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

Senate-Passed Amendment	Proposed Conference Changes
Limitation on Covered Job Opportunities (Section 2)	Changes definition of "agriculture" to clarify that packinghouse and food processing jobs currently excluded from H-2A program are excluded from reformed program.
Wages (Section 2)	Clarifies that the premium prevailing wage rate cannot be less than the federal or applicable State minimum wage. (per CRS)
Housing (Section 7)	Requires employers to make a good faith effort to locate housing where a housing allowance is provided. Also shortens the period for State determinations of the sufficiency of housing from 3 to 1 year and requires that housing be provided 4 years rather than 5 years after a finding of insufficient housing.
Transportation (Section 7)	Eliminates any ambiguity that employers must reimburse inbound and outbound transportation costs after the required work commitments are met.

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

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

Transfer of Workers Dissatisfied with Employer (Section 8)

-Applies to Foriegn worker

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

Clarifies that employers may voluntarily agree to transfer workers to other qualified employers.
Clarifies alien workers may return home at any ti

State Department Issuance of Visas (Section 6)

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

Limitation on the Number of Visas (Section 6)

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

NOT AGREED;
50%
Wyden wou
some limit
out years

Establishment of Employer/Worker Advisory Board (Section 13)

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

Termination of Program (Section 13)

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

Effective Date of Program (Section 14)	The effective date for the program is 1 year rather 6 months after enactment to allow more time for government agencies to implement program. DOL is mandated to issue report within 6 months regarding measures being taken and progress made in implementation.
Initial Waiver of Ineligibility (Section 9)	States that otherwise admissible aliens are not deemed inadmissible to participate in program if they leave the US no later than within 1-year after the 4-year phase-in period.
Removal by Attorney General of Aliens Violating Program Terms (Section 9)	Requires AG to remove workers who abandon employment and fail to maintain legal status in US.
Identification Document and Document System (Section 9)	Establishes tamper- and counterfeit-proof identification document to verify employment eligibility of aliens. Such document must be compatible with existing government law enforcement and benefit eligibility databases and must measure whether aliens depart US as required by their visas.
Permanent Resident Status (Previous Section 10) No	Provision providing employment-based preference for permanent resident status for aliens working 4 years in program is deleted. NOT AGREE
User's Fee (Section 12)	Establishment of user's fee is being drafted by Legislative Counsel subject to Congressional Budget Office input.
Unemployment Insurance (Section 4)	Provision requiring payment of unemployment insurance to domestic workers as a condition of program participation is being considered by Legislative Counsel subject to Congressional Budget Office input.

Additional changes proposed by Wyden and accepted.

Suggested Amendments to H-2A Draft BAI98.I65

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

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

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

   "(3) COMPUTER DATABASE.--

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

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

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

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

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

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

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

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

   No

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

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

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

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

(3) ASSURANCE OF PROVISION OF REQUIRED WAGES AND BENEFITS.—The employer shall assure that the employer will provide the wages and benefits required by subsections (a), (b), and (c) of section ____07 to all workers employed in job opportunities for which the employer has applied under subsection (a) and to all other workers in the same occupation at the place of employment.

(4) ASSURANCE OF EMPLOYMENT.—The employer shall assure that the employer will not refuse to employ Qualified individuals referred under section ____05, ~~or~~ and will terminate Qualified individuals employed pursuant to this

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

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

(5) ASSURANCE OF COMPLIANCE WITH LABOR LAWS.—

(A) IN GENERAL.—An employer who requests registered workers shall assure that, except as otherwise provided in this title, the employer will comply with all applicable Federal, State, and local labor laws, including laws affecting migrant and seasonal agricultural workers, with respect to all United States workers and alien workers employed by the employer.

(B) LIMITATIONS.—The disclosure required under section 201(a) of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1821(a)) may be made at any time prior to the time the alien is issued a visa permitting entry into the United States.

(6) ASSURANCE OF ADVERTISING OF THE REGISTRY.—The employer shall assure that the employer will, from the day an application for workers is submitted under subsection (a), and continuing throughout the period of employment of any job opportunity for which the employer has applied for a worker from the registry, post in a conspicuous place

(ii) the most economical and reasonable transportation and subsistence costs that would have been incurred had the worker or alien used an appropriate common carrier, as determined by the Secretary.

(B) DISTANCE TRAVELED.—No reimbursement under paragraph (1) or (2) shall be required if the distance traveled is 100 miles or less.

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

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(1) IN GENERAL.—An employer that applies for registered workers under section ____04(a) shall, as a condition for the approval of such application, continue to offer employment to qualified, eligible United States workers who are referred under section ____05(b) after the employer receives the report described in section ____05(b).

(2) LIMITATION.—An employer shall not be obligated to comply with paragraph (1)—

(A) after 50 percent of the anticipated period of employment shown on the employer's application under section ____04(a) has elapsed; or

(B) during any period in which the employer is employing no aliens in the occupation for which the United States worker was referred; or

(C) during any period when the Secretary is conducting a search of a registry for job opportunities in the occupation and area of intended employment to which the worker has been referred, or other occupations in the area of intended employment for which the worker is qualified that offer substantially similar terms and conditions of employment.

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

(4) REFERRAL OF WORKERS DURING 50-PERCENT PERIOD.—The Secretary shall make all reasonable efforts to place a registered worker in an

September 18, 1998

MEMORANDUM FOR ELENA KAGAN AND SALLY KATZEN

FROM: JULIE FERNANDES and CECILIA ROUSE

RE: AMENDED WYDEN-GRAHAM AGRICULTURAL GUESTWORKERS BILL

As you know, Senators Wyden and Graham have put forward a series of changes to their bill to reform the H-2A agricultural guestworker program. On Friday morning, you will be meeting with staff of Senators Ron Wyden (D-OR), Bob Graham (D-FL), Edward Kennedy (D-MA), and Dianne Feinstein (D-CA), and Representatives Howard Berman (D-CA), Sanford Bishop (D-GA), and Xavier Becerra (D-CA), to discuss where we are.

Though their new proposal does move in our direction in a couple of areas (e.g., it restores the requirement that growers reimburse workers for transportation; eliminates the provision that would have required reducing workers' wages by 20% as an incentive to repatriate; adds a requirement that growers make a "good faith" effort to assist workers in utilizing the housing voucher), fundamental substantive objections remain. The following is a list of the most significant problems with the new Wyden-Graham proposal.

1. The bill would eliminate the current requirement that growers must conduct private market recruitment for workers, substituting a simple requirement to check a new and untested government-run "job registry".

The core of the Wyden-Graham bill remains the creation of a new "job registry" administered by the government. Under their bill, growers would need only to check this registry before employing H-2A workers. Thus, all responsibility for the recruitment of domestic farmworkers would shift to a new, untried, process for which the government and low-wage workers are entirely responsible. In addition, although this registry would take years to create and implement effectively, employers could begin to hire H-2A workers within 6 months of the enactment of the bill.

At last week's meeting, there was some discussion about extending the start date for the use of the registry from six months to one year after the enactment of the bill. However, even if this change is made, it would not address the fundamental problems with the proposed registry: (1) that use of the registry would relieve the growers of any obligation to do positive recruitment; and (2) that the bill would require wholesale reliance on a method of recruitment that has not been shown to be effective.

2. The bill would erode U.S. worker wages.

The wage provisions of the Wyden-Graham bill have not changed. Under the current program, growers who employ H-2A workers are required to pay all their farmworkers the higher of the prevailing wage (equal to the average local wage for the crop) or an "adverse effect wage rate" (AEWR) (equal to the average statewide wage). The use of the AEWR reflects the fact that foreign workers (both undocumented and H-2A guestworkers) can sometimes dominate a local labor market and depress the local prevailing wage: in such a case, using a statewide calculation (the AEWR) may be more appropriate. The Wyden-Graham bill caps the AEWR at 105% of the local prevailing wage. We continue to believe that this cap is not set high enough to compensate for the depression of wages in areas where there is a heavy reliance on foreign workers and not sufficiently high to attract new U.S. workers into agricultural employment.

In addition, the current proposal from Sens. Wyden and Graham does not include the much-discussed "user fee" (equal to 8½ percent of the H-2A worker's wage). Without this fee, the wage cost of hiring a U.S. workers remains 8 ½ percent higher than hiring an H-2A worker.

3. The bill does not provide an adequate mechanism for housing foreign guestworkers.

Though the proposal continues to replace the requirement that growers provide housing with a requirement that the growers provide workers with a housing voucher, it now includes a requirement that growers make a "good faith" effort to locate housing for the worker. Though this minimal assistance obligation is an improvement, the fundamental obligation that the grower assure that workers are adequately housed would be eliminated. Also, though the Wyden-Graham proposal permits States to certify that there is inadequate housing for farmworkers (within one year of enactment of the bill), there is no requirement that states make an assessment of their rural housing stock and no incentive for them to do so. Further, even if such a certification is made by a State, the growers may still provide vouchers instead of housing for up to four additional years.

There are many areas (particularly in the West) where there simply is not an adequate supply of rural housing to meet the needs of farmworkers. This proposal does not address that. Rather, it gives a grower a minimum of five years after enactment of the bill to continue to use vouchers, regardless of the availability of adequate housing. Moreover, even with the "good faith" assistance by growers, it remains unrealistic to expect low-wage foreign migrant farmworkers to be able to secure housing using a federal voucher. Thus, many workers will likely end up without housing, or will overcrowd any available rental housing.

4. The bill would eliminate the requirement that growers guarantee part of the work offered to recruit U.S. and foreign workers.

This proposal continues to eliminate the requirement that growers guarantee 3/4 of the work offered to recruit U.S. and foreign farmworkers. Under current law, H-2A workers must be paid for at least 75% of the work contract period for which they were recruited, except when there is an "act of God." This "three-fourths guarantee" gives migrant workers some indication of their potential earnings and discourages employers from over-recruiting to secure a labor surplus and drive down wages. Though Wyden's staff discussed trying to include a modified version of this requirement in their bill, their most recent proposal does not restore this protection. The elimination of the 3/4 guarantee would encourage growers to lure workers from hundreds or thousands of miles away with the promise of potentially high earnings without any obligation to fulfill any part of that promise. The change also could encourage growers to recruit more workers than they actually need to hedge against uncertainties.

The Wyden-Graham proposal would require H-2A workers to be covered under the Migrant and Seasonal Worker Protection Act (MSPA). Under MSPA, U.S. migrant farmworkers appear to enjoy a guarantee of 100% of the work contract period for which they were recruited. There is some internal dispute as to whether Wyden's proposal to cover H-2A workers under MSPA would mean that H-2A workers would enjoy a 100% work guarantee. No one on either Sen. Wyden's or Sen. Graham's staff has claimed that this change would provide such a guarantee.

MEMORANDUM FOR ELENA KAGAN and SALLY KATZEN

FROM: JULIE FERNANDES
CECILIA ROUSE

RE: WYDEN-GRAHAM AGRICULTURAL GUESTWORKERS BILL

DATE: September 14, 1998

Background

Agricultural "guestworkers" are admitted on H-2A visas for temporary jobs. Under the current program, in order hire H-2A workers, an employer must demonstrate to the DOL that (a) there are not sufficient U.S. workers able, willing, qualified and available to perform the services; and (b) there will be no adverse effect on the wages and working conditions of similarly-employed U.S. workers. Employers also are required to pay workers an "adverse effect wage rate" (AEWR), determined by the average wage paid to non-managerial agricultural workers in the state; provide free housing to workers outside the commuting area; reimburse workers' inbound transportation if they complete half the contract, outbound also if they complete the contract; guarantee 3/4 of the hours of the contract; and hire any qualified U.S. worker who applies during the first half of the work contract. There is no cap on the number of H-2A visas granted. Out of the 1.6 million farmworkers in the United States, approximately 600,000 are unauthorized to work, and approximately 20,000 are in the H-2A program.

In June 1995, in response to efforts in Congress to pass legislation that would create a new guestworker program (without the worker protections present in the existing program) and agreeing with the recommendation of the Commission on Immigration Reform, the President stated his opposition to a "new guestworker program." However, he also stated that if the crackdown on illegal immigration contributes to labor shortages, he would direct the Departments of Labor and Agriculture to work cooperatively to improve and enhance the existing H-2A program.

Grower advocates argue that they continue to experience difficulties in finding domestic farmworkers and that the H-2A program is slow, cumbersome, and expensive. However, a recent (December 1997) GAO study concluded that agribusiness does not now and will not soon face an agricultural labor shortage. The GAO's finding of a labor surplus echoes the conclusions of the U.S. Commission on Agricultural Workers (1992), and the U.S. Commission on Immigration Reform reports (1995 and 1997). While the GAO report suggested that there could develop localized labor shortages, it noted the widespread belief that employers should respond to the market place by increasing wages, improving recruitment and modernizing their labor practices. Further, the GAO report cited a study which concluded that substantial wage increases would have little effect on consumer produce prices or international competitiveness. Many growers blame the INS's recent crackdown on undocumented farmworkers for the shortages of domestic farmworkers and their need to rely on a dysfunctional H-2A program.

On March 12th of this year, the House Judiciary Subcommittee on Immigration approved legislation, sponsored by Rep. Robert Smith (R-OR), that provides for a new pilot guestworker program that erodes existing worker protections. In a letter to Chairman Lamar Smith, Secretary Herman stated that if this legislation were presented to the President, she would recommend a veto. This bill was voted out of the subcommittee on a voice vote, but has not been taken to the full House Judiciary Committee.

Soon after this bill was introduced, we initiated a process with the Departments of Labor and Agriculture to determine what kinds of regulatory and/or administrative reforms we could put into place before the next growing season. We developed a set of regulatory reforms that respond to the growers' concern that the program needs to be streamlined (i.e., improved processes; reduced paperwork and delay). The Department of Labor and the Justice Department (which handles the immigration aspects of the program) have developed a package of proposed rulemaking changes that we hope will go in effect by the end of January. However, though some grower advocates were pleased with the set of administrative reforms, they continue to press for a legislative package that would fundamentally alter the way the program is operated.

On July 22, 1998, Senators Ron Wyden, Bob Graham and Gordon Smith (R-OR) introduced an amendment to the CJS appropriations bill that would make significant changes to the current H-2A program. On that same day, the Secretary of Labor sent a letter to Senator Wyden stating her strong opposition to his amendment which creates a new guestworker program that erodes labor protections for migrant farmworkers. The overall concern with the Wyden-Graham bill is that it shifts costs and risks from employers to workers and/or the government.

__Issues Regarding H-2A Reform__

Issue #1
Use of the Adverse Effect Wage Rate
Whether we would consider eliminating the adverse effect wage rate and replacing it with an enhanced prevailing wage rate.

Current Law:

Under the current program, growers who employ H-2A workers are required to pay their workers the higher of the prevailing wage (determined by the average wage for the crop in the local area), the federal, state or local minimum wage or an "adverse effect wage rate" (AEWR) (equal to the average statewide agricultural wage rate). Because foreign workers can sometimes dominate a local labor market, this wage depression is often reflected in the local prevailing wage. The

AEWR partially corrects for this depressive effect by measuring farmworker wages on a statewide basis -- thus dissipating the impact of foreign workers on the wage.

Wyden-Graham Bill:

Under the Wyden-Graham bill, the worker is required to be paid either the prevailing wage or the AEWR (capped at 105% of the prevailing wage).

Recommended Administration Position:

The Departments of Labor and Agriculture agree that our goal is to find a way to calculate the wage that both takes into account the depression of wages in areas where there is heavy reliance on illegal and H-2A workers and that isn't so high as to drive employers to hire undocumented workers. Thus, we have agreed to explore proposals to replace the AEWR with some form of an enhanced prevailing wage, so long as the enhancement is adequate. Our preliminary assessment is that 105% of prevailing wage would be an *inadequate* enhancement.

Though we may conclude that a move away from the AEWR could more accurately reflect proper wages in certain sectors, we will likely face significant backlash from the Hispanic and farmworker communities if the new formula results in lower wages in any sector.

Issue #2
Employer Recruitment -- Use of Proposed Registry
Whether we support the creation of a registry system for matching growers to farmworkers that totally replaces an employer's obligation to conduct positive recruitment.

Current Law:

Under current law, if the grower is seeking to employ H-2A workers, he must affirmatively recruit in the private marketplace (know as "positive recruitment") and use the federal-state Job Service to circulate job offers to areas where migrant workers may be located. Thus, the responsibility for farmworker recruitment is shared between the prospective employer and the U.S. Employment Service.

Wyden-Graham Bill:

USDA wants to be open

Under the Wyden-Graham bill, growers seeking to employ H-2A workers would have no obligation to attempt to recruit legal U.S. farmworkers except through a newly-created "job registry." Thus, all responsibility for the recruitment of domestic farmworkers would shift to a new, untried, process for which the government and low-wage workers are entirely responsible. This registry would take years to create, but H-2A workers could be hired within 6 months of the enactment of the bill. Further, because growers would no longer have an obligation to recruit domestically, they would be free to concentrate their worker recruitment efforts abroad.

Recommended Administration Position:

There is general agreement between USDA and DOL that total reliance on a registry (undeveloped; untested) would be unacceptable -- growers must retain some of the responsibility for finding U.S. workers. However, despite these concerns, it may be worthwhile to develop a pilot program to test whether a registry of the kind described in the bill could be an effective tool to assist growers in locating U.S. farmworkers. We could also consider the development of a method of ensuring that those domestic workers whose names are included in the registry are authorized to work (as in the Wyden bill).

Issue #3
Housing
Whether H-2A employers should continue to have an obligation to provide housing to their workers. Also, whether this obligation is met by the issuance of housing vouchers.

Current Law:

Current law requires growers who employ H-2A workers to provide them with free housing.

Wyden-Graham Bill:

The Wyden-Graham bill allows growers to provide a payment voucher (equal to 1/4 of the Fair Market Rate in the applicable county for a two bedroom apartment) in lieu of housing, unless the State certifies that adequate housing is not available in the area. Under this approach, the grower employing H-2A workers would have no obligation to assure that housing is actually available and could be obtained with the voucher.

Recommended Administration Position:

The DOL's chief concern is that the cost of housing not be transferred from the grower to the worker. They also believe that it should remain the grower's responsibility to ensure that housing is available for the workers. USDA remains of the view that the provision of a housing voucher or an increased wage (to reflect the cost of housing) should satisfy the grower's obligation, even if there is no housing available for these workers.

First, there are many areas (particularly in the West) where there simply is not an adequate supply of rural housing to meet the needs of these workers. Second, even if there is some housing available in the area, it is unrealistic to expect low-wage foreign migrant farmworkers to be able to secure housing on their own using a federal voucher. Thus, reliance on a voucher system will leave many workers either without housing or overcrowding any available rental housing.

We recommend not eroding the existing requirement that growers who use the H-2A program provide their workers with housing. However, we may want to consider whether the federal government could do more to assist growers in creating housing for their farmworkers. Currently, the Department of Agriculture administers a migrant farmworker housing program that we could scale up. Also, it may be possible to find ways to encourage states to use their CDBG or HOME funds to target the creation of farmworker housing. Finally, it may be possible to waive some housing regulations if the H-2A worker were housed in established housing (i.e., a hotel, government housing, etc.). These options would be designed to assist the growers with fulfilling *their* obligation to provide adequate housing for their workers -- not as a shift in responsibility from the growers to the government.

Issue #4
The 3/4 Guarantee
Whether we support the continued use of the 3/4 guarantee.

Current Law:

don't get 3/4 if displaced by a U.S. worker.

Under current law, workers must be paid for at least 75% of the work contract period for which they were recruited, except when there is an "act of God." This "three-fourths guarantee" gives migrant workers some indication of their potential earnings and discourages employers from over-recruiting to secure a labor surplus and drive down wages. Under the MSPA (which applies to U.S. migrant farmworkers, but not H-2A workers), workers enjoy a 100% guarantee.

Wyden-Graham Bill:

The Wyden-Graham bill would eliminate this work guarantee for H-2A workers. This change will encourage growers to lure workers from hundreds or thousands of miles away with the promise of potentially high earnings without any obligation to fulfill any part of that promise. This may also encourage growers to recruit more workers than they actually need to hedge against uncertainties.

Recommended Administration Position:

There is agreement within the Administration that the H-2A program should generally track the worker protections included in the Migrant and Seasonal Worker Protection Act (MSPA). As noted, under the MSPA, migrant farmworkers are guaranteed 100% of the work contract period for which they were recruited. Thus, the 3/4 guarantee for H-2A workers is more flexible (and thus better for growers) than the 100% guarantee mandated for those who employ only U.S. workers.

It would seem inconsistent for us to endorse a standard substantially less for the H-2A program than that required under the MSPA. When asked why the growers could live with the 100% guarantee under MSPA, but not the 75% guarantee under the H-2A program, we were told by USDA that it is because the MSPA guarantee is never enforced, and the H-2A guarantee is.

Issue #5
Repatriation Incentive
Whether we support wage-withholding as an incentive for H-2A workers to repatriate.

Current Law:

Under current law, there is no mechanism for ensuring that H-2A workers return to their home country.

Wyden-Graham Bill:

Permits employers to withhold 20% of a worker's wages, to be reclaimed upon the worker's return to his home country.

Recommended Administration Position:

In general, there is agreement within the Administration that we should try to develop an effective way to ensure that guestworkers return to their home country after the termination of the contract. However, this wage deduction is a bad idea that would likely prove ineffective.

First, this would be the first time that the federal government authorized the withholding of worker wages as an incentive toward future behavior. Second, it is unclear whether many of these workers would be able to recover this money from the accounts in their home countries. In addition, there is no evidence that these amounts would serve as a disincentive for employees who intend to stay in the U.S.

According to Sen. Wyden, this provision is not important to the growers, but is key to the viability of his legislation in the Congress. Some members of Congress are concerned that a new guestworker program will lead to an increase in foreign workers in the U.S. and thus an increase in those that do not return to their home country. However, as noted, there is very little reason to believe that a worker who wants to overstay his visa will be deterred by this withholding. Thus, it only would serve to inconvenience (and possibly, disadvantage) those workers who want to work here and return home.

Issue #6
Transportation Reimbursement
Whether employers should continue to be required to provide reimbursement to workers for inbound transportation if they complete 50% of the contract, and for outbound transportation if they complete 100% of the contract.

Current Law:

Under current law, the employer must reimburse the H-2A worker for inbound transportation costs if the worker completes 50% of the contract and for outbound transportation costs if the worker completes 100% of the contract.

Wyden-Graham Bill:

Under the Wyden-Graham proposal, workers may receive such reimbursement from their employer, but the employer is under no obligation to pay. This change would simply shift the cost of transportation to and from the job from the grower to the worker.

Recommended Administration Position:

There is general agreement within the Administration that growers should be responsible for the transportation costs of their H-2A workers. Therefore, we strongly oppose allowing growers to have discretion in reimbursement. However, we could consider giving the grower options on how to reimburse the worker for transportation costs. For example, the grower could have a choice between providing the transportation outright, advancing the cost of transportation to the worker, reimbursing the worker for the transportation, or paying the worker a much higher wage (such as 120% of the prevailing wage) with the intent that the wage "bonus" would be sufficient to cover transportation costs. In addition, there is likely agreement that DOL could develop a pilot program to provide transportation advances for U.S. farmworkers.

Ruth Samardick Steve Mandel Gail Coleman Bruce Alker
Harry Sheinfeld Bob Bach / Barbara Strack - INS
Keith Collins - USDA Steve Fischel - State

DRAFT

----- REV. DRAFT -- REV. DRAFT -- REV. DRAFT ----

Julie Fernandes - DPC

Ideas for Possible Temporary Nonimmigrant Agricultural (H-2A) Guestworker Program Reform

July 30, 1998

→ **Recognizing that the step to legislation is a BIG one ...**

- ***Pilot test new Registry of available U.S. farm workers.***

The Smith-Wyden-Graham bill would shift responsibility for recruitment of U.S. farmworkers from growers seeking access to foreign guestworkers to the Department of Labor (intended to be financed by user fees from participating growers). Growers would have no obligation to recruit U.S. farmworkers beyond asking DOL to find the workers they need, and no obligation to hire any U.S. farmworkers except those delivered by DOL's Registry after confirming the workers are legally authorized to work in the U.S.. For several reasons, the Registry established by the bill can not function effectively.

Nonetheless, though it would be very expensive and complex, the idea of such a Registry – built on the infrastructure of America's Job Bank and America's Talent Bank, and the existing agricultural recruitment system operated by the U.S. Employment Sevice – should be tested for feasibility and effectiveness, though it should not be the sole mechanism for recruiting U.S. workers (see below). Growers, government, and NGOs would be responsible for recruiting workers to Register, and prospective H-2A employers would be required to use the Registry as one (of several) means of obtaining legal U.S. workers.

- ***User fees finance program operations.***

A user fee imposed on employers participating in the program would (1) provide an incentive to find and use U.S. farmworkers, and (2) finance the new costs of the Registry pilot, the travel advance fund, a housing construction fund, and the entry-exit system.

- ***Growers share responsibility for recruiting legal U.S. farmworkers.***

In addition to using the Registry, growers using the H-2A program would have to make *bona fide* efforts to recruit and hire U.S. farmworkers including reemploying former/current legal workers, direct recruiting in labor supply areas, and creating partnerships with NGOs and worker organizations.

DRAFT

- ***Growers participating in the H-2A Program <u>must</u> use the INS pilot verification system.***

Growers advocating for the Smith-Wyden-Graham legislation argue that they want a stable, legal workforce that will reduce their vulnerability to work disruptions and crop/financial loses, but they refuse to use the INS pilot verification system because they expect this will reveal that their current workforce is illegal and they would then be forced to compete based on wages and benefits to attract legal U.S. farmworkers. Growers seeking access to foreign labor should be required to use the INS pilot verification system - instead of just relying on the DOL's Registry to assure the legal status of their workforce.

- ***Reduce lead time for grower application from 45 to 30 days and the lead time for certification/petition approval from 20 to 7 days before grower's "date of need."***

Current law requires DOL certification decision at least 20 days before the employer's first "date of need" for workers in order to allow time for INS petition processing and State Dept. visa processing. Consolidation of the certification and petition processes (in DOL) allows reduction of this lead time to seven days (as in the Smith-Wyden-Graham bill) and, consequently, reduction of the lead time for application/petition submission from 45 to 30 days before the date of need, and still allow (barely) adequate time for effective recruitment. (Possibly, shorter lead times could be allowed for: (1) established program users who demonstrate reduced reliance on foreign H-2A workers; and, (2) those growers who can provide estimates of labor needs and "date of need" 90 or 60 days prior so as to allow more time for recruitment efforts, including through the Registry.)

- ***U.S. and foreign farmworkers employed by growers participating in the H-2A program are covered under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).***

This provision of Smith-Wyden-Graham would extend MSPA coverage to H-2A foreign farmworkers - on the same basis as their U.S. co-workers - and simplifies (terms and conditions of employment) disclosure obligations.

- ***Authorize and fund travel advance pilot program for U.S. farmworkers recruited by growers participating in the H-2A program.***

This provision of Smith-Wyden-Graham, intended to be financed by user fees, helps overcome a common obstacle faced by U.S. farmworkers in accepting H-2A job offers - financing transportation to the job site until reimbursed after completing 50 percent of the contract period, at which time they are reimbursed by their employer for their in-bound transportation costs. A travel advance fund (financed by user fees and administration to be determined) would largely be a relatively small, revolving fund

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repaid by the worker when reimbursed for in-bound transportation as a condition of continued eligibility to participate in the program.

- ***Allow housing allowance in lieu of grower-provided housing.***

A provision of Smith-Wyden-Graham would change the current H-2A requirement that growers provide safe housing - both as an incentive to U.S. workers taking these jobs and as a means of preventing adverse impact on the local communities - to allow, as an option, a housing voucher unless the State determines there is an inadequate housing supply in the area. However, Smith-Wyden-Graham does not require growers to assure that any housing is available, and allows growers to transfer some housing costs - for utilities, maintenance and repair - from the employer to the low-wage workers, ostensibly as an incentive for growers to build and provide farmworker housing.

This proposal would be improved by allowing an H-2A employer to provide a housing allowance in lieu of housing only if temporary rental housing is "reasonably available" at the HUD rate in the community where the workers are to be employed. To be "reasonably available" the housing must be available in sufficient quantity at the HUD rate, must be rentable by farmworkers, meet minimum standards (including occupancy limits), and must be reserved by the employer. The housing would be paid for through vouchers provided to the workers to prevent farmworkers from accepting a cash payment but not using it to secure housing or increasing earnings by reducing housing costs through overcrowding (perhaps reducing the availability of housing in the future).

- ***Modify minimum wage requirements to prevent adverse effect.***

Under the current H-2A program, H-2A employers must pay the highest of the Federal/State minimum wage, the locally prevailing wage for the crop, or the "Adverse Effect Wage Rate" (AEWR) - which is the average agricultural wage rate for the State (or region). The AEWR is intended to prevent wage depression from the use of foreign workers, which can be reflected in local "prevailing wages" where significant numbers of foreign workers - legal or illegal - are employed, and is thus based on a larger labor market (even though this broader-based rate can be affected by a large proportion of illegal workers in the State-wide agricultural labor market).

Our principles dictate against reducing already stagnant farmworkers' wages (or allowing transfer of employers' costs or business risks to their workers), but - as cost is at the center of employers' concerns - we may want to consider some modification in the AEWR. For example, we could consider requiring payment of the AEWR where the local, crop-specific agricultural workforce is not predominantly (*e.g.*, more than 90 percent) composed of legal U.S. workers. The AEWR would not apply elsewhere, but H-2A growers would have to pay the locally-prevailing wage <u>plus ten percent</u>, reflecting the fact that prevailing wage determinations always are based on wages paid in earlier periods and as an incentive to find and use legal U.S. workers. It must be recognized, however, that such an approach will result in some minimum wage requirement reductions, and - at least in the foreseeable future - it will be extremely difficult to make reliable determinations about the threshold of legal U.S. versus foreign workers in a crop-area workforce.

- ***Eliminate the existing FICA/FUTA tax exemption for foreign H-2A farmworkers; use proceeds for repatriation incentive.***

Under current law and the Smith-Wyden-Graham bill, growers are not required to pay FICA (Social Security) and FUTA (Unemployment Insurance) taxes on the earnings of their H-2A employees, and H-2A workers are not required to pay the employee tax to contribute to the Social Security Trust Fund. This presents two major problems.

First, it creates real economic incentives for employers to favor foreign farm workers. The tax exemptions reduce the employer's gross payroll for these workers by about 8 percent compared to similarly-employed U.S. workers (and illegal workers). This creates an unfair competitive advantage for employers of foreign guestworkers over those who employ U.S. workers, and creates an obvious economic incentive to employ foreign workers and build a structural dependency on a foreign workforce.

Second, the H-2A guestworkers enjoy higher net compensation than similarly-employed U.S. workers - currently 7.6 percent of gross wages - by not having to pay the employee's portion of the Social Security tax. This is yet another reason that foreign guestworkers may find these jobs more attractive than U.S. workers, more of whom may be willing to take these jobs if they were paid as much as their foreign co-workers.

As many foreign guestworkers will eventually become U.S. residents and eventually use the Social Security system, one approach would be to recognize this reality and repeal the tax exemptions for both employers and employees. Another approach would be to require H-2A employers to pay the equivalent of their FICA/FUTA taxes into a "repatriation account" on behalf of each worker. This eliminates the economic incentive to employ and become dependent on foreign workers and may provide some additional incentive for guestworkers to return to their home country upon completion of their work in the U.S. Of course, another possibility is that the employer's portion of the taxes be paid as the user fee to finance the various governmental activities contemplated under such law.

- ***Prohibit use of the H-2A program by growers in designated labor surplus areas.***

Recognizing persistent high unemployment rates in many large agricultural areas of the country, growers in areas designated as "labor surplus" areas by the Secretary of Labor would be ineligible to participate in the program.

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- *Require entry-exit control system for H-2A workers.*

Great concern centers on the question of whether large numbers of legal guestworkers entering the U.S. will overstay their visas and add to the large resident illegal population, with their labor replaced by a continuing turnover of new legal temporary foreign guestworkers. Any reformed H-2A program should have carefully crafted entry-exit controls, paid for from user fees, to assure this result is avoided.

- *Cap the number of visas under the program.*

The current H-2A program is not capped, but usage remains low because of the many incentives to employ legal U.S. workers. A reformed H-2A program with fewer such incentives could be capped, but any number picked would be highly contentious.

- *Adjustment of Status (Legalization) Provision?*

The single greatest incentive to foreign guestworkers to not remain illegally in the U.S. by overstaying their temporary visa would be the prospect of eventual legalization to permanent residency through adjustment of status (as reflected in the Smith-Wyden-Graham bill). At the same time – while being highly controversial politically and generally contrary to the thrust of immigration reform proposals to reduce unskilled employment-based immigration to the U.S. – this measure could actually increase foreign guestworkers' vulnerability to exploitation during their period of temporary work authorization because the "prize" of eventual legalization would depend on their continued participation in the program and, thus, in large part, on their employer's goodwill.

- ***Other existing worker protections and incentives – e.g., the "50 percent rule," the "three quarter guarantee," transportation reimbursement, etc. – would remain unchanged.***

STATEMENT OF PRINCIPLES
H2-A REFORM

The Administration's guiding principles for reform of the H2-A program are intended to assure that these policies achieve greater stability in the agricultural workforce so that our agricultural producers and farm workers both benefit. Growers must have a more predictable and reliable labor supply, while we provide adequate workplace protections for domestic and foreign farm workers who are among the poorest and most vulnerable in our society.

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

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

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To	
Julie FerNANdeZ	456-5581

From			
X	Keith Collins	____	Larry Salathe
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____	Jim Schaub	____	Vacant
____	Al French	____	Ginny Taylor
____	Shirley Brown	____	Vacant

MESSAGE

Number of Pages (including cover sheet) ________

H-2A PROGRAM STREAMLINING

PRIORITIZATION OF CHANGES
U.S. Department of Agriculture

(Annotated)

1. Eliminate INS's petition process by delegating authority to DOL to issue petition approvals (Form I-797).

2. Provide simultaneous issuance of H-2A certifications and petition approvals (Form I-797).

3. Electronically transmit Form I-797 to consulates.

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

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

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

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

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

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

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

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

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

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

7

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

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

Does this somehow shift the burden?

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

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

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

Streamlines process to obtain replacement H-2A workers.

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

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

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

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

How?

14. Improve timeliness of prevailing wage determinations.

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

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

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

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

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

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

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

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

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

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

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

20. Conduct education/outreach program for new users.

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

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

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

24. Accommodate electronic filing of job orders and applications.

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

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

26. Simplified renewal application for compliant employers.

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

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

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

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

29. USDA PILOT

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

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

30. DOL PILOT

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

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

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

Insignificant reward.

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

Significant reward.

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

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

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

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

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

Same as above.

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FAX COVER SHEET

Please Deliver to:
Irene Bueno

Fax #: 456-5581
Company: Domestic Policy Council

From: BRUCE GOLDSTEIN

Pages: 4

Message:

The attached letter to Secretary Herman criticizes the recent changes in the H-2A program regulations both because the Department adopted anti-worker provisions that were unjustified, and refused to propose or adopt any pro-worker revisions to the H-2A regulations.

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July 14, 1999

Ms. Alexis Herman
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

Re: H-2A Labor Certification Process Administrative Measures

Dear Secretary Herman:

The Farmworker Justice Fund, Inc. and the organizations listed below[1] submitted comments opposing proposed changes to the regulations under the H-2A temporary foreign agricultural worker program. Significant portions of those regulatory changes were made final in a notice in the Federal Register on June 29, 1999, and become effective July 29, 1999. I write to express my organization's strong disagreement with the action taken by the Employment and Training Administration and our great disappointment in this Administration regarding the H-2A program.

As reflected in the preamble to the new regulations, our comments argued that the proposed rule was unreasonable partly because it fails to adopt any of the numerous proposals to improve implementation of the workers' rights and interests under the H-2A

[1] National Council of La Raza, California Rural Legal Assistance Foundation, Inc., International Labor Rights Fund, Migrant Farmworker Justice Project of Florida Legal Services, Inc., Florida Impact, Virginia Justice Center for Farm and Immigrant Workers, Washington (State) Alliance for Immigrant and Refugee Justice, Mexican American Legal Defense and Educational Fund, North Carolina Justice and Community Development Center, Immigrant Legal Resource Center (California), National Immigration Law Project of the National Lawyers Guild, Inc., Migrant Farm Worker Division of Texas Rural Legal Aid, Texas Appleseed Advocacy Fund, Everglades Community Association (Fla.), Mexican American Council (Fla.), Latin America Immigrant & Refugee Organization (Fla.), Home Education Livelihood Program, Inc. (New Mexico), Pineros y Campesinos Unidos del Noroeste (Ore.), Association of Farmworker Opportunity Programs, National Immigration Law Center, Housing Assistance Council, Migrant Legal Action Program, South Texas Civil Rights Project, League of United Latin American Citizens, Lawyers Committee For Civil Rights Under Law of Texas, North Texas Immigration Coalition, Texas Immigration and Refugee Coalition, Arizona Interagency Farmworkers Coalition, and Comite de Apoyo a Los Trabajadores Agricolas (Farmworkers Support Committee).

program. The Department now has explained its failure to address the workers' side of these issues: It is "outside the scope of this rulemaking." 64 Fed. Reg. 34959. The comments do not adequately explain why it was within the scope of rulemaking activity to propose and adopt regulatory policies that are one-sided to the favor of employers.

We believe that it was within the scope of the rulemaking to do *something* to improve the treatment of farmworkers under the H-2A program. The Department has received repeated requests over many years, including major efforts by my organization in 1994 and 1998, for reforms of the supposedly "interim" regulations that were issued in 1987 for the H-2A program following Congressional amendments. Recommendations to benefit farmworkers also have been made by the General Accounting Office and the Office of Inspector General. Even if the Department had concluded that it lacked the time or resources for a comprehensive revision of the regulations, *some* remedy for farmworkers could have been proposed. Not every pro-worker recommendation needed to be ignored. We hope that one day the Department of Labor concludes that it is within the scope of its rulemaking activities to help farmworkers affected by the H-2A program..

We are not oblivious to the debates in Congress regarding guestworker issues and the possibility that the Administration believes that any pro-worker reforms might stimulate anti-worker legislation. But the pressure by agribusiness lobbyists and the contents of the employers' legislative proposals could hardly become any heavier or more severe. That excuse always exists. It is long past the time for the Department to take a strong stand on enforcing the rights of workers under the H-2A program.

We appreciate very much the efforts that you and your Administration have made to enforce the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act. We understand that the improvements that have been made may well have been greater if Congress had been willing to provide greater resources for labor law enforcement. We also are encouraged by the Administration's opposition to the guestworker legislation that was introduced last year and is likely to be re-introduced in the near future.

The inadequate handling of the H-2A regulations, however, is a very serious shortcoming. Much of the Department's other work will be undermined if employers can continue to secure approval on 99% of their applications for guestworkers, avoid meaningful recruitment of U.S. workers, and exploit the vulnerable guestworkers by offering inadequate wages and working conditions. The new regulatory changes were motivated by employers' demands to "streamline" a program that already was streamlined for them by Congress in 1986 and by the Reagan Administration in 1987. These new changes worsen the H-2A program from the workers' perspective and totally ignore the workers' needs and interests. The H-2A program is growing rapidly, expanding to new crops and new states, using labor practices that are unfair and often illegal. The new regulations, by weakening recruitment inside the United States while employers' recruitment abroad becomes more extensive, will result in replacement of U.S. workers with guestworkers in many of these jobs. That, in turn, will mean the illegal or unfair job terms will go unchallenged, because the non-immigrant guestworkers justifiably fear discharge and deportation or denial of a job and visa the following season. The U.S. workers, afraid of being replaced, will also avoid challenging employer misconduct. Union organizing – the only method by which farmworkers have secured major improvements in their job terms – will be impeded.

The regulatory changes are irrational and, therefore, unjustified for the reasons set forth in our comments. The employers' comments indicated that these regulatory changes do not go far enough. But these rule changes do not acquire rationality merely because the employers feel comfortable making extreme demands. That the regulations could be even worse is not a consolation. The H-2A program is bad enough. Indeed the U.S. Commission on Security and Cooperation in Europe – the Helsinki Commission – in 1993 issued a report in which it said that the H-2A program "should be discontinued because domestic workers are displaced and foreign workers have been subject to abuse."

At bottom, the employers are making the same claim they have made for over one hundred years -- "labor shortages." Government should not test the U.S. labor market or expect improvements in wages and working conditions, they say, because no one wants these jobs. The answers to these allegations do not change. "The issue then is job standards. We must raise the standards and conditions of work in migratory farm employment and thereby eliminate the dependence by farm employers on poverty at home and misfortune abroad as the foundation of the recruitment of their labor supply. Fundamentally, this means that public policy must encourage farm employers to build reliable jobs for reliable people, not to maintain obsolete and intolerable standards. . . .We must build toward an agriculture that will yield a decent American income for those who provide labor." These comments continue to be apt today even though they were issued in the 1951 Report of the President's Commission on Migratory Labor (p. 24). That report regretted the fact that little had changed since similar views were stated in the Report of the Commission on Country Life of 1909 (see pp. 22-2).

Now is the time to take a strong stand. Our economy continues to grow. Labor-intensive agriculture has, year after year, smashed previous records for exporting America's fruit, vegetables and horticultural products. We are competing well in the global economy but farmworkers have yet to reap the benefits of increased production-value and improving agricultural productivity, for which they share a large part of the responsibility.

Once again, we ask the Department to make regulatory and administrative changes to implement the rights granted to foreign and domestic workers under the H-2A statute.

Sincerely,

BRUCE GOLDSTEIN
FARMWORKER JUSTICE FUND, INC.

6/9/98

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→ Ms. Julie F@
DPC
From: Frances @ DOL
Per conversation - 12 pages

May 22, 1998

Honorable Alexis Herman
Secretary of Labor
U.S. Department of Labor Room
200 Constitution Ave., N.W.
Washington, D.C. 20210

Re: <u>H-2A Temporary Foreign Agricultural Worker Program Regulatory Reform</u>

Dear Secretary Herman:

Correspondence to the Farmworker Justice Fund, Inc. by your staff indicates that the Department intends to take regulatory action under the H-2A temporary foreign agricultural worker program. For several years, farmworker advocates have been requesting a number of administrative reforms in the H-2A program to begin to ensure that U.S. farmworkers do not suffer adverse effects from the employment of temporary foreign workers and that the "guestworkers" do not experience unlawful or unfair employment practices. The reforms we propose, which appear on the attached outline, renew requests made previously by the Farmworker Justice Fund. The need for these reforms has become more urgent recently as the number of employers securing H-2A workers has increased and the program has spread to new states and crops.

We would appreciate the opportunity for a meeting between you and your staff and several farmworker advocates to discuss H-2A administrative reform.

The Department has violated its statutory mandate to prevent adverse effects to U.S. workers resulting from the employment of H-2A workers. DOL has permitted H-2A employers to offer wages and working conditions that attract workers from third world economies but not U.S. farmworkers. For those U.S. workers interested in these inadequate wages and conditions, DOL has permitted employers to erect improper obstacles to hiring and continued employment.

Our request contains several types of reforms, including revisions of the H-2A program regulations, issuance of policy directives, and more effective enforcement efforts. The most urgently-needed proposals are those which call on the agency to end its approval of inadequate wages and working conditions. While rulemaking is necessary, the regulations are already adequate as to some issues; what must change is the agency's commitment to applying those regulations.

H-2A policymaking frequently occurs when the ETA regional offices, guided by the national office staff, issue detailed decisions in response to the specific job terms offered in job clearance orders filed by H-2A employers. In general, such policymaking has worked to the marked disadvantage of migrant farmworkers and to the benefit of employers seeking to take advantage of a glutted labor market and ETA's weak commitment to enforcement.

Needed reform of the guestworker system will not succeed unless you assign new leadership and adequate resources to the H-2A program.

At times, national office personnel have justified their conduct on policy views that are anathema to the statute and good policy.

Some officials have argued that too much regulatory effort occurs under the H-2A program relative to the small percentage of jobs it supplies in American agriculture. This contention not only dismisses workers' statutory rights but ignores the broad effects that the use of the H-2A program has on job terms at non-H-2A employers.

DOL officials also have argued that they have been setting "reasonable" terms of employment, after balancing the interests of workers and employers. The law does not authorize the Department to reach compromise between employer and worker demands, but rather prohibits adverse effects on U.S. labor standards.

At times, DOL personnel have opined that they are seeking to impose order or rationalization on a chaotic, unstructured farm labor market. Toward this end, H-2A employers have been permitted, even encouraged, to initiate experience, job reference, productivity and other requirements that are not common in agriculture. Not surprisingly, the effect has been to displace U.S. workers jobs at H-2A employers with guestworkers who are more malleable and, therefore, preferable.

DOL personnel have also stated that implementation of effective H-2A regulations is futile because it will merely force employers into using undocumented workers. This view ignores the vast majority of the farm labor force who are citizens or lawful resident aliens, and the high unemployment and underemployment that they experience, as documented in a recent General Accounting Office report. Moreover, this defeatist attitude has caused DOL to avoid requiring H-2A employers to test the labor market with adequate wages and working conditions.

There has been a troubling pattern that calls into question the H-2A program leadership's impartiality and good faith. The former chief of agricultural labor certifications, John Hancock, is now a paid consultant who testifies before Congress regarding the H-2A program on behalf of agricultural employers who condemn the program and wish to end its labor protections. Robert Haverkamp, until recently in the H-2A program's national office and earlier in the Boston regional office, retired from government to go to work for the chief lobbyist (Monte Lake) and consultant (James Holt) at the principal law firm (McGuinness

& Williams) for the H-2A growers. Several other former H-2A officials are now working for agribusiness on H-2A issues. This "revolving door" issue raises questions about the impartiality of H-2A decisionmaking while these persons held office. Perhaps more importantly, we fear that absent strong oversight from top leadership in the Department, current DOL employees may be influenced in their H-2A decisionmaking by the potential for lucrative employment in the future as a consultant to employers.

The need for substantive reform is evidenced by several basic truths, most of which are documented in the reports of the Commission on Agricultural Workers, the U.S. Commission on Immigration Reform, the General Accounting Office report on the H-2A program, or other studies.

First, *there is a significant surplus of United States migrant and seasonal agricultural workers*, including in states where H-2A employers exist. U.S. workers are suffering substantial periods of unemployment and underemployment, contributing to average earnings levels below the poverty line and declining real wages. Recent public-benefits legislation is causing even more people, many with significant work experience, to enter the low-wage job market.

Second, U.S. farmworkers want the jobs that H-2A program employers are giving to temporary foreign workers. Apple-picking, for example, is relatively desirable farmwork among U.S. farmworkers, who fill the jobs in big apple producing areas like Pennsylvania, West Virginia, Washington State, and most of Western New York. But many U.S. workers will not take H-2A jobs at current wages and benefit levels, and some are deterred by the
? notorious reputation of the H-2A program.

Third, the U.S. Employment Service – which is most H-2A employers' primary method of recruiting U.S. workers – is not utilized by even a significant minority of U.S. farmworkers. Thus, employers should and can be more responsible for conducting their own "positive recruitment" as required by statute. The Department should ensure that such recruitment is meaningful. Currently, H-2A employers tend to form associations to secure workers in foreign countries using labor recruiters, but rarely put as much effort into recruiting in the United States, despite the statutory and regulatory obligation to do so. The reality, however, is that recruitment is a process that is difficult to regulate. Reform must focus on substantive job terms because they largely determine who applies and re-applies for jobs.

Fourth, employers benefit from the restricted legal status and poor economic status of temporary foreign workers: H-2A workers are docile, young, single males and highly productive.[1] H-2A workers' high productivity levels, as compared to many U.S. workers,

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[1] Contrary to our national employment policies, H-2A employers are permitted to hire whole labor forces of workers of a single gender, one national origin, a single race, and without disabilities. We understand that a Georgia employer recently hired the first female H-2A workers ever.

result in part because H-2A wage levels are low for U.S. workers relative to the cost of living in the U.S. economy, but are very high for workers from third world economies. Moreover, H-2A workers, as "non-immigrants," fear -- often correctly -- that unless they silently comply with their employers' harsh employment practices, they will be fired and immediately repatriated.

Fifth, the wages, working conditions and recruitment obligations prescribed by the Department have formed a *ceiling*, rather than, as intended, a set of a *minimum* protections. U.S. workers who demand higher wages are deemed "unavailable" and will be replaced by H-2A workers. Under basic economic theory, an employer having difficulty attracting U.S. workers should raise wages, improve working and living conditions, enhance recruitment efforts, and encourage workers to return in future seasons. This does not happen under the H-2A program. Employers have little reason to offer more than the minimum.

Sixth, although the H-2A program was intended to be a short-term, last-resort solution for temporary labor shortages, for most employers the H-2A program has become permanent. The H-2A employers find that wages and working conditions which DOL permit bring them a very desirable (i.e., fearful and hard-working) foreign labor force. Some employers have been in the program for 30 years, despite huge farm labor surpluses -- by any measure -- for large periods of time during those years.

policy reforms

The Farmworker Justice Fund, Inc.'s requested reforms appear in the attached document. The most urgently needed policy reforms involve (1) wages (particularly the "adverse effect wage rate" and piece-rate issues), (2) transportation cost advances, (3) prevailing practices, and (4) crewleader utilization, because DOL's positions with regard to these matters are the most important cause of the adverse effects on U.S. farmworkers and the exploitation of vulnerable temporary foreign workers. We thank you for your consideration of these proposals.

Sincerely,

Bruce Goldstein

BRUCE GOLDSTEIN
CO-EXECUTIVE DIRECTOR
FARMWORKER JUSTICE FUND, INC.

Attachment

FARMWORKER JUSTICE FUND, INC.

1998 AGENDA FOR REFORM OF THE H-2A PROGRAM

I. PROPOSED CHANGES TO H-2A PROGRAM REGULATIONS

A. Transportation Cost Advances

H-2A employers must be required by regulation to provide U.S. workers with transportation to the place of employment or transportation cost advances, including actual subsistence costs during travel. Job service personnel have repeatedly said that a large percentage of H-2A jobs would be filled by U.S. workers if they had transportation cost advances. Through various financial systems in which the employers participate, foreign workers in distant lands -- no matter how impoverished -- have been able to secure travel financing to arrive in isolated rural areas in the U.S.. The lack of such systems for U.S. migrant workers denies them jobs. Moreover, DOL's past efforts to regulate travel advances, failed? in part because its policies were not simple or strict. Employers' allegations of risks of loss of travel advances can be addressed, just as many costs related to high employee turnover can be and routinely are addressed.

B. Wages

1. Piece Rates and Other Incentive Rates Must Be Subject to Regulation

a. Piece Rates Must Be Linked to the AEWR. Piece rates --which are still the most common form of wage rates in agriculture -- must increase proportionally to increases in the Adverse Effect Wage Rate, or else the AEWR is almost meaningless. Regardless of the precise methodology, a new regulation should state that the piece rate must generate earnings at least 30% above the hourly-rate AEWR for the average worker (a common incentive interval in agriculture).

Regulate all wage systems.

b. Productivity. Equally important, the regulation must prohibit employers from increasing productivity standards to avoid the effect of AEWR increases for piece rate workers.

c. "Task Rates" And Other Incentive Systems Must Be Regulated. DOL must state that it prohibits use of so-called "task rates" under the H-2A program. End the policy of refusing to regulate "task rates" or other incentive systems, which are usually disguised variable piece rates. All wage systems must be regulated to ensure that they do not cause adverse effects.

d. Prevailing wage rate conversion methodology. For H-2A employers converting from a piece rate wage system to an hourly wage rate, DOL must protect the prevailing piece rate's hourly earnings level. In addition, an employer that wishes to convert to a piece rate wage from an hourly rate wage must set the piece rate so that the average worker will earn at least 30% above the AEWR (a common minimum incentive in piece rate systems), not the AEWR.

2. Reform of Adverse Effect Wage Rate. It is critically important that DOL change the AEWR methodology because it has allowed adverse effects on U.S. workers' wages. The AEWR is now based on average regional farmworker wages. These wage rates have been depressed by the current and historical presence of H-2A and undocumented farmworkers. Moreover, an average wage level should not be offered by an employer who claims difficulty finding job applicants. A premium wage must be offered. Several reasonable alternatives exist and Congress granted DOL flexibility on this issue. We would like to provide further input as DOL further examines this priority.[2] One suggestion, for example, would be to set the AEWR at the level of the top-paid ten percent of workers in the *local* market, or the top 80th percentile on the *regional* wage survey, whichever is higher. Another option would merely increase the AEWR by 30% above the average wage level under the existing survey method.

3. Wage Deductions. Employers should be prohibited from taking deductions that bring wages below the AEWR or the H-2A prevailing wage, whichever is higher, and not merely the FLSA minimum wage We ask that DOL amend the H-2A regulations to adopt FLSA-like restrictions to prevent employers from undercutting the H-2A program minimum wage levels through various wage deductions.

4. Sheepherders' Wages

DOL approves monthly sheepherder wages that are absurdly low. Apply the AEWR to H-2A sheepherders.

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[2] AFL-CIO v. Dole, 923 F.2d 182, 184 (D.C. Cir. 1991), held that Congress "left it in the Department's discretion how to ensure that the importation of farmworkers" did not adversely affect U.S. workers' wages, id. at 184, and that this discretion is "rather broad." Id. at 187. Although the current AEWR methodology was upheld, the Court indicated quite clearly that in the face of "imprecise" measures and "inconclusive data," there was a "range of reasonable methodological choices open to the Department." Id. DOL need only supply a reasoned explanation in the course of changing the current, anti-worker policy. Moreover, since the time of that rulemaking, more evidence of adverse effect has appeared.

5. Prohibit Employers From Fixing Uniform Wage Rates H-2A employers have formed cartels which offer workers identical wage rates across entire states or large portions of states. Such uniform wages restrain competition among employers. Individual growers do not attempt to lure productive workers to particular growers by offering higher wages; instead they have fixed wages at depressed levels and established a system to allocate productive (and less productive) workers among the various growers. DOL, with assistance from the Justice Department, should take action to end such antitrust-law violations.

C. Working Conditions

1. Prevailing Practices

a. All non-wage practices and benefits should be subjected to a prevailing practice standard, including productivity standards and crop quality standards. The job service regulations, 20 C.F.R. § 653.501, already require this, but the H-2A Program Handbook differs and should be revised through rulemaking. The Handbook discriminates by setting a difficult-to-satisfy standard for benefits to be provided to workers, but allows an easier standard for employment practices that growers seek to impose on workers.

b. Eliminate the unique, anti-worker double-majority definition of "prevailing practice." A prevailing practice should be one that is engaged in by a majority of employers or is experienced by a majority of the employers in the local area and occupation. DOL, by contrast, does not require a benefit for employees unless both a majority of workers in the area receive it and a majority of employers in the area provide it. This standard is rarely met and exempts H-2A employers from competing with other businesses.

c. Prevailing practice surveys must exclude H-2A employers because they merely reflect what DOL allows, rather than current market conditions, and are tainted by the presence of H-2A workers.

2. Fully Implement The Free Housing Requirement. End the policy of denying free housing to U.S. workers who live (either temporarily or permanently) near an H-2A employer. U.S. workers should not be forced to suffer an effective wage differential compared to the H-2A workers, who receive the valuable benefit of free housing.[3] End the sex discrimination under the H-2A program, which is

[3] The proposed regulatory reform would reverse an informal interpretation issued in 1981 but would be consistent with the language of the regulations which were in effect in 1986, as required by 8 U.S.C. §

often justified by the employers' claim that it cannot provide women with housing.

3. Meal Charges and Food Quality. Amend the regulation to allow workers to opt out of employer-provided meal plans. Many workers have serious complaints about the quality of food provided by employers, and some are continuously subjected to another nation's cuisine. Many workers purchase food to prepare themselves and are effectively paying twice for meals.

D. Employer Recruitment and Job-Retention Efforts

The agency's limited resources for the H-2A reform effort should focus on ensuring that the substantive terms of employment are attractive to U.S. workers because wages and working conditions are more severe impediments to U.S. worker hiring and are more amenable to government enforcement as contrasted with the employers' inadequate recruitment efforts. Nevertheless, two needed regulatory reforms are the following:

1. Use of Crewleaders. The H-2A administrators must acknowledge the critical role played by crewleaders in securing jobs for U.S. farmworkers. When use of crewleaders is a "common" or "normal" practice in an area, it should be required of H-2A employers, with the common or normal compensation for the type of service provided by the crewleader. Crewleader compensation should be competitive. DOL in practice ignores crewleader compensatoin, thereby denying jobs to thousands of U.S. farmworkers. Of course, the employers must ensure that the farm labor contractors comply with federal and state law.

2. Call-Back Rights. DOL should require that any H-2A worker (or U.S. worker) who completes the season be given a hiring preference over other H-2A workers, subject to the job opportunity being available and the absence of qualified U.S. workers. Among other things, this will reduce H-2A workers' fear of reporting labor violations to the government and seeking legal advice.

E. First-Time H-2A Applicants

First time H-2A applicants should be required to maintain at least the same level of wages and working conditions offered in prior years. This has been a problem in Idaho, for example. Investigations should also be made to determine whether prospective H-2A employers have been reducing wages and benefit levels over several years to produce an artificial labor shortage.

F. Increase Employers' H-2A Fees. Impose fees that reflect the true cost of the H-2A program and end the substantial subsidy and incentive employers receive to hire H-2A workers. Professor Philip Martin estimated that DOL and the state job service system spent about $15

1188(c)(4). See Phillips v. McLaughlin, 854 F.2d 673 (4th Cir. 1988) (vacating decision and dismissing challenge to 1981 interpretation as moot).

million annual to process labor certification requests. This subsidy amounts to about $750 for each H-2A job (in 1993). Martin found that DOL collects less than $500,000 annually from the H-2A employers. Taxpayers should not be paying for 97% of the government's cost..

II. REFORMS THAT DO NOT REQUIRE REGULATORY AMENDMENT

Many of the abusive practices occurring under the H-2A program already violate the existing regulations or are otherwise inadequate. This is a non-exhaustive list of major, recurring problems in DOL's administration of the program which require policy directives.

A. Unequal Use of Crewleaders. DOL should issue a policy directive to implement the employers' current regulatory obligation to engage in at least the same kind and degree of recruitment efforts for U.S. as for H-2A workers. 20 C.F.R. § 655.105(a)(1)-(2). If employers hire crewleaders, employer associations or other third parties to help recruit H-2A workers, then DOL should require them to do the same for U.S. workers. DOL must investigate whether crewleaders are used and if so the types of services provided and, most importantly, the compensation. Growers should not be permitted to escape this obligation by arguing, as some do, that their past hiring of crewleaders who violated the law should not be considered as the retention of a crewleader.

B. Denying Workers' Right to Choose Their Employer
Employers and associations, despite a policy guideline issued recently, still appear to be denying workers and crews the right to choose which employer to work for. This takes several forms: (1) Associations and employers do not honor workers' choice of employers; (2) Employers frequently deter U.S. workers or cause them to quit by splitting up groups of U.S. workers among several H-2A employers. (3) The Boston regional office permits individual employers, under certain circumstances, to refuse to hire "inexperienced" workers in jobs that do not require experience, and the employers have abused that (unlawful) permission. DOL must send a simple, strong message that U.S. workers have the right to select their employer and that U.S. worker groups are ordinarily not to be split up.

C. Employment Contracts. The terms of employment should be given to workers in their native language and should be written in plain, concise terms.

D. End The Many DOL-Approved Employer Gimmicks

1. Refusal To Give U.S. Workers Job Preference Under the 50% rule, 655.103(e), if an employer gets labor certification for a number of H-2A workers and then hires that number (or more) of U.S. workers, but still retains H-2A workers, the job service should continue to refer U.S. workers there because there are job openings for which U.S. workers have a job preference. A contrary policy issued by the Boston regional office gives employers incentives to fire U.S. workers.

2. Giving Job Applicants the "Runaround." Job applicants frequently face

various obstacles in the hiring process. An unjustified delay at times causes U.S. workers to be deterred from pursuing the job. Some job applicants are told by employers or associations that they must apply at a job service office or an employer association's central office far from the grower's fields. Too many U.S. workers have needed the intervention of a legal advocate merely to apply for a job.

3. Experience and Skill Requirements. Disallow job qualifications, experience and reference requirements, unless they are the prevailing practice among non-H-2A employers and are otherwise job-related and *bona fide*. Such standards are routinely used to deny jobs to U.S. workers, in violation of current regulations. Harvest work is unskilled work; through decent wages and working conditions and training employers can secure high-quality workers.

4. Manipulation of Season Length To Discourage US Workers. In North Carolina, Idaho and Georgia, jobs historically held by U.S. workers have been denied to U.S. workers by employers whose H-2A applications combine several distinct seasons, crops, and jobs into one job order, for which some U.S. workers are not available. *Prohibiting H-2A job offers that consolidate seasons and different crops should be a priority.* The GAO found that the manipulation of the season length also resulted in the denial of workers' cost of transportation home.

5. Productivity standards and quality requirements should be permitted only if they are the prevailing practice among non-H-2A growers. They must be *bona fide*, objective, quantifiable, fully disclosed and implemented on a fair and equal basis.[4] Such standards are often subjective, bogus, and discriminatorily applied to U.S. workers.

6. Inadequate Reimbursement of Travel Expenses

(a) In some states, although workers who complete half the season and are entitled to reimbursement of their travel expenses, including subsistence costs, they are paid based on the cost of the commissary meals supplied by employers, rather than the actual costs of food in commercial establishments.

(b) The regulation requires employers to reimburse travel expenses from the place where the worker came. § 655.102

[4] In Virginia tobacco, for example, the employers require workers to "perform at the same level of production as other workers performing the same task." Approval of this clearance order term and the employers' use of it to terminate workers are contrary to existing regulations because no productivity level that can be measured is identified and no way exists to verify that this standard has been violated. See 20 C.F.R. ' 655. 103(c); H-2A Program Handbook at I-43 & c.

(b)(5)(ii). In the recent past, H-2A workers have received reimbursements for only a portion of their travel (e.g., to the U.S.-Mexico border, rather than home).

E. Positive Recruitment

The Regional Administrators have made the positive recruitment requirement a sham, despite extensive authority to require employers to engage in meaningful recruitment. 655.103(e), (f); H-2A Program Handbook at I-44. H-2A employers routinely have failed to find workers during periods of large labor surpluses in agriculture. Too much emphasis has been placed on the job service, which largely does not work. The most important reform in recruitment policy is to require employers to offer decent wages and working conditions, as described above. Some additional methods that should be required are as follows

1. Improve Recruitment Methods. Provide an "800" telephone number and accept collect calls from job applicants. Require employers to make a good faith effort to contact other employers on the migrant stream establish a series of consecutive ("piggy-backed") jobs.

2. Require Long Term Recruitment Planning
Employers should prepare a plan showing how they intend to reduce their dependence on foreign workers for future years and how they intend to utilize more efficiently available workers. Some potential techniques to choose from include: creating incentives for workers to return in future seasons and to bring other job applicants, provision of family housing, enhanced wages, planning for development of housing, offering health care benefits, cooperating with other employers to hire domestic farmworkers (and not merely to hire H-2A workers), etc.

3. Housing. H-2A growers should be required to follow the common practice of opening their housing to workers who arrive in advance of the harvest. It is humane and good recruitment and worker-retention policy.

F. DOL ENFORCEMENT

1. End the Delays and Build Worker Trust in DOL

DOL must be more sensitive in its administrative investigations to the vulnerability of both the H-2A and U.S. workers. Always subject to retaliation, workers need confidence that contacting DOL about labor violations will be worth the risk. Delays and unresponsiveness cause many workers to be loathe to seek redress. The delays must end and workers must be kept informed. 6

Investigation of administrative complaints regarding H-2A employer or job service violations should occur within several days, before the workers have departed the job site. Initial determinations should be made promptly so that perhaps the employer will settle the matter before the worker leaves the area. Final resolution of administrative complaints must be quicker.

2. Coordinate Enforcement. ESA must immediately inform ETA when violations are found.

3. Take Tougher Stands. ETA must immediately inform the H-2A employer that it is terminating job service assistance and will deny labor certification as a result of a finding of a labor violation. This will foment quicker settlements and deter violations. DOL must stop settling for fractions of what workers are owed, and must coordinate more with workers' attorneys.

Farmworker Justice Fund, Inc.
5/22/98

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

JUN 26 1998

The Honorable Edward M. Kennedy
Ranking Member
Subcommittee on Immigration
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

This letter is intended to confirm the Administration's commitment to immediately undertake rulemaking to propose several measures to streamline the H-2A program as outlined below. Streamlining measures already put in place administratively are enclosed in the attachment.

Our goal is to publish a final rule to implement streamlining changes in H-2A program pursuant to notice and comment rulemaking by the end of January 1999. The publication of this rule will be timed to have an impact on the program's administration during next year's growing season. Our rulemaking would propose:

1. Immigration and Naturalization Service (INS) delegating H-2A petitioning authority to the Department of Labor (DOL);

2. INS delegating to DOL the authority to issue petitions for replacement of certified H-2A employees upon proof of an H-2A employee's repatriation;

3. Eliminating the requirement that employers use a registered farm labor contractor (FLC) as a source to recruit U.S. workers if the FLC has a demonstrated history of employing illegal or unauthorized workers, or has a history of other abuses;

4. Reducing the length of time that employers must file an H-2A application from 60 to 45 days before the date when employees are needed;

5. Changing the deadline for when employer-provided housing must be available for inspection from 30 days before the date of need to 15 days before the date of need; and

6. Eliminating the requirement that certified H-2A employers provide notice that H-2A employees have departed for the place of employment.

These proposed changes will ease application filing and housing inspection deadlines and reduce the program's process steps. As a result, they will have a direct effect on the timeliness with which H-2A employees are made available – a key and recurring criticism of the program voiced by employers.

My staff appreciated the opportunity to speak with you about the H-2A program and hope that our proposals are responsive to your concerns. We also look forward to a continuing dialogue with Congress, agricultural employers, and farmworker advocates on other key H-2A issues.

Sincerely,

Alexis M. Herman

Alexis M. Herman

Enclosure

cc: All Members of the Immigration Subcommittee of the Senate Judiciary Committee

H-2A Reform Proposal

This proposal is for a notice of proposed rulemaking (NPRM) in two parts. Part I will discuss the steps already taken by DOL to streamline the H-2A program. Part II will lay out the reforms that are being noticed for rulemaking.

Part I

Action accomplished

(By General Administrative Letter (GAL) directive)

A. The Labor Department now requires "positive recruitment" of U.S. farmworkers only in areas where DOL finds that there is a significant number of qualified workers willing to make themselves available for employment at the time and place needed.

B. The Labor Department now counts as "available" for employment only those U.S. workers who are identified by name, address and social security number.

C. The Labor Department is committed to consistently meeting the existing 7-day deadline after receipt of initial application to notify employer of deficiencies that prelude adjudication of the application and the 20-day deadline -- prior to the employers' "date of need" -- to issue approved certifications. The Labor Department will improve automation to assist in meeting these deadlines.

Part II

Rulemaking proposals -- Stage 1

A INS to delegate H-2A petition approval authority to DOL. Removing the INS adjudication step will result in two-step (State --DOL) process, rather than a three-step (State --INS --DOL) process. DOL will then provide simultaneous approval of H-2A certification and petition approval.

B. INS delegation of authority to DOL to issue petition approval (I -797) for replacement of certified H-2A workers upon proof of the worker's repatriation.

C. Eliminate the requirement that a certified H-2A employer provide notice of H-2A workers' departure for the place of employment .

D. Require employers' H-2A labor certification applications to be submitted 45 (rather than 60) days prior to the employers' "date of need."

E. Reduce the deadline for employer-provided housing to be available for inspection from 30 to 15 days prior to the employers' "date of need ."

F. Grower will no longer bc required to be use a registered farm labor contractor (FLC or "crew leader") as a source of U.S. workers if the FLC has a demonstrated history of employing illegal or unauthorized workers or of other labor abuses.