interest, computed as to the end of the calendar month next preceding the date of such issue, borne by all marketable interest-bearing obligations of the United States then forming a part of the public debt, except that where such average rate is not a multiple of one-eighth of 1 percent next lower than such average rate. Such special obligations shall be issued only if the Secretary of the Treasury determines that the purchase of other interest-bearing obligations of the United States, or of obligations guaranteed as to both principal and interest by the United States on original issue or at the market price, is not in the public interest.

`(2) SALE OF OBLIGATION- Any obligation acquired by the Trust Fund (except special obligations issued exclusively to the Trust Fund) may be sold by the Secretary of the Treasury at the market price, and such special obligations may be redeemed at par plus

accrued interest.

`(3) CREDITS TO TRUST FUND- The interest on, and the proceeds from the sale or redemption of, any obligations held in the Trust Fund shall be credited to and form a part of the Trust Fund.

`(4) REPORT TO CONGRESS- It shall be the duty of the Secretary of the Treasury to hold the Trust Fund, and (after consultation with the Attorney General) to report to the Congress each year on the financial condition and the results of the operations of the Trust Fund during the preceding fiscal year and on its expected condition and operations during the next fiscal year. Such report shall be printed as both a House and a Senate document of the session of the Congress to which the report is made.

`(I) MISCELLANEOUS PROVISIONS-

`(1) APPLICABILITY OF LABOR LAWS- Except as provided in paragraphs (2), (3), and (4), all Federal, State, and local labor laws (including laws affecting migrant farm workers) applicable to United States workers shall also apply to H-2C aliens.

`(2) LIMITATION OF WRITTEN DISCLOSURE IMPOSED UPON RECRUITERS- Any disclosure required of recruiters under section 201(a) of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1821(a)) need not be given to H-2C aliens prior to the time their visa is issued permitting entry into the United States.

`(3) EXEMPTION FROM FICA AND FUTA TAXES- The wages paid to H-2C aliens shall be excluded from wages subject to taxation under the Federal Unemployment Tax Act and under the Federal Insurance Contributions Act.

`(4) INELIGIBILITY FOR CERTAIN PUBLIC BENEFITS PROGRAMS-

`(A) IN GENERAL- Notwithstanding any other provision of law and except as provided in subparagraph (B), any alien provided status as an H-2C alien shall not be eligible for any Federal or State or local means-tested public benefit program.

`(B) EXCEPTIONS- Subparagraph (A) shall not apply to the following:

`(i) EMERGENCY MEDICAL SERVICES- The provision of emergency medical services (as defined by the Attorney General in consultation with the Secretary of Health and Human Services).

`(ii) PUBLIC HEALTH IMMUNIZATIONS- Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment for communicable diseases.

`(iii) SHORT-TERM EMERGENCY DISASTER RELIEF- The provision of non-cash, in-kind, short-term emergency disaster relief.

`(m) REGULATIONS-

`(1) REGULATIONS OF THE SECRETARY- The Secretary shall consult with the Secretary of Agriculture, and the Attorney General shall approve, all regulations dealing with the approval of labor condition attestations for H-2C aliens and enforcement of the requirements for employing H-2C aliens under an approved attestation. The Secretary shall promulgate, and the Attorney General shall approve, such

regulations not later than 180 days after the date of the enactment of the Farmers' Temporary Employment Assistance Act.

`(2) REGULATIONS OF THE ATTORNEY GENERAL- The Attorney General shall consult with the Secretary of Agriculture on all regulations dealing with the approval of petitions for admission or extension of stay of H-2C aliens and the requirements for employing H-2C aliens and the enforcement of such requirements. The Attorney General shall promulgate such regulations not later than 180 days after the date of the enactment of the Farmers' Temporary Employment Assistance Act.

`(n) DEFINITIONS- For the purpose of this section:

`(1) AGRICULTURAL ASSOCIATION- The term `agricultural association' means any nonprofit or cooperative association of farmers, growers, or ranchers incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any agricultural workers.

`(2) AGRICULTURAL EMPLOYMENT- The term `agricultural employment' means any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)) or section 3121(g) of the Internal Revenue Code of 1986 and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

`(3) EMPLOYER- The term `employer' means any person or entity, including any independent contractor and any agricultural association, that employs workers.

`(4) H-2C ALIEN- The term `H-2C alien' means an alien admitted to the United States or provided status as a nonimmigrant under section 101(a)(15)(H)(ii)(c).

`(5) SECRETARY- The term `Secretary' means the Secretary of Labor.

`(6) UNITED STATES WORKER- The term `United States worker' means any worker, whether a United States citizen, a United States national, or an alien, who is legally permitted to work in the job opportunity within the United States other than an alien admitted pursuant to this section.'

(b) CLERICAL AMENDMENT- The table of contents of the Immigration and Nationality Act is amended by inserting after the item relating to section 218 the following new item:

`Sec. 218A. Alternative agricultural worker program.'

END

Farmworker Justice Fund

1. DOL with inadequate ability to enforce existing requirements for wage and working conditions.

2. Wages

All wage systems must be regulated to ensure that they do not cause adverse effects.

- a. piece rates should be subject to regulation -- linked to the AEWR (for example, piece rate must generate earnings at least 30% above the AEWR for the average worker -- a common incentive interval in agriculture)
- b. "task rates" and other such methodology should also be regulated.
- c. reform methodology for calculating the AEWR. Now has adverse effects on U.S. worker wages. AEWR is not based on average regional farmworker wages -- could be based more on the high end of the wage rate in the region. Those wages have been depressed by the current and historical presence of H-2A and undocumented workers.
- d. employers prohibited from taking deductions that bring wages below the AEWR or the H-2A prevailing wage, whichever is higher, and not merely the FLSA minimum wage.
- e. prohibit employers from fixing uniform wage rates within a region or crop.

3. transportation costs and advances

- a. require H2A employers to provide U.S. workers with transportation to the place of employment or transportation cost advances.

4. prevailing practices

- a. eliminate the double-majority definition of prevailing practice. engaged by a majority of employers OR experienced by a majority of employees in the local area and occupation. DOL uses and.
- b. prevailing practice surveys should exclude H-2A employers

5. working conditions

- a. all non-wage practices should be subject to prevailing practices -- including productivity standards and crop quality standards. Conflict between the regulation and the H2A handbook.
- b. end discrimination against women
- c. amend regulation to allow workers to opt out of the employer-provided meal plans.

6. housing

- a. end the policy of denying free housing to U.S. workers who live (either temporarily or permanently) near an H2A employer.

HOW U.S. EMPLOYERS FIND AMERICAN WORKERS

All U.S. employers, even primary producers, face the challenge of obtaining and retaining workers – like capital and customers. They typically do so through direct efforts and, sometimes, through intermediaries, both private and public. The process fundamentally involves finding ways to (1) effectively communicate the availability of employment opportunities to prospective workers and (2) offer competitive wages and working conditions that will attract prospective workers to meet their employment needs.

Direct Efforts

- ⇒ Advertisements at the place of business, and in newspapers, magazines, the Internet
- ⇒ Outreach to potential labor supplies – schools, universities, community-based organizations, even neighborhoods – through personal recruitment, job fairs, advertisements and such means
- ⇒ Outreach to potential labor suppliers (as described below) – labor unions, employment agencies, etc.
- ⇒ Recruitment among other employers' – especially competitors' – workforce
- ⇒ Using personal networks – relatives, friends, and relatives and friends of current and former employees

Use of Intermediaries

⇒ Private:

- Employment agencies – typically employers pay a fee for outreach, identification, screening and referral of qualified workers (Some employment agencies provide similar services to workers seeking employment opportunities and charge a fee to the worker)
- Temporary help agencies provide workers – employed by the agency – usually for short-term employment needs, such as replacement workers, temporary or seasonal jobs
- Labor unions refer members for employment opportunities
- Union and industry training and apprenticeship programs train and refer workers

- Labor brokers – such as agents and farm labor contractors – locate, recruit and supply (and sometimes supervise) workers for a fee (usually paid by the employer but sometimes extracted from the earnings of the workers)
- Community-based organizations – while not in the “labor exchange business,” many CBOs are eager to facilitate information exchange and similar services to benefit the members of the community

⇒ Public:

- America's Job Bank provides employers the opportunity to post job openings nationally; more than 200,000 job openings are currently listed
- America's Talent Bank provides workers a vehicle to post their resumes which employers can search to find qualified employees
- State Employment Service Agencies operate almost 2,000 offices nationally to provide labor exchange services for local employers and workers, and access to information about interstate job opportunities
- The Agricultural Recruitment System helps agricultural employers recruit workers within the local area, the same State and from parts of other States that are traditional labor supply areas

Agricultural job search and recruitment strategies

Agricultural workers, agricultural employers, and farm labor contractors use a number of strategies to find work or workers. Many of these strategies parallel those used by other employers, but also differ in kind and degree in important respects.

Agricultural employers and employees use two basic strategies to find workers and work: direct hires – in which the recruitment and employment relationship is directly between the worker and grower – and use of farm labor contractors, labor intermediaries who typically recruit, supervise, transport and house workers on behalf of the grower. Regardless of whether a farm worker is employed directly by a grower or a farm labor contractor, a majority of farm workers report – through the National Agricultural Worker Survey (NAWS) – that they found their job through kinship/friendship networks.

The use of farm labor contractors has grown significantly over the last several years. Farm labor contractors employed approximately 16 percent of all migrant and seasonal farm workers in FY 1992-93, but that number grew to about 24 percent in FY 1996-97 – a nearly 50 percent increase in farm labor contracting employment.

Grower-hired farm workers tend to do different task than those employed by farm labor contractors – only 35 percent of grower employees are engaged in harvest tasks compared with 54 percent of farm labor contractor employees. A higher percentage of grower-hired workers are engaged in post-harvest (15 percent) and semi-skilled tasks (23 percent) than farm labor contractor employees (8 and 18 percent respectively). The actual method through which the employ is recruited – by either grower or farm labor contractor – does not vary significantly by task.

Farmworker job seeking strategies

- ⇒ 62% found their job through a kinship/friendship network.
- ⇒ 27%-found employment on their own without the benefit of a network, employment service, or employer recruitment.
- ⇒ 10% found employment through employer (FLC or grower) recruitment.
- ⇒ Less than 5% found employment through the employment service or labor union.

Grower recruitment strategies:

- ⇒ 24% of all farm workers – and 29% of all migrants – are recruited and employed by farm labor contractors.
- ⇒ 10% were employed because they were directly recruited by the employer, recalled by their previous year's employer or have a year-to-year agreement with the grower.

- ⇒ Less than 2% of agricultural job placements are through the State Employment Service. Between June 1995 and July 1996, about 190,000 migrant and seasonal farmworkers sought employment through the U.S. Employment Service State offices and only about 65,000 were actually placed in agricultural jobs.
- ⇒ The remaining were recruited through a variety of other means, primarily kinship/friendship networks.

Direct efforts:

- ⇒ Growers rarely advertise in newspapers, magazines or on the Internet for workers. It is not uncommon for growers to advertise using signs posted along roads directing potential workers to the field where hiring is being done.
- ⇒ There is very little outreach to potential labor supply except through farm labor contractors who often recruit in labor supply areas.
- ⇒ Some growers recruit by contacting other employers to either refer workers once the work is complete or share workers where the employment is complementary.
- ⇒ The most common recruitment technique is for potential workers to find the employer through kinship/friendship networks. These kinship/friendship networks are often activated by a request from the employer to current employees for more workers. Over 60% of all farmworkers find employment through this method.

Use of intermediaries:

⇒ Private:

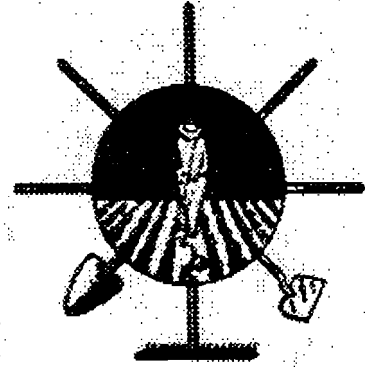
- ◆ Very few growers use traditional employment agencies, temporary help agencies, labor unions, community-based organizations, or training/apprenticeship programs as a means to secure workers.
- ◆ A substantial number of employers *[Is there any way to put dimensions on this?]* use farm labor contractors to secure workers, particularly those, who have short-term, high labor demand tasks.

⇒ Public:

- ◆ Very few workers are placed through the America's Job Bank/Talent Bank. For example, during a review of America's Job Bank on September 17, only about a dozen migrant or seasonal agricultural jobs were posted for the entire state of Oregon, a time of peak agricultural labor demand in that State.
- ◆ The employment service received about 188,000 farmworker applications *[Is there anything more we can do to characterize the kinds of agricultural jobs*

- e.g., more for full-time than harvest, more for long season than short?/
and placed about one-third of those applicants in agricultural jobs between June 1995-July 1996. Another approximately 30,000 farmworkers were referred to agricultural jobs but not hired. The placements represent less than 2% of all agricultural jobs.

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FAX COVER SHEET

Please Deliver to:
Julie Fernandez

Fax #: 456-5581
Company: Domestic Policy Council

From: BRUCE GOLDSTEIN

Pages: 5

Message:

Attached is an analysis of the changes that are being discussed regarding the Senate's guestworker amendment.

This fax may contain confidential or privileged information. If you receive it in error, please contact the sender and do not distribute. Thank you.

AGRIBUSINESS ALLIES IN CONGRESS PROPOSE SOME CHANGES IN SENATE AGRICULTURAL GUESTWORKER PROPOSAL

Another version of the Senate's agricultural guestworker proposal has surfaced. It would substitute for the Senate-passed amendment in Title XI of S. 2260, the Senate appropriations bill for Commerce, Justice, State and the Judiciary. The House version, which does not contain a guestworker amendment, is H.R. 4276. It is unclear whether this draft will even be submitted to the conference committee. The side-by-side analysis accompanying the draft is inaccurate, including about the wage issues.

The revisions are limited in number. Some would merely reinstate provisions that were in the original version and were stripped out just before passage. This draft does not substantially change the Senate guestworker program. It remains fundamentally and irrevocably flawed. In some ways the draft has become significantly worse.

- ◆ **This draft eliminates the provision that would have allowed applications for permanent visas by some guestworkers who managed to find 6 months of work in four consecutive years.** The latter provision was located in § 1110, but does not appear in the new draft proposal. In another immigration-related provision, draft section 1109 in proposed INA § 218A would, like the original amendment, permit employers to bring in workers who had been in the U.S. illegally after April 1, 1997, waiving the 1996 immigration law's 3-year and 10-year bars against admission. However, such workers could only be hired once outside the country, and this waiver would last only four years. 218A(a)(1)(A)(iii). The new amendment is also more specific about the nature of the identification and documentation systems for the guestworkers. 218A(a)(1)(D).
- ◆ The draft amendment would redefine and narrow the term "agricultural employment" to **no longer apply to poultry processing or meat-packing.** The current H-2A program definition would be used. § 1102(2).
- ◆ The draft amendment eliminates the Senate-passed **Kennedy Amendment** -- § 1115, regarding Presidential authority to protect labor standards in implementing the program -- and the **Feinstein Amendment** -- § 1106(a)(3) requiring a special cap on the number of visas sought by labor contractors and employers associations.
- ◆ The wage provisions would be amended with a phrase to include a vague reference to state and federal minimum wage laws. The authors continue to avoid a forthright statement that affected workers would be entitled for each hour worked to the federal or state minimum wage and, in e.g. California, overtime wage rates. See § 1107(a)(1). **The wage provisions would remain a complex system that permits unconscionable wage systems,** such as "group rates," "task rates," and inadequate provisions on the "adverse effect wage rate" and the "prevailing wage."¹
- ◆ There would be a **maximum number of guestworker visas during the first four years of the new program,** probably resulting in annual caps of about 65,000-80,000, 130,000-160,000, 260,000-320,000 and 455,000-560,000. The actual formula would be a rising

percentage (10%, 20%, 40% and 70%) of the number of unauthorized immigrants estimated to be working in agriculture as extrapolated from the DOL National Agricultural Workers Survey. Draft § 1106(a)(3). The existence of a cap is somewhat misleading since the visas of guestworkers admitted during one year could be extended into the following two years without counting against the cap. See § 1109 and proposed § 218A(a)(1)(B) and (2).

- ◆ The draft would reinstate a provision about **unemployment compensation** coverage that was stripped out of the first version of the Senate amendment. Growers under the program would be obligated to provide unemployment compensation coverage to U.S. workers even in states that discriminate against farmworkers. This provision will not have much impact since employers will generally displace U.S. workers with guestworkers. § 1104(c)(9) page 14-15.
- ◆ The draft amendment refers to imposition of a **"user fee"** on employers who actually secure guestworkers. A similar provision was stripped out of the Senate amendment. It is unclear whether technically this provision can be reinstated. Even if it could be, it is unclear whether the fees would amount to enough to create the program and operate it. See draft §§ 1104(c)(10) page 15; 1105(d), 1106(b)(2), 1106(d)(3), 1112.
- ◆ **Housing.** The employers (who would *not* be obligated to provide housing but would be required to provide a "housing allowance") would be required by this draft amendment, upon "the request of a worker" to "make a good faith effort to assist the worker in identifying and locating housing in the area of intended employment." § 1107(b)(6)(A). This is an unenforceable, vague requirement that is utterly useless when, as is common, there is no migrant-worker housing available. The draft amendment also changes the deadlines allowing state governors to certify a lack of housing in agricultural areas, which would kick in the obligation to provide housing under this program 4 years later. § 1107(b)(6)(B)-(C).
- ◆ The draft amendment would reinstate the H-2A program's obligation on employers to reimburse workers who complete half the season for their **transportation costs**, and pay the workers' way home upon completion of the entire season. § 1107(c). A travel cost provision had appeared in the earlier version but had been stripped out.
- ◆ The amendment would permit the Department of Labor to help arrange for a transfer to another employer for a guestworker who files a complaint alleging violation of the law's requirements. § 1108(a)(3). But the transfer could not occur unless the first employer obtains a replacement worker! And, there would have to be to a second employer participating in the guestworker program willing to take the worker. Given the history of blacklisting, that's unlikely. These workers are not free.
- ◆ The revisions states that the state **"job registry"** could be "part of the computer databases known as 'America's Job Bank' and 'America's Talent Bank.'" See draft § 1103(a)(3). So there would be no new, modern, job-matching system. This bill is not about matching US workers with jobs; it's about excluding US workers from jobs,

eliminating the modest labor protections required of employers who use the existing Job Service.

- ◆ **Enforcement.** A new provision would *obligate* the Secretary of Labor to investigate and make findings within 10 days regarding allegations of child labor, minimum wage, and housing allowances. § 1108(a)(1)(B). It is unclear whether this mandatory expedited procedure – which DOL probably could never meet – was intended to gain prompt enforcement or establish an incredibly short, pro-grower statute of limitations.
- ◆ **The General Accounting Office would issue a report** with the help of an advisory board of eight persons, half of which would be agricultural employer representatives appointed by USDA and half of which would be agricultural worker representatives appointed by DOL. § 1113. There would then be a Congressional procedure to consider whether to continue the program. § 1113.
- ◆ The **effective date** has been extended from 6 months after enactment to one year after enactment. § 1114(a). Supposedly that would provide sufficient time for the job registry to work. It never will.

Farmworker Justice Fund, Inc., (202) 776-1757

9/28

¹ **The Wage Issues.** First, the draft alters the definition of the “adverse effect wage rate” to say that it could not be less than a state or federal minimum wage (whichever is greater), nor more than the prior year’s regional average hourly earnings of field and livestock workers. (Compare current and draft § 1102(1)). However, where there would be no adverse effect wage rate (i.e. if the local prevailing wage’s hourly earnings equals or exceeds the regional average wage), no minimum wage coverage would exist under that provision.

Contrary to a description of the revised amendment, the draft does *not* alter the definition of “prevailing wage” (§ 1102(6)) and does *not* require the prevailing wage to be no less than the state or federal minimum wage. See § 1107(a)(2)-(3).

Assume the state minimum wage of \$6.00 per hour in Oregon, a regional average earnings of \$7.08, and the local prevailing wage is 50 cents per bag of fruit which on average yields \$7.00 per hour. Some workers earn more per hour on that piece rate and some earn less. There would be no adverse effect wage rate, since the average hourly earnings on the piece rate is more than the regional average wage. Because there is no adverse effect wage rate, the reference to the state or federal minimum wage in draft § 1102(1) does not kick in. Workers could be paid the prevailing rate of 50 cents per bag of fruit and could legally be paid \$3.00 per hour. Low average earnings would occur when the crop is sparse, the weather difficult, or the worker is not as experienced or fast as others.

Second, the draft would change § 1107(a)(4)(B), regarding proof of compliance with any applicable minimum hourly wage rates for employers that are using any kind of incentive rate. The employer could show compliance using its average wage levels for its workers, “taken as a group” (rather than what each worker earns per hour), “except the hourly wage prescribed under section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1), or the applicable State minimum wage. . . .” *It doesn’t discuss compliance for employers who pay by hourly rates at all.* It allows employers who pay by piece rates to use a group-average analysis except to prove compliance with the state or federal minimum wage, but as indicated earlier and in other analyses, *it doesn’t require the employer to meet the minimum wage in state or federal law.*

In fact, other provisions provide that this law would supersede state or federal labor laws. See §§ 1104(a)(E) ("wages and other terms . . . are not required to be more . . . than those required by this section. . . ."); 1104(c)(5)(A)(requiring compliance with federal and state labor laws "except as otherwise provided in this title"); 1107(a)(1)(employers must pay minimum wage levels in this Act "and is not required to pay more" (parentheses omitted)).

Latest Version of Wyden-Graham Bill

1. H-2A workers (agricultural workers) covered by MSPA
2. Clarified that state/federal wage laws apply if more than 105% of the prevailing wage.
3. Workers would receive a housing voucher and growers would have to make a good faith effort to assist workers to find housing.
4. Requires expedited investigation of flagrant violations of child labor statute or housing or wage provisions of the H2A law.
- ⑤ Growers must reimburse all inbound and outbound transportations (under same rules as current) for all domestic workers referred by the registry.
- ⑥ 50% Rule would apply for all U.S. workers referred by the registry.
7. A worker (or a worker advocate) can petition to change jobs within the H2A system.
8. Clarified that State Department cannot issue a visa unless the DOL says it is o.k.

Q: However, the only obligation is that the grower attest to having done the right things, then DOL must say o.k. If the grower makes the right promises, after X days, the visas can be issued.

9. Caps on the annual number of H-2A visas: \$60K the first year; up to \$600K in the ~~10th~~ ^{4th} year.
10. Established a grower/worker advisory board
11. Reports to Congress in YR3 and YR5
- ⑫ Registry to take effect one year from enactment (rather than 6 months)

Q: How are the other aspects of the bill effected by the fact that the registry does not take effect until one year after enactment of the bill?

13. Lifts the three-year/ten-year ban for workers who want to work in the H-2A program (within a certain window of time)

Q: This creates an incentive to be a temporary worker forever. If deported, can return as an H-2A worker?

14. Legalization provisions (if after four years of six months each year, eligible to legalize).

15. Calls for the creation of an exit-entry visa system (linked the the consulate in the home country).
16. Modified the 3/4 guarantee. Grower would be on the hook for the 3/4 guarantee, unless the employer can arrange for other work for the worker.

Q: This is Wyden's proposal; others don't agree.

17. AG study of visa overstaying; determine options to ensure repatriation.

8202 228 2777 SEN RON WIDEN - DC 03/10/98 15:40 1.002/011

September 16, 1998

TO: Cecelia Rouse
FR: David Blair

Julie

RE: Yesterday's meeting

I'm attaching the memorandum we worked from yesterday detailing changes.

With regard to the exchange with John Frasier, I'm attaching the memo that we prepared in July responding to issues raised by the Dept. Of Labor, which included the piece about requiring the actual hiring of workers referred by the registry.

Also, there is disagreement about sharing these with the White House. We would ask that these materials be held internally for now.

328 H

**COMPARISON OF SENATE-PASSED H-2A REFORM AGJOBS AMENDMENT
TO S. 2260 WITH PROPOSED CONFERENCE CHANGES**

Senate-Passed Amendment

**Proposed Conference
Changes**

**Limitation on Covered Job
Opportunities (Section 2)**

Changes definition of "agriculture" to clarify that packinghouse and food processing jobs currently excluded from H-2A program are excluded from reformed program.

Wages (Section 2)

Clarifies that the premium prevailing wage rate cannot be less than the federal or applicable State minimum wage. (per CRS)

Housing (Section 7)

Requires employers to make a good faith effort to locate housing where a housing allowance is provided. Also shortens the period for State determinations of the sufficiency of housing from 3 to 1 year and requires that housing be provided 4 years rather than 5 years after a finding of insufficient housing.

Transportation (Section 7)

Eliminates any ambiguity that employers must reimburse inbound and outbound transportation costs after the required work commitments are met.

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**Department of Labor Investigations,
Enforcement and Penalties (Section 8)**

Requires DOL to conduct expedited investigations and make findings within 10 days if a worker alleges the following serious violations: 1) violation of existing child labor laws; 2) failure to make wage payments; 3) failure to pay housing allowance; and 4) providing housing in violation of government housing safety standards that pose an immediate threat of serious bodily injury or death to workers. Hearing process provided if violation found.

**Transfer of Workers Dissatisfied with
Employer (Section 8)**

-Applies to Foreign worker

Provides DOL discretion to transfer a worker who has filed a complaint alleging an employer has violated program terms to another employer approved to participate in the program. Provides that employer from whom the worker is transferred must first obtain replacement worker and clarifies responsibility for transportation reimbursement in transfer situation.

**State Department Issuance of
Visas (Section 6)**

Clarifies that employers may voluntarily agree to transfer workers to other qualified employers.

Clarified alien workers may return home at any time

Clarifies that if the Secretary of Labor fails to act on an employer application within statutory timeframes that the Secretary of State may approve an application, but only if the employer meets all program requirements.

**Limitation on the Number of Visas
(Section 6)**

Places caps on the number of visas allowed during the first 4 years after the effective date as follows: 10%; 20%; 40% and ~~70%~~ of the number of unauthorized workers found working in agriculture by DOL's most recent National Agricultural Worker Survey. [After 4th year there is no cap.] Secretary of Agriculture ensures that visas are allocated on a geographically diverse basis, considering seasonal demands in all parts of the country.

NOT AGREE

50%

Wyden wants
some limit
out years.

**Establishment of Employer/Worker
Advisory Board (Section 13)**

Establishes advisory board to consult with GAO in preparation of its reports on program operation. 4 employer representatives are selected by Secretary of Agriculture and 4 workers representatives are selected by Secretary of Labor.

Termination of Program (Section 13)

Requires reports to Congress by GAO on operation of program, including recommendations on program improvements and the continuation or termination of the program at the end of 5 years. If GAO recommends termination of program, an expedited and privileged joint resolution procedure is provided for prompt congressional action on termination. If Congress passes resolution ending reformed program, the existing H-2A will not sunset and will continue in its current form.

Effective Date of Program (Section 14)

The effective date for the program is 1 year rather 6 months after enactment to allow more time for government agencies to implement program. DOL is mandated to issue report within 6 months regarding measures being taken and progress made in implementation.

Initial Waiver of Ineligibility (Section 9)

States that otherwise admissible aliens are not deemed inadmissible to participate in program if they leave the US no later than within 1-year after the 4-year phase-in period.

Removal by Attorney General of Aliens Violating Program Terms (Section 9)

Requires AG to remove workers who abandon employment and fail to maintain legal status in US.

Identification Document and Document System (Section 9)

Establishes tamper- and counterfeit-proof identification document to verify employment eligibility of aliens. Such document must be compatible with existing government law enforcement and benefit eligibility databases and must measure whether aliens depart US as required by their visas.

Permanent Resident Status (Previous Section 10)

No

Provision providing employment-based preference for permanent resident status for aliens working 4 years in program is deleted.

NOT AGREED

User's Fee (Section 12)

Establishment of user's fee is being drafted by Legislative Counsel subject to Congressional Budget Office input.

Unemployment Insurance (Section 4)

Provision requiring payment of unemployment insurance to domestic workers as a condition of program participation is being considered by Legislative Counsel subject to Congressional Budget Office input.

Additional changes proposed by Wyden
and accepted.

Suggested Amendments to H-2A Draft BA198.165

1. P. 5, after line 10, insert at the appropriate place a new subsection ()

✓ () to ensure that United States citizens and United States nationals enjoy the right of first refusal for any temporary or seasonal agricultural work available through the registries;"

2. P. 6, after line 5, insert a new subsection (3)

✓ "(3) COMPUTER DATABASE.--

(A) The Secretary of Labor may establish the registries as part of the computer database known as "America's Job Bank."

3. P. 7, on line 9 after "unless," strike the remainder of the sentence and insert the following:

✓ "the Secretary of Labor has requested and obtained from the Attorney General a certification that the person is authorized to be employed in the United States."

4. P. 9, at the end of line 4, insert

✓ "The Secretary shall assure that information about the registry is made available to eligible workers through all appropriate means, including appropriate State agencies, groups representing farm workers, and nongovernmental organizations."

5. P. 17, insert a new sentence after "employer"

✓ "The Secretary shall identify first eligible United States citizens and United States nationals who are qualified registered workers and shall contact such workers first."

6. P.21, after line 10, insert a new subsection "(v)"

✓ "(v) For the fifth year and for each year thereafter, the Secretary of Labor, in consultation with the Secretary of Agriculture, shall establish the number of aliens that may be employed pursuant to this Act based on....[insert guidelines]"

No

1 which the employer requests a registered worker
2 is temporary or seasonal.

3 (B) SEASONAL BASIS.—For purposes of
4 this title, labor is performed on a seasonal basis
5 where, ordinarily, the employment pertains to
6 or is of the kind exclusively performed at cer-
7 tain seasons or periods of the year and which,
8 from its nature, may not be continuous or car-
9 ried on throughout the year.

10 (C) TEMPORARY BASIS.—For purposes of
11 this title, a worker is employed on a temporary
12 basis where the employment is intended not to
13 exceed 10 months.

14 (3) ASSURANCE OF PROVISION OF REQUIRED
15 WAGES AND BENEFITS.—The employer shall assure
16 that the employer will provide the wages and bene-
17 fits required by subsections (a), (b), and (c) of sec-
18 tion ____07 to all workers employed in job opportu-
19 nities for which the employer has applied under sub-
20 section (a) and to all other workers in the same oc-
21 cupation at the place of employment.

22 (4) ASSURANCE OF EMPLOYMENT.—The em-
23 ployer shall assure that the employer will ^{not} refuse to
24 employ ^{Qualified} individuals referred under section ____05, ~~or~~ and will
25 terminate ^{Qualified} individuals employed pursuant to this

note: "qualified" individuals is a current term of art.

1 title, only for lawful job-related reasons, including
2 lack of work.

3 (5) ASSURANCE OF COMPLIANCE WITH LABOR
4 LAWS.—

5 (A) IN GENERAL.—An employer who re-
6 quests registered workers shall assure that, ex-
7 cept as otherwise provided in this title, the em-
8 ployer will comply with all applicable Federal,
9 State, and local labor laws, including laws af-
10 fecting migrant and seasonal agricultural work-
11 ers, with respect to all United States workers
12 and alien workers employed by the employer.

13 (B) LIMITATIONS.—The disclosure re-
14 quired under section 201(a) of the Migrant and
15 Seasonal Agricultural Worker Protection Act
16 (29 U.S.C. 1821(a)) may be made at any time
17 prior to the time the alien is issued a visa per-
18 mitting entry into the United States.

19 (6) ASSURANCE OF ADVERTISING OF THE REG-
20 ISTRY.—The employer shall assure that the em-
21 ployer will, from the day an application for workers
22 is submitted under subsection (a), and continuing
23 throughout the period of employment of any job op-
24 portunity for which the employer has applied for a
25 worker from the registry, post in a conspicuous place

1 (ii) the most economical and reason-
2 able transportation and subsistence costs
3 that would have been incurred had the
4 worker or alien used an appropriate com-
5 mon carrier, as determined by the Sec-
6 retary.

7 (B) DISTANCE TRAVELED.—No reimburse-
8 ment under paragraph (1) or (2) shall be re-
9 quired if the distance traveled is 100 miles or
10 less.

11 (d) CONTINUING OBLIGATION TO EMPLOY UNITED
12 STATES WORKERS.—

13 (1) IN GENERAL.—An employer that applies for
14 registered workers under section ____04(a) shall, as
15 a condition for the approval of such application, con-
16 tinue to offer employment to qualified, eligible Unit-
17 ed States workers who are referred under section
18 ____05(b) after the employer receives the report de-
19 scribed in section ____05(b).

20 (2) LIMITATION.—An employer shall not be ob-
21 ligated to comply with paragraph (1)—

22 (A) after 50 percent of the anticipated pe-
23 riod of employment shown on the employer's
24 application under section ____04(a) has
25 elapsed; or

5706

1 (B) during any period in which the em-
2 ployer is employing no aliens in the occupation
3 for which the United States worker was re-
4 ferred; or

5 (C) during any period when the Secretary
6 is conducting a search of a registry for job op-
7 portunities in the occupation and area of in-
8 tended employment to which the worker has
9 been referred, or other occupations in the area
10 of intended employment for which the worker is
11 qualified that offer substantially similar terms
12 and conditions of employment.

13 (3) LIMITATION ON REQUIREMENT TO PROVIDE
14 HOUSING.—Notwithstanding any other provision of
15 this title, an employer to whom a registered worker
16 is referred pursuant to paragraph (1) may provide
17 a reasonable housing allowance to such referred
18 worker in lieu of providing housing if the employer
19 does not have sufficient housing to accommodate the
20 referred worker and all other workers for whom the
21 employer is providing housing or has committed to
22 provide housing.

23 (4) REFERRAL OF WORKERS DURING 50-PER-
24 CENT PERIOD.—The Secretary shall make all rea-
25 sonable efforts to place a registered worker in an

SEN RON WYDEN - DC 09/12/98 16:03 P.0017009

UNITED STATES SENATE
WASHINGTON, DC 20510-3703

8202 228 2717

RON WYDEN
OREGON

Facsimile Transmission From Senator Ron Wyden

717 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510-3703
(202) 224-5244 - VOICE
(202) 228-2717 - FAX

TO: Cecelia House 456-2223

FROM: David E.

DATE: _____

NOTE:

I may be revising this
tomorrow. Please hold
close.

THERE ARE _____ PAGES TO THIS TRANSMISSION, INCLUDING THIS
COVER SHEET. IF YOU HAVE EXPERIENCED ANY DIFFICULTY, PLEASE
CONTACT _____ AT THE ABOVE NUMBER.

September 12, 1998

TO: Ron
FR: David Blair

RE: PREPARATION FOR ERSKINE BOWLES MEETING

I. HOW THE BILL WORKS:

I've copied the section by section, below, and added in clarifying notes, and notes about modifications agreed to, marked *.

SECTION 2: Definitions

- Defines Adverse Effect Wage Rate at 5% above the prevailing wage level;
- Defines Prevailing Wage as the rate of wages that is the 51st percentile of employees for the activity in the area of intended employment.
- *Added language suggested by CRS Law division to unequivocally put prevailing rate above state of federal minimum wage rate. (As passed, the bill is subject to state and federal minimum wage law; problem is that the minimum wage law has exceptions for certain small ag employers; we're fixing that problem)

SECTION 3: Agricultural Worker Registries

- Directs Sec. of Labor to establish a system of registries containing a database of eligible U.S. workers seeking farm work; requires the registries to ensure that U.S. workers are informed of work opportunities; to maximize employment for eligible workers; and to provide U.S. workers timely referral to job opportunities.
- Directs organization of the system of registries in consultation with the states, and according to logical labor market regions (ie. Pacific Northwest, Southeast, etc.)
- Allows **any individual** to be included in the registry, and allows **them** to identify skills, areas, crops, or other information that **the worker** wants taken into account in determining the kinds of referrals they want to receive.
- Requires the **registry** (not the worker) to validate the employment eligibility of each person listed;
- Requires advertising and other means to promote the use of the registry;

*Under conservative assumptions, the account built by the user fee should easily rise to more than \$35 million per year. This provides a real, and never before tried, capability to design a farm worker registry and job service - involving advertising, outreach, and recruitment - that will

be effective at matching up legal U.S. residents with jobs in farm work. Remember, this is what Berman originally triggered to back in February – the notion of a well funded, effective system of matching workers with work.

Response to DoL assertion that the registry cannot work: It was used effectively in Florida; with all the technology that we already have in which individuals can access a system - touch screens, telephone systems, keyboards; PLUS, funding to put registry outlets in many different kinds of facilities - union halls, Job Service offices, community organizations - there is no reason to think that we could not make effective referrals in a 3 week period.

Process: 1. Grower submits an application for workers;

2. Registry has two weeks to notify all registered workers of the job opportunity

3. In the 3rd week the Grower is notified of how many workers committed to the job;

The remainder of the total worker need is then submitted to INS and the State Department for issuance of H-2A visas for foreign workers.

SECTION 4: Employer Application and Assurances

-Applications are made to the Secretary of Labor for a referral of U.S. workers via a search of the registry;

-The employer must specify the terms and conditions of the work, its duration, the number of jobs, the bona fide occupational qualifications, and the wages offered;

-Application must be made 21 days before workers are needed at the job site;

-Requires the employer to make the following assurances:

-that the work is temporary or seasonal;

-that the job is not a result of a labor dispute;

-that the employer will provide the wages and benefits required under the Act;

-that the employer will comply with all labor laws, including the Migrant and Seasonal Worker Protection Act, Fair Labor Standards Act, etc.

-Requires notification of all workers employed in the previous season of the job opportunity;

-Requires the provision of Worker's Compensation insurance;

-Requires that the employer independently provide Unemployment Insurance (if operating in a state that does not require UI for farm workers)

-The Secretary may approve or reject the application for workers;

-The Secretary shall reject the application for previous program violations;*

SECTION 5: Search of Registry

-Upon approval of the employer application, requires the Secretary to search the registry and identify registered workers with appropriate qualifications; Secretary shall contact each qualified registered worker and determine if the worker will accept the job and commit to the employment;

-No later than 7 days before the date on which the employer needs workers, the Secretary must provide the employer with the list of workers who committed to the work; if there are insufficient

workers to fulfill the request, the Secretary shall notify the Attorney General to initiate the Visa issuance process for the remaining need.

SECTION 6: Issuance of Visas and Admission of Aliens

- Directs the Secretary of State to issue the number of H-2A visas necessary to remainder of the request for workers;
- Fail Safe:** If the employer has not received a referral from the Secretary of Labor within the required time frame (2 weeks), the employer may directly apply for alien workers to the Secretary of State, who shall issue the requested visas within 5 days, after consultation with the Secretary of Labor and the Attorney General;
- Provides for a redetermination of need if workers referred by the registry do not actually show up at the job site;
- Provides expedited procedure for unexpected emergencies.

SECTION 7: Employment Requirements:

- Requires payment of the prevailing wage rate PLUS 5%, unless the wages are more than the annual average wage rate for field and livestock workers in the area (currently the Adverse Effect Wage Rate), in which case the employer shall pay the prevailing wage;
- Describes the wage survey methods appropriate to determine wage rates.

HOUSING:

- Requires the employer to either provide housing at no cost, or to provide a housing allowance where sufficient housing is available. Allowance to be based on the average HUD fair market rental rates for 2 bedroom dwellings for rural counties in a state, assuming 2 persons per bedroom; Governor determines the sufficiency of housing.
- Allows reasonable charges for utilities, damages, and for a no more than \$50 security deposit for employer-provided housing;
- Encourages employers to construct housing by providing a 40 percent reduction in user fees where housing is provided;

TRANSPORTATION:

- Requires payment by the GROWER for the worker's inbound transportation cost if 50 percent of the work contract period is completed; and reimbursement for the outbound travel to either a place of subsequent employment or to the worker's home, upon completion of the entire work period;
- Establishes a pilot program for the advancement of a worker's transportation costs prior to travel to the site of a job opportunity; ***We are still having difficulty putting this provision in the bill because of the rules governing user fees.

50% RULE:

-Requires an H-2A employer to offer any U.S. worker a job during the first 50% of the employment period, unless there are job opportunities through the registry of similar pay and conditions in the local area;

SECTION 8: Enforcement and Penalties

-Provides for the investigation of complaints and for enforcement at the initiative of the Secretary;

-Provides remedies for violations;

-Establishes criteria for program violations and debarment from the program;

****Still working on a provision for 'flagrant violations' - and one of the violations included in this process will be any violation of child labor laws. And as you recall the principal problem in the Oregonian series involved violations of laws -- things like the children picking fruit and boosting mom or Dad's production - blatantly illegal, but happens.**

SECTION 9. Alternative Program for the Admission of temporary H-2A workers

The purpose of the section is to assist the Immigration and Naturalization Service in controlling the admission and repatriation of aliens admitted under this program; to disqualify any alien who fails to depart at the completion of the work contract or upon abandonment of the job; to limit the admission period to the employment period or 10 months, whichever is less; to require employers to report premature job abandonment; to issue to H-2A workers counterfeit- and tamper-resistant identification cards; to provide procedures for an extension of the alien's stay or a change in the alien's authorized employment; for the Attorney General to conduct a study to determine whether H-2A aliens depart the United States in a timely manner; and to prohibit family members from accompanying H-2A workers to the United States.

TRUST FUND:

-For each alien employee, requires payment by the employer of the amount that would otherwise have been withheld in FICA and FUTA taxes, were the employee a legal U.S. resident; directs spending of the trust fund to the administration, advertising, and recruitment efforts of the Registries; to finance the transportation benefits under the program; and to increase the stock of migrant worker housing in areas where housing is deemed insufficient;

****While the replacement of the user fee provisions is going well, it has not yet been finally worked out.**

SECTION 10: Inclusion in Employment-based Immigration Preference Allocation

-Provides a "credit" toward legal U.S. residency for alien farm workers who complete four years of correct participation in the program; for the first time creates a legal immigration status for migrant farm workers into the U.S.

****You know the political problems with this provision -- and I note that in the draft G.Smith gave us Friday, reflecting negotiations, they have dropped this from the text, even though we've**

made it explicit that you are not ready to let go of this. However, they also understand that if we file with this provision included, the bill is dead on arrival in the conference.

SECTION 11: Migrant and Seasonal Head Start

-Increases the allocation of funds to the Migrant and Seasonal Head Start Program; removes barriers to participation for the families of migrant farm workers.

IMPORTANT CONSIDERATIONS

- ◆ The current H-2A program involves a package of worker protections that would be ideal - if any workers actually received those protections. Perhaps 40,000 farm workers - 25,000 foreign, and about 15,000 domestic - receive the benefits of the current program. 99.8% of U.S. farm workers get none of these benefits. Yet there are more than 1.6 million farm workers in the United States. This legislation was drafted under the philosophy that if we could develop a program that growers would actually use, while still assuring important worker protections, then we could extend those protections to hundreds of thousands of workers, instead of just thousands.

Under this legislation we are not only entitling workers to housing benefits - either provided directly or paid for with an allowance that is based on actual rental rates - we are creating a variety of incentives for growers to invest in farm worker housing:

- A grower who provides housing gets a 40% break on the user fee, and avoids the per-worker cost of the allowance;
- Excess funds in the account built up by the user fee will go to help build seasonal farm worker housing in areas deemed to have a shortage of this type of housing.
- The drafters believe that if growers have a greater degree of certainty about their ability to find workers, they will be more inclined to make the long term investments in farm worker housing.

Farm worker wages will go up on farms that participate in the program. Currently the only wage standard applicable to 99.8% of U.S. farm workers is the minimum wage. Workers covered by this bill would have a higher minimum wage called the prevailing wage; the prevailing wage takes the average wage of the farm workers in a region, and sets the mid point as the minimum wage; any economist will tell you that the effect of that is to raise the wages of all workers covered by the standard.

This bill bears no resemblance to the Bracero program:

- the only similarity between the Bracero program and this bill is that both programs involve agriculture.
- Bracero was a treaty between the U.S. and Mexico, a basically open-ended program in which employers simply requested worker permits from the government, and the government provided them. It was formed in response to the WWII labor shortage.
- contained no requirements to give US workers right of first refusal to jobs.

then let's
crack down on
harder on illegal
immigrants

they get
workers every year
why not provide
housing for all of them?

but the real
comparison here
is to the AEW.

-predated most labor laws that now apply to agricultural employers, and contained nowhere near the level of worker protections and benefits included in the bill.

- ◆ Growers face a real crisis in farm labor **which was implicitly validated by the GAO.** GAO concluded that there was no crisis in farm labor as long as there was no crackdown on illegal aliens. There is, however, a very real crackdown involving the validation of employee data by the Social Security Administration. The SSA is turning information about invalid numbers over to IRS, which in turn sanctions employers for inaccurate W-2 filings. Increasingly, growers are having to choose between getting their crops in or paying fines for inaccurate data filings to the IRS. Growers fear that it is only a matter of time before the INS makes use of this data in enforcement efforts.

This, of course, says nothing about GAO's tacit acceptance of what is now a wholly illegal nature of farm work.

II. CHANGES AGREED TO SINCE THE BILL PASSED THE SENATE

Since the bill passed the Senate our efforts have been on two fronts:

- restoring the agreed upon items back into the bill: Unemployment insurance, user fee, transportation pilot; at this writing these have not been finalized
- adding provisions that you have requested and that were judged to bring Feinstein on board.

AGREED TO AND REFLECTED IN THE 9-11 DRAFT FOR THE CONFERENCE COMMITTEE:

-Suggestions made by CRS to tighten the wage provision; CRS law division is redrafting their memo on the point of state/federal minimum wage primacy.

-INVOLUNTARY SERVITUDE (p. 36): The bill now contains an explicit grievance process for any H-2A visa'd foreign worker; under the grievance process the Secretary may allow transfer of an alien worker to any other H-2A approved employer; the worker may not be transferred until the employer receives a replacement worker; and the grower may at any time transfer a worker voluntarily to another H-2A employer upon filing of a grievance.

-HOUSING (p.30): shortened the amount of time in which a "finding of insufficient housing" can trigger a firm requirement for a grower to be denied the housing allowance option. Bill had 8 years (certification no sooner than 3, 5 years to comply); now has 5 years (certification after 1 year, 4 years to comply).

Also, Feinstein provision, (p. 29): at the request of a worker, the grower "shall make a

good faith effort to assist the worker in identifying and locating housing in the area of employment."

-GAO REVIEW OF IMPLEMENTATION(p.56): 9-11 draft requires GAO report on implementation at years 3 and 5 of the program; establishes an expedited procedure for congressional disposition of recommendations.

-ADVISORY BOARD(p.58): Your suggestion for a grower-worker advisory panel is established "to provide advice to the GAO in the preparation of reports.."

-PHASE IN of the program, "caps" on visas: The 9-11 draft allows the Secretaries of Labor and Agriculture to limit the # of H2a visas for the 4 initial years of the program, in 10% increments of the annual National Ag Worker Survey. 10% the first year, 20 the second, etc.

ITEMS AGREED TO BUT NOT YET REFLECTED IN THE 9-11 DRAFT

-The ADVISORY BOARD created in the bill will be authorized to request the initiation of labor department investigations of flagrant violations.

STATUS OF ADDITIONAL WYDEN ISSUES

-Concern about INS prior approval before a worker can get on the registry: advocates are saying that there will be INS bureaucratic impediments to a worker to get listed:
RESPONSE: There is ZERO bureaucracy that a worker must contend with to list him or her self on the registry. It is the job of the REGISTRY to make an independent computer check - as is now done with all public benefits programs like food stamps - to validate the person's residency status. If the person is using invalid SS #, their name is purged from the registry. ***Just spoke with Carole, she has ideas about making this clearer.

-Feinstein floor amendment: authorized the secretary to set a cap on the number of workers brought in by an agricultural association or independent contractor; it did not allow a cap on a request by an individual grower. The amendment is NOT reflected in the 9-11 draft.

-ENFORCEMENT: The growers are drafting an expedited enforcement process for Flagrant Violations. Flagrant violations will be things like failure to pay wages; violation of child labor laws, and others.

(As you know the primary grower concern is that under current H-2A, participation brings the enforcement microscope on employers - which is in itself a response to critics of "no enforcement." The horror stories come from non h2a growers)

-CHILD LABOR - Lantos bill: unresolved, but we are getting significant resistance. The hope is that since most child labor horror stories involve violations of current laws, the Flagrant Violations piece will cover it for you.

-NUMERICAL LIMIT ON WORKERS: We have not instituted the out year limitations on visas than can be issued through the program, as per your directions.

-“INSTANT” Departure of an H-2A visa’d worker from a farm the worker no longer wants to work at. The bill establishes a grievance procedure, but the worker cannot depart until a replacement worker is brought in. Your directions are for there to be no lag time on that.

COMPARISON OF ORIGINAL WYDEN PROPOSAL VS. THE SMITH BILL VS. THE BIPARTISAN AGREEMENT

1. REPEAL OF THE CURRENT SEARCH REQUIREMENTS FOR H2A APPLICANTS:

Wyden proposal:

Under current law H2A applicants must search for U.S. resident farm workers. Both worker and grower advocates believe that the regulation of this process is highly subjective and ineffective. This search process is repealed and replaced with a 21 day search process using a registry of agricultural workers.

Smith Bill: 7 Day process involving "Labor Condition Attestation", in which the grower attests that certain benefits will be provided to foreign workers; uses the current DoL system of job clearances to determine if there are U.S. workers willing to take the jobs.

Bipartisan bill: 21 day search process through the Registry.

2. ESTABLISHMENT OF AN AGRICULTURAL WORKER REGISTRY:

Wyden: A worker registry would be established to create an effective and efficient system enabling agricultural producers to secure qualified U.S. labor. The purpose of the registry is to create a highly functional resource for matching U.S. farm workers with work opportunities.

The Secretary of Labor would oversee this worker registry, which would be organized according to logical labor market regions. Any legal U.S. resident could at any time either add or delete their name from the registry. Workers listed on the registry will have the first choice to fill a job for which foreign workers are sought. The registry will be designed to be a highly functional resource for matching farm workers with work opportunities.

Administration of the registry would be financed by user fee payments from H-2A program participants.

Smith Bill: No provision

Bipartisan bill: Creation of the Registry, as described above.

3. ASSURANCE OF A LEGAL LABOR SUPPLY

The employer is assured that workers provided through the registry are legally entitled to work in the United States.

Smith Bill: No provision

Bipartisan bill: Legal status validated by the Registry, as described.

4. APPLICATION PROCESS TO SECURE FARM WORKERS

Wyden: For a grower who is experiencing a shortage of workers, an application for workers may be made to the Department of Labor. The application would be subject to a 21 day process, as follows:

- ◆ The application is referred to the registry for recruitment of legal U.S. workers.
- ◆ U.S. workers are given a preference to fill the jobs requested in the application, and would be notified first of the work opportunity.
- ◆ After interested U.S. workers have indicated their intent to take jobs with the applicant, H-2A Visas would be made available for the remaining number of workers sought by the grower.
- ◆ If the Department of Labor fails to act within the time lines under the bill, the opportunity is provided for direct application to the State Department for the issuance of H-2A visas.

Smith Bill: Upon acceptance of application (7 days for review by Dept. Of Labor), INS has 3 days in which to issue H-2A visas

Bipartisan bill: 21 day registry search as described above.

5. APPLICATION OF THE MIGRANT AND SEASONAL WORKER PROTECTION ACT.

Wyden: The proposal would eliminate the current exemption from MSPA for H-2A workers, as it applies to the protection of workers in the United States. | ?

Smith Bill: Same

Bipartisan bill: same

6. ELIMINATION OF THE AGRICULTURAL WORKER EXEMPTION UNDER THE FEDERAL UNEMPLOYMENT TAX ACT.

Wyden: The proposal brings farm workers under the full benefits of the federally assured system of unemployment insurance. Farm workers would be treated like workers in virtually all other occupations. Washington and California currently require equal treatment of farm workers, and Oregon Gov. Kitzhaber has proposed eliminating the exemption for each of the past three years. ?

Smith Bill: No provision

Bipartisan bill: All H-2A program participants must provide Unemployment Insurance coverage.

7. TRANSPORTATION PILOT PROGRAM

The proposal directs the Secretary of Labor to conduct a pilot program involving the issuance of

vouchers to farm workers for the purpose of traveling to job referrals made through the registry.

A pilot program is necessary to resolve concerns that transportation benefits have been tried in the past but resulted in workers cashing in the benefit or using the transportation for some other purpose.

Smith Bill: only required if assistance is also provided to foreign workers.

Bipartisan bill: Transportation pilot program, plus payment of transportation as currently required except that payments will come through the Dept. Of Labor out of the account built by the user fees.

8. CREDIT TOWARD LEGAL RESIDENCY

Wyden: Section 203(b)(3) of the Immigration and Nationality Act establishes priorities for legal immigration to the United States. Currently, farm workers, not including temporary or seasonal workers, are classified as "other workers," for the purposes of immigration. The bill would create a new authority for the issuance of a certain number of immigration visas to "qualified immigrants who have completed 4 years of work in the U.S. under an H-2A visa."

The proposal would allow an illegal alien to return to their home country and be allowed to reenter the United States legally under an H-2A visa.

Smith Bill: no provision

Bipartisan bill: Includes the provision as described above.

9. IMPROVE FARM WORKER FAMILY ACCESS TO HEAD START

Wyden: The proposal removes some of the administrative barriers identified by farm worker advocates to participation of farm worker families in the Head Start program.

Smith Bill: no provision

Bipartisan bill: Includes the provision as described.

10. ASSIST WORKERS IN LINKING SUCCESSIVE JOBS INVOLVING DIFFERENT HARVEST SEASONS.

Wyden: The proposal requires that the registry be designed for the additional purpose of assisting workers to increase the length of their work season by identifying opportunities to work on other crops with complementary harvest seasons. ✓

Smith Bill: no provision

Bipartisan bill: Includes the provision, as described.

Department of Labor H-2A Issues
July 17, 1998

1. Federal or State Minimum wage

DoL concern: That the bill could allow a prevailing wage determination that is less than the applicable minimum wage requirement.

Discussion/Response: P. 12, line 21 requires compliance with "all applicable Federal, State, and local labor laws..." Our policy is that minimum wage standards apply.

2. Migrant and Seasonal Worker Protection Act (MSPA) Disclosure to foreign workers

DoL concern: Is that the draft does not require full disclosure of the terms and conditions of the contract to foreign workers, as it does to U.S. workers, and that MSPA disclosure should occur earlier than once the visa is issued. H-2A workers shouldn't have to wait until they have their visa to hear about MSPA.

Discussion: Recruiters in foreign countries are often looking for interested workers for a number of farmers. The employer is not determined until the worker requests a visa, so that is the first point where the specific terms of employment could be disclosed.

Resolution: Modify the bill to require informing the foreign worker of MSPA rights prior to issuance of visa, but after specific employer has been determined. This could be done prior to actual visa issuance, but would usually be at the embassy. Importantly, we take major steps to cover H-2A workers by MSPA. This has never been done before. Our clarification of MSPA coverage ensures that every worker receives information about terms and conditions of employment before the visa is issued. This disclosure can happen at the consulate, which is where, realistically it is known which specific job the alien is going to. A recruiter in the field may be recruiting for 10 or more growers; were we not to clarify this, he/she would have to hand out documentation on each and every different job possibility. Workers are protected because they know terms and conditions before they come to the US, and the process is streamlined because we recognize the reality of ag recruitment.

3. Rejected applications from debarred applicants

Employer Assurances: **Sec. 4(e)(2) APPROVAL OF APPLICATIONS.**-If the Secretary determines that an application meets the requirements of subsection (a) and is not ineligible to apply under section 8(b)(4), the Secretary shall...approve the application...

DOL concern: Section 8(b)(4) refers to program disqualifications which result in three year and permanent disbarment. Applicants who are currently disbarred should be disqualified from applying, regardless of the length of time of the disbarment.

Discussion/Resolution: Sec. 4(e)(2) should be amended to allow the Secretary to refuse any application from an employer who is currently disbarred.

4. Identified housing should meet federal standards

Housing: Sec. 7(b)(2) (pg26) ...an employer may, at the employer's election, provide housing that meets applicable federal standards for temporary labor camps or secure housing that meets applicable local standards for rental or public accommodation housing or other substantially similar class of habitation, or in the absence of applicable local standards, State standards for rental or public accommodation housing or other substantially similar class of habitation.

DOL concern: Federal standards should be applicable for employer provided housing. Secured housing needs to meet local or State standards. In many rural areas, there may be no State or local housing standards. In these cases, federal standards should apply.

Discussion: This section indicates that where no local standards apply, State standards for rental or public housing accommodation or other substantially similar class of habitation would apply. Thus, there would be State standards which could apply to all areas.

Response: DOL should identify examples of where State standards would not be applicable or clarify why federal standards would be necessary.

5. Housing: assurance that housing is, in fact available

The bill allows the payment of an allowance (at 1/4 the average of HUD-identified fair market rents of a state's rural counties)

DoL concern: That prior arrangements should be made to assure that when workers arrive they actually have housing opportunities, that housing is actually available.

Response: First, it is clearly in the grower's primary interest to see to it that workers situate themselves in an area from which they can be retrieved for work. Second, securing rental housing "Up front" invites NIMBY-ism, likely creating a political problem for the grower within the community, as the grower attempts to secure what is expressly farm worker housing from the rental market.

The bill provides authority for a state, through the governor, to determine that for any locality there is an insufficient supply of farm worker housing; such a finding eliminates the "allowance option" and compels all H-2A program participants to directly provide housing.

The bill creates a significant incentive for growers to build farm worker housing, by increasing a grower's certainty about finding a legal labor supply, by providing a 40% break on user fees for growers with on site housing, and by allowing the recovery of property damages from workers.

6. Housing: allowance of charges for utilities, maintenance, security deposit, and damages (draft, p. 27)

For a grower that provides housing to farm workers, the bill allows the payment of charges as follows:

- fair market value (but not more than the employer's actual cost) for maintenance and utilities;
- security deposit to protect against gross negligence or willful destruction of property
- may require a worker found to have been responsible for damage..not normal wear and tear..to reimburse the employer for the reasonable cost of repair.

DoL concern: Is that these provisions are burdensome to farm workers

Discussion: Clearly, the goal of this legislation is to increase the stock and provision of housing for seasonal farm workers, free of charge. It does this by providing a variety of incentives (reduced user fees, savings on housing allowances, financial assistance for construction of seasonal housing) for growers to construct housing. An important incentive to any housing provider is the ability to protect against property damage.

We require that the deposit is a REASONABLE fair amount, which the worker receives back in full, provided no damage has occurred. Although it may seem "hostile" to workers, it may help workers in two ways: 1) By allowing the grower to secure a small deposit, he/she will be more assured that housing that he/she builds will remain viable for many more years. Not having a reasonable, fair deposit would DISCOURAGE the construction of farm worker housing. 2) It protects the farm workers from damages caused by one destructive individual. In areas where you have numbers of people living in close proximity, why should a dozen farm workers suffer from one person's actions. Items damaged are re-built and the housing is maintained in a way that benefits everyone.

Response: Amend the draft to cap the security deposit at \$50.00 per worker.

7. Wage withholding

Page 50-51 of the bill requires the withholding of 20% of the foreign worker's wages, to be deposited in an interest bearing trust and paid to the worker upon return to the home country.

DoL concern: That this provision is hostile to workers, that we have no parallel circumstance in which we withhold wages in order to incent future behavior.

Discussion: This provision is of little interest to growers. However, the viability of this legislation is directly related to the assurance to border states that H-2A foreign workers will, in fact, return to the home country upon completion of the H-2A contract. In addition, with the payment of, at minimum, a worker's transportation and housing costs, plus the implicit motivation of foreign workers to come here, save as much as they can, and return home, the provision seems unlikely to affect the ability of a worker to afford basic living expenses.

Response: Revise the draft to require monitoring of the return rate of H-2A foreign workers, and

provide discretionary authority to the Attorney General, if it is found there is an insufficient return rate, to institute a wage withholding system.

8. Transportation

The bill requires the payment, by the DoL, out of the user fee account, payment of transportation for inbound (after 50% of work period) and outbound (at season end) travel to the work location, if greater than 100 miles. The bill requires a pilot program for providing transportation advances to workers.

DoL concern: That requiring a worker to seek reimbursement from the Department is bureaucratic both for the Department and the grower. The grower should pay this cost directly.

Discussion/Response:

Our goal was to establish a transportation benefit to workers that would be paid for by the growers. The bill does this. Under conservative estimates of user fee receipts, this provision should be fully funded; so, too, will the Dept. Of Labor's costs to administer the program.

9. Who may complain--Enforcement and Penalties

Enforcement: Sec. 8(a)(1) (pg 37, line 12) Complaints may be filed by any aggrieved person or organizations (including bargaining representatives).

DOL Concern: Foreign workers are vulnerable; they are afraid to file complaints. Any interested party should be able to request that DOL investigate an employer, and DOL should be able to instigate an investigation at any time.

Discussion: Anonymous complaints are investigated now. That is not changing. Workers would not be required to identify themselves.

Resolution: Add language, if necessary, to clarify that other interested parties may file complaints and that the Department of Labor may investigate any employer at their discretion. Our policy is to retain any existing authority under which the Department of Labor investigates wage, working conditions, or other violations.

10. Statute of limitations on complaints

Enforcement: Sec. 8(a)(1) (pg 37) No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, as the case may be.

DOL concern: The statute of limitations on complaints, as with Fair Labor Standards Act, should allow for two years (three years for repeat offenders) not just one year.

Discussion: This section only applies to issues other than those covered under FLSA, MSPA or other statutes.

Resolution: Our policy is not to affect any current statute of limitations requirement of either FLSA or MSPA. We are asking Legislative Counsel to confirm that this is the case, and to add clarifying language if necessary.

11. Penalties for "other" material violations

Enforcement: Sec. 8(a)(4)(A-B) (pg 39-40) PROGRAM DISQUALIFICATION (3 YEARS FOR SECOND VIOLATION and PERMANENT FOR THIRD VIOLATION) -Upon a (second final) (third final) determination that an employer has failed to pay the wages required under this Act, the Secretary shall report such determination to the Attorney General and the Attorney General shall disqualify the employer from the employment of aliens ... for a period of 3 years) (from any subsequent employment.)

DOL concern: Penalties of 3 year and permanent disbarment should apply to other violations, ie, filing an application that misrepresents a material fact or failing to meet a condition specified in Section 4.

Resolution: Add language to the draft that allows debarment from program participation for both wage and any other substantial violations of program requirements.

12. Three quarters guarantee:

The 3/4 guarantee was adopted via regulation and is not specifically directed by any statute. Under the 3/4 guarantee, a grower must guarantee any H-2A worker, and any US worker referred to an H-2A grower, the pay that the worker would have made in 3/4 of the expected work season.

DoL concern: The 3/4 guarantee is necessary to assure workers of a certain amount of work, to prevent growers from requesting an overage of workers with the intent of later "culling" the undesirables, and to prevent a worker from traveling a long way only to find the work season shut down because of market conditions or other, non-disaster related reasons.

Discussion:

This is precisely one of the problems with the current program that needs to be corrected. Agricultural production is, by nature, a chancy and unpredictable thing. Even predicting how many workers will be needed and how long they will be needed is subject to great uncertainty. Many circumstances can arise where harvesting or some other activity will be cut short. When the bottom falls out of the price for a crop, if the grower can cover its harvesting cost and at least some of the production costs, which have already been incurred, the grower will continue to harvest. If the price falls to the point where even the harvesting cost cannot be covered, the grower will attempt to minimize his losses by stopping harvesting. We know of no other circumstance in the U.S. economy in which an employer who is losing money is compelled to continue operating. To require this as a condition for qualifying for foreign workers is unreasonable.

We think the current bill deals with this problem in a reasonable way. With the registry in place, if a worker's season is unexpectedly reduced, the worker can go back to the registry for another job. This worker picks up the phone, informs the Registry he/she is looking for work, and is referred to the next job that comes along. He/she can also bump H-2A workers who have not yet completed their 50% of the work period. Through the registry, we want to not only make sure that a worker has a chance to complete at least 3/4 of a job -- but string together an entire YEAR of jobs, even if climate conditions make that difficult.

With regard to the concern about overshooting the request for workers, and then culling, workers who are wrongfully terminated (including aliens under our bill) are subject to the protection of applicable federal, state and local laws.

Response: Addition of the following language, p. 12, line 16, to read: "The employer shall assure that the employer will refuse to employ or terminate eligible individuals referred pursuant to this act only for lawful job related reasons, including lack of work."

13. Protection against arbitrary dismissal of workers

DoL concern: Is that the registry, and the bill, does not provide job opportunities to non-skilled persons, and would allow the setting of arbitrary standards enabling growers to dismiss unwanted workers without legal cause.

Discussion:

Employers are subject to all federal, state and local labor laws. Workers (both domestic and alien) have the same protections against wrongful termination as every other worker.

The bill assures that an employer has no incentive to unlawfully terminate a domestic worker. Sec. 6(c)(1)(A) authorizes the replacement of a terminated worker with an H-2A worker only if the worker is terminated "for a lawful job-related reason". The Labor Department decides whether this condition has been met. If, in DOL's view, the worker was improperly terminated, no authority to import a replacement H-2A worker will be granted. This, by the way, is the same way replacement of terminated domestic workers works in the current H-2A program.

Non-skilled workers (welfare or otherwise) are eligible to be listed on the registry, and the bill requires their referral to jobs for which they are qualified, i.e. jobs for unskilled workers, on the same basis as DOL refers any other registry worker. Sec. 4(e) provides that DOL may reject any employer's application for workers which fails to comply with the requirements of the Act. Sec. 4(a) provides that qualifications must be bona fide occupational qualifications. DOL is the arbiter of whether any particular qualification is a bona fide occupational qualification. If, in DOL's view, an employer's application contains qualifications which are not lawful, it will be rejected. This is exactly how this issue is handled currently.

qualifications and experience

In the draft bill the DOL is the arbiter of what constitutes appropriate qualifications, including experience requirements. If it deems a particular qualification not to be a bona fide occupational qualification, the application is rejected and the employer cannot participate in the program.

Some DOL personnel and farm worker advocates argue that employers seeking foreign workers should not be permitted to impose any qualifications, including an experience requirement, on any job for which the employer is seeking foreign workers. This is one of the reasons this issue is addressed in the draft bill. Growers totally reject the notion that to qualify for foreign workers they must first accept and employ workers who do not possess the bona fide occupational qualifications for the jobs.

Response: Addition of language specified in issue #12, above.

14. Prevent the abuse of probationary period.

The bill provides for a redetermination of the need for workers if the worker is not ready, willing, able, or qualified to perform the work required, or if the worker is terminated for a lawful job-related reason, or if the worker quits or doesn't show.

DoL concern: Is that the provision could be abused

Discussion:

As discussed above, it is the Labor Department which is the arbiter of whether an employment criterion such as an employment standard is lawful and job-related. If it isn't, DOL will reject the employer's application to the registry, which is what they do now.

Response: Addition of language specified in #12, above.

15. Entitlement of H-2A workers to Legal Services Corporation representation:

DoL concern: That the provision on page 56 line 1, which establishes that H-2A foreign workers are not eligible for any means tested public benefit program, revokes eligibility for Legal Services assistance.

Response: This is not our policy; we have asked Legislative Counsel to determine if this is a problem and if so to add language clarifying that H-2A workers may obtain Legal Services assistance.

16. 50% rule:

DoL Concern: That the bill renders the so called "50% rule" ineffective.

Discussion: The 50% rule allows a U.S. worker to “bump” a foreign H-2A worker during the first 50% of the H-2A contract period. Under the bill, a worker seeking work through the registry may only exercise this ‘bumping’ right if there are no other requests for workers through the registry from elsewhere in the state.

Response: Revise the language to allow bumping rights for a U.S. worker through the registry to any job in the area, instead of any job in the state. In other words, if there is no other registry search underway within the local area (instead of anywhere in the state), the worker gets bumping rights.

DISCUSSION CONCEPTS FOR H2A REFORM

**COMMENTS INVITED. PLEASE SEND TO SENATOR RON WYDEN OR
SENATOR BOB GRAHAM, U.S. SENATE, WASHINGTON DC 20510**

Since adoption of the amendment by Senator Wyden and others requiring a General Accounting Office review of the H-2A program, he and his staff have been talking to workers, growers, and officials involved in farm labor issues to develop a proposal to reform the program. A draft proposal crafted over the past eighteen months is described below. Senator Wyden and Senator Graham are interested in your suggestions, comments, and views about this proposal. This is a draft, and in no way should be considered a finished product, but a vehicle for discussion.

The current H-2A program does not work effectively for either American agricultural workers or farm employers. It fails to match American workers with agricultural employers who need labor, often leaving farmers without workers at harvest time. Too often, labor practices under the program have failed to protect both American and foreign workers.

Grower groups have indicated that reform legislation should be built on three principles:

1. The H-2A search requirements for U.S. workers are virtually impossible to comply with -- and a special hardship for smaller growers. The H-2A search requirement for U.S. workers should identify, in a timely and cost-efficient manner, workers who are fully informed about the nature of the job, will be available when needed, and are willing and able to perform the work for the full season.
2. Most growers want to hire legal workers with proper documents, but argue persuasively that even their best efforts leave them open to penalties under INS immigration rules. The program should provide assurance that the workers referred are legally entitled to work in the United States.
3. The process for certifying that no U.S. workers are available is too long, given short and unpredictable harvest seasons. The process for certifying an employer to employ foreign labor, if needed, should be quick, straightforward and reliable.

Farm worker advocates seek several responsible changes to insure fairer treatment for farm workers.

1. Farm worker advocates say that current federal laws create incentives for U.S. growers to seek foreign workers. For example, U.S. law exempts foreign workers from coverage under the Migrant and Seasonal Worker Protection Act. In addition, a U.S. grower does not pay federal social security and unemployment taxes on foreign workers the way such payments are made for

This doesn't sound like a bad idea //

U.S. resident employees - making foreign workers "cheaper" than domestic workers. These laws should be changed to insure that the costs of hiring domestic workers or foreign workers is the same.

2. Greater efforts must be made to extend the work season for U.S. farm workers. This could be accomplished through better coordination between growers. Because different crops have different harvest seasons, such coordination could increase the amount of annual earnings for an individual farm worker.

3. Access to social and employment services should be improved, by removing the barriers to participation by farm families in programs like Head Start, and by providing farm workers with regular unemployment insurance coverage.

A possible proposal to reform the H2A program would address each of these concerns raised by growers and farm workers. This proposal would include:

1. **REPEAL OF THE CURRENT SEARCH REQUIREMENTS FOR H2A APPLICANTS:**

Under current law H2A applicants must search for U.S. resident farm workers. Both worker and grower advocates believe that the regulation of this process is highly subjective and ineffective. This search process is repealed and replaced with a 21 day search process using a registry of agricultural workers.

~ by region (?)

2. **ESTABLISHMENT OF AN AGRICULTURAL WORKER REGISTRY:**

A worker registry would be established to create an effective and efficient system enabling agricultural producers to secure qualified U.S. labor. The purpose of the registry is to create a highly functional resource for matching U.S. farm workers with work opportunities.

The Secretary of Labor would oversee this worker registry, which would be organized according to logical labor market regions. Any legal U.S. resident could at any time either add or delete their name from the registry. Workers listed on the registry will have the first choice to fill a job for which foreign workers are sought. The registry will be designed to be a highly functional resource for matching farm workers with work opportunities.

Administration of the registry would be financed by user fee payments from H-2A program participants.

3. **ASSURANCE OF A LEGAL LABOR SUPPLY**

The employer is assured that workers provided through the registry are legally entitled to work in the United States.

4. APPLICATION PROCESS TO SECURE FARM WORKERS

For a grower who is experiencing a shortage of workers, an application for workers may be made to the Department of Labor. The application would be subject to a 21 day process, as follows:

- ◆ The application is referred to the registry for recruitment of legal U.S. workers.
- ◆ U.S. workers are given a preference to fill the jobs requested in the application, and would be notified first of the work opportunity.
- ◆ After interested U.S. workers have indicated their intent to take jobs with the applicant, H-2A Visas would be made available for the remaining number of workers sought by the grower.
- ◆ If the Department of Labor fails to act within the time lines under the bill, the opportunity is provided for direct application to the State Department for the issuance of H-2A visas.

5. APPLICATION OF THE MIGRANT AND SEASONAL WORKER PROTECTION ACT.

The proposal would eliminate the current exemption from MSPA for H-2A workers, as it applies to the protection of workers in the United States.

6. ELIMINATION OF THE AGRICULTURAL WORKER EXEMPTION UNDER THE FEDERAL UNEMPLOYMENT TAX ACT.

The proposal brings farm workers under the full benefits of the federally assured system of unemployment insurance. Farm workers would be treated like workers in virtually all other occupations. Washington and California currently require equal treatment of farm workers, and Oregon Gov. Kitzhaber has proposed eliminating the exemption for each of the past three years.

7. TRANSPORTATION PILOT PROGRAM

The proposal directs the Secretary of Labor to conduct a pilot program involving the issuance of vouchers to farm workers for the purpose of traveling to job referrals made through the registry.

A pilot program is necessary to resolve concerns that transportation benefits have been tried in the past but resulted in workers cashing in the benefit or using the transportation for some other purpose.

8. CREDIT TOWARD LEGAL RESIDENCY

Section 203(b)(3) of the Immigration and Nationality Act establishes priorities for legal immigration to the United States. Currently, farm workers, not including temporary or seasonal workers, are classified as "other workers," for the purposes of immigration. The bill would create a new authority for the issuance of a certain number of immigration visas to "qualified immigrants who have completed 4 years of work in the U.S. under an H-2A visa."

(?) The proposal would allow an illegal alien to return to their home country and be allowed to reenter the United States legally under an H-2A visa.

9. IMPROVE FARM WORKER FAMILY ACCESS TO HEAD START

The proposal removes some of the administrative barriers identified by farm worker advocates to participation of farm worker families in the Head Start program.

10. ASSIST WORKERS IN LINKING SUCCESSIVE JOBS INVOLVING DIFFERENT HARVEST SEASONS.

The proposal requires that the registry be designed for the additional purpose of assisting workers to increase the length of their work season by identifying opportunities to work on other crops with complementary harvest seasons.

In addition, your comments on an additional, albeit controversial, concept would be welcome:

PROGRAM FOR TRANSITION INTO GROWER-PROVIDED HOUSING

The proposal would provide a 4-year transition period during which growers who do not have grower-provided housing could participate in the registry and qualify to employ H-2A workers if sufficient registry workers were not available by providing a housing allowance in lieu of housing. Employers who provide housing would pay a reduced user-fee to participate in the registry program. Any surplus funds in the user-fee account and additional authorized appropriations would be provided to increase the stock of in-season Farm worker housing in areas where it is insufficient.

The major (and unresolved question):

Is there a total cost package (including wages, housing, transportation, taxes, etc.) that is high enough to attract U.S. workers and not drive down wages of current U.S. farmworkers, that is also low enough such as not to drive employers into the illegal labor market.