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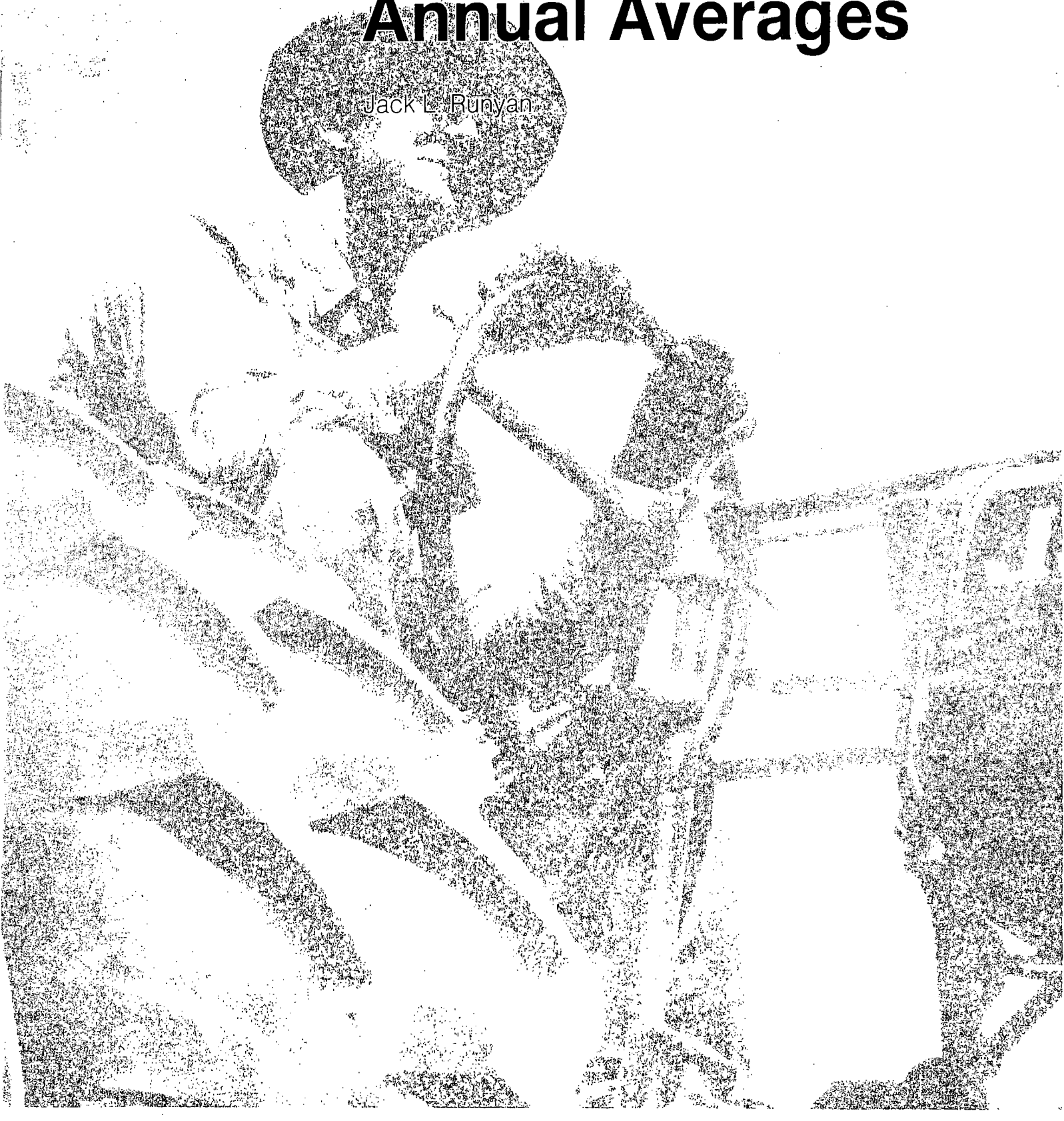


Agricultural
Economic
Report
Number 762

An Economic Research Service Report

Profile of Hired Farmworkers, 1996 Annual Averages

Jack L. Runyan



Office of Inspector General

**U.S. Department of Labor
Office of Audit**

**CONSOLIDATION OF
LABOR'S ENFORCEMENT
RESPONSIBILITIES FOR
THE H-2A PROGRAM
COULD BETTER PROTECT
U.S. AGRICULTURAL
WORKERS**

Report Number: 04-98-004-03-321
Date Issued: March 31, 1998

March 31, 1998

MEMORANDUM FOR:

BERNARD ANDERSON
Assistant Secretary
for Employment Standards

FROM:

/ s /
JOHN J. GETEK

FROM: JOHN J. GETEK
Assistant Inspector General
for Audit

SUBJECT: Consolidation of Labor's Enforcement
Responsibilities for the H-2A Program
Could Better Protect U.S. Agricultural Workers
Final Audit Report No. 04-98-004-03-321

The attached subject final report is submitted for your resolution action. We request a response to this report within 60 days.

If you have any questions concerning this report, please contact Robert Wallace, Regional Inspector for Audit, in Atlanta at (404) 562-2341.

Attachment

March 31, 1998

MEMORANDUM FOR: RAYMOND J. UHALDE
Acting Assistant Secretary
for Employment and Training

FROM: /s/
JOHN J. GETEK
Assistant Inspector General
for Audit

SUBJECT: Consolidation of Labor's Enforcement
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ACRONYMS

ARS Agricultural Recruitment System - ETA

AEWR Adverse Effect Wage Rate

CFR Code of Federal Regulations

CFR	Code of Federal Regulations
DOL	U.S. Department of Labor
ESA	Employment Standards Administration
ETA	Employment and Training Administration
FY	Fiscal Year
GAO	General Accounting Office
H-2A	VISA Category - Temporary Agricultural
I-9	Employment Eligibility Verification Form
INS	Immigration and Naturalization Service
IRCA	Immigration Reform and Control Act of 1986
MSFW	Migrant Seasonal Farmworker
NAWS	National Agricultural Worker Survey
OHO	Order Holding Office
OIG	Office of Inspector General
PY	Program Year
RA	Regional Administrator
RAW	Replenishment Agricultural Worker
RO	Regional Office - ETA
SESA	State Employment Security Agency
SAW	Special Agricultural Worker
SIC	Standard Industry Code
SSN	Social Security Number
UI	Unemployment Insurance
USC	United States Code
USES	United States Employment Service
WHD	Wage and Hour Division

U.S. Department of Labor Office of Inspector General

Audit Report

CONSOLIDATION OF LABOR'S ENFORCEMENT RESPONSIBILITIES FOR THE H-2A PROGRAM COULD BETTER PROTECT U.S. AGRICULTURAL WORKERS

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This report reflects the findings of the Office of Inspector General at the time that the audit report was issued. More current information may be available as a result of the resolution of this audit by the Department of Labor program agency and the auditee. For further information concerning the resolution of this report's findings, please contact the program agency.

Report Title: Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers

Report Number: 04-98-004-03-321

Issue Date: March 31, 1998

The OIG conducted an audit of the effectiveness of DOL's certification procedures in satisfying the H-2A provisions of the Immigration Reform and Control Act's (IRCA) temporary agricultural guestworker program. Two Agencies within DOL have responsibilities under the H-2A program. DOL's Employment Standards Administration, Wage and Hour Division (WHD), enforces H-2A contract wage and working condition standards to ensure foreign workers who are admitted do not erode similarly employed U.S. workers' conditions and pay. The Employment and Training Administration (ETA) administers a certification process under which growers who seek foreign laborers must demonstrate that they have actively recruited U.S. workers and have cooperated with DOL-funded State Employment Security Agencies (SESAs) in further efforts to recruit U.S. workers.

We found the H-2A certification process administered by ETA to be ineffective. Many studies point to a surplus of agricultural workers. Yet, our sample of Fiscal Year (FY) 1996 H-2A certifications indicates that neither the SESAs' efforts nor recruiting efforts required of employers resulted in significant numbers of U.S. workers being placed in agricultural jobs for which foreign H-2A laborers had been requested. Only 2 percent (252 of 10,134) of our sample of agricultural job openings for which growers had requested foreign workers were filled by domestic workers.

The SESAs are ETA's partners in helping to recruit U.S. workers for agricultural jobs. However, most agricultural employers used means other than the SESAs to recruit farmworkers. Also, the SESAs' efforts to recruit workers for H-2A jobs were often passive and few domestic referrals resulted from local, intrastate or interstate activities. In addition, some SESAs were hesitant to refer workers to H-2A employers because they believed sincere efforts to employ them would not be made. Consolidation of many agricultural employers' requests for H-2A workers into fewer applications covering large geographic areas may also dampen domestic workers' interest in the jobs. Finally, information upon which ETA bases its decisions to certify workers is often incomplete and little information is collected to help manage the program or determine its effectiveness.

A more fundamental concern is whether the environment in which the H-2A program operates will allow

protection of U.S. agricultural workers' jobs. In recent years, an increasing proportion of agricultural workers are in the U.S. illegally. A 1995 DOL study conservatively estimated that 37 percent of the agricultural workforce, or 600,000 workers, were illegal immigrants. In

contrast, ETA certified only about 18,000 H-2A crop workers during FY 1996. Consequently, it is from a large population of unauthorized immigrants that most employers recruit farmworkers.

Further complicating the recruitment process is agricultural workers' widespread use, as shown by our work and that of others, of fraudulent documents that are not detected by the Immigration and Naturalization Service's (INS') Form I-9 requirements. As a result, growers, DOL and the SESAs often cannot distinguish unauthorized foreign job applicants from U.S. workers. We found evidence suggesting that the SESAs had in some instances referred unauthorized workers, believing they were U.S. workers, to fill requested H-2A jobs. Consequently, attempts to fill agricultural jobs with U.S. workers are hobbled and DOL's ability to serve either agricultural employers' or U.S. workers' interests is called into question.

Moreover, enforcement responsibilities for the H-2A program's provisions are presently fragmented between ETA and ESA's WHD. We found little evidence of coordination between the two entities in matters related to H-2A investigations, and WHD staff we interviewed expressed frustration over the division of responsibilities.

Recognizing that changes in ETA's certification procedures would not solve the systemic problems identified in our audit, we recommended that emphasis be focused on increased enforcement of H-2A recruitment, wage and working condition requirements. We also recommended that ETA certification resources be redirected to the Employment Standard Administration's (ESA) Wage and Hour Division (WHD) along with the authority to apply sanctions against employers for violating program requirements.

We recommended employers be required to maintain evidence of their efforts to recruit U.S. workers and to continue cooperation with the SESAs in local, intrastate and interstate recruitment efforts. Wage and working condition protections for H-2A workers should also continue to be required through employer assurances in work contract provisions. We also recommended the Secretary and the Assistant Secretaries for Employment and Training and Employment Standards work with the Congress and other affected agencies to obtain necessary changes in IRCA provisions to:

- Consolidate DOL enforcement responsibility within the WHD for examination of employer compliance with H-2A program recruitment, wage and working condition assurances. WHD authority should be expanded to allow sanctions against employers, such as debarment, for violating program requirements.
- Shift ETA resources currently used in the certification process to the WHD to assist in its expanded role.

Control of illegal immigration, through an effective means of denying unauthorized workers U.S. jobs, is essential. Therefore, we encouraged the Secretary to work with the Congress and other affected agencies in developing a reliable means of verifying individuals' legal status before they are hired.

ETA and ESA provided a joint response that indicates general agreement with our findings and recommendations. However, the response notes that problems have been cited by OIG and the General Accounting Office in this and past reports of both the permanent and temporary immigration programs. The agencies suggest that changes to DOL's employment-based immigration responsibilities might be better considered in tandem with a broader set of reforms for all such programs. The response also indicates the Secretary has been a strong advocate and will continue to support development of an effective employment eligibility verification system. However, it is noted that control of illegal immigration is the principal responsibility of the Attorney General and Commissioner of the INS.

Full Text of Report



[Return to Audit Reports](#)

WHD

Wage and Hour Division

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EXECUTIVE SUMMARY

Under the Immigration Reform and Control Act's (IRCA's) H-2A provisions, the Secretary of Labor is responsible for helping ensure available U.S. agricultural workers fill jobs before growers are allowed permission to employ temporary foreign laborers. We have completed an audit of the H-2A program's operations in seven states, for the period October 1, 1995 through September 30, 1996, to determine the U.S. Department of Labor's (DOL's) effectiveness in meeting this responsibility.

Background

The key strategy used by DOL to determine the availability of U.S. workers and recruit them for agricultural jobs is a certification process administered by the Employment and Training Administration (ETA). Growers who seek foreign laborers must demonstrate that they have actively recruited U.S. workers and have cooperated with DOL-funded State Employment Security Agencies (SESAs) in further efforts to recruit U.S. workers. In addition, the Employment Standards Administration, Wage and Hour Division (WHD), enforces H-2A contract wage and working condition standards to ensure foreign workers who are admitted do not erode similarly employed U.S. workers' conditions and pay. Additional background on the H-2A program can be found in Appendix B of this report.

Audit Results

We found the H-2A certification process is ineffective. It is characterized by extensive administrative requirements, paperwork and regulations that often seem dissociated with DOL's mandate of providing assurance that American workers' jobs are protected.

Many studies point to a surplus of agricultural workers. Yet, our sample of Fiscal Year (FY) 1996 H-2A certifications indicates that neither the SESAs' efforts nor recruiting efforts required of employers resulted in significant numbers of U.S. workers being placed in agricultural jobs for which foreign H-2A laborers had been requested. Only 2 percent (252 of 10,134) of the agricultural job openings for which growers had requested foreign workers were filled by domestic workers.

The SESAs are ETA's partners in helping to recruit U.S. workers for agricultural jobs. However, most agricultural employers used means other than the SESAs to recruit farmworkers. Also, the SESAs' efforts to recruit workers for H-2A jobs were often passive and few domestic referrals resulted from local, intrastate or interstate activities. In addition, some SESAs were hesitant to refer workers to H-2A employers because they believed sincere efforts to employ them would not be made. Consolidation of many agricultural employers' requests for H-2A workers into fewer applications covering large geographic areas may also dampen domestic workers' interest in the jobs. Finally, information upon which ETA bases its decisions to certify workers is often incomplete and little information is collected to help manage the program or determine its effectiveness.

A more fundamental concern is whether the environment in which the H-2A program operates will allow

A more fundamental concern is whether the environment in which the H-2A program operates will allow protection of U.S. agricultural workers' jobs. In recent years, an increasing proportion of agricultural workers are in the U.S. illegally. A 1995 DOL study conservatively estimated that 37 percent of the agricultural workforce, or 600,000 workers, were illegal immigrants. In contrast, ETA certified only about 18,000 H-2A crop workers during FY 1996. Consequently, it is from a large population of unauthorized immigrants that most employers recruit farmworkers.

Further complicating the recruitment process is agricultural workers' widespread use, as shown by our work and that of others, of fraudulent documents that are not detected by the Immigration and Naturalization Service's (INS') Form I-9 requirements. As a result, growers, DOL and the SESAs often cannot distinguish unauthorized foreign job applicants from U.S. workers. We found evidence suggesting that the SESAs had in some instances referred unauthorized workers, believing they were U.S. workers, to fill requested H-2A jobs. Consequently, attempts to fill agricultural jobs with U.S. workers are hobbled and DOL's ability to serve either agricultural employers' or U.S. workers' interests is called into question.

The division of H-2A responsibilities in the Department of Labor -- with ETA handling compliance with certification requirements and WHD charged with enforcing the terms of H-2A work contracts -- prevents cohesive enforcement of H-2A program requirements and contributes to uncertainties over responsibilities. Changes in ETA's certification procedures alone will not solve the systemic problems we have identified. Rather, we believe resources now devoted to the H-2A certification function as carried out by ETA could be better spent on increased enforcement of H-2A recruitment, wage and working condition requirements.

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Recommendations

We recommend employers be required to maintain evidence of their efforts to recruit U.S. workers and to continue cooperation with the SESAs in local, intrastate and interstate recruitment efforts. Wage and working condition protections for H-2A workers should also continue to be required through employer assurances in work contract provisions. However, resources used by ETA in the certification process should be redirected. We recommend the Secretary and the Assistant Secretaries for Employment and Training and Employment Standards work with the Congress and other affected agencies to obtain necessary changes in IRCA provisions to:

- Consolidate DOL enforcement responsibility within the WHD for examination of employer compliance with H-2A program recruitment, wage and working condition assurances. WHD authority should be expanded to allow sanctions against employers, such as debarment, for violating program requirements.
- Shift ETA resources currently used in the certification process to the WHD to assist in its expanded role.

Control of illegal immigration, through an effective means of denying unauthorized workers U.S. jobs, is essential. Therefore, we encourage the Secretary to work with the Congress and other affected agencies in developing a reliable means of verifying individuals' legal status before they are hired.

Response to Our Draft Report

Response to Our Draft Report

ETA and ESA provided a joint response that indicates general agreement with our findings and recommendations. However, the response notes that problems have been cited by OIG and the General Accounting Office (GAO) in this and past reports of both the permanent and temporary immigration programs. The agencies suggest that changes to DOL's employment-based immigration responsibilities might be better considered in tandem with a broader set of reforms for all such programs.

The response also indicates the Secretary has been a strong advocate and will continue to support development of an effective employment eligibility verification system. However, it is noted that control of illegal immigration is the principal responsibility of the Attorney General and Commissioner of the INS.

The above recommendations are **unresolved**. They will be resolved upon OIG's receipt of an action plan to accomplish the recommended changes.

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INTRODUCTION AND PRINCIPAL CRITERIA

Purpose of the H-2A Labor Certification Process

The Immigration Reform and Nationality Act, as amended by the Immigration and Control Act of 1986 (IRCA), Public Law 99-603, allows agricultural employers who anticipate difficulty in obtaining domestic workers to petition the U.S. Attorney General, through the Immigration and Naturalization Service (INS), for permission to bring nonimmigrant aliens into the United States for temporary or seasonal work. The program is commonly called "H-2A," after its reference in the IRCA's provisions.

The IRCA and related Federal regulations contain provisions that intend to provide employers access to foreign workers to fill temporary labor shortages, yet protect American workers' jobs and their working conditions. Before the INS will approve a petition for foreign workers, an employer must apply to DOL for certification. Labor's certification procedures attempt to ensure that (1) there are not sufficient U.S. workers who are able, willing, qualified and available at the time and place needed, to perform the labor or services involved in the petition; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

Labor requires evidence of an employer's attempts to recruit domestic workers and a number of other assurances that include, payment of proper wages to foreign employees, adequate housing accommodations and other working condition protections.

Principal Criteria

In addition to the IRCA, Labor's responsibilities for the H-2A Program are contained in an interim final rule published in regulations at 20 CFR, Part 655. Justice has issued regulations at 8 CFR, Part 214, which clarifies the responsibilities of Justice and Labor. In January 1988, ETA published The H-2A Handbook which supplies guidance on the law and regulations.

ETA's regional offices and the SESAs have been delegated responsibility for routine program operation.

ETA's regional offices and the SESAs have been delegated responsibility for routine program operation. However, DOL's WHD, through statutes and regulations governing labor standards and working conditions, are involved in enforcing H-2A contract provisions. In addition, the U.S. Department of Agriculture has responsibility for establishing minimum rates of pay foreign workers must receive. Further information on the H-2A program and its requirements are included in the "Background" section, included as an appendix to this report.

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CHAPTER I

H-2A CERTIFICATION REQUIREMENTS ARE INEFFECTIVE

The H-2A program's certification requirements intend to ensure available U.S. workers are protected by providing them first consideration for available agricultural jobs before employers are allowed to hire foreign workers. As a condition of gaining approval to import foreign agricultural workers, employers are required to actively recruit U.S. workers and file their job openings with the SESA.⁽¹⁾ The SESAs circulate the job openings both within the state and to other so-called "supply states," where a surplus of agricultural labor has been identified. The SESAs also refer interested applicants to the employer. The employer is obligated to hire any qualified available U.S. workers. U.S. workers hired reduce the numbers of H-2A workers ETA will certify.

Few U.S. Workers Were Recruited for H-2A Jobs

Neither employers' nor the SESAs' efforts to recruit U.S. workers for H-2A jobs were effective.

During FY 1996, employers submitted 1,930 applications which contained requests for 17,355⁽²⁾ H-2A seasonal crop workers. We selected a random sample of 318 certifications involving requests for 10,134 H-2A workers, or 58 percent of all crop workers certified. We found:

- 520 workers (5 percent of 10,134) were referred to the jobs; and
- 252 workers (2 percent of 10,134) were hired.

1. The Employment Service (ES) components of the SESAs are involved in H-2A activities, as is the U.S. Employment Service (USES), which is a part the U.S. DOL's Employment and Training Administration (ETA). To ease the discussion, we have referred to activities of the states' ES components as SESAs' activities and functions performed by the USES as ETA's activities.

2. In total 19,103 H-2A workers were requested by employers, during FY 1996, of which 17,355 were agricultural crop workers. We limited our sample to agricultural crop workers in 7 states, which totaled 10,134 and represented 58 percent of the H-2A crop workers employers requested during FY 1996. See the "Objectives, Scope and Methodology" section of this report for additional information.

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Of the 252 workers in our sample who were hired, only 34 found jobs as a result of employers'

Of the 252 workers in our sample who were hired, only 34 found jobs as a result of employers' recruitment efforts and 218 were hired through referrals by the SESAs.⁽³⁾

Poor success contradicts data indicating a surplus of farmworkers. Poor success in recruiting U.S. agricultural workers for H-2A positions seems to contradict data that indicate a national surplus of agricultural workers exists. We did not find data that identifies the numbers of agricultural job openings and available farmworkers. However, studies produced by several governmental and private sources indicate a nationwide shortage of farmworkers has not existed for several years and does not currently exist.

For example, tabulations of unpublished data from DOL's FY 1993-1994 *National Agricultural Workers Survey*, (NAWS), published in April 1997, indicates that even in primary harvest months, many agricultural workers were not employed. According to NAWS, the surplus of farm workers ranged from a low of 13 percent in June and July of 1995 to a high of 28 percent during the months of January and February of 1995.

Why then do most employers find agricultural workers to fill their needs without relying on the H-2A program? The contradiction may be answered by the means and methods ETA and employers used to recruit workers.

Little Recruitment or Hiring of Agricultural Workers Occurred Through the SESAs' Efforts

ETA relies upon each SESA and its local offices structure to help identify, recruit and refer U.S. workers to agricultural employers that have requested H-2A workers.

However, in large measure, U.S. agricultural employers (exclusive of those who have requested H-2A workers and are required to list their openings with the SESAs), bypass the SESAs and use other means of locating workers to fill their needs. In the states we sampled, we found that few agricultural workers relied upon the SESAs to locate seasonal farm work.

Few Agricultural Jobs are Filled Through the SESAs. During PY 1995, national statistics indicate employers requested that the SESAs find seasonal crop workers to fill about 114,000

3. H-2A procedures require that employers' advertising and other recruitment efforts direct applicants to local SESA offices. The local offices refer applicants to the employers who interview them. Typically, the SESAs records do not distinguish workers referred by the SESAs' efforts from those referred through employers' recruitment. We distinguished those hired by the SESAs and those hired through employers' efforts by reviewing recruiting reports filed by employers in our sample.

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openings, or less than 1 percent of the estimated 1.6 million temporary agricultural works in the U.S.⁽⁴⁾

In the 7 states selected in our review, we visited a total of 15 SESA local offices and the states' central offices to determine the extent to which either agricultural employers searching for workers or farmworkers who wanted employment used the SESAs. We also reviewed the methods which were being used to recruit farmworkers for job openings and identified any distinctions between those used to recruit workers for H-2A positions and for positions with other agricultural employers.

Local Offices Do Not Actively Recruit Agricultural Workers. In the local offices, we found effort

Local Offices Do Not Actively Recruit Agricultural Workers. In the local offices, we found effort spent in recruiting workers for H-2A job openings was often passive. We were told that farmworkers seldom present themselves at the local offices searching for work or respond to advertisements. Most local offices indicated they relied on the centralized system of job listings and attempted to match any interested applicants with intrastate job orders or agricultural job orders circulated through the Interstate Clearance System. The same processes were described for referrals of workers to agricultural employers not requesting H-2A workers. The most pronounced difference was that the SESAs less frequently contacted farm labor contractors and crew leaders to identify workers for H-2A employers than for other employers' labor needs.

SESAs Reported Better Success in Placing Workers in Non-H-2A Jobs. Although few agricultural orders are filled by the SESAs, reported data indicate the SESAs had greater overall success in placing agricultural workers with non-H-2A employers than they did with employers involved in the H-2A program. However, in some states, we found workers placed with agricultural employers had either not been actively recruited by the SESAs or the reported placement statistics were erroneous.

For the seven states included in our review, we compared the total job openings, applicants referred, and applicants placed by the SESAs during PY 1995 on agricultural job orders against the H-2A job orders in our FY 1996 sample. The combined data, presented in the table, indicate the SESAs achieved an overall placement rate of 55 percent on agricultural job

4. Analysis of the percentage of the Nation's seasonal crop workforce the SESAs filled is hampered by lack of reliable data on the number of job openings in the United States. Hence, we have compared the number of SESA-related placements to estimates of the temporary agricultural workforce. However, estimates from ETA's data indicate the SESAs place workers in less than 5 percent of the Nation's agricultural job openings.

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COMPARISON OF SESAS' OPENINGS, REFERRALS AND PLACEMENTS JOB ORDERS FOR SEASONAL CROP WORKERS TO H-2A ORDERS SAMPLED FOR THE SEVEN STATES INCLUDED IN OUR SAMPLE					
	JOB OPENINGS	APPLICANTS REFERRED	APPLICANTS PLACED	PERCENTAGES	
				REFERRED TO OPENINGS	PLACED TO OPENINGS
All Agricultural Orders	73,653	81,360	40,876	110%	55%
H-2A Requests	10,134	520	218	5%	2%

orders. In contrast, our analysis of H-2A certifications issued during FY 1996 showed that the states filled only 2 percent of H-2A employers' job openings. The extreme differences in referral and placement

filled only 2 percent of H-2A employers' job openings. The extreme differences in referral and placement rates were even more pronounced among individual states and within local areas. For example:

- One state reported filling only 3 percent of their H-2A job openings, yet also reported filling an impressive 90 percent of their temporary agricultural job openings for non-H-2A workers.
- Another state received H-2A applications containing 3,158 job openings. However only 17 job applicants were referred and 15 hired, a placement rate of less than 1 percent. However, the SESA reported receiving job orders for 8,644 agricultural workers from employers not requesting H-2A workers and filled 5,232, a 60 percent placement rate.
- In yet another state, only one employer requested H-2A workers and filed applications for 170. The SESA was unable to place any workers on the job orders. In contrast, our review of 1,100 statewide job orders received by the SESA during PY 1995 indicates 86 percent of the agricultural job openings requested by other employers (7,265 of 8,382) were filled. Further, the SESA local office serving the H-2A employer's area found crop workers for all 77 job openings requested by other employers.

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Agricultural Recruitment and Placement Data is Suspect. In visiting SESA local offices and reviewing the data, we found employers' job orders, the local offices' referrals and placements of workers were sometimes reported as having occurred in the same day.

Individuals the SESAs reported as having been referred and placed were farmworkers, usually represented by crew leaders, who returned to the same areas year after year and often to the same employers. Because of relationships fostered between SESA personnel, employers and crew leaders, the SESAs were advised of employers' and crew leaders' recruiting and hiring activities. Consequently, recorded referrals and placements do not reflect the SESAs' active efforts to locate and employ agricultural workers to fill job openings.

We were unable to determine the extent to which these practices inflated the SESAs' reported success. However, we found it occurred with some regularity. For example, in one state we visited, two of four local job service offices claimed credit for referring and placing workers who had already been hired. At the time they were visited by Job Service personnel, the crew leaders and employers had already recruited the workers and decided who would be hired. The local offices' involvement came only after the employer contacted them, at the time work was to begin.

We also found some of the data could not be supported. In another state, the SESA local office erroneously reported H-2A workers employed by an area grower as U.S. workers the SESA had referred and placed.

In some instances, SESA personnel provided a variety of services to the employers, such as assisting them in completing the Immigration and Naturalization Service (INS) I-9 forms and other paperwork. However, the activity was not SESA-initiated referrals or placements. In other instances, the only contact SESA personnel had with workers were visits to the employer or crew leader to determine the numbers of workers that were present so they could be reported as placed.

The Interstate Clearance System Has Little Impact on Recruiting Workers

It is intended that the interstate job orders assist in addressing local shortages by advertising openings in areas where a surplus of available labor exists. Through the Interstate Clearance System, SESAs submit job orders to states identified as having a surplus of agricultural workers, as part of the attempt to find available U.S.

workers. However, agricultural clearance orders receive little attention and result in few referrals of U.S. workers.

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Supply States Not Actively Recruiting on Clearance Orders. We also visited Florida and Texas and reviewed the processing of agricultural clearance orders received from other states through the Interstate Clearance System.⁽⁵⁾ We chose Florida and Texas because they reported to DOL a combined total of 49,484 applicants for Migrant and Seasonal Farmworker (MSFW) jobs, of which 13,647 were placed during PY 1995. Consequently, they have more agricultural job applicants than workers to fill the jobs and were designated as "labor-supply" states.

Statistics were not available in Florida to determine the number of workers referred on agricultural clearance orders during PY 1996 but SESA staff informed us that few referrals were made.⁽⁶⁾

Data we reviewed in Texas indicates that during PY 1996, it received 560 agricultural clearance orders involving requests for 9,031 workers. It referred 361 workers on agricultural clearance orders, of which 327 were to a nursery in the Midwest. In total 308 workers were hired. Only 15 workers were referred to growers that had requested H-2A workers.⁽⁷⁾

Based on interviews with officials in both Florida and Texas, we found that little effort is spent on filling interstate clearance orders. Most orders are received and put into the statewide computer system. It is then the responsibility of local offices to recruit on the order. We were told that due to budget constraints, little outreach was being used to fill most interstate orders, and active recruitment would occur on a larger scale only when the ETA placed special emphasis on filling job orders from a specific area or location.

SESAs are Hesitant to Refer Workers on H-2A Job Orders. We also found some staff were hesitant to refer workers to certain H-2A employers, because it was their perception that the workers referred to certain H-2A employers would not be hired. They believe some employers delayed the applicant interviews or discouraged domestic workers from accepting jobs. Officials also indicated the numbers of available workers who could be referred was reduced because some growers would not pay the "override" (fee) crew leaders require.

5. Our visits to Florida and Texas to review the Interstate Clearance System were in addition to those made in seven other states to examine the certification process.

6. We selected a sample of 30 Interstate Clearance Orders related to Florida and found the State had accepted 26 of the orders. However, there was evidence that referrals may have been on only two of the orders.

7. Generally, nursery workers are not H-2A program participants.

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Officials in "Supply" States Believe Surplus of Agricultural Workers is Overstated. Officials in both Texas and Florida disagreed with the assertion that their States contain a large supply of agricultural workers who are available to fill the interstate job orders, as the reported statistics may suggest.

Officials in Texas indicated that not all applicants the SESA reported in the "Migrant and Seasonal Farm Worker" (MSFW) job classification are available farmworkers. The numbers reported as MSFWs include migrant food processing workers and non-migrant seasonal farmworkers. Hence, many of the workers are not available because they do not harvest crops or are not willing to accept a job outside of the area in which they live. They also indicated workers may be unwilling to travel because transportation advances are frequently not offered by growers and many employers lack facilities for family housing.⁽⁸⁾

Florida officials indicated the numbers of available workers may be inflated because workers register at the SESA for jobs during the slow harvest periods, draw unemployment benefits, and find work during the peak harvest season, when they are needed by employers in other states.

**"Positive Recruitment"
Requirements Do Not
Result in Local Hiring**

As part of the H-2A application process, employers are required to submit a plan indicating steps that will be taken to "positively recruit" U.S. workers. Prior to certification of H-2A workers, ETA requires that employers provide evidence the plan was implemented and issue a recruitment

report to ETA indicating the results of the effort. The plan is in addition to filing the local job order and agricultural clearance order through the Interstate Clearance System. Any U.S. workers hired, or suitable U.S. workers who have been identified but not hired by the employer, reduce the numbers of H-2A workers ETA will certify.

As previously discussed, only 520 domestic workers were referred and 252 hired by employers in our sample of 10,134. These recruitment efforts generally involved placing advertisements for the job opportunities in newspapers of general circulation and on the radio; contacting prior workers; contacting farm bureaus and agricultural extension services and advising them of the

8. Although some H-2A employers provide family housing they are only required to do so when it is the prevailing practice in the area of intended employment. We noted that data from the April 1997 NAWS indicates that nearly half of all farmworkers surveyed lived with family members, which may support the assertion that many may not be willing to travel long distances.

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job orders; posting recruitment posters in areas frequented by farmworkers; and advertising by word of mouth to other area growers.

While there is agreement that "positive recruitment" efforts result in few hires, there is much disagreement as to the cause. Most employers that use H-2A workers and SESA staff at some of the

local offices we visited told us that "positive recruitment requirements" were not effective because U.S. workers were not available or were unwilling to harvest crops. Employers told us many U.S. workers refuse the jobs or are offered jobs but do not show up for work. Employers also indicate those that do present themselves for work often find the job disagreeable and leave before the harvest is completed.

Some SESA staff, H-2A program administrators and farmworker advocacy groups indicate growers prefer H-2A workers because they are more malleable and less likely to voice complaints about wages and working conditions. Hence, some SESA staff indicate they are reluctant to refer U.S. workers to H-2A employers because they will not hire them.

"Spot" Labor Shortages May Exist. The most plausible reason that neither H-2A employers nor the SESAs have success in recruiting U.S. workers is that such workers are not available. Although available evidence does not indicate a nationwide labor shortage, one may exist for certain crops or geographic areas.

Many growers whose comments we obtained emphasized that they use H-2A workers only because they are unable to find local agricultural workers. It is likely that spot labor shortages exist. For example, according to some SESA personnel and growers, it is difficult to find U.S. workers willing to harvest tobacco. We also received indications from the Virginia and New York SESAs' staff and growers that the apple harvest in certain areas of those States has been completed by Jamaican H-2A workers for many years, because adequate supplies of U.S. workers willing to do "ladder work" were not available.

Involvement of Growers Associations May Present Special Concerns for Local Recruitment. Several H-2A program administrators and interest groups expressed their belief that agricultural employers' increasing reliance on growers' associations discourages local workers' interest in available agricultural jobs.

Associations often provide "turn-key" access to H-2A workers by completing many of the INS and ETA administrative requirements necessary to receive certification for H-2A workers, including "positive recruitment" of U.S. workers. They may also recruit H-2A workers, ensure they receive their visas, arrange transportation and complete other activities related to the workers' arrival, employment and departure.

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Some grower associations represent several hundred agricultural employers, and account for a large proportion of the requests for H-2A workers. Of the 318 H-2A certifications in our sample, only 37 certifications (12 percent) were filed by associations, yet these requests accounted for 6,809 of the 10,134 workers (67 percent) covered by the job orders.

DOL's H-2A program regulations allow joint employer⁽⁹⁾ associations to transfer workers among its members to perform work for which the H-2A certification was granted (20 CFR 655.106(c)(2)(I)). During a growing season, associations may file a series of orders which consolidate the applications of many employers over a period that encompasses the harvest season of all its members listed on the certification. In some instances, associations file "master orders," which include wide geographic areas and may involve the harvest of dozens of crops at widely varying piece rates. Much of the concern voiced to us by SESAs and farmworker advocacy groups was directed at the "master order" concept.

We identified instances involving master orders in which we do not believe positive recruiting efforts

were sufficient for ETA to have issued a certification. In one state, ETA certified 8

H-2A master applications, involving 467 agricultural employers and 3,873 job openings, or 38 percent of all H-2A crop openings in our FY 1996 sample. The job openings that related to the master orders were in many locations throughout the state and involved a joint employer.

As part of its mandatory "positive recruitment" efforts, the association advertised the jobs in a newspaper and on a radio station in a large metropolitan area of the state. ETA accepted copies of these advertisements as proof of the employers' positive recruitment efforts. While the advertisements may have satisfied the H-2A program requirement that advertisements be made in a "newspaper of general circulation" and on radio, we do not believe the effort was sufficient to have reached any interested local applicants.⁽¹⁰⁾

SESA staff also indicated that wide geographical areas where associations ask U.S. applicants to work may also reduce local interest in the jobs. Decisions related to the movement of workers rest with the joint association. The jobs offered workers could be with any of an association's member employers within the state. In addition, the workers are subject to

9. Associations are allowed to file H-2A applications as joint employers, sole employers or agents. Joint employers receive certification jointly with their member employers and share the same responsibilities as employers.

10. Some sources suggest formal advertising is not the most effective means of recruiting workers. The Report of the Commission on Agricultural Workers, November 1992, points out that many studies indicate the importance of informal networks in recruiting farmworkers. According to the report, most farmworkers find work through networks of friends and relatives, not more formal processes.

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transfer to other member employers throughout the duration of the contract period to harvest a variety of crops. Therefore, a worker may be unable to accept the job offer due to travel restraints or family obligations.

We were also told by some SESAs' staff and interested organizations that groups of migrant and seasonal farmworkers who otherwise may be available do not have an interest in the jobs because there is no assurance they will remain together. Many are interested in working specific crops, or during specific periods as part of an established migrant stream that moves northward. Also, some associations will not pay overrides (fees) to crew leaders who represent groups of farmworkers, because it had not been established as a prevailing practice in the area.⁽¹¹⁾

Interested groups also believe the employers' obligations to positively recruit U.S. workers are prematurely shortened by the extended harvest season included in the master orders. For example, during our audit period, ETA accepted one association's request for 1,408 workers for the period March 29, 1996 through November 1, 1996. The order included numerous crops and their anticipated harvest seasons, which varied throughout the period for which workers were requested.⁽¹²⁾ The employers' obligations to continue positive recruitment efforts and active recruitment on interstate orders expire when the workers depart for the employers' place of work. Consequently, master orders may allow

employers who have crops that mature late in the period to end their positive recruitment efforts many months in advance of the harvest.

Certifications Were Often Made on Incomplete Data and Were Not Timely

ETA's decision to certify an employer's request for foreign workers culminates a lengthy, paperwork-intensive process that should provide assurance suitable U.S. workers were not available to

fill the jobs for which foreign workers have been admitted. The certification process should also provide evidence that the wages paid foreign workers and the conditions under which foreign workers will be engaged will not erode those of similarly employed U.S. workers. Consequently, in making the decision, ETA must consider all evidence of the recruiting efforts and assurances that wage and working condition protections are in place.

11. For certain job elements, the employer must offer or conform to standards which prevail among other employers who hire U.S. workers in the same area, and in the same occupation. SESAs are encouraged to conduct formal studies of prevailing practices among employers, as time and resources permit.

12. The request identifies the need as primarily for tobacco workers, but enumerates numerous vegetable crops and their anticipated harvest seasons as "minor crops" which workers may be asked to harvest.

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However, files maintained by ETA's regional offices often lacked sufficient information for RAs to have made an informed determination on the availability of U.S. workers or to have ensured employers had satisfied other H-2A program requirements. In addition, data ETA tracks on its H-2A program activities is incomplete and insufficient to allow evaluation of program operations.

Information Necessary for ETA to Have Made Determinations Was Often Absent. ETA's guidance on the certification process (the *H-2A Program Handbook*) stresses the importance of providing ETA's Regional Administrators (RAs) with accurate documentation of both the employers' and SESAs' recruitment efforts, so a determination of U.S. workers' availability can be made. According to ETA Handbook No. 398 (H-2A Program Handbook):

In making a finding of U.S. worker availability, the RA must have accurate documentation from the Employment Service offices and from the employer of the efforts put forth by the employer and the SESA and the recruitment results.

However, certifications for H-2A workers were routinely issued without complete information on the results of efforts to recruit U.S. workers. Also, certifications were often issued without documentation that the petitioning employer's housing had been inspected and that the housing was acceptable.

We selected a random sample of 318 H-2A certifications made during FY 1996. The certifications we examined involved employers' requests for 10,134 H-2A workers. The documentation was maintained by four ETA regional offices that service the seven states included in our audit. Information available in the files varied widely among regional offices. Overall we found:

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- 57 percent (183 of 318) of the certifications did not contain the recruitment reports indicating the results of the SESAs' local and intrastate recruitment efforts;
 - 83 percent (264 of 318) did not show evidence that the SESAs had filed the job orders through the Interstate Clearance System and files on only 3 certifications documented the results of interstate recruitment; and
 - 49 percent (156 of 318) did not contain evidence that housing inspections had occurred.

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Applications for H-2A Workers Were Not Processed Within Statutory Time Frames.

We found ETA frequently missed deadlines for processing employers' H-2A applications and certifications.

IRCA's provisions establish time frames in which ETA is required to process applications and certifications for H-2A workers and inform employers of their decisions. The purpose of these provisions is to provide employers with prompt notification of ETA's actions, allow time to recruit U.S. workers and complete housing inspections and other H-2A program requirements. The requirements also provide employers time to obtain visas and INS approval for H-2A workers who have been certified, so they are available when needed.

IRCA requires that the employer must be notified, in writing, within 7 days of filing an application for H-2A workers, whether ETA's review of the application indicates it has met standards and been accepted or has not met the standards and been denied. If the application has been denied, the employer is to be given a prompt opportunity to modify and resubmit the application or appeal the decision.

We found employers were not notified of ETA's actions within 7 days for 60 percent (193 of 318) of the certifications in our sample. ETA missed the 7-day requirement by an average of 15 days.⁽¹³⁾

Once an application is accepted,⁽¹⁴⁾ the employer is required to complete "positive" recruitment efforts. The SESA, within the state where the workers are to be employed, use a copy of the employer's job order to recruit U.S. workers within the state and file an interstate agricultural job order to obtain workers from other states. Also, following ETA's acceptance of the employer's application, housing inspections and other H-2A program requirements are to be completed. Within 23 days of the anticipated date of need, the employer must provide ETA with evidence that the requirements have been met. ETA must provide the employer with its decision to certify the numbers of H-2A workers requested (all or in part), no later than 20 days before the first date of need.

13. An additional 65 files did not contain application acceptance or rejection dates for us to evaluate.

14. Employers must submit an application to the ETA Regional Offices for H-2A workers, at least 60 days before it is anticipated they will be needed. Other time frames also apply for various H-2A program requirements which are discussed in the "Background" section of this report.

Again from our sample, we found ETA missed the 20-day requirement on 40 percent of the certifications (130 of 318) by an average of 8 days.⁽¹⁵⁾

Data Necessary to Evaluate H-2A Program Activities Is Not Maintained. ETA does not maintain nationwide data on its certification activities. Instead, each regional office is expected to maintain a log of activities. However, both the means used to collect data and the data that was being collected were inconsistent among the regional offices we visited. Regional data collection procedures ranged from manual tabulation to entry and storage of the data in a variety of data processing formats. The data available among offices was also inconsistent, as the statistics collected depended upon the data elements each office felt was useful.

We found ETA's National Office obtains program information either through telephone calls to the regional offices or through the exchange of manually prepared documents. As needed, they obtain statistics from each region for the following: number of applications certified, number of job openings, and amount of certification fees collected. Data needed to help evaluate the effectiveness of the program, such as applicant referrals and placements, were not being maintained and analyzed.

**DOL's H-2A Enforcement
Responsibilities are Fragmented**

Presently, enforcement responsibilities for the H-2A program's provisions are divided between ETA and ESA's WHD. We believe consolidation of the responsibilities would eliminate any confusion regarding the agencies' enforcement

responsibilities and improve protections afforded both U.S. and foreign workers.

Generally, ETA's responsibilities include matters concerning approval or denial of certification requirements and obligations of employers related to the certification process, such as employers' compliance with positive recruitment requirements. ETA may reduce the number of H-2A workers they will certify or deny an employer certification for up to 3 years, depending upon the nature, severity and number of violations identified. ETA has a period of 2 years after the date of certification to notify the employer of the action. The employer may request an administrative review or hearing. We did not identify any instances in which ETA had sanctioned employers.

15. ETA does not maintain information on its performance in meeting IRCA's time frames. ETA may grant an exception to the filing deadlines in emergency situations where employers can demonstrate good cause for not meeting the required time frames. Some delinquencies we identified may be due to emergency H-2A applications; however, we do not believe the incidents are significant.

WHD enforces provisions of workers' contract terms, such as wages, transportation, meals and housing. They conduct investigations and inspections pertaining to the payment of required wages, transportation,

meals, and housing provided during the period of employment. WHD's jurisdiction is limited to actual events transpiring when there is an employer-employee relationship.

Penalties available to WHD include the recovery of unpaid wages, the assessment of civil monetary penalties and the right to petition in court for specific performance of contractual obligations. Though these penalties are required to be reported to ETA for consideration, they are treated separately for the purpose of sanctioning an employer for H-2A violations. WHD may only recommend to ETA the denial of a future labor certification. We noted several cases involving H-2A and other agricultural employers in which WHD had taken action to recover wages and assess penalties.

Our review of guidance provided WHD's investigators indicates that if they encounter a situation outside the scope of their jurisdiction, such as a U.S. worker who may have been improperly denied employment by an H-2A employer, a referral would be made to ETA but WHD would not complete a fact determination process.

Although the H-2A Handbook calls for coordination between ETA and WHD in such matters related to H-2A investigations, we found little evidence of interface between the two entities. WHD, as a general rule, does not receive copies of H-2A applications or other documentation that would allow them to target or focus on H-2A activities. We were told cases involving

H-2A workers or U.S. workers employed in combination with H-2A workers are the result of complaints. We identified an instance in which confusion over responsibilities may have prevented action from being pursued against an employer abuse. WHD staff we interviewed also expressed frustration over the division of responsibilities.

already doing? The authority to apply sanctions would be more effective if combined with the authority to investigate wage and working condition violations and invoke penalties. It would allow one agency to have more complete knowledge and more effectively address the activities of unscrupulous employers.

Additional H-2A Program Issues Require Attention

We identified additional H-2A program issues that need to be addressed. They include incomplete program guidance, and troublesome H-2A program provisions and procedures.

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H-2A Program Regulations Have Not Been Finalized. Regulations implementing DOL's role and responsibilities in the H-2A program have not been finalized. On June 1, 1987, ETA published an interim final rule and request for comments with the intention of issuing the final rules and regulations. While more than 10 years have passed, the H-2A regulations have not been issued in final form. The formal process of requesting and evaluating comments from those involved in the program would, we believe, surface issues which could strengthen the program.

Fifty-Percent Rule May Burden Employers and Workers. H-2A interim regulations require that from the time foreign workers depart for the employer's place of employment, the employer shall provide employment to any qualified, eligible U.S. worker who applies until 50 percent of the H-2A work contract has elapsed. While the intent of this requirement is to ensure that domestic workers continue to be afforded job opportunities, it could burden employers and result in H-2A workers being dismissed

without the means to return home.

Agricultural employers we interviewed believe the requirement should be changed because it could result in having H-2A workers replaced after the employer had borne the expenses of transporting, training, and housing foreign workers. Thus, an agricultural employer could be required to choose between paying more workers than needed or displacing trained workers with new workers. Further, it could result in unjust injury to displaced foreign workers.

During our H-2A case file reviews, we identified one instance in which an employer received certification and hired 75 H-2A workers. However, 36 domestic applicants were subsequently referred by the SESA through the Interstate Clearance System. The employer was required to hire the domestic applicants. In this instance, the employer chose to retain the H-2A workers. However, had the employer been unable to pay the wages of both groups or meet other assurances, such as housing, the H-2A workers would have been dismissed.

Interstate Recruitment Could Benefit from Consolidation of Job Orders. Our analysis of 318 of the 1,930 H-2A applications filed by employers during FY 1996 indicates agricultural employers located near one another often requested workers for similar crops during the same periods of time. For example, of the 73 applications filed by employers in the State of Kentucky, 70 requested tobacco workers, primarily from July to December 1996. Of the 68 applications filed by New York employers, 59 requested workers to harvest apples during the period June through October 1996.

Current interim H-2A regulations require that each of the H-2A job orders be forwarded to designated "supply states" for purposes of recruitment. Reviews in the four regional offices

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showed that in many instances this requirement resulted in the interstate recruitment process being reduced to a paperwork exercise that, as we have discussed, results in few referrals.

We believe that DOL should explore alternative approaches to the interstate recruitment procedures currently used. For example, labor needs of employers requesting workers in similar geographic areas, for the same crops during similar periods of need, could be consolidated into single agricultural interstate job order and forwarded to "supply states." Each of the employers and other pertinent information could be identified within the consolidated orders. This method would significantly reduce the number of interstate job orders and associated administrative burden and could improve response to the orders.

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CHAPTER II

INABILITY TO CONTROL UNAUTHORIZED FOREIGN AGRICULTURAL WORKERS COMPROMISES THE H-2A PROGRAM

The H-2A Program has not been widely used by agricultural employers as a means of obtaining workers. Instead, most agricultural employers have found sufficient workers to fill their needs. However, the

agricultural labor pool on which most growers depend is comprised of an increasing number of unauthorized foreign workers who are difficult to distinguish from U.S. workers. It is from this pool of workers that the SESAs recruit "domestic" workers to fill positions for which agricultural employers have requested foreign laborers.

Only a Small Fraction of Foreign Farm Laborers in the U.S. Are H-2A Workers

The H-2A program is the only legal avenue available for U.S. growers to obtain foreign farmworkers. However, the program has remained a small provider of the nation's agriculture workers.

Since IRCA's passage in 1986, the annual numbers of H-2A workers admitted has remained below 30,000, or less than 2 percent of the Nation's estimated 1.6 million crop workforce.

As previously discussed, many sources indicate that a surplus of agricultural workers exists that most growers tap for their labor needs. Some lack of program demand, since the passage of IRCA, is explained by the large numbers of foreign farmworkers who were "legalized" under the IRCA's "Special Agricultural Workers and General Amnesty" (SAW) provisions. When IRCA's provisions were being debated, there were concerns that shortages of agricultural workers would result from provisions that intended to tighten border enforcement and impose stiff penalties on employers who knowingly hired unauthorized foreign workers. These concerns led to IRCA's "safety net" provisions that created a means of legalizing undocumented farmworkers with experience in perishable crops. A glut of farmworkers was created through legalization of about 1.3 million undocumented workers - the majority in California - under IRCA's SAW provisions.

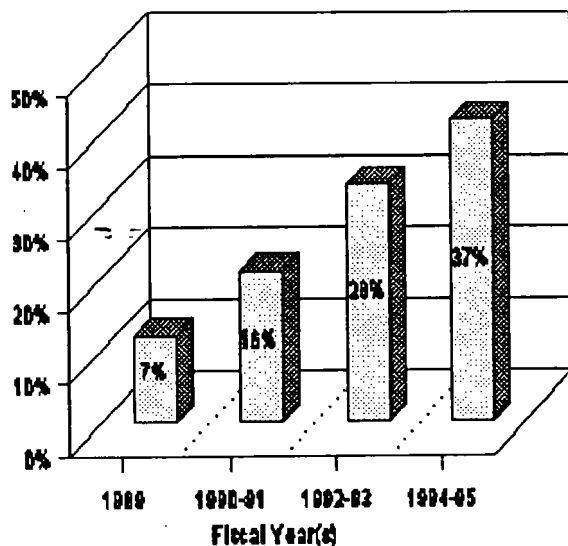
However, studies indicate those legalized under the SAW provisions have steadily deserted farm labor for other occupations. One such source is DOL's most recent National Agricultural Worker Survey (NAWS), which contains data provided by a sample of approximately 2,500 randomly selected agricultural workers across the Nation. According to the most recently published survey (April 1997), IRCA-legalized workers represented about one-third of the farmworkers in FY 1989. In FY 1994-95, their proportion had dropped to 19 percent.

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Increasing Numbers of Unauthorized Foreign Workers Are Employed in U.S. Agricultural Jobs

Data also indicate the gap between declining numbers of legalized SAW workers and the need for agricultural workers has been filled by unauthorized immigrants.

NAWS estimates that 37 percent of farmworkers employed in U.S. agriculture are unauthorized immigrants.⁽¹⁶⁾ As the chart indicates, the proportion of unauthorized agricultural workers has substantially increased since 1989 and continues to rise. The report concludes:

Percentage of Unauthorized Farmworkers in the U.S.

Source: "A Profile of U.S. Farm Workers, Data from the National Agricultural Workers Survey," USDOL, April 1997

"... the tendency for new entrants to enter agriculture every year from abroad showed absolutely no sign of slowing despite the legalization program."

The study also found a rapid influx in new unauthorized foreign workers employed in U.S. agriculture. According to the study's authors,

In 1994-95, 18 percent of all farm workers were in their first year in U.S. farm work. Of these newcomers, 70 percent were unauthorized foreigners.

The high proportion of unauthorized foreign workers in U.S. agriculture is also borne out by analysis we have completed using techniques employed in a related audit.⁽¹⁷⁾ We determined that Unemployment Insurance (UI) claimants' use

16. Although many studies are available with varying estimates, none offer definitive figures on the numbers of unauthorized workers present in the U.S. NAWS is an often referenced source of such data. However, some analysts suggest the proportion of unauthorized agricultural workers presented in the NAWS may be conservative because data is obtained from interviews of crop workers whose legal status may not be directly verified.

17. OIG report no. 04-98-001-03-315, "Verification of Social Security Numbers Could Prevent Unemployment Insurance Payments to Illegal Aliens."

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of unissued Social Security Numbers (SSNs) was often a good indicator that the claimants were unauthorized immigrants, who were improperly receiving UI benefits. In the States of Florida, Georgia, North Carolina and Texas, we compared the SSNs of individuals in the UI claims files against a listing of unissued SSNs available from the Social Security Administration (SSA). We selected a judgmental sample from this data to determine the cause of the discrepancies. We found that in 54 percent of the cases, UI claimants were unauthorized immigrants who were not entitled to benefits.⁽¹⁸⁾ Many indicated they had defeated IRCA's identification requirements by "purchasing" counterfeit Social Security cards and other documentation.

IRCA's documentation requirements are ineffective. IRCA requires that employers review documents that establish new employees' identities and their eligibility to work in the U.S. There are several forms of "approved" documentation. An INS Form I-9 must be completed to evidence the employer's review of documents. One acceptable document is a Social Security card.

Employers are supposed to review the documentation and make a judgment as to whether it appears genuine. However, IRCA prohibits employers from discriminating against individuals on the basis of national origin or citizenship, requiring more or different documents than are prescribed from a particular individual if the documents appear genuine. Our discussions with INS indicate that good quality forgeries

of acceptable documents are prevalent and easily obtained. Unauthorized immigrants identified in our related audit told us they obtained counterfeit Social Security cards and other documents for as little as \$25.

Analysis indicates many illegal immigrants work in both agricultural labor "supply" and "demand" states. We obtained UI wage data employers reported to the SESAs in the States of Florida, Georgia, North Carolina and Texas. Florida and Texas are designated labor "supply" States. These States are designated as having a surplus of agricultural workers, to whom other states look for referrals. Georgia and North Carolina are labor "demand" States, which historically have not had enough agricultural workers to fill job openings.

The data identified employers and their related employees' names, SSNs and quarterly earnings. We isolated agricultural employers by selecting those with related Standard Industrial Classification (SIC) codes.

To ensure we identified the most significant instances, we identified each agricultural employer who met both of the following conditions: (1) the employer had reported at least five workers

18. Our sample included 241 claimants for which we were able to obtain adequate evidence of their legal status, through interview and INS verification. Of this total, 129 were unauthorized immigrants.

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using unissued SSNs; and (2) the proportion of workers using unissued SSNs accounted for at least 10 percent of the total workers the employer had reported.

Across the 4 states, we identified over 2,100 agricultural employers that met the criteria. Instances in which the percentage of workers using unissued numbers exceeded 25 percent were common.⁽¹⁹⁾

Our work indicates the existence of a large illegal foreign workforce in the U.S. agricultural industry, as other studies have reported. However, the high proportion of unauthorized foreign workers also has implications for the H-2A program's ability to protect U.S. workers jobs.

SESAs May Have Referred Unauthorized Workers to Agricultural Employers

Similar analysis of the SESAs' data suggests significant numbers of "domestic" workers whom some states referred to agricultural jobs were unauthorized workers.

SESAs' Referrals to Employers Probably Included Unauthorized Immigrants. In six of the seven states included in our review, we obtained the SSNs of applicants referred and placed in agricultural jobs, as reported by the SESAs. Using the process previously described, we determined the numbers of applicants using unissued SSNs. As shown in the table below, the referrals of applicants using unissued SSNs varied widely among states, but averaged 10 percent and exceeded 18 percent in one of the six states we reviewed.

The analysis further showed that about 85 percent of those referred by the SESAs who were using

unissued SSNs were hired by employers.

19. The data provide indications of significant problems; however, it is not designed to produce definitive estimates of unauthorized workers in U.S. agriculture. The period covered by our examination varied among the states because of the availability of data. Consequently, the percentage of unissued SSNs we identified represent the proportion to the total reported by employers. Therefore, if an individual worked for more than one employer under an unissued SSN during the period, the number would be counted more than once as an exception. However, this is offset by individuals who worked under a valid number for more than one employer, which would be included in the base used to calculate the proportion. We believe the proportions discussed understate the true percentage of workers using invalid numbers. Our review did not include those using a number issued to another individual either living or dead. In testing our programs, we shared some of our work with the SSA's Inspector General which completed a name and SSN match on the data. Although we were not privy to the information because of restrictions on disclosure, SSA indicated the exception rate was more than twice what we found by identifying unissued numbers alone.

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SESA APPLICANT REFERRALS (AGRICULTURAL)				
July 1, 1995 through June 30, 1996				
STATE	APPLICANTS REFERRED	APPLICANTS WITH UNISSUED SSNs		
		NO. REFERRED	PERCENTAGE	NO. PLACED
GEORGIA	7,070	902	12.8	843
VIRGINIA	4,244	794	18.7	574
NEW YORK	3,110	386	12.4	328
NORTH CAROLINA	25,300	2,204	8.7	1,925
CONNECTICUT	2,194	7	0.3	1
KENTUCKY	990	17	1.7	8
TOTAL	42,908	4,310	10.0	3,679

Unauthorized Immigrants May Have Also Been Referred to H-2A Jobs. We were unable to conduct our SSN match against all H-2A job referrals, because the data was only sporadically available. However, we did identify instances which suggest unauthorized foreign workers were referred to H-2A jobs as a part of the SESAs' efforts to recruit domestic workers. As a result, incongruous situations occurred in which SESAs recruited and referred what may have been unauthorized immigrants to growers as replacements for legally admitted H-2A workers.

For example, in one instance, an agricultural employer received certification for 75 H-2A workers. After

they began working, 36 "domestic" applicants were referred to the employer by the SESA. The "domestic" workers were recruited through the interstate job order system and were from other states. The employer was required to hire all qualified and available "domestic" workers who applied until 50 percent of the contracted period of work had expired. (See the discussion of the "50 percent rule" in the Background" section of this report.) We examined the SSNs of the "domestic" workers who had been referred and found eight workers (22 percent) had supplied unissued SSNs and may have been unauthorized workers.

In another instance during our audit period, an employer placed 2 job orders with the local job service office requesting referrals to fill 170 agricultural openings. He also submitted an application to import H-2A workers if sufficient numbers of U.S. workers were not available. The job service referred a total of 66 applicants to the employer. While job service records

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indicate that none of the applicants contacted the employer for an interview, 13 of the 66 applicants (20 percent) were using SSNs which had not been issued.

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CONCLUSION

The certification process is characterized by extensive administrative requirements, paperwork and regulations that often seem dissociated with DOL's mandate of providing assurance that American workers' jobs are protected. Information on which ETA makes its decisions to certify workers is often incomplete and little information is collected to help manage the program or determine the effectiveness of its activities.

The SESAs are ETA's partners in helping to recruit U.S. workers and preventing the necessity of jobs being filled by foreign workers. However, most agricultural employers used other means of recruiting farmworkers and the SESAs' efforts to recruit workers for H-2A jobs were often lethargic. Few domestic referrals resulted from local, intrastate or interstate activities and some SESAs were hesitant to refer workers to H-2A employers because they believed sincere efforts to employ them would not be made.

H-2A employers' efforts to recruit U.S. workers were also unproductive, probably because some localized shortages of workers existed, and perhaps because of organizations that consolidated many employers' recruiting efforts, diminishing local workers' interest in the jobs.

The divided responsibilities of ETA for compliance with certain certification requirements and WHD for enforcing the terms of H-2A work contracts prevent cohesive enforcement of H-2A program requirements and contribute to uncertainties over responsibilities. Consolidating enforcement responsibilities would allow better oversight.

Eclipsing concerns with certification procedures is the large number of unauthorized immigrants in the agricultural workforce. Passage of the H-2A program presumed the need for a legal source of foreign agricultural labor to meet shortages anticipated as a result of immigration controls imposed by IRCA.

However, over a decade after IRCA's passage, illegal immigration continues to provide an increasing supply of unauthorized workers to meet agricultural employers' needs.

As the economic and labor conditions that IRCA was expected to produce by controlling the borders have not materialized, the H-2A program is operating out of the context for which it was designed. As a result, DOL's H-2A certification program cannot and does not protect U.S. agricultural workers' jobs from the effects of imported labor, contrary to its mandate under IRCA.

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The widespread availability of false documentation and ineffectiveness of the I-9 process mask unauthorized immigrants as U.S. workers. We found that neither employers nor the SESAs could distinguish between legal and unauthorized workers. Even where the SESAs placed domestic workers in jobs for which H-2A certifications had been requested, we found indications that some of those workers may have been unauthorized.

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RECOMMENDATIONS

As discussed in Chapter I, DOL's role in certification is ineffective. We believe the U.S. worker would be better protected if staff devoted to DOL's certification activities were redirected to increased enforcement, including enforcement of employment assurances.

Therefore, we recommend employers who seek H-2A workers continue to be required to maintain evidence of their efforts to recruit U.S. workers, in accordance with prevailing standards and practices. This should include continued cooperation with the SESAs in efforts to recruit U.S. workers, both within a state and among states. Employers should also be required to continue providing assurances regarding pay and working conditions afforded H-2A workers. However, resources used in the certification process should be redirected. We recommend the Secretary and the Assistant Secretaries for Employment and Training and Employment Standards work with the Congress and other affected agencies to introduce legislation that will:

- Consolidate responsibility within the WHD for post-application examination and enforcement of employer compliance with H-2A program recruitment, wage and working condition assurances. WHD should also be given the authority to apply sanctions against employers, such as debarment from participation in the H-2A program for violating program requirements.
- Shift ETA resources currently used in the certification process to the WHD to assist in its expanded role.

We also recommend substantive changes be made to the program, including issuance of final program regulations through the rule making process and other issues discussed in the section of this report titled "Additional H-2A Program Issues Require Attention."

Finally, control of illegal immigration, through an effective means of denying unauthorized workers U.S.

jobs, is essential for a viable guest worker program. Therefore, we encourage the Secretary to work with the Congress and other affected agencies in developing a reliable means of verifying individual's citizenship status as they are hired. We note that several such "pilot" systems are now being tested.

29

AGENCIES' RESPONSE TO OUR DRAFT REPORT

The Acting Assistant Secretary for ETA and the Assistant Secretary for ESA provided a joint response to our draft report that suggests general agreement with our findings and recommendations. (See Appendix C for the text of the complete response.)

ETA and ESA concurred with our recommendation that enforcement authority for the H-2A program be consolidated within WHD. (See Appendix C.) However, the response indicates that the OIG and GAO have reported problems in related programs and reforms may be better considered in the broader context of all employer-based immigration programs.

The response indicates agreement to publish for notice and comment changes to the H-2A program that will revisit provisions that require rulemaking and finalize the H-2A program regulations.

The response also indicates that while primary responsibility for immigration rests with the Attorney General and the INS, the Secretary is a strong advocate of an effective employment-verification system.

However, the Agencies disagreed with statements in our report which they indicate may suggest that a shortage of agricultural workers exists. The response emphasizes that a surplus of farmworkers is available, although a good portion of them are unauthorized to work in the U.S. Consequently, most growers who want farmworkers find them and do not depend upon the

H-2A program.

With respect to the use of master orders, the Agencies' response points out that ETA is currently instructing its regions to carefully examine the scope of growers' associations applications to ensure, with certain exceptions, that the master order only requests workers for one time period and one primary crop.

OIG'S CONCLUSIONS

We concur with the response and acknowledge that a number of alternatives are available and should be considered for consolidating enforcement authority within WHD. We also agree that significant problems exist in the H-2A and other immigration programs for which DOL has program responsibilities. Hence, changes should encompass larger reforms necessary in all of the employment-based immigration programs.

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We do not have substantial disagreement with the Agencies' comments that there is a surplus from which most growers obtain farmworkers and that most growers do not rely upon the H-2A program. We also acknowledge that many factors, as discussed in this report, contribute to poor success in placing domestic

agricultural workers with H-2A employers.

The above recommendations are **unresolved**. They will be resolved upon OIG's receipt of an action plan to accomplish the recommended changes.

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APPENDIX A

OBJECTIVES, SCOPE AND METHODOLOGY

OBJECTIVE

The audit's objective was to determine the effectiveness of DOL's certification procedures in satisfying the H-2A provisions of IRCA's Temporary Agricultural Guestworker Program. In particular, we focused upon DOL's responsibilities for ensuring there are not sufficient U.S. workers available to perform services for which foreign workers have been requested and that the hiring of foreign workers will not adversely affect the wages or working conditions of U.S. workers similarly employed.

We evaluated the adequacy of certification procedures that intend to identify and recruit U.S. workers, including "positive recruitment" responsibilities of employers, the SESAs' roles in supporting recruitment efforts, and other factors that affect the availability and recruitment of U.S. workers.

SCOPE

The audit period was October 1, 1995 through September 30, 1996 (FY 1996). Since the SESAs' ES operations are reported on a program year basis, we used the period July 1, 1995 through June 30, 1996 (PY 1995) for reviewing SESAs' agricultural job order information. We conducted a limited scope audit and designed our case review sample to examine certifications issued within four ETA regions which accounted for 80 percent of the FY 1996 H-2A certifications. Our audit was conducted in accordance with *Government Auditing Standards*.

Our audit fieldwork was conducted at four levels: ETA's National Office; ETA Regional Offices (Regions I, II, III, and IV); 7 SESA state administrative offices, and 15 SESA local offices. Sites visited are identified in the table on the following page. In addition to the 7 states identified, we also conducted limited work in the States of Florida and Texas for the purpose of reviewing the Interstate Clearance System, and the processing of agricultural clearance orders. We also held discussions with joint employer associations representing H-2A employers, various H-2A and non-H-2A agricultural employers and interested farmworker organizations.

The Department's Employment Standards Administration, Wage and Hour Division, is charged with enforcing wage and working condition provisions of H-2A contracts. We did not include this enforcement mandate within the scope of our audit, except as it related to coordination of enforcement efforts among agencies within DOL, and whether required wage and working condition assurances were included in contracts prior to certification by ETA.

H-2A WORK SITES		
ETA REGIONAL OFFICE	SESA	LOCAL OFFICE
I - Boston	Connecticut	Hartford
	Massachusetts	Leominster
II - New York	New York	Kingston Lockport Plattsburg
III - Philadelphia	Virginia	Exmore South Boston South Hill Winchester
IV - Atlanta	Georgia	Tifton
	Kentucky	Hopkinsville
	North Carolina	Dunn Oxford Smithfield Stanford

METHODOLOGY **ETA National Office.** At ETA's National Office, we identified and evaluated procedures used to administer H-2A and migrant seasonal farmworker programs. We identified the populations of H-2A certifications and other agricultural job orders for our audit period. We also determined H-2A program costs.

ETA Regional Offices. We selected four ETA Regional Offices (Regions I through IV) for review. The regions selected certified 83 percent of the FY 1996 H-2A job openings (15,840 of 19,103). We identified and evaluated procedures for H-2A applications and job orders.

We selected a random sample of 318 H-2A certifications and evaluated the associated case files. In FY 1996, ETA certified 1,930 H-2A applications containing 19,103 job openings. We eliminated from this universe 857 applications and 1,748 jobs involving shepherding and related

occupations. From the remaining 1,073 applications containing 17,355 seasonal crop worker job openings, we selected as our universe those applications filed in four regional offices which represent 15,840 of the job openings. We selected for review a statistical sample of 318 applications containing 10,134 job openings located in the following four DOL regions, of which ETA certified 9,951 (98 percent).⁽²⁰⁾

UNIVERSE			SAMPLE	
REGION	CERTIFICATIONS ISSUED	JOB OPENINGS	CERTIFICATIONS REVIEWED	JOB OPENINGS
I	385	3,422	130	1,323
II	166	2,390	68	1,076
III	24	3,158	24	3,158
IV	257	6,870	96	4,577
TOTALS	832	15,840	318	10,134

State Employment Security Agencies. At each SESA, we documented the H-2A application and certification process through interviews and flowcharts. We evaluated and compared non-H-2A agricultural recruitment and placement activities with the SESAs' performance in referring and placing domestic workers with employers requesting H-2A certification. We also identified populations of non-H-2A agricultural employers (non-H-2A) and sent questionnaires to selected employers.

Local Job Service Offices. Again, we identified and evaluated local office procedures for

H-2A applications and job orders. We examined local office methods for recruiting agricultural labor. In selected local offices, we examined placements claimed on agricultural orders.

Joint Employer Associations. We obtained various forms of H-2A documentation from employer associations operating in two of the states we audited. We also conducted interviews concerning the joint employer associations' role in the H-2A program.

Agricultural Employers. We selected a sample of employers that had received H-2A certifications during FY 1996 and employers that had recruited workers referred by SESAs. We contacted a sample of employers to determine the methods they used to recruit workers. We asked them to comment on why they did or did not use the H-2A program, their views on the effectiveness of the H-2A program, and various aspects of their attempts to recruit workers.

20. In total, our sample included certifications for 9,951 H-2A workers; however, subsequent to ETA's certification, a number of domestic workers were hired reducing the H-2A workforce to 9,882.

We also conducted limited reviews in the States of Florida and Texas to determine the procedures used in processing interstate agricultural job orders, the numbers of interstate orders filed through the Interstate Clearance System, and those that involved H-2A job openings. We also interviewed the staff to determine how decisions regarding referrals of workers on the interstate orders were made and obtained the staffs' views on the H-2A program.

Unissued SSNs. Using information supplied by the Social Security Administration, we developed a computer program and applied it to wage history files in the States of Florida, Georgia, North Carolina and Texas. The program enabled us to identify agricultural employers and related employees that were reported as having earned wages under SSNs that were not issued at the time the wages were reported.

The period covered by our review varied by state and depended upon the availability of wage history data. Generally, the files included the most current 8 quarters of wage history data available at the time of our visit, which included quarters through September 30, 1996.

Using the same technique, we identified workers referred in six of the seven states to agricultural employers who were using unissued SSNs. Where data was available, we also identified individuals referred to H-2A employers as domestic workers using unissued SSNs.

APPENDIX B

BACKGROUND

History of the Use of Foreign Agricultural Workers in the U.S.

The Braceros program, one of the most widely used guestworker programs, began in 1942 and lasted until 1964.⁽²¹⁾ During its 22 year existence, it is estimated that between 4 and 5 million Mexican agricultural workers were admitted into the U.S. as temporary workers. U.S. agricultural employers were prohibited from recruiting workers directly from Mexico and contracts were written so that the Farm Security Administration was the primary employer that contracted with individual agricultural employers and braceros. A total of 445,000 Mexican workers was admitted into the U.S. at the program's peak, in 1956. Many worked on California vegetable farms. Support for the program waned when studies indicated wages of similarly employed domestic workers were stagnate or declined in areas where braceros were used and because of pressure from organized labor, religious and community groups.

The H-2 Program

The H-2 Program began with passage of the Immigration and Nationality Act of 1952. The H-2 Program was in effect and operated concurrently with the Braceros Program. However, unlike the Braceros or British West Indies Programs, the H-2 Program was the first to be enacted as a permanent part of the law, rather than a means of addressing a specific labor shortage.

The H-2 Program allowed employers to bring in foreign workers for temporary jobs provided DOL found that their presence would not displace U.S. workers or adversely affect their wages or working conditions.

Employers were required to recruit domestic workers for up to 80 days before work was to begin, offer a contract that paid workers at least a minimum established wage rate, provide housing, and offer meals at minimal cost. Generally, the terms and conditions of their employment could not be less than the "local prevailing practice." Also, the employer had to

21. A good historical perspective on the use of foreign workers is contained in the "Report of the Commission on Agricultural Workers," submitted to the Congress on November 6, 1992. Much of the abbreviated history presented here is taken from the report or its sources.

guarantee employment for three-fourths of the contract period and compensate workers for on-the-job injuries.

If domestic workers were not found, an employer could bring in foreign workers. However, the employer had to provide foreign workers the same terms and working conditions. If qualified domestic workers applied within the first half of the contract period, they had to be hired, regardless of whether foreign workers were employed.

When the Braceros Program ended in 1964, the H-2 program became the only legal means to contract with nonimmigrant workers for agriculture. However, the H-2 program was also the subject of much debate, criticism and litigation. Worker advocates believed the protections intended by the law were not effective in preventing exploitation of foreign workers. Growers, primarily in the West, believed the program was inflexible and did not allow them to address the unpredictable nature of their perishable crops and needs for workers.

The Immigration Reform and Control Act of 1986

Congress was concerned about the flow of illegal immigration into the U.S. and debated the issue throughout much of the 1970s. In 1981, a bipartisan commission recommended that the numbers of illegal immigrants could be reduced by (1) stricter control of the U.S.

borders, (2) denial of employment to undocumented workers, and (3) legalization of long-term undocumented aliens.

Illegal aliens were to be prevented from gaining employment by requiring employers to hire only individuals who could establish their right to work in the U.S. and by imposing fines and/or prosecuting employers who did not comply. The recommendation to legalize certain aliens then in the Country was intended to avoid: (1) punishing those undocumented immigrants who had spent many years in the U.S. and (2) risking disruption of the economy by deporting them. The "legalization" provisions of IRCA also appealed to agricultural growers that wanted assurance a domestic supply of labor would be available to work in the industry. The Commission's recommendations became the basis of provisions in IRCA.

The SAW provisions of IRCA provided aliens the opportunity to gain permanent resident status if they could prove they had performed 90 "man-days" of seasonal agricultural services during the 1-year period that ended May 1, 1986. "Seasonal agricultural services" were defined as the production of "... fruits and vegetables of every kind and other perishable commodities." The definition of "perishable commodities" was expanded to include a variety of crops which are not edible, such as cotton and Christmas trees.

The SAW provisions were more generous than the IRCA's general legalization program. Under the general program, aliens were required to prove they resided in the U.S. continually from January 1, 1982,

and demonstrate knowledge or study of English and U.S. history. SAW applicants had 18 months to apply for legal status, where general legalization applicants had 12 months. Standards for deportation of illegal aliens apprehended by INS were also more liberal for those individuals who indicated they were potential SAW applicants than for those who hoped to stay their deportation under the general legalization program.

Nearly 1.3 million SAW applications were filed with the INS during the 18-month application period. California accounted for about 52 percent of the SAW applicants filed, followed by 11 percent in Texas and 8 percent in Florida. Some sources indicate there was a significant amount of fraud in the application process that resulted from the larger than expected numbers of applicants and poor implementation of the program.

The Replenishment Agricultural Worker Program (RAW) was also included in the IRCA's provisions. RAW allowed the admission of foreign farmworkers into the U.S., in the event that an agricultural labor shortage was determined to exist. The RAW's provisions were the result of growers' concerns that those legalized under SAW's provisions would quit agricultural work and the supply of workers they had historically hired would diminish.

The number to be admitted was based upon a "shortage number" established by the DOL and the USDA with assistance of the Census Bureau. The RAW program was authorized from 1990 to 1994. The RAW's requirements were complex; however, no shortages were determined to exist during the period. Consequently, no RAW workers were admitted.

The H-2A Program

Many of the H-2A Program's provisions are similar to the H-2 Program that it replaced. The most distinguishing difference is the effort the H-2A Program requires of employers to recruit and hire U.S. workers before foreign workers can be employed. Employers may petition the Attorney General, through the INS, to import temporary foreign agricultural workers. However, they must first apply to the DOL for certification that (1) there are not sufficient domestic workers available to perform the services, and (2) that hiring foreign workers will not adversely affect the wages or working conditions of U.S. workers similarly employed.

The Application and Certification Mechanism. DOL's certification procedures, which are found in Federal Regulations at 20 CFR Part 655, identify the methodology used to determine if

the two requirements have been satisfied. Routine certification functions have been delegated to the DOL's ETA regional offices.

An employer or agent of the employer must file an application with one of ETA's RAs who has jurisdiction over the state in which the foreign laborers are requested. Accompanying the application must be a job offer for U.S. workers, which must also be provided the SESA local office serving the area of employment.

The application must be received by ETA's regional office no less than 60 days prior to the employers first estimated dates of need. Several workers can be requested on each application, provided the same types of services are to be performed in the same occupation and area of employment. Separate applications are required for each date of need unless the regional office believes the dates of need are so close that separate applications would impose a filing burden on the employer.

Generally, applications must be received by ETA's regional offices a minimum of 60 days before the employer's date of need for the workers. ETA must notify the applicant within 7 days of any deficiencies in the application and the applicant has 5 days to submit corrections or amendments. The RA must make a certification determination no later than 20 days before the date of need, if the employer has complied with the requirements for certification. In special emergency situations, the RA has the authority to waive the 60-day requirement.

When the employer's application is received by the local office, the local office uses the "job offer" portion of the application to prepare a local job order and complete the agricultural clearance order. Local recruitment should begin immediately.⁽²²⁾ After the employer and the SESA are notified by the RA that the application has been accepted and the clearance order is approved, the SESA distributes the employer's clearance order into the intrastate and interstate clearance system.

In the RA's acceptance letter, the employer is directed to carry out a "positive recruitment plan" (discussed in a later section of this narrative), cooperate with the SESA in recruiting U.S. workers and document all referrals, and the reasons those referred were not hired. The employer is also directed to contact past domestic workers to determine their availability. The acceptance letter also includes instruction on minimum recruitment efforts expected of the employer and the terms and conditions of employment that must be included in job

22. Although used in this discussion, the distinction between local and intrastate recruitment often lacks meaning because many states post job orders at all local offices. Further, some states have centralized "local office" functions.

advertisements. The employer is required to provide proof of workers' compensation insurance for all his or her workers. Also, the employer is advised that the RA must be advised no later than 3 days prior to the certification date of the results of the recruitment efforts, so the RA can make a determination on the certification 20 days in advance of the stated date of need.

Upon receipt of the employer's report, the RA makes a determination to accept or deny all or part of the certification. The letter identifies the number of H-2A workers the employer may recruit, the period covered by the certification, and other information pertinent to the employer's request. The number of H-2A workers certified will depend upon the number of U.S. workers available and recruited for the jobs and whether the employer has complied with the terms of the application.

Appeal of a RA's Decision. If an application is rejected, the RA must provide the employer notification by next-day delivery, state the reason(s) for the denial and offer the applicant the opportunity to amend the application and resubmit it within 5 calendar days. The applicant is also offered the opportunity to receive an expedited administrative review or *de novo* hearing before an administrative law judge. Identical appeal procedures for denial of a certification are available to employers.

Employers seeking H-2A certification must have free housing available for non-local workers. The SESA is responsible for ensuring a preoccupancy housing inspection is completed and that the employer's housing, at a minimum, meets applicable OSHA or ETA standards. The SESA itself may not complete the housing inspections. Rather, it may have written cooperative agreements with other governmental

agencies to complete the inspections. Housing need not be owned by the employer. The employer may lease or rent facilities for the workers. An employer whose housing is not in compliance may be granted conditional access to the interstate clearance system with the assurance that the housing will pass inspection at least 30 days prior to the anticipated date of need. If the housing does not pass inspection, the employer's job order is removed from clearance.

"Positive Recruitment" Efforts Required of Employers. The H-2A Program's "positive recruitment" requirement is one of the most significant changes IRCA made to provisions that existed under the H-2 temporary labor agricultural program. The employer is responsible for positive recruitment efforts to attract U.S. workers that are " . . . no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment." The positive recruitment requirement is in addition to circulation of the clearance order through the ES system. The employer is also responsible for attempting to secure U.S. workers through farm labor contractors (crew chiefs or crew leaders), where it is the prevailing practice of non-H-2A

agricultural employers to do so. Employers may be required to pay crew chiefs an "override" for their services.

The 50 Percent Rule. The employer's obligation to conduct positive recruitment ends on the date foreign workers depart for the employer's place of employment. However, the employer must keep the order active with the SESA until 50 percent of the contract period has expired. Except for very "small" requests, the employer is required to hire any qualified and eligible U.S. worker who applies for a job until 50 percent of the period of work contract has expired. Thus, under the "50 percent rule," an H-2A worker can be displaced by a U.S. job seeker.

Agricultural Recruitment System (ARS). The ARS was established to help agricultural employers recruit workers on a temporary or seasonal basis and to provide workers who are seeking temporary agricultural employment with opportunities for employment. The vehicle established to satisfy this role is the intra and interstate recruitment system. This system is designed to offer an employer, in an area with a shortage of agricultural labor, the opportunity to recruit workers within the same state or from other states that traditionally experience a surplus of workers. An employer's clearance order (ETA 790) must meet certain requirements (outlined previously) before the order can be placed in the intra or interstate system. This determination is made by the ETA RA or his/her designee. Once the order has been approved by the RA, the Order Holding Office (OHO) clears the order to local offices within the state and to designated supply states around the country.

Three-fourths guarantee. The employer must guarantee the worker an opportunity to work at least three-fourths of the number of hours in the work days during the period of the contract, beginning with the first workday after the arrival of the worker at the place of employment and ending on the expiration date specified in the work contract. If the employer affords the worker during the total work contract period less employment than that required under this guarantee, the employer must pay such worker the amount which the worker would have earned had the worker worked for the guaranteed number of days. This guarantee does not apply to any H-2A worker who is displaced by a U.S. worker due to the 50 percent rule.

Adverse Effect Wage Rate (AEWR). Employers apply for certification under the H-2A provisions must offer at least the AEWR to foreign workers certified under H-2A and any qualified domestic workers interested in the job offer. The AEWR is the hourly wage rate that is determined by the U.S. Department

of Agriculture (USDA) through survey findings that use the weighted average hourly wage rate for field and livestock workers (combined) for each state. The AEWs are published in the *Federal Register*, usually in March or April, and become effective immediately upon publication.

Prevailing Practice Surveys. SESAs are encouraged to conduct formal surveys of employers, as their resources permit, to determine the acceptability of wages, benefits, and working conditions on the employer's H-2A application. The following three standards apply:

- The U.S. workers must be offered the same level of benefits as the employer intends to offer H-2A workers (and vice versa). In addition, no offer may impose restrictions or obligations not imposed on the H-2A workers.
- The minimum level of wages, benefits and working conditions may not be less than those required by regulations at 20 CFR 655.102 - 103 and 20 CFR Part 653, Subpart F.
- Certain job elements must conform to the "normal" or "common" practices or standards used by other employers of U.S. workers in the same area.

Legal Status of Workers Referred. Employers are exempt from the sanctions related to hiring an unauthorized alien if the alien was referred by a SESA, if the employer retains documentation of the referral by that agency, and if the documentation certifies that the agency has complied with procedures as specified in IRCA with respect to the individual's referral. SESAs are not required to participate in the verification process but may do so if they choose.

Verification of a job applicant's legal status to work in the U.S. is done by completing the Form I-9 (Employment Eligibility Verification Form). The basic procedures for filling out the Form I-9 are:

- The employees fill out the first section of the form, providing basic information about themselves (name, address, social security number, etc.). The employees also use this section to attest that they are either U.S. citizens, or are authorized to work in the U.S. permanently or until a specified date.
 - The employer, or the employer's representative (which may include the SESA), reviews original documents that establish identity and employment eligibility within 3 business days of the date that employment begins. The employer must review at least one original document that establishes both identity and employment eligibility, or the employer must review one original document that establishes identity and one original document that establishes the worker's eligibility to work in the U.S. The employer must accept any documents that are presented to them, so long as they reasonably appear on their face to be genuine. The employer is not allowed to require any more or less documentation for different groups of employees.
-

APPENDIX C

TEXT OF AGENCIES' RESPONSE

TO OUR DRAFT REPORT



[Return to Audit Reports](#)

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 30, 1998

MEMORANDUM FOR:

CHARLES C. MASTEN
Inspector General

JOHN J. GETEK
Assistant Inspector General
for Audit

FROM:

/ s /
RAYMOND J. UHALDE
Acting Assistant Secretary for
Employment and Training

/ s /
BERNARD E. ANDERSON
Assistant Secretary for
Employment Standards

SUBJECT:

Response to the Office of the Inspector General (OIG)
Draft Report on the H-2A Temporary Foreign Farmworker
Program (Draft Report No. 04-98-004-03-321)

Thank you for the opportunity, and the extension afforded, to comment on your draft report on the H-2A Program, *"Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers."* The Employment and Training Administration (ETA) and the Employment Standards Administration (ESA) and its Wage and Hour Division (WHD) concur with many of the findings and the recommendations in the draft report.

Our response first addresses the draft report's recommendations and then we offer comments on some of the findings set forth in the body of the draft report.

OIG Recommendation:

"We recommend the Secretary and the Assistant Secretaries for Employment and Training and Employment Standards work with the Congress and other affected agencies to introduce legislation that will:

- *Consolidate responsibility within the WHD for post-application examination and enforcement of employer compliance with H-2A program recruitment, wage and working condition assurances. WHD should also be given the authority to apply sanctions against*

employers, such as debarment from participation in the H-2A program for violating program requirements.

- ***Shift ETA resources currently used in the certification process to WHD to assist in its expanded role. "***

Agencies' Response:

ETA and ESA/WHD concur. While we are examining the issue, we do not believe that legislation would be required to effect this recommendation (except for the appropriate resource adjustments through the appropriations process) as it falls within the Secretary's authority delegated under the Immigration and Nationality Act (INA) and by the Attorney General. The recommended transfer to ESA's Wage and Hour Division of H-2A program administration (certification) and enforcement responsibilities now performed by ETA will include transfer of appropriate resources. In conjunction with the transfer, we also concur - as we did with a similar recommendation emanating from a recent General Accounting Office (GAO) review of the H-2A program - that WHD should be given the authority to apply sanctions against employers, such as debarment from participation in the H-2A program for violating program requirements.

We believe that implementation of this recommendation should occur in the broader context of DOL's efforts to improve the effectiveness of its other major employment-based immigration programs. As you know, for some time, the Office of the Assistant Secretary for Policy (ASP), the Bureau of International Labor Affairs (ILAB), ESA and ETA have been working together to develop options to address major weaknesses in the application adjudication (certification) process for both temporary and permanent employment-based immigration. Many of the weaknesses cited in the OIG's earlier report on the permanent labor certification program and the H-IB labor condition application (LCA) program, as well as those cited in this draft report relating to the H-2A program, relate to difficulties in recruiting U.S. workers for jobs for which U.S. employers seek foreign workers, and to effective wage and labor protections for foreign and similarly-employed U.S. workers. These weaknesses also affect other employment-based immigration programs. Consolidating DOL responsibilities for all employment-based immigration programs is among the options being considered as part of the action needed to correct these recruitment and worker protection weaknesses. Thus, OIG's recommendation to transfer ETA's H-2A certification responsibilities to WHD should be seen in the broader context of other reforms under review to improve employment-based immigration programs and, perhaps, should be implemented in tandem with the broader set of reforms that are adopted.

OIG Recommendation:

"We also recommend substantive changes be made to the program, including issuance of final program regulations through the rulemaking process and other issues discussed in the section of this report titled, "Additional H-2A Program Issues Require Attention. " ["Which include possible changes to the "50 percent rule" and consolidation of Job Orders in the Interstate Clearance System].

Agencies' Response

Generally, ETA and ES/WHd concur. We have agreed to implement recommendations regarding changes to the H-2A program from the GAO and other sources that will require rulemaking. Through this upcoming notice-and-comment rulemaking we will entertain public comments on changes to the H-2A rules and finalize the H-2A program regulations. In this process, we will consider and solicit public comment regarding possible changes to the "50 percent rule" and the feasibility of consolidating agricultural job orders in the Interstate Clearance System. ETA and ESA/WHd believe, however, that the 50 percent rule plays a key role in providing employment opportunities and protections for U.S. workers and in enabling employers to tap into the domestic labor supply.

OIG Recommendation:

"... we encourage the Secretary to work with the Congress and other affected agencies in developing a reliable means of verifying individual's citizenship status as they are hired. We note that several such 'pilot' systems are now being tested "

Agencies' Response:

The Secretary and Department of Labor staff have been and will continue to be strong advocates of an effective system for employment eligibility verification, which is principally the responsibility of the Attorney General and the Commissioner of the Immigration and Naturalization Service (INS) under the relevant provisions of the INA.

With respect to the draft OIG report's findings on other aspects of the operation of the H-2A program, we offer the following comments which reference the titled subsections of the report.

Purpose of the H-2A Labor Certification Process (p. 4)

The correct reference in the first paragraph is to the Immigration Reform and Control Act (IRCA).

Few U.S. Workers Were Recruited for H-2A Jobs (p.5)

Both the GAO and OIG reports concluded - like virtually every other serious study of the issue that there is no nationwide shortage of farmworkers, but there may be spot shortages in certain crops and areas at certain times. It is to address just such spot shortages that the H-2A program exists.

But we do not agree that *"poor success in recruiting U.S. agricultural workers for H-2A positions seems to contradict data that indicate a national surplus of agricultural workers exists"* (p.6). There are many reasons - well-described in the draft report - why domestic

recruitment efforts under the H-2A program are largely ineffective, and that U.S. farmworkers are sometimes not hired by H-2A employers. Among these reasons are that many H-2A employers have used H-2A workers for decades, domestic recruitment efforts - by employers and the State Employment Security Agencies (SESAS) - often do not effectively disseminate information about available jobs to locations or in a manner that actually reaches U.S. farmworkers, lack of family housing, high

transportation costs, and uncertainty about where and which jobs a farmworker would be assigned to, particularly where grower associations make the application for H-2A workers on behalf of a large and geographically disbursed number of their members. Of course, none of these documented reasons for ineffective recruitment relates in any way to the availability of U.S. farmworkers, and certainly these reasons do not cast doubt on the existence of a nationwide agricultural worker surplus in the country.

At the end of this section there is a paragraph we find somewhat contradictory and perplexing. The draft report says, *"Why then do most employers find agricultural workers to fill their needs without relying on the H-2A program? The contradiction may be answered by the means and methods ETA and employers used to recruit workers."* As the draft report later documents, most employers find agricultural workers to fill their needs without relying on the H-2A program precisely because there is an available supply of farmworkers in the U.S. (though a good portion of them are not legally authorized to work), and agricultural employers which really want U.S. farmworkers use different, more effective means to find and connect with them.

Little Recruitment or Hiring of Agricultural Workers Occurred Through the SESAs' Efforts (p. 6)

ETA is working to improve dissemination of information about agricultural job opportunities, including increased use of America's Job Bank, which is accessible by worker advocates and outreach agencies. Some States recently informed ETA that because they have been successful in placing most U.S. workers who are seeking agricultural jobs with non H-2A employers, that is where they focus their limited recruitment and placement resources.

The Interstate Clearance System Has Little Impact on Recruiting Workers (p. 9)

ETA is very concerned as to whether the SESAs have adequate resources to perform even the minimum recruitment activities required under the H-2A program due to budget reductions by the Congress. For example, Florida's overall foreign labor certification allocation has decreased from \$1.8 million in 1996, to \$1 million in 1997, and to \$764,000 in 1998 - only about 40 percent of the level just two years earlier. Texas' allocation has decreased from \$2.2 million in 1996, to \$1.2 million in 1997, and to \$893,000 in 1998 - down 40 percent over these two years. These resources must fund not only activities relating to the H-2A program, but the permanent and other temporary nonimmigrant programs as well.

SESAs are Hesitant to Refer Workers on H-2A Job Orders (p. 10)

The draft report notes that *"some [SESA] staff were hesitant to refer [U.S. farm] workers to*

certain H-2A employers, because it was their perception that the workers referred to certain H-2A employers would not be hired. They believe some employers delayed the applicant interviews or discouraged domestic workers from accepting jobs " This is, indeed, a common problem. It is entirely understandable that SESA staff would not want to send generally destitute U.S. farmworkers off on what would amount to a "wild goose chase" at best, or an expensive, demeaning, and very frustrating exercise at worst, where their experience is a history of poor success in getting a U.S. employer that wants foreign workers to hire U.S. farmworkers. In its earlier report regarding the permanent labor certification and H-1B LCA programs, the OIG found exactly this phenomenon occurring with great frequency in the permanent program. It should be no surprise that it commonly occurs as well in employment-based nonimmigrant programs, like H-2A. SESA staff would be mis-serving both its customers - the employer

who only wants foreign farmworkers and the U.S. farmworkers who really have no chance of being hired by that employer - if they insist on making referrals linking the two parties.

Footnote 8 (p. 11) should say that family housing is required to be provided workers with families when it is the prevailing practice in the area of intended employment.

"Positive Recruitment" Requirements Do Not Result in Local Hiring (p. 11) and "Spot" Labor Shortages May Exist (p. 12)

We do not agree that, as the draft report states, *"The most plausible reason that neither H-2A employers nor the SESAs have success in recruiting U.S. workers is that such workers are not available."* As pointed out in earlier comments, the draft report itself documents a number of reasons - unrelated to the actual availability of U.S. farmworkers - that both SESAs and H-2A growers domestic recruitment efforts are largely unsuccessful. That is not to say that "spot", shortages of agricultural labor do not exist, which the H-2A program exists to address.

ETA has recently placed a priority on more effective positive recruitment. The agency has recently issued positive recruitment instructions (copy attached), and has reviewed positive recruitment tools at its national H-2A conference in May 1996. ETA acknowledges that neither the States nor its regional offices have the expertise or staff to effectively direct individual recruitment efforts by thousands of employers directed to specific locations and advertising sources. The agencies will examine new ways to obtain the assistance of worker advocates and community-based organizations in improving the effectiveness of recruitment efforts both by employers and the State agencies.

Involvement of Growers Associations May Present Special Concerns for Local Recruitment (p. 12)

H-2A applications from growers' associations are specifically authorized in the law, and represent significant savings in program administration because potentially hundreds of different employers may be combined in a single master order.

ETA has no direct evidence that H-2A applications from growers' associations discourage U.S. workers, but we do not disagree with this basic proposition; we agree especially that large, statewide master orders submitted by associations pose such problems. Consequently, ETA is currently instructing its field staff to carefully examine the scope of associations' applications - a master order can only request workers for one time period, and must be for one primary crop. However, if growing other crops in addition to the primary crop is normal practice in the area, it remains permissible to include these crops in the master order. ETA has instructed its regions that receive and process master orders that when a separate or secondary crop, such as cucumbers, is normally harvested by a separate group of workers who "specialize" in that crop, to better protect U.S. workers, the separate/secondary crop must be excluded from the master order.

Certifications Were Often Made on Incomplete Data and Were Not Timely (p. 14)

This finding parallels the GAO's findings. While ETA does not dispute that necessary information on which to base certifications was not available in the files reviewed, we would point out that, during the period covered by the OIG's review, ETA's largest H-2A region did not have an H-2A staff person

2 assigned to this activity (though a full-time staff person is now in place). Further, with respect to information which was not available in the files reviewed, such as recruitment reports, we would note that there are instances where a recruitment report would not be needed. For instance, a recruitment report might not be required of an employer who applies a few days after another employer (with the same type crop and dates of need) who had previously recruited without success. However, a local and an interstate job order must always be completed, and the file should at least contain a negative report from the SESA indicating that there were no referrals. ETA will take steps to ensure that regions consistently maintain the required documentation.

Regarding the OIG's finding that housing inspection reports were missing from the files, ETA notes that we have recently denied or delayed a number of certification requests due to lack of housing. Some H-2A housing is rental housing meeting local standards and thus would not require inspection. Additionally, the housing in many master orders is used during the season for a number of master orders from the same association and employers. If the first order contains written confirmation of an acceptable housing inspection, the next several orders during the season might not contain the actual inspection document for the same housing. Nonetheless, ETA will follow up with the regions on this finding.

The OIG finds that many certifications in 1996 were not issued during the statutorily-required time period. ETA points out that there are many reasons a certification is appropriately issued after the 20 day statutory period - these include an employer's lack of approved or inspected housing, delays in providing a recruitment report, if required, and delays by the employer in responding to deficiencies in the application. While delays in meeting the seven day requirement for initial processing of applications are only attributable to actions by the agency, we are concerned that diminishing regional staff resources may require other actions to ensure that the Department is better able to consistently meet this statutory deadline.

Data Necessary to Evaluate H-2A Program Activities Is Not Maintained (p. 17)

This finding also parallels a GAO finding. ETA has requested that \$275,000 in FY 1998 funds be reprogrammed to establish an automated tracking, case processing and management system for the H-2A program. This system is urgently needed and ETA will place a high priority on its development. Many of the timeliness issues noted previously are exacerbated by lack of a uniform, "real time" information system to assist the regions in processing cases, tracking deadlines, and allowing National Office monitoring. ETA has already commenced planning for this system; mandatory items in the new system will include recording housing inspections and the required job orders.

DOL's H-2A Enforcement Responsibilities are Fragmented (p. 17)

The reference to "*SESA 's WHD* " needs to be corrected.

Additional H-2A Program Issues Require Attention (p. 18)

ETA and ESA/WHM believe that the H-2A program's "50 percent" rule provides essential U.S. worker protection. However, as discussed above in response to the draft report's related recommendation, we will explore whether there are circumstances in which the rule might be applied differently.

With respect to the draft report's suggestion regarding alternative approaches to the interstate recruitment

✓ process, ETA plans to expand the current pilot project in New York State regarding use of the America's Job Bank for New York apple harvest orders. (See attached)

As noted above, the Department has committed to a number of additional changes in the H-2A program in response to recommendations from the GAO and other sources. These changes include:

- Changing the H-2A application lead time to 45 days, rather than 60 days, and reducing the lead time for completing housing inspections.
- Extending the authority to suspend employers with serious labor standard violations to WHD (which is also addressed in the OIG's draft report);
- Extending the first week wage guarantee which applies to U.S. farmworkers recruited through the interstate clearance system to H-2A workers;
- Providing an exception to the requirement to use farm labor contractors (FLC) where the FLCs have a documented history of using illegal workers or other labor abuses;
- Allowing employers to submit in their applications a bonding requirement for FLCs to protect employers from risks such as the FLC providing illegal workers, or failing to perform.

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Again, we appreciate the opportunity to review and comment on this draft report. If we can be of any further assistance or clarify our comments, please do not hesitate to contact John Fraser, Acting Administrator of WHD, at 219-8305, or John Beverly, Director, U.S. Employment Service, at 219-5257.

Attachments

CLASSIFICATION
ES

U. S. Department of Labor

Employment and Training Administration

SYMBOL

Washington, D.C.

20210

CORRESPONDENCE

TEEL

DATE
July 14, 1997

DIRECTIVE: GENERAL ADMINISTRATION LETTER NO. 7-97

FROM: / s /
ROBERT S. KENYON
Acting Administrator
for Regional Management

SUBJECT: Pilot Project Using America's Job Bank in the H-2A Recruitment Process

1. Purpose. To provide instructions for processing and coding New York State (NY) job orders using Americals Job Bank (AJB) for recruitment of H-2A workers.
2. Reference. Title 20 CFR 653.500-3, 29 CFR Part 500, ESPL No. 4-95, FR Vol. 61 No. 96 (MSPA).
3. Background. The National Office has designated NY as the pilot State for using AJB to transmit recruitment information for coded H-2A job opportunities throughout the United States. This project will not alter the legal requirements of the H-2A process, and is expected to provide information on job opportunities to more U.S. workers.

As a result of using AJB in the H-2A recruitment process, electronic orders for jobs in NY will instantly be made available to all SESAs. SESAs and local entities with access to either AJB or the INTERNET will have information sufficient for referral to job opportunities resulting from H-2A orders. **Unless otherwise indicated (or specifically requested) NY State staff will not routinely provide a hard copy of complete job orders to other States.**

This pilot project will help establish procedures for using electronic methods to comply with the regulatory recruitment requirements. If this pilot is successful for NY H-2A orders, similar procedures will be extended to all H-2A orders and to all interstate clearance orders.

Rescissions	EXPIRATION DATE
None	July 31, 1998

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4. Action Required. State Administrators are requested to inform staff that:
 - a. AJB will be the primary means of informing the ETA system of criteria (H-2A) job opportunities in NY State;
 - b. The attached procedures should be adhered to in responding to NY State H-2A job orders; and
 - c. Since only AJB will be used initially to notify the ES system of NY State H-2A openings, it is essential that local office staff in States which have traditionally received hard copies of the NY orders access AJB on a routine basis, especially during the traditional recruitment period for NY harvest orders (July 1-August 15).
5. Inquiries. Inquiries should be directed to the appropriate Regional Certifying Officer.
6. Attachments.

- A. Procedures for Interstate Clearance of H-2A Job Orders Utilizing Americals Job Bank
 - B. Sample Order
 - C. Codes for H-2A Job Orders
 - D. Code Definitions
-

Attachment A to GAL No. 7-97

PROCEDURES FOR INTERSTATE CLEARANCE OF H-2A JOB ORDERS UTILIZING AMERICA'S JOB BANK

I. General

In the 1970's, a series of ES complaints were consolidated in a lawsuit titled NAACP (Western Region) v. Brennan. Among the problems identified in the complaints and lawsuit were referrals of farmworkers to jobs for which there were deficient orders or orders with insufficient information. In resolving the lawsuit, DOL established guidelines for the handling of interstate orders, both criteria and noncriteria. Those guidelines were promulgated in regulations at 20 CFR 653.500-503 and were designed to insure that farmworkers were not referred to jobs that offered inadequate wages or working conditions and that farmworkers had access to information about all material aspects of the job offer.

Although automated job banks were in use at the time of the regulations, their use was limited and electronic distribution was within the State. A State had to take specific action to place a job on the Interstate Job Bank (IJB), the predecessor of today's Americals Job Bank (AJB). States were informed of jobs on the IJB through periodic updates of microfiche. There were often delays of two weeks or more between the time a local office accepted a job order and when an order would appear on the IJB microfiche.

The use of electronic technology has the positive effect of making information about agricultural jobs available more quickly in more States and in locations other than the Employment Service office. With automation advances today and the development of AJB, in most States when a job is listed by AJB, it is simultaneously available throughout the States. Some States also make all their job orders available on the Internet.

II. Preliminary Steps

- A. The coded AJB job order (Attachment 3) will be considered to be the approved ETA checklist for purposes of compliance with 20 CFR 653.501(f)(2)(ii). The checklist shall summarize wages, working conditions and other specifications on the job order. The checklist shall be provided in English and in Spanish when necessary.
-

-2-

B. The full description of the meaning of each H-2A element (3/4 guarantee, 50% rule, etc.) will be available in English on the internet at:

<http://www.labor.state.ny.us/agricul>

Local offices which have active applicants interested in these orders can print a copy of the H-2A provisions to provide to such workers.

III. Operating Procedures

Upon issuance of this GAL, the AJB Interstate clearance pilot project will be effective with respect to jobs in New York only. All States shall refer workers to all available agricultural job opportunities (criteria and noncriteria) in New York utilizing the following procedures:

- A. Job orders will continue to be developed in the field with the assistance of local job service staff.
- B. Orders will continue to be submitted to the Regional Office (Region II) for review and approval.
- C. After completion of the regional review process, New York State will be notified of acceptance consistent with current practice.
- D. Upon receiving notice of acceptance, the order will be released for entry into the National AJB system. Orders will not be released into the National AJB system until the ETA Regional Office in New York has accepted them for entry into the clearance system.
- E. Once the order has been placed into the AJB system, a copy of the complete order (the ETA 790 and all attachments) will be provided to each designated applicant-holding ETA Regional Office, and the Regional Farm Labor Enforcement Committee for the New York Region.

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F. Applicant-holding offices should provide a complete copy of the job order only when they have applicants who have expressed an interest in being referred and who have requested an opportunity to inspect a copy of the complete order.

The applicant-holding office should use the internet to print a blank copy of the order, found at:

<http://www.labor.state.ny.us.agricul/sample.pdf>

and use the information on the AJB to create a complete order. If the applicant-holding office does not have access to the Internet, it should request the order-holding office to fax a copy of the complete order in English, or Spanish when necessary. Standard "boilerplate" such as the 3/4 rule,

etc., should already be available so that it may be provided to workers at all local offices, and it is also available on the general web address. The applicant-holding office must continue to provide each referred worker a copy of the description of the worker's rights developed by the National Farm Labor Coordinated Enforcement Committee.

IV. General Provisions

A. Attachment B provides a sample of the AJB screen containing the codes as they will appear on the screen; Attachment C provides an explanation of the code meanings. Attachment D provides additional definitions and discussion of the codes.

In developing this new procedure, the coding system (Attachment C) was developed to meet the needs of the pilot State. Therefore, the categories shown may not be universally applicable. For example, when harvesting a strawberry crop, the cents/drop category is not needed. In instances such as this where the category is "Not Applicable," the AJB screen entry should show as "N."

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B. Recent MSPA amendments (Federal Register Vol. 61, No. 96) require that employers disclose additional information regarding workers' compensation. ETA is working with ESA to incorporate this information either on the checklist or in the free form so that the job order can fulfill the MSPA disclosure requirements.

C. Supplementary information such as detailed job information including experience and productivity standards should be explained in the "free form" section of the computer screen. The NY AJB system will allow (5) lines for typed text, one of which is used for the codes.

Attachment 2 to GAL No. 7 97

CODES FOR H-2A JOB ORDERS

The codes used for R-2A job orders, shown in detail below, consist of a series of numbers and letters. The position in the line of code determines the category of information to which it applies and the positions of the categories will not change during the period of this pilot project. A "Y" in a particular category (e.g., UT) will serve to indicate that the category is provided in the order. An "N" indicates that it is not provided.

In the cases of the hourly rates, piece rates, minimum hourly wage, normal days per week, normal hours per day and cost per day for meals, the normal figures are shown, when applicable. Otherwise an "N" will be used. A fuller discussion of the codes and positions follows in Attachment D.

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

AGE
SEX
MARITAL STATUS
EDUCATION
RELIGION
RACE
COUNTRY OF ORIGIN
DATE OF BIRTH
PLACE OF BIRTH
MILITARY SERVICE
PROFESSIONAL TRAINING
WORK EXPERIENCE
CURRENT EMPLOYMENT
REASON FOR LEAVING PREVIOUS EMPLOYMENT
REFERENCES
SKILLS
LANGUAGES
HOUSING
TRANSPORTATION
FOOD
HEALTH CARE
SOCIAL SECURITY
VISA STATUS
ENTRY DATE
EXIT DATE
STATUS

EXAMPLE :

A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W
 Categories:
 Y, Y, 99, W, N, N, 6, 7, Y, 98, 5, Y, 9, N, N, Y, Y, Y, Y, 9, Y, Y, N, Y
 Codes:

NOTE: HOUSING CODES>>> S = SINGLE, F = FAMILY, O = OTHER (no cost rental, etc.)

Attachment D to GAL No. 7-97

CODE DEFINITIONS

The required information on H-2A job orders is coded on the AJB screen (Attachment B) and includes the categories listed below:

CATEGORIES	DEFINITION
A. Hourly Rate	Is the activity paid by the hour?
B. Piece Rate	Is the activity paid by piece?
C. Fresh Market Rate	Piece rate for fresh market fruit
D. Processing Rate	Piece rate for fruit for processing
E. Drops Rate	Piece rate for fruit on ground
F. Overtime Pay	Does employer pay overtime?
G. Minimum Hourly Wage	Higher of AEWB or prevailing wage
H. Workers compensation	Does employer provide workers compensation?
I. Hours Per Day	Normal hours per day
J. Days Per Week	Normal days per week
K. 3/4 Guarantee	Does employer assure work for 3/4 of contract hours?
L. No Cost Housing	Coded type of housing provided: S=Single; F=Family; O=Other (motel, etc.)
M. Meals	Does employer provide 3 meals a day?
N. Meal Costs	Daily charge for 3 meals
O. Cooking Facilities	Does the employer provide cooking facilities in lieu of meals?
P. Tools	Does employer provide all tools free?
Q. Training	Does employer provide training for worker to meet productivity standards?

CATEGORIES	DEFINITION
R. Productivity Standards	Does employer specify productivity standard(s) for job retention?
S. Transportation Advance	Does the employer advance transportation costs?
T. Transportation Reimbursement	Does employer reimburse inbound after the shorter of 15 days or 50% of contract & pay for return transportation?
U. 50% Rule	Will employer hire able U.S. workers through 50% of contract period?
V. Unemployment Insurance	Does employer provide UI coverage?
W. Alternative Work	Does employer require alternative work for 1st week's guarantee?

Items in bold (common to all H-2A orders) may be included in a standard boilerplate format prepared as a handout in English and Spanish at a local office or the local office can find an expanded presentation in the complete order available by fax or at: <http://www.labor.state.ny/agricul>

Discussion of Codes:

Codes A (Hourly rate) and B (Piece rate)

For most harvest jobs, the wage will be either hourly (A) or piece rate (B). In some orders, there may be both an hourly and a piece rate component. For example, the sample order for a "Farmworker, Fruit II" indicates that the wages will be both hourly and piece. The job description says the worker will assist in harvest beginning in mid August. Therefore, there is a piece rate wage of \$0.60 (per EAB or 1 1/8 bushels) listed in the "fresh market" category.

Code F (Overtime pay)

The majority of H-2A occupations are exempt from the requirement for paying overtime.

Code J (Days per week)

By looking at the "Hours:" row on the A/B order and the hours in Code I, a Saturday half-day can be determined. For example, if an order said 44 hours, Code I was 08 and Code J was 6, it is clear that the worker is expected to work 8 hours M-F and 4 hours on Saturday to reach the 44 hour total.

Codes M (Meals) and N (Meal costs)

If Code M is "Y," then there must be an entry in Code N. If the entry in Code N is "0.00," that should mean that the employer is providing meals at no cost to the worker. Also, if Code M is "Y," then Code O must be "N."

U. S. Department of Labor

Employment and Training Administration

SYMBOL

Washington, D.C.

20210

CORRESPONDENCE

TEES

DATE
January 6, 1997

DIRECTIVE: FIELD MEMORANDUM NO. 17-97

TO: ALL REGIONAL ADMINISTRATORS

FROM: / s /
BARBARA ANN FARMER
Administrator
for Regional Management

SUBJECT: Improvements in H-2A Processing

1. Purpose. To transmit policy regarding issues involving recruitment of U.S. workers in the H-2A program.
2. References. 20 CFR Part 655, Subpart B (H-2A regulations); ETA Handbook No. 398.
3. Background. Since the H-2A Regulations went into effect on June 1, 1987, questions have been raised about when and under what conditions U.S. workers are considered to be available and used as a basis for full or partial denial of H-2A certifications. Questions have also been raised in regard to the process of redeterminations in the 72 hour window in the regulations. A third issue relating to recruitment has been the adequacy and/or necessity of Positive Recruitment.

During the debate and testimony concerning proposed "guestworker" legislation to amend or replace H-2A, a number of growers and their representatives alleged that ETA is inconsistent and needlessly bureaucratic in interpreting and enforcing its regulations in regard to recruitment. At the same time, worker advocates expressed concern about the adequacy of the recruitment process for domestic workers, and especially about the use of adequate positive recruitment.

This memorandum clarifies some of these issues with the goal of retaining realistic protections for U.S. workers while streamlining the process for growers and SESA staff.

4. Policy Discussion:

- a. Every effort should continue to be made to locate able, willing and qualified U.S. workers. However, the number of requested H-2A workers

RECISSIONS:	Expiration Date
NONE	January 31, 1998

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should not be reduced unless the Regional Office is reasonably certain the workers listed as available by a recruitment source such as a SESA are in fact actually willing to take the job and likely to arrive by the date of need. At a minimum, the recruitment source should conduct an adequate screening of applicants, and encourage, as well as assist, employers to conduct an interview. Regions should use judgement in determining availability of workers, particularly in those instances in which a list of names and social security numbers is provided the day before, or the day of certification, when an employer has no opportunity to interview those workers. (It is assumed that no denial will be made based merely on a list of names without social security numbers or vague statements with respect to the number of workers available.) Section 655.106 notes that an available worker is one "who has made a firm commitment to work for the employer...". A written agreement signed by the worker to accept the job should be considered as a "firm commitment."

In making full or partial denials, the Regions should consider the historical record of recruitment sources both in relation to the percentage of workers on a list who continue to express interest after the employer interview and the percentage of those workers who show up as agreed by the date of need.

b. As a reminder, the 50 percent rule protects the employment rights of U.S. workers. Employers should be informed of the number of workers who might be available and reminded that they must make a job available for all who arrive at the job site. The goal should be to eliminate the need for redeterminations by certifying the appropriate number of H-2A workers initially.

c. If workers identified by the Regional Office as able, willing and qualified do not report as promised, Regions should use discretion in reducing the number requested in the redetermination based on "last minute" replacements. Since in most situations there is another employer with a later start date, the focus should be on an effective placement of the replacement worker, and not on producing a name as a basis for rejecting a redetermination request. Because many employers prepare their processing documents in advance, providing timely notification with respect to replacement workers is essential to providing quality customer service. The intent should be to identify and refer domestic workers who will report as promised and remain to complete the job.

d. Positive recruitment should not be a "paper process." If there are credible reports of "a significant number of able and qualified U.S. workers, who, if recruited, would likely be willing to make themselves available for work at the time and place needed" then positive recruitment

-3-

should not only be required, but should include information on the specific format, location and language of radio advertisements, and how direct contacts with worker and worker organizations will be made including examples of multilingual "flyers" about the job and information regarding to

whom they will be sent.

e. In consideration of the increased use of America's Job Bank (AJB) and of other electronic and automated systems of job information, approved agricultural job orders should be routinely entered upon receipt into the AJB. In addition, States are encouraged to use electronic and automated systems in notifying all potential workers of agricultural job openings.

5. Action Required: Please ensure appropriate staff in the Regional Offices and State Agencies are informed of these policies.

6. Inquiries. Inquiries should be directed to Richard Kaufmann or Robert Haverkamp on (202) 219-8666.



[Return to H-2A Audit Report](#)



[Return to OA Audit Reports](#)

DOL INSPECTOR GENERAL REPORT
(Excerpts, April, 1998)

We found the DOL certification process is ineffective. It is characterized by extensive administrative requirements, paperwork and regulations that often seem dissociated with DOL's mandate of providing assurance that American workers' jobs are protected. [Page 1]

Many studies point to a surplus of agricultural workers. Yet, our sample of Fiscal Year (FY) 1996 H-2A certifications indicates that neither the SESAs' efforts nor recruiting efforts required of employers resulted in significant numbers of U.S. workers being placed in agricultural jobs for which foreign H-2A laborers had been requested. Only 2 percent (252 of 10,134) of the agricultural job openings for which growers had requested foreign workers were filled by domestic workers. [Page 1]

Data we reviewed in Texas indicates that during PY 1996, it received 560 agricultural clearance orders involving requests for 9,031 workers. It referred 361 workers on agricultural clearance orders, of which 327 were to a nursery in the Midwest. In total 308 workers were hired. Only 15 workers were referred to growers that had requested H-2A workers. [Page 10]

Based on interviews with officials in both Florida and Texas, we found that little effort is spent on filling interstate clearance orders. Most orders are received and put into the statewide computer system. It is then the responsibility of local offices to recruit on the order. We were told that due to budget constraints, little outreach was being used to fill most interstate orders, and active recruitment would occur on a larger scale only when the ETA placed special emphasis on filling job orders from a specific area or location. [Page 10]

Most agricultural employers used means other than the (employment service) to recruit farmworkers. [Page 2]

A more fundamental concern is whether the environment in which the H-2A program operates will allow protection of U.S. agricultural workers' jobs. In recent years, an increasing proportion of agricultural workers are in the U.S. illegally. A 1995 DOL study conservatively estimated that 37 percent of the agricultural workforce, or 600,000 workers, were illegal immigrants. In contrast, ETA certified only about 18,000 H-2A crop workers during FY1996. Consequently, it is from a large population of unauthorized immigrants that most employers recruit farmworkers. [Page 2]

As a result [of fraudulent documents], growers, DOL and the [State employment services] often cannot distinguish unauthorized foreign job applicants from U.S. workers. We found evidence that the [employment services] had in some instances referred unauthorized workers, believing they were U.S. workers, to fill requested H-2A jobs. [Page 2, 27]

Unauthorized Immigrants May Have Also Been Referred to H-2A Jobs. We were unable to conduct our SSN match against all H-2A job referrals, because the data was only sporadically

available. However, we did identify instances which suggest unauthorized foreign workers were referred to H-2A jobs as a part of the SESAs' efforts to recruit domestic workers. As a result, incongruous situations occurred in which SESAs recruited and referred what may have been unauthorized immigrants to growers as replacements for legally admitted H-2A workers. [Page 26]

We believe resources now devoted to the H-2A certification function as carried out by [Employment Training Administration] could be better spent on increased enforcement of H-2A recruitment, wage and working condition requirements. [Page 2]