

August 25, 1998

MEMORANDUM FOR GENE SPERLING

FROM: ZE'-EV EIGER

SUBJECT: H-2A Guestworker Reform

Background

In recent years, the proportion of illegal agricultural workers has risen. A 1995 DOL study conservatively estimated that thirty-seven percent of the agricultural workforce, or 600,000 workers, were illegal immigrants. In many states the percentage of illegal workers is in fact higher.¹ Complicating the recruitment process is agricultural workers' widespread use of fraudulent documents undetected by the I-9 requirements of the Immigration and Naturalization Service (INS). The DOL, the State Employment Security Agencies (SESAs), and agricultural employers often cannot distinguish unauthorized foreign job applicants from U.S. workers. Only 2 percent (252 out of 10,134) of a DOL sample of agricultural job openings, for which employers had requested foreign workers, were filled by domestic workers; and in FY 1996, H-2A admissions totaled 9,635. There are currently about 18,000 to 20,000 agricultural guestworkers in the U.S. under the H-2A program. The program does not place a cap on the number of H-2A visas granted.

Agricultural employers criticize the H-2A program for their difficulties in obtaining domestic labor, referring to a domestic agricultural labor shortage. Employers firmly believe that reform is needed to increase the efficiency of the current program. A 1997 GAO study, however, concluded that no widespread agricultural labor shortage exists, rather only localized or spot shortages; and this finding reinforces similar conclusions reached by the U.S. Commission on Agricultural Workers (1992) and the U.S. Commission on Immigration Reform (1995 and 1997). The GAO report suggested that employers should be able to respond to market conditions, including recognized spot shortages, by increasing wage rates, improving recruitment, and modernizing labor practices. Further, the GAO report cited a study that concluded neither consumer produce prices nor international competitiveness would be affected by substantial wage increases. Many employers blame the recent INS crackdown on undocumented foreign workers for their labor shortages and their need to rely on an ineffective and inefficient guestworker program.

The current H-2A program permits employers to apply for the admission of nonimmigrant alien agricultural workers to perform work of a seasonal or temporary nature. The program is authorized by the Immigration and Nationality Act (INA) as amended by the

¹For example, in California, agricultural employers believe that number is closer to seventy percent.

Immigration Reform and Control Act (IRCA) of 1986². The purpose of the H-2A program is to assure domestic agricultural employers an adequate labor force while protecting the jobs and wages of U.S. workers.

Under the H-2A program, temporary certification permitting use of aliens is not granted until the DOL determines that there are not sufficient U.S. workers available and the employment of aliens will not adversely affect U.S. workers. Any agricultural employer who needs workers to perform labor services of a temporary or seasonal nature may apply. If a labor certification is granted, it is the employer's responsibility to arrange for the admittance of aliens into the U.S. by filing a visa petition with the INS. Applications must be filed by the employer with the DOL at least sixty days before the first date on which workers are needed. If the application is acceptable, the DOL makes a certification determination twenty calendar days before the date on which the workers are needed.

After the employer applicant has provided sufficient proof of complying with the H-2A requirements, the Regional Administrator (RA), a branch of the DOL, grants temporary alien agricultural certification for the number of job opportunities for which there are insufficient U.S. workers available. After certification, the employer must continue to recruit U.S. workers until the H-2A workers have departed for the work site. In addition, the State Employment Service (SES) continues to refer qualified U.S. workers to the employer; and the employer must hire these workers.

Requirements under the Current H-2A Program

- **Recruitment:** The agricultural employer must engage in independent positive (i.e., active) recruitment of U.S. workers, including newspaper and radio advertising in areas of expected labor supply. Such recruitment must be at least equivalent to that conducted by non-H-2A agricultural employers to secure U.S. workers.
- **Wages:** Employers must pay H-2A workers the “**adverse effect wage rate**” (AEWR), the applicable prevailing wage rate, or the statutory minimum wage rate, whichever is higher. The AEWRs are the minimum wage rates which the DOL has determined must be offered and paid to U.S. and H-2A workers, and they are established for each state. The region- or state-wide AEWR for all agricultural employment for which H-2A certification is being sought, is equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the

²IRCA prohibits discrimination on the basis of national origin and citizenship status in hiring, referral and recruitment for a fee, and discharge, as well as unfair treatment in the I-9 process and retaliation against individuals pursuing their right under this portion of the law.

USDA.³ The AEWs are designed to prevent the employment of these nonimmigrant alien workers from adversely affecting the wages of similarly employed U.S. agricultural workers.

- **Housing:** The employer must provide free and approved housing to all workers, both foreign and domestic, who are not able to return to their residences the same day.
- **Meals:** The employer must provide either three meals a day to each worker or furnish free and convenient cooking/kitchen facilities. If meals are provided, then the employer may charge each worker a certain amount per day for these meals.
- **Transportation:** The employer is responsible for the following types of transportation for workers: 1) After a worker has completed fifty percent of the work contract period, the employer must reimburse the worker for the cost of transportation and subsistence from the place of recruitment to the place of work; 2) The employer must provide free transportation between any required housing site and the work site for any worker who is eligible for such housing; 3) Upon completion of the work contract, the employer must pay return transportation to the worker's prior residence or transportation to the next job.
- **Workers' Compensation Insurance:** The employer must provide Workers' Compensation or equivalent insurance for all workers, both foreign and domestic.
- **Three-fourths Guarantee:** The employer must guarantee to offer each worker employment for at least three-fourths of the workdays in the work contract and any extensions. In applying this guarantee and determining any additional wages due, the following facts must be established: 1) The beginning and ending dates of employment; 2) The number of workdays between the established beginning and ending dates of the guarantee period; and 3) The hours of worktime for the guarantee. The guarantee is then established by computing seventy-five percent of the established total hours of work time in the contract period. Note that the employer may not count any hours offered on such days in which the worker refused or failed to work.
- **Fifty Percent Rule:** The employer must employ any qualified U.S. worker who applies for an available job until fifty percent of the contract period has elapsed.
- **Tools and Supplies:** The employer must furnish at no cost to the worker all necessary tools and supplies, unless it is common practice for the worker to provide certain items.
- **Labor Dispute:** The employer must ensure that the available job for which the employer

³Some 1998 AEWs: California, \$6.87; Florida, \$6.77; Georgia, \$6.30; Hawaii, \$8.83; Kentucky, \$5.92; and Ohio, \$7.18.

is requesting H-2A certification is not vacant due to a strike or lockout.

- **Certification Fee:** A fee will be charged to an employer granted temporary alien agricultural labor certification. The fee is \$100, plus \$10 for each available job certified, up to a maximum fee of \$1,000 for each certification granted.
- **Farm Labor Contractors (Crewleaders):** A farm labor contractor is an organization or entity that either supervises, recruits, transports, houses, or solicits farm labor other than the owner of the work site. Bona fide registered farm labor contractors may be eligible to apply for and receive H-2A certification, although they generally deal with domestic laborers. Farm labor contractors would be required, as employers, to provide all the minimum benefits specified by the H-2A regulations, including the three-fourths guarantee and the fifty percent rule.

Recent Legislative Reform Efforts

Representative Robert Smith (R-OR) introduced **H.R.3410**, the companion bill to S.1563, a proposal that would reform the H-2A program so that employers can fill their labor shortages in a timely fashion while the wages and working conditions of domestic workers receive continued protection. Senators Gordon Smith (R-OR), Bob Graham (D-FL), and Ron Wyden (D-OR) also introduced **S.AMDT.3258**, an amendment to the Commerce, Justice, State, and Judiciary appropriations bill, S.2260, proposing H-2A reform (agreed to by a Senate Yea-Nay vote of 68 to 31). S.AMDT.3258 would establish a system of registries of temporary nonimmigrant agricultural workers to provide for a sufficient supply of such workers, as well as amend the INA to streamline procedures for the admission and extension of stay of nonimmigrant agricultural workers.

The Administration's View on H.R.3410 and Guestworker Reform

In a press statement on 23 June 1995, the President expressed his firm opposition to a new guestworker program, although he indicated that if the crackdown on illegal immigration contributes to localized labor shortages, then the Departments of Agricultural and Labor should "work cooperatively to improve and enhance existing programs." The Administration believes a new guestworker program would increase illegal immigration and adversely effect the employment, compensation, and working conditions of U.S. workers; and in a letter written to the House Judiciary Committee, dated 12 March 1998, Secretary Herman recommended that the President veto H.R.3410, on the grounds that any difficulties administering the H-2A program can be effectively addressed administratively, rather than legislatively. The Administration has already initiated a rulemaking process to streamline the H-2A program that is to be completed by the end of January 1999; and the Departments of Agriculture and Labor are currently working to make the existing H-2A program more responsive to employers and more effective in protecting domestic workers.

Proposal for Bi-Partisan Working Group on the H-2A Program

Purpose: To examine various policy proposals related to the H-2A foreign agricultural guestworker visa program, and determine whether and where consensus can be reached among a bipartisan working group of Members of Congress and the Administration.

Background: During the current Congress, a number of proposals have been put forward for changing the H-2A foreign agricultural guestworker program. Secretary Herman proposed to Senator Coverdell the establishment of a bipartisan group of Members of Congress and the Administration for the purpose of examining various policy options related to the H-2A program and determining where consensus for change could be achieved. The Senate has passed H-2A reform legislation – principally sponsored by Senators Smith (R-OR), Wyden (D-OR) and Graham (D-FL) – that the Administration has indicated it strongly opposes because it is inconsistent with principles articulated by the Administration to guide H-2A program changes.

Participants:

- For the Administration – Secretaries Herman (Labor) and Glickman (Agriculture), INS Commissioner Meissner (or delegate), and representatives of the Domestic Policy Council, National Economic Council, and OMB;
- From the Congress – Senators Coverdell, Wyden, Graham, Kennedy, Feinstein, and Abraham; Representatives Lamar Smith, Bishop, Beccera, Berman and Mel Watt.

Proposed Process: The Secretaries of Labor and Agriculture will formally invite participation, generally outlining the intended goals and proposed process. Staff of the participating offices would initially be tasked to

(1) develop a set of principles to guide discussion of possible H-2A program revisions, and (2) compile an inventory of H-2A policy proposals to be examined with the objective of determining if it is possible to reach consensus on any of these proposals. The policy options would generally fall into the following categories:

- ⇒ Administrative Processes
- ⇒ Worker Recruitment
- ⇒ Wages and Costs
- ⇒ Housing
- ⇒ Enforcement
- ⇒ Immigration Management/Repatriation

An initial draft of proposed principles and policy proposals has been developed by DOL (copy attached) and can be circulated as a possible starting point to the participating offices for review. Participants' staff would meet to discuss and, if necessary, revise these documents.

The participating Members will meet with the Secretaries of Labor and Agriculture and INS Commissioner to review the draft principles and policy proposals for the purpose of directing the respective staff to initiate a series of meetings/discussions of the various policy proposals in light of the articulated, agreed-upon principles. These meetings – of the participating Members and Administration officials, and at the staff-level – will not include the participation of organizations outside of the Federal government.

The staff will meet weekly to review the policy implications of each of the proposals on the list of policy options accepted by the participants. The objective would be to rigorously examine each of the substantive proposals to consider the likely impact on both growers and domestic and foreign farm workers. The staff will provide periodic reports to the Administration and participating Members, and will outline areas where consensus can be achieved, identify policy proposals or areas where consensus cannot be achieved, and target proposals/areas that may warrant further examination and discussion.

When the staff-level discussions have addressed all the issue that were accepted for review by the Administration and participating Members, a report will be submitted to the participants outlining areas of potential consensus with recommendations for next steps, issues where consensus could not be reached, and issues where consensus was not reached but which may warrant further discussion among the principal participants.

After receiving the staff report, the participants may meet to consider the policy options which staff recommended for further discussion at the principal level. The process would conclude with a letter from the Secretaries of Labor and Agriculture to the participating Congressional Members outlining areas of consensus and the steps necessary/to be taken to effect the agreed-upon program changes.

Possible Timeline:

- ◆ Aug 25 Communication from Labor Dept. to invite bipartisan participation (proposed principles and policy option inventory to be forwarded when ready)
- ◆ Sept 8 (week) Staff-level meeting to review/revise principles and policy options inventory
- ◆ Sept 21 (week) Principals' Meeting (Secretaries and Members) to bless principles/policy options for examination
- ◆ Sept 28 (week) Begin weekly staff-level policy option review/discussion meetings
- ◆ Oct 30 (tent.) Staff report to principals
- ◆ Nov 16 (tent.) Principals' meeting
- ◆ Dec 11 (tent.) Concluding letter

Framework for H-2A Reform Discussions

August 20, 1998

Guiding Principles

Reforms to the H-2A temporary nonimmigrant agricultural guest worker program must **not**:

- Increase illegal immigration to the United States;
- Reduce job opportunities for legal U.S. farm workers;
- Depress wages and work standards for American farm workers.

The Administration's guiding principles for reform of the H-2A program are intended to assure that our policy achieves greater stability in the agricultural workforce in a way that agricultural producers and farm workers both benefit. Growers must have a more predictable and reliable legal labor supply, while adequate workplace protections are afforded domestic and foreign farm workers – who are among the poorest and most vulnerable in our society.

The Administration's guiding principles in reforming the H-2A program are designed to create a system:

1. Where the procedures for using the program are simple and the least burdensome for growers;
2. Which assures an adequate legal labor supply for growers in a predictable and timely manner;
3. That provides a clear and meaningful first preference for employment of U.S. farm workers, and a means for mitigating against the development of a structural dependency on foreign workers in a crop or area;
4. Which avoids the transfer of costs and risks from businesses to low-wage workers;
5. That encourages longer periods of employment – and, thus, higher annual earnings – for legal U.S. farm workers; and,
6. Which assures decent wages and working conditions for domestic and foreign farm workers, and that normal market forces work to improve wages, benefits and working conditions.

Framework for Reform Discussions

- ◆ Administrative Processes
- ◆ Worker Recruitment
- ◆ Wages and Costs
- ◆ Housing
- ◆ Enforcement
- ◆ Immigration Management/Repatriation

Framework – Idea Inventory

1. Administrative Processes

Issues: From the growers' perspective, the principal issues involve the long lead time for application (currently 60 days before the "date of need") – which they contend is too long a period to make accurate predictions about timing and labor needs—and the paperwork burden involved in the application process. From workers' perspective, the primary issue is assuring adequate time for bona fide efforts to recruit U.S. farm workers so that they get a legitimate first crack at the agricultural jobs that will otherwise go to foreign workers.

Responsibilities

- a. Consolidate DOL Certification and INS petition approval (eventually including for replacement H-2A workers) into one process administered by DOL (GAO rec.; DOL/INS regulatory initiative)
- b. Consolidate responsibility within DOL in Wage and Hour for post-application examination and enforcement of employer compliance with H-2A program requirements, with resources shifted from ETA/USES (OIG rec.; DOL concurred)
- c. Government – not employer – responsible for reimbursing transportation costs of eligible workers (S.2260)

Process Time Frames

- d. Require employers' H-2A labor certification applications to be submitted 45 (rather than 60) days before the employer' "date of need" (GAO rec.; DOL reg. initiative)
- e. Reduce lead-time for employer applications to 30 (rather than 60) days before "date of need" (Georgia growers)
- f. Consistently meet 7 day deadline – after initial receipt of employer's labor certification application – to give written notification to the employer of deficiencies precluding adjudication of the application. (DOL request for reprogramming of resources to establish support/tracking system was denied)
- g. Consistently meet existing 20 day deadline – prior to employer's "date of need" – to issue approved certifications. (DOL request for reprogramming of resources to establish support/tracking system was denied)
- h. After consolidation of certification and petition adjudication processes in DOL, change the law to set deadline for DOL approval of employers' application/petition to 7 (rather than 20) days before the "date of need" (GAO rec.; DOL concurs)
- i. Reduce the deadline for employer-provided housing to be available for inspection to 15 (rather than 30) days before the "date of need" (DOL reg. initiative)
- j. Change the current labor certification process to one based on employers' attestations to comply with program requirements (S.2260)

- k. Allow certification of additional H-2A workers to replace farm workers with invalid SSN who are hired and subsequently abandon employment (Current emergency certification/redetermination procedures already accommodate)
- l. Regularly collect data on DOL performance in meeting program deadlines, using data to monitor and improve performance (GAO rec; DOL concurred; request for reprogramming of resources to establish support/tracking system was denied)
- m. Eliminate the requirement that certified H-2A employers provide notice of H-2A workers' departure for the place of employment (DOL reg. initiative)
- n. Simplify H-2A application and related documentation (DOL/INS administrative/regulatory initiative dependent on implementing application/petition consolidation)
- o. Update and revise the H-2A Handbook to include procedures for all agencies involved and key contact points (GAO rec.; DOL concurred)

2. Worker Recruitment

Issues: From the growers' perspective, the principal issues are avoiding bureaucratic, unproductive recruitment efforts and substantially reducing their vulnerability deriving from employing a partially illegal workforce. From the workers' side, the issue is effectively assuring bona fide efforts to fulfill the policy objective of first preference for hiring U.S. workers, including requiring H-2A employers to use whatever means to recruit U.S. workers their competitors – who do not use foreign workers – employ.

- a. Require "positive recruitment" of U.S. farm workers by growers only in areas where DOL finds that there are a significant number of qualified workers willing to make themselves available for employment at the time and place needed (DOL administrative change implemented)
- b. Count as "available" for employment – and thereby certify fewer H-2A workers than requested by an employer – only those U.S. workers who are identified by name, address, and SSN (DOL administrative change implemented)
- c. Post employers' H-2A job orders on America's Job Bank (DOL proposal; requires job order simplification)

Farm Labor Contractors (Crewleaders)

- d. Strengthen the [MSPA] program of registering farm labor contractors to require bonding; at least allow H-2A employers to require bonding as a condition of employing a farm labor contractor (Georgia growers)
- e. Allow H-2A grower to include a bonding requirement for FLCs they employ so as to protect against risk such as the FLC employing illegal workers or failing to perform (DOL future reg. initiative)
- f. Eliminate the requirement that farm labor contractors must be used by H-2A growers if the use of contractors is the prevailing practice of growers in the area (Georgia growers)

- g. Provide an exception from current program requirement – that growers use registered farm labor contractors as a source of U.S. workers where such use is the prevailing practice in the crop/area – for any FLC who has a demonstrated history of employing illegal workers or other serious labor abuses (DOL reg. Initiative; variant on Georgia growers’ proposal)
- h. Require use of farm labor contractors as recruitment mechanism wherever use is “common” or “normal” (not prevailing) in an area, and require payment of competitive rates for farm labor contractors’ services (FJF)

Employment Eligibility Verification

- i. Secretary of Labor work with Congress and other affected agencies to develop a reliable means of verifying individual’s authorization to work as they are hired (OIG rec.; DOL concurred)
- j. Create a national employment eligibility verification system so that employers can check on the legal status of domestic workers who are hired during the H-2A process (Georgia growers)
- k. Require growers using the H-2A program to use INS pilot employment eligibility verification system
- l. Growers only responsible for recruiting and hiring farm workers in the U.S. through the DOL-administered Registries (and contacting former employees); Registries are responsible – and have only 14 (or 7?) days, or 3 days in the case of “emergency” applications – to locate, contact, verify employment eligibility, and refer U.S. workers to growers seeking foreign farm workers; failure to refer timely or to refer sufficient workers allows direct application for workers to Secy of State. (S.2260)
- m. Secy of State authorizes additional H-2A workers if Registry-referred workers fail to report; are “not ready, willing, able, or qualified” to do the work; or, abandon or are terminated from employment. (S.2260)
- n. Pilot test new Registry of available U.S. farm workers; growers share responsibility for positive recruitment of U.S. farm workers
- o. Require employers’ “positive recruitment” to include: providing an 800 contact telephone number and accepting “collect” calls from worker job applicants; contacting other potential employers to link a series of job opportunities; and developing a long-term recruitment plan to reduce dependence on foreign guestworkers (FJF)
- p. H-2A workers covered by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), but disclosure only required at time of visa issuance. (S. 2260)
- q. DOL rulemaking regarding possible consolidation of agricultural job orders in the Interstate Clearance System. (OIG rec.; DOL concurred)

Productivity Standards

- r. H-2A employers allowed to set minimum production standards after a “3-day break-in period.” (S.2260)

- s. Employer-established productivity standards and quality requirements should be permitted only if they are the prevailing practice among non-H-2A employers, are *bona fide*, objective, justifiable, fully disclosed and implemented on a fair and equitable basis (FJF)

Experience (and related) Requirements

- t. H-2A employers should be allowed to specify “agricultural experience” as a condition for hiring U.S. farm workers (Georgia growers)
- u. Disallow job qualifications, experience and reference requirements unless they are the prevailing practice among non-H-2A employers and are otherwise job-related and *bona fide* (FJF)
- v. Allow H-2A workers to move from one certified H-2A employer to another, with the final employer responsible for return transportation costs [Current law] (Georgia growers)
- w. Prohibit H-2A job orders that consolidate seasons and different crops (FJF)
- x. Prohibit use of the H-2A program in designated labor surplus areas

3. Wages/Costs

Issues: From the growers’ perspective, the principal issue involves managing costs so that they remain competitive in the international market. From the workers’ side, the cost factor in the H-2A program should be the primary incentive to use U.S. farm workers (and disincentive to use foreign guest workers). The program should not operate to undercut wages, benefits and working conditions, but rather allow normal labor market forces improve these conditions.

- a. Revise H-2A regulations to require employers to guarantee H-2A workers’ wages for the first week following “date of need,” with payment no later than 7 days after the “date of need” (GAO rec.; DOL concurred)

Three-quarter Guarantee

- b. Revise H-2A regulations regarding the existing three-quarter guarantee to remove incentives to growers to overestimate the contract period, including considering applying the three-quarter guarantee incrementally during the contract period. (GAO rec.; DOL evaluation)
- c. Eliminate the existing three-quarter guarantee (S.2260)
- d. Modify (effectively eliminate) the existing three-quarter guarantee to allow H-2A growers to limit the contract period to “duration of crop activity” and terminate the contract period offered due to changes in market conditions (Georgia growers)

Adverse Effect Wage Rate

- e. Eliminate Adverse Effect Wage Rate (AEWR); require payment of 105% of prevailing wage for crop/area where AEWR is higher than prevailing wage (S.2260)
- f. Eliminate Adverse Effect Wage Rate (AEWR); require payment of prevailing wage for crop/area (Georgia growers)
- g. Only require payment of Federal minimum wage (not AEWR) as “training wage” for inexperienced workers during training period stipulated in the grower’s contract offer (Georgia growers)
- h. Require increases in piece rates to reflect increases in AEWR (FJF)
- i. Prohibit H-2A employers from increasing productivity requirements to offset increases in AEWR (FJF)
- j. Change AEWR methodology to set at 90th percentile of local market wage, or 80th percentile of regional market wage, or 30% above average wage; AEWR should apply to shepherders (FJF)
- k. Disallow any wage deductions by H-2A employers which reduce earnings below the highest required wage (FJF)
- l. Prohibit H-2A employers from fixing uniform wage rates across large areas – States or regions (FJF)

Fifty Percent Rule

- m. DOL rulemaking regarding possible changes in the existing “50 percent rule” – which requires hire of any U.S. farm workers who become available for during the first one-half of the work contract period (OIG rec.; DOL concurred)
- n. Modify the existing “50 percent rule” to only require hiring of local workers (who reside within commuting distance), but extend this obligation to the entire (100 percent of) contract period (Georgia growers)
- o. Eliminate existing “50 percent rule” except for workers referred through the Registries unless there are other substantially similar job opportunities in the area. (S.2260)
- p. Workers covered under State Unemployment Insurance system (if covered under State law?) [Current law?] (S.2260)

Payment Methods

- q. H-2A employers expressly authorized to pay hourly wage, piece rate, task rate, or “other incentive payment method, including a group rate,” irrespective of prevailing payment method (S.2260)
- r. H-2A employers are in compliance with wage requirements if “the average of the hourly earnings of the workers, taken as a group,” equals the required hourly wage. (S.2260)
- s. Prohibit payment by “task rate” or other variable piece rate method of pay (FJF)

- t. For employers converting from piece rate to hourly rate, protect earnings level; for employers converting from hourly to piece rate payment method, set piece rate to assure earnings at least 30% above AEW (FJF)

Transportation Reimbursement

- u. H-2A workers apply for transportation reimbursement to the government, not the employer (S.2260 intended)
- v. H-2A workers may apply to the employer for transportation reimbursement, but employer not obligated to provide such reimbursement (S.2260, as passed)
- w. H-2A workers not eligible for transportation reimbursement if distance traveled is less than 100 miles (S.2260)
- x. Pilot program for transportation advances for U.S. farm workers (S.2260)
- y. Require H-2A employers to provide travel advances to U.S. farm workers (FJF)

User Fees

- aa. Employers' cost incentive to employ foreign guestworkers (no payment of FICA/FUTA taxes) offset by charging equivalent user fee to finance certain program activities – e.g., administrative expenses for worker registries, transportation reimbursement and advance pilot program, increase farm worker housing stock (S.2260)
- bb. Impose user fees which reflect the true cost of the H-2A program and end subsidy and incentive to use H-2A workers (FJF)
- cc. Allow H-2A workers to opt out of employer-provided meal plans (FJF)
- dd. Require first-time H-2A employers to maintain at least wages/working conditions previously offered (instead of H-2A minimum requirements) (FJF)

4. Housing

Issues: Growers do not want to be required to provide – and throughout the Western U.S. that would mean incurring the capital expense of building – housing as a condition for access to foreign guestworkers. From the workers' perspective (and from the perspective of community impact), it is unfair to recruit workers from hundreds and thousands of miles away for short-term, low-wage jobs and expect them to be able to find and arrange for affordable housing, especially in rural areas where there is little rental housing stock.

- a. Federal housing standards no longer apply to any "rental or public accommodation housing or other substantially similar class of habitation"; rather, local or, if none, State standards apply (S.2260)
- b. H-2A employers can charge workers up to fair market value for the cost of maintenance and utilities of housing provided (S.2260) – *also a wages/cost issue*

- c. H-2A employers can charge workers reasonable amounts (perhaps up to \$25 per week) for the cost of maintenance, utilities, repair and clean-up of housing provided (Georgia growers) – *also a wages/cost issue*
- d. H-2A employers may charge workers a security deposit – up to \$50 – to protect against “gross negligence or willful destruction of property” (S.2260) – *also a recruitment issue*
- e. H-2A employers may require reimbursement (wage deduction) from responsible worker of reasonable cost of repairing damage to housing provided that is “not the result of normal wear and tear” [Current Law] (S.2260)
- f. Reduced user fee to H-2A growers providing housing as an incentive to build/provide housing (S.2260)
- g. H-2A employers may provide a minimum “housing allowance” in lieu of housing, unless – no earlier than 8 years after enactment – a State Governor certifies that there is inadequate farm worker housing available (S.2260)
- h. H-2A employers may provide a minimum “housing allowance” in lieu of housing, but must also arrange for decent housing at the allowance level
- i. Require free housing for all U.S. farm workers, including “local” workers (FJF)
- j. Require H-2A growers to make their housing available for U.S. workers who arrive early (FJF)

5. Enforcement

Issues: From the growers’ perspective, they want to clearly understand their compliance obligations and not be subject to compliance investigation – which they often regard as harassment – at their busiest time. Workers want rigorous enforcement.

- a. Extend to Wage and Hour the authority to debar violating employers which commit serious labor standards or H-2A program violations from future use of the H-2A program. (GAO and OIG rec.; DOL concurred, future reg. initiative)
- b. Issue final (to replace “interim final”) H-2A regulations. (OIG rec.; DOL concurred)
- c. Secretary of Labor’s enforcement authority narrowed – complaint-based (??); 12 month statute of limitations on complaints; “reasonable cause” threshold; penalties limited to certain kinds of violations (S.2260)
- d. Three-year and permanent debarment for repeated violations (S.2260)
- e. Associations not responsible for members’ violations; members not responsible for association’s violations (S.2260)
- f. Require hiring of former H-2A workers (where allowed) to offset disincentives to complain about labor violations (FJF)
- g. Require disclosure of terms/conditions of employment to be given to workers in their native language in plain language (FJF)
- h. More timely initiation and completion of DOL enforcement actions (FJF)

6. Immigration Management/Repatriation

Issues: Growers want a legal workforce to reduce their vulnerability to workforce disruption at critical times in the crop production cycle, and want no responsibility for assuring that foreign guest workers who they are allowed to import into the U.S. actually depart from the country after their employment ends. No one knows how much "leakage" there is from the current H-2A program into the ranks of the illegal resident population; a greatly expanded foreign guest worker program would certainly increase illegal immigration and the resident illegal population. At the same time, there is no effective system for collecting information to manage departures from the U.S.

- a. H-2A worker ineligible for continued participation in the program if, during the prior 5 years, the worker violates the terms of admission to the U.S. (S.2260)
- b. H-2A workers admitted to U.S. have 14 days after termination of employment contract to search for other legal work in the U.S. (S.2260)
- c. H-2A workers admitted must be issued fraud-resistant identification/work authorization documents (S.2260)
- d. An employer may file for extension of stay to employ an H-2A worker already in the country and may legally employ such worker from the date application is made (S.2260)
- e. Attorney General study whether H-2A workers timely depart the U.S. after period of authorized employment (S.2260)
- f. Legalization for H-2A workers who complete at least 6 months employment in the U.S. under the H-2A program for 4 consecutive years in compliance with program requirements (S.2260)
- g. Require withholding of percentage of H-2A workers wages, deposited in accounts reclaimable within limited time period in home country, as incentive to repatriate
- h. User fee offsetting FICA/FUTA advantage used as repatriation incentive
- i. Require entry-exit control system for all H-2A workers

Other issues:

- Expand the scope of the H-2A program to include agricultural – meat/poultry – processing employment (S.2260)
- Secretary authorized to establish cap on number of H-2A visas issued pursuant to applications from “independent contractors, agricultural associations and such similar entities” (Feinstein amend. to S.2260)
- Comprehensive report by Attorney General and Secretaries of Labor and Agriculture (S.2260)

- All H-2A employers non-wage practices and benefits should be subject to prevailing practice standards (FJF)
- Prevailing practice determination should not be based on “double majority” standard and should exclude all H-2A employers
- Assure that U.S. and H-2A workers are truly allowed to choose their employer (FJF)
- Cap the number of visas available under the H-2A program

DOL PROPOSALS TO IMMEDIATELY MODIFY THE H-2A PROGRAM

1. **H-2A applications may be submitted 45 days, rather than 60 days before the date of need.** (GAO recommendation with which DOL concurred; also indicated in DOL reply to H-2A reform proposals supported by Congressman Bishop).

2. **Delegate to DOL INS' authority to approve H-2A visa petitions.** (GAO recommendation with which DOL concurred in principle while that INS concurrence needed to be explored as well as implementation methods and resource questions).

3. **Extend to the Employment Standards Administration, Wage and Hour Division, authority to suspend employers with serious labor standards or H-2A contract violations.** (GAO recommendation with which DOL concurred)

4. **Provide an exception to the requirement to use Farm Labor Contractors (FLC) when such use is the prevailing practice but where FLCs have also had a history of using illegal workers or other labor abuses.** (Indicated in DOL reply to H-2A reform proposals supported by Congressman Bishop)

5. **Allow employers to submit in their applications a bonding requirement for FLCs to protect employers from risks such as the FLC providing illegal workers or failing to perform.** (Indicated in DOL reply to H-2A reform proposals supported by Congressman Bishop)

6. **Authorize pilot projects which reward an employer's decreased use of H-2A workers.** (Indicated in USDA/DOL "Concept Paper" on ways to streamline the H-2A program)

USDA
says O.K.

OK

OK

more INS
info

Reg.

Reg.

Do not have
this
authority
now.

INS
can do.

give employer discretion to
do this, if they
want

H-2A PROGRAM STREAMLINING

PRIORITIZATION OF CHANGES

U.S. Department of Agriculture

(Annotated)

- OK 1. Eliminate INS's petition process by delegating authority to DOL to issue petition approvals (Form I-797).
2. Provide simultaneous issuance of H-2A certifications and petition approvals (Form I-797).
- State Dept. (?) 3. Electronically transmit Form I-797 to consulates. (Qs of security) (?)

Items 1, 2, and 3 should reduce time required to obtain visas by 1 to 3 weeks.

Meet 20-day statutory deadline for issuance of H-2A certifications.)

New GAO found DOL missed certification deadline on 41% of applications. The result is that employers frequently are unable to obtain workers when needed.

Meet 7-day statutory deadline for written notice of any deficiencies in employer's H-2A application.

GAO found deadline missed on 44% of applications by an average of 6 days and as many as 36 days. Employer can not begin positive recruitment until this is received.

Count as available only U.S. workers identified by name, address, and Social Security number.

The employment service has the name, address, and social security number of all referred workers. Employers need this information to perform the required eligibility screening and to determine whether the worker intends to report to work.

7. Not count as available alien workers with invalid employment eligibility documents.

8. Increase certification by number of U.S. workers with invalid Social Security numbers who are hired and subsequently quit.

New: employers may be fined for reporting mismatched names and social security numbers as may occur with fraudulent documents. However, employers are not permitted to use Social Security's verification system to verify employment eligibility. What happens is, when an illegal worker is confronted with the invalid documentation by employer, the worker quits. But the worker has been already counted as available in the H-2A certification process.

9. Implement INS entry-exit control system to enable absconders to be debarred from future H-2A program participation and their employers to be fined.

INS is required to develop an automated entry/exit control system by the Immigration Control and Financial Responsibility Act of 1996.

10. Require positive recruitment ^{only} where DOL finds there are a significant number of qualified workers willing to make themselves available at the time and place needed.

This is responsive to employer complaints of being required to conduct fruitless searches repeatedly in the same area. The language tracks the statute.

11. Issue I-797 for replacement H-2A worker on proof of original worker's repatriation.

Streamlines process to obtain replacement H-2A workers.

12. Undertake employment service review to identify any procedural barriers to effective U.S. worker recruitment and referrals.

Employment service farm labor referrals are a fraction of those in the past. Some say farm workers are under served due to program emphasis on placements for full-time year-round jobs, curtailing of satellite offices, curtailing of farm labor specialists. America's Job Bank could offset these developments.

13. Permit uniformly-applied plan of merit- or seniority-based pay differentials.

Currently, the interpretation of the prohibition of disparate treatment of U.S. and alien H-2A workers conflicts with employer merit- or seniority-based wage administration plans.

14. Improve timeliness of prevailing wage determinations.

Prevailing wage surveys are conducted by State employment service agencies under contract with DOL. An employer can not engage in positive recruitment without being advised of the prevailing wage that must be offered.

15. Employment service facilitate interviews of referred workers by employers.

Employers are required to recruit hundreds, and sometimes thousands, of miles from the job location. Telephone interviews might improve the high attrition rate of remotely-hired workers by giving them a better understanding of the job offer and the job requirements.

16. Target enforcement at most egregious violators and sample of new H-2A users.

DOL agreed to this in response to employers' complaints at the joint USDA/DOL meetings.

Any way to make employer responsible for employer leaving Bond (recoverable)

What does Canada do?

DOL Admin. Solving already

Reg?

Emp. See Farworker Growers

fraud? proof?

Is this possible w/ the reduced resources? Ritchie order.

Shift the burden?

17. Employment service notify employer if it refers substitute workers rather than original referrals.

Necessary in order for employer to assess the results of the positive recruitment. (Employers' complaint had to do primarily with referrals from Puerto Rico.)

- ✓ 18. Simplify H-2A application and related documentation.

Currently, H-2A applications may require repetitious filing of forms. The entire packet must be filed if only one change--such as a different date of need--is made. This could be simplified by using a master application and subsequently filing amendments indicating any changes.

19. Improve usefulness of job description--work with employers to develop short-form, plain-language job descriptions, including videos.

This could help prospective workers anticipate what to expect at a certain job. Realistic expectations should reduce the large number of workers who quit immediately upon arrival at the jobsite.

20. Conduct education/outreach program for new users.

- ✓ 21. Post job orders on the America's Job Bank internet database.

- ✓ 22. Simplify job order for America's Job Bank.

- ✓ 23. Simplify disclosure document--fact sheet for referred U.S. workers.

- ✓ 24. Accommodate electronic filing of job orders and applications.

- ✓ 25. Reduce the deadline for housing to be available for inspection from 30 to 15 days before date of need; authorize waiver.

This might be useful for new H-2A program users if they had not previously provided worker housing because it would give them 15 additional days to get ready for the inspection. Any farm employer who provides housing must meet the same standards prior to its occupancy. Whether that date is moved up 15 or 30 days is not very significant.

- ✓ 26. Simplified renewal application for compliant employers.

- ✓ 27. Eliminate required notice by employers of H-2A workers departure for the place of employment.

This is the cutoff date for positive recruitment (but not the employer's obligation to hire U.S. workers who may come forward). It would be simpler for everyone to simply define the date as 5 days prior to the date of need which would be about the same.

28.

Reduce deadline for applications from 60 to 45 days before date of need.

This is not very significant. Whether recruited workers will show up by the date of need can not be forecast much better 45 days in advance than 60 days.

29. USDA PILOT

- Job order filed 45 days prior to date of need, with *estimated* period of employment.
- H-2A application filed after period of positive recruitment, at least 5 days before petition and application filing date.
- Notification to U.S. workers of any change in final period of employment.

This procedure provides incentives for the employer to successfully recruit U.S. workers while preserving the employer's option to use the H-2A program if the recruitment fails. It's a slightly better alternative than the present system where the employer must commit to H-2A at least 60 days in advance of need and has no incentive, beyond the effort necessary to be in compliance, to hire U.S. workers.

30. DOL PILOT

Facilitate U.S. farm worker recruitment--reward increased use of U.S. farm workers.

Special provisions for employers increasing utilization of U.S. workers (reducing dependence on H-2A workers).

- Reduce application deadline to 30 days before date of need.

Insignificant reward.

- Eliminate requirement for positive recruitment beyond using America's Job Bank and advertising.

Significant reward.

- Change 50 percent rule to a maximum of 25 percent of work contract period.

Modest reward, but would be strongly opposed by farm worker advocates.

- Early certification for first-time users meeting a pre-set target for hiring of U.S. farm workers.

I see no advantage to certification prior to the statutory deadline of 20 days prior to the date of need. The employer risks liability under the 3/4 guarantee (and perhaps a first week guarantee if DOL accepts GAO's recommendation) if workers are brought in earlier than needed.

- Early certification for users seeking non-modifiable certification for at least 10 percent fewer H-2A workers.

Same as above.

H2A

7/27/98

What is likely to happen to this?

→ Smith hates this bill.

⊕ Procedural bars in the House to authorizing by appropriations.

Kennedy's staff was talking about a small, pilot program on this.

— ~~Reagan~~ Engage in a credible process to move forward on some substantive areas.

This will likely not be worked out by the Approps. conference. They will subcontract this out - likely to authorizers.

housing; wages; pilot?

1. Inventory (internal) of what housing options are.

2. Meet w/ Members

(Wyden, Graham ⊕ mod. Dems.)

Kennedy/Feinstein

Usefully engaged (vs.) negotiating and giving things away.

Eliminate key vulnerabilities in program
① housing
② employer/employee match
EK: Let's have our internal process and put off deciding which members to approach.

→ Put together a legislative package.

Registry

- Housing voucher (w/obligation to ensure housing available)
- Use 8 1/2% that growers pay (replace FICA surcharge) and use it as an incentive for repatriation (incentive to repatriate)

- AEWB changes?

Non-legislative ideas

- USDA rural housing \$
used to build H2A housing or maintenance & repair
- HUD w/housing \$ for that purpose
- FEMA (w/disaster \$)
- DoD barracks

front \$ for all farmworkers

①
Barbara
Chow

OMB-wide sweep in transportation money
(+ housing money).

any set of govt. programs
w/resources to devote to this

w/USDA
rural housing
\$

Growers can't get any assurance that workers that they hire are authorized to work.

Facilitate use of verification pilots?

②

John F. → write up 4 leg. proposals (+ any others?)
(w/USDA)

③

Julie → Anything on immigration side to do here?

④

Leg. lay of the land (w/OMB)
(Peter, Gen)

Mtg. Friday

for paper Thursday

Interact:

Libertarians in U.S. ag.

no Congressmen

Jack Reid & Patrick
Kennedy

temporary
staging facilities

temp.
detention facilities

trips to a # of facilities
many are fed (military)
some are municipal
facilities.



7/31/98

Leg. Re-cap

Wyden/Smith/Graham : on CJS bill

out of Senate

Has not gone to the floor of H

CJS Open Rule in House

This will be one of the amendments in the House

(as early as next week - Tu./Wed./Th.)

PJ - call from Wyden re: what process is.

Process

USDA/DOL/WH/HUD

Kennedy

Berman

Wyden

Parshop

Graham

~~Smith~~

Coverdell

Becerra

Feinstein

G. Smith

PJ: appropriators
need to be involved.

Alexis Herman to make initial calls.

Offer to meet as soon as they want.

DOL

- 80% of current applications are from grower associations.
- Kennedy amendment:—
unconstitutional (?)

Incentive (\$) to get growers out of illegal market and get into the H2A program (or use U.S. workers).

[Wages
housing (don't want to have to provide)
3/4 guarantee (no minimum commitment re: earnings)
recruitment (?)

AG employers must be made to compete for labor (like other employers).

[Another mtg. next week to start w/ the OMB project]



1996
Guestworker
Vote

UNITED STATES DEPARTMENT OF LABOR

FACSIMILE TRANSMISSION

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

200 Constitution Avenue,
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Room S-1325
Washington, DC 20210

Confirmation:
202/219-6141

June 16, 1998/12:27pm

TO: JULIE AND CECE

DEPARTMENT/COMPANY:

FACSIMILE NUMBER:

FROM: EARL GOHL

NUMBER OF PAGES INCLUDING COVER:

FACSIMILE REPLIES: CONGRESSIONAL AFFAIRS

202/219-5120

INTERGOVERNMENTAL AFFAIRS

202/219-5736

IMMEDIATE OFFICE OF THE ASSISTANT SECRETARY

202/219-5288

MESSAGE: Attached is the guestworker vote from 1996....the checks are people no longer in congress.....the pro guestworkers lost 29 and the antis lost 46...I think. Plus Hilliard, Thurman and Kennelly who had opposed guestworkers are sponsors of the guestworker bill this time

FINAL VOTE RESULTS FOR ROLL CALL 85(Republicans in roman; Democrats in *italic*; Independents underlined)

H R 2202 RECORDED VOTE 21-MAR-1996
 AUTHOR(S): Pombo of California Amendment, as Amended
 QUESTION: On Agreeing to the Amendment

Q: main differences
 btwn this bill and
 new bill (2377).

	<u>AYES</u>	<u>NOES</u>	<u>PRES</u>	<u>NV</u>
REPUBLICAN	157	76		2
DEMOCRATIC	23	165		7
INDEPENDENT		1		
TOTALS	180	242		9

--- AYES 180 ---

Arney	Fawell	Metcalf
✓ Baker (CA)	Fazio	Mica
Baker (LA)	✓ Fields (TX)	Miller (FL)
Ballenger	✓ Forbes	Montgomery
Barr	Fox	✓ Moorhead
Barrett (NE)	✓ Funderburk	Morella
Bartlett	Gallegly	✓ Myers
Bass	Gekas	Myrick
Bevill	Gillmor	Nethercutt
Bilirakis	Gilman	Neumann
Bishop	Goodling	Norwood
Bliley	Gordon	Nussle
Boehner	Graham	Packard
Bonilla	Greenwood	Parker
✓ Bono	Gunderson	✓ Paxon
Boucher	Gutknecht	Payne (VA)
✓ Brewster	Hamilton	✓ Peterson (FL)
✓ Browder	✓ Hancock	Pickett
✓ Brownback	Hansen	Pombo
Bryant (TN)	Hastert	Pryce
✓ Bunn	Hastings (WA)	✓ Quillen
Bunning	Hayworth	Riggs
Burr	Hefner	✓ Roberts
Callahan	✓ Heineman	✓ Rose
Calvert	Herger	Salmon
Camp	✓ Hilleary	Sanford
Campbell	Hobson	Saxton
Canady	Hoekstra	Schaefer
Chambliss	Houghton	✓ Seastrand
Chenoweth	✓ Hutchinson	Shadegg
Christensen	Inglis	Shuster
✓ Chrysler	Johnson (CT)	Sisisky

The Final Votes in Vote type format for Roll ...

Page 2 of 4

✓ Clinger	Jones	Skelton
Coble	Kelly	Smith (MI)
Coburn	Kim	Smith (WA)
Collins (GA)	Kingston	Solomon
Combest	Knollenberg	Souder
Condit	Kolbe	Spence
✓ Cooley	LaHood	Spratt
Cox	Latham	Stearns
Cramer	LaTourette	Stump
Crane	Laughlin	Tanner
Crapo	Lazio	Tauzin
✓ Cremeans	Lewis (CA)	Taylor (NC)
Cubin	Lewis (KY)	Thomas
Cunningham	Lightfoot	Thornberry
Deal	Lincoln	Tiahrt
DeLay	Linder	Upton
Deutsch	Livingston	Vucanovich
Dickey	✓ LoBiondo	✓ Walker
Dooley	Longley	Walsh
Doolittle	Lucas	Watts (OK)
Dreier	Manzullo	Weller
Dunn	McCollum	White
Ehlers	McCrery	Whitfield
Emerson	McDade	Wicker
English	McHugh	Wolf
Ensign	McInnis	Young (AK)
Everett	McIntosh	Young (FL)
Ewing	McKeon	✓ Zeliff

--- NOES 242 ---

Abercrombie	✓ Gibbons	Owens
Ackerman	Gilchrest	Oxley
✓ Allard <i>Schiff</i>	Gonzalez	Pallone
✓ Andrews *	Goodlatte	Pastor
Archer	Goss	Payne (NJ)
Bachus	Green	Pelosi
Baesler	Guillermo	Peterson (MN)
Baldacci	Hall (OH)	Petri
Barcia	Hall (TX)	Pomeroy
Barrett (WI)	Harman	Porter
Barton	Hastings (FL)	Portman
Bateman	Hefley	Poshard
Becerra	Hilliard	Quinn
✓ Beilenson	Hinchey	Rahall
Bentsen	✓ Hoke	Ramstad
Bereuter	Holden	Rangel
Berman	Horn	✓ Reed

The Final Votes in Vote type format for Roll ...

Page 3 of 4

Bilbray	>	Hostettler	Regula
> Blute		Hoyer	> Richardson
Boehlert		Hunter	Rivers
Bonior		Hyde	Roemer
Borski	*	Istook	Rogers
Brown (CA)		Jackson (IL)	Rohrabacher
Brown (FL)		Jackson-Lee (TX)	Ros-Lehtinen
Brown (OH)	>	Jacobs	> Roth
> Bryant (TX)		Jefferson	Roukema
Burton	>	Johnson (SD)	Roybal-Allard
Buyer	>	Johnson, E. B.	Royce
Cardin		Johnson, Sam	Rush
Castle		Kanjorski	Sabo
Chabot		Kaptur	Sanders
> Chapman		Kasich	Sawyer
Clayton		Kennedy (MA)	/ Scarborough
Clement		Kennedy (RI)	> Schiff
Clyburn		Kennelly	> Schroeder
> Coleman		Kildee	Schumer
Collins (MI)		King	Scott
Conyers		Klecza	Sensenbrenner
> Costello		Klink	Serrano
Coyne		Klug	Shaw
Danner		LaFalce	Shays
Davis		Lantos	Skaggs
> de la Garza		Largent	Skeen
DeFazio		Leach	Slaughter
DeLauro		Levin	Smith (NJ)
> Dellums		Lewis (GA)	Smith (TX)
Diaz-Balart		Lipinski	Stenholm
Dicks		Lofgren	> Stockman
Dingell		Lowe	> Studds
Dixon		Luther	Stupak
Doggett		Maloney	Talent
> Dornan		Manton	> Tate
Doyle		Markey	Taylor (MS)
Duncan		Martinez	> Tejeda
> Durbin		Martini	Thompson
> Edwards		Mascara	> Thornton
Ehrlich		Matsui	Thurman
Engel		McCarthy	> Torkildsen
Eshoo		McDermott	Torres
Evans		McHale	> Torricelli
Farr		McKinney	Towns
Fattah		McNulty	Traficant
> Fields (LA)		Meehan	Velazquez

The Final Votes in Vote type format for Roll ...

Page 4 of 4

Filner	Meek	Vento
✓ Flake	Menendez	Visclosky
✓ Flanagan	✓ Meyers	✓ Volkmer
✓ Foglietta	Miller (CA)	✓ Waldholtz
Foley	Minge	Wamp
✓ Ford	Mink	✓ Ward
✓ Fowler	✓ Molinari	Watt (NC)
Frank (MA)	Mollohan	Waxman
✓ Franks (CT)	Moran	Weldon (FL)
Franks (NJ)	Murtha	Weldon (PA)
Frelinghuysen	Nadler	✓ Williams
✓ Frisa	Neal	✓ Wilson
Frost	Ney	Wise
Furse	Oberstar	Woolsey
Ganske	Obey	Wynn
Gejdenson	Olver	Yates
Gephardt	Ortiz	✓ Zimmer
✓ Geren	✓ Orton	

--- NOT VOTING 9 ---

Clay	Johnston	Stark
Collins (IL)	Moakley	Stokes
Hayes	Radanovich	Waters

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TESTIMONY

OF

**MARK S. SCHACHT,
DEPUTY DIRECTOR**

REGARDING

S. 1563

THE TEMPORARY AGRICULTURAL WORKER ACT OF 1997

AND

S. 1698

THE FARMERS' TEMPORARY EMPLOYMENT ASSISTANCE ACT

SUBMITTED TO THE

**SUBCOMMITTEE ON IMMIGRATION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

**WASHINGTON, D.C.
JUNE 24, 1998**

CRLAF strongly opposes S. 1563 and S. 1698. These bills lead U.S. agricultural labor policy in exactly the wrong directions. They perpetuate U.S. agriculture's unhealthy over-reliance on vulnerable, low-wage foreign farm workers, threaten continued displacement of legal U.S. domestic farmworkers, and will undoubtedly stimulate further undocumented migration. My testimony focuses in detail on several of the major problems CRLAF sees with these measures.

**U.S. Growers Have Actively Discouraged Retention of A Huge Workforce
Of SAWs Legalized By IRCA; Many SAWs Are Unemployed Or Under-
Employed in the Regions Where New Guestworkers Would Work**

I was one of the farmworker advocates brought together by Representatives Schumer, Panetta and Berman to negotiate the SAW provisions with grower representatives in 1986. One of the premises supporting the eventual legalization of more than 1 million farmworkers as part of that legislation was that agriculture would seek to retain that new legal workforce through positive changes in wages, benefits and management practices. Regretably, none of that has happened. Wages in real terms have fallen; use of labor contractors has increased; recruitment and exploitation of undocumented workers continues; and large numbers of SAWs have been displaced in California.¹ These workers are part of a huge reservoir of unemployed and under-employed legal US workers available for agricultural employment in rural California.²

¹ Rural offices of CRLAF routinely encounter SAW clients who describe widespread underemployment and unemployment of other SAWs in California agriculture. Although many would like to leave farm jobs, they often lack the skills and education to compete for work in other industries.

² See, attached, CRLAF's recent publication: "Joblessness in the California Heartland," which documents double-digit unemployment rates in the 18 key labor intensive crop-producing counties for more than a decade.

The fact is that growers and grower associations are directly responsible for these conditions. Research by agricultural economists at the University of California has established the obvious: that growers and associations, who directly negotiate the wages and prices for harvest labor, know when they are bidding down costs below the point at which compliance with applicable state and federal law is possible; they also know when those prices go so low that the only harvest crews available will necessarily be comprised mainly of undocumented workers.

Agriculture, in short, has perpetuated the conditions which favor very low wage, young male immigrant (undocumented) farmworkers, and they obviously prefer that workforce. S.1563 and S.1698 provide a mechanism to maintain access to that workforce for the foreseeable future.

Growers Have Complained About The H-2A Program's 'Flawed Structure' and Bureaucratic Requirements, But S.1563 & S.1698 Go Beyond Administrative Reforms And Would Gut Housing, Wage and Other Labor Protections

In its recent report, "H-2A Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers,"³ the GAO laid out a series of important regulatory changes that could be made to improve the H-2A program. Nowhere did GAO suggest that changes should be adopted that eviscerate important labor protections, and which can only result in harm to both foreign and domestic workers. Yet, that is exactly what S.1563 and S.1698 do.

For example, in lieu of current law's requirement that free, sanitary housing be provided, these bills state that housing or a housing allowance must only be provided when it "is the prevailing practice."⁴ Under the current law's definition of that term, that would mean that a

³ GAO/HEHS-98-20

majority of employers, and a majority of employees, in the affected area must be providing, and receiving, housing, respectively.⁵ Since it is rare that both conditions are ever met, the bills' effect will be to eliminate the free housing requirement. For California, and elsewhere, this will mean a housing crisis in rural counties that receive guestworkers (where low to moderate income housing is already in very short supply).

In lieu of current law's "adverse effect" wage rate (designed originally to insure that foreign workers are not brought in at wages too low to attract available domestic workers), these bills provide that employers must only pay "the prevailing rate."⁶ As noted earlier, farm worker wages have declined in real terms for the last decade, as growers steadily displaced portions of their legal workforce and came to rely (again) on undocumented workers. The "prevailing rate" provision insures that only such workers (or guestworkers) will find farmwork attractive.

There are numerous other, similar, changes made by these bills that are designed to relax current law's worker protections. Without exception, the affected provisions of current law are all weakened or eliminated outright.⁷

⁴ See §3(a), S.1563; §3(a), S.1698.

⁵ "H-2A Program Handbook," U.S. Department of Labor, ETA, Handbook No. 398 (Washington, 1988), p. II-6: "The criteria that must be followed in determining that a practice (or other program component) is, in fact, prevailing, is as follows: [a] majority of employers of US workers in an area (and for an occupation) engage in the practice (or offer the benefit); and [t]his majority of employers...also employs a majority of US workers in the occupation in the area."

⁶ See §3(a), S.1563; §3(a), S.1698.

⁷ For example, none of the following H-2A program requirements are included in the new H-2C program:

The H-2A program requires employers who claim a labor shortage to reimburse workers for their incoming transportation costs upon completing half the season, and to pay for the costs of traveling home upon completion of the season.

The H-2A program's "three-fourths" guarantee requires employers, absent an Act of God, to offer workers a minimum amount of work or pay for any shortfall. If the stated contract season is 8 weeks, the employers must offer at least 6 weeks worth of work.

The H-2A law requires "positive recruitment," i.e., private-market efforts to find workers.

**S.1563 & S. 1698 Would Establish A Grower-Controlled Admissions
Process Where Guestworkers Could Be Admitted Without Any
Showing That A Labor Shortage Even Exists**

Under the current H-2A program, there must be a government determination that there are not sufficient legal US workers available at the time and place needed. Under S. 1563 and S. 1698, an employer seeking H-2C workers needs no such determination. Instead, the bills provide that he or she would file a “labor condition attestation” covering the desired alien workers with the local office of the state job service. The attestation is deemed accepted within seven days “[u]nless such agency finds that...[it] is incomplete or obviously inaccurate.”⁸

The next step to gaining admission of the guestworkers is for the employer to apply to the District Director of INS having jurisdiction over where the aliens will be employed. Both bills’ statutory provisions require that an employer’s petition, accompanied by the currently valid labor condition attestation previously accepted by the state agency, must be approved “within 3 working days,” if the employer’s petition “is correctly filled out”; the District Director shall “immediately” transmit a copy of the petition to the appropriate official at the port of entry or U.S. consulate where the alien(s) will apply for a visa or admission to the United States.⁹

CRLAF believes that the net effect of the enactment of these or similar provisions is to create a virtually automatic guestworker 10-day admissions device that, were the cap on S. 1563

Footnote No. 7, cont.

The H-2A program specifies the cost of meals that employers may charge workers.

H-2A employers must comply with other local “prevailing practices,” (such as offering workers transportation to town to buy food), but H-2C employers need only comply with a few stated standards.

The Secretary of Labor under the H-2A program possesses the authority to go to court to enforce the regulations and the workers’ employment contracts. The H-2C program does not provide that authority. Instead H-2C establishes a scheme of minimal oversight and virtually meaningless enforcement remedies.

⁸ See §3(a), S.1563; §3(a), S.1698.

⁹ See §3(a), S. 1563; §3(a), S.1698.

eliminated, or if S. 1698 were enacted in its stead, would allow for the admission of large numbers of guestworkers on demand.¹⁰

**There Are Currently More Than A Quarter Million Unemployed Legal
US Workers Available for Work in the 18 Major Crop-Producing
Counties in California: Guestworkers Are Not Needed**

The most recent data for California (May 1998)¹¹ reveal that there are 264,990 unemployed individuals in the counties that make up California's major crop production regions: the San Joaquin Valley; the Salinas Valley; the Imperial Valley; the Sacramento Valley; and the Coachella Valley. These persons are available for work in largely rural parts of our state, and many of them are former SAWs who would work in agriculture if work were available.

As CRLAF's new "Joblessness" report makes clear, the persistent high unemployment in rural counties where agriculture is a major employer, and where crop acreage is expanding, tells us that there are no shortages of workers, there are shortages of jobs.¹² This year's agricultural production, in fact, has also been hampered by unseasonably wet and cool weather which has significantly reduced labor needs in this state, worsening the overall job situation.¹³

Of course, California is not the only major state whose agricultural regions suffer from enduring high unemployment. In its report on the H-2A program, the GAO stated:

¹⁰ The two year limitation and 20,000 cap of S.1563 are unlikely to survive the first full-scale uses of these programs. There is no question that labor condition attestations will be filed in large numbers, creating a shortfall of "needed" alien workers and no doubt leading to immediate pressure to lift the cap. Respecting the two year limitation, it's worth remembering that the infamous Bracero program (P.L. 78) was also limited to two years of operation; Congress routinely re-passed the law, extending its operations in two year installments until 1964.

¹¹ State of California, Employment Development Department, Report 400C (April 1998). See chart on p. 10, below.

¹² Indeed, as welfare-to-work progresses in California, some officials have begun to doubt privately that "welfare reform" will succeed in these counties because of such high unemployment.

¹³ "Welfare-to-farm-work drive stalled" (Fresno BEE, June 8, 1998) p. C1

“Information provided by USDA does not alter our assessment that the overwhelming weight of evidence indicates that widespread farm labor shortages do not exist now and are unlikely to occur in the near future....We also note that, although in this report we included only the annual unemployment rate for 20 major agricultural counties, we also reviewed monthly unemployment rates from January 1994 through June 1997 for these counties. As we reported, 15 of these counties had unemployment rates above 7 percent for every month during this entire period, even during peak periods of agricultural activity. Many of these counties, for example, Yuma, Arizona, and Yakima, Washington, had rates far in excess of 7 percent for every month during this period.”¹⁴

Rather Than Enacting A Second Agricultural Guestworker Program, Congress Should Let the Department of Labor Implement The GAO’s H-2A Program Recommendations And Take Further Steps To Encourage Recruitment and Retention of Legal US Workers

In Chapter 4 of its report, the GAO made a number of recommendations designed to “simplify the H-2A process and reduce the cost and burden on agricultural employers.”¹⁵ We respectfully suggest that the affected administrative agencies be given a chance to evaluate and implement GAO’s recommendations before legislation is enacted to scrap the H-2A program.

At the same time, Congress should begin sending a message to the industry that it needs to raise wages,¹⁶ improve conditions, and recruit and retain a legal workforce, something it promised Congress it would do in 1986.

¹⁴ “H-2A Guestworker Program,” (GAO/HEHS-98-20), p.72.

¹⁵ Ibid., p. 67.

To assist in the evolution of agricultural labor policy in that direction, Congress should direct itself to assuring that federal and state labor laws are enforced effectively, thus removing the economic advantage of employing and exploiting undocumented workers. To accomplish this, Congress will have to dramatically expand the funding for the Department of Labor's Wage & Hour division so that it can have a significant investigatory presence, year-round, in all major agricultural regions. A similar expansion of U.S. prosecutorial resources in those areas will also be necessary to insure that enforcement efforts can be pursued to the fullest extent of the law. In addition, Congress should amend the Migrant and Seasonal Agricultural Worker Protection Act to establish strict liability of growers and grower associations for violations of AWPAs which occur anywhere in their operations. This change will make use of farm labor contractors less

¹⁶ J. E. Taylor, et al., in "Poverty Amid Prosperity" (Urban Institute Press, 1997), demonstrate that farmworkers' wages could be increased by up to 50% over current average rates, without a significant impact on food prices. On pp. 89-90, they write: "How can a disinterested observer evaluate claims that fewer Mexican farm workers will raise the price of a head of lettuce from \$1 to \$2? There were about 100 million "consumer units" (i.e., households) in the US in 1993, and they spent an average \$30,700 during the year—the five largest expenditure items were housing, \$9,600; transportation, \$5,500; food, \$4,400; personal taxes, \$3,000; and personal insurance and pensions, \$2,900. (Citation omitted.) The US population in 1993 was about 258 million, so the average consumer unit contained about 2.6 persons.

Food expenditures included \$2,700 for food eaten at home, which equaled 9 percent of total expenditures, or about \$52 per week. The major items consumed at home were meat and poultry, on which spending averaged \$735; fruits and vegetables, \$445; cereals and bread, \$435; and dairy products, \$295... About 60 percent, or \$270, of the fruit and vegetable expenditures were for fresh vegetables... Over 52 weeks, this means that the average consumer unit spent \$5.20 on fresh produce.

Farmers received about 19 percent of the average retail price for fresh fruits (\$26 of \$135) and 23 percent of the average retail price of fresh vegetables (\$31 of \$135), thereby obtaining \$57, or 21 percent, of the \$270 average retail expenditures on fresh fruits and vegetables in 1993.

Farm labor, including supervisory labor, typically represents about one-third of farmers' costs of production for fresh fruits and vegetables--or about \$8.60 of the \$26 that the average US consumer unit spends on fresh fruit and \$10.20 of spending on fresh vegetables. Thus, these labor costs total about \$19 per consumer unit per year.

Suppose that current levels of [illegal] immigration are large enough to reduce farm wages 50 percent below the level they would otherwise be, so that current farm worker wages of \$5 to \$6 per hour would be \$7.50 to \$9 per hour without additional [illegal] immigrant workers. And suppose that the entire cost of higher farm wages is passed on to consumers, so that the annual cost of the farm labor used to produce the fresh fruit consumed by the average American household rises from \$8.60 to \$13 and the cost of farm labor rises from \$10.20 to \$15. If these increased farm labor costs were completely passed on to consumers, spending on fresh fruits and vegetables eaten at home for a typical 2.6 person consumer unit would increase by less than \$10, from \$270 to almost \$280."

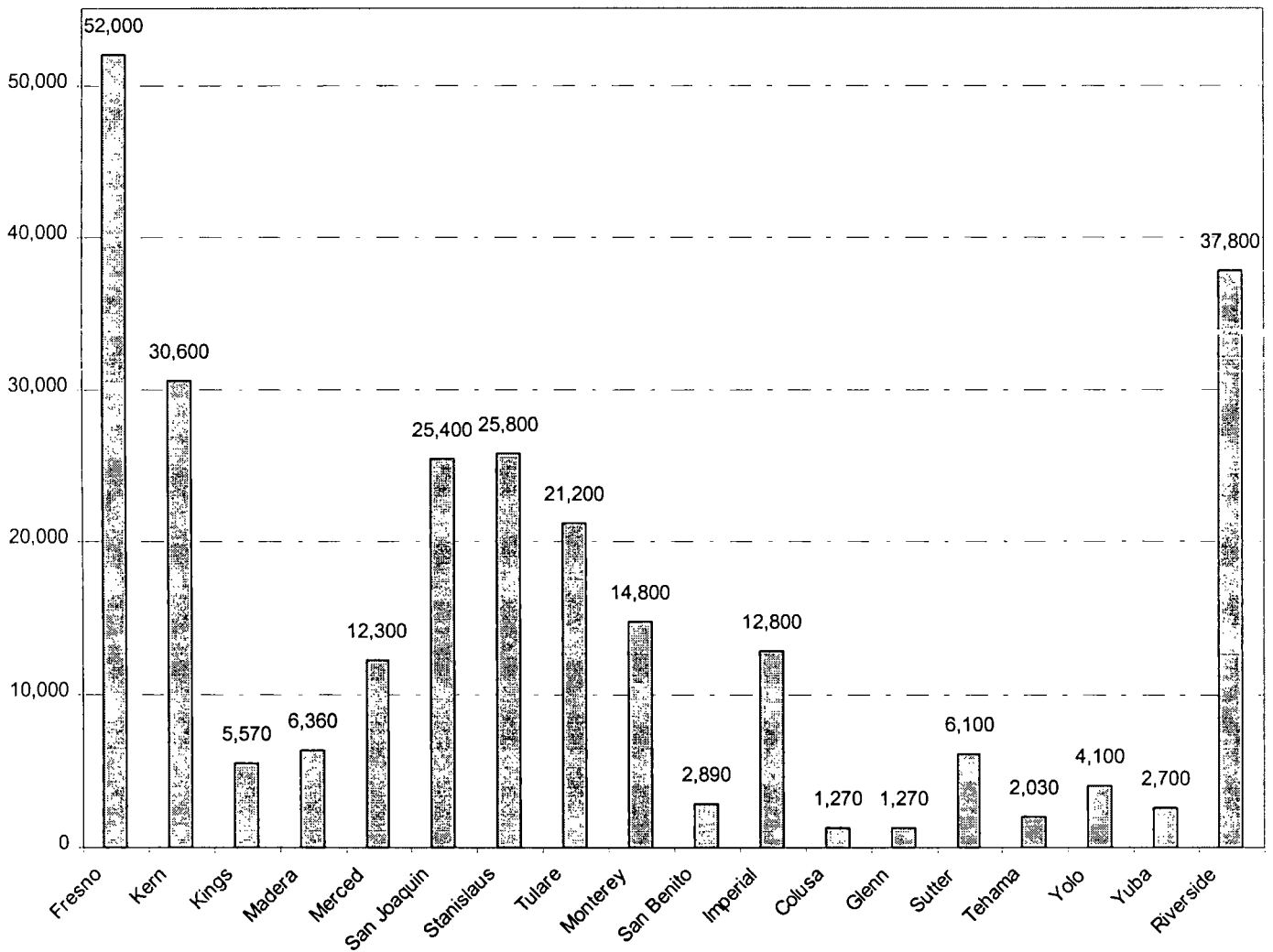
attractive economically and will perhaps encourage many agricultural employers to directly hire farmworkers rather than using often unscrupulous intermediaries.

The net effect of implementing these suggestions would be to put pressure on agriculture to do something that most other industries take as a given: to secure labor, they must compete in the market place by offering decent wages, working conditions and benefits.

It is only in the agricultural labor market in recent decades that this idea has seemed radical. But, in an era of welfare reform, opposition to new immigrants, and persistent high rural unemployment, it is long past time for agriculture to change its practices and provide needed work to the legal US workers that make up a labor surplus in many parts of this country.

Thank you for your consideration of our views. For more information, please don't hesitate to contact me directly at 415-397-5715.

**264,900 LEGAL US WORKERS ARE UNEMPLOYED, AS
OF MAY 1998, IN CALIFORNIA'S 18 MAJOR
CROP-PRODUCING COUNTIES**



Source: State of California, Employment Development Department, Report 400C (May 1998)

**Gohl Earl**

From: Gohl Earl
Sent: Wednesday, July 08, 1998 9:08 AM
To: Palast Geri; Luna David; Flournoy David (Todd)
Subject: graham

Below is a summary of the Graham/Wyden H-2A proposal that they expect to introduce this week. As soon as I have paper or more clarification I will circulate it.

1. DOL would develop a registry of farm workers to be available for growers of fill labor needs. The registry would be financed through H-2A fees that would be equivalent to the FICA and FUTA taxes that would have been paid by growers if domestic workers were recruited.
2. Workers placed from the registry and H-2A workers would receive a 105 per cent of the prevailing rate for the crop. The Adverse Wage Rate would be abolished.
3. Register workers both foreign and domestic would receive housing or a housing allowance. The allowance would be pegged to Fair Market Rents issued by HUD.
4. Transportation for H-2A would be current law.
5. Expansion of Head Start programs for migrant workers
6. MISPA coverage for both H-2A and migrants
7. H-2A workers would have 20 per cent of pay withheld until they returned to the consulate of origin.
8. If a worker came to US as H-2A for 4 years they would be eligible for permanent unskilled status.



UNITED STATES DEPARTMENT OF LABOR

FACSIMILE TRANSMISSION

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

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202/219-5288

MESSAGE:

S 1563 IS

105th CONGRESS

1st Session

S. 1563

To amend the Immigration and Nationality Act to establish a 24-month pilot program permitting certain aliens to be admitted into the United States to provide temporary or seasonal agricultural services pursuant to a labor condition attestation.

IN THE SENATE OF THE UNITED STATES

November 13, 1997

Mr. SMITH of Oregon (for himself, Mr. CRAIG, Mr. GORTON, Mr. ROBERTS, and Mr. GRAMS) 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 establish a 24-month pilot program permitting certain aliens to be admitted into the United States to provide temporary or seasonal agricultural services 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 'Temporary Agricultural Worker Act of 1997'.

SEC. 2. NEW NONIMMIGRANT CATEGORY FOR PILOT PROGRAM TEMPORARY AND SEASONAL 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)(H)(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) of the Immigration and Nationality Act (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. PILOT PROGRAM FOR ALTERNATIVE AGRICULTURAL TEMPORARY WORKER PROCESS USING ATTESTATION.

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

the following:

`ALTERNATIVE AGRICULTURAL TEMPORARY WORKER PROGRAM

`SEC. 218A. (a) CONDITION FOR EMPLOYMENT OF PILOT PROGRAM ALIENS-

`(1) ESTABLISHMENT OF PILOT PROGRAM; RESTRICTION OF ADMISSIONS TO PILOT PROGRAM PERIOD-

`(A) IN GENERAL- The Attorney General shall establish a pilot program for the admission of aliens classified as a nonimmigrant under section 101(a)(15)(H)(ii)(c) to perform temporary or seasonal agricultural services pursuant to a labor condition attestation filed by an employer or an association for the occupation in which the alien will be employed. No alien may be admitted or provided status as a pilot program alien under this section after the last day of the pilot program period specified in subparagraph (B).

`(B) PILOT PROGRAM PERIOD- The pilot program period under this subparagraph is the 24-month period beginning 6 months after the date of the enactment of the Temporary Agricultural Worker Act of 1997.

`(2) ADMISSION OF ALIENS- No alien may be admitted to the United States or provided status as a pilot program 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 pilot program aliens pursuant to subsection (h); and

`(C) the employer has not, during the pilot program period, been found by the Attorney

General to have employed any aliens in violation of section 274A(a) or this section.

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

`(A) WAGE RATE- The employer will pay pilot program 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 pilot program aliens will not adversely affect the working conditions of similarly employed workers in the area of employment.

`(C) LIMITATION ON EMPLOYMENT- A pilot program 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 pilot program 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 its workers employed in the occupation in which, and at the place of employment where, pilot program 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 pilot program 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.

`(4) LIMITATION ON NUMBER OF VISAS- In no case may the number of aliens who are admitted or provided status as a pilot program alien in a fiscal year exceed 25,000.

`(5) OPERATION OF PROGRAM IN NOT LESS THAN 5 AREAS- Alien admissions under this section shall be allocated equally to employers in not less than 5 geographically and agriculturally diverse areas designated by the Secretary of Agriculture. The entire United States shall be encompassed within such areas.

`(6) GENERAL ACCOUNTING OFFICE REPORT-

`(A) IN GENERAL- The Comptroller General of the United States shall, concurrently with the operation of the pilot program established by this section, review the implementation and enforcement of the pilot program for the purpose of determining if--

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

`(ii) the program has ensured that pilot program aliens are employed only in authorized employment and that they timely depart the United States when their authorized stay ends;

`(iii) 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

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

`(B) REPORT- Not later than 90 days after the termination of the pilot program established by this section, the Comptroller General of the United States shall submit a report to Congress setting forth the conclusions of the Comptroller General from the

review conducted under subparagraph (A).

“(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 pilot program 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 pilot program alien 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 pilot program under this section is unaffected by withdrawal of a labor condition attestation.

`(c) EMPLOYER RESPONSIBILITIES AND REQUIREMENTS FOR EMPLOYING PILOT PROGRAM ALIENS-

`(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 pilot program aliens--

`(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 pilot program 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 pilot program 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 pilot program 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 pilot program 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 pilot program 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 pilot program 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 pilot program 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 pilot 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 pilot program 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, regardless of whether any of the job opportunities may already be occupied by pilot program 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 a pilot program alien prematurely abandons the alien's employment.

`(2) OUT-OF-STATUS- A pilot program 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 removal 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 THE STATE EMPLOYMENT SECURITY AGENCIES-

`(1) DISSEMINATION OF LABOR MARKET INFORMATION- The Secretary shall direct State employment security agencies to disseminate non-employer-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-

`(A) IN GENERAL- 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 pilot program 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.

`(B) PROCEDURES- A State employment agency that refers any individuals for employment pursuant to subsection (g)(2)(A) shall comply with the procedures specified in subsection (b) of section 274A. For purposes of the attestation requirement in subsection (b)(1), the agency employee who is primarily involved in the referral of the individual shall make the attestation on behalf of the agency. The agency shall retain the completed forms and make them available for inspection as required in subsection (b)(3) of section 274A.

`(C) EMPLOYMENT VERIFICATION- For purposes of complying with subsection (b) of section 274A with respect to an individual referred by a State employment agency, a pilot program employer may, at the employer's option, fulfill the requirements of subsection (b) of this section in lieu of retaining the documentation described in section 274A(a)(5).

`(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 2 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 pilot program 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 pilot program 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- 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 any subsequent employment of pilot program aliens.

`(3) ROLE OF ASSOCIATIONS-

`(A) VIOLATION BY 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 a pilot program 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 PILOT PROGRAM 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 pilot program 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 pilot program aliens is correctly filled out, and the employer is not ineligible to employ pilot program 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 a pilot program 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 pilot program 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 a pilot program 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 a pilot program 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 pilot program 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 pilot program alien 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 PILOT PROGRAM ALIENS WITHOUT VALID IDENTIFICATION AND EMPLOYMENT ELIGIBILITY CARD- 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 PILOT PROGRAM STATUS- An alien having status as a pilot program 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 a nonimmigrant visa issued under section 101(a)(15)(H)(ii)(c) 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 pilot program 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 pilot program aliens shall--

'(i) withhold from the wages of their pilot program alien workers an amount equivalent to 25 percent of the wages of each pilot program 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 pilot program 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 pilot program 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 pilot program aliens.

“(2) LIMITATION OF WRITTEN DISCLOSURE IMPOSED UPON RECRUITERS- Any disclosure required of recruiters under section of 201(a) of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1821(a)) need not be given to pilot program 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 pilot program 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 a pilot program 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) SELECTION OF AREAS- The Secretary of Agriculture shall select the areas under subsection (a)(4) not later than 60 days after the date of the enactment of the Temporary Agricultural Worker Act of 1997.

“(2) 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 pilot program aliens and enforcement of the requirements for employing pilot program aliens under an approved attestation. The Secretary shall promulgate, and the Attorney General shall approve, such regulations not later than 90 days after the date of the enactment of the Temporary Agricultural Worker Act of 1997.

“(3) 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 pilot program aliens and the requirements for employing pilot program aliens and the enforcement of such requirements. The Attorney General shall promulgate such regulations not later than 90 days after the date of the enactment of the Temporary Agricultural Worker Act of 1997.

`(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) PILOT PROGRAM ALIEN- The term `pilot program 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

Total Pages: _____

LRM ID: JAW352

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

Tuesday, June 30, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: James J. Jukes (for) Assistant Director for Legislative Reference

OMB CONTACT: Jeffrey A. Weinberg

SUBJECT: PHONE: (202)395-3457 FAX: (202)395-3109
LABOR REVISED Statement for the Record on S1563 Temporary
Agricultural Worker Act of 1997

DEADLINE: 10AM Thursday, July 2, 1998

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

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Julie A. Fernandes

LRM ID: JAW352 SUBJECT: LABOR REVISED Statement for the Record on S1563
Temporary Agricultural Worker Act of 1997

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or

(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Jeffrey A. Weinberg Phone: 395-3457 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3457

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

Concur

No Objection

No Comment

See proposed edits on pages _____

Other: _____

FAX RETURN of _____ pages, attached to this response sheet

**Statement for the Record
of John Fraser
Deputy Wage and Hour Administrator
Employment Standards Administration
United States Department of Labor**

before the

**SUBCOMMITTEE ON IMMIGRATION
OF THE SENATE JUDICIARY COMMITTEE**

June 24, 1998

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to provide testimony for the hearing record. This testimony discusses the Administration's views on legislative proposals for a new agricultural guestworker program. It also describes administrative and regulatory steps the Department has and is taking to make the current "H-2A" temporary nonimmigrant agricultural worker program more responsive to the needs of agricultural growers and more protective of agricultural workers.

Your Subcommittee has two similar bills pending before it to amend the Immigration and Nationality Act to establish a new agricultural guestworker program in addition to the current H-2A temporary nonimmigrant agricultural worker program. One bill, S. 1563 (Smith, OR), would establish a 24-month pilot program as an alternative to the current H-2A program; the other, S. 1698 (Coverdell, GA), would establish a permanent alternative program to the current H-2A program.

Mr. Chairman, the President has been and remains strongly opposed to establishing a new agricultural guestworker program. In June 1995, the President said:

"I oppose efforts in the Congress to institute a new guestworker or 'bracero' program that seeks to bring thousands of foreign workers into the United States to provide temporary farm labor."

In explaining his position, the President said,

"A new guestworker program is unwarranted for several reasons:

- * It would increase illegal immigration
- * It would reduce work opportunities for U.S. citizens and other legal residents
- * It would depress wages and work standards for American workers"

Virtually every other thorough and balanced review of this question has reached the same conclusion.

The Congressionally-created, bipartisan Commission on Immigration Reform examined this question and stated its conclusion: "The Commission believes that an agriculture guestworker program, sometimes referred to as a revisiting of the 'bracero agreement,' is not in the national interest and unanimously and strongly agrees that such a program would be a grievous mistake."

Another Congressionally-created bipartisan commission -- the Commission on Agricultural Workers -- also examined this issue and, in November 1992, stated its conclusion: "... [w]ith the existing agricultural labor supply, there is currently no need to supplement the farm work force with additional foreign workers beyond those authorized through the existing H-2A [temporary foreign agricultural worker nonimmigrant] program."

In 1997, the Binational Study on Migration -- a joint undertaking by highly respected scholars from both Mexico and the U.S. -- again examined this question and its report stated its conclusion, which in part states: "...opening a legal channel for Mexican temporary workers would probably add to, rather than substitute for, unauthorized workers, perhaps depressing conditions for legal Mexican-born workers in the U.S. labor market Such [guestworker] programs may 'substitute legal for illegal workers,' but it is not in the interest of either country to codify easily exploitable labor exchanges."

Also in 1997, at the direction of Congress, the General Accounting Office (GAO) examined the existing H-2A agricultural guestworker program. GAO concluded (as discussed further below) that there is no basis for establishing a new foreign farmworker program in our immigration law.

Mr. Chairman, these reviews represent a great weight of thoughtful, scholarly and bi-partisan support for the President's position opposing a new agricultural guestworker program.

As the Subcommittee knows, the Administration has put in place comprehensive initiatives to reduce the number of illegal immigrants in the United States. These include a national Border Control strategy and enhanced resources to significantly expand the Justice and Labor Departments' efforts to curtail illegal migration and the illegal employment which is the primary lure for this migration. As the Senate legislation demonstrates, there continues to be talk about another agricultural guestworker program should the Administration's efforts effectively reduce the flow of illegal migrant farmworkers across the border. Western growers in particular claim there will be labor shortages and disdain the existing H-2A nonimmigrant agricultural worker program as unresponsive to their perceived needs.

However, in his June 1995 statement, the President also said:

"If our crackdown on illegal immigration contributes to labor shortages -- especially for perishable crops that require large numbers of workers for short periods of time -- I will direct the Departments of Labor and Agriculture to work cooperatively to improve and enhance existing programs to meet the labor requirements of our vital agricultural industry consistent with our obligations to American workers."

Despite these assurances, and the absence of any credible evidence of farm labor shortages, some agricultural interests continue to cite the Administration's increased efforts to control illegal immigration to promote another agricultural guestworker program. The perceived basis for yet another such program is that some growers will risk being unable to harvest their crops without the illegal workforce that they have used in the past. However, the preponderance of the farm labor force is work-authorized and among this group, there is substantial underemployment. Furthermore, these agricultural growers have not utilized the existing "safety valve" -- the H-2A agricultural guestworker program.

We recommend examining the underlying need for any new agricultural guestworker program by addressing three questions:

- (1) Is there a problem, *i.e.*, is there a shortage of farmworkers in the U.S.?
- (2) If there is a labor supply problem, is a foreign guestworker program the best way to address it?
- (3) In a particular case where other approaches prove ineffective and a foreign guestworker program is seen as the only way to deal with supplying temporary labor to U.S. agriculture, is there something fundamentally wrong with the existing H-2A temporary farm labor program which already provides agricultural growers a "safety valve"?

Our careful analysis of the answer to each of these questions is "No," and leads us to the unavoidable conclusion that a new agricultural guestworker program is simply not in the national interest of the United States.

There Is No Shortage of Farmworkers

With regard to the first question, the evidence is overwhelming -- and, to our knowledge, uniform -- that there is no overall shortage of farmworkers in the U.S., nor is there likely to be in the near future. All of the available data on labor supply indicate that overall there has been and continues to be an agricultural labor surplus.

The Immigration Reform and Control Act of 1986 (IRCA) not only provided for a generous legalization program for nearly 1.1 million agricultural workers, but for a contingent Replenishment Agricultural Worker (RAW) Program as well. But for each of the four fiscal years that this program was in place (FY 1990-93), the joint USDA/DOL research showed that there was no shortage of agricultural workers in the United States (though during these years an average of about 17,000 nonimmigrant H-2A farmworkers were admitted each year to work on crops where, in many cases, they had been working for several decades). The majority of these 1.1 million legal workers remain available for farm work.

Independently, the Congressionally-mandated, bi-partisan Commission on Agricultural Workers similarly concluded in its November 1992 report that the national supply of agricultural labor was more than adequate and that there was no need to supplement the farm work force with additional foreign workers beyond those authorized through the existing H-2A program.

And just this past December, the GAO -- in a report directed by the Congress to evaluate the supply of agricultural labor and the H-2A program's ability to meet the needs of agricultural employers while protecting domestic and foreign agricultural workers -- stated the following conclusion: "A sudden widespread farm labor shortage requiring the importation of large numbers of foreign workers is unlikely to occur in the near future. There appears to be no national agricultural labor shortage now, but localized labor shortages may exist for specific crops or geographical areas." The GAO also concluded that Immigration and Naturalization Service enforcement efforts are unlikely to significantly reduce the number of unauthorized farmworkers, a significant component of the agricultural labor force.

The fact is that there is no current evidence of a shortage of farmworkers or the likelihood of one developing. On the contrary, the Department's National Agricultural Workers Survey (NAWS), which continues to collect detailed demographic and labor force data on the U.S. farm labor force, reveals 1) a high degree of un- and under-employment among U.S. farmworkers and 2) that a surplus of farmworkers has persisted, and may even be increasing. NAWS data have shown that even in the primary harvest months, a significant segment of U.S. farmworkers are not employed in farmwork.

A New Guestworker Program Is Not In The National Interest

As to the second question, our analysis leads us to conclude -- like the several other prestigious, independent and bi-partisan analysts already cited -- that a new foreign guestworker program is not the best or only way to address any farmworker shortages in the U.S. Creation of such a program would likely result in many more -- and more significant -- problems than it might conceivably address.

Some of the principal reasons we draw this conclusion include the following:

First is that we should not forget this country's negative historical experience with the Bracero Program, which was terminated by Congress in 1964 on the basis of its adverse impact on the wages and working conditions of U.S. farm workers. The Bracero Program also caused recurring tensions in U.S.-Mexican relations, as Mexico continually accused U.S. employers of mistreating Mexican nationals working in U.S. agriculture. Any new guestworker program can be expected to raise similar bilateral issues, as clearly indicated in the recently released Binational Study on Migration.

Second, there is little reason to believe that offering and promoting yet another avenue for legal entry and employment in the U.S. will lure certain employers and entire sectors of the economy away from a reliance on illegal workers. IRCA's history in the agricultural sector has shown this not to be the case.

Third, a new foreign guestworker program will not necessarily reduce the flow of illegal workers into the U.S. or reduce the number of illegal visa overstayers. Such a new program would not, as some may suggest, merely convert the current illegal flow into a legal one. On the contrary, historical experience in the U.S. and Europe indicates that guestworker programs establish migratory networks and paths that most commonly exacerbate illegal migration rather than reducing it.

Fourth, once temporary worker programs are established, they soon become entrenched and extremely difficult to terminate. Such programs can transform temporary labor shortages into structural workforce problems. The experience of other countries also shows that reliance on temporary worker programs often delays, and may prevent, structural adjustments in the economy. History also shows that guestworker programs, because they create structural workforce problems, can create pressures for legalization and conversion to permanent residency of guestworkers.

Fifth, the use of guestworkers commonly moderates market-driven incentives to improve productivity and raise wages to levels at which the jobs would be more attractive to domestic workers. A new agricultural guestworker program would encourage more nonimmigrant employment in agriculture, where workers are among the most vulnerable

and, thus, where U.S. workers are most likely to suffer unfair competition, displacement, and other forms of harm, building structural labor supply problems. Guestworker programs can also create and institutionalize a two-tier workforce with the guestworker population being extremely vulnerable, not only to workplace exploitation but to a host of civil and human rights abuses consequent to their second-class status and their indenture to one employer or even industry.

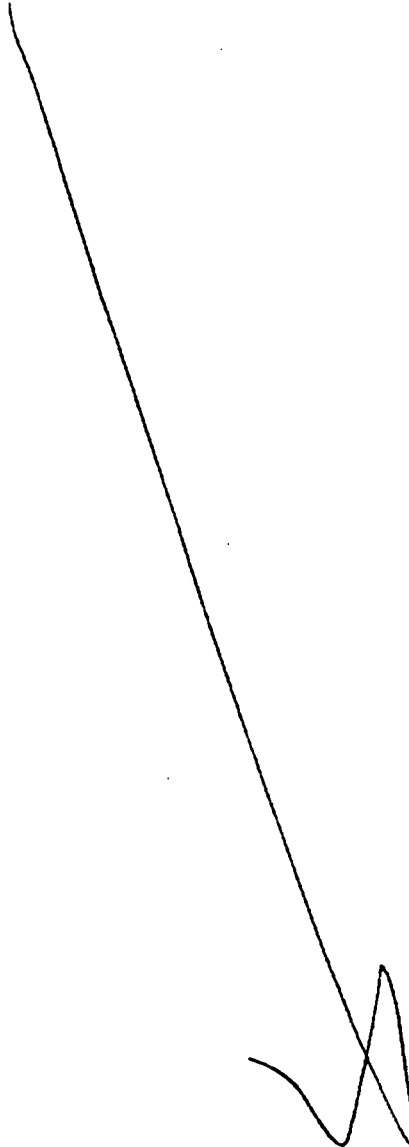
The H-2A Program

Our answer to the third question is that, based on experience with the current H-2A program, it can work to meet localized agricultural labor shortages.

Over the past four decades, the H-2A program (and its predecessor H-2 program) have provided a safety valve for agricultural growers to ensure that their crops can be harvested. The program can work well when utilized, although, as I will discuss further in a moment, we are initiating certain administrative and regulatory changes -- some of which were recommended by the GAO in its December 1997 report and by DOL's Office of Inspector General (OIG) in a March 1998 report evaluating the effectiveness of the program -- to make the program work better. While the Department's focus on making every effort to find U.S. workers for H-2A jobs may have inconvenienced some employers, there is scant evidence that the Department has denied legitimate requests for nonimmigrant farmworkers. In fact, a high percentage of growers who seek workers under the H-2A program -- even in the face of the substantial oversupply of domestic farmworkers already mentioned -- are granted approval to bring in foreign workers. Further, there are provisions in the H-2A program to accommodate agricultural employers filing emergency requests if there is good and substantial reason, such as unforeseen changes in market conditions. While relatively few such requests have been received, the Department has consistently accommodated growers with legitimate emergency needs.

However, nearly all H-2A workers are used on the East Coast, not in the West. Western growers, if they have a need, have not tried to use the present system. If utilization of the H-2A program increased, as it has somewhat in the last few years, more agricultural employers would be offering U.S. workers job opportunities superior to those otherwise available for a particular commodity in an area because of the wage and benefits requirements of the H-2A program. This, in turn, would enable placement of available U.S. workers in these jobs. Combined with enhanced illegal immigration control, this could lead to replacing unauthorized workers with U.S. or nonimmigrant workers.

Any resort to yet another, untested foreign agricultural guestworker program -- especially where the reforms center on reducing legal protections for highly vulnerable farmworkers -- raises anew the specter of the dreadful outcomes of the Bracero Program. Ironically, it appears that the impetus for creating a totally new agricultural guestworker program comes primarily from those who have not even tried the existing H-2A program and, rather, continue to rely on attracting illegal migrants to meet their workforce needs.

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Views on Senate Legislation

These reasons explain the Administration's strong opposition to a new agricultural guestworker program like that defeated in 1996 in the House, and like the bills before your Subcommittee. But, Mr. Chairman, let me also explain the Administration's opposition to the Senate bills in particular by posing and suggesting answers to four questions that we would urge the Subcommittee to carefully consider.

First, will the bills provide growers the stable labor supply they seek? These bills would permit admission of thousands (up to 25,000 under S. 1563 and an unlimited number under S. 1698) of foreign agricultural guestworkers without any independent DOL determination of shortage. This is a larger number than growers have been requesting under the H-2A program. So the answer to this question may be "yes" for some growers. Those growers currently using the H-2A program would likely move over to the new program under these bills because -- with much weaker worker protections -- unquestionably their labor costs would be lower. And other growers may want to use the program as well. But at what price to the Nation? In our view, these proposed new guestworker programs would exacerbate the nation's problem with illegal immigration, adversely impact the employment opportunities, wages and working conditions of U.S. farm workers, and increase -- not reduce -- the opportunity for abuse of foreign agricultural workers. The bottom line is that these consequences are too great a price to pay. This is especially true given the fact that the H-2A program can provide growers the supply of workers they need while moderating the risk of these harmful side effects.

The second question is whether the bills will protect U.S. agricultural workers from unfair competition? It should be unambiguously clear to all that they will not. The Senate legislation will severely weaken protections provided by the existing H-2A program. For example, the bills contain no requirement for employers to develop and implement an affirmative or effective domestic farm worker recruitment plan, and qualified U.S. workers who seek employment could be discriminated against and rejected before the work begins (as well as after work starts). The result, we believe, would inevitably be to discourage the hiring of U.S. farm workers and undermine their wages and working conditions.

All employers in the U.S. economy -- even our Armed Forces -- compete for workers, and they do so by offering wages and benefits and other enticements commensurate with the skills and knowledge they need in their workforce. This competition even occurs in generally unskilled labor markets. But agricultural wage rates -- both piece rates and hourly wage equivalents -- have generally stagnated, remaining at the same level in real terms and even declining in some crops over the last two decades. U.S. farmworkers are already experiencing the effects of unfair competition from illegal immigrants in the farm labor workforce. There is simply no

reason to believe that these trends will be reversed by effectively "legalizing" this flow of foreign workers which will inevitably expand.

The third question you should consider is whether the legislation will adequately protect foreign agricultural workers from abuse? Again, the answer is clearly "No." Foreign farmworkers would be entitled to a limited Migrant and Seasonal Agricultural Worker Protection Act (MSPA) disclosure of terms and conditions of employment, but only when they are at the border for their visa to be issued. This means that workers could face having to decide about whether to take the employment when recruited without knowing the terms and conditions of employment, or perhaps based on false information. They could then find themselves at the border seeking a visa when they learn what the real terms and conditions of employment are. These foreign workers could be brought into the country at their own expense -- their employers would have no obligations to pay or reimburse transportation cost into or out of the U.S. -- and without any housing (unless the provision of housing is the locally prevailing practice). How will the communities into which these workers would be brought react to such circumstances? And even the starkly limited worker protections provided under the bills could not be effectively enforced. The Department could only enforce pursuant to a complaint alleging violation -- unlikely from foreign workers unaware of their legal rights and effectively bonded to and entirely dependent upon their U.S. employer. And the Department would have no authority to pursue court action on behalf of the workers to obtain compliance with the required terms and conditions of employment. In effect, these bills could "simplify" the current H-2A program by transferring costs from agricultural producers (who benefit from an expanded labor supply) to the workers and the communities in which they will live and work.

Finally, we must consider how the legislation will affect illegal immigration to the U.S.? As I noted, and the Binational Study also suggests, experience shows that guestworker programs establish migratory networks and paths that increase illegal immigration. Guestworkers tend to come and stay in the receiving country. Either program resulting from these bills would be no different -- it would be easy for foreign agricultural workers admitted under the program to become illegal workers by overstaying in this country. Under current law, in addition to paying return transportation costs, H-2A employers must post a bond to assure the return of workers to their country of origin. The Senate bills, however, would put an employer under no obligation to ensure the workers it imported leave the U.S. upon completion of the work. Rather, they address this issue by transferring this cost to the workers -- by requiring that a substantial portion of the foreign workers' wages be withheld until the workers return to their home country. Not only does this approach shift the financial burden to the workers, but it is highly questionable that even such an extreme measure as this would provide sufficient incentive for many workers from Mexico to leave the U.S. given the overall wage differential between

the U.S. and Mexico. And further exacerbating the bills' potential adverse impact on illegal immigration is the fact that they would also allow guestworkers to remain in the U.S. for a period of time between jobs, giving them better opportunity and more time than under the current system to disappear into the underground economy. (In this regard, it should also be noted that the bills would have the foreign workers -- not their employers -- pay, at least in part, for the Federal government's administration of the program which primarily benefits the employers.)

H-2A Reform Proposals

Mr. Chairman, as I noted, the President has assured American agriculture that if current efforts to stop illegal immigration contribute to agriculture labor shortages, he would direct the Secretaries of Labor and Agriculture to improve and enhance existing programs to meet agricultural labor needs. To date we see no evidence of a shortage of domestic agricultural workers. Nevertheless, we are mindful of concerns which have been raised about and suggestions made to improve the operations of the current H-2A program, and we are committed to taking steps to make the program better serve the needs of the nation's agricultural growers while effectively protecting agricultural workers.

As has already been alluded to in this statement, both the GAO -- at the direction of Congress -- and the Department's OIG have recently completed thorough reviews of the H-2A program. These independent bodies have put forth a number of findings and recommendations for changes in the H-2A program that we have carefully considered. We have concurred with many of these recommendations and are moving ahead with implementation or appropriate rulemaking proposals. We have already implemented some changes administratively and are committed to notice-and-comment rulemaking to propose changes in the H-2A program which help "streamline" the program and address complaints from some growers who have used the H-2A program. Administratively, we now require "positive recruitment" of U.S. farmworkers only in an area where we find that there is a significant number of qualified workers willing to make themselves available for employment at the time and place needed. Also, we now only count as "available" for employment those U.S. workers who are identified by name, address and social security number. Lastly, the Department is committed to consistently meeting the existing 7-day deadline after receipt of initial application to notify the employer about deficiencies that preclude adjudication of an application and the 20-day deadline -- prior to the employer's "date of need" -- to issue approved certifications. And we will improve automation to assist in meeting these deadlines.

On the rulemaking side, we intend to propose reducing the current lead times for application and for housing inspection, and to reduce the number of steps in the application and worker entry process from three to two by combining the DOL

application and INS petition adjudication processes. If implemented through rulemaking, this would mean that DOL approval of an employer's H-2A application would also constitute approval from INS, eliminating what can be a two- to three-week step from the pre-entry process. Other rulemaking proposals would shift from INS to DOL the authority to issue petitions for replacement of certified H-2A employees upon proof of an H-2A employee's repatriation; eliminate the requirement that growers use a registered farm labor contractor (FLC) as a source to recruit U.S. workers if the FLC has a demonstrated history of employing unauthorized workers or of other abuses; and eliminate the requirement that certified H-2A employers provide notice that H-2A employees have departed for the place of employment. We are committed to moving forward with these proposals, and others which respond to GAO and OIG recommendations, and are considering still others that can help streamline the H-2A process without sacrificing worker protections. We intend to have completed at least some portion of this rulemaking in time for next season.

Conclusion

Mr. Chairman, the Administration has taken consistent positions with respect to foreign guestworker programs -- that there must be a demonstrated need for foreign workers combined with adequate worker protections and meaningful steps to resolve any labor shortage by using U.S. workers. We agree with the bi-partisan Commissions on Agricultural Workers and Immigration Reform in strongly recommending that Congress not establish any new agricultural guestworker program, which would simply not be in the national interest.

We will continue to closely monitor through our NAWS and other sources agricultural labor supply to determine if there are any developing labor shortages in agriculture. We are also firmly committed to following through with administrative and regulatory improvements to the H-2A program that can make it more responsive to agricultural growers' needs so that any localized agricultural labor shortages can be met through the H-2A program.

I appreciate the attention given by the Subcommittee to our views, and their consideration. The Department looks forward to continuing to work closely and cooperatively with you and your staff.