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THE WHITE HOUSE

WASHINGTON

February 18, 1986

MEMORANDUM FOR BRANDEN BLUM  
LEGISLATIVE ATTORNEY  
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS   
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ and DOA Responses to House Judiciary  
Committee Requests Concerning Temporary  
Agricultural Worker Provision of  
Immigration Reform Legislation

Counsel's Office has reviewed the above-referenced responses and  
finds no objection to them from a legal perspective.





EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

February 6, 1986

LEGISLATIVE REFERRAL MEMORANDUM

SPECIAL

TO: Department of Agriculture  
Department of Justice  
Department of Labor  
Department of Health & Human Services  
Department of State  
Council of Economic Advisers  
Small Business Administration

SUBJECT: Department of Justice and Department of Agriculture responses to House Judiciary Committee requests concerning temporary agricultural worker provision of immigration reform legislation.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than February 11, 1986.

(NOTE -- We have not yet received the Department of Labor's draft answers to the committee's questions. Its response will be forwarded for review upon receipt.)

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

James C. Murr for  
Assistant Director for  
Legislative Reference

Enclosure

cc: Fred Fielding    Tara Treacy    Sarah Brentlinger    Andrea Hoffman  
John Cooney    Mike Margeson    Phil Hanna



DEPARTMENT OF AGRICULTURE  
OFFICE OF THE DEPUTY SECRETARY  
WASHINGTON, D.C. 20250

FEB 5 1986

To: Branden Blum

From: Pat Quinn *PHO*

Re: USDA Responses to House Judiciary Committee Questions

Attached are the Department of Agriculture's (USDA) responses to questions sent to Deputy Secretary John R. Norton on January 23, 1986 by House Judiciary Committee Chairman Rodino (D-NJ).

Of the 27 questions forwarded to us on January 23, 16 had been received previously by DOL, INS, and USDA. Of those 16, consensus inter-agency responses have been developed for 13 (#'s 1,3,4,5,6,7,8,13,14,16,17,18,21). On three (3) questions (#'s 2,19,20), no agreement has been reached, but response options have been developed.

Attached for review and distribution are USDA's responses for the new questions (#'s 9,10,11,12,15,22,23,24,25,26,27) and the option responses for the three questions which remain in dispute (#'s 2,19,20).

USDA will stand by its agreement to the consensus responses for the remaining 13 questions, finalized by Greg Leo (INS), Jude Muskett (DOL) and myself on January 23.

Should you have any questions regarding this, or related matters, please let me know.

IMMIGRATION QUESTIONS  
House Subcommittee (1/23/86): Draft Responses

- #12) All Administration witnesses testified on September 30, 1985 that workers admitted under a seasonal worker program should be restricted to employment in "truly perishable commodities."

The Administration believes that the term "perishable" should be defined by the Secretary of Agriculture in regulation. That definition should be consistent with one now contained in the Perishable Agricultural Commodities Act (PACA).

- #22) An exemption for agricultural employers from employer sanctions generates its own set of volatile political and policy problems which might considerably exceed those created by the "guestworker" debate. Most interest groups (aside from portions of the AFL-CIO) would oppose such an exemption. This opposition which would include, of course, agricultural producers, might well ensure the demise of immigration reform legislation.

More importantly, the exemption is an unsound policy option for a number of reasons:

- 1) It undermines the fundamental intent of "immigration control" legislation because this represents a conscious choice not to deal with a significant portion of the enforcement problem, since 15% of all illegal aliens are employed in agriculture.
  - 2) Agricultural employers would inevitably become the target of increased INS/Border Patrol internal enforcement.
  - 3) A substantial illegal flow of Mexican farmworkers would continue to be encouraged by the magnet of job opportunities in the agricultural sector.
  - 4) An exemption might retard changes in labor-management and movement toward mechanization which could benefit the fresh fruit and vegetable industry over the long term.
- #23) The so-called "50 percent rule" has been eliminated in every version of immigration reform legislation considered by the House or Senate since 1980. There has been near unanimous agreement among Democrats and Republicans that the 50 percent rule does not genuinely benefit U.S. farmworkers and serves as an obstruction to the H-2 program's effective use. The 50 percent rule is not a requirement of the non-agricultural H-2 program.

The Administration has consistently supported the 50 percent rule's elimination in favor of the S.1200/HR 3810 language requiring employers to hire U.S. workers "until the date the aliens departed for work with the employer." This language ensures that U.S. workers will receive priority in hiring until the last feasible moment.

It must be remembered that during the H-2 certification process: 1) employers are required to advertise for and recruit available U.S. workers for 80 days; 2) DOL's interstate clearance system is utilized to locate, recruit and refer U.S. workers for 80 days; 3) DOL must certify that U.S. workers are not available prior to the importation of H-2 workers; 4) employers then sign a contract with H-2 workers which requires them to guarantee to pay the H-2 workers 75% of the contract period wages.

Thus, post-certification referrals (i.e. referrals under the 50 percent rule) force the H-2 employer either to hire additional, unneeded labor or break his H-2 contract with the foreign workers. This is an unfair, unnecessary and workable system which must be eliminated.

- #24) The generosity of immigration reform legislation's amnesty/legalization program has never had any relationship to "grower pressures for the adoption of a new, foreign worker program." There are no recent developments which suggest that has changed.

In crafting reforms to the H-2 program and in passing the Wilson-Panetta/Morrison programs, Congress has, of course, considered this option. Most Members have concluded that, aside from the broader policy implications of an extremely generous legalization program, it is a short term solution at best. Uncertainties abound: How many undocumented workers will be eligible? How many will qualify? How many will remain in farmwork and for how long?

- #25) Yes. The Administration strongly advocates inclusion of a seasonal worker program for perishable commodities in HR 3810. The absence of any program for perishable commodities would have catastrophic consequences for our fresh fruit and vegetable industry; it might also ensure the demise of immigration reform legislation in the 99th Congress.

While not identical to the Administration's proposal, the Wilson amendment does have a number of similarities; including:

- 1) Limited duration: Wilson is much shorter (3 years) than the Administration plan (7-22 years).
- 2) Limited number of workers: A continuous cap of 350,000 in Wilson, while the Administration proposal would remain uncapped for two years before declining over time.
- 3) MSPA labor standards, particularly regarding job disclosure requirements, are contained in both.
- 4) The Wilson Program is self-financed by grower contributions (approx. 11%), as required under the Administration proposal.

The Administration regards a seasonal worker program for perishable commodities as an essential component of balanced immigration reform

legislation. The Wilson program is similar fundamentally to the Administration's proposal and would be supported if the alternative would be "the adoption of no perishable crop program at all."

- #26) The Administration would strongly oppose any change to HR 3810's "housing allowance" provision as it applies to the H-2 program for the following reasons:
- 1) The Administration has consistently supported the concept of a housing allowance during the past 4 years and has specifically supported HR 3810's language which was included in both the House and Senate passed bills in the 98th Congress.
  - 2) The Administration and the Congress have supported this provision because housing is not presently available in sufficient numbers, particularly in the West. New units are expensive to construct and are now prohibited in many areas by local zoning ordinances.
  - 3) HR 3810's language, drafted primarily by Congressmen Lungren (R-CA) and Mazzoli (D-KY) is specifically intended to address concerns that H-2 workers will not be properly housed. The language of HR 3810 would not allow H-2 employers to substitute payment of a housing allowance unless "suitable housing is otherwise available in the proximate area of employment." Thus, if it is determined that such housing is not available in the "proximate area," the employer must provide for the housing itself.
  - 4) The Administration cannot emphasize too strongly that HR 3810's housing allowance provision is fundamental to the acceptance of H-2 as a viable program for growers throughout the nation.
- #27) No. The Administration feels that it is far too early in the legislative process to eliminate the transition program as a policy option.

The Administration has supported the Transition Program that was eliminated from HR 3810 for more than four years. It has never been controversial; in fact, nearly all House Judiciary Committee Democrats as well as Congressmen George Miller (D-CA) and Howard Berman (D-CA) have consistently supported the Transition Program.

Passage of a seasonal worker program for perishable commodities in the House cannot be assumed and is not probable at this time. Thus, a reformed H-2 program will likely become the only alternative for perishable crop producers. The Transition Program is essential to ease the difficult adjustment from a predominantly illegal workforce to the highly-structured H-2 program.

The Administration would regard the Transition Program as unnecessary if the House were to pass a viable seasonal worker program for perishable commodities.

- (4) (4)
9. How many farms are there in the United States today? How many ten years ago? How many farms today are fruit and vegetable farms? How many ten years ago? How many fruit and vegetable farms use hired labor today? What are the projected numbers of all farms and of fruit and vegetable farms ten years from now? How many are projected to use hired labor ten years from now?

The only data available on hired labor use on all fruit and vegetable farms in the United States is from the 1978 and 1982 Censuses of Agriculture. Comparable labor data were not collected in the 1974 Census. According to Census data there were about 2,479,000 farms in the United States in 1978. The number of farms declined by about 9.6 percent to 2,241,000 farms in 1982.

In 1982, there were about 115,000 fruit and vegetable farms, down about 8 percent from 125,000 farms reported in 1978.

In 1982, about 57,000 fruit and vegetable farms employed hired labor, down about 7 percent from the 62,000 farms using hired labor in 1978. The number of farms using contract labor declined from 32,000 in 1978 to 23,000 in 1982, a drop of about 27 percent.

The Economic Research Service has projected the number of farms in the United States in 1995 at about 1,890,000. No estimates are available for the number of fruit and vegetable farms or for farms using hired labor in 1995. However, if recent trends continue for the next ten years, the number of fruit and vegetable farms and the number of these farms using hired labor in 1995 is likely to be below current levels. But, because the average size of these farms is expected to increase, we do not expect the amount of hired labor used on these farms in 1995 to drop below current labor use. Unanticipated increases in machine harvesting of fruit and vegetable crops could reduce labor requirements on these farms by 1995.

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10. Which fruit and vegetable crops are harvested by machines? Which are harvested by hand? Which account for the bulk of all hired labor?

Major vegetable crops produced in the United States are white potatoes, sweet corn, tomatoes, green peas, lettuce, snap beans, dry onions, cabbage, cucumbers, melons, asparagus, broccoli, and carrots. Machines are used to harvest varying amounts of some of these crops, while other crops are completely harvested by hand. Virtually all commercially produced white potatoes, carrots, and green peas are mechanically harvested. About 80 to 90 percent of snap beans and sweet corn, but only 50 percent of dry onions and tomatoes are harvested by machines. The major crops exclusively harvested by hand are broccoli, lettuce, and melons. More than 80 percent of cucumbers and cabbage, and more than 95 percent of asparagus are hand harvested by field workers. There are several other important vegetable crops produced on a smaller scale which are hand harvested. Although the total acreage of these minor crops is relatively small, the availability of harvest labor is a critical issue for producers. The expenditures for labor on all vegetable and melon farms comprise about 9.6 percent of the total labor expenditures on all U.S. farms.

More labor is used in the production of fruit and tree nuts than is used to produce vegetables and melons. Fruit and tree nut farms account for about 17 percent of the total labor costs in U.S. agriculture. Citrus is the single largest user of harvest labor of all fruit and tree nut crops. Almost all citrus is harvested by hand. Other leading fruit crops are apples, grapes, peaches, pears, plums and prunes. About 95 percent of the apple crop is hand harvested and nearly all pears are picked by hand. Some, but not all, grapes used to make wine, juice, and raisins are harvested with machines, but all grapes for the fresh market are harvested by hand. About three-fourths of all grapes are harvested by field workers. Over one-half of all plums and prunes are machine harvested, but only 10 to 15 percent of peaches are mechanically harvested. Mechanical harvesting technologies are used extensively in tree nut crops. Nearly all almonds and walnuts and over one-half of pecans are harvested by machines.

11. What technological changes are projected for fruit and vegetable crops during the next decade? What will the impact of these changes be on the need for labor?

The development of mechanical technologies for harvesting U.S. fruit and vegetable crops progressed steadily in the 1940's, 1950's, and 1960's. Since then, both the rate of development of new harvesting technologies and increases in the rate of use of harvesting machines on farms have declined.

Much of U.S. agricultural production is now mechanized. However, the harvest of some fruit and vegetable crops is still done by field workers because: (1) the product is easily damaged during harvest, and when it is damaged its quality and value is severely reduced; (2) the limited production of some crops provides only a small market for expensive specialized machines; (3) the per farm acreage of some crops is not large enough to make high-cost machines economically feasible for small farm operators; (4) some crops ripen at uneven rates on a given tree, field, or plant which complicates harvesting by machines; (5) additional research is required to fully develop mechanized harvesting machines for some crops, such as watermelons and asparagus; and (6) there has been an adequate harvest work force comprised of American and legal and illegal foreign national workers.

Commercially available equipment could be used to harvest nearly all carrots, potatoes, and processed citrus and tomatoes, if growers found the machines to be cost effective. However, additional research and development would be required to develop machines needed to fully mechanize the harvest of most other fruit and vegetable crops. Furthermore, before the harvest of other fruit crops could be fully mechanized even by the machines currently on researcher's drawing boards, many orchards would have to be replanted with dwarf or semi-dwarf trees. The adoption by growers of available harvesting machines for wine grapes would also require considerable replanting or re-trellising of vines. Replanting of orchards may ultimately reduce production costs, but the capital required and production and revenue loss for years until the new orchards reach fruit-bearing stage may mean that replanting and mechanical harvesting are not currently cost effective for most growers.

15. What were total U.S. agriculture sales in 1984?
- What percentage of those sales were fruits and vegetables?
  - What was the total value of U.S. farm exports in 1984?
  - Which crops accounted for the largest share of those exports?
  - What was the total value of fruit and vegetable exports?
  - What is their projected share of U.S. farm exports ten years from now?
  - What was the total value of U.S. farm imports in 1984?
  - Which crops account for the largest share of those imports?
  - What was the total value of fruit and vegetable imports?
  - What is their projected value and share of total imports ten years from now?

In 1984, cash receipts from the sale of agricultural commodities totaled \$141.8 billion. Fruits and vegetables accounted for 10.7 percent of U.S. agricultural sales.

The total value of U.S. agricultural exports in 1984 was \$37.8 billion. Grains, feeds, and oilseeds and related products accounted for the largest share (67.6 percent) of agricultural exports. The value of U.S. fruit and vegetable exports in 1984 was \$2.8 billion. Fruit, vegetable, and nut exports accounted for about 8 to 9 percent of total U.S. agricultural exports between 1981 and 1985, up from 6 to 7 percent in the late 1970's. Exports of bulk commodities (grains and oilseeds) have been particularly hard-hit by a combination of inflexible commodity programs and a strong dollar. The net result has been an increase in the share of fruits, vegetables, and nuts in total agricultural exports relative to bulk commodities. Over the next decade the dollar is expected to weaken from the high levels of 1984-1985. Accordingly, while U.S. foreign sales of fruits, vegetables, and nuts will increase, their share of total agricultural exports could fall to 7 to 8 percent by the mid-1990's as bulk commodities' share of exports increases.

The total value of U.S. agricultural imports in 1984 was \$19.3 billion. Animals and animal products, coffee, fruits, vegetables, and sugar-related products accounted for the largest share (62.5 percent) of total imports. The value of U.S. fruit, nut, and vegetable imports was \$3.7 billion. The United States became a net importer of fruits, vegetables, and nuts in 1984. The turnaround from the historical net export position for the United States can be tied directly to the strong value of the dollar and a loss of competitiveness in foreign markets, as well as in U.S. fruit, vegetable, and nut markets. Imports are currently very price competitive. Fruit, vegetable, and nut imports now comprise nearly 18 percent of total agricultural imports, up from 8 to 10 percent over the 1970's. If the foreign exchange value of the dollar falls, the portion of fruit, nut, and vegetable imports in the total agricultural import bill will fall. Given the expected weakening of the dollar over the next decade, fruit, nut, and vegetable imports as a proportion of the total imports could decline to 12 to 14 percent.

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Question #2  
(Seasonal Worker Program)

Option A: Non-Specific

"The Administration believes that the wage and working condition requirements of the H-2 program ~~and its successor~~ should also apply to any other foreign agricultural worker program except for such variations as may be required by structural differences."

Option B: Specific:

The Administration believes that the wage and working condition requirements of the H-2 program and its successor should also apply to any other foreign agricultural worker program except for such variations as may be required by structural differences. The following protections should be included in any foreign agricultural worker program:

- A. Adverse Effect Wage Rate: as required under the H-2 program.
- B. Workman's Compensation or an equivalent insurance.
- C. MSPA shall apply to any such field harvest laborers admitted under such a program with regard to job disclosure, working conditions, housing, transportation and wage determination.

The following H-2 provisions would be inappropriate for a seasonal worker program for structural reasons:

A. Written contract: The Administration's support for a limited seasonal worker program is based upon the fact that the H-2 program contractually binds employers and foreign workers, thereby limiting the workers freedom of movement. In perishable agriculture, workers must be transferred quickly to respond to the harvest cycle and the climatic fluctuations within a geographical region over a period of several months. This is particularly true of smaller producers with short-term needs for relatively large numbers of harvest workers.

We believe requiring a written contract under these circumstances is not reasonable, but we do strongly support inclusion of MSPA's job disclosure requirements which would provide the workers with prior notice of the terms and conditions of their employment. This job disclosure provision is designed to ensure the essential worker protections provided by a written contract.

B. Guaranteed Employment for at least 75% of their contract period: While the so-called "three-quarter guarantee" is a reasonable requirement of the H-2 program, its application to a seasonal worker program would be wholly inappropriate.

The Administration's program would not guarantee employment for a specific period, but would, instead, allow the worker to move freely among approved employers. Workers would not be bound to a particular employer; they would be free to seek the most attractive wages and working conditions within an area of employment.

Again, with the largely perishable, short-season, labor-intensive commodities, a "three-quarter guarantee" would severely impair worker movement in response to weather emergencies and the harvest cycle.

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Questions #19 + 20  
(H-2 Program reform)

Option A: Non-Specific

"All Administration witnesses testified on September 30 to the fact that the Administration prefers the temporary worker reforms contained in S.1200 to those contained in H.R. 3080."

The Administration has placed emphasis on its long-term goal that the H-2 program be improved to discourage long-term dependence upon an alternative program for perishable commodities. The Administration believes that H-2 should eventually become the only temporary foreign worker program for all agricultural commodities."

Option B: Specific

"All Administration witnesses (DOL/DOJ/USDA) testified on September 30 to the fact that the Administration strongly prefers the temporary worker reforms contained in S.1200 to those contained in H.R. 3080."

The Administration has placed emphasis on its long-term goal that the H-2 program be streamlined and continuously improved to discourage long-term dependence upon an alternative program for perishable commodities. The Administration believes that H-2 should eventually become the only temporary foreign worker program for all agricultural commodities.

With the exception of H-2 regulatory authority, the Administration has endorsed S.1200's H-2 reforms as a prudent first step toward a streamlined H-2 program which can eventually address the needs of all agricultural commodities.

The following changes to the Section 301 of H.R. 3080 would be required in order for the legislation to be consistent with the Administration position regarding H-2 reform:

1. Acceptance of H-2 Applications
2. Expedited Appeal of Denial of Certification
3. Attorney General Expedited Review when Workers are not Actually Available
4. Length of Stay of H-2 Workers
5. Permitting Presentation of Countervailing Evidence
6. Treatment of Associations Acting as Employers
7. Treatment of Association (Member Violations)
8. Transfer of Workers Among Employers Permitted
9. Disqualification Limited to One Year

(10) (17)

C. The requirement that an H-2 employer provide transportation from the employee's residence to the place of employment and return should be maintained in the successor program. It is not feasible, however, to transpose this requirement to the seasonal worker program where a foreign worker may have several employers during his sojourn in the U.S.

We favor instead, a plan where the U.S. government, using funds contributed by program users, would reimburse the government of the sending country for the cost of internal transportation within that country, provided the worker's transportation to the first place of employment in the United States was paid by a U.S. employer, or association of employers, either directly or through an agent.

Internal transportation within the U.S. would be negotiable between the worker and subsequent employers. The government would issue with the visa a non-negotiable voucher to be used only with specified carriers to return the workers to his home country.

D. A bilateral agreement with the source country: The Administration proposal is multilateral and would not be limited to Mexico as a source country. However, cooperation with all source countries -- particularly Mexico -- will be an important component of the program's development.



U.S. Department of Justice  
Immigration and Naturalization Service

*Blum*  
**DRAFT**

Office of the Commissioner

425 Eye Street N.W.  
Washington, D.C. 20536

CO 703.785

Honorable Peter W. Rodino, Jr.  
Chairman  
Committee on the Judiciary  
House of Representatives  
Washington, D.C. 20515

Re: Temporary Worker Provisions of Immigration Reform Legislation.

Dear Mr. Chairman:

Enclosed are the responses of the Department of Justice to the questions submitted regarding the temporary agricultural worker aspects of immigration reform legislation. In addition, enclosed are materials explaining the tentative Administration proposal on this issue.

As Deputy Secretary of Agriculture Norton, Assistant Secretary of Labor Baroody and I testified before the House Immigration Subcommittee last September, the Administration has developed a statement of principles of a proposed temporary agricultural worker program which we think is the best approach to a very difficult area. Following the meeting that Norton, Baroody and I had with you last summer, the three departments have worked diligently to solidify in detail provisions of such proposal, but have not reached final concurrence. However, we did reach tentative agreement on a number of elements, which can be of assistance to the Judiciary Committee.

Clearly, the agriculture worker issue is one of the most difficult obstacles toward accomplishing passage of immigration reform legislation. The single overriding principle must be that we cannot allow this issue, or any other, to prevent passage of a bill. As we have discussed, the flow of illegal aliens continues to increase by dramatic proportions. For example, during mid January in San Diego in one twenty-four hour period we apprehended 3, 249 illegal aliens, an all time record for a one day period. The trend of border apprehensions along the Mexican border is up 40%. If this trend continues at the present level, as there is every expectation that it will, we will apprehend over 1.6 million during the last year. The three basic elements that are required to deter illegal aliens are: 1) Increased border enforcement: much of which has been accomplished by budget enhancements in the last several years.

2) Employer sanctions to demagnetize the job market which draws illegal aliens to this country, and 3) The SAVE program which will prevent illegal aliens from accessing the unemployment, welfare and other benefit programs. Although, most illegal aliens come to this country to work, like others if they lose their jobs they often will access benefit programs.

These three elements will give substantial ability to limit illegal immigration, to control our borders and at the time preserve our heritage of legal immigration. As you know, currently over 500,000 legal immigrants, mostly from Asia and Latin America, are entering the United States each year. An additional 60-70 thousand refugees are admitted yearly. When illegal immigration estimated at about 500,000 net per year approaches the level of legal immigration we must be concerned about the erosion of our legal system. Therefore, we must proceed this year to enact Immigration Reform Legislation.

With respect to the agricultural provisions we are aware of the number of options before your committee: 1) the Wilson Schumer, Panetta and Berman, apparently focusing on a green card for agriculture workers & apparently a supplemental legalization program for agriculture; 3) the discussion of the exemption of agriculture (perishable growers) from employer sanctions; 4) streamlined H-2 provisions alone to allow growers to use temporary workers; 5) the Administration's proposal set forth in the attachments and the previous testimony given.

We believe the Administration approach is a balanced one and a middle ground between many of the other alternatives noted. Therefore, we believe the Judiciary Committee and others in Congress should give strong consideration to this proposal.

Again it is most importantly that we make the tough decisions among the above alternatives and move a bill on to House passage, to Conference and prompt enactment into law. We look forward to working with the Judiciary Committee in the weeks and months ahead to accomplish our mutual goal.

Best regards

Sincerely,

Alan C. Nelson  
Commissioner

Honorable Alan C. Nelson  
Commissioner  
Immigration and Naturalization Service

1. Some observers of the old Bracero program claim that it provided Mexico with a necessary safety valve and that, accordingly, it served to deter illegal immigration. Other observers claim the opposite: that the program, by exposing Mexican workers to the relatively high wages of the United States, acted to increase illegal immigration. What effect do you think the Bracero program had, and from an enforcement standpoint, is a large, foreign agricultural program a good or bad idea?

Like many other controversial programs, persuasive arguments can be made on both sides. It is plain that illegal immigration increased after the Bracero program was terminated. It will not serve our purpose here, to fan the flames of controversy regarding the Bracero program. We must regain control of large scale illegal immigration, a significant portion of which goes into agricultural employment. Many growers have become dependent on this labor. An important consideration in fashioning a prudent and balanced solution to this situation is the need to provide growers an efficient means to obtain legal foreign workers when needed to supplement the domestic workforce while protecting job opportunities for American Workers and ensuring basic worker protections. We have proposed to allow for legal entry of foreign workers based on established need. The program will not be "large" in relation to the need and we will be able to enforce it. Any seasonal worker program for perishable commodities must have strong monitoring and worker protections and must be based on a finding that American workers are not available prior to any admission being allowed.

2. The other body recently passed legislation to allow 350,000 guestworkers into the United States. To ensure that they return to their home country, the legislation requires that 20% of their wages be placed in escrow to be paid when the worker returns. Mr. Nelson, do you believe that provision will effectively induce workers to return.

Yes, I believe it will in coordination with employer sanctions, increased enforcement, and if we have strong provisions to monitor these programs. See attached material on draft proposed Administration program with other aspects intended to induce workers to return to their home countries.

Many undocumented workers in agriculture are annual migrants who return home of their own volition. The withholding of a portion of wages to be paid after their return adds a strong inducement to depart at the end of the employment period.

3. Does it make any difference from an enforcement standpoint whether the spouses and children of foreign agricultural workers are allowed to accompany them to the United States?

Yes, it does -- returning to their families is another inducement to go home. We also would be concerned about the economic burden on our rural community resources; housing, educational and health services for example. Workers without accompanying families will have more mobility and send money back home to support their families. This will constitute far less of a risk of overstay.

4. What percentage of undocumented workers in the U.S. are perishable crop farmworkers?

The lack of adequate data on the size of the illegal immigrant population in the U.S., the number of undocumented workers, and their occupational distribution is well known. On the basis of available data, the Administration offered a "cautious speculation" in 1982 that not more than 15 percent of all Mexican undocumented workers in the U.S. are likely to be employed in the agricultural sector. USDA has suggested in March 1983 testimony before the House immigration subcommittee that 300,000 - 500,000 undocumented aliens work in U.S. agriculture each year, principally in seasonal harvest work in the Southwest and along the West Coast.

5. Please list with specificity the foreign worker protections that you would deem essential to any foreign agricultural worker program Congress might enact.

In addition, here are some of the foreign worker protections that were contained in the Bracero program. Please tell me in each case whether these protections should be included in any new program.

- A. Written contract
- B. Guaranteed employment for at least 75% of their contract period
- C. Employer-provided housing
- D. Free tools and equipment
- E. Meals provided at cost
- F. Paid transportation to and from the U.S.
- G. A written agreement with each source country

The Administration favors application of all Federal and State laws protecting American migrant and seasonal agricultural workers to foreign agricultural workers in the U.S. Additionally, the Administration believes that the wage and working condition requirements of the H-2 program and its successor should also apply to any other foreign agricultural worker program except for such variations as may be required by structural differences. The following protections should be included in any foreign agricultural worker program:

- 1. Adverse Effect Wage Rate: as required under the H-2 Program.
- 2. Workmen's Compensation or an equivalent insurance.
- 3. Housing, provided or paid for by the employer.
- 4. Free tools and equipment.
- 5. Meals provided at cost.

The following H-2 provisions would be inappropriate for a seasonal worker

program for structural reasons:

- A. Written contract: The Administration has proposed a limited seasonal worker program (see attachment) in recognition of the fact that the H-2 program contractually binds employers and foreign workers, thereby limiting the worker's freedom of movement. In perishable agriculture, workers must be transferred quickly to respond to the harvest cycle and the climatic fluctuations within a geographical region over a period of several months. This is particularly true of smaller producers with short-term needs for relatively large numbers of harvest workers.

We believe requiring a written contract under these circumstances is not reasonable, but we do strongly support inclusion of MSPA's job disclosure requirements which would provide the workers with prior notice of the terms and conditions of their employment. This job disclosure provision is designed to ensure the essential worker protections provided by a written contract.

- B. Guaranteed Employment for a least 75% of their contract period: While the so-called "three-quarter guarantee" is a reasonable requirement of the H-2 program, its application to a seasonal worker program would be inappropriate.

The Administration's proposed program would not guarantee employment for a specific period, but would, instead, allow the worker to move freely among approved employers. Workers would not be bound to a particular employer; they would be free to seek the most attractive wages and working conditions

within an area of employment.

Again, with largely perishable, short-season, labor-intensive commodities, a "three-quarter guarantee" would severely impair worker movement in response to whether emergencies and the harvest cycle.

C. The requirement that an H-2 employer provide transportation from the employee's residence to the place of employment and return should be maintained in the successor program. It is not feasible, however, to transpose this requirement to the seasonal worker program where a foreign worker may have several employers during his time in the U.S.. Under the Administration's proposed program, the government would issue, with the visa, a non-negotiable voucher to be used only with specified carriers to return the workers to his home country, provided the worker's transportation to the first place of employment in the United States was paid by a U.S. employer, or association of employers, either directly or through an agent. Internal transportation within the U.S. would be negotiable between the worker and subsequent employers.

D. A bilateral agreement with the source country: The Administration proposal is multi-lateral and would not be limited to Mexico as a source country. However, cooperation with all source countries--particularly Mexico--will be an important component of the program's development.

6. The Bracero Program of the 40's and 50's is generally viewed as having been a very bad program in terms of worker protections. What are some of the key differences between the Administration's proposal and the Bracero program that cause you to believe your program will not result in such abuses?

During the 40's and 50's worker protections for migrant and seasonal agricultural workers in the U.S. generally were inadequate. Since those days, worker protection legislation has been enacted by Congress and by the States. The Administration believes that these laws and the wages and working condition requirements of the H-2 program and its successor should also apply to any other foreign agricultural worker program except for such variations as may be required by structural differences.

7. Please describe the existing mechanisms and avenues available to an H-2 worker who believes he or she is being treated unfairly by his employer. Should a new mechanism be created in this bill to handle such complaints? Should H-2 workers have the right to legal services attorneys?

H-2 workers who believe they are being treated unfairly by employers have access to existing mechanisms and avenues available to all agricultural workers in the United States. These include the State Employment Service complaint system; the Department of Labor's Employment Standards Administration (ESA) farm specialists, who handle only agricultural worker labor law enforcement matters; ESA Wage and Hour investigators; and numerous State enforcement mechanisms. In addition, the majority of H-2 agricultural workers admitted to the U.S. (the roughly 9,000 "British West Indians," principally from Jamaica and Barbados) have access to representatives of the British West Indies Central Labour Organization (BWICLO), who are stationed in the areas where these workers are employed. The BWICLO representatives are responsible for liaison activity between workers and employers for a number of matters, including complaint resolution. We believe that foreign governments have an active interest in the welfare of their workers abroad, and that through consulates and other possible mechanisms they will provide adequate representation for their nationals in this country. There is, therefore, no need to extend U.S. taxpayer supported legal services to these foreign agricultural workers.

8. A comprehensive 1980 study of the Bracero program by the Congressional Research Service states:

"The bracero program by itself did not prove to be a solution to the problem of large scale illegal entry from Mexico. On the contrary, as it was administered during the early stages, the existence of the bracero program appeared to make the problem worse. It was not until sharply increased enforcement measures were combined with a greatly expanded program that it was possible to divert most of the illegal flow into legal channels. However, ... both these measures were effected at a considerable price, in terms of apparent effect on domestic and agricultural workers, stemming from the expanded program, and the ill will created in the Mexican American community by "Operation Wetback." Please respond

We agree with the need for incentives for aliens to return to their home country. The withholdings from wages, the other aspects of the attached Administration draft proposal and a bar to future participation in the program of those who violate the terms of their admission are felt to be sufficient to ensure compliance.

The presence of the employer sanctions provisions of both bills will prevent temporary agricultural workers from finding other types of employment.

Both bills provide for increased enforcement activities in the interior of the United States which are directed at employers. This increased enforcement capability will allow the program to be closely monitored.

9. Under your proposal, who would contract with foreign workers, the U.S. Government or individual U.S. employers?

Employers would be responsible for the Employment relationship with the worker. The U.S. Government would be involved in developing the agreements with foreign governments and the general procedures to be followed. As stated earlier employers of seasonal workers must meet the job disclosure requirements under MSPA and will be responsible to the worker and the U.S. Government for meeting the terms and conditions of employment required for participation in the Program.

10. Describe how the costs associated with your program would be paid. Who would shoulder the burden, the U.S. taxpayer or the grower? How much would your proposal cost?

The program will be financed by participating employers who will be required to pay approximately 11% of the wages paid to foreign workers (the equivalent of what they would pay in FICA and FUTA taxes if there workers were covered) into a trust fund. The Attorney General would have the authority to raise the employer contribution, if necessary, to cover the cost of program operations. This serves Two Purpose - The Adjustment of the Wage Rate to Equalize the differential with services workers, and to pay the costs to the Government of the Administration of the program. Start up costs have not yet been calculated.

See attached draft Administration proposal.

11. Under your proposal would foreign workers be eligible for unemployment compensation? Cash assistance? Medicaid? Would Social Security taxes be withheld?

We oppose making foreign workers eligible for any type of direct or indirect Federal assistance. Rather, this program has been designed to ensure that workers are continuously employed while in the U.S. H-2 workers are currently not eligible for unemployment compensation, cash assistance, and Medicaid; employers of H-2 farmworkers are exempt from FICA and FUTA. Neither H.R. 3080 nor S. 1200 would change that policy. Similarly, foreign workers under the Administration's proposed program would neither benefit from, nor be required to contribute to these programs.

As mentioned previously, workmen's compensation would be provided to all foreign and U.S. agricultural workers at Employer Expense.

12. Would it or would it not be possible under your proposal, for foreign workers to be recruited and admitted even if no formal agreement regarding workers rights has been reached with the sending country?

Yes, it would be possible, but sending countries which require exit permits could restrict the departure of their nationals. We believe, however, that a bi-lateral agreement would be in the interest of both the U.S. and the sending country.

13. Would your proposal allow undocumented aliens already in the United States participate in the program? Would it encourage or discourage such participation?

Possible in the first year only, but more development is needed on this issue. There is concern that registration of such workers in the United States would be inducement for others to enter illegally in order to register. Therefore, it is possible that undocumented workers should be required to return home, (as we believe most do anyway, on an annual basis), and be legally admitted in order to participate.

14. How are "perishable commodities" defined in your proposal? Would workers be allowed to engage in activities other than harvest (e.g., processing activities, transportation, packing and freezing?)

Workers admitted under "The Administration's program would be restricted to employment in field harvest labor of truly perishable commodities. A definition consistent with the one now contained in the Perishable Agricultural Commodities Act (PACA), adjusted to meet this "truly perishable" intent is feasible.

15. Former Secretary of Labor Ray Marshall has said: "If in future years we establish a clear and pressing need for additional workers, it would be better to admit such workers as immigrants with full legal rights than admit them as questworkers with seriously circumscribed rights." What do you think of the idea of admitting foreign workers as immigrants rather than as nonimmigrants?

A number will qualify as immigrants under proposed legalization. Beyond those so qualifying, believe that the admission of aliens as permanent residents to perform agricultural labor would adversely affect the U.S. labor force. As permanent residents, these workers would be free to seek non-agricultural employment in the off-season or to leave agriculture altogether. U.S. workers in non-agricultural occupations would be impacted by the entry of these workers and would not be protected by the labor certification provisions of the law as they now are. In addition such a policy would not provide an adequate or stable labor force for agricultural producers. Unless the current preference system were radically changed, the limitation on visa numbers by country and the sharing of visas with other preferences would most likely not allow for the timely admission of an adequate number of agricultural workers. There is currently a delay of almost two years in the admission of sixth preference immigrants because available visas are oversubscribed. An influx of agricultural worker applicants and their families would create larger backlogs and an even longer waiting period.

16. Once the Administration decides on the specifics of its proposal, will legislative language -- in the form of a bill or amendment -- be sent over for introduction?

We have attached to this response provisions of a draft seasonal agricultural worker program favored by the Administration. Final agreement has not been reached but we would be pleased to draft this program in the form of an amendment to H.R. 3810 for consideration by the Congress along with the other proposals being considered.

One factor is paramount. The difficulty of resolving this hard issue on agricultural workers must not slow down or deter the Judiciary Committee and full House from making-up an immigration bill which is critical for our nation. The House should delegate all agricultural program considerations before it - vote accordingly - pass out a bill - and proceed promptly to conference with the Senate.

17. Does the Administration prefer S. 1200 to H.R. 3810 with regard to agricultural workers? If so why?

The Administration believes that the "H-2" or "N" provisions of S. 1200 which are essentially those agreed to in conference last year represent a refinement of the concepts embodied in H.R. 3810 H-2 provisions. Specifically S. 1200 addresses the need of agricultural producers who may experience unforeseen emergencies as a result of weather conditions or the failure of referred workers to arrive or perform satisfactorily. Such measures would not be precluded by regulation under H.R. 3810, but we believe that agricultural producers whose economic lives are at stake at harvest time should have the security of these provisions in statute. S. 1200 also provides that members of an agricultural association may not be penalized unless actual complicity in a violation is established. By its silence on this issue, H.R. 3810 would allow continuation of the current policy of holding members of an association 'jointly and severally liable' for violations in which they may have had no part.

Although we support the version of the H-2 program in S. 1200 we would as announced in the attached Administration Statement of Principals delete the requirement that the Attorney General approve all regulations for this program, giving the authority for the labor certification provisions to the Secretary of Labor. We would eliminate the provision which would allow H-2 workers in the country to seek employment upon termination of their contract. We have no objection to allowing H-2 workers to remain in the country to accept pre-arranged employment with another certified employer if there is a brief interval between jobs.

We favor the seasonal worker program attached to this response rather than the program now contained in S. 1200, and oppose the agricultural labor Transition Program in that bill.

18. What type of H-2 modifications do you support? Why keep two separate programs? Why not simply make your program applicable to both perishable and nonperishable commodities?

The Administration supports the H-2 provisions in S. 1200, with the changes noted in our response to the previous question. We believe that this program will eventually provide for the needs of all agricultural producers. We have been persuaded, however, that many producers of perishable commodities who have come to depend on undocumented labor may find it difficult, if not impossible to immediately adjust to the requirements of that program. We therefore, have proposed the limited Seasonal Worker Program (attached to this response) which would allow producers of perishable commodities to make the transition to an H-2 type program.

19. Professors Philip Martin and Mark Miller conducted a study of the Swiss, French and West German guestworker programs. They concluded:

The fundamental flaw of postwar Western European guestworker policies was the implicit assumption that the economic man could be divorced from the purposes of public policy from the social, political, and cultural being. It is true that without the manpower supplied by guestworkers programs, labor shortages would most probably have impeded the postwar economic growth of Western Europe. The short and middle-term economic benefits accruing to Europeans, however, were mitigated by largely unforeseen long-term problems. First, the countries became dependent upon foreign workers to provide manpower for key industries. Second, recourse to foreign workers probably retarded some needed rationalization of industry and restructuring of the labor force. Third, foreign worker employment tended to depress wages and to deteriorate working conditions in low-skilled job categories. Fourth, as foreign workers become long-term residents, they and their dependents required important social service and governmental infrastructure expenditures. Fifth, foreign worker employment involved hidden overhead costs stretching from additional employer paperwork to the necessity of biligual supervision and job training. With the recession of the mid-1970's of course, high unemployment of indigenous workers made guestworker programs appear even less like assets to the economy of Western Europe. To what extent did you evaluate European programs before deciding that a guestworker program would be needed here? Do you disagree with the conclusion of Martin and Miller? If not, what makes you think your program would not lead to the same problems they describe.

There are important differences between the proposed temporary foreign worker programs for agriculture and the European guestworker programs. The European programs studied by Professors Martin and Miller permitted foreign workers to reside in the receiving countries for several years. The worker could work year-round in nonfarm jobs. Many of these workers eventually brought their families or formed families during their stay. We are quite mindful of the attachments such guestworkers develop to the host country's labor market and social service costs inherent in such arrangements. We have developed the basic structure of a seasonal worker program to specifically avoid such pro-

blems. Workers will be admitted only for seasonal farmwork. They would not be allowed to bring dependents and would be required to return home for a specified period each year, and would not be eligible to participate after a certain number of years.

20. In light of the extremely controversial and divisive nature of the foreign agricultural worker issue, would it not be in the best interests of passing immigration reform legislation to exempt growers from employer sanctions?

As a matter of fairness and consistency employer sanctions should apply to all segments of the economy. The Administration supports the policy embodied in the current law that when U.S. employers are unable to find needed workers in this country, aliens may be admitted for such work provided that wages and working conditions of similarly employed domestic workers are not adversely affected. We have developed our proposal for a limited seasonal agricultural worker program in accordance with this policy to meet the particular needs of producers of perishable commodities at this time. Our proposal allows time for this important industry to make the necessary adjustments which will be required by passage of employer sanctions covering all employers while affording strong protections to domestic workers.

However, as noted in our response to Question 16, passage of a reform bill must again be slowed by debate over the agricultural worker issue. If a compromise temporary agricultural worker program cannot be agreed to and passage of a bill is endangered, this option of exemption only growers of perishable commodities from employer sanctions may be a viable alternative. It is absolutely essential, in any event, that the open field search warrant provisions be dropped from the bill.

21. Growers representatives have urged us to incorporate into H.R. 3810 the language of S. 1200 regarding liability to agricultural associations and members of such associations. How, specifically, does that language in S. 1200 alter the prevailing rules regarding master-servant relationships and accountability? Absent such language, what would the Government have to prove to impute the liability of a member to the association and vice-versa? Does the language shift any burdens of proof or of production of evidence from the defendant to the Government?

If an association is a joint employer with its employer members the current rule requires that the association and its members agree to be "jointly and severally" liable for compliance with the H-2 labor certification. We understand that this rule frustrates the participation of associations as joint employers in the H-2 program because of concern by growers that they may be held liable for violation's of which they are innocent. The participation of associations as joint employers provides for more rational use of H-2 labor by allowing the transfer of workers among members as the need arises.

The provisions of S. 1200 are intended to insure that liability may only be imputed to parties when they participated in or had knowledge of and derived benefit from the violation. They do not alter the master-servant relationship between employer and employee. Neither are the burden of proof or production of evidence shifted. Under S. 1200 the government would, however, have to establish additional elements of a violation ie. The participation or knowledge of and benefit from a violation before liability could be imputed.

22. Should the so-called "50 percent rule" be retained? Why or why not?

We believe that the "50 percent rule" should not be retained in the H-2A program, because its application could put an employer in a position of having to choose between violating the terms of certification or terminating a foreign worker in violation of the employment contract. Termination of the H-2 worker while not required by the rule becomes necessary as a practical matter if there is not sufficient housing for the H-2 workers on board and the U.S. worker applicants. The H-2 worker must then of course be repatriated since his admission was contingent on the specific certified employment.

23. Do you believe it would be wise to loosen the continuous residency requirements for agricultural workers so that more would be able to legalize, thereby decreasing grower pressures for the adoption of new, foreign worker programs?

No. some agricultural workers, of course, will legalize under other provisions of the legislation we believe that many of the undocumented workers in agriculture are true migrants who desire to live in their countries and work periodically or seasonally in the U.S. Such aliens may not desire permanent resident status. Also as indicated in our response to question 15, as permanent residents, aliens would be free to seek work in other sectors with potential adverse affects on those labor markets, and they might abandon agricultural employment altogether.

This runs contrary to the purpose of immigration control is S.1200 and H.R. 3810. It would create a magnet to draw additional illegals to this country. For these reason we feel it is in advisable.

24. From both administrative and substantive standpoints, should the Department of Justice be given authority to reject Department of Labor regulations?

It is sound administrative policy for regulatory authority to reside with the agency responsible for the administration of a program. Consultation with the Departments of Agriculture and Justice by the Labor Department prior to the issuance of regulations will, we believe, be sufficient for the inclusion of the substantive views of those agencies with respect to the labor certification process.

25. Would you urge the House, in considering H.R. 3810, to support the Wilson amendment to S. 1200 if the alternative would be the adoption of no perishable crop program at all?

We urge the House to incorporate the provisions of the Administration's proposed seasonal agricultural worker program into H.R. 3810 as a reasonable compromise and a workable program. As noted above there is a pressing need for immigration reform which controls illegal entry.

It is essential that the differences on agricultural worker issues not again stop progress on immigration reform. If a compromise along the lines of the Administration proposal cannot be realized let the House vote its will on all proposals, including the Wilson Amendment, the Schumer Compromise, the various H-2 approaches and the exemption on a temporary or permanent basis of perishable growers from employer sanctions.

26. Should H-2 users be required to provide housing?

We believe that H-2 and temporary Agricultural workers who work beyond a reasonable community distance from their residence should be provided safe and healthy housing. Because many growers do not now have such housing we believe that an allowance to the worker to cover the cost of housing known to exist in the proximate area, or paid directly to the housing provider would be appropriate. Controls and monitoring should be applied to assure that decent housing is utilized by these agricultural workers if not directly provided by the growers

27. The Subcommittee recently deleted the transition worker program from the bill. Do you believe that was wise?

Yes, the Agricultural Labor Transition Program as introduced in H.R. 3080 contained two very serious flaws. (1) By making eligible any alien who has worked illegally in U.S. agriculture for 90 days since January 1, 1980, a number of aliens far in excess of the job opportunities available would be eligible to register. Additionally, since it would be very difficult to detect fraudulent documents, even more aliens than are eligible could be registered.

(2) By providing for registration of undocumented workers in the U.S. the bill would induce illegal entry for the purpose of registration.

- o Trust fund for program administration
  - Employer contributes equivalent of FICA/FUTA Tax (about 11% of alien worker wages)
  - Government provides return transportation for aliens from this fund
- o Trust fund to encourage repatriation
  - 20% of wages withheld from aliens
  - payable at U.S. consulate in home country
- o Secretary of State negotiates agreements with participating countries
  - allocates visas among participating countries
- o AG will determine effective date between 12-18 months from enactment to avoid disruption of the harvest.
  - qualified employers will be exempt from employer sanctions prior to effective date.

(a) ESTABLISHMENT OF SEASONAL AGRICULTURAL WORKER PROGRAM.

The Attorney General, in consultation with the Secretary of Agriculture and the Secretary of Labor, shall by regulation establish a program (hereafter in this section referred to as "the program") for the admission into the United States of seasonal agricultural workers to perform field labor harvesting perishable commodities as defined by the Secretary of Agriculture consistent with the definition in the Perishable Agriculture Commodities Act.

(b) AUTHORIZATION OF EMPLOYERS.

(1) NATURE OF EMPLOYER.

A request for authorization to employ seasonal agricultural workers under this program may be approved if the request is made by an agricultural producer of perishable commodities or an association of such producers, provided that the requirements of subsection (b) (2) are met and approval is not precluded by the provisions of subsection (c).

(A) The employer may be represented by an agent but must accept responsibility for the certifications required in subsection (b) (2).

(B) An employer with a need for workers at separate, distant locations (as defined by the Attorney General in regulation) shall submit a request for each location.

(2) REQUIREMENTS FOR APPROVAL.

The requesting employer must certify to the Attorney General the following:

(A) NEED FOR WORKERS.

The total number of seasonal agricultural workers under this program required for the harvest of perishable commodities in each month and the perishable commodities to be harvested, and that

(B) EMPLOYMENT OF DOMESTIC WORKERS.

(i) The employer will make a good faith effort to recruit domestic workers (as required by the Attorney General in regulations) in the area of intended employment, including the placing of job orders with the State employment service, and will accept for employment able, willing and qualified workers referred by the employment service for the harvesting of perishable commodities as long as seasonal agricultural workers under this program are employed in the harvest, and

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- (ii) In the case of a request for authorization by an employer who has employed seasonal agricultural workers under this program in the previous 12 months, the employer will report on the results of efforts to employ domestic field harvest workers, and

## (C) WAGES AND WORKING CONDITIONS.

The employer will provide to nonimmigrant and domestic field harvest workers such wages and working conditions (required by the Attorney General in regulation) as will not adversely affect the wages and working conditions of similarly employed domestic workers, including:

### (i) HOUSING.

The provision of housing or payment of rent for housing for workers who reside beyond a reasonable commuting distance, and

### (ii) WORKERS COMPENSATION.

If this employment is not covered by State worker's compensation law, the employer will provide insurance at no cost to the worker covering injury and disease arising out of, or in the course of the worker's employment, which will provide benefits at least equal to those provided under the State worker's compensation law for comparable employment, and

## (D) JOB INFORMATION DISCLOSURE.

The employer will, upon request, disclose in writing to non-immigrant and domestic field harvest workers, when an offer of employment is made, the place of employment, the wage rates, the employee benefits to be provided, and any costs to be charged for each of them, the crops to be harvested and the anticipated period of employment, and

## (E) NOTICE TO ATTORNEY GENERAL OF EMPLOYMENT.

The employer will notify the Attorney General of the entering into and termination of an employment relationship with a non-immigrant seasonal agricultural worker under this program not later than 72 hours from the time the relationship is both entered into and terminated, and

## (F) COMPLIANCE WITH RULES.

The employer will comply with the rules established by the Attorney General in regulation governing authorization to employ seasonal agricultural workers under this program, and not withstanding any other provision of law, will allow the Attorney General access to fields and records for the purpose of verifying such compliance.

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## (3) EXEMPTION FROM SANCTIONS.

Prior to the effective date of this section, a requesting employer who meets the requirements of this subsection, shall be exempt from penalties imposed under Section 274A with respect to job opportunities identified in clause (2)(A).

## (c) SUSPENSION OF AUTHORIZATION.

The Attorney General shall not approve a request for authorization or shall suspend authorization to employ seasonal agricultural workers under this program if any of the following conditions exist:

### (1) LABOR DISPUTE.

There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such authorization, or

### (2) VIOLATION OF TERM OF PREVIOUS AUTHORIZATION.

#### (A) IN GENERAL.

If the Attorney General has determined, after notice and opportunity for a hearing, that the employer at any time has:

- (i) substantially violated an essential term or condition of subsection (b) with respect to the employment of domestic or nonimmigrant workers, or
- (ii) has not paid any penalty for such violation which has been assessed by the Attorney General.

#### (B) SUSPENSION LIMITED TO ONE YEAR.

No employer may have its authorization denied or suspended under clause (A) for more than one year for any violation described in that clause.

#### (C) EXPEDITED PROCEDURES.

The Attorney General shall provide for an expedited procedure for the review of a suspension of authorization under subsection (c)(2) not later than 72 hours after the time the request for review is received.

## (d) ROLES OF AGRICULTURAL ASSOCIATIONS.

### (1) FILING BY AGRICULTURAL ASSOCIATIONS.

A request for authorization to employ seasonal agricultural workers under this program may be filed by an association as an agent for its member producers of perishable commodities.

(2) ASSOCIATIONS ACTING AS EMPLOYERS.

If such as association is a joint or sole employer of seasonal agricultural workers under this program, the authorization obtained under this section by the association may be used for job opportunities of any of its members requiring such workers to perform field harvest labor.

(3) MEMBER'S VIOLATION DOES NOT NECESSARILY DISQUALIFY ASSOCIATION OR OTHER MEMBERS.

If an individual member of such an association is determined to have committed an act that under subsection (c) (2) results in the suspension of authorization with respect to the member, the suspension shall not apply to the association or other member unless the Attorney General determines that the association or other member participated in, or had knowledge of and derived benefit from the violation.

(4) ASSOCIATION'S VIOLATION DOES NOT NECESSARILY DISQUALIFY MEMBERS.

If an association as a joint employer, or sole employer is determined to have committed an act that under subsection (c) (2) results in the suspension of authorization with respect to the association, the suspension shall apply only to the association and not to any individual member of the association unless the Attorney General determines that the member participated in, or had knowledge of and derived benefit from, the violation.

(e) MISCELLANEOUS PROVISIONS

(1) AUTHORITY.

The Attorney General is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with the terms and conditions of authorization under subsection (b).

(2) APPROPRIATE DOCUMENTATION.

The Attorney General and the Secretary of State shall provide for visas and such other secure documents as may be necessary to carry out this section and to verify authorization to be legally employed in the United States.

(3) COVERAGE UNDER OTHER EMPLOYMENT LAWS.

Seasonal agricultural workers under this program shall be fully protected by all Federal and State laws and regulations governing the employment of domestic migrant and seasonal agricultural workers and other nonimmigrant agricultural workers, except where such provisions of law or regulation are inconsistent with the provisions of this section.

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## (4) UNION MEMBERSHIP.

A nonimmigrant worker admitted under this section may join a union and fully participate in union activities so long as such activities are not inconsistent with provisions of the Immigration and Nationality Act.

## (f) NUMERICAL LIMITATIONS.

The Commission on Temporary Agricultural Worker Programs shall determine the number of workers to be admitted under this section for the duration of the program.

### (1) DETERMINATION FACTORS.

The Commission shall determine the number of workers to be admitted based on data provided by employers requesting authorization to employ seasonal agricultural workers under this program, the results of recruitment efforts by such employers, information on historic labor needs, the abundance and marketability of crops and other factors as the commission may determine necessary.

### (2) ANNUAL REDUCTION OF NUMERICAL LIMITATIONS.

The total number of workers determined by the Commission to be admitted in the calendar year beginning after the first twelve months from the effective date of the program shall be the base number for the purpose of determining the maximum number of workers to be admitted in future years. The Commission shall determine the maximum number of workers to be admitted in succeeding calendar years by reducing the base number from 5 to 20 percent each year.

## (g) ENTRY OF SEASONAL AGRICULTURAL WORKERS.

### (1) LENGTH OF STAY.

A foreign worker may not be admitted to the United States as a seasonal agricultural worker under this program for a period of more than 9 consecutive months. An admission period shall be deemed completed upon expiration of the visa, or on the date the worker applies for payment of withheld wages under Subsection (i)(3)(B), if that date is earlier than the visa expiration date.

### (2) LENGTH OF ABSENCE.

A foreign worker may not be readmitted to the United States as a seasonal agricultural worker under this program for at least 6 months from the completion date of the previous admission period under clause (1).

### (3) MAINTENANCE OF STATUS.

To maintain status as a seasonal agricultural worker under this program, the worker must be seeking work with, or working for an employer authorized by the Attorney General under subsection (b) and may not go without such employment for longer than 15 days. The expiration date of the visa notwithstanding, a worker who has been unable to find authorized employment for 15 days must depart the United States.

### (4) LIMIT OF ELIGIBILITY.

A foreign worker will not be eligible to participate in this program when the aggregate of the workers previous admission periods total forty five months.

### (h) PENALTIES FOR NON-COMPLIANCE BY WORKER.

A seasonal agricultural worker under this program who fails to maintain status is subject to the following penalties as determined by the Attorney General:

- (1) Deportation from the United States as provided for in the Immigration and Nationality Act,
- (2) The cost of deportation under clause (1) shall be deducted from the wages withheld under subsection (j) (2) (B).
- (3) Ineligible for admission as a seasonal agricultural worker under this program for 5 years.

### (i) ALLOCATION AND USE OF VISAS.

#### (1) WORKERS IDENTIFIED BY EMPLOYERS.

In the first year following enactment of this section employers may, in accordance with procedures established by the Attorney General, identify foreign workers whom they have employed in the past and whom they wish to be considered for admission as seasonal agricultural workers under this program. In the second year following enactment, such identified workers who are otherwise eligible for admission, shall receive preference in the allocation of visas up to the limit of visas allotted by the Secretary of State under subsection (k) (2) to their country of origin.

#### (2) WORKERS REFERRED BY FOREIGN GOVERNMENTS.

- (A) If, after visas have been issued to eligible workers who have been identified by employers under subsection (i) (1), there are additional unused visas allotted to a country, workers referred by that country's government who are otherwise eligible for admission may be issued the remaining visas.

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(B) In the calendar year beginning after the first 12 months from the effective date, and for the duration of the program, visas shall be made available to workers referred by participating foreign governments in accordance with agreements approved by the Secretary of State under subsection (k).

(3) SPOUSES AND CHILDREN.

A spouse or child of a seasonal agricultural worker under this program is not entitled to a nonimmigrant visa by virtue of such relationship, but may qualify independently as a seasonal agricultural worker.

(4) MAY NOT ADJUST STATUS.

A seasonal agricultural worker under this program may not adjust or change status under section 245 or section 248.

(5) NOT ELIGIBLE FOR FEDERAL ASSISTANCE.

A seasonal agricultural worker under this program is not eligible for any program of financial assistance under federal law.

(j) TRUST FUND.

(1) ESTABLISHMENT.

The Attorney General shall establish by regulation a trust fund to provide funds for the administration of the program and to provide a monetary incentive for seasonal agricultural workers in the program to return to their country of origin. The Attorney General shall promulgate regulations as necessary to carry out this subsection, including the delegation of collection and disbursement authority to other appropriate agencies of the Federal Government.

(2) PAYMENTS INTO TRUST FUND.

In the case of employment of a seasonal agricultural worker under the program:

(A) EMPLOYER PAYMENT.

The employer shall pay into the trust fund established under this subsection an amount equivalent to the employer's cost under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) for similarly employed domestic workers, but not less than 11 percent of the wages of the worker.

(B) WORKER PAYMENT.

There shall be deducted from the wages of the worker and paid into such trust fund an amount equivalent to 20 percent of the wages of the worker.

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## (3) USE OF AMOUNTS IN TRUST FUNDS.

### (A) EMPLOYER PAYMENTS AND INTEREST.

Funds provided under paragraph (2)(A) and interest thereon, shall be used for the purpose of administering the program, including:

#### (i) TRANSPORTATION.

Funds under paragraph (2)(A) may be used to provide or pay for the cost of transportation to return seasonal agricultural workers under this program to their country of origin. Such cost may only be incurred for a worker once during a period of admission.

#### (ii) ATTORNEY GENERAL MAY INCREASE PAYMENT.

If the funds provided under paragraph (2)(A) will not be sufficient to cover the cost of administering this program including the cost of transportation for workers, the Attorney General may by regulation, increase the employer payment.

### (B) WORKER PAYMENTS.

Amounts described in paragraph (2)(B) paid into the trust fund with respect to a worker and interest thereon shall be paid to the worker if:

(i) the worker applies for payment within 30 days of the last day of employment in an admission period at a United States consulate in the country of origin, and

(ii) the worker has complied with the terms and conditions of the program, including the obligation to be continuously employed (or actively seeking employment) in the harvest of perishable commodities.

### (k) AGREEMENTS WITH FOREIGN GOVERNMENTS.

(1) Within one year of enactment of this section the Secretary of State shall negotiate and conclude agreements with foreign governments for participation in this program. The negotiations shall include consideration of:

(A) The role of foreign governments and others in referring workers for admission under this program,

(B) Recruitment of foreign workers within their country of origin by U.S. employers. The Secretary of State shall not agree to the establishment of recruitment or worker screening locations in the proximate area of the border without prior concurrence of the Attorney General,

# DRAFT

- (C) The need for a contract or treaty between governments concerning the implementation and operation of this program,
- (D) The number or proportion of available visas to be allocated for nationals of participating countries,
- (E) The terms and conditions of employment of seasonal agricultural workers under this program, and
- (F) Procedures for handling payments of withheld wages to returning workers within their home countries.

## (2) COUNTRY ALLOCATIONS.

After each determination of the total number of workers to be admitted by the Commission on Temporary Agricultural Worker Programs under subsection (f), the Secretary of State shall determine the number of visas within the total number to be made available to nationals of each participating country.

## (3) EXPANSION OF CONSULTATES.

The Secretary of State is authorized to take such steps as may be necessary in order to expand and establish consultates in foreign countries participating in this program.

## (1) EFFECTIVE DATE.

The provisions of this section shall be effective and implemented by regulation between twelve and eighteen months from enactment on a date determined by the Attorney General to have minimal impact on harvest activities. The Attorney General shall, before the effective date, provide by regulation for employers to identify workers as provided in subsection (i)(1) and request authorization to employ seasonal agricultural workers under this program as provided in subsection (b).

# DRAFT

## ADMINISTRATION PROPOSAL

S1200 (as passed)

## DISCUSSION

**(a) ESTABLISHMENT OF SEASONAL AGRICULTURAL WORKER PROGRAM.** - The Attorney General, in consultation with the Secretary of Agriculture and the Secretary of Labor, shall by regulation establish a program (hereafter in this section referred to as "the program") for the admission into the United States of seasonal agricultural workers to perform field labor harvesting perishable commodities as defined by the Secretary of Agriculture consistent with the definition in the Perishable Agriculture Commodities Act.

Similar, but permissible work includes planting, cultural practices, production, cultivation, growing and harvesting. There is no reference to PACA.

The statement of principles specifies field harvest work only. USDA and DOL have agreed that the definition of perishable commodities should be consistent with the PACA definition.

# DRAFT

ADMINISTRATION PROPOSAL

S1200

DISCUSSION

## (b) AUTHORIZATION OF EMPLOYERS.

(1) NATURE OF EMPLOYER. - A request for authorization to employ seasonal agricultural workers under this program may be approved if the request is made by an agricultural producer of perishable commodities or an association of such producers, provided that the requirements of subsection (b)(2) are met, and approval is not precluded by the provisions of subsection (c).

(A) The employer may be represented by an agent but must accept responsibility for the certifications required in subsection (b)(2).

(B) An employer with a need for workers at separate, distant locations (as defined by the Attorney General in regulation) shall submit a request for each location.

S.1200 is unclear on this issue. It says an alien may be imported by a petitioner which employes or contracts for the employment of individuals. Subsequent provisions equate petitioner with employer, and specify that an employer petition is not required for a visa.

No provision.

No provision.

The Administration proposal makes clear that only producers (growers) may be authorized to employ aliens. Farm labor contractors should not be authorized because this program is designed for growers who have been dependent on illegal labor. Contractors have been required to register under MSPA which outlaws employment of illegals. A grower could use a contractor as an agent but must be responsible as the employer.

Separate request from multi-farm businesses would facilitate administration and control.

**(2) REQUIREMENTS FOR**

Similar

**APPROVAL.** - The requesting employer must certify to the Attorney General the following:

**(A) NEED FOR WORKERS.** -

Similar

The total number of seasonal agricultural workers under this program required for the harvest of perishable commodities in each month and the perishable commodities to be harvested, and that

**(B) EMPLOYMENT OF DOMESTIC WORKERS.**

(i) The employer will make a good faith effort to recruit domestic workers (as required by the Attorney General in regulations) in the area of intended employment, including the placing of job orders with the State employment service, and will accept for employment able, willing and qualified workers referred by the employment service for the harvesting of perishable commodities as long as seasonal agricultural workers under this program are employed in the harvest, and

Similar, but requires employment of U.S. workers only until work activity commences.

These data are needed by the Commission for initial determination of numbers to be admitted. They would also be useful for monitoring although it is not recommended that employer authorizations be limited by numbers, months, or crops.

Employment preference for U.S. workers throughout the harvest will be controversial. Arguments in favor:

- U.S. migrants under H-2 and by custom are recruited well in advance of need in their home bases. They may be overlooked by employers and displaced by aliens if required recruitment is local and short-term. The problem increases with distance from Florida and Texas.
- H-2 type recruitment is not acceptable to perishable growers to say they cannot predict needs in advance.
- As a practical matter, employers will usually hire all the workers they can get at the peak of the harvest (subject to available housing).
- Guarantees that available U.S. workers would not be displaced by aliens.

Arguments against:

- May require inordinate turnover of labor.
- Unfair to foreign workers who may be displaced.
- May be unacceptable to foreign governments.

(ii) In the case of a request for authorization by an employer who has employed seasonal agricultural worker under this program in the previous 12 months. The employer will report on the results of efforts to employ domestic field harvest workers, and

Similar

**(C) WAGES AND WORKING CONDITIONS.** - The employer will provide to foreign and domestic field harvest workers such wages and working conditions (required by the Attorney General in regulations) as will not adversely affect the wages and working conditions of similarly employed domestic workers, including:

Similar.

**(i) HOUSING.** - The provision of housing or payment of rent for housing for workers who reside beyond a reasonable commuting distance, and

Similar.

Alternatives to employer paying directly to housing provider are: employers pay, allowance to the worker, or employer pays allowance to the worker only if suitable housing is available in the proximate area. The Administration proposal provides the greatest assurance that workers will be adequately housed.

# DRAFT

ADMINISTRATION PROPOSAL

S1200

DISCUSSION

**(ii) WORKERS COMPEN-  
SATION.** - If this  
employment is not  
covered by State  
worker's compensation  
law, the employer  
will provide insurance  
at no cost to the  
worker covering injury  
and disease arising  
out of, or in the  
course of the worker's  
employment, which will  
provide benefits at  
least equal to those  
provided under the  
State worker's  
compensation law for  
comparable employment,  
and

Similar.

**(D) JOB INFORMATION  
DISCLOSURE.** The em-  
ployer will, upon  
request, disclose in  
writing to nonimmigrant  
and domestic field  
harvest workers,  
when an offer of  
employment is made,

Similar.

# DRAFT

ADMINISTRATION PROPOSAL

S1200

DISCUSSION

the place of employment, the wage rates, the employee benefits to be provided, and any costs to be charged for each of them, the crops to be harvested and the anticipated period of employment, and

**(E) NOTICE TO ATTORNEY  
GENERAL OF EMPLOYMENT.**

The employer will notify the Attorney General of the entering into and termination of an employment relationship with a nonimmigrant seasonal agricultural worker under this program not later than 72 hours from the time the relationship is both entered into and terminated, and

Similar.

0201

ADMINISTRATION PROPOSAL

S1200

DISCUSSION

**(F) COMPLIANCE WITH RULES.**

The employer will comply with the rules established by the Attorney General in regulations governing authorization to employ seasonal agricultural workers under this program, and notwithstanding any other provision of law, will allow the Attorney General access to fields and records for the purpose of verifying such compliance.

**(c) SUSPENSION OF AUTHORIZATION.**

- The Attorney General shall not approve a request for authorization or shall suspend authorization to employ seasonal agricultural workers under this program if any of the following conditions exist:

Similar, but only provides for suspension of authorization.

**(1) LABOR DISPUTE.**

There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such authorization, or

Similar.

Definition of labor dispute for this purpose will be controversial. Should be consistent with definition in II-2 successor program.

**(2) VIOLATION OF  
TERM OF PREVIOUS  
AUTHORIZATION.**

**(A) IN GENERAL. -**  
If the Attorney  
General has deter-  
mined, after notice  
and opportunity  
for a hearing, that  
the employer at any  
time has:

(i) substantially  
violated an essential  
term or condition of  
subsection (b) with  
respect to the  
employment of domestic  
or nonimmigrant  
workers, or

(ii) has not paid  
any penalty for  
such violations  
which has been  
assessed by the  
Attorney General.

Similar, but limits  
liability to violation  
within previous 2 years.

Liability for previous violation should  
not be limited. Appeals process could  
take longer than 2 years.

## ADMINISTRATION PROPOSAL

S1200

DISCUSSION

### **(B) SUSPENSION - LIMITED TO ONE YEAR. -**

No employer may have its authorization denied or suspended under clause (A) for more than one year for any violation described in that clause.

Similar.

### **(C) EXPEDITED PROCEDURES. -**

The Attorney General shall provide for an expedited procedure for the review of a suspension of authorization under subsection (c) (2) not later than 72 hours after the time the request for review is received.

Similar, but provides for de novo administrative hearing, precedence on district court docket for de novo determination with burden on the AG to sustain the suspension.

## ADMINISTRATION PROPOSAL

S1200

## DISCUSSION

### **(d) ROLES OF AGRICULTURAL ASSOCIATIONS.-**

Similar.

#### **(1) FILING BY AGRICULTURAL ASSOCIATIONS.-**

A request for authorization to employ seasonal agricultural workers under this program may be filed by an association as an agent for its member procedures of perishable commodities.

Provision in subsection (d) are similar to provisions in the S.1200 N visa (H-2) program. Current H-2 provision makes all members of an association jointly and severally liable for violations thus discouraging the formation of associations and the participation of associations employers.

#### **(2) ASSOCIATIONS ACTING AS EMPLOYERS.-**

Similar.

If such as association is a joint or sole employer of seasonal agricultural workers under this program, the authorization obtained under this section by the association may be used for job opportunities of any of its members requiring such workers to perform field harvest labor.

**(3) MEMBER'S VIOLATION DOES NOT NECESSARILY DISQUALIFY ASSOCIATION OR OTHER MEMBERS.** - If an individual member of such an association is determined to have committed an act that under subsection (c) (2) results in the suspension of authorization with respect to the member, the suspension shall not apply to the association or other member unless the Attorney General determines that the association or other member participated in, or had knowledge of and derived benefit from the violation.

Similar.

**(4) ASSOCIATION'S  
VIOLATION DOES NOT  
NECESSARILY DISQUALIFY  
MEMBERS.**

- If an association as a joint employer, or sole employer is determined to have committed an act that under subsection (c)(2) results in the suspension of authorization with respect to the association, the suspension shall apply only to the association and not to any individual member of the association unless the Attorney General determines that the member participated in, or had knowledge of and derived benefit from, the violation.

Similar.

**(e) MISCELLANEOUS  
PROVISIONS -**

**(1) AUTHORITY.**

The Attorney General is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with the terms and conditions of authorization under subsection (b).

Similar.

**(2) APPROPRIATE**

**DOCUMENTATION.** - The Attorney General and the Secretary of State shall provide for visas and such other secure documents as may be necessary to carry out this section and to verify authorization to be legally employed in the United States.

Similar, but no reference to Secretary of State.

## ADMINISTRATION PROPOSAL

S1200

## DISCUSSION

### **(3) COVERAGE UNDER OTHER EMPLOYMENT LAWS.-**

Seasonal agricultural workers under this program shall be fully protected by all Federal and State laws and regulations governing the employment of domestic migrant and seasonal agricultural workers and other nonimmigrant agricultural workers, except where such provisions of law or regulation are inconsistent with the provisions of this section.

No provision.

It should be established for the record (in response to a question from the House subcommittee) that the AG would find the following provisions of the current H-2 program inconsistent with the provisions of this program:

- written contract
- 3/4 guarantee
- transportation

### **(4) UNION MEMBERSHIP.-**

A nonimmigrant worker admitted under this section may join a union and fully participate in union activities so long as such activities are not inconsistent with provisions of the Immigration and Nationality Act.

No provision.

## ADMINISTRATION PROPOSAL

S1200

## DISCUSSION

### (f) NUMERICAL LIMITATIONS.-

The Commission on Temporary Agricultural Worker Programs shall determine the number of workers to be admitted under this section for the duration of the program.

### (1) DETERMINATION FACTORS. -

The Commission shall determine the number of workers to be admitted based on data provided by employers requesting authorization to employ seasonal agricultural workers under this program, the results of recruitment efforts by such employers, information on historic labor needs, the abundance and marketability of crops and other factors as the commission may determine

- Numerical limitations are determined by the AG after consultation with USDA and DOL.
- 350,000 cap
- Program sunsets in 3 years
- AG establishes agricultural employment regions and numerical limitations by region, by month. AG may adjust regional limit upwards on petition by employer. Must decide on petition within 72 hours.

The Commission established by S.1200 would need to be extended for the life of this program and introduced into HR 3180.

The establishment of numerical limitations by region and month would require the Government to manage the supply of labor with precision (and be responsible for local imbalances). Such attempts might interfere with, rather than facilitate the working of a relatively free agricultural labor market. It seems more likely that workers will arrive when and where they are needed, if employers, associations or their agents undertake to recruit them.

**(2) ANNUAL REDUCTION OF NUMERICAL LIMITATIONS.** - The total number of workers determined by the Commission to be admitted in the calendar year beginning after the first twelve months from the effective date of the program shall be the base number for the purpose of determining the maximum number of workers to be admitted in future years. The Commission shall determine the maximum number of workers to be admitted in succeeding calendar years by reducing the base number from 5 to 20 percent each year.

## ADMINISTRATION PROPOSAL

S1200

## DISCUSSION

### (g) ENTRY OF SEASONAL AGRICULTURAL WORKERS. -

#### (1) LENGTH OF STAY. -

A foreign worker may not be admitted to the United States as a seasonal agricultural worker under this program for a period of more than 9 consecutive months. An admission period shall be deemed completed upon expiration of the visa, or on the date the worker applies for payment of withheld wages under Subsection (i) (3)(B), if that date is earlier than the visa expiration date.

Similar, but period of reference is calendar year.

Administration proposal provides for multiple entry during an "admission period", allowing aliens to return home for brief periods, without requiring a new visa for readmission.

#### (2) LENGTH OF ABSENCE. -

A foreign worker may not be readmitted to the United States as a seasonal agricultural worker under this program for at least 6 months from the completion date of the previous admission period under clause (1).

Requires absence of 3 months between admissions.

## ADMINISTRATION PROPOSAL

SI200

DISCUSSION

**(3) MAINTENANCE OF STATUS.** - To maintain status as a seasonal agricultural worker under this program, the worker must be seeking work with, or working for an employer authorized by the Attorney General under subsection (b) and may not go without such employment for longer than 15 days. The expiration date of the visa notwithstanding, a worker who has been unable to find authorized employment for 15 days must depart the United States.

No provision.

**(4) LIMIT OF ELIGIBILITY.** - A foreign worker will not be eligible to participate in this program when the aggregate of the workers previous admission periods total forty five months.

No provision.

The forty five month limitation equals five maximum admission periods of 9 months each.

## ADMINISTRATION PROPOSAL

S1200

## DISCUSSION

### (h) PENALTIES FOR NON-COMPLIANCE BY WORKER. -

A seasonal agricultural worker under this program who fails to maintain status is subject to the following penalties as determined by the Attorney General:

(1) Deportation from the United States as provided for in the Immigration and Nationality Act,

(2) The cost of deportation under clause (1) shall be deducted from the wages withheld under subsection (j) (2) (B).

(3) Ineligible for admission as a seasonal agricultural worker under this program for 5 years.

### (i) ALLOCATION AND USE OF VISAS. -

(1) WORKERS IDENTIFIED BY EMPLOYERS. - In the first year following enactment of this section employers may, in accordance with procedures established by the Attorney General, identify

Similar, but no provision for recovering cost of deportation.

Preference given to workers previously employed under this program by total length of employment.

S1200 encourages attachment to the U.S. labor market.

An alternative to legal admission of aliens in the first year would be registration of undocumented workers in the U.S.

#### Arguments in favor:

- Minimum disruption of customary employer practices.
- Minimum inconvenience to aliens.

foreign workers whom they have employed in the past and whom they wish to be considered for admission as seasonal agricultural workers under this program. In the second year following enactment, such identified workers who are otherwise eligible for admission, shall receive preference in the allocation of visas up to the limit of visas allotted by the Secretary of State under subsection (d) (7) to their country of origin.

**(2) WORKERS REFERRED BY FOREIGN GOVERNMENTS. -**

(A) If, after visas have been issued to eligible workers who have been identified by employers under subsection (i) (1), there are additional unused visas allotted to a country, workers referred by that country's government who are otherwise eligible for admission may be issued the remaining visas.

No provision.

**Arguments against:**

- Would encourage illegal entry
- difficult to apply numerical limitation
- logistical problems for secure, hands-on registration
- problem of apprehended aliens who are not registered, but may be eligible
- relatively high cost for short term acquisition of real property, mobile equipment and staffing costs.

## ADMINISTRATION PROPOSAL

S1200

## DISCUSSION

(b) In the calendar year beginning after the first 12 months from the effective date, and for the duration of the program, visas shall be made available to workers referred by participating foreign governments in accordance with agreements approved by the Secretary of State under subsection (k).

No provision.

**(3) SPOUSES AND CHILDREN.** - A spouse or child of a seasonal agricultural worker under this program is not entitled to a non-immigrant visa by virtue of such relationship, but may qualify independently as a seasonal agricultural worker.

Similar.

**(4) MAY NOT ADJUST STATUS.** - A seasonal agricultural worker under this program may not adjust or change status under section 245 or section 248.

Similar, but with exception for immediate relatives.

**(5) NOT ELIGIBLE FOR FEDERAL ASSISTANCE. -**

A seasonal agricultural worker under this program is not eligible for any program of financial assistance under federal law.

AG must identify programs for which aliens would be ineligible.

ADMINISTRATION PROPOSAL

S1200

DISCUSSION

**(j) TRUST FUND. -**

**(1) ESTABLISHMENT. -**

The Attorney General shall establish by regulation a trust fund to provide funds for the administration of the program and to provide a monetary incentive for seasonal agricultural workers in the program to return to their country of origin upon expiration of their visas under the program. The Attorney General shall promulgate regulations as necessary to carry

Similar, but without provision for delegation.

out this subsection, including the delegation of collection and disbursement authority to other appropriate agencies of the Federal Government.

**(2) PAYMENTS INTO TRUST FUND.** - In the case of employment of a seasonal agricultural worker under the program:

Similar, but no reference to FICA/FUTA

**(A) EMPLOYER PAYMENT.** - The employer shall pay into the trust fund established under this subsection an amount equivalent to the employer's cost under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) for similarly employed domestic workers, but not less than 11 percent of the wages of the worker.

## ADMINISTRATION PROPOSAL

S1200

## DISCUSSION

**(B) WORKER PAYMENT. -**  
There shall be deducted from the wages of the worker and paid into such trust fund an amount equivalent to 20 percent of the wages of the worker.

Similar.

### **(3) USE OF AMOUNTS IN TRUST FUNDS. -**

**(A) EMPLOYER PAYMENTS AND INTEREST. -** Funds provided under paragraph (2)(A) and interest thereon, shall be used for the purpose of administering the program, including

Similar.

**(i) TRANSPORTATION. -** Funds under paragraph (2)(A) may be used to provide or pay for the cost of transportation to return seasonal agricultural workers under this program to their country of origin.

No provision.

Alternatives include (1) no transportation provided by the government as in S1200 and (2) Round trip transportation.

(1) A return trip voucher provided by the government would be the most equitable and administratively feasible way to assure prompt departure of alien.

## ADMINISTRATION PROPOSAL

S1200

## DISCUSSION

Such cost may only be incurred for a worker once during a period of admission.

### (ii) ATTORNEY GENERAL MAY INCREASE PAYMENT. -

If the funds provided under paragraph (2)(A) will not be sufficient to cover the cost of administering this program including the cost of transportation for workers, the Attorney General may by regulation, increase the employer payment.

### (B) WORKER PAYMENTS. -

Amounts described in paragraph (2)(B) paid into the trust fund with respect to a worker and interest thereon shall be paid to the worker if:

(i) the worker applies for payment within 30 days of the last day of employment in an admission period at a United States consulate in the country of origin, and

(ii) the worker has complied with the terms and conditions of the program, including the

Similar.

(2) Arguments in favor of government financed round trip:

- Assures arrival of aliens
- Cost of transportation shared by all employers through trust fund contributions.

Arguments against:

- Planning problem for government of where to send workers. If burden is on employers to recruit and pay transportation (through associations/agents) it will assure that aliens arrive at time and place needed.
- Potential for government financing one way or round trip for someone who never works in authorized employment.
- H-2 employers must pay round trip for all U.S. and foreign workers.

obligation to be continuously employed (or actively seeking employment) in the harvest of perishable commodities.

**(k) AGREEMENTS WITH FOREIGN GOVERNMENTS. -**

(1) Within one year of enactment of this section the Secretary of State shall negotiate and conclude agreements with foreign governments for participation in this program. The negotiations shall include consideration of:

(A) The role of foreign governments and others in referring workers for admission under this program,

Sense of Congress that the President establish an advisory commission to consult with Mexico and other countries regarding the operation of the program.

(B) Recruitment of foreign workers within their country of origin by U.S. employers. The Secretary of State shall not agree to the establishment of recruitment or worker screening locations in the proximate area of the border without prior concurrence of the Attorney General,

(C) The need for a contract or treaty between governments concerning the implementation and operation of this program,

(C) The number or proportion of available visas to be allocated for nationals of participating countries,

(E) The terms and conditions of employment of seasonal agricultural workers under this program, and

## ADMINISTRATION PROPOSAL

S1200

## DISCUSSION

(F) Procedures for handling payments of withheld wages to returning workers within their home countries.

**(2) COUNTRY ALLOCATIONS. -**

After each determination of the total number of workers to be admitted by the Commission on Temporary Agricultural Worker Programs under subsection (f), the Secretary of State shall determine the number of visas within the total number to be made available to nationals of each participating country.

The AG in consultation with the Secretaries of State and Agriculture will determine visa allocation among participating countries including Caribbean Basin countries.

**(3) EXPANSION OF**

**CONSULTATES. -** The Secretary of State is authorized to take such steps as may be necessary in order to expand and establish consultates in foreign countries participating in this program.

Similar.

ADMINISTRATION PROPOSAL

S1200

DISCUSSION

**(1) EFFECTIVE DATE.** - The provisions of this section shall be implemented beginning on the first day of the twelfth month beginning after the date of enactment of this section, except that the Attorney General may, before that date, by regulation, provide for employers to identify workers as provided in subsection (i)(1) and request authorization to employ seasonal agricultural workers under this program as provided in subsection (b).

Similar, but no provision for identifying workers or processing requests prior to effective date.

## STATEMENT OF PRINCIPLES

### Seasonal Worker Program

- \* The Administration supports the creation of a seasonal worker program to address the particular labor needs of growers of perishable commodities.
- \* Any workers admitted under such a program would be admitted only for the purpose of doing field harvest labor for truly perishable commodities.
- \* MSPA shall apply to any such field harvest laborers admitted under such a program with regard to job disclosure, working conditions, housing, transportation and wage determination.
- \* Two years after the effective date of any such program, the Agricultural Worker Commission will set a cap on the total number of workers to be admitted in the subsequent year; on an annual basis thereafter, the statute will provide that the Commission lower the cap by not less than 5% nor more than 20%; the Commission would have the discretion to determine the precise percentage decline within that range and could, for one year only, suspend the decline altogether if exceptional circumstances warranted such suspension.
- \* In setting the cap and subsequent rates of decline, the Commission will consider labor market conditions and the abundance of crops.
- \* State Department concerns with respect to the operation of such a program in foreign countries will be appropriately addressed.

### H-2 Program

- \* DOL, acting independently and in response to recommendations from the Agricultural Workers' Commission, will take meaningful steps to improve the H-2 program as a workable and acceptable means of meeting shortages in the domestic agricultural labor market.
- \* The Administration supports S. 1200's temporary worker reforms except that the Secretary of Labor will issue the regulations governing labor certification under this program after meaningful consultation with the Departments of Justice and Agriculture. Both the regulatory authority provision and the consultation requirement will be statutory.

### Search Warrant Provision

- \* The Administration strongly restates its opposition to the imposition of an open field search warrant requirement over immigration law enforcement officers.

## OUTLINE OF ELEMENTS

### Agricultural Worker Programs Immigration Reform Legislation

#### A. H-2 Program

1. Adopt S.1200's H-2 reforms (Section 122) with the following changes:
2. The Secretary of Labor shall issue regulations implementing this Section, after formal consultation with the Secretary of Agriculture and the Attorney General.
3. There will be statutory authority for the consultation process.
4. A memorandum of understanding between DOL, USDA and DOJ will be developed which specifically outlines this consultation process. It is agreed that the memorandum will provide for meetings, the exchange of written proposals, and an opportunity for substantive comment on such proposals prior to, and subsequent to, USDL's issuance of an ANPR, Proposed Rule, or Final Rule.
5. DOL, acting independently and in response to recommendations from the Agricultural Workers' Commission, will take meaningful steps to improve the H-2 program as a workable and acceptable means of addressing shortages in the domestic agricultural labor market.

B. Seasonal Worker Program for Perishable Crops

o The elements of this Program shall include:

1. Length of Stay Provisions

(a) A foreign worker's length of stay in the United States under this program would be limited to 9 consecutive months.

(b) Each foreign worker participating in this program would be required to return to his home country for not less than a 6-month period prior to returning to the United States under this program.

(c) No foreign workers can participate in this program for more than 5 calendar years. It is noted that these need not be consecutive calendar years.

2. Cap on the Number of Eligible Workers

(a) There shall be no cap on the total number of workers participating in this program for a period of two years following the effective date of the program.

(b) The Agricultural Worker Commission, as created by S.1200, shall establish the numbers admitted based on market information including the abundance and marketability of crops, historic labor

needs, job orders placed by participating growers and other factors as determined by the Commission.

- (c) Two years after the effective date of the program, the Commission established by this legislation will established a cap on the number of workers allowed to participate in this program. The Commission will determine on an annual basis the number of workers to be admitted for each successive year.

### 3. Length of Program

- (a) This program will last for a period of not more than twenty two years, nor less than seven years from date of enactment. On an annual basis after the initial cap is established, the statute will provide that the Commission lower the cap by not less than 5% nor more than 20%; the Commission would have the discretion to determine the precise percentage decline within that range and could, for one year only, suspend the decline altogether if exceptional circumstances warranted such suspension.

- (b) In setting the cap and subsequent rates of decline, the Commission will consider the items noted in 2 (b) above.

### 4. Definition of Perishable Seasonal Workers

- (a) The Secretary of Agriculture shall define the term "perishable" in regulation; the definition shall be the PACA definition and

clearly limit this program to the provision of field harvest labor for truly "perishable" commodities.

- (b) Growers of other than perishable commodities must use the H-2 program. It is a goal of this legislation to continuously review and improve the workability of the H-2 program so that perishable commodities growers will shift to the H-2 program and/or reduce dependence on foreign workers.

## 5. Recruitment

- (a) Recruitment emphasis for the first year of the program will focus on domestic efforts to assimilate current perishable commodities workers into the program. After a one year period of negotiation with foreign governments, emphasis will shift to off-shore recruitment efforts.
- (b) Recruitment shall be conducted at dispersed locations within supplying nations. No recruitment shall occur in the proximate area of the border ports of entry. Growers of perishable commodities will be required to pay a "transportation allowance" to be used to buy worker transportation to and from the sending country. This will be comparable in all ways possible to the housing allowance provision precluding cash payment of the allowance. Such allowance shall come from the 11% fee or the AG by regulation can require additional allowances only in the event that the fund is found insufficient to cover the cost of the

program, including transportation.

- (c) Recruiting through grower associations is encouraged. The AG by regulation can specify all recruiting of perishable commodities workers must be done through a recognized Grower Association if other recruiting arrangements are not satisfactory.

#### 6. Operational Considerations

- (a) Associations must report and verify arrival and departure of all participating visa holders in this program.
- (b) The Government will have the clear ability to audit and monitor the arrival and departure of program participants.
- (c) There shall be no bar from participating in the H-2 program for those holders of Seasonal Worker Program Visas who have fulfilled the terms and obligations of their participation in that program during the previous year. Transition of these individuals to the H-2 program should be encouraged by certified participants in the H-2 and perishable programs.

#### 7. Attorney General's Role and Responsibilities

- (a) The Attorney General, with the involvement and assistance of the Departments of Labor and Agriculture, will accomplish the development of regulations governing this program and will conduct

a test of local labor markets to conduct this program. The Attorney General will in a similar way develop regulations governing the collection and dispersal of transportation payments and will review perishable commodities workers' wages to keep them as much as possible in line with wages paid in the H-2 program within that locality. As necessary, the Attorney General, with the assistance of the Departments of Labor and Agriculture, will develop by regulation means to determine local labor needs to assure that foreign workers are not displacing willing, qualified American workers.

- (b) The Attorney General will start-up this program in coordination with the establishment of employer sanctions. This will provide for a six to nine month period to write and publish appropriate regulations.

8. Protections that Workers will Return to Sending Countries

- (a) Refer to B (1) (a), (b) and (c) above which set forth worker length of stay periods of nine months each year, a six month "repatriation" period and five year maximum participation.
- (b) The program shall provide for withholding deduction of 20% of the temporary agricultural employees' salary and transmittal of such amount to the home country. Regardless of whether the visa has expired, the worker must leave the United States within 15 days of last verifiable employment. Penalty for non compliance is:

- A five year bar from the program,
- Forfeit of the 20% withholding trust fund deposits, and
- Deportation from the United States as provided for in the Immigration and Nationality Act.

9. Cost of Program

The cost of this program will be recovered through the deduction of <sup>an equivalent</sup> the FICA/FUTA allowance from the workers' wages. It is understood that this is approximately 11% of the wages paid. This money will be established in a pool administered by the Attorney General for the purposes of Administration, Enforcement and to pay transportation costs.

10. Other Provisions

- (a) The method of determining the wages of seasonal workers under the terms of this program shall provide that wages are not lower than the minimum wage and shall meet all state and local wage laws.
- (b) All state and federal labor laws governing working conditions shall apply to holders of seasonal worker visas as issued under the terms of this program.

- (c) All certified employers under this program shall provide workmen's compensation protection to visa holders in a manner equivalent to that which would be provided an American worker in similar circumstances.
- (d) To start up this program, one year after enactment, qualified harvesters of perishable commodities will be preferred. After a year, when negotiations are concluded with foreign governments for participation in this program, this preference will be reviewed in light of international agreements related to this program. It is contemplated that successful perishable program workers will be offered the opportunity to participate in the perishable commodities workers program after successfully completing the first year.
- (e) Union Membership and Labor Dispute Provision: a seasonal worker may join a union if he wishes. Other Department of Labor regulations related to labor disputes apply.
- (f) A spouse or child of a seasonal agricultural worker is not entitled to a seasonal worker visa by virtue of such relationship, but may participate in the program if qualified as such a worker.

11. State Department's Responsibilities

- (a) Within a year of enactment, the State Department shall conclude negotiations with the foreign governments concerning the following

matters:

- The role of foreign governments and others in referring workers for participation in this program.
  - The need for a contract or treaty between governments concerning the implementation and operation of this program.
  - Allocation of number of available temporary worker slots among interested foreign countries.
  - Quality of working conditions of foreign nationals who will work under this program.
  - Procedures for handling payments to returning workers within their home countries.
- (b) The State Department shall establish the process of visa issuance in the sending countries. As part of this process, efforts shall be pursued to develop machine readable visas and to obtain and install appropriate equipment.
- (c) The State Department and INS shall work together in the development of a secure identifier for participants in the program, probably similar to existing <sup>alien worker</sup> identifying cards ~~such as the alien registration card~~, currently in use.

(d) The State Department will provide a detailed estimate of the costs of implementing the provisions of this program to the Office of Management and Budget <sup>of</sup> not later than six months after enactment of this program.)<sup>e</sup>

12. Additional Provisions of Agreement

(a) There will be no requirement that INS officers obtain a search warrant prior to entry into open fields or other outdoor agricultural operations.

(b) There will be no transitional agricultural worker program.