

THE H-2A PROGRAM: HOW THE WEIGHT OF AGRICULTURAL EMPLOYER SUBSIDIES IS BREAKING THE BACKS OF DOMESTIC MIGRANT FARM WORKERS

ANDREW SCOTT KOSEGI*

INTRODUCTION

Finding a ready source of agricultural labor has been a problem that has plagued agricultural employers since the emergence of the United States of America as a nation. Early attempts to force Native Americans to work in the fields failed miserably when the labor supply quickly dwindled from smallpox and other diseases.¹ As this failure became obvious, the focus shifted to the importation of labor from other countries.² Initially, the colonists brought over poor, white Europeans to meet their insatiable need for agricultural laborers; however, such efforts failed when these indentured servants abandoned their obligatory employment only to blend in with the other, white European settlers.³ Next, resorting to the importation of dark-skinned Africans became the apparent way to distinguish those who were slaves from those who were the European colonists.⁴ Additionally, given the seemingly unlimited supply of Africans, the slave trade provided the perfect answer to agricultural labor shortages.⁵ Following the effects of the Emancipation Proclamation, the trend in the late nineteenth and early twentieth centuries was to import agricultural labor from Mexico.⁶ Unfortunately, that trend appears to be continuing into the twenty-first century as proposed legislation attempts to mainstream the ability of agricultural

* J.D. Candidate, 2002, Indiana University School of Law—Indianapolis; B.A., 1997, Marian College; Project director of the Migrant Farm Worker Project at Indiana Legal Services, Inc. since 1997. The opinions expressed herein are those of the author and do not necessarily represent the views of the Migrant Farm Worker Project or Indiana Legal Services, Inc.

1. *See generally* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM 38 (8th ed. 2000) (outlining initial use of Native Americans as agricultural slaves who eventually became weakened by diseases); WILBUR R. JACOBS, DISPOSSESSING THE AMERICAN INDIAN 122-23 (1972) (discussing Native American slavery and discussing the relationship between free American Indians and black slaves on colonial American farms); BERNARD W. SHEEHAN, SEEDS OF EXTINCTION 227-32 (1973) (describing the loss of entire Native American villages to smallpox and other epidemic diseases).

2. FRANKLIN & MOSS, *supra* note 1, at 38.

3. *Id.* at 39.

4. *Id.*

5. *Id.*

6. *See, e.g.*, KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 7 (1992) (suggesting that Mexican laborers instead of European immigrants were more beneficial to U.S. agriculture because Mexicans could be forced to return to their country more easily when the contracted work was completed). For a history of early use of Mexican labor in the United States, see ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY (1964).

employers to import foreign workers.

Today, a federal program exists whereby U.S. growers, unable to find sufficient U.S. labor, may request permission to import temporary foreign agricultural workers. It is called the H-2A Program.⁷ However, legislation introduced in Congress over the past few years would substantially alter that program for the worse. Such legislation has been fueled by a desire to improve the ability of agricultural employers to import foreign agricultural workers more easily than allowed by the purportedly cumbersome current program.⁸ Yet, the proposed alterations to the present program would not only be devastating to the foreign workers imported to work on U.S. farms, but they would further set back any progress in working conditions of U.S. farm workers.

This Note will address several different aspects of the H-2A Program. Part I will focus on the historical framework from which the program has evolved. Part II will lay out the specifics of the present H-2A Program in detail. Part III will highlight the proposed legislation that has failed to pass during the past few sessions of Congress. Part IV will address the policy concerns involved with the program and explain the types of changes necessary to protect better the workers involved. Finally, Part V will propose solutions to the overarching policy concerns involved.

I. HISTORICAL BACKGROUND

The current H-2A Program does not exist in a vacuum. Instead, it has evolved from an elaborate and contentious history. To fully grasp the import of the current program and the proposed changes to it, one should begin with a thorough understanding of its predecessors and how the program came into existence.

A. *Pre-Bracero Years*

The United States has a lengthy history of permitting the importation of Mexican laborers. In the 1880s, Mexican citizens were used in the southwestern United States as agricultural workers and railroad workers.⁹ This practice occurred even though the "Anti-Alien Contract Labor law of 1885" made it

7. The program is not so creatively named from the source within immigration law that classifies the imported workers as nonimmigrant aliens, 8 U.S.C. § 1101(a)(15)(H)(ii)(A) (1994).

8. See *Agricultural Opportunities Act: Hearing on H.R. 4548 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 78 (2000) (statement of Rep. Richard W. Pombo) ("The current H-2A program which is used to assist in maintaining a stable agriculture workforce is over 50 years old and with so many bureaucratic problems that, in short, it is a nightmare to obtain workers in a timely manner."). Ironically, recent statistics indicate an increased reliance on H-2A workers. See IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 31 (2000) (indicating that 27,308 H-2A workers were admitted in 1998, compared to the 9635 admitted in 1996). Undoubtedly, this number has grown since 1998.

9. CALAVITA, *supra* note 6, at 7.

unlawful to import unskilled laborers for employment purposes.¹⁰ In response to the need for additional laborers from Mexico in the early twentieth century, immigration officials exempted Mexicans from quotas and literacy requirements.¹¹ This practice violated the Immigration Act of 1917,¹² which prohibited the importation of persons by employment offers.¹³ These policies continued through World War I and promoted Mexican immigration to the United States.

However, the policy goal was not only to have an expanding source of labor available, but to restrict that source as deemed necessary. Thus, in the 1920s, twenty percent of Mexican laborers' earnings were withheld by the Department of Labor.¹⁴ Upon the laborers' return to Mexico, their withholdings would be returned.¹⁵ Moreover, during the Depression of the 1930s, a massive anti-immigrant movement culminated in the forcible "repatriation" of Mexican laborers.¹⁶ These policies attested to the dispensability of Mexican labor when the economy took a turn for the worse.

B. Bracero Program: 1942-1964

1. *Wartime Program.*—In 1941, many U.S. growers requested that Mexican agricultural laborers be allowed to enter the country again; however, the federal government rejected such requests, stating that there was no labor shortage.¹⁷ The policy changed, however, in 1942, after the bombing of Pearl Harbor.¹⁸ As the United States entered World War II, farmers quickly noted that importation of foreign workers would allow for greater production and thus contribute to the national defense.¹⁹ In April 1942, a governmental committee was formed to address the growing need for agricultural laborers.²⁰ This committee was comprised of members from the Departments of Labor, State, Agriculture, Justice, and the War Manpower Commission.²¹ The committee quickly approved a plan for importing Mexican laborers.²² Shortly thereafter, the U.S. government

10. *Id.* at 6; *see also* Act of Feb. 26, 1885, ch. 164, 23 Stat. 332 (repealed 1952).

11. CALAVITA, *supra* note 6, at 6-7.

12. Ch. 29, 39 Stat. 874 (repealed 1952).

13. *Id.* § 3, at 876.

14. CALAVITA, *supra* note 6, at 7.

15. *Id.*

16. Juan Gómez-Quíñones, *Mexican Immigration to the United States and the Internationalization of Labor, 1848-1980: An Overview*, in MEXICAN IMMIGRANT WORKERS IN THE U.S. 25 (Antonio Rios-Bustamante ed., 1981).

17. RICHARD B. CRAIG, *THE BRACERO PROGRAM* 38 (1971).

18. *Id.* at 38-40.

19. *Id.* at 39.

20. *Id.* at 39-40.

21. *Id.* at 40; *see also* CALAVITA, *supra* note 6, at 19.

22. CRAIG, *supra* note 17, at 40.

approached the Mexican government to discuss a contract labor program.²³

Within a few months, the two governments had arrived at a treaty creating the Bracero Program. The term “Bracero” commonly refers to the Mexican workers granted permission to work in the United States as a result of this program.²⁴ The responsibilities for its implementation were spread out over an array of federal agencies.²⁵ One author explained the differing governmental roles, stating:

From 1942 to 1947, the Department of Agriculture had primary authority for coordinating the Bracero Program, but its operation involved a complex network of interagency responsibilities. The agreements with Mexico were negotiated largely by the Department of State; the United States Employment Service was responsible for certifying labor shortages and estimating prevailing wages; the Farm Security Administration—and later the War Food Administration—did the actual recruitment and contracting; and the INS authorized and oversaw the admission and return of the workers.²⁶

Under the terms of the bilateral agreement, most U.S. growers²⁷ were allowed to use foreign agricultural workers from Mexico, as long as there was a shortage of U.S. workers.²⁸ The agreement also required that the Mexican citizens not be used in the U.S. military, and that they be treated fairly and guaranteed certain worker protections.²⁹ One major concession that the Mexican government demanded was that the contracted workers must be employed not by individual growers, but by the U.S. government itself.³⁰ Thus, any grievances would be resolved between the governments and not between the individual actors.³¹ Further, the agreement called for the U.S. government to fund the transportation of the workers to and from Mexico and the work sites.³² Also, the workers were paid at least the same prevailing wage rate other agricultural workers received, with an absolute minimum of thirty cents per hour.³³ Finally, Mexican laborers were to be guaranteed three-quarters of the work promised by the contract and ten percent of their pay was to be held back and sent to a Mexican bank where

23. *Id.*

24. The name “bracero” is derived from the Spanish word *brazo*, which in English means “arm” and “hints at the function these braceros were to play in the agricultural economy.” CALAVITA, *supra* note 6, at 1.

25. *Id.* at 20.

26. *Id.* at 20-21.

27. Texas growers were specifically excluded from the program after Mexican officials cited a repeated history of worker abuses. *Id.* at 20.

28. *See id.* at 20.

29. CRAIG, *supra* note 17, at 43.

30. *Id.*

31. *Id.* at 44.

32. *Id.*

33. *Id.*

it would be held for the workers.³⁴

2. *Ad Hoc Post-War Extensions.*—From 1942 to 1947, over 200,000 Braceros were officially granted permission to perform agricultural labor.³⁵ On April 28, 1947, well after World War II had ended, Congress eventually called for the wartime Bracero Program to be terminated by December 31, 1947.³⁶ However, because of concern expressed by agricultural employers over the loss of their steady labor supply, the program did not officially come to an end at that time.³⁷ Instead, the Department of State, on February 21, 1948, formed a new agreement with the Mexican government to continue importing agricultural labor.³⁸ This agreement, created almost entirely by administrative agencies, differed greatly from the wartime Bracero Program.³⁹ The most significant changes involved the nature of the employment contracts. The U.S. government was no longer the employer; rather, the agreements were now between individual growers and the Bracero workers.⁴⁰ Also, the growers themselves were responsible for recruiting and transporting Mexican workers to and from Mexico and the farms.⁴¹ Additionally, the changes failed to establish a minimum hourly wage and did not guarantee pay for lack of promised employment.⁴² As the program was implemented, illegal entrants, the new source of labor, were arriving in large numbers.

Actions taken on both sides of the border contributed to increased illegal immigration from 1948 to 1951. First, the United States took a laissez-faire approach to immigration enforcement.⁴³ Growers were especially supportive of an open border, as it would provide an easier way to obtain workers.⁴⁴ Second, Mexico mistakenly believed that agreeing to grant Bracero positions first to those already illegally in the United States would curb the exodus of Mexicans across the border.⁴⁵ On the contrary, the policy only increased the illegal entry of

34. *Id.* at 44-45. Recently, a class action lawsuit was filed against the U.S. government, the Republic of Mexico, and various banks on behalf of Braceros who never received these withdrawn earnings. Rich Connel & Robert J. Lopez, *Mexican Report Contradicts Claims that '40s War Workers Weren't Paid*, L.A. TIMES, Mar. 30, 2001, at A3, available at 2001 WL 2474131.

35. CALAVITA, *supra* note 6, at 20-21 (citing CONG. RESEARCH SERV., HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE 65 (1980)).

36. *Id.* at 25.

37. *See id.*

38. *Id.*

39. *Id.* at 27; *see also* CRAIG, *supra* note 17, at 53.

40. CRAIG, *supra* note 17, at 53.

41. *Id.* at 54.

42. *See id.*

43. *Id.* at 63; *see also* CALAVITA, *supra* note 6, at 29 (both citing NELSON GAGE COPP, "WETBACKS" AND BRACEROS: MEXICAN MIGRANT LABORERS AND AMERICAN IMMIGRATION POLICY, 1930-1960, at 189 (R. & E. Research Assocs. 1971) (1963)).

44. *See* CALAVITA, *supra* note 6, at 35.

45. *Id.* at 28.

Mexicans into the United States.⁴⁶

It took another wartime situation, the Korean War, before any substantial changes were made to the informal Bracero agreements.⁴⁷ In 1950, the United States entered into the Korean War, and again growers called for the admission of more Mexican agricultural workers.⁴⁸ However, before the Mexican government would agree to let more of its citizens enter the United States as Braceros, it demanded that control of the program revert back to the U.S. government instead of remaining with the individual growers.⁴⁹

In March 1951, the President's Commission on Migratory Labor released a report⁵⁰ which focused on the harmful effects of Braceros on the domestic workforce. In particular, the report suggested that the program allowing for the importation of foreign agricultural workers depressed the wages of domestic workers.⁵¹ It stated that "[i]n the normal competitive market, prices, including the price of labor, are determined by the forces of supply and demand. Accordingly, if there is a labor shortage, the price of labor should rise. Yet the opposite of this actually has occurred with wages of migratory farm workers."⁵² The Commission made several recommendations on how to improve the situation. To curb the flow of illegal immigration, it suggested strengthening immigration laws, especially by penalizing U.S. employers that use illegal workers.⁵³ Further, it recommended that "[f]uture efforts be directed toward supplying agricultural labor needs with our own workers and eliminating dependence on foreign labor."⁵⁴

3. *Public Law 78: Solidifying the Future of the Program.*—In June 1951, Congress passed Public Law 78.⁵⁵ In response to the concerns of the Mexican government, the legislation restored the United States as government guarantor of the Bracero contracts.⁵⁶ Further, the legislation had requirements similar to the previous Bracero accords; specifically, that there be insufficient labor in the United States; no adverse affect on wages or working conditions of domestic

46. *Id.*; cf. GALARZA, *supra* note 6, at 64 (asserting that legalization of illegal entrants eased border enforcement problems for the United States and maintained a steady labor supply to U.S. growers).

47. *See* CRAIG, *supra* note 17, at 66.

48. CALAVITA, *supra* note 6, at 43.

49. *Id.*

50. *See* THE PRESIDENT'S COMM'N ON MIGRATORY LABOR, MIGRATORY LABOR IN AMERICAN AGRICULTURE iii (1951).

51. *See id.* at 60-61.

52. *Id.* at 60.

53. *Id.* at 88.

54. *Id.* at 36.

55. *See* Mexican Agricultural Workers Importation (Wetback) Act, ch. 223, 65 Stat. 119 (1951) (amended 1953, 1954, 1955, 1958, 1960, 1961, and 1963; no longer effective by its own terms as amended).

56. CALAVITA, *supra* note 6, at 43-44.

workers; and “reasonable efforts” to recruit U.S. workers.⁵⁷ The legislation was notable, however, in its lack of response to the recommendations of the President’s Commission.⁵⁸ Critics of the legislation noted three problems with the legislation: its lack of guidance on how to assess whether there was a labor shortage; its lack of a system for establishing a prevailing wage; and the absence of criminal penalties for continued use of illegal workers.⁵⁹ Immediately following President Truman’s reluctant signature on the passed legislation,⁶⁰ negotiations began on a new treaty between Mexico and the United States to provide U.S. growers with agricultural workers.⁶¹

The two countries signed a new Bracero treaty on August 2, 1951.⁶² Due to the leverage that the Mexican government exerted over the process, it was able to negotiate multiple benefits and protections for the Bracero workers, including free transportation to and from Mexico, a prevailing wage rate, work guarantees, insurance (even when state law did not require the same for domestic workers), cooking facilities or provided meals, housing, tools, and the right to join labor unions.⁶³ However, rather than making a long-term commitment, the Mexican government only agreed to a six-month trial period.⁶⁴ The Mexican government sought a trial period primarily because it wanted to see if the U.S. Congress would pass legislation to penalize U.S. employers for using illegal immigrants. Siding with the Mexican government, President Truman called upon Congress to pass similar penalties, or he would terminate the Bracero Program.⁶⁵

In response to concerns by the Mexican government and President Truman, S. 1851⁶⁶ was introduced in the Senate.⁶⁷ After the House passed a different form of the bill and the conference committee had agreed upon a final version, S. 1851 became law when President Truman signed Public Law 283 on March 20, 1952.⁶⁸ Following the passage of Public Law 283, the Mexican government would not agree to the long-term extension of the Bracero Program without additional guarantees.⁶⁹ Critical to the Mexican government was that the new treaty call for

57. CRAIG, *supra* note 17, at 74.

58. *Id.* at 75; *see also* CALAVITA, *supra* note 6, at 44.

59. CALAVITA, *supra* note 6, at 44.

60. CRAIG, *supra* note 17, at 71-72.

61. CALAVITA, *supra* note 6, at 45.

62. CRAIG, *supra* note 17, at 78.

63. *See id.* at 80-81. Although there were strong worker protections provided by law, growers did not always comply with them. *See infra* Part I.B.4.

64. CRAIG, *supra* note 17, at 78-79.

65. *Id.* at 94.

66. 82d Cong. (1951) (enacted).

67. CRAIG, *supra* note 17, at 78-79.

68. *See* Act of March 20, 1952, ch. 108, 66 Stat. 26 (1952) (amended 1952, 1978, 1981, 1986, 1988, 1994, 1996, and 2000). This law made it a crime to harbor or conceal illegal aliens; however, employing illegal aliens was not considered harboring or concealing for purposes of the statute. CRAIG, *supra* note 17, at 95.

69. *See* CRAIG, *supra* note 17, at 99.

the U.S. Secretary of Labor to determine the prevailing wage rate.⁷⁰ Eventually, on June 12, 1952, the two sides arrived at a new agreement.⁷¹

Around the same time that the new treaty was signed, Congress passed the Immigration and Nationality Act,⁷² which included provisions authorizing the importation of H-2 workers.⁷³ Similar to the Bracero Program, the H-2 Program only allowed temporary workers to enter following a certified labor shortage. However, given the popularity of the recently enacted Bracero Program, most employers did not come to rely on the H-2 Program until after the demise of the Bracero Program.⁷⁴

In 1954, when the Bracero Program was awaiting renewal, negotiations between the governments of Mexico and the United States crumbled.⁷⁵ In response to the Mexican government's demand for better worker protections, the United States threatened to institute a unilateral labor program without the input of the Mexican government.⁷⁶ As a result, another bilateral agreement between the United States and Mexico was reached on March 10, 1954, extending "the migrant-labor program to December 31, 1955."⁷⁷

A major concern for both governments was the increase of illegal entries by Mexican citizens in search of employment opportunities in the United States.⁷⁸ To curb the flow of illegal entrants and to redirect reliance upon the new Bracero accords, the United States Immigration and Naturalization Service (INS), under the helm of Commissioner Joseph Swing, former General in the U.S. Army, commenced "Operation Wetback."⁷⁹ On June 17, 1954, a concerted effort at capturing illegal entrants began in California.⁸⁰ The operation soon spread

70. *Id.* at 99 n.74.

71. *Id.* at 99.

72. Ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

73. *See id.*

74. *See* H. Michael Semler, *The H-2 Program: Aliens in the Orchard: The Admission of Foreign Contract Laborers for Temporary Work in U.S. Agriculture*, 1 YALE L. & POL'Y REV. 187, 194 (1983); *cf.* CALAVITA, *supra* note 6, at 148 (stating that the reason growers did not use Mexican H-2 workers was an executive order).

75. CRAIG, *supra* note 17, at 108-09.

76. *See* H.R.J. Res. 355, 83d Cong. (1954) (replacing the bilateral agreement with a unilateral program instituted by the United States to recruit Mexican laborers if negotiations with the Mexican government over the terms of a bilateral agreement were unsuccessful). However, the two governments were soon able to agree on terms for renewal of the Bracero Program. CRAIG, *supra* note 17, at 121; *see also* GALARZA, *supra* note 6, at 69 (describing this law as "an effective weapon . . . placed in the hands of the American negotiators . . .").

77. *See* CRAIG, *supra* note 17, at 121-22.

78. *Cf. id.* at 126 (referring to figures showing 309,033 braceros entering in 1954, while 1,075,168 illegal entrants entered during the same year).

79. *See* CALAVITA, *supra* note 6, at 51-55; *see also* CRAIG, *supra* note 17, at 128.

80. CALAVITA, *supra* note 6, at 54 (noting that in addition to illegal entrants, the INS was accused of deporting legal residents and even United States citizens of Mexican descent); *see also* CRAIG, *supra* note 17, at 128.

throughout the Southwest.⁸¹ Critical to its success was the effective use of the media by the INS to scare away many more illegal entrants than could have been apprehended.⁸² In the end, the INS viewed Operation Wetback as a great success.⁸³ The tide of illegal entrants decreased dramatically,⁸⁴ while the numbers of Bracero workers steadily climbed.⁸⁵

The trend of increased importation of Bracero laborers would continue. It is estimated that 2.5 million Mexican Braceros were employed in the United States between 1954 and 1959.⁸⁶ Within these six years, over \$200 million was withheld from Mexican Braceros' paychecks and sent to the Mexican government, which held the money for the workers.⁸⁷ Given the importance of the program to the Mexican economy, the Mexican government during this time became less involved with negotiating new terms and summarily accepted requests to renew the program.⁸⁸

4. *The Eventual Demise of the Program.*—The Bracero Program had been extended by various measures and remained operative until the end of 1963.⁸⁹ However, the election of John F. Kennedy as President marked a shift in the political dynamic. President Kennedy desired substantial revisions to the program to protect domestic farm workers.⁹⁰ Moreover, the horrible working and housing conditions of agricultural workers had been brought to light in 1960 by a CBS documentary entitled "Harvest of Shame."⁹¹

Although unable to achieve by legislation many of the changes demanded, the Kennedy administration was able to regulate the program better through decisions by the Department of Labor. In 1962, the Secretary of Labor began

81. CRAIG, *supra* note 17, at 129.

82. CALAVITA, *supra* note 6, at 54.

83. *Id.*

84. CRAIG, *supra* note 17, at 129 (referring to statistics that show the number of illegal entrants declining in 1955 to less than 250,000; in 1956, less than 73,000; and, by 1960, less than 30,000).

85. CALAVITA, *supra* note 6, at 55 (showing the number of braceros increasing from 201,380 in 1953; to 398,650 in 1955; and 445,197 in 1956).

86. CRAIG, *supra* note 17, at 130; *see also* CALAVITA, *supra* note 6, at 218 (citing CONG. RESEARCH SERV., *supra* note 35, at 65).

87. CRAIG, *supra* note 17, at 130.

88. *Id.* at 137-38 (explaining that income from Bracero remittances ranked third during these years behind tourism and cotton production).

89. *See id.* at 155-74.

90. *See id.* at 164, 174-75.

91. *See* LINDA C. MAJKA & THEO J. MAJKA, FARM WORKERS, AGRIBUSINESS, AND THE STATE 160 (1982). Due to the widespread exploitation experienced by most of the program's invitees, today the name Bracero has become synonymous with indentured servitude. *See* H.R. REP. NO. 99-682(I), at 83-84 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5687-88; *see also* H.R. REP. NO. 106-982(I), at 53 (2000) (stating that the documentary "exposed abuses by the growers, including unpaid wages, poor housing, and the physical toll of 'stoop labor'").

enforcing a new wage rate.⁹² Previously, growers were only required to pay the prevailing wage rate of their area, but now the Secretary would require them to pay an adverse-effect wage rate (AEWR) based on the entire state.⁹³ Such an AEWR was derived from a government study of farm workers.⁹⁴ This requirement effectively forced growers to pay more than before to both domestic and Bracero workers.⁹⁵

The move by the Secretary of Labor dramatically reduced the number of growers willing to continue using Bracero workers.⁹⁶ At the same time, mechanization of the cotton crop, which previously warranted the use of significant Mexican laborers, created less of a demand for human laborers.⁹⁷ Thus, from 1960 until 1964, the use of Bracero workers decreased each year.⁹⁸ Further actions by Congress signaled the end of the contentious program, which had been responsible for importing over four million Mexican workers between 1942 and 1964.⁹⁹ In 1963, one final extension of the Bracero Program was passed by Congress, thus prolonging the program's existence until December 31, 1964.¹⁰⁰ Growers were put on notice that no more extensions would be granted.¹⁰¹ While begrudgingly accepting the demise of the Bracero Program, their focus shifted instead to finding a new source of laborers.

C. The H-2 Program: 1952-1986

In 1952, as part of the Immigration and Nationality Act of 1952,¹⁰² Congress passed legislation creating the H-2 program.¹⁰³ At first, the program did not receive much attention because of the existence of the Bracero Program.¹⁰⁴ However, as that program expired in 1964, growers focused on the H-2 Program and how to use it to continue the labor trends established under the Bracero

92. CRAIG, *supra* note 17, at 178-80.

93. *Id.* at 179. Administrative authority of this kind recently had been upheld by a federal district court. *See Dona Ana County Farm & Livestock Bureau v. Goldberg*, 200 F. Supp. 210 (D.D.C. 1961).

94. CRAIG, *supra* note 17, at 180-81.

95. *Id.* at 180.

96. *See id.* at 180-81.

97. *See id.*

98. In 1960, there were 315,846 Braceros (down from 437,543 in 1959); in 1961, 291,420; in 1962, 194,978; in 1963, 186,865; and in 1964, 177,736. CALAVITA, *supra* note 6, at 218 (citing CONG. RESEARCH SERV., *supra* note 35, at 65).

99. *See id.* (citing CONG. RESEARCH SERV., *supra* note 35, at 65).

100. CRAIG, *supra* note 17, at 195.

101. *See id.* at 196.

102. *See supra* note 73 and accompanying text for further context.

103. The H-2 Program, unlike the Bracero Program, was not limited to agricultural employment. Gail S. Coleman, *Overcoming Mootness in the H-2A Temporary Foreign Farmworker Program*, 78 GEO. L.J. 197, 202 (1989).

104. *See Semler, supra* note 74, at 194.

Program.¹⁰⁵ Yet the Department of Labor had other plans for the H-2 program, including effectuating the eventual elimination of reliance on foreign workers.¹⁰⁶ These differing views for the future of the H-2 Program led to a showdown in the U.S. Senate.¹⁰⁷

In 1965, as regulations were promulgated concerning the H-2 Program, a struggle emerged in the Senate regarding who was best fit to determine whether, in fact, foreign workers were necessary based on a U.S. labor shortage.¹⁰⁸ Growers, who wanted easy access to workers, suggested that the more lenient Secretary of Agriculture should make such a determination; on the other hand, the administration wanted the more stringent Secretary of Labor to be responsible for such certification.¹⁰⁹ In the end, the Senate was evenly divided, and Vice President Hubert Humphrey cast the deciding vote, resulting in the Secretary of Labor having determination-making authority.¹¹⁰ “Bolstered” by this affirmation of his authority, the Secretary of Labor responded by terminating the use of Mexican labor in the United States for agriculture.¹¹¹ However, continued admissions of H-2 workers were allowed for two agricultural industries—Northeast apple orchards and Florida sugarcane.¹¹² The arrangement allowing for limited importation of H-2 workers for the sugarcane and apple industries continued until 1976.¹¹³ Shortly thereafter, requests for Mexican workers in different crops were first certified.¹¹⁴

Similar to previous foreign labor programs, growers had to show a lack of sufficient labor in the United States to import H-2 workers.¹¹⁵ Further, the importation of foreign workers could not adversely impact similarly employed U.S. workers.¹¹⁶ The best way for the Department of Labor to prevent such a negative affect was by setting an adverse-effect wage rate (AEWR), an area-by-area minimum wage paid to each H-2 worker.¹¹⁷ Additionally, employers of H-2 workers had to provide free housing to their U.S. workers¹¹⁸ and pay travel advances to U.S. workers if also provided for foreign workers.¹¹⁹ The H-2

105. *See id.*

106. *See* 29 Fed. Reg. 19101, 19101 (Dec. 30, 1964).

107. Semler, *supra* note 74, at 195.

108. *See id.* at 195-96.

109. *See id.*

110. *See id.* at 196.

111. *Id.*

112. *Id.*

113. *See id.* at 196-97, 200-04.

114. *See id.* at 204.

115. *See* 8 C.F.R. § 214.2(h)(3)(i) (1982).

116. *Id.*

117. *See* Labor Certification Process for Temporary Agricultural and Logging Employment, 20 C.F.R. §§ 655.200(b), 655.207 (1982).

118. 20 C.F.R. § 655.202(b) (1982).

119. 20 C.F.R. § 655.202(a) (1982).

Program continued to expand¹²⁰ until it was replaced in 1986 by the H-2A Program.

II. THE H-2A PROGRAM

A. *Immigration Reform and Control Act of 1986*

The Immigration Reform and Control Act of 1986 (IRCA) continued the various immigration reforms.¹²¹ Three main aspects of the Act specifically addressed issues affecting migrant farm workers: the employer sanctions provisions, the legalization programs offered to promote farm work, and the revisions made to the H-2 Program. Each aspect will be discussed separately.

1. *Employer Sanctions.*—"The employer provisions of [the] IRCA prohibit[ed] three types of activity: (1) the knowing hiring of unauthorized aliens; (2) the continued employment of known unauthorized aliens; and (3) the hiring of any individual without verifying identity and authorization to work . . ."¹²² Amazingly, this marked the first time in U.S. history that employers of undocumented workers would be penalized by the government.¹²³ The sanctions could take one of two forms: civil fines or criminal charges.¹²⁴ Not surprisingly, growers became concerned that cutting off their ability to hire undocumented farm workers would extinguish their labor supply.¹²⁵ As one author put it, "If employer sanctions were to be instituted under the proposed legislation, growers wanted some assurance that they lawfully could obtain sufficient numbers of workers."¹²⁶ Thus, another part of the legislation provided growers with a supply of domestic labor.

2. *Legalization Programs.*—As part of IRCA, Congress created an amnesty program, which offered to legalize the migrant farm worker labor pool.¹²⁷ Under the terms of the program, known as the Special Agricultural Worker (SAW) program, any undocumented worker (up to 350,000 total) that had completed ninety days of work in seasonal agricultural work during each of the previous

120. Semler, *supra* note 74, at 205.

121. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered titles and sections of U.S.C.).

122. MICHAEL FIX & PAUL T. HILL, ENFORCING EMPLOYER SANCTIONS 32 (1990).

123. The Mexican government made requests in the 1950s to penalize employers for exactly this type of activity, but they were to no avail. See CRAIG, *supra* note 17, at 126.

124. See FIX & HILL, *supra* note 122, at 34.

125. See Stephen Yale-Loehr, *Foreign Farm Workers in the U.S.: The Impact of the Immigration Reform and Control Act of 1986*, 15 N.Y.U. REV. L. & SOC. CHANGE 333, 335 (1988).

126. *Id.*

127. The migrant farm worker amnesty program should not be confused with the "general amnesty" or registry program also offered by the IRCA. Under that program, any illegal alien who had continuously resided in the United States since before January 1, 1982, could apply for permanent residency. See 8 U.S.C. § 1255a (1994 & Supp. V 1999).

three years would be eligible to gain lawful permanent residency.¹²⁸ Those who did not meet these requirements, but had worked at least ninety days during the previous year, would gain permanent residency, but would have to wait additional time.¹²⁹

In the event these SAW workers were to leave agricultural work after gaining lawful status, the IRCA provided for the Replenishment Agricultural Worker (RAW) program.¹³⁰ Under this program, workers could be brought in only during a three-year span (1990 to 1993) and only if there was a certified labor shortage.¹³¹ Additionally, if RAW workers wanted to maintain their lawful status, they would have to continue to work in agriculture for at least ninety days for each of the three years after their entry.¹³² However, these were not the only means by which growers were insured a continued labor supply.

3. *H-2A Program Creation.*—In addition, the IRCA made significant alterations to the H-2 Program, thereby providing a further source of immigrant labor for agricultural employers. The new law divided the H-2 program into two separate programs: the H-2A Program (for importation of temporary, foreign, *agricultural* workers) and the H-2B Program (for importation of temporary, foreign, *non-agricultural* workers).¹³³ The H-2A Program essentially is the same today as it was upon its creation in 1986.

B. H-2A Program Specifications

Under the current H-2A Program statutory requirements, the Attorney General may not approve a petition requesting foreign agricultural workers unless the petitioner has requested a certification from the Department of Labor.¹³⁴ That certification must state that

- (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
- (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.¹³⁵

Further, the Department of Labor is prohibited from certifying a labor shortage

128. *Id.* § 1160(a) (1994); *see also* CALAVITA, *supra* note 6, at 168.

129. *See* 8 U.S.C. § 1160(a).

130. *See* CALAVITA, *supra* note 6, at 168; *see also* 8 U.S.C. § 1161(a)(1) (1988) (repealed 1994).

131. *See* 8 U.S.C. § 1161(a).

132. *See* Yale-Loehr, *supra* note 125, at 364 (noting also that to become a U.S. citizen, RAWs would have to work five years in agriculture after entry).

133. *Id.* at 335-36.

134. 8 U.S.C. § 1188(a) (1994).

135. *Id.*

if any of the following conditions exist: there is a labor dispute in progress; there have been previous violations of H-2A worker agreements; no workers' compensation insurance is provided; or

[t]he Secretary determines that the employer has not made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.¹³⁶

There are also regulations pertaining to the H-2A Program that mostly regulate actions by different divisions of the U.S. Department of Labor.¹³⁷ Under certain regulations, the Employment and Training Administration of the Wage and Hour Division must ensure that job offers to potential H-2A workers include the following: workers' compensation coverage, free housing, three-quarters guarantee (i.e., that there will be work for at least three-quarters of the contract period), provision for three daily meals or equipment to prepare meals, free tools where common practice, and free transportation between work site and living quarters (as well as reimbursement of transportation costs from country of origin after completing at least fifty percent of the work contract).¹³⁸ Additionally, an AEWR must be paid to all U.S. based and H-2A workers.¹³⁹ The purpose of the AEWR is to set a minimum wage in a given area so that the wages of domestic workers in that same area will not be negatively impacted by the importation of foreign workers.¹⁴⁰ Finally, an employer must provide employment to any qualified U.S. worker applying for the same job for which an H-2A worker has been hired until fifty percent of the work contract has elapsed.¹⁴¹

III. PROPOSED LEGISLATION AFFECTING THE H-2A PROGRAM

In 2000, as in recent years,¹⁴² several bills were introduced in Congress that would have substantially altered the configuration of the H-2A Program. One of the bills, the Agricultural Opportunities Act,¹⁴³ introduced on May 25, 2000, would have eliminated the need for the current H-2A Program all together. In its

136. *Id.* § 1188(b).

137. *See, e.g.*, 8 C.F.R. § 214.2(h) (2001); 20 C.F.R. §§ 651.10, 655.0-655.00, 655.09-655.114; 29 C.F.R. § 501.0-501.47 (2000).

138. *See* 20 C.F.R. § 655.102(b) (2001).

139. *See id.* § 655.100(b).

140. *See id.*

141. *Id.* § 655.103(e).

142. *See, e.g.*, H.R. 3410, 105th Cong. (1998); H.R. 2377, 105th Cong. (1997); *see also* H.R. 1327, 107th Cong. (2001) (requiring all lawsuits brought by H-2A workers against an employer be brought "in the State in which the employer resides or has its principal place of business").

143. H.R. 4548, 106th Cong. (2000).

place, the author of the bill, Representative Richard W. Pombo of California, would have created a new H-2C Program.¹⁴⁴ The other series of bills would have significantly changed the structure of the current H-2A Program.

A. Registry Legislation

Several differences exist between the Pombo proposal and the current H-2A Program. The starkest difference would have been the creation of a central registry of readily available domestic workers to agricultural employers, maintained by the U.S. Department of Labor.¹⁴⁵ Thus, whenever a U.S. grower sought foreign agricultural laborers, that employer would first have been required to request domestic employees from the registry.¹⁴⁶ If there were an insufficient number of workers produced from the search of the registry, then the grower would have been able to petition for H-2C workers to fill the employment vacancies.¹⁴⁷ There would have been no additional recruitment requirements that the grower would have to satisfy before being granted permission to hire foreign workers.

Additional changes pertain to requirements that an employer of the H-2C workers would have been required to meet in order to receive and maintain H-2C workers. As is the case with the H-2A program, an employer would have had to pay each worker the greater of an AEWR or the prevailing wage rate.¹⁴⁸ However, the definition of AEWR would have been changed to mean generally the prevailing wage rate of the area plus a five percent increase.¹⁴⁹ Second, the original bill provided that a housing allowance could be provided to the H-2C workers, for the first three years after the bill takes effect, in lieu of actual housing arrangements; yet, that change was subsequently altered by the Judiciary Committee to require that housing be provided unless the Governor of that state certifies that adequate housing is available in the area.¹⁵⁰ Finally, absent from the Pombo bill, but later added by the Judiciary Committee, was a requirement that guaranteed three-quarters of the work days to a recruited employee similar to the three-quarters guarantee as found in the H-2A Program.¹⁵¹

B. Adjustment Legislation

A combination of other bills would substantially alter the existing H-2A

144. *See id.* § 2(4)-(5).

145. *See id.* § 101(a)(1).

146. *See id.* § 101(a)(4).

147. *See id.* § 202-03.

148. *See id.* § 204(a); cf. Susan LaPadula Buckingham, Note, *The DOL Fails U.S. and Foreign Laborers with New AEWR Methodology*, 4 GEO. IMMIGR. L.J. 477 (1990) (explaining history of AEWR methodology and that twenty percent enhancement, used before IRCA, was unjustly taken away by DOL regulations).

149. Compare H.R. 4548, § 2(1) with 20 C.F.R. § 655.100(b) (2001).

150. Compare H.R. 4548, § 204(b)(6) with H.R. REP. NO. 106-982(I), at 9-10 (2000).

151. *See* H.R. REP. NO. 106-982(I), at 11.

Program instead of replacing it with an entirely new program. The main bill, H.R. 4056,¹⁵² would have created a lawful residency program for those who were unlawfully present in the United States and working in agriculture for at least 880 hours (or 150 days) during the year prior to March 31, 2000.¹⁵³ These previously undocumented immigrants would have initially been granted nonimmigrant and nonpermanent status for up to seven years.¹⁵⁴ Within those seven years, the immigrant would have had to continue to work for at least 180 days in agriculture for a minimum of five years before being eligible for lawful permanent resident status.¹⁵⁵ Once these nonimmigrant laborers have obtained the necessary work quota and have petitioned for permanent residency, there would have been a limitation on the issuance of visas.¹⁵⁶ There would have been a cap of twenty percent of all those eligible to apply per year, with priority based on accumulated work hours.¹⁵⁷ Thus, some laborers would have had to wait five years or more after completing their work requirement before being granted their permanent status (and the ability to petition for their families who must otherwise remain abroad).

Additional modifications made by H.R. 4056 include changes similar to those found in the Pombo bill. The general definition of the AEWR that the new H-2A workers would have to be paid would have been changed to a five percent increase above the prevailing wage rate in any given area.¹⁵⁸ The bill made no provision for the required recruitment of U.S. workers beyond searching for those workers who have applied to a job registry.¹⁵⁹ A housing allowance could have been paid to workers instead of providing housing.¹⁶⁰ Finally, unlike the final version of H.R. 4548, H.R. 4056 did not guarantee that H-2A workers would be paid for at least three-quarters of the contract period.

C. Compromise Legislation

Just before the conclusion of the 106th session of Congress, a compromise bill had been reached among members from the Senate and the House of Representatives that would have revamped the H-2A Program and provided earned adjustment of status for undocumented migrant farm workers.¹⁶¹

152. 106th Cong. (2000); *see also* S. 1815, 106th Cong. (1999); S. 1814, 106th Cong. (1999).

153. *See* H.R. 4056, § 101(a)(1)(A).

154. *See id.* § 101(a).

155. *See id.* § 101(b).

156. *See id.* § 101(b)(5).

157. *See id.*

158. *See id.* § 1(A).

159. *See id.* § 201(a).

160. *See id.* § 304(b)(6). Starting three years after enactment, the Governor of the relevant state would have had to certify the availability of sufficient housing. *Id.*

161. Michael Doyle, *Senator Leader Blocks Guestworker Deal*, FRESNO BEE, Dec. 16, 2000, at A25.

However, at the last minute, the Senate leadership withdrew the compromise.¹⁶² The compromise would have had two major components.

The first portion of the compromise package would have provided an earned adjustment program for undocumented agricultural workers.¹⁶³ Similar to that under the Immigration Reform and Control Act of 1986, if workers completed one hundred days of work in agriculture during the year prior to the bill's enactment, they would have been eligible to apply for the legalization program.¹⁶⁴ Unlike the IRCA, they would have been required to continue to work in agriculture until they had completed 360 days of work within the six year period following the bill's enactment.¹⁶⁵

The second portion would have modified the H-2A Program. One change would have allowed growers to provide a housing allowance instead of actual housing, where the governor of the state certified that there was adequate housing in the given area.¹⁶⁶ Additionally, the current AEWR would have been frozen until 2004, following a study of its methodology.¹⁶⁷ Finally, procedures at the U.S. Department of Labor would have been streamlined to make the program easier for growers to access.¹⁶⁸

D. Senator Gramm's Recent Comments

On January 11, 2001, U.S. Senator Phil Gramm of Texas, one of the leading critics of the compromise legislation just discussed, released a fact sheet entitled "How a U.S.-Mexico Guest Worker Program Might Function."¹⁶⁹ It was produced after discussions with Mexican President Vicente Fox. The goals outlined include "fair treatment, including protection under the law, for Mexican

162. *See id.*

163. *See id.*

164. Managing Attorney Rob Williams of Florida Legal Services, Presentation at National Legal Aid & Defender Association Conference (Nov. 30, 2000). Williams represented the United Farm Workers (UFW) union in the negotiations of the compromise legislation. Notes from the presentation made by the author are in his possession. More specifics about the compromise are not included herein as a copy was not made available to the public.

165. *See id.*

166. *See id.* However, even a housing allowance would not be enough to satisfy the American Farm Bureau Federation (AFBF), which would like to see H-2A employers given Section 8 housing vouchers by the U.S. Department of Housing and Urban Development. For a policy statement by the AFBF on H-2A housing issues and other H-2A Program changes, see Am. Farm Bureau, *Immigration—Reform of the H-2A Program* (Sep. 2001), <http://www.fb.org/issues/backgrd/immigrat107.html>.

167. By regulation, the adverse effect wage rate must be published in the Federal Register "at least once in each calendar year." 20 C.F.R. § 655.107(a) (2001).

168. Williams, *supra* note 164.

169. <http://www.senate.gov/~gramm/press/guestworker.html>. Recently, Senator Gramm announced his intention to retire from the U.S. Senate in 2002.

citizens who live and work in the United States.”¹⁷⁰ Gramm’s initial operational objectives were to secure the border from an influx of illegal immigrants; create a “workable” employment program tied annually to the U.S. unemployment rates, for Mexican workers that would require them to return to Mexico after completion of their work; and increased penalties for the employment of undocumented workers.¹⁷¹

Since Senator Gramm’s comments in January, there has been an increase in press coverage of the H-2A Program.¹⁷² The debate centers around whether those being given immigrant status to work in the United States should also be given the right to permanently reside in the United States after completing the requisite farm work.¹⁷³ Advocates for immigrants believe they should, while those on the growers’ side believe the opposite. Senator Gramm sides with the growers.¹⁷⁴ This issue should be decided in the near future.¹⁷⁵

IV. POLICY CONCERNS

A. *Current H-2A Program Concerns*

1. *Is There a Labor Shortage?*—The potential existence of a labor shortage is one of the most heated debates surrounding the H-2A program. Growers continually argue that the short supply of labor for agricultural entities necessitates recruiting foreign workers as the H-2A Program would facilitate.¹⁷⁶ The argument has two components. First, growers argue they cannot find enough workers. Second, growers assert that even if they could find workers, they would be overwhelmingly undocumented and susceptible to immigration raids, leaving the growers with no one to pick their crops.¹⁷⁷ However, as one explores these

170. *Id.*

171. *Id.*

172. *See, e.g.,* Ruben Navarrette, *Immigration Policy Can Make Strange Bedfellows*, INDIANAPOLIS STAR, Apr. 19, 2001, at A13.

173. *Id.*

174. *Id.*

175. Just before the tragic attacks on September 11, 2001 in the United States, President Vicente Fox of Mexico visited with U.S. President George W. Bush in Washington, D.C. to discuss the issue of a “regularization” program for Mexican workers in the United States. Little has been mentioned since September 11 about these efforts. No one is certain how long it will take for Congress to take up the issue of Mexican immigration to the United States.

176. *Agricultural Opportunities Act: Hearing on H.R. 4548 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 112 (2000) (statement of Dewey Hukill for Texas Farm Bureau) (“Many Texas growers are beginning to find that labor available [sic] related problems are taking more of their management time. This is happening in the state that at one time boasted a bountiful farm and ranch labor work force.”).

177. PHILIP MARTIN, GUEST WORKERS FOR AGRICULTURE: NEW SOLUTION OR NEW PROBLEM? (Ctr. For German & European Studies, Univ. of Cal., Berkeley, Working Paper 4.8, 1996) (referencing grower arguments from Congressional hearings occurring in 1995 on proposed foreign

claims, the short-sightedness of the position becomes apparent.¹⁷⁸

As to whether there is a labor shortage, under the terms of the H-2A Program statute, growers seeking foreign workers are first required to recruit domestic workers in their traditional place of residence.¹⁷⁹ Yet, in practice, the Department of Labor often will not require that growers recruit workers outside of their region. If an Indiana grower cannot locate an adequate number of workers within his local area and wishes to employ H-2A workers, he might only be required to perform a positive search within the nearby region of states such as Illinois, Ohio, and Michigan. However, these states likely are experiencing the same local shortage of workers as Indiana because, generally, the source for Midwest farm workers does not come from the region itself, but from base states such as Texas.¹⁸⁰ Had the Indiana grower been required to seek domestic workers directly from the base states, he would likely have found an abundance of workers because in most of these states, unemployment rates soar to double digits even in recent times of relative economic growth.¹⁸¹

The statute demands positive recruitment from sources likely to produce results, yet, the Department of Labor, perhaps in an effort to not appear too bureaucratic, has formed its own seemingly contradictory interpretation. The H-2A Program's statutory requirements should be strictly construed. It should not be up to the Department of Labor, which changes with each administration, to opine about what positive recruitment should be required of growers seeking to hire H-2A workers. Further, the statute clearly states that the positive recruitment requirement is "in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer."¹⁸² Thus, it is insufficient to place the job order on a series of states' employment service systems or America's Job Bank in order to satisfy the positive recruitment requirement. The statute explicitly requires more.¹⁸³

agricultural worker programs).

178. As to the effects from the increased use of undocumented workers, more will be discussed on this issue, see *infra* Part V.A.3.b.

179. See *supra* note 136 and accompanying text.

180. See STEPHEN H. SOSNICK, *HIRED HANDS: SEASONAL FARM WORKERS IN THE UNITED STATES* 10-14 (1978). Base states are called such because they are the bases from which workers flow in the migrant stream northward. The largest include Texas, Florida, and California.

181. H.R. REP. NO. 106-982(I) (2000) (citing the National Agricultural Workers Survey); see also H-2A AGRICULTURAL GUESTWORKERS: STATUS OF CHANGES TO IMPROVE PROGRAM SERVICES, at 4 (2000) (GAO/T-HEHS-00-134) [hereinafter *STATUS*] (explaining that the "national unemployment rate for hired farmworkers has remained above 10 percent since 1994, has increased since 1997, and at 11.8 percent in 1998, has remained well above the national average").

182. 8 U.S.C. § 1188(b)(4) (1994).

183. Additionally, regulations for the Department of Labor state, "The [Regional Administrator] shall ensure that the effort, including the location(s) of the positive recruitment required of the potential H-2A employer . . . shall be no less than . . . the *kind* and *degree* of recruitment efforts which the potential H-2A employer made to obtain H-2A workers." 20 C.F.R.

As to the argument that the INS will target agricultural operations for undocumented workers and thereby create a shortage of available workers, the INS has itself debunked this claim.¹⁸⁴ Because of its limited resources, the INS must focus its efforts on higher priorities such as criminally convicted “aliens,” rather than agricultural workers.¹⁸⁵ Thus, it does not seem that growers’ fears about INS raids on their farms are well-founded.

2. *Indentured Servitude*.¹⁸⁶—H-2A workers are required to work only for their petitioning employers. Under INS regulations, employment “authorization only applies to the specific employment indicated in the relating petition, for the specific period of time indicated.”¹⁸⁷ The workers are not entitled to work for any other employer if discharged. Once they cease employment with the petitioning employer, they immediately become undocumented and are illegally in the country.¹⁸⁸ Further, the employer of H-2A workers fired for cause will “not be responsible for providing or paying for the subsequent transportation and subsistence expenses of [that] worker . . . and that worker is not entitled to the ‘three-quarters guarantee’ . . .”¹⁸⁹

Unfortunately, because H-2A workers are literally tied to a certain agricultural employer, the current regulations could easily lead to program abuse by unscrupulous growers. Suppose an H-2A employee complains about hazardous or potentially illegal working conditions to his employer. That worker could be easily intimidated or discharged (work standards may be written in a rather ambiguous and subjective manner to facilitate such illegal retaliations). Once the H-2A employee is discharged “for cause,” then the INS is notified and the employee is forced unjustly to leave the country without the benefit of free transportation or the guaranteed work wages. Unable to explain himself sufficiently in the English language, this unjust act goes completely unknown and therefore unpunished.

Because of the vulnerable position of H-2A workers, strong enforcement of the program requirements is necessary to discourage the kind of abuses demonstrated above and to ensure that program standards are being met.¹⁹⁰ The

§ 655.105(a) (2001) (emphasis added). Hence, if a grower hires a farm labor contractor to find H-2A workers in Mexico, then the same effort should be required in the search for domestic workers.

184. H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS, at 2 (1998) (GAO/T-HEHS-98-200) [hereinafter CHANGES].

185. *Id.*

186. For constitutional arguments based on the doctrine of involuntary servitude, see Kimi Jackson, *Farmworkers, Nonimmigration Policy, Involuntary Servitude, and a Look at the Shepherding Industry*, 76 CHI.-KENT L. REV. 1271, 1288-92 (2000).

187. 8 C.F.R. § 214.2(h)(5)(viii)(B) (1997).

188. *Id.* § 214.2(h)(5)(vi)(A) (pertaining to duty of H-2A employer to notify INS within twenty-four hours after an H-2A worker absconds).

189. 20 C.F.R. § 655.102(b)(11) (1997).

190. See 132 CONG. REC. 30183 (1986) (comments of Rep. Berman of California) (“H-2 workers would be entitled if they otherwise qualified . . . to legal services representation, because

federal government, through the enforcement branch of the Department of Labor, attempts to enforce these laws the best it can; however, by the admission of a senior administrator, it is unable to meet all the demands made upon it by the H-2A program under current funding levels.¹⁹¹ For this reason, additional enforcement mechanisms and entities must be utilized. One such group involved with supplemental enforcement of H-2A regulations is the Migrant Legal Service programs.

Programs funded by the Legal Services Corporation (LSC) specifically allow representation of H-2A workers only with legal issues arising from their work agreements.¹⁹² However, a previously undefined sentence fragment in the corporation's appropriations act led some critics to raise questions about whether legal service programs should be allowed to represent an alien who is no longer present in the United States.¹⁹³ Because of concerns raised by this complaint, the corporation appointed the Erlenborn Commission to determine the Congressional intent of the undefined "presence in the United States" requirement. The commission sought public comment on the issue.¹⁹⁴ In the end, the commission determined that "[f]or H-2A workers, representation is authorized if the workers have been admitted to and have been present in the United States pursuant to an H-2A contract, and the representation arises under their H-2A contract."¹⁹⁵ Thus, as long as the H-2A worker seeking representation was at one time present in the United States under the work contract on which the suit is based, then LSC-funded legal service programs permit representation that worker.¹⁹⁶

without that, the protections contained for those workers, the housing protections, the domestic, the transportation protections, the piecework rate and adverse impact wage rates protections become utterly meaningless.").

191. See *Agricultural Opportunities Act: Hearing on H.R. 4548 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 44 (2000) (statement of John R. Fraser, Deputy Administrator, Wage and Hour Division, U.S. Dep't of Educ.). As a recommendation, Mr. Fraser stated:

Congress should support increased resources for stronger enforcement of U.S. labor laws. Increased funding and Congressional support for strong labor law enforcement will ensure that the Department can effectively focus on and deploy adequate resources to address those employers which pay less than legal wages and provide substandard work environments.

Id.

192. 45 C.F.R. § 1626.11 (2001). Aside from permitting representation of H-2A workers, LSC-funded programs prohibit the representation of any other nonimmigrant alien (except for victims of domestic violence in certain circumstances).

193. Complaint filed with the Legal Services Corporation against the Georgia Legal Services Corporation by, inter alia, the National Legal and Policy Center (Mar. 17, 2000), <http://www.nlpc.org/lsc/complaints/000317ga.htm> (arguing that an LSC-funded program should not be able to represent H-2A workers who are no longer "present" in the United States).

194. 64 Fed. Reg. 8140, 8141 (Feb. 18, 1999).

195. ERLNBORN COMMISSION REPORT at 58 (2000).

196. However, such complaints demonstrate the tactics certain pro-grower groups will resort

3. *Discrepancy of Benefits.*—A strange phenomenon occurs as a result of the federal regulations surrounding the H-2A Program: *foreign* agricultural workers will be provided with employment benefits that the *domestic* work force is not entitled to receive. This effect occurs in several areas of the law.¹⁹⁷

The H-2A statute mandates that employers provide workers' compensation coverage for all workers, including H-2A workers.¹⁹⁸ In many states, including Indiana, workers' compensation coverage is not required for agricultural workers.¹⁹⁹ Thus, if an employer in Indiana were to hire H-2A workers, he would be required to provide workers' compensation coverage, under the federal regulations, for those workers (and for domestic workers hired under the same employment contract); however, domestic employees working for the same employer on a different type of job would be exempt from workers' compensation coverage. Unfortunately, the disparate treatment does not end there.

The H-2A Program guidelines also require certain benefits for the foreign workers, including free housing, transportation reimbursements, three-quarters work guarantee, AEWR, and three meals provided per day or access to a facility in which to cook meals.²⁰⁰ One would assume, logically, that the same employer would have to offer similar benefits to his domestic population, regardless of whether it is working in the same type of job as the H-2A workers. Unfortunately, if the job order under which the H-2A workers are working (e.g., picking cantaloupes) is sufficiently distinguishable from positions in which domestic workers are working, (e.g., picking watermelons), then the same employer need not provide the same types of benefits to all workers.²⁰¹ Hence, the employer could charge some of the domestic workers for meals, housing, and transportation, while having to provide the same exact benefits to H-2A workers free of charge. Also, the employer legally can pay the domestic workers

to in order to prevent H-2A Program violations from being detected and redressed.

197. See, e.g., *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861 (4th Cir. 2001) (holding that the Age Discrimination Employment Act does not apply to the hiring of H-2A workers outside the United States), *cert. denied*, 122 S. Ct. 463 (2001); *Farmer v. Employment Sec. Comm'n of N.C.*, 4 F.3d 1274 (5th Cir. 1993) (addressing a conflict of laws between the H-2A Program housing provisions and the prohibitions against discrimination based on familial status of Title VIII of the Civil Rights Act of 1968).

198. 8 U.S.C. § 1188 (b)(3) (1994).

199. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994) (holding that agricultural worker exemption from workers' compensation coverage does not violate the Equal Privileges clause of the Indiana Constitution). Other states that generally exclude agricultural workers from mandatory workers coverage include: Alabama, Arkansas, Kansas, Kentucky, Mississippi, Nebraska, Nevada, New Mexico, North Dakota, Rhode Island, South Carolina, and Tennessee. See SHELLEY DAVIS, *INCREASING FARMWORKERS' ACCESS TO WORKERS COMPENSATION BENEFITS* at 17 (1999).

200. 20 C.F.R. § 655.102(b) (2001); see also Part II.B, *supra*.

201. See Letter from Sarah Carroll, Regional Certifying Officer, Employment & Training Admin., U.S. Dep't of Labor, to Tish Sowards, Regional Director, Int'l Labor Mgmt. Corp. (May 24, 2000) (on file with author).

significantly less per hour than the H-2A workers.²⁰² Finally, the domestic worker is not guaranteed to receive wages for at least three-quarters of the work promised to him, as is the H-2A worker.

On the other hand, domestic workers have a better employment situation than H-2A workers. The Migrant and Seasonal Agricultural Worker Protection Act (AWPA) creates several obligations on the part of any employer utilizing domestic agricultural workers.²⁰³ Included among these obligations are duties for recruiting, transporting, housing, and employing migrant and seasonal farm workers. If any duty is breached, the violating party may be held liable in a private action brought by the offended worker(s) for up to \$500 per violation per worker.²⁰⁴ The law is designed to deter similar violations in the future by private enforcement.²⁰⁵ However, H-2A workers were specifically excluded from the protection of AWPA.²⁰⁶ Thus, in order for an H-2A worker to bring a claim against a breaching employer, he must generally bring a state suit under a contract law theory.²⁰⁷

Such outcomes are inherently unjust. Regulations should be promulgated by the Department of Labor to ensure that all workers receive the same compensation for performing essentially the same type of farm work. If the Department of Labor does not act, then it is incumbent upon Congress to prevent such an unjust result from continuing.

Just because domestic workers are entitled to some benefit that H-2A workers are not should not be seen as a victory for domestic workers. Instead it should be viewed as a failure for the H-2A workers. Economic success for domestic workers will come only through positive Congressional action as

202. The 2000 federal minimum wage that the domestic worker is required to receive was \$5.15 per hour, 29 U.S.C. § 206(a)(1); yet, the H-2A worker is required to receive the adverse effect wage rate, which for 2000 in Indiana was \$7.62 per hour. 65 Fed. Reg. 5696, 5696 (Feb. 4, 2000). In 2001, the federal minimum wage has remained at \$5.15 per hour, 29 U.S.C. § 206(a)(1), while the AEWR has increased in Indiana to \$8.09 per hour. 66 Fed. Reg. 40298, 40299 (Aug. 2, 2001).

203. See 29 U.S.C. §§ 1801-72 (1994 & Supp. V 1999).

204. See *id.* § 1854(c)(1) (1994).

205. The AWPA is a remedial statute. See *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985), where the court stated:

The legislative history of the Act and the decisions interpreting it make clear that the purpose of this civil remedy is not restricted to compensation of individual plaintiffs.

It is designed also to promote enforcement of the Act and thereby deter and correct the exploitive practices that have historically plagued the migrant farm labor market.

Id.

206. 29 U.S.C. § 1802(8)(B)(ii), (10)(B)(iii) (1994).

207. For an interesting case on suits brought by H-2A workers, see *Lopez-Aguirre v. Workman*, No. 1998-CA-001367-MR (Ky. Ct. App. Aug. 25, 2000) (holding that there is an exhaustion of remedies requirement implied within H-2A regulations requiring an H-2A employee to first file a complaint with the Department of Labor before being able to file a state contract claim), *rev'd*, No. 1998-CA-001367-MR (Ky. Ct. App. Dec. 8, 2000) (same judge, reversing case after a petition for rehearing).

discussed in Part V *infra*.

B. Proposed Legislation Concerns

1. *Pombo Registry Proposal Concerns.*—The creation of a registry system to assist growers in their recruitment efforts is a positive development. The Clinton administration undertook similar initiatives by the implementation of America's Agricultural Labor Network or "AgNet."²⁰⁸ AgNet is an "on-line job matching system to help connect agricultural employers and workers."²⁰⁹ It allows growers to look for workers and workers to post their work experience. However, the critical difference between the Pombo proposed registry of workers and the AgNet would be their differing purposes. With the Pombo registry, growers would *only* have to search the registry for workers. If their search was unsuccessful, then they would be able to petition the Department of Labor for foreign agricultural workers. They would not be required to conduct any additional positive recruitment by more traditional means, such as using the services of a farm labor contractor to recruit workers personally. On the other hand, AgNet is merely another source, and not the exclusive source, of recruitment for agricultural employers.²¹⁰

Given the level of education and English proficiency of most migrant farm workers,²¹¹ the AgNet purpose seems to make better sense. Migrants who are alerted and have the ability to post resumes and search for jobs will be able to utilize the resource. For those who would not be able to access the computer systems in order to post their credentials, the Pombo registry would have disastrous consequences. They would be penalized when it came time for growers to recruit for employment.

Ultimately, the registry debate can be reduced to the question of who should have the burden to connect an employer to an employee in agriculture? If the growers have the responsibility of finding employees, is it not likely that they will find them wherever they are and by whatever means necessary? Otherwise growers' crops would rot in the fields. However, if the employees must link themselves to the employer, the excluded notions of migrant labor unions and collective bargaining power come into play.²¹² The status quo under the H-2A Program is to place the burden on the growers through positive recruitment requirements. However, the Pombo bill sought to alter the status quo and place the burden to connect employee and employer on the federal government. Given

208. See *Agricultural Opportunities Act: Hearing on H.R. 4548 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 44 (2000) (statement of John R. Fraser, Deputy Administrator, Wage and Hour Division, U.S. Dep't of Educ.) (requesting funding for this Internet-based network that the Department of Labor already has begun developing).

209. *Id.*

210. *Id.*

211. SOSNICK, *supra* note 180, at 64-66.

212. See Part V.A.2.b *infra* (discussing NLRA exclusion for agricultural workers).

the difficulties the Department of Labor has in implementing the current H-2A scheme, why did the Pombo legislation assume that efforts to connect these two groups would be any better?

The drawbacks to the Pombo bill do not stop there. The bill also eviscerated most of the worker protections found in the current H-2A Program. Among those provisions lost are free housing for foreign workers and legal representation by LSC-funded organizations.²¹³ It is true that the current H-2A Program does not operate as smoothly as all parties would like, but the answer to the problems is not to eliminate worker protections. If workers cannot use legal service programs to raise actual concerns about their working conditions, how does this lead to a better program? Surely, Congress wants workers to be able to protect themselves from overstepping by law-breaking growers. The Pombo bill ignored this reality and was extremely lopsided in favor of agricultural employers.

2. *Adjustment Legislation Concerns.*—At least with the adjustment legislation, foreign agricultural workers would have received something more substantial in return for their dedicated service to American agriculture than they would have under the Pombo bill. They eventually would have been able to become permanent, lawful U.S. residents, and later U.S. citizens if they so choose. However, their reward would come at the cost of having to commit to continue working in U.S. agriculture for at least five years.²¹⁴ Moreover, they would have been required to complete at least 180 days of work in each of those five years.

A problem with this legislation is that it would be extremely difficult for many agricultural workers to accumulate the required number of days of work per year to obtain lawful residency. From 1997 to 1998, farm workers worked on the average 24.9 weeks per year, and those figures have been on the decline.²¹⁵ To qualify under this legislation, the foreign workers would have to be able to work *more* weeks than domestic workers, and that is fallaciously assuming that the domestic workers will work seven days per week during each of those weeks. The reasonable solution would be to lower the number of days the workers should be required to work per year. Yet that leads to another potential problem.

When workers are forced to work prospectively in order to gain a benefit, the very nature of the workers' relationship to their employer dramatically changes. No longer will workers be as willing to complain about working conditions or

213. Because the LSC regulations only permit representation of H-2A workers, LSC-funded programs would not have been authorized to represent the new H-2C workers of the Pombo bill. See *supra* note 192.

214. See *supra* Part III.B. This requirement, no doubt, is included to prevent the type of mass exodus from agriculture of the "legalized" work force that occurred after the 1986 SAW program. DANIEL ROTHENBERG, WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARM WORKERS TODAY 144 (1998).

215. *Agricultural Opportunities Act: Hearing on H.R. 4548 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 41 (2000) (statement of John R. Fraser, Deputy Administrator, Wage and Hour Division, U.S. Dep't of Educ.) (citing National Agricultural Worker Survey figures).

unjust employment practices, for fear of being prevented from obtaining the necessary number of work weeks under the legislation. The agricultural employer will have increased bargaining power in the work relationship, and inevitably some growers will use that power in an illegal manner to intimidate “uncooperative” workers.

3. *Compromise Legislation Concerns.*—The compromise legislation, in part, combined elements of both the Pombo proposal and the adjustment proposals. It would have lowered the number of days that a foreign agricultural worker needed to complete within six years to a total of 360.²¹⁶ Also, it would have altered the housing requirement and commissioned a study of the AEW.²¹⁷

While the compromise would have pleased many growers and farm worker advocates, it is questionable whether it would really have resolved the long-term problems that exist within the migrant farm worker job market. History should be instructive on this point.²¹⁸ Under the many foreign agricultural worker programs that have existed, one thing has remained certain—there is always a need to find a new source of agricultural workers. Why exactly is there a constant need for government intervention to generate an agricultural workforce and not workers in other private sectors?²¹⁹

4. *Gramm Proposal Concerns.*—Apparent from Senator Gramm’s comments is his great concern about and desire to curb illegal immigration, while at the same time adjusting the current H-2A Program to be more useful to American growers. It is promising that Senator Gramm has had discussions with Mexican President Vicente Fox on the subject, and includes as one of his goals the fair treatment of all Mexican citizens working and living in the United States. However, given that Senator Gramm was opposed to the compromise legislation, it is difficult to predict what type of legislation he might propose that would satisfy his peers in the U.S. Senate. It is questionable whether his focus on substantially increasing employer sanctions for the use of undocumented workers would produce enough votes for passage of the legislation.

V. SOLUTIONS TO POLICY CONCERNS

The underlying issue often ignored by Congress when it is debating new legislation on foreign agricultural workers is why U.S. growers constantly need to be supplied with a new work force. Why does the former work force choose alternative employment over agricultural work? Although farm work is difficult, it can be no more difficult than that of some factory workers; yet, the federal government is not called upon every few decades to readjust programs to allow for foreign factory workers. Why not? What sorts of obstacles hinder the continuation of a steady, migrant, agricultural work force?

216. See *supra* Part III.C.

217. See *supra* Part III.C.

218. See *supra* Part I.

219. See *infra* Part V.

A. "Agricultural Exceptionalism"

The economic situation of many family farms is not unknown to most Americans today. More and more family farms are losing ground to more industrial agricultural operations (not to mention land developers). Is this an American tragedy or just market forces exerting force over an outmoded form of business? Regardless of the answer, one thing is clear: as long as Americans continue to romanticize the situation of the American farmer, an expectation of governmental intervention will remain in the agricultural sector of the economy.²²⁰ The farming business community believes that it is entitled to special treatment under the law. The disparate treatment of agribusiness from other sectors of the economy has come to be known as "agricultural exceptionalism."²²¹ This perception has taken many forms over the years, and its results will be scrutinized in this section of the Note.

Agricultural exceptionalism would not be so objectionable if other aspects of the agricultural economy were not harmed by it; however, the current plight of domestic migrant farm workers can be directly tied to its perpetuation. If this perception, and more importantly, its effects, are eliminated, the agricultural work force would stabilize enough so that there would no longer be a need for continued reliance on temporary, foreign agricultural worker programs.

1. State-Based Exceptions.—

a. *Workers' compensation.*—Many states exclude migrant farm workers from compulsory eligibility under workers' compensation laws.²²² Such an outdated approach to migrant health care is atrocious, given that farm work is viewed as one of the most dangerous occupations in the United States.²²³ Even though workers' compensation is generally governed by individual states, perhaps it is time to view the special difficulties associated with migrant labor injuries as a federal interstate commerce issue. Under such a theory, Congress

220. In 1962, Ernesto Galarza describes the relationship between the family farmer and agribusiness in the following way:

The identification of the small grower with the corporate industrial farm had long been a familiar device of image-making. In general its purpose was to drape the homespun look, the earthy simplicity, the hayseed frugality of the folk farmer over an industry that had none of these telluric charms. Agribusiness had grown into a vast, taut, complicated network of big production, big processing, big transportation, big financing and big marketing.

GALARZA, *supra* note 6, at 241.

221. See generally *id.* at 106; Jim Chen, *Of Agriculture's First Disobedience and its Fruit*, 48 VAND. L. REV. 1261 (1995); Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487 (1998).

222. See *supra* note 199 and accompanying text.

223. ROTHENBERG, *supra* note 214, at 7 (citing farm work as the occupation with "nation's highest incidence of workplace fatalities and disabling injuries"); see also RONALD L. GOLDFARB, *MIGRANT FARM WORKERS: A CASTE OF DESPAIR* 151 (1981) (citing farm work as one of the most dangerous occupations nearly twenty years ago).

would have the constitutional power to enact legislation to require agricultural employers to provide workers' compensation for their employees.²²⁴

b. Unemployment insurance coverage.—Another disgraceful aspect of many states' denial of economic rights to farm workers comes from migrants' effective exclusion from unemployment benefits.²²⁵ While many policy reasons have been suggested for denying unemployment insurance coverage to agricultural workers (including the multi-state nature of the work), most of these problems have been resolved for other occupations.²²⁶ In the end, this exception must be viewed as yet another entitlement provided to agri business by sometimes overly-sympathetic legislatures.

c. State minimum wage laws.—In addition to the federal minimum wage laws, many states have established their own minimum wages. Again, agricultural employees are often exempted from them.²²⁷ Such laws rarely provide greater protections than those required by federal law, but there are occasions when state minimum wage laws apply to farm workers²²⁸ and even require a higher wage rate than the federal minimum wage.²²⁹ Such variations from the status quo of denying farm workers labor rights should be applauded.

2. Federal-Based Exceptions.—

a. Fair Labor Standards Act.—Under the Fair Labor Standards Act, migrant farm workers are completely exempted from some of the Act's protections, including overtime provisions, and partially from other protections, such as minimum wage and child labor provisions.²³⁰ Thus, some farm workers do not have to even be paid federal minimum wages, while no farm worker needs to be paid overtime wages. Also, children as young as eleven years old are allowed to work in agriculture—already established as one of the most dangerous fields—so long as they work with their parents' permission.²³¹ Such leniency in the law

224. *Workmen's Compensation for Farmworkers, Hearings*, 92d Cong. 4 (1973) (statement of Robert E. McMillen, counsel for the United Farm Workers union) (likening Congress' ability to regulate farm laborers workers' compensation to Longshoremen's and Harbor Workers' Compensation Act, enacted in 1927).

225. *See, e.g.*, IND. CODE § 22-4-8-2 (l)(1)(A) (1998) (requiring an agricultural employer "during any calendar quarter in either the current or preceding calendar year" to have paid remuneration of at least \$20,000 before the unemployment regulations apply to it); H.R. 1003, 107th Cong. (2001) (resolution to raise minimum amount growers must make in a quarter before they would be subject to unemployment tax from \$20,000 to \$50,000).

226. For a policy discussion on unemployment insurance coverage of farm workers, see SOSNICK, *supra* note 180, at 274-78.

227. *See, e.g.*, IND. CODE § 22-2-2-3(m) (1998) (excluding "persons engaged in agricultural labor" from the definition of "employee," to whom Indiana minimum wage laws apply).

228. *See, e.g.*, OR. REV. STAT. § 51-652.210 (1999) (farm workers are not excluded from definition of "employee").

229. *See, e.g., id.* § 51-653.025 (farm workers, as "employees," must be paid at least \$6.50 per hour under Oregon's minimum wage laws).

230. 29 U.S.C. § 213 (1994 & Supp. V 1999).

231. *See id.* §§ 212, 213(c).

exclusively for the benefit of agribusiness and at the expense of children is repulsive. No such exemptions exist for minors in other economic sectors, and neither should they exist in agriculture.

Perhaps when the Fair Labor Standards Act was enacted in 1938, the agricultural component of the U.S. economy necessitated special treatment; however, as the family farm has changed into a multi-billion dollar agribusiness, the need for special treatment has vanished.²³² There is evidence that the exclusion of farm workers from the original legislation may have been racially motivated.²³³ Why would a farm laborer continue to work in an occupation in which minimum wages were not guaranteed and overtime work was uncompensated?

b. National Labor Relations Act.—One of the most harmful federal agricultural exceptions is that which excludes “agricultural laborer[s]” from the protection of the National Labor Relations Act (NLRA).²³⁴ Because of their exclusion from the Act’s definition of “employee,” they are not protected from the retaliation that may occur as a result of their efforts to organize and collectively bargain.²³⁵ Prior to the enactment of the NLRA, migrant farm workers actively organized themselves; however, after being excluded, such efforts diminished.²³⁶

Imagine the impact farm workers could have on their working conditions if they were able to organize and collectively bargain for wages.²³⁷ Some have argued that there is such a right under international law.²³⁸ Perhaps the results from such an organized system, although painfully new at first for growers, would reap benefits not only for the workers but for the industry as a whole.

232. See ROTHENBERG, *supra* note 214, at 1.

233. For an expounding of this theory, see Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987).

234. 29 U.S.C. § 152 (1994).

235. *Id.* § 157; cf. SOSNICK, *supra* note 180, at 371-74 (explaining that one of the reasons Cesar Chavez embraced the agricultural exemption from the NLRA was so that farm workers would not be limited by the statute’s restrictions against secondary boycotts).

236. For an excellent review of pre-NLRA attempts to organize and the effects of the migrant exclusion from the NLRA, see Austin P. Morris, S.J., *Agricultural Labor and National Labor Legislation*, 54 CAL. L. REV. 1939 (1966); VARDEN FULLER, *LABOR RELATIONS IN AGRICULTURE* (1955).

237. Much has been written about the unionizing efforts of the United Farm Workers (UFW) and Cesar Chavez. See generally JOAN LONDON & HENRY ANDERSON, *SO SHALL YE REAP: THE STORY OF CESAR CHAVEZ & THE FARM WORKERS’ MOVEMENT* (1970); PETER MATTHIESSEN, *SAL SI PUEDES: CESAR CHAVEZ AND THE NEW AMERICAN REVOLUTION* (1969); RONALD B. TAYLOR, *CHAVEZ AND THE FARM WORKERS* (1975); JAN YOUNG, *THE MIGRANT WORKERS AND CESAR CHAVEZ* (1972). For a Midwest perspective on farmwork organizing, see W.K. BARGER & ERNESTO M. REZA, *THE FARM LABOR MOVEMENT IN THE MIDWEST* (1994).

238. LANCE A. COMPA, *UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS* (2000), <http://www.hrw.org/reports/2000/uslabor>.

Instead of growers expending such an incredible amount of money on lobbying efforts designed to guarantee a source of labor, they would be ensured a reliable work force. Moreover, growers could then turn their attention (and money) to more effectively managing their agricultural operations.

3. *Results of Agricultural Exceptionalism.*—What have been the results of this decades-old policy of agricultural exceptionalism? Has it been an incredible success story? As always, the answer depends on to whom the question is asked. For the agribusiness community that has profited tremendously thanks to its special treatment, its answer would likely be a most-resounding “yes.” However, for the farm workers losing out on the American dream as a result of this exceptionalism, the answer most definitely will be “no.”²³⁹

a. *Depressed wages.*—Farm workers are among the poorest laborers in the United States, averaging around \$6500 per year in income.²⁴⁰ Farm workers have experienced “fewer weeks of employment; earned less per hour in real terms; [and] continued to have poverty level earnings.”²⁴¹ Given the low state of wages, it is suggested that instead of a labor shortage (as asserted by those desiring to increase use of H-2A workers) there is an over-supply of labor.²⁴² If there were a labor shortage, wages would not be falling but increasing so as to attract a sufficient number of employees. This fact illustrates one of the contradictions existing within the employment of farm workers: how can there be a “labor shortage” with lowering wages? The answer lies in the reliance of growers on undocumented workers.

b. *Increased reliance on undocumented workers.*—Growers want the best of all worlds. First, they reap the benefits of utilizing undocumented workers in the form of paying lower wages. At the same time, they petition Congress for a more reliable (and non-deportable) work supply through “guestworker” programs.²⁴³ They are constantly seeking the cheapest source of labor without being concerned about how one practice creates the need for the other.

U.S. growers’ extreme reliance on undocumented workers has led to the

239. This harsh farm worker reality flies in the face of those who naively believe that if people only worked hard enough, they would be economically successful.

240. ROTHENBERG, *supra* note 214, at 6. This figure is based on the income of seasonal farm workers, while migratory farm workers only average about \$5000 per year. *Id.* The fruit and vegetable industry earns \$28 billion annually. *Id.* at 1-2.

241. *Agricultural Opportunities Act: Hearing on H.R. 4548 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 41 (2000) (statement of John R. Fraser, Deputy Administrator, Wage and Hour Division, U.S. Dep’t of Educ.) (citing National Agricultural Worker Survey figures).

242. Compare CHANGES, *supra* note 184, at 4 with STATUS, *supra* note 181, at 3-4 (agreeing that no farm labor shortage exists).

243. See, e.g., *Agricultural Opportunities Act: Hearing on H.R. 4548 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 112 (2000) (statement of Dewey Hukill for Texas Farm Bureau). The author has refrained from using the term “guestworker” throughout this Note because he feels that it misrepresents the nature of the relationship between the employer and laborer.

depression of wages for domestic workers, thus driving them out of agricultural work.²⁴⁴ Why are growers using undocumented workers? Most agree that it is because foreign workers are less likely to complain about poor working conditions and unfair labor practices.²⁴⁵ Some growers believed that the workers should be content with the privilege of working in the United States and receiving wages at all, even if they are lower than the law requires. Reports indicate that the use of undocumented agricultural workers has been steadily increasing.²⁴⁶ As a result, few attempts are being made to retain the domestic work force and more reliance is being placed on undocumented workers.

c. *What Is the Solution?*—While there are no easy answers to addressing the problems of depressed wages and illegal immigration, any solution to stabilize the agricultural work force must factor in the role of the undocumented work force. Some approaches maintain that if the borders were more tightly secured and illegal immigration stopped, the working conditions of U.S. workers would improve.²⁴⁷ Often included in such proposals, is an attempt to strengthen employer sanctions for using undocumented workers. However, illegal immigration to the United States seems to be inevitable as long as economic conditions in nearby countries continue to languish.²⁴⁸

Foreign “guestworker” programs are not the answer. As has been shown through the history of such programs, they are a temporary solution.²⁴⁹ They merely provide a short-term answer while ignoring the long-term implications of inviting foreign workers into an area of the economy already deeply depressed. The situation of domestic agricultural workers has improved little since the introduction of foreign agricultural workers. A bolder step is necessary.

Perhaps international or trans-border unions should be used to incorporate the undocumented workforce into a solution, instead of labeling undocumented workers as the problem. At the same time, such a union would also assist

244. ROTHENBERG, *supra* note 214, at 238 (recording comments of Jim Handelman, Farm Labor Specialist with the U.S. Department of Labor).

245. Philip Martin, *California's Farm Labor Market and Immigration Reform*, in FOREIGN TEMPORARY WORKERS IN AMERICA 193 (B. Lindsay Lowell ed., 1999).

246. Compare ROTHENBERG, *supra* note 214, at 127 (estimating the undocumented work force in agriculture to be one in four), with *Agricultural Opportunities Act: Hearing on H.R. 4548 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 41 (statement of John R. Fraser, Deputy Administrator, Wage and Hour Division, U.S. Dep't of Educ.) (estimating the same group to be about fifty percent of the agricultural work force).

247. See Gramm, *supra* note 169 (“I believe that an effective guest worker program can help the American economy The United States must seek to regain control of its border, to end the influx of illegal immigrants whose arrival is tacitly condoned and which produces contempt for the rule of law.”).

248. This paper does not address atrocities committed by the United States government in Latin America that have contributed to such conditions. For a brief overview of how U.S. policy affects the conditions in surrounding countries, see NOAM CHOMSKY, *TURNING THE TIDE: U.S. INTERVENTION IN CENTRAL AMERICA AND THE STRUGGLE FOR PEACE* (1985).

249. See *supra* Part I.

domestic workers in improving their working conditions. However, without including undocumented workers, such a unionizing effort is bound to fail. Strikebreakers, in the form of undocumented workers, would be too easy to locate. Trans-national agreements may also provide a possible solution. Although attempted in the past with Mexico rather unsuccessfully, now may be the time to renegotiate.

B. Additional Necessary Reforms

1. *Increase Minimum Wage.*—The very least that Congress could do to ease some of the burdens of the domestic agricultural work force is to raise the minimum wage.²⁵⁰ Given that migrant farm workers are among the poorest of the poor, a raise in the minimum wage would have dramatic effects upon their incomes.²⁵¹

2. *Increase Resources for Enforcement of U.S. Labor Laws.*—Another way that Congress could assist the plight of migrant farm workers would be to increase funding for the enforcement of labor laws. The Wage and Hour Division of the U.S. Department of Labor is the agency primarily responsible for enforcing labor laws that affect migrant workers. It is extremely underfunded to accomplish its duty to properly monitor the migrant employment situation.²⁵²

In addition, Congress could fund more extensively another source for enforcing labor laws, namely, the Migrant Legal Services programs of the Legal Services Corporation. “Since few private attorneys are willing to take on farmworkers’ legal claims, virtually all labor-law cases alleging employers’ mistreatment of farmworkers have been brought by Legal Service attorneys.”²⁵³ Increased funding, earmarked for the migrant legal service programs, would ensure the continued enforcement of laws protecting the employment rights of oppressed migrant farm workers.

CONCLUSION

Many of the important themes discussed in this Note—illegal immigration, temporary foreign agricultural workers, and the economic conditions of domestic agricultural workers—have been debated in Congress for years. No easy solutions are obvious. However, one thing that can be unequivocally stated is that agricultural exceptionalism has existed for well over seventy years. Additionally, employment conditions of migrant farm workers have not improved over the same decades. There must be a direct connection between the two. If

250. Am. Farm Bureau, *Minimum Wage* (Sept. 2001), <http://www.fb.org/issues/backgrd/minwage107.html> (stating that the American Farm Bureau Federation Policy “specifically opposes increases in the minimum wage . . .”).

251. Martin, *supra* note 245, at 185-86 (describing how a labor cost increase will have less effect on the cost of goods sold because farmers receive less from the sale of their products than other producers do).

252. ROTHENBERG, *supra* note 214, at 215.

253. *Id.* at 229.

agricultural exceptionalism in its current form continues to exist well into the twenty-first century, unfortunately the proposed solutions provided in this Note may still be debated seventy years from now.