

U.S. Department of Labor

Employment Standards Administration
Washington, D.C. 20210



Reply to the Attention of:

NOV 20 1997

MEMORANDUM FOR JOHN R. FRASER
Acting Administrator
Wage and Hour Division

FROM: 
CECILY A. RAYBURN
Director, Division of
Financial Management

SUBJECT: GAO Draft Report, H-2A Agriculture Guestworker
Program: Changes Could Improve Services to
Employers and Better Protect Workers-HEHS-98-20

Attached is a General Accounting Office (GAO) notification letter transmitting the subject draft report for comments. There are four recommendations.

GAO is requesting comments by Friday, November 28, 1997. In order to meet that deadline, we request that you submit your comments, both in hard copy and electronic format, to the Branch of Management Review and Internal Control by Tuesday, November 25, 1997. The attached format is suggested.

Should you have questions on this matter, please contact Rose Broadwater or Griffin Crump at 219-5714.

Attachments

H-2A Agricultural Guestworker Program: Changes Could Improve
Services to Employers and Better Protect Workers-HEHS-98-20.

Recommendation

Comments



United States
General Accounting Office
Washington, D.C. 20548

**Health, Education, and
Human Services Division**

November 18, 1997

The Honorable Alexis M. Herman
Secretary of Labor

Dear Ms. Herman:

Enclosed for your review and comment are 15 copies of our draft report, H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers (GAO/HEHS-98-20, Code 205338).

Please note that this draft is being provided to obtain advance review and comment from those with responsibility for the subjects it discusses. It has not been fully reviewed within GAO and is, therefore, subject to revision. Recipients of this draft must not, under any circumstances, show or release its contents for purposes other than official review and comment. It must be safeguarded to prevent publication or other improper disclosure of the information it contains. This draft and all copies of it remain the property of, and must be returned on demand to, the General Accounting Office.

We would like to obtain the Department of Labor's comments by December 1, 1997. Comments received within that period will be included in the report. In the meantime, should you wish to contact us or have any questions, please call me at (202) 512-7014 or Charles Jeszeck, Assistant Director, at (202) 512-7036.

Sincerely yours,

Cornelia M. Blanchette

for Carlotta C. Joyner
Director, Education and
Employment Issues

Enclosures - 15

GAO

Draft Report

Report to Congressional Requester

November 1997

H-2A AGRICULTURAL GUESTWORKER PROGRAM:

Changes Could Improve Services to Employers and
Better Protect Workers

Notice:
This draft is restricted
to official use.

This draft report is being provided to obtain advance review and comment from those with responsibility for the subjects it discusses. It has not been fully reviewed within GAO and is, therefore, subject to revision.

Recipients of this draft must not, under any circumstances, show or release its contents for purposes other than official review and comment. It must be safeguarded to prevent publication or other improper disclosure of the information it contains. This draft and all copies of it remain the property of, and must be returned on demand to, the General Accounting Office.

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December 31, 1997

Congressional Addressees

As mandated by Division C of the Omnibus Consolidated Appropriations Act, 1997 (P.L. 104-208) and the Conference Report for the Agricultural Rural Development, FDA Appropriation Act of 1997 (P.L. 104-726), this report presents information on (1) the likelihood of a widespread agricultural labor shortage and its impact on the need for nonimmigrant guestworkers and (2) the H-2A program's ability to meet the needs of agricultural employers while protecting domestic and foreign agricultural workers, both at present and should a significant number of nonimmigrant guestworkers be needed in the future. We are sending this report to you because of your committees' oversight responsibility for federal agencies involved in the H-2A program.

We are providing copies of this report to the Secretary of Labor, the Assistant Secretaries for the Employment and Training Administration, Employment Standards Administration, and Occupational Safety and Health Administration; the Attorney General, and the Chief Administrator of the Immigration and Nationalization Service; the Secretary of Agriculture; the Secretary of State; individual members of Congress who contacted us regarding this mandate; and others upon request. If you have any questions on this report, please contact Carlotta C. Joyner, Director, Education and Employment Issues, at (202) 512-7014. This report was prepared under the direction of Charles Jeszeck, Assistant Director. Other major contributors to this report are listed in appendix VII.

Sincerely yours,

Richard L. Hembra
Assistant Comptroller General

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List of Addressees

The Honorable Robert Smith
Chairman
The Honorable Charles Stenholm
Ranking Minority Member
Committee on Agriculture
House of Representatives

The Honorable William Goodling
Chairman
The Honorable Major Owens
Ranking Minority Member
Committee on Education and the Workforce
House of Representatives

The Honorable Henry Hyde
Chairman
The Honorable John Conyers
Ranking Minority Member
Committee on the Judiciary
House of Representatives

The Honorable Richard Lugar
Chairman
Committee on Agriculture
The Honorable Tom Harkin
Ranking Minority Member
Committee on Agriculture
United States Senate

The Honorable James Jeffords
Chairman
The Honorable Edward M. Kennedy
Ranking Minority Member
Committee on Labor and Human Resources
United States Senate

The Honorable Orrin Hatch
Chairman
The Honorable Patrick Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate

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EXECUTIVE SUMMARY

PURPOSE

During congressional deliberations on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, concerns surfaced about whether there would be enough farm workers to meet the needs of the agricultural industry after the Act's new constraints on foreign workers' ability to enter the country were implemented. The H-2A nonimmigrant guestworker program provides a way for U.S. agricultural employers to import nonimmigrant foreign workers to perform seasonal agricultural work on a temporary basis when domestic workers are unavailable.¹ During fiscal year 1996, agricultural employers used the H-2A program to import about 15,000 workers, less than 1 percent of the agricultural field labor force.

The Congress wanted to know if the H-2A guestworker program could provide a sufficient supply of agricultural workers in the event of a significant farm labor shortage. As a result, the 1996 law, included in the Omnibus Consolidated Appropriations Act, 1997, directed GAO to review various aspects of the H-2A program.² This review addresses a number of issues, including (1) the likelihood of a widespread agricultural labor shortage and its impact on the need for nonimmigrant guestworkers and (2) the H-2A program's ability to meet the needs of agricultural employers while protecting domestic and foreign agricultural workers, both at present and should a significant number of nonimmigrant guestworkers be needed in the future. (See app. I for a list of primary congressional contacts in addition to the report addressees, and app. II for a detailed listing of the questions agreed upon in discussions.)

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¹See 8 U.S.C. 1101(a)(15)(H)(ii)(a).

² Division C of the Omnibus Consolidated Appropriations Act, 1997 (P.L. 104-208). The Conference Report for the Agricultural Rural Development, FDA Appropriation Act of 1997 (P.L. 104-726) also mandated that GAO study the H-2A program.

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BACKGROUND

The Immigration Reform and Control Act of 1986 created the current program under which employers may bring workers into the country on a temporary, nonimmigrant basis, commonly referred to as the "H-2A" program. The purpose of the H-2A program is to ensure agricultural employers an adequate labor supply while also protecting the jobs, as well as the wages and working conditions, of domestic farmworkers. Under the program, agricultural employers who anticipate a shortage of domestic workers can request nonimmigrant alien workers. The State Department issues nonimmigrant visas for H-2A workers only after the Department of Justice, through its Immigration and Naturalization Service (INS), has approved the employers' petition for authorization to import workers. Justice does not approve the petition until the Department of Labor has approved the employer's application for certification that a labor shortage exists and that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the importation of guestworkers. The Department of Agriculture acts in an advisory role including conducting wage surveys for Labor's determination of the minimum wage rates to be paid by employers of H-2A workers--the so called "adverse effect wage rate"--which are designed to mitigate any negative effect their employment may have on domestic workers.

Labor is also responsible for ensuring that agricultural employers comply with their contractual obligations to H-2A workers and for enforcing labor laws covering domestic workers including the wage, housing, and transportation provisions of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). For example, workers who complete 50 percent of the contract period are guaranteed reimbursement for transportation from their homes while those who complete the entire contract are guaranteed work or wages for a minimum of three quarters of the contract period and reimbursement for transportation home. Agricultural employers must provide the same wages, benefits, and working conditions to H-2A workers that are provided to domestic workers employed in "corresponding employment" and must offer them working conditions identical to those offered domestic workers in their employ.

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RESULTS IN BRIEF

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 at this time, although localized labor shortages may exist for specific crops or geographical areas. Although many farmworkers--an estimated 600,000 workers--are not legally authorized to work in the United States, INS does not expect its enforcement activities to significantly reduce the aggregate supply of farmworkers. INS expects its limited impact to result from the prevalence of fraudulently documented farmworkers and competing enforcement priorities. In fiscal year 1996, less than 5 percent of the 4,600 INS worksite enforcement efforts were directed at agricultural workplaces. INS enforcement efforts are largely conducted in response to complaints, and the agency receives few complaints about agricultural employers. INS officials in both field and headquarters positions unanimously stated that operational impediments prevented the agency from significantly reducing the number of unauthorized farmworkers. The prevalence of unauthorized and fraudulently documented farmworkers does, however, leave individual growers vulnerable to sudden labor shortages should INS target their establishments for enforcement efforts.

Although few agricultural employers seek workers through the H-2A program, those that do are generally successful in obtaining foreign agricultural workers on both a regular and emergency basis. In fiscal year 1996, Labor approved 99 percent of all H-2A applications. However, both employers and Labor officials have difficulty meeting time frames specified by law and regulation. Labor does not collect key program management information that would allow it to monitor program performance. In addition, the multiple agencies and levels of government implementing the program may result in confusion for both employers and workers.

While INS enforcement efforts are unlikely to create a significant increase in demand for H-2A workers, changes in program operations could improve the ability of growers to obtain workers when needed--whether or not there is a nationwide labor shortage--and

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better protect the wages and working conditions of both domestic and foreign workers. These include reducing both the time required to process applications and the period of time the worker must be employed to qualify for a wage guarantee.

PRINCIPAL FINDINGS

A Widespread Farm Labor Shortage Is Unlikely In The Near Future, Although Localized Shortages Are Possible

A widespread labor shortage does not currently appear to exist and is unlikely in the near future. Although there is widespread agreement that a significant portion of the farm labor force is not legally authorized to work, INS enforcement activity is unlikely to generate significant farm labor shortages.

Ample Supplies of Farm Labor Appear to be Available in Most Areas

Although data limitations make the direct measurement of a labor shortage difficult, our own analysis suggests, and many farm labor experts, government officials, grower and farm labor advocates agree, that a widespread farm labor shortage has not occurred in recent years and does not appear to currently exist. For example, GAO's analysis of the monthly and annual unemployment rates of 20 large agricultural counties--those that contain large amounts of fruit, tree nut, and vegetable production in dollar value--found that 13 counties maintained annual double digit unemployment rates and 19 had rates above the national average throughout 1994 - 1996. As of June 1997, 11 counties still exhibited monthly unemployment rates double the national average of 5.2 percent and 15 of the 20 counties displayed rates at least 2 percentage points higher than the national rate. Only two of the counties had unemployment rates below the June 1997 national average. These high unemployment rates generally existed over the entire year, even during peak

agricultural periods. The lack of evidence of widespread farm labor shortages does not preclude the existence or potential for more localized shortages in a specific crop or remote geographic area.

INS Enforcement Efforts Are Unlikely
To Significantly Reduce The Number of
Unauthorized Farmworkers

GAO estimates that approximately 600,000 farmworkers in the United States lack legal authorization to work. However, INS officials around the country were unanimous in their statements that they do not expect to have any general impact on the supply of farm labor either nationally or regionally, given the large number of fraudulently documented farmworkers and competing enforcement priorities. Most investigation resources are focused on identifying aliens who have committed criminal acts, including violent criminal alien gang and drug-related activity, and on detecting and deterring fraud and smuggling. In fiscal year 1996, 304 staff years were devoted to non-criminal investigations, including worksite enforcement for all industries--an average of about 6 INS staff years per state. Fewer than 5 percent of the 4,600 investigations completed in fiscal year 1996 involved employers in agricultural production or services. Further, fewer than 700 workers, about 4 percent of all employees at those worksites, were arrested during INS' enforcement operations at these agricultural worksites. INS officials do not expect a significant increase in the near future.

The prevalence of such a large number of unauthorized and fraudulently documented farmworkers leaves individual employers vulnerable to sudden labor shortages should INS target their establishment for an enforcement effort. Although efforts are underway to improve employers' ability to identify fraudulent documents, these efforts are still in the early stages and are not likely to have any significant impact on the availability of illegally documented farmworkers in the near future. The degree to which these initiatives, if fully implemented, would affect the number of unauthorized workers and the

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supply of agricultural workers is unknown; full implementation would require legislative action.

Although Employers Obtain H-2A Workers, Applications Are Not Processed In A Timely Manner

Agricultural employers receive certification from Labor for almost all workers they request through the H-2A program on both a regular and an emergency basis, regardless of skill level required. Labor's Employment and Training Administration (ETA) issued certifications for 99 percent of the 3,700 applications filed nationwide from October 1, 1996 through July 30, 1997, and certified all but 1 percent of the 30,000 job openings requested on these applications.

However, Labor does not always process applications on time, which makes it difficult to ensure that employers will be able to get workers when they need them. The H-2A program has statutory and regulatory deadlines, such as a requirement that employers file an application for workers at least 60 days before they are needed and that Labor issue a decision on certification of a labor shortage at least 20 days before the date of need. GAO's analysis showed that in fiscal year 1996, at least 35 percent of Labor's certifications missed the statutory 20-day deadline, limiting the time available to process visas through INS and State. Although no data were available on how many employers failed to obtain the required workers by the date of need, GAO identified some applications that were not even certified by Labor until after the date of need.

Lack Of Data Makes It Difficult To Monitor Timeliness And Oversee Program

Labor does not collect data necessary to determine the extent and cause of its failure to meet regulatory and statutory deadlines for both regular and emergency applications. A

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program official told us that the agency does not need to maintain data on timeliness because he will hear from agricultural employers about any missed deadlines. Without adequate data, we could not corroborate Labor's explanation that the delay in meeting the certification deadline was due to reasons outside the control of the office responsible for certifications, such as the time required to inspect farm worker housing and to employers' failure to provide required documentation of efforts to recruit domestic workers and of health care coverage in a timely manner.

INS Involvement in Petition Approval

Adds Little Value To Process

After receiving Labor's certification, INS must approve an employers' petition for H-2A visas before workers can apply to the State Department for visas, a procedure which can add up to 3 weeks to processing time. INS officials agreed, however, that the INS petition approval process added little value to the process because petitions for H-2A visas were unlike any other visa petitions in that they did not generally identify individual workers. Therefore, INS examiners were only checking to make sure that Labor had issued a certification and that the employer had submitted the correct fees for the INS petition. This verification that Labor has certified the position is done again by the State Department, according to officials at the two consulates--Monterrey and Hermosillo, Mexico--that process almost all H-2A visas.

Requirement to Request Workers

60 Days in Advance Is Problematic

Even if all processing deadlines are met, agricultural employers, their advocates and state employment officials told us that the workers may not be available when needed. This is because the weather and other factors make it hard to estimate 60 days in advance the date workers will be needed to begin work. This is especially true for crops with short harvest periods. This difficulty may help explain why many employers were late filing

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applications for certification with Labor: 42 percent of all applications in fiscal year 1996 were filed late. The 60-day deadline may also encourage employers to estimate the earliest possible date, which can have negative consequences for workers who arrive before the employer has work for them: they are left with no income until work is available.

Lack Of Information, Multiple Agencies

Administering H-2A Program Can Make Program Participation More Difficult

Employers, advocates, and agency officials expressed frustration about the lack of information on H-2A procedures. Labor's handbook on the H-2A Labor certification process includes information that is outdated, hard to understand, and incomplete. Program participants can also be confused by the multiple agencies and levels of government involved in the H-2A program, which fosters redundant agency oversight, and the inability to determine compliance with program requirements. In some states, for example, employer-provided farm worker housing is subject to similar federal, state and local housing regulations and inspected by multiple agencies. Some redundancy may also result in employers misunderstanding program requirements. Employers and employer and labor advocates in California, for example, told us that tents for farmworkers were prohibited because they had to be heated and cooled. However, both federal and state housing officials said that tents are permitted and air conditioning is not required.

Worker Protection Provisions

Difficult To Enforce

Violations of H-2A worker protection provisions, including the requirement that foreign guestworkers be guaranteed wages equivalent to at least three-quarters of the amount specified for the entire contract period, are difficult to identify and enforce. Most investigations of labor standards violations involving farmworkers are complaint-driven.

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However, H-2A guestworkers may be less aware of U.S. laws and protections than domestic workers, and they are unlikely to complain about worker protection violations, such as the 3/4 guarantee, fearing they will lose their jobs or will not be hired in the future. Labor, for example, received no complaints from workers employed by H-2A employers in fiscal year 1996 even though GAO's analysis suggests it is likely that some workers did not receive their guaranteed wages. In general, Labor officials reported that it is hard to ensure that abusive employers do not participate in the H-2A program.

Labor officials also noted operational impediments in enforcing these protections. For example, the 3/4 guarantee is only applicable at the end of the contract period and H-2A workers must leave the country soon after the contract ends. Labor officials said they could not monitor the 3/4 guarantee effectively because they cannot interview workers after they return to Mexico to confirm their work hours and earnings. These enforcement difficulties create an incentive for less scrupulous employers to request contract periods longer than necessary: if workers leave the worksite before the contract period ends, the employer is not obligated to pay the 3/4 guarantee or workers' transportation home. However, if the worker abandons the contract, it can be very difficult to determine if these workers have left the country or are, instead, taking jobs from domestic workers.

The H-2A program requires that agricultural employers provide equivalent wages, benefits, and working conditions to H-2A workers as those that are provided to domestic workers employed in "corresponding employment." Current Labor regulations guarantee wages for the first week of work to domestic workers who are referred to agricultural employers through the interstate clearance system of the Employment Service, unless the employer informs the state employment service of a delay in the date of need at least nine days in advance. However, no provisions are made to provide the same guarantee to H-2A workers, resulting in a disparity of treatment and the potential for personal hardship for foreign workers.

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Agencies Could Handle Major Increase In
Program Workload With Additional Resources

In the unlikely event of a national farm labor shortage, Labor, INS, and state employment service officials told us they could handle an unanticipated, major, short-term increase in program workload. In the event of a significant, sustained national increase in the demand for agricultural guestworkers, however, Labor and INS officials agreed that they would need additional resources to effectively process the increased number of applications. Although the administration's Domestic Policy Council has met with officials from Labor, INS, Agriculture and State to address this issue, no proposals are currently available for review.

RECOMMENDATIONS

To improve the H-2A program's ability to meet the needs of agricultural employers while protecting the wages and working conditions of farmworkers, GAO is making recommendations to Congress, the Attorney General, and the Secretary of Labor. These recommended actions would improve service to employers by allowing them to request workers 45 days in advance of need rather than requiring 60-day notice. This shorter time period could be met by (1) removing INS from the petition approval process and (2) closer monitoring by Labor of its performance in meeting deadlines. The recommendations also maintain protection for domestic workers by keeping the same number of days allowed for recruitment of domestic workers prior to certification of a labor shortage and better protect H-2A workers by extending to them the same guarantee of first-week wages that now applies to domestic workers in corresponding employment and by revising the regulations regarding the three-quarters wage guarantee. Other recommendations would improve service to both employers and workers by providing better information about the program and consolidating enforcement responsibilities within Labor.

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AGENCY COMMENTS

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ABBREVIATIONS

BLS	Bureau of Labor Statistics
CLASS	Consular Lookout and Support System
ESA	Employment Standards Administration
ETA	Employment and Training Administration
FDA	Food and Drug Administration
INS	Immigration and Naturalization Service
IRCA	Immigration Reform and Control Act
MSPA	Migrant Agricultural and Seasonal Worker Protection Act
OSHA	Occupational Safety and Health Administration
RAW	Replenishment Agricultural Worker provisions of IRCA
SAW	Seasonal Agricultural Worker provisions of IRCA
SESA	State Employment Service Agency
USDA	U.S. Department of Agriculture
WHD	Wage and Hour Division
WICLO	West Indies Central Labour Organisation

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CHAPTER 1 INTRODUCTION

During congressional deliberations on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, concerns surfaced about whether there would be enough farmworkers to meet the needs of the agricultural industry after the Act's new constraints on foreign workers' ability to enter the country were implemented. The H-2A nonimmigrant guestworker program provides a way for U.S. agricultural employers to import nonimmigrant foreign workers to perform seasonal agricultural work on a temporary basis when domestic workers are unavailable.³ During fiscal year 1996, agricultural employers used the H-2A program to import about 15,000 workers, less than 1 percent of the agricultural field labor force.⁴

The Congress wanted to know if the H-2A guestworker program could provide a sufficient supply of agricultural workers in the event of a significant farm labor shortage. As a result, the 1996 law, included in the Omnibus Consolidated Appropriations Act, 1997, directed us to review various aspects of the H-2A program. These issues are included in two general objectives--(1) the likelihood of a widespread agricultural labor shortage and its impact on the need for nonimmigrant guestworkers and (2) the H-2A program's ability to meet the needs of agricultural employers while protecting domestic and foreign agricultural workers, both at present and should a significant number of nonimmigrant guestworkers be needed in the future.

³See 8 U.S.C. 1101(a)(15)(H)(ii)(a).

⁴Estimates of the size of the agricultural work force differ. As of July 1997, the Department of Agriculture reported about 1.4 million hired workers employed on farms. This includes both field and livestock workers hired directly and from contractors. The Commission on Agricultural Workers noted that a reasonable estimate would be 2.5 million workers in the U.S. performing farmwork at some time during the course of a year. Using its own and USDA data, the National Agricultural Workers Survey estimates that there are about 1.6 million field workers. See A Profile of U.S. Farmworkers: Demographics, Household Composition, Income and Use of Services. U.S. Department of Labor, April 1997, p. 31.

BACKGROUND

Throughout the 20th century, Congress has authorized numerous programs to allow U.S. agricultural employers to use foreign temporary guestworkers in the event of a labor shortage. For example, during World War I Congress authorized a temporary farm labor program to replace workers who were in the military; that program admitted almost 77,000 Mexicans to the United States. During a similar labor shortage created by World War II, Congress authorized a program to bring Mexican guestworkers called "braceros" to the United States. The Bracero program operated under a series of legislative authorizations from 1942 to 1964, bringing between 4 and 5 million workers to work on the nation's farms, primarily in the western part of the United States. While the Bracero program was still in effect, the Immigration and Nationality Act of 1952 (P.L. 82-144) authorized a guestworker program which included agricultural workers, known as "H-2" after the section of the law. Similar in structure to the Bracero program, the H-2 program was enacted as a permanent program and was primarily used by agricultural employers in the east to contract with Caribbean workers.

The Immigration Reform and Control Act of 1986 (IRCA) divided the H-2 program into two visa categories: the H-2A program for agricultural employers and the H-2B program for non-agricultural employers.⁵ The H-2A program allows employers to import foreign workers to "perform agricultural labor or services . . . of a temporary or seasonal nature." The purpose of the H-2A program is to ensure agricultural employers an adequate labor supply while also protecting the jobs, as well as the wages and working conditions, of domestic farmworkers. Under the program, agricultural employers who anticipate a shortage of domestic workers can request nonimmigrant alien workers.⁶ The Department of Justice authorizes the State Department to issue nonimmigrant visas for H-2A workers

⁵The H-2B program allowed employers to import foreign workers to perform nonagricultural temporary or seasonal service or labor.

⁶The procedures of the H-2A program are very similar to the operations of the agricultural provisions of the former H-2 program.

only after the Department of Labor certifies that a labor shortage exists and that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the importation of guestworkers. The Department of Agriculture conducts surveys and acts in an advisory role to Labor in Labor's determination of the minimum wage rates to be paid by employers of H-2A workers--the so called "adverse effect wage rate"--which are designed to mitigate any adverse effect their employment may have on domestic workers similarly employed.

Federal agencies are responsible for protecting both H-2A and domestic farmworkers from being exploited by agricultural employers. Labor's Wage and Hour Division (WHD), part of the Employment and Standards Administration (ESA), is responsible for ensuring that agricultural employers comply with the contractual obligations that apply to H-2A workers, including wages, benefits, and working conditions. Since agricultural employers must offer identical working conditions to willing domestic workers, WHD must also ensure compliance for domestic workers employed in "corresponding employment."

WHD also enforces additional protections afforded to domestic farmworkers by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which establishes basic protections for domestic migrant and seasonal farmworkers regarding wages, housing, and transportation.⁷ MSPA requires that employers and contractors of migrant farmworkers register with the federal government and notify prospective workers of the wages and working conditions before they are hired. MSPA also requires that workers be provided with housing that meets certain minimum standards for health and safety, and that they be transported in vehicles that meet certain standards for safety.

Labor's Occupational Safety and Health Administration (OSHA) is generally responsible for regulating workplace safety and health, including the establishment of mandatory standards for temporary labor camps and for permanent migrant farmworker housing

⁷Foreign farmworkers employed under the H-2A program are not covered by MSPA.

constructed on April 3, 1980 or later. OSHA issued a national field sanitation standard in 1987 which required agricultural employers to provide field laborers, at no cost, drinking water and toilet and handwashing facilities. In those states that operate their own safety and health programs under federal OSHA approval, the state OSHA enforces provisions of the field sanitation standard.⁸ In February 1997, Labor transferred responsibility for enforcing the field sanitation standard in states without state safety and health programs from OSHA to WHD.

The Immigration and Naturalization Service, in addition to admitting qualified guestworkers under the H-2A program, is responsible for protecting domestic workers by ensuring that (1) foreign workers do not enter the U.S. illegally and (2) U.S. employers do not hire illegal workers. Within INS, border management is largely the responsibility of the Border Patrol, while INS investigators throughout the country are responsible for identifying, apprehending, and expelling illegal workers, and for sanctioning employers who knowingly hire aliens who are not authorized to work in this country.

With the passage of IRCA in 1986, it became illegal for employers to knowingly hire people who are not authorized to work in the United States.⁹ All employees hired after November 6, 1986, regardless of citizenship, are required to show employers certain documents to establish both identity and employment eligibility. Employers, in turn, must verify the identity and employment eligibility of everyone they hire. Employers may not, however, discriminate against individuals on the basis of national origin or citizenship. INS's Worksite Enforcement program enforces this provision. INS investigations special agents and Border Patrol officers investigate employers, inspect eligibility verification,

⁸The Occupational Safety and Health Act of 1970 allows states to operate their own safety and health programs as long as they are determined by OSHA to be at least as effective as the federal OSHA program. Currently 25 states operate their own programs.

⁹Before IRCA was enacted, MSPA, which was enacted in 1983, prohibited migrant farmworker contractors from recruiting or employing illegal aliens.

determine the nature and degree of compliance, remove unauthorized aliens from the worksite, and can sanction employers who knowingly hire aliens unauthorized to work.

IRCA also established the Commission on Agricultural Workers to study the effects of the act on the agricultural industry, with special emphasis on perishable crop production.¹⁰ The Commission was also asked to review a number of more specific questions regarding IRCA's impact, including the adequacy of the supply of agricultural labor in the United States, whether certain geographic regions need special programs or provisions to meet their needs for agricultural labor, and the extent to which the labor difficulties experienced by agricultural employers are related to the lack of modern labor-management techniques. The Commission in its 1992 report concluded that no new supplementary foreign worker programs were warranted at that time.¹¹ However, it also urged the continuation of adequate monitoring and analysis of the farm labor market to facilitate quick action if future shortages develop. Labor conducts the National Agricultural Workers Survey (NAWS) on an annual basis, collecting detailed information on the characteristics and work patterns of agricultural workers, including job history data used to estimate fluctuations in farm labor supply.

The Immigration Act of 1990¹² mandated the U.S. Commission on Immigration Reform to examine and make recommendations regarding the implementation and impact of U.S. immigration policy. In 1995, the Commission found a considerable oversupply of farmworkers throughout the country with heavy unemployment even during peak harvest

¹⁰The Commission defined perishable crops as Fruit, Vegetable, and Horticultural Specialty Production: a classification that includes the production of most labor-intensive crops. Fruit includes berries, grapes, citrus fruits, deciduous tree fruits, avocados, bananas, coffee, dates, figs, olives, pineapples, tropical fruit, and tree nuts. Vegetable includes all vegetables and melons grown in the open. Horticultural specialties includes bedding plants, bulbs, florists' greens, flower and vegetable seeds, flowers, foliage, fruit stocks, nursery stock, ornamental plants, shrubberies, sod, mushrooms, and vegetables grown under cover.

¹¹Report of the Commission on Agricultural Workers, Commission on Agricultural Workers (Washington, D.C.: Nov. 1992).

¹²See PL 101-649, Sec. 141.

periods. As of September 1997, the Commission found that the agricultural labor market had not changed significantly. The Commission concluded that any new agricultural guestworker programs, particularly "those that seek to revisit the Bracero program," are not needed, concluding that such programs expand rural poverty, and "are incompatible with the values of democratic societies worldwide."¹³

Although neither commission recommended new programs, considerable congressional interest in farm labor issues continues. For example, in March 1996, the House rejected legislation that would have moved the H-2A program from Labor to the Justice Department and replaced the H-2A program's certification requirements with provisions permitting agricultural employers to attest or state that a labor shortage existed in their area and that employing temporary foreign guestworkers would not adversely affect domestic workers. This legislation would also have modified the program's housing provisions and withheld portions of guestworkers' wages to be paid upon the workers' return to the country of origin. The House also rejected another amendment that would have transferred the H-2A program to Justice, in addition to shortening filing and recruitment times and capping the program at 100,000 workers. Similar legislation has been submitted in both chambers of the current Congress, but no action had been taken as of December 31, 1997.

SCOPE AND METHODOLOGY

To address the objectives of this review, we collected documents and interviewed officials from the Departments of Labor, Justice, State, and Agriculture, as well as the Commission on Immigration Reform. We interviewed state health department and employment service officials in the three states using the most H-2A workers in fiscal year 1996--North Carolina, Virginia, and New York--and in the state producing the largest dollar value in agriculture - California. We also interviewed numerous agricultural employers and

¹³U.S. Commission on Immigration Reform, Legal Immigration: Setting Priorities. Washington, DC., 1995, p. 173.

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agricultural employer association representatives, H-2A and non-H-2A farmworkers, and farm labor advocates including unions. We analyzed data from the Department of Justice's Immigration and Naturalization Service (INS), Labor, and State, grower associations, state Employment Service offices, and selected state unemployment insurance programs. We also consulted with methodological and subject area experts, such as agricultural economists, immigration and labor experts, and policy analysts, and reviewed literature on immigration and agricultural labor markets. We conducted our review from April 1997 to August 1997 in accordance with generally accepted government auditing standards. (See app. II for more detailed information on our scope and methodology.)

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CHAPTER 2

NO WIDESPREAD AGRICULTURAL LABOR SHORTAGE IS ANTICIPATED

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 at this time, although localized labor shortages may exist for individual crops and in specific geographical areas. Although a significant percentage of the U.S. farm labor work force is not legally authorized to work in the United States, INS does not expect its enforcement activities to significantly reduce the aggregate supply of farmworkers.

LOCAL LABOR SHORTAGES ARE POSSIBLE,
BUT NO NATIONAL AGRICULTURAL
LABOR SHORTAGE APPEARS TO EXIST

Although the limitations of available data make the direct measurement of a labor shortage difficult, our analysis suggests, and many farm labor experts, government officials, grower and farm labor advocates agree, that a widespread farm labor shortage has not occurred in recent years and does not currently exist. However, the lack of evidence of a widespread farm labor shortage does not preclude the potential for, or existence of, localized shortages particular to specific crops or geographic areas. Many grower advocates, Agriculture Department officials, and farm labor experts told us that a large proportion of the current agricultural labor supply is composed of workers who are not authorized for employment, leaving many agricultural employers vulnerable to potential labor shortfalls in the event of a concentrated or targeted INS enforcement effort. Many individual growers we interviewed concurred with this assessment, expressing concerns about the prospect of localized shortages, resulting from intensified INS enforcement activities.

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Limited Data Make Measurement of Labor Shortages Difficult

The limited data available make it difficult to directly measure a market imbalance such as a farm labor shortage.¹⁴ For example, it has been suggested that the analysis of job vacancy data could help identify those occupations where shortages exist, but the Bureau of Labor Statistics (BLS) no longer collects this information. Although the U.S. Employment Service does collect information on the number of workers seeking and obtaining employment in agriculture through referrals at individual state employment services, an agency official estimates that such activity accounts for less than 5 percent of all job placements in agricultural field work nationally.¹⁵ Regardless, job vacancy data alone would be insufficient to determine whether a labor shortage existed; they would need to be considered in conjunction with other labor market indicators.¹⁶

¹⁴A shortage can be defined as a situation where the number of farm job vacancies persistently exceeds the number of farm labor job seekers at the current wage rate or with moderate wage increases. However, the assumptions made about the operation of a particular labor market will have implications for the concept of a farm labor shortage. For example, the simplest economic model of a labor market specifies that in the event of a shortage (an excess of jobs over available workers) market forces (rising wage rates) should work to eliminate that shortage. However, many economists believe that labor markets do not behave the same way as product (e.g. shirts or fish) markets, and thus must be analyzed differently. (See Robert M. Solow, The Labor Market as a Social Institution, Cambridge, Mass., Basil Blackwell, 1990.) A more dynamic model of labor market adjustment would acknowledge that employers may react in a variety of ways, not only possibly by increasing wages but also by increasing recruitment efforts or reducing production. An analysis of such dynamics can explain labor shortages if adjustment speed is slow or if there are barriers to adjustment. (See Malcolm S. Cohen, Labor Shortages As America Approaches the Twenty-first Century, Ann Arbor, Mich, University of Michigan Press, 1996.)

¹⁵Between June 1995 and July 1996, the U.S. Employment Service received 188,139 active applications at its state offices from workers classified as migrant and seasonal farmworkers. Of this number, 91,549 were referred to agricultural employment, of which 64,847 were placed into employment. See The Annual Report of the U.S. Employment Service, Program Year 1995, Washington D.C., U.S. Department of Labor, p.E-3.

¹⁶For example, if an occupation had a high vacancy rate and a high unemployment rate it could mean that insufficient information about the occupation (e.g. wage rates, location of employment, skill level) was preventing workers and employers from being matched. It could mean that there were rigidities in geographic mobility (e.g. employment was located in

Other labor market indicators are consistent with the view that a widespread national farm labor shortage does not currently exist. For example, experts agree that sustained high unemployment rates generally signify that surplus labor is available and that persistently low unemployment rates can indicate a labor shortage. Although unemployment rates are available for states and counties, BLS does not construct unemployment rates for the agricultural industry for counties or all states, or for occupations such as agricultural field worker, so this connection in agriculture cannot be verified directly. In any case, employers could have difficulties filling positions for a particular occupation even in the presence of a high unemployment rate.¹⁷

Rapidly rising hourly wages are also consistent with a labor shortage and some hourly and piece rate wage data are available for agricultural field workers from the Department of Agriculture and other sources. However, rising hourly wage rates may not always signify a labor shortage if, for example, workers are paid by piece rate, as is fairly common in the production of fruits, vegetables and horticulture.¹⁸

inaccessible areas). See Cohen, Labor Shortages As America Approaches The Twenty-first the 21st Century, p.12.

¹⁷For example, if an employer had to locate and interview many workers for a particular occupation before finding one with the appropriate skills and if workers could not easily search for this job, an occupational labor shortage could exist even with an area with an unemployment rate significantly above zero.

¹⁸According to traditional economic theory, if the demand for labor exceeds supply, wages will be bid up by employers, and thus, rapidly rising wages are consistent with a labor shortage. However, if, for example, changes in production techniques or worker effort result in the individual employee becoming more productive, hourly rates could rise without the presence of a labor shortage even if farmworkers are paid under constant or falling piece rates. Piece rate payment is fairly common among agricultural workers. NAWS estimated that for fiscal year 1995, about 24 percent of all field workers, who work primarily in fruits and vegetables, received a piece rate form of compensation for at least part of their earnings.

Ample Supplies of Farm Labor Appear
to Be Available in Most Areas

Most farm labor experts, government officials, grower and labor advocates we interviewed agree with our conclusion that agricultural employers in most of the country have had adequate supplies of labor for many years and continue to do so. Our analysis is based on: 1) the large number of illegal immigrant farmworkers granted amnesty in the 1980s; 2) persistently high unemployment rates in key agricultural areas; 3) state and federal designations of agricultural areas as labor surplus areas; 4) stagnant or declining wage rates as adjusted for inflation; and 5) continued investments by growers in agricultural production.

Farmworker amnesty provisions in IRCA resulted in the legalization of large numbers of farmworkers, ensuring agricultural employers adequate supplies of farm labor during the mid to late 1980s. Beginning fiscal June, 1987, the Special Agricultural Worker (SAW) provisions of IRCA permitted farmworkers with 90 or more days of qualifying work in agriculture to apply for legal status. The SAW program received nearly 1.3 million applications during its first 18 months of operation, over half of them in California alone, resulting in the legalization of a significant portion of the U.S. agricultural labor supply.¹⁹ Available data suggest that SAW workers have comprised a significant, albeit declining, proportion of the U.S. agricultural labor market since the late 1980s, falling from 33 percent of all farmworkers in fiscal year 1989 to 19 percent in fiscal year 1995.²⁰

¹⁹IRCA provided agricultural employers additional protection from labor shortages through its Replenishment Agricultural Worker (RAW) provisions, which would have permitted the legal importation of foreign workers if Labor and Agriculture had determined that a labor shortage existed. The provision, in place for four fiscal years beginning in FY 1990 and expired in FY 1994, was never triggered, with both departments consistently agreeing that domestic labor supplies were adequate to meet agricultural employers' demands for such workers. The Commission on Agricultural Workers also agreed with this assessment reporting that "there [was] an oversupply of workers in most agricultural labor markets." Report on the Commission on Agricultural Workers, Washington D.C. November 1992. U.S. GPO.

²⁰See A Profile of U.S. Farm Workers: Demographics, Household Composition, Income and Use of Services, U.S. Department of Labor, April 1997, p 36.

Many agricultural areas exhibit persistently high rates of unemployment over the last few years, suggesting that existing labor supplies were and continue to be more than adequate to meet agricultural employers' needs. Our analysis of recent annual and monthly unemployment rates of 20 large agricultural counties--those that contain large amounts of fruit, tree nut, and vegetable production in dollar value--is consistent with this view.²¹ Of these 20 counties, 13 maintained annual double digit unemployment rates throughout 1994 - 1996. (For more detailed information, see table III.1, app. III.) As of June 1997, 11 counties exhibited monthly unemployment rates double the national average of 5.2 percent and 15 of the 20 counties displayed rates at least 2 percentage points higher than the national rate. Only two of the counties had unemployment rates below the June 1997 national average.²²

State responses to changes mandated by the recently enacted federal welfare reform legislation also suggest that many agricultural areas may currently be experiencing farm labor surpluses rather than shortages. Section 6(o) of the Food Stamp Act, as added by section 824 of the Personal Responsibility and Work Opportunity Reconciliation Act, provides that an individual shall be ineligible for the program if during the preceding 36 month period, he or she received benefits for 3 months while not working or participating in a work program for at least 20 hours per week. However, in an effort not to penalize food stamp recipients who reside in areas with limited employment opportunities, the Secretary of Agriculture may waive these provisions for any group of individuals in a requesting state if the Secretary determines that the area in which the individual resides is essentially a labor surplus area--has an unemployment rate of over 10 percent or does not

²¹As of 1992, the latest year for which detailed county data were available from the Department of Agriculture, these 20 counties accounted for over 50 percent of the dollar value of all fruit and tree nut production in the U.S., 48 percent of the dollar value of all vegetables and about 16 percent of the total national dollar value of nursery and greenhouse production.

²²Agriculture is a seasonal industry so it is possible that some areas could have low unemployment rates during the labor intensive part of the year such as during harvest time, but still show high annual rates of joblessness. However, our analysis of monthly unemployment rates during this period shows high rates (above 7%) throughout the period January 1994 - June 1997 for most of the 20 high agricultural counties.

have sufficient numbers of jobs to provide employment for the individuals. As of late July 1997, 42 states had applied for and received waivers from the Secretary of Agriculture for counties and other jurisdictions, including many agricultural areas. All of the 20 large agricultural counties we analyzed received at least partial waivers from Agriculture and 18 received waivers covering their entire counties.²³ (For more detailed information, see table III.2, app. III.)

Cities, counties and other jurisdictions also can be designated annually by Labor's Employment Service as "labor surplus areas." A labor surplus area must have an average unemployment rate at least 20 percent above the average national unemployment rate during the previous 2 calendar years or a rate of 10 percent or more during the previous 2 calendar years. Labor may also designate an area as surplus if it had unemployment rates of at least 7.1 percent for each of the three most recent months or projected unemployment of at least 7.1 percent for each of the next 12 months or has documentation that this has already occurred. Such designation confers preference in bidding on federal procurement contracts for firms that will locate contract work in those areas. As of August 1997, Labor had designated all of 13 and parts of 5 others of the 20 large agricultural counties we analyzed as labor surplus areas. (See table III.2, app. III.)

Some experts cite evidence that agricultural wage rates adjusted for inflation (real wage rates) have declined in recent years, a trend that is also more indicative of a labor surplus than a labor shortage. Our analysis of agricultural wage data shows declining real wage rates. Since the late 1980s, annual average hourly wages for agricultural workers have been flat or declined in real terms (See table III.3, app. III.) and real annual average hourly wage rates for piece workers fell. (See table III.4, app. III.)²⁴ Declining or flat real wages

²³California's Santa Barbara and San Diego counties received partial waivers. Of the 20 counties, 13 received full waivers under the 10 percent unemployment rate provision while 7 received full or partial waivers under the "insufficient jobs" provisions.

²⁴It should also be noted that for the period 1989 - 95, Agriculture's National Agricultural Statistical Service (NASS) data on hourly farm wages showed a smaller decline in real terms than that exhibited by the BLS average hourly wage rate for all nonagricultural workers-- 3.6%

were also occurring as total employment in agriculture was falling by 10 percent between 1987 and 1996 (table III.4, app III), which also suggests the presence of farm labor surpluses rather than shortages.²⁵

One expert also noted that growers appear to continue to be investing in new farm production that will not bring returns for a number of years, suggesting a long term confidence that agricultural labor would be available. Consistent with this belief, between 1989 and 1995, the last year for which data are available, acreage for fruits and tree nuts, vegetables and nurseries, (the more labor intensive agricultural commodities), has increased by over 30 percent, with the dollar value of production and total production tonnage also rising by 52 percent and 9.6 percent, respectively. (See table III.5, app III.)

Localized Labor Shortages May Exist
In Individual Crops And For
Specific Geographical Areas

The lack of evidence of widespread farm labor shortages does not preclude the existence or potential for more localized shortages in a specific crop or geographic area. Both growers and labor advocates described current difficulties in obtaining workers and concerns about future difficulties in certain areas. For example, both growers and farm labor advocates agreed that it was increasingly difficult to get domestic labor to work in

compared to 4.5%. However, the NAWS data on hourly wage rates, which, unlike NASS or BLS data, is based on the survey responses of workers rather than employers, showed an 11.5% decline over the same period. Some experts argue that the decline in real farm wages detected by both NASS and NAWS would be even greater if not for an increase in the minimum wage enacted during this period.

²⁵This trend should be interpreted with caution because it does not include agricultural employment obtained through farm labor contractors and there is considerable turnover in many agricultural labor markets. However, available evidence suggests, at a minimum, considerable underemployment in agriculture. NAWS data for 1995 show that, on a monthly basis, over 40 percent of all crop workers were not employed in agriculture over the entire year, even during peak periods. See A Profile of U.S. Farm Workers: Demographic, Household Composition, Income and Use of Services, U.S. Department of Labor, April 1997, p. 36.

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tobacco harvesting in areas of North Carolina, although they disagreed on the cause of this development. Similarly, regional Labor officials suggested that it was likely that the geographic inaccessibility of some particularly remote agricultural areas such as in Nevada contribute to a long-time difficulty that they believed growers in those areas have had in obtaining domestic workers. Some growers, grower advocates, and agriculture department officials also expressed concern that the large number of workers not authorized to work left themselves or agricultural employers in their areas vulnerable to INS enforcement actions that could prove financially devastating to farm operations.

Opinions differ regarding solutions to localized labor shortages. Farm labor advocates and some government officials say that the supply of domestic labor is generally sufficient to meet the needs of U.S. agriculture. For example, some of them suggested that the implementation of the work requirements of the recent welfare reform legislation could serve as a potential source of labor for agricultural employers in some areas of the country. In other areas, they believe, many workers with farm labor experience could be drawn back to agricultural employment with fairly modest wage increases that would have little effect on consumer prices or U.S. agricultural competitiveness.²⁶ Some employers we interviewed, however, think it unlikely that many former welfare recipients will have the ability to be suitable farmworkers, particularly single mothers with young children requiring daycare. Transportation from urban population centers to rural work sites was also cited as an impediment. Regarding wages, some employers were convinced that they could not be competitive if they raised wages.

²⁶Changes in field worker wages appear to have a fairly small impact on consumer produce prices. For example, one estimate found that a 1 percent increase in real farm worker wages would increase the real costs of fruits and vegetables by about 0.4 percent. The study concluded that the long term effect on retail prices of fruits and vegetables of removing all illegal farmworkers would be about 3 percent, with a 6 percent price increase in the short term. See How Much is That Tomato in the Window? Retail Produce Prices Without Illegal Farmworkers. Wallace Huffman and Alan McCunn, Center For Immigration Studies, February 1996. However, the study also assumed that such unauthorized workers accounted for only 17 percent of the agricultural workforce, while current estimates from NAWS are 37 percent.

INS ENFORCEMENT EFFORTS ARE NOT LIKELY TO SIGNIFICANTLY REDUCE THE AVAILABILITY OF AGRICULTURAL LABOR

Although many farmworkers are not authorized to work in this country, INS officials do not expect their enforcement efforts to significantly reduce the availability of agricultural labor, either nationally or regionally. Law-abiding employers, in particular, are unlikely to be targeted for enforcement efforts, given INS's focus on apprehending criminal aliens and identifying employers who have engaged in criminal acts. Current enforcement efforts in agriculture are a small proportion of INS' total enforcement operations and result in few apprehensions. Conducting enforcement operations in agriculture is particularly resource-intensive. Enforcement officials in INS' Office of Investigations and Border Patrol around the country told us they do not plan to redirect their efforts from other enforcement activities to agriculture and do not expect to have any general impact on farmers' ability to harvest crops. They agreed, however, that a limited number of individual agricultural employers could be affected. In addition, efforts to increase employers' ability to identify fraudulent documents are not expected to have an immediate impact.

Many Farmworkers Are Not Authorized For Employment

Many grower advocates, Agriculture Department officials and experts told us that a large and increasing proportion of the existing agricultural workforce is not authorized to work. Data from the NAWS and our analysis of available data support this conclusion. The most recent NAWS survey found that 37 percent of all field workers in 1995 were ineligible for employment--up from 7 percent in 1989.²⁷ We estimate that there are approximately 600,000 farmworkers in the United States who lack legal authorization to

²⁷During the period, many of the workers legalized under the SAW program left agriculture and were replaced by workers who were not authorized to work. Of the 18 percent of all farmworkers who were in their first year of farm work during fiscal year 1995, 70 percent were unauthorized foreigners. See A Profile of U.S. Farmworkers: Demographics, Household Composition, Income and Use of Services. U.S. Department of Labor, April 1997.

work, using the NAWS estimate of 37 percent of an agricultural field labor force of 1.6 million.

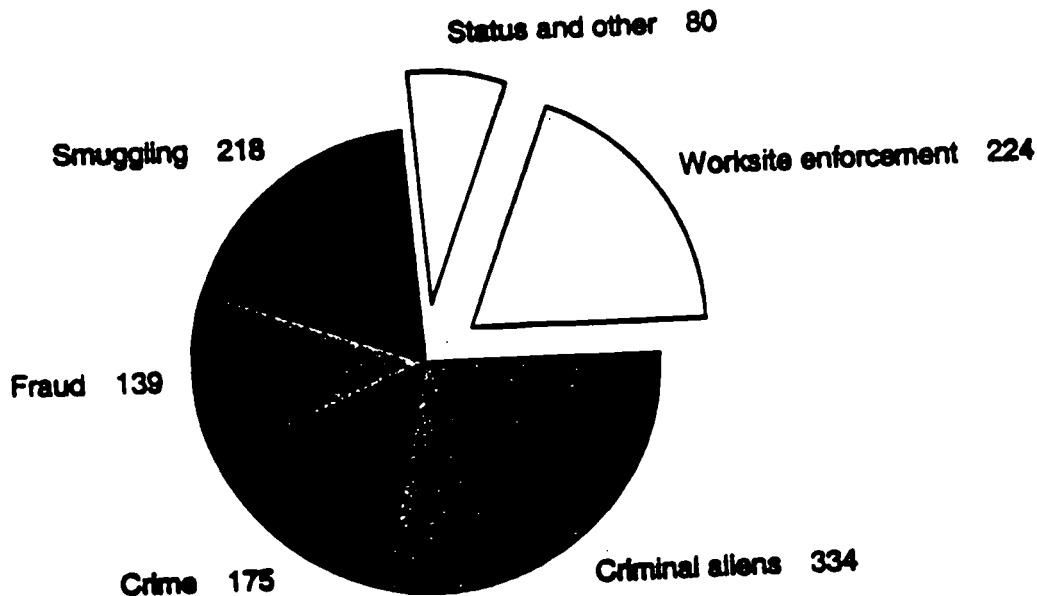
Few INS Enforcement Resources
Are Directed At Worksite Enforcement

INS enforcement efforts are directed at preventing the illegal entry of persons and identifying and apprehending illegal aliens within the United States. The majority of INS enforcement resources are devoted to preventing illegal entry through the activities of the Border Patrol and the Inspections program. The Investigations program, which consumed fewer than one-fifth of INS enforcement resources, has the primary responsibility for identifying and apprehending those illegally in the United States. The Investigations program is also responsible for worksite enforcement which includes enforcing the IRCA requirements that employers hire only U.S. citizens or authorized aliens and verify their employment eligibility. Worksite enforcement consumed less than 4 percent of INS enforcement activities in fiscal year 1996. As shown in figure 2.1, most investigation resources are focused on identifying aliens who have committed criminal acts, including violent criminal alien gang and drug-related activity and detection and deterrence of fraud and smuggling. In fiscal year 1996, 304 staff years were devoted to non-criminal investigations, including worksite enforcement for all industries, or an average of about 6 INS staff years per state.²⁸ See app. V for the distribution of enforcement actions by INS region.

²⁸Of the 304 staff years, 224 were devoted to worksite enforcement, the remaining 80 were devoted primarily to investigations and to apprehending "status" violations, e.g., persons who enter the country without going through border inspection but are not suspected of criminal behavior.

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Figure 2.1: INS Staff Years By Type of Investigation. (fiscal year 1996)



Few INS Enforcement Resources Are
Directed Towards Agricultural Employers,
and Few Agricultural Workers are Arrested

INS officials told us that relatively few worksite enforcement resources are assigned to agriculture because almost all of their investigations are complaint-driven and they receive relatively few complaints from rural areas. Only about 5 percent of the 4,600 investigations completed in fiscal year 1996 involved employers in agricultural production or services. Further, fewer than 700 workers, about 4 percent of all employees at those worksites, were arrested during INS' enforcement operations at these agricultural

worksites. Even these numbers overstate the potential impact of INS activity on the need for H-2A workers because about 40 percent of these "agricultural" employers appear to be employed in industries that are not defined as agricultural under H-2A--landscapers, lawn maintenance firms, veterinarians, and kennels.

INS officials told us that these totals represent a reduction rather than an increase in INS enforcement efforts directed at agricultural employers. Until 1995, the Border Patrol played a significant role in worksite enforcement on farms through "farm and ranch checks." In fiscal year 1995, most of these resources were refocused on explicit border control activities. This redirection of resources sharply reduced Border Patrol involvement in worksite enforcement--from approximately 30 percent of the total worksite enforcement resources to less than 5 percent. Border Patrol officials we talked to universally stated that, with current resources, they could have no significant impact on the agricultural workforce.

Law-Abiding Employers Unlikely to Be Targeted for Enforcement Efforts

Officials told us that agricultural employers who comply with the law are not likely to be targeted for enforcement efforts, given the need to focus on apprehending aliens and identifying employers who have engaged in criminal acts.²⁹ Law-abiding agricultural employers are not a top priority for INS targeted inspections. An annual National Targeting Plan is developed each year to target worksite inspections in response to complaints or leads. The FY97 plan identifies 15 industries in which large numbers of illegal aliens have been employed, 2 of which hire farmworkers--"general farm and field crops" and "farm labor and management." INS focuses primarily on employers in these

²⁹Law-abiding employers may hire workers not legally authorized to work in the United States because the law specifies that the employer is in violation of the law only to the extent that they know that the worker is illegal. Employers who obtain the required documentation from workers may unknowingly hire illegal workers if the worker provides fraudulent documents.

15 industries who are "abusive"--that is, employers who are known to have intentionally hired illegal workers; to have been involved in criminal violations like alien smuggling and harboring; to be repeat offenders; or to have subjected their employees to unlawfully substandard working conditions, housing, or wages. INS' secondary focus is on abusive employers in industries other than the 15 with histories of illegal immigration activity.

The fiscal year 1997 plan for worksite enforcement was based on a lead- or complaint-driven approach, targeting employers when there is a concrete allegation or evidence of abuse or violations of IRCA. Major violators are employers in industries or locations with a history of reliance upon unauthorized labor who employ unauthorized aliens and violate criminal statutes, violate other regulatory requirements, or continually depend upon unauthorized labor. Officials told us that this emphasis on major violations can result in some investigations of specific farm operations, such as when there are allegations of farmworkers "dealing dope," but that more often the result is that more urban industries, such as garment manufacturing, become targets for investigations.

Removing Illegal Aliens From Domestic Farm Labor Force Is Expensive and Difficult

INS enforcement officials we spoke with noted that logistical impediments make it difficult to apprehend and remove illegal aliens in general and that agricultural worksites present unique enforcement difficulties. These difficulties include the distance many agricultural worksites are from INS offices, the unusually large number of people necessary to conduct an enforcement operation on a farm, the need to obtain the necessary search warrants, the lack of perimeter fencing, and the considerable costs of processing and transporting apprehended illegal aliens.

Planning and conducting a major enforcement operation requires considerable human resources. To obtain enough personnel to conduct an operation, INS must often secure the assistance of other law enforcement agencies. For example, an enforcement operation we

observed at a poultry processing facility involved 26 of the INS district's special agents, or almost 75 percent of them, as well as about 40 additional personnel from the state police department, the county sheriff's department, the city police force, a multiagency drug task force, and the U.S. Secret Service. Most agricultural worksites are located in rural areas, often at great distances from the field offices of the enforcement agencies, making the logistics of agricultural enforcement more time-consuming and costly than those conducted at more urban nonagricultural worksites. In one district, agents said that they were discouraged by agency management from pursuing worksite enforcement investigations that would involve travel costs and instead encouraged to pursue cases in the local metropolitan area.

INS officers face certain judicial requirements which can also complicate enforcement efforts at agricultural workplaces. For example, current law requires INS officers to have either the employer's permission or a search warrant before entering a farm or other outdoor agricultural operation to interrogate a person about his or her right to be in the United States. Enforcement agents told us that as farms become larger and more spread out workers may be moved from one field to another during the course of a day and that workers could be employed on fields in multiple counties for the same employer. This situation can require the procurement of multiple search warrants. In addition, according to INS agents, an operation in an open field would require more personnel to effectively secure the area and would probably involve chasing the "runners," many of whom would likely escape.

Once suspected illegal aliens are apprehended, they may be sent to a detention center for a hearing or, if they are offered and accept voluntary departure, transported back to their home country. If an apprehended worker demands a hearing, INS district offices incur additional detention costs like food and housing. Depending on where the apprehension takes place, transporting the worker can be costly. An assistant INS district director for investigations in the Southeast told us that he uses \$250 per person as a rule of thumb for estimating the cost of food, housing, and transportation, which does not include the

salaries of any of the law enforcement personnel involved. Even if this assistant district director could apprehend several thousand illegal workers, his budget could not cover the transportation costs of voluntary departures. Another assistant district director from a midwestern district stated that his office's expenses are even higher: when he apprehends illegal Mexican workers, his office has to pay the airfare to the border for those who agree to depart voluntarily.

Individual Agricultural Employers Can Be
Affected by INS Enforcement Actions Despite
Complying With Legal Requirements.

Although most agricultural employers would not be targeted by INS for an enforcement action, a limited number of individual employers could be significantly affected in spite of their efforts to comply with legal requirements. Both individual employers and INS officials told us that high-quality fraudulent documents can be obtained so readily that it is virtually impossible for employers who are assiduously obeying the law to be certain that they are not hiring illegally documented workers. Agricultural employers told us that even though they suspected many of their employees were illegal, the employees possessed the required documents, and the employers had to hire them since they had no basis to assert that the documents were fraudulent. Further, employers said they were afraid of being sued for discrimination if they attempted to obtain further verification.

Efforts to Increase Employers'
Ability to Identify Fraudulent Documents
Will Have No Immediate Impact

Although efforts are underway to improve employers' ability to identify fraudulent documents, these efforts will have no significant impact on the availability of illegally documented farmworkers in the near future. In 1991 President Bush issued Executive Order 12781 authorizing demonstration projects of an employment verification system.

INS established the Employment Verification Pilot, a voluntary test program that allows employers to electronically verify the employment eligibility of newly hired noncitizen workers. INS told us that the program does little currently to assist employers because documents are verified by INS only if the individual worker identifies himself or herself as an alien. INS has plans for additional pilot programs, all of which are small in scope and have limitations similar to the existing programs.

Another effort to assist employers in screening unauthorized workers for employment is the development of a model counterfeit-proof social security card. Such a card would permit quicker and more accurate identification of those job applicants and employees who are unauthorized to work. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 directed the Commissioner of the Social Security Administration to develop a prototype of a counterfeit-resistant social security card, but no actions have been taken yet.

The degree to which these initiatives will affect the number of unauthorized workers and the supply of agricultural workers in general is unknown, and in any case, their effect is expected to be gradual. These efforts are unlikely to be implemented in the near future and would require additional legislative changes. Both efforts are pilot projects at the present time; the verification pilot has only been conducted on a limited basis. Even if both efforts prove successful, they would have to be authorized as permanent programs. Furthermore, the verification program would require an additional statutory change requiring employers to verify, on their own, the accuracy of the information on documents submitted by job applicants and employees.³⁰

³⁰Current law requires that the employer obtain a copy of the employee's documentation that he or she is a U.S. citizen or otherwise authorized to work and examine it to ensure that it is not an obvious forgery. However, the employer is not required to ensure that the information contained on the document is accurate.

CHAPTER 3

H-2A PROGRAM CAN BE IMPROVED TO BETTER MEET THE NEEDS OF AGRICULTURAL EMPLOYERS AND WORKERS

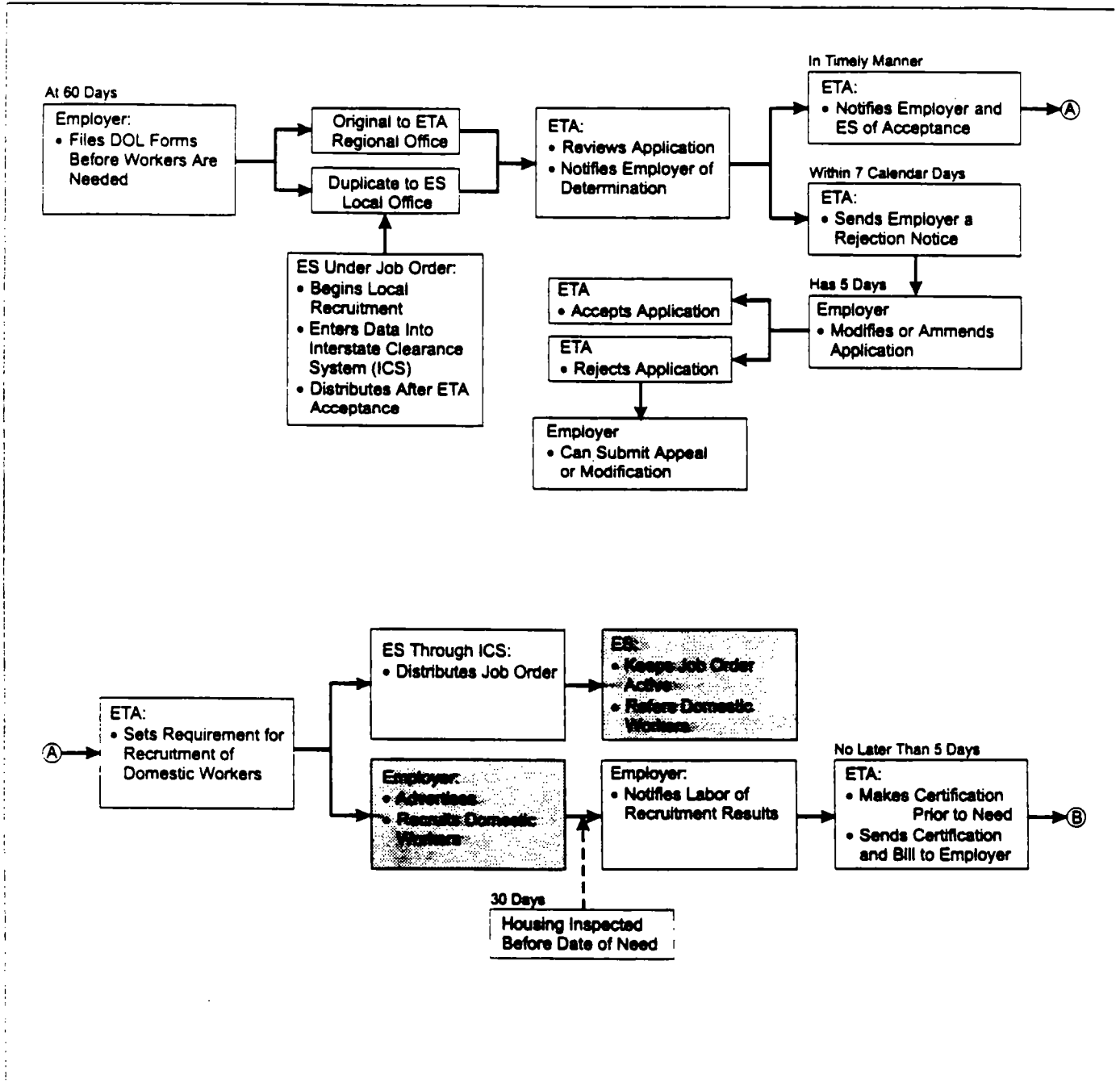
Agricultural employers currently receive labor certification for almost all workers they request through the H-2A program on both a regular and an emergency basis. Although Labor does not generally track timeliness, our analysis indicates that both Labor and employers have difficulty meeting deadlines for processing and filing applications. INS petition approval procedures also add time and cost to the program without adding significant value to the process. In addition, the multiple agencies and levels of government involved in the H-2A program may result in redundant oversight and confusion for program participants. Certain program requirements also do not appear to be accomplishing their intended purpose. For example, the requirement that agricultural employers actively recruit domestic workers before bringing in guestworkers is often inadequate to protect employment opportunities for U.S. workers. Violations of provisions to guarantee that foreign guestworkers are paid for at least three-quarters of the agreed-upon contract period are also difficult to identify and enforce, potentially reducing incentives for H-2A workers to remain with the employer for the contract period. In addition, in spite of regulations requiring that foreign and domestic workers receive equivalent treatment, domestic workers have guaranteed wages not available to foreign workers.

STATUTORY AND REGULATORY DEADLINES FOR H-2A PROCESS

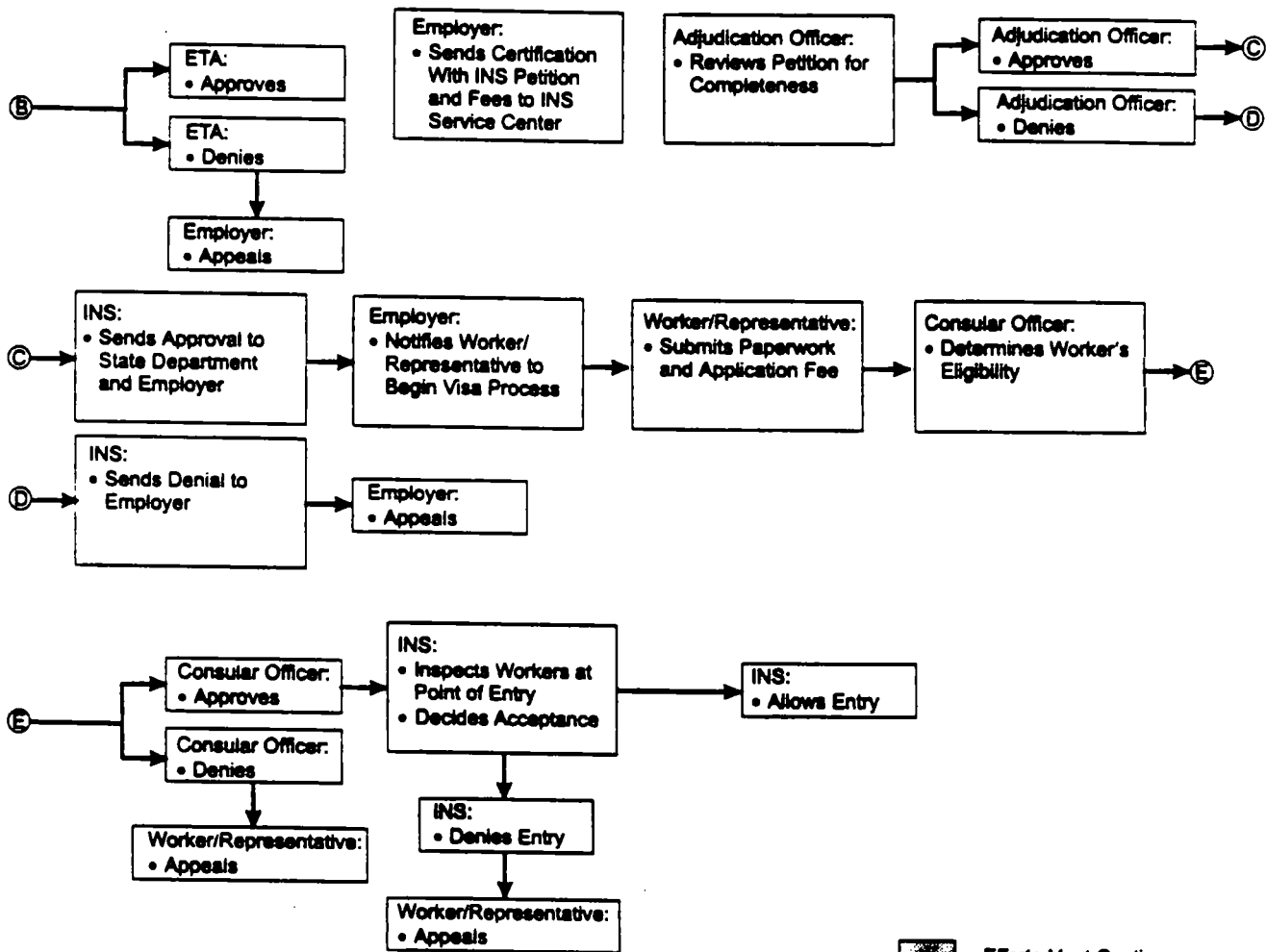
To help ensure a balance between meeting the needs of agricultural employers for an adequate supply of seasonal labor and protecting the jobs, wages, and working conditions of domestic farmworkers, the H-2A application process requires the employer to process applications through multiple agencies as shown in figure 3.1.

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Figure 3.1 H-2A Process for Obtaining Permission to Import H-2A Workers



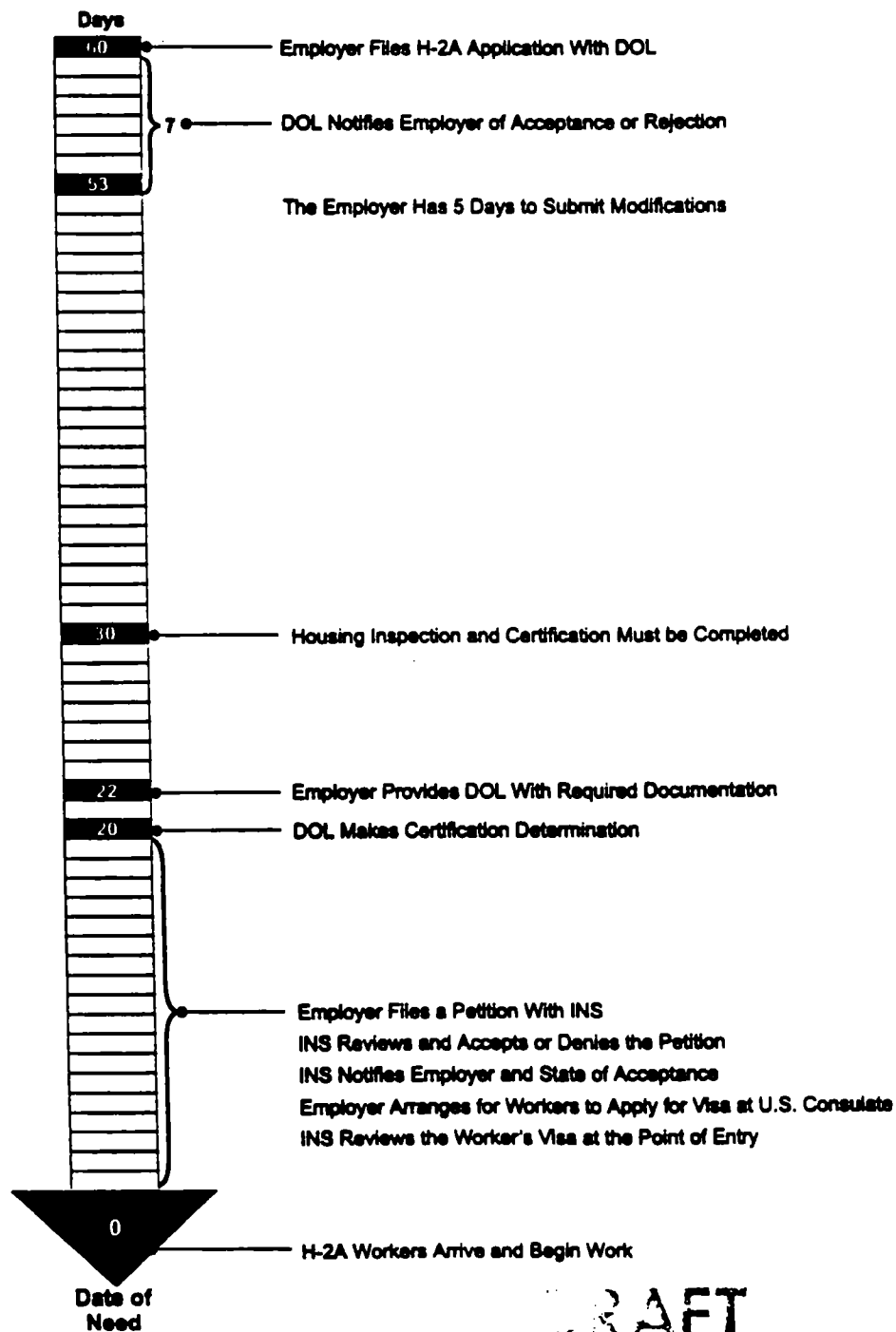
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Efforts Must Continue
Until 50% of Contract
Period Has Elapsed

The H-2A process also sets very specific time requirements that the employer, Labor and state agencies must meet, as shown in figure 3.2.

Figure 3.2: Time Requirements for Applying for Agricultural Workers Under the H-2A Program



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To allow sufficient time to recruit domestic workers and inspect housing, an employer wishing to participate in the H-2A program must first submit an application to one of ETA's 10 regional offices, with a copy to the local state employment service agency (SESA), at least 60 days before the workers are needed. The application includes a request for alien employment certification and a job offer to domestic workers, which the SESA will use in attempting to locate domestic workers for the job. Labor may waive the 60-day filing requirement in emergency situations if the employer can demonstrate that "good and substantial cause exists," such as unforeseen changes in market conditions or unexpected unavailability of previously identified domestic workers.

To allow the employer an opportunity to amend the application and initiate mandatory "positive recruitment" of domestic farmworkers, ETA is required by law to make a determination as to whether or not the application will be accepted and notify the employer if it is to be rejected within 7 days of receipt. If the application is rejected the employer has 5 days to submit amendments. Labor must include in the letter of acceptance specific steps the employer must take to actively recruit domestic workers for the job openings before the certification is issued. To provide sufficient time for the employer to petition INS and the workers to obtain visas, the regional administrator must decide to grant or deny certification, in whole or in part, no later than 20 calendar days before the date of need, provided that the employer has provided Labor with documentary evidence of meeting the certification criteria. (See figure 3.2) For example, at least 22 days prior to the date of need employers must provide ETA with evidence of their efforts to recruit domestic workers and evidence that prospective workers are covered for work-related injury or illness.

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COMPLETING CERTIFICATION AND VISA PROCESSING BY DATE OF NEED MAY NOT PROVIDE WORKERS WHEN NEEDED BY EMPLOYERS

The date of need employers request on the H-2A application may differ from the actual date the workers are needed. Agricultural employers, their advocates, and agency officials told us that it was extremely difficult to accurately estimate the date workers would be needed sixty days in advance of the harvest. Employers stated that agricultural work is too dependent on the vagaries of weather to predict when workers will be needed 60 days in advance. This problem is particularly acute for crops that have a very short harvest time such as cherries where the entire harvest season lasts as little as three to five days.

EMPLOYERS RECEIVE LABOR CERTIFICATION FOR ALMOST ALL THE WORKERS THEY REQUEST

Employers are certified for almost all H-2A openings they request, regardless of the skill level required.³¹ Specifically, Labor's Employment and Training Administration (ETA) issued certifications for 99 percent of the 3,700 applications filed nationwide in fiscal year 1996 and the first 9 months of 1997. Although 3 percent of all applications were initially rejected, most of these were accepted after employers amended their applications. In addition, ETA certified 99 percent of the 40,000 job openings requested on these applications during this period. These applications simply request a certain number of job openings, and do not identify individual job applicants. (See table IV.2, app IV, for detailed information about geographic distribution and results of applications filed in fiscal years 1994-97.) Because employers do not fill all of the job openings Labor certifies, the number of job openings is higher than the number of H-2A visas issued by the State

³¹The skill levels of H-2A workers vary with their occupation. Most H-2A workers are field workers employed in the harvesting of crops, which has limited skill requirements. However, some H-2A workers are engaged in higher skilled occupations such as sheepherding and operating combines. Applications for high-skilled occupations were approved as often as those for low-skilled.

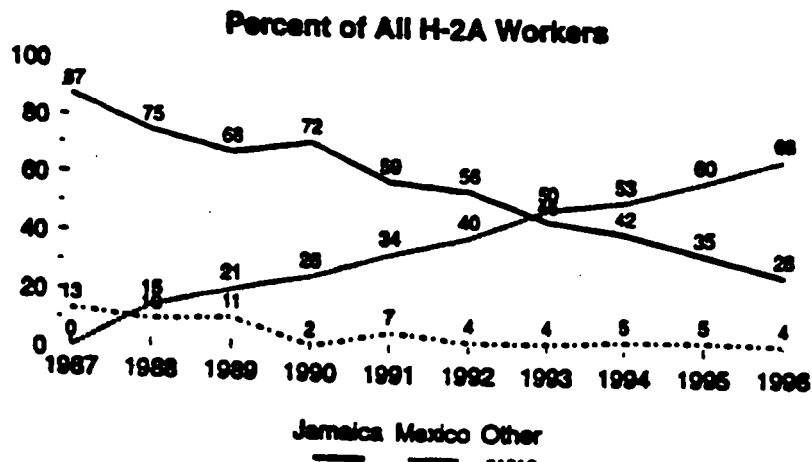
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Department. For example, although 20,000 job openings were certified for fiscal year 1996, about 15,000 H-2A workers were actually employed.

In fiscal year 1996, 68 percent of all H-2A workers came from Mexico while 28 percent of all H-2A workers came from Jamaica. As shown in figure 3.3, this represents a significant shift over the last 10 years as the sugarcane industry which was the predominate employer of H-2A workers until the early 1990's, has mechanized and therefore no longer needs low-wage workers. (See app. IV.1 for more detailed information about the country of origin for H-2A workers and other characteristics of H-2A workers.)

Figure 3.3: Country of Origin for H-2A Workers Has Shifted From Jamaica to Mexico, 1987-1996



LABOR OFTEN ISSUES CERTIFICATIONS AFTER THE DATE OF NEED

Although Labor does not generally track timeliness, our analysis showed that a large number of Labor's certifications are issued too late to ensure that employers will be able to get workers by the specified date of need. In fiscal year 1996, one-third of all Labor's

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certifications (588 certifications) were issued after the statutory deadline of 20 days prior to the date of need.³² For 43 of these applications, the certification was not issued until after the specified date of need. One cause of late certifications is employers' failure to file applications at least 60 days prior to the date of need, as required. For example, in fiscal year 1996, employers filed 1,769 applications with Labor. Of these, 737, or 42 percent, were filed with fewer than 60 days remaining to the date of need.³³

Even when the employer files a timely application, Labor still sometimes misses the certification deadline. In fact, Labor missed the certification deadline for 40 percent of the 1,030 applications submitted at least 60 days prior to the date of need by agricultural employers. Reasons for missing the certification deadline include (1) Labor fails to accept or reject the application in a timely manner, delaying the beginning of positive recruitment, (2) the employer fails to provide required documentation in a timely manner, and (3) the application was filed on an emergency basis, which, if accepted, would waive the 60 day filing requirement.

Labor Lacks Management Data Necessary
to Determine and Correct Causes of Failure to Comply
With Statutory and Regulatory Time Requirements

Labor does not collect or analyze information that would allow it to determine either the extent or causes of its failure to meet regulatory and statutory deadlines. Labor's guidelines recommend that regional offices keep a log of H-2A labor certification activity, including the dates (1) workers are needed, (2) applications are accepted or rejected, and (3) certification is expected and actually takes place. However, Labor cannot provide information on the extent to which either Labor or the employers meet these time frames

³²For 60 applications we were unable to determine the timeliness of submission because information was missing on either the date of need or the certification date.

³³In two cases there was no information as to when Labor received the application.

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because not all regions collect and maintain this information. Regional Labor staff responsible for overseeing the H-2A program in some regions that we spoke with explained that their failure to keep such records was caused by a breakdown of computer equipment over 18 months earlier that had not been remedied. An official in one region told us that although the region enters some information into an automated system, the region does not have access to any reports from the system and would have to go through filing cabinets in order to obtain basic information on the processing of individual H-2A applications. In addition, the Chief of Labor's Office of Agricultural Certifications told us that his office does not keep national records on the timeliness of Labor's responses to applications, nor does it need to because if Labor misses a deadline his office will hear about it from the employer.

Failure to Provide Timely Notification of
Acceptance Decision Could Cause Delays in Certification

Our analysis of data from ETA's Atlanta regional office, one of the few regions for which this data was available, showed that Labor was missing deadlines for notification. In fiscal year 1996, Labor initially accepted 95 percent of the applications it received, although it missed the 7-day requirement to respond for 45 percent of them by an average of almost 6 days, and by as long as 43 days. For the period Oct 1, 1996 through June 30, 1997 the Atlanta regional office missed the 7-day response deadline for 47 percent of the 412 applications filed.³⁴

The timeliness of Labor's notification of its decision to accept an application is important, because full efforts by employers and SESAs to recruit domestic workers for H-2A job openings cannot begin without it. For example, the SESA may not circulate the job offer outside of the local area prior to the regional administrator's acceptance of the application. In addition, Labor's notification of its decision to accept the application specifies the

³⁴These data do not include seven cases for which acceptance and rejection dates were missing.

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recruitment effort that the employer must undertake, called "positive recruitment," within specific time frames in order for Labor to approve the certification. Active recruitment efforts must continue from this time until foreign workers have departed for the United States.

Officials in numerous regions attributed the delays almost exclusively to employers' failure to provide required documentation of positive recruitment and health care coverage in a timely manner. Some officials attributed the lack of timely documentation as at least partially the result of the time required to inspect housing. However, no region had any systematic record to track the timeliness of employer documentation so we were unable to verify this information.

Labor Lacks Information on the
Frequency, Cause and Timeliness
of Emergency Applications

Labor has no required deadline for processing emergency applications; instead, ETA encourages regions to complete emergency applications as soon as possible, or within one week of receipt. We could determine neither the frequency of emergency applications filed nor the extent to which the one week goal was achieved because Labor does not identify and track emergency applications. We reviewed individual emergency applications in the three regions with the largest number of H-2A job openings in 1996. All three regions had waived the 60-day filing requirement for emergency applications filed in this region in fiscal year 1996. Emergency applications were accepted for several reasons, such as in response to an INS enforcement action that resulted in the removal of undocumented workers from a farm in the Northeast just before the harvest.

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INS Petition Approval Process Can Increase Program Processing Time

After receiving Labor's certification, the employer and foreign guestworkers have 20 days in which to obtain visas before the date of need; the first step is for INS to approve the employer's petition to import nonimmigrant aliens for the certified job openings.

Employers file the petition (form I-129) with one of four INS service centers: Dallas, Texas; St. Albans, Vermont; Lincoln, Nebraska; or Laguna Niguel, California. The petition includes Labor's certification and identifies desired "beneficiaries," or employees, if known.

INS officials in all four processing centers told us that petitions for H-2A nonimmigrant agricultural workers are unique in that they are not required to identify specific workers, and rarely do. Most H-2A petitions identify only the number of workers needed for a specific job. INS, therefore, need not review individuals' visa eligibility as it does for other petitions. INS officials in both headquarters and the field offices described the INS role in processing H-2A visa petitions as "rubber stamping" and suggested that it provided little or no added value while delaying employers ability to get workers in a timely manner and adding to the costs.³⁵

INS is not subject to statutory processing deadlines; nor does it track processing times for the H-2A program paperwork. INS service center officials told us that because H-2A petitions represent only a fraction of the visa petitions the centers process (petitions for 15,000 workers out of petitions for 26 million visas for fiscal year 1996) and are not filed separately, a retrospective analysis of processing times would be prohibitively time and resource consuming. INS officials' estimates of the time required to process the petitions across the INS service centers ranged from 2 days to 21 days.

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³⁵INS officials told us that they have considered proposals to delegate the agency's role in the approval of H-2A petitions.

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Officials at all four service centers told us that they expedite H-2A petitions. The adjudications officer examines the petition to ensure that Labor's certification is enclosed; individual workers, if identified, have not been banned from entering the United States; and a check from the employer to cover the filing fee of \$75 per petition plus \$10 for every named beneficiary is enclosed. Adjudication officials told us that although they do not have data on H-2A denials, they rarely, if ever, deny H-2A petitions that include both the Labor certification and the appropriate fees. However, federal and state labor officials told us that INS's fee structure sometimes causes confusion and delay in obtaining workers. For example, in one case we were able to track, the confusion caused a 10-day delay at INS, which meant workers were not available when they were needed. The emergency application, which requested visa extensions for H-2A workers already in the United States, was filed 7 days before the date of need. Labor inspected the housing and approved the certification in one day. Although INS completed review of the application in fewer than 2 days after receipt, it took 10 days to approve the petition because the employer did not submit the correct fee. Labor officials told us that they had been unable to contact the INS service center by telephone to determine the correct fee; as a result, they unintentionally misinformed the employer about the amount of the fee. The petitioner herself told us that she had contacted both Labor and INS to determine the correct fee but was given two different amounts. She sent two checks to INS to cover both possibilities, and INS approved the order 6 days after the date of need.

State Department Processing Substantially

More H-2A Visas in Recent Years

After its approval, INS must notify both the employer and State that the petition has been approved. The employer must now identify potential workers who must file visa applications with accompanying fees directly to the State Department consulate in their country of origin. The worker must go to the consulate to apply for the visa. Because H-2A visa applicants come predominantly from Mexico, the consulates in Monterrey,

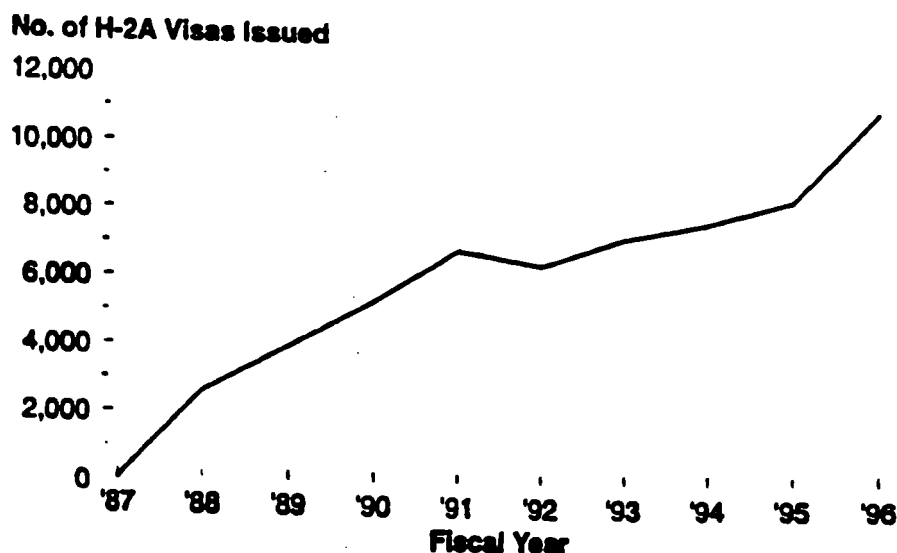
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Mexico, and Hermosillo. Mexico, together processed 93 percent of all H-2A visa applications in fiscal year 1996.

Although the number of workers entering the U.S. through the H-2A program has experienced limited fluctuation since the programs inception in 1986, the number of workers arriving with visas has increased substantially. (See figure 3.4).

Figure 3.4: Number of H-2A Visas Processed, FY 1986-97



This increase is caused by a shift in the country of origin of H-2A workers over the last ten years. Nationals of certain Caribbean islands entering the United States as H-2A