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A License to Exploit: The Need to Reform the H-2A Temporary Agricultural Guest Worker Program.

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A LICENSE TO EXPLOIT: THE NEED TO REFORM THE H-2A TEMPORARY AGRICULTURAL GUEST WORKER PROGRAM

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† St. Mary's University School of Law, Candidate for J.D., May 2003; Texas A&M University, College Station, B.A. English Literature, August 1999. I would first and foremost like to thank my family for their continued love and support throughout my law school experience. I would also like to thank all *The Scholar* writers and editors who have contributed to my paper with their diligent cite-checking and editing efforts. Particularly I would like to thank Alexander V. Neill for his generosity and constant willingness to help no matter how challenging the task. This comment is dedicated to all the foreign farm workers who contribute to our country and deserve our respect.

I. INTRODUCTION

The temperature had reached 105 degrees on that scorching summer day Carmelo Fuentes collapsed from heat exhaustion in July 1998.[1] Fuentes had been picking in the tomato fields of North Carolina most of the day.[2] He was denied a short break by his employer.[3] He then began to show the beginning signs of heat stress, but this was "dangerously ignored."[4] Fuentes soon after collapsed from a heat stroke.[5] At age 36, he suffered from collapsed internal organs and severe brain damage.[6]

Fuentes and thousands of others, mainly from Mexico, work in American fields under unfavorable conditions. They are working not as undocumented immigrants, but legally under the H-2A temporary agricultural guest worker program. However, these legal workers are often exploited and essentially reduced to indentured servitude.

The current guest worker program has its roots in the World War II Bracero accord and the H-2 programs of the Immigration and Nationality Act of 1952 (INA).[7] The programs were originally established to supply personnel for domestic positions unfilled by American citizens.[8]

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1. *Agricultural Job Opportunity Benefits and Security Act: Hearing on S.1814 Before the Senate Judiciary Subcommittee on Immigration*, 106th Cong. (2002) (statement of Cecilia Muñoz, Vice-President for the Office of Research, Advocacy and Legislation of the National Council of La Raza), *available at* http://judiciary.senate.gov/oldsite/5420cm.htm (last visited Jan. 17, 2003).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See* Victoria Lehrfeld, *Patterns of Migration: The Revolving Door from Western Mexico to California and Back Again*, 8 LA RAZA L.J. 209, 219-20 (1995).

8. *See* Andrew Scott Kosegi, *The H-2A Program: How the Weight of Agricultural Employer Subsidies is Breaking the Backs of Domestic Migrant Farm Workers*, 35 IND. L. REV. 269, 270 (2001).

Several members of Congress are currently trying to amend the Immigration and Nationality Act of 1952 to reform the H-2A temporary agricultural guest worker program.[9] Of the amendments, the proposed legislation from Senator Edward Kennedy and Representative Howard Berman seek not only to bring temporary workers to replenish American labor forces, but also to establish fair provisions that compensate immigrants regardless of their legal status.[10]

The first temporary worker program was introduced during World War II.[11] When the call of duty oversees drained much of the manpower in the United States, the agricultural industry lacked workers.[12] Consequently, the United States and Mexico bilaterally agreed to establish a program that would allow Mexican immigrants to fill these positions.[13] This program saw its end in 1964.[14]

Under the INA,[15] an H-2 guest program was established to create another temporary guest worker program.[16] Under the act, employers were only permitted to hire foreign workers if no domestic workers were available to fill the jobs.[17] Eventually, under the Immigration Reform and Control Act of 1986 (IRCA),[18] the program was divided into two parts,

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9. S. 1313, 107th Cong. (2001); H.R. 2736, 107th Cong. (2001); S. 1161, 107th Cong. (2001); H.R. 2457, 107th Cong. (2001). Identical bills were proposed by Democrats, Senator Edward Kennedy and Representative Howard Berman, in 2001 to provide for the adjustment of status of certain foreign agricultural workers. Counterpart bills were proposed by Republicans, Senator Larry Craig and Representative Christopher Cannon, to amend the INA to streamline procedures for the admission and extension of stay of nonimmigrant agricultural workers. Specifically, Representative Cannon's bill imposes wage rate limitations that the Secretary of Labor may require an employer to pay an alien who is an H-2A nonimmigrant agricultural worker.

10. S. 1313, at §101(a)(1)(A)(i); H.R. 2736, at §101(a)(1)(i). One of the components of the proposed legislation would be to adjust the status of an alien who performed agricultural employment in the United States for at least 540 hours or 90 work days, whichever is less, for twelve consecutive months during an eighteen month period.

11. *See* Edward J. Williams, *The Maquiladora Industry and Environmental Degradation in the United States – Mexico Borderlands*, 27 ST. MARY'S L.J. 765, 771 (1996).

12. *See id.*

13. *See* Maria Elena Bickerton, *Prospects for a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program,* 79 TEX. L. REV. 895, 896 (2001).

14. *See* Lorenzo A. Alvarado, *A Lesson From My Grandfather, The Bracero*, 22 CHICANO-LATINO L. REV. 55, 59 (2001).

15. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

16. See Cecilia Danger, Comment, *The H-2A Non-Immigrant Visa Program: Weakening its Provisions Would be a Step Backward for America's Farmworkers*, 31 U. MIAMI INTER-AM. L. REV. 419, 420 (2001).

17. Immigration and Nationality Act §101(a)(15)(H)(ii), 66 Stat. at 168. *See* AFL-CIO v. Brock, 835 F. 2d 912, 913 (D.C. Cir. 1987).

18. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

the H-2A and the H-2B programs.[19] The programs differed by categorizing agricultural and non-agricultural workers.[20] Although these programs have been amended, they remain unjust.[21]

If the current program is not revised, it will continue to exercise its unfair and permanent reality for the estimated 45,000 Mexican migrants who work under the program:[22] their deportation back to the impoverished conditions from which they came and had eagerly left.[23]

Additionally, the current program limits the legal protections given to its participants who are not afforded the rights of permanent residents or citizens.[24] Paradoxically, the program also increases illegal immigration, exploits guest workers,[25] and creates discrimination due to the employer sanction provisions.

Sen. Kennedy's and Rep. Berman's bills solve these issues by offering (i) eventual permanent residency to the guest workers; (ii) allowing the guest workers to be protected under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA); and (iii) maintaining the calculation of the wage currently offered to guest workers.[26]

II. SUMMARY

This comment discusses the effectiveness of the current H-2A temporary agricultural guest worker program as established under the INA and the problems guest workers face under the programs. Part III addresses the historical background surrounding the guest worker program, begin-

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19. Martinez v. Reich, 934 F. Supp. 232, 237 (S.D. Tex. 1996).

20. *Id.*

21. *See* Gail S. Coleman, *Overcoming Mootness in the H-2A Temporary Foreign Farmworker Program*, 78 Geo. L. J. 197, 201 (1989) (stating that growers' interests are in direct conflict with congressional policy, causing battles between the growers and the Department of Labor).

22. *See* CHRISTINE SOUZA, CALIFORNIA FARM BUREAU FED'N, FARM LABOR CONTRACTOR TRIES H-2A GUEST WORKER PROGRAM (2002), *available at* http://cfbf.com/agalert/2002/aa-061902b.htm (last visited Oct. 21, 2002).

23. *See* PHILIP MARTIN, CTR. FOR IMMIGRATION STUDIES, GUEST WORKER PROGRAMS FOR THE 21ST CENTURY (2000), *available at* http://www.cis.org/articles/2000/back400.html (last visited Oct. 21, 2002).

24. *See id.*; *see also* BRUCE GOLDSTEIN, FARMWORKER JUSTICE FUND, INC., THE BASICS ABOUT GUESTWOKRER PROGRAMS (2001), *available at* http://www.fwjustice.organization/talking.htm (last visited Oct. 21, 2002).

25. *See* Martin *supra* note 23 (estimating that 4.9 million illegal immigrants were arrested during the Bracero years).

26. S. 1313, 107th Cong. §§ 101, 302, 218A (2001); H.R. 2736, 107th Cong. §§ 101, 302, 218A (2001). These specific components of the legislation call for i.) an adjustment of status after a certain number of work hours have been completed, ii.) coverage under AWPA, which would allow the workers to organize in labor unions, and iii.) the maintaining of the Adverse Effect Wage Rate (AEWR).

ning with the World War II Bracero accord, and the revamping of the guest worker program under the INA and IRCA. Part IV outlines the current guest worker program as it stands today. Part V addresses the negative effects guest worker programs have on its participants, which include the increase of illegal immigration, the lack of rights guest workers are afforded, and the discrimination surrounding the employer sanctions. Part VI outlines the 2001 introduced legislation, which proposes to amend the H-2A provisions under the INA and advocates for the passage of the democratic legislation. Part VII proposes a blanket amnesty and the passage of the democratic legislation which favors the guest worker. Part VIII concludes the comment with a reiteration of the negativity surrounding the current guest worker program and reasons why guest workers should be afforded more rights.

III. HISTORICAL BACKGROUND

A. *The Inequities Suffered by Los Braceros, 1942-1964*

> "Is this indentured alien-an almost perfect model of the economic man, an 'input factor' stripped of the political and social attributes that liberal democracy likes to ascribe to all human beings ideally-is this bracero program the prototype of the production man of the future?"
>
> —Ernesto Galarza[27]

> "There comes a large cloud of dust
> with no consideration
> Women, children and old men
> are being driven to the Border
> Goodbye beloved countrymen
> we are being deported
> But we are not outlaws
> we come to work."
>
> —"El Deportado," Mexican folk ballad[28]

With the onset of World War II, United States farmers faced an enormous shortage of employees.[29] In an effort to alleviate the problem, the United States government bilaterally agreed with Mexico to procure the

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27. ERNESTO GALARZA, MERCHANTS OF LABOR 16 (1964).

28. JAMES D. COCKCROFT, OUTLAWS IN THE PROMISED LAND: MEXICAN IMMIGRANT WORKERS AND AMERICA'S FUTURE 64 (1986).

29. Bustos v. Mitchell, 481 F.2d 479, 482 (D.C. Cir. 1973); Cockcroft, *supra* note 28, at 67.

urgently needed agricultural work force.[30] Thus, the Labor Importation Program of 1942, better known as the "Bracero Program" was born.[31] Under the program, farm workers were funneled from the impoverished rural communities of Mexico to fields in the United States.[32] In the beginning, approximately 118,000 Mexican farm workers ventured into American fields as a result of the program.[33] The workers were assigned to agricultural states such as California and Michigan.[34] The workers toiled for extremely long hours for low wages.[35]

The Braceros' contracts were often drafted in English.[36] This language barrier prevented the workers from fully understanding the provisions in their contracts, such that taxes were being deducted from their paychecks, or that there was a possibility of negotiations regarding their wages.[37] After the Bracero's contracts and temporary guest worker visas were expired, they were sent back across the border.[38]

Under the Bracero system, workers were subject to the absolute power of their employers.[39] The workers had minimal rights and worked at the whim of their overseers.[40] However, as the number of undocumented Mexican workers grew, it created a large pool of inexpensive agricultural workers, resulting in an unnecessary guest worker program.[41]

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30. *See id. See generally*, GALARZA, *supra* note 27, at 9, 46-57 (1964).

31. TED Case Studies, *Los Braceros 1942-1964: Mexican Labor Importation*, *at* http://www.american.edu/projects/mandala/TED/bracero.htm (last visited Mar. 27, 2003). The term "Bracero" is a Spanish word, literally meaning arm or strong arm. ROBERT B. TAYLOR, A STUDY IN THE ACQUISITION & USE OF POWER, CHAVEZ AND THE FARM WORKERS 67 (1975).

32. Walter Ewing, *A New Bracero Program for the 21st Century*, 19 Wash. Report on the Hemisphere No. 19 (1999), *available at* http://www.crlaf.org/coha1814.htm (last visited Oct. 24, 2002).

33. *See* ROBERT C. JONES, MEXICAN WAR WORKERS IN THE U.S. 24 (1945).

34. BARBARA A. DRISCOLL, THE TRACKS NORTH: THE RAILROAD BRACERO PROGRAM OF WWII 51 (1999).

35. Ewing, *supra* note 32 (stating that farm workers toiled for extremely low wages until their contracts expired).

36. *See id.*

37. Pam Belluck, *Mexican Labors in U.S. During War Sue for Back Pay*, N.Y. TIMES, Apr. 29, 2001, *available at* 2001 WL 20056795.

38. TAYLOR, *supra* note 31; Ewing, *supra* note 32.

39. *See generally* MARIA HERRERA-SOBEK, THE BRACERO EXPERIENCE ELITELORE VERSUS FOLKLORE 39-74 (1979) (discussing the story of Pedro Tarango in the Bracero Program); Ewing, *supra* note 32 (citing the absolute power enjoyed by employers under the Bracero Program).

40. *See generally* HERRERA-SOBEK, *supra* note 39, at 39-74 (discussing the experience of Pedro Tarango in the Bracero Program); Ewing, *supra* note 32.

41. *See* CARLOS E. CORTES, MEXICAN MIGRATION TO THE UNITED STATES 50-51 (1976); *see also* TAYLOR, *supra* note 38, at 106.

In 1960, Edward R. Murrow released his *Harvest of Shame* documentary which candidly and graphically exposed the squalid conditions and abuse surrounding the Bracero Program.[42] Murrow's television documentary, in addition to other economic reasons, triggered an ardent opposition to the Bracero Program by labor unions and civil rights groups during the 1960s.[43] Faced with discontentment, Congress began to reevaluate the Bracero Program.[44] In 1964, during the height of this controversy, Congress allowed the Bracero Program to expire.[45] Overall, an estimated 4.5 million immigrants worked as Braceros during the program's existence.[46] By the end of the 1950s, more than 400,000 workers had migrated to the United States on an annual basis to participate in the Bracero Program.[47]

The inequities faced by the Braceros during the aforementioned program have recently been addressed. Unfortunately, justice has continued to be denied. In September 2001, a class-action lawsuit was filed in California against the governments of the United States and Mexico calling for the reparation of an alleged $500 million plus interest estimated to have been withheld from Mexican immigrants who participated in the Bracero Program.[48] The reparation lawsuit was brought on behalf of approximately 300,000 Mexican laborers [49] Between 1942 and 1949, 10 percent of the Braceros' wages, which included social security money and transferred wages, were deducted from their paychecks.[50] That money was put into personal United States savings accounts.[51] At the end of the labor periods, the money was to have been transferred from the personal

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42. *See* TAYLOR, *supra* note 31, at 106.

43. *See id.*

44. *See* Kimi Jackson, *Farmworkers, Nonimmigrant Policy, Involuntary Servitude, and a Look at the Shepherding Industry*, 76 CHI. KENT. L. REV. 1271, 1276 (2000).

45. *See id.* at 1271–72.

46. Danger, *supra* note 16, at 422.

47. *Id.*

48. Belluck, *supra* note 37; *Former Mexican Guest Workers Regroup in Bid to Claim Unpaid Wages*, DALLAS MORNING NEWS, Sept. 4, 2002, *available at* 2002 WL 26638665; *Suit Seeks Back Pay For Mexican Guest Workers*, HOUSTON CHRON., June 13, 2002, *available at* 2002 WL 3270049.

49. Belluck, *supra* note 37; *Former Mexican Guest Workers Regroup*, *supra* note 48.

50. Belluck, *supra* note 37; Oscar Avila, *Judge Nullifies Mexican Migrant Workers' Suit For WWII Pay*, CHI. TRIB., Aug. 30, 2002, *available at* 2002 WL 26636577; Minerva Canto, *Braceros Suing For Back Pay Win Delay*, ORANGE CO. OBSERVER, Feb. 16, 2002, *available at* 2002 WL 5440366; *Suit Seeking Mexican Worker Back Pay Dismissed*, CHARLOTTE OBSERVER, Aug. 30, 2002, *available at* 2002 WL 26317618.

51. Belluck, *supra* note 37; Canto, *supra* note 50; *Suit Seeks For Back Pay*, *supra* note 48.

United States accounts to accounts in Mexico.[52] Experts assert that many Braceros did not know of their entitlements.[53] Other workers were falsely informed that no such accounts existed, or received empty promises that never materialized.[54]

One such example is Felipe Nava, a 78-year-old man, who came to Syracuse, New York in 1943 to work as a railroad laborer.[55] Mr. Nava said he was never aware that money was being deducted from his paycheck, nor that he was entitled to receive his earnings once he returned to Mexico.[56] "We came to help this country during the Second World War," Mr. Nava said, "This is wrong. Somewhere, somehow they should tell us we were supposed to have money."[57] United States records show that as much as $32 million was withheld, and, unfortunately it is unclear how much was returned.[58] A 1946 record from the Mexican government shows all but $6 million was transferred.[59] Advocates estimate that with interest, the total amount owed could be as much as $500 million.[60]

The Braceros' battle for reparation came to an unfavorable end in August 2002.[61] The United States District Court, Northern District of California, ruled against the Braceros' claims and granted the defendant's motion to dismiss.[62] The defendants included Mexico, two Mexican banks, the United States, and Wells Fargo American Bank.[63] The court concluded that the Mexican banks and Mexico were absolutely immune to suit, that there was no breach of contract or breach of fiduciary duty by Wells Fargo Bank, and that the United States government was protected from suit by the statute of limitations.[64]

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52. *Suit Seeks Back Pay*, *supra* note 48; *Suit Seeking Mexican Worker Back Pay Dismissed*, *supra* note 50.

53. *Former Mexican Workers Regroup*, *supra* note 48 (noting that lawyers representing the Braceros have argued that many of them were illiterate and unable to understand the terms of their contracts and were unaware they were entitled to money).

54. *Suit Seeks Back Pay*, *supra* note 48 (quoting a former Bracero as stating "I went back to Mexico City to the government office to see about my 10 percent. They said, what are you talking about? Get out of here.").

55. Belluck, *supra* note 37.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Avila, *supra* note 50; *Former Mexican Workers Regroup*, *supra* note 48; *Suit Seeks Back Pay*, *supra* note 48.

61. Cruz v. United States, No. C-01-00892 CRB, 2002 WL 2001967, at *16 (N.D. Cal. Aug. 23, 2002).

62. *Cruz*, 2002 WL 2001967, at *16.

63. *Id.* at *2.

64. *Id.*, at *6-9, 16.

B. *The H-2 Guest Worker Program as Introduced Under the Immigration and Nationality Act of 1952*

Aside from the Bracero Program, other guest worker programs have existed in the United States. The major programs were the H-2 programs established under the INA in 1952.[65] The INA delegated to the Attorney General the power to authorize visas for temporary foreign workers, if there were no unemployed persons capable of performing agricultural or non-agricultural jobs in the United States.[66] The process to fill empty jobs with foreign workers under the INA, was called the H-2 program.[67]

Under the INA, the Attorney General required domestic employers to pay temporary foreign workers nothing lower than the hourly Adverse Effect Wage Rate (AEWR).[68] This wage rate approximated the rates that may have existed had there not been an increase in foreign labor supply.[69] Employers were only allowed to hire foreign workers if no domestic workers applied for positions offered at these rates.[70]

C. *The H-2A and H-2B Programs Crystallized Under the Immigration Reform and Control Act of 1986*

After many years of disagreement over the effectiveness and fairness of the Bracero Program and its progeny, Congress passed IRCA in

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65. *See* AFL-CIO v. Brock, 835 F.2d 912, 913 (D.C. Cir. 1987).

66. 8 U.S.C. § 1101 (a)(15)(H)(ii) (1988). The statute authorizes the Attorney General to approve visas to temporary foreign workers, categorized as nonimmigrant aliens under this statute, "if unemployed persons capable of performing such service or labor cannot be found in this country [the United States]." *Id.*

67. *See Brock*, 835 F.2d at 913. After the act was implemented, the Department of Labor adopted their "so-called" H-2 regulations, hence the name. *Id.* The program administered the certification process of foreign workers who applied for employment under the guest worker program. *Id.*

68. 8 C.F.R. § 214.2 (h)(3) (1986). *See also*, *Brock*, 835 F.2d at 913. Congress' mandate that the employment of nonimmigrants participating under the H-2 program not adversely affect the wages and working conditions of United States employees, was done by prohibiting employers from paying foreign employees below an hourly "adverse effect wage rate" (AEWR). *Id.* If no United States workers applied for positions at these rates, employers were then allowed to fill the vacant positions with foreign workers. *Id.* Additionally, if United States workers demanded higher than AEWR wages from H-2 employers, those domestic workers would be considered unavailable for employment and employers could then fill those positions with foreign workers. *Id.* The inference could then be made that much of the legislative history behind the H-2 program concentrated on protecting the United States employer and employee. *Id.*

69. *See Brock*, 835 F.2d at 913.

70. *See id.*

1986.[71] Pressure by powerful lobbyists to restrict immigration led to the passage of IRCA.[72]

Among the provisions of IRCA was a revised H-2 program.[73] The law allowed the temporary admission of foreign workers to perform labor only if a shortage of United States workers existed.[74] Specifically, the law allowed admission of nonimmigrant aliens whom: "having a residence in a foreign country which he has no intention of abandoning. . . is coming temporarily to the United States to perform temporary services of labor, if unemployed persons capable to performing such services or labor cannot be found in the country."[75]

Employers in the agricultural industry as well as employers in the hotel and restaurant businesses commonly used the original H-2 program.[76] The original H-2 program did not statutorily limit the number of workers that could be admitted and thus, approximately 30,000 were admitted each year.[77] The Employment and Training Administration in the Department of Labor and the Immigration and Naturalization Service in the Department of Justice issued detailed regulations that governed the program.[78]

Congress viewed the original H-2 program regulations as not affording enough equal protection to the interests of the agricultural employers and non-agricultural workers.[79] Congress recognized there were unique needs of growers and an inadequacy of current protections for farm

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71. *See* L. Tracy Harris, Note, *Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act*, 72 MINN. L. REV. 900, 909-10 (1988).

72. *See* Lehrfeld, *supra* note 7, at 219–20 (stating that lobbyists such as The Federation of American Immigration Reform worked to limit immigration).

73. Wint v. Yeutter, 902 F.2d 76, 78 (D.C. Cir. 1990). Additionally, "Congress included in IRCA a new Seasonal Agricultural Worker (SAW) program." *Id.* The program gave eligible participants legal authorization to work in the United States and an opportunity to obtain permanent residence. *Id.* To qualify, applicants must have shown that they had been present in the United States and performed "seasonal agricultural services," as defined in the statute, for a minimum of 90 days during the year ending on May 1, 1986. *Id.* The H-2A visa program differed from SAW in that SAW participants were eligible for legal permanent residence status whereas H-2A participants were not; they were allowed to stay legally in the United States as long as they remained employed by the job for which their visas were issued. *Id.* After the time limit on their visas expired, they had to return to the country from where they came with no chance of obtaining permanent status. *Id.*

74. *See* 8 U.S.C. § 1186 (a)(1)(A) (Supp. V. 1987).

75. *See id.*

76. H.R. Rep. No. 99-682, at 80 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5649, 5684.

77. *Id.*

78. *Id.*

79. *Id.*

workers.[80] Therefore, IRCA established a "separate and distinct H-2 program for agriculture, referred to as the H-2A program."[81] The Act "crystallized" the difference between agricultural and non-agricultural laborers by creating the H-2A agricultural program and the H-2B non-agricultural program.[82] The H-2A program established a method for agricultural employers to cope with a shortage of domestic workers by bringing nonimmigrant aliens to the United States to do temporary agricultural work.[83] The purpose of the H-2A program is to balance the following competing interests: "to assure an adequate labor force on the one hand and to protect the jobs of citizens on the other."[84]

The IRCA amendments also imposed civil as well as criminal penalties against United States employers who hire illegal immigrants.[85] Unfortunately, IRCA's penalties proved easy to avoid.[86] Employers would simply use recruiters who would vouch for the documented status of the contracted laborers.[87] A loophole emerged for employers, wherein the contractors would face penalties when the workers were determined to be undocumented.[88] Thus, the employers escaped punishment.[89]

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80. *Id.*

81. *Id.*

82. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) and (b) (1988); Martinez v. Reich, 934 F. Supp. 232, 237 (S.D. Tex. 1996). Prior to IRCA, Congress did not differentiate between non-agricultural and agricultural temporary foreign workers. *Id.* All workers under the program were referred to as "H-2" workers. *Id.*

83. *See* Caraballo v. Reich, 11 F.3d 186, 190 (D.C. Cir. 1993).

84. *See* Rogers v. Larson, 563 F.2d 617, 626 (3d Cir. 1977). Judicial interpretation of the Congressional intent behind the temporary foreign worker programs was articulated by Circuit Judge Maris for the District Court of the Virgin Islands, in 1968, when he stated: "Congressional policy . . . is that American labor be protected and that temporary workers be admitted only when it tends to serve national economy, cultural interests, and welfare of the United States, by facilitating entry for temporary residence of aliens whose specialized experience or exceptional ability would best serve the American needs." *Id.*; *see also*, *Larson*, 563 F. 2d. at 626 n.10.

85. 8 U.S.C. § 1324a(e)(4)(A) (Supp. VI 1986). IRCA imposed civil penalties on employers ranging from $250 to $10,000 for each unlawfully employed undocumented alien. *Id.* 8 U.S.C. § 1324 a(f)(1). Criminal penalties of IRCA included a fine of up to $3000 for each employed undocumented alien and up to six months imprisonment for repeated offenses. *Id.*

86. Lehrfeld, *supra* note 7, at 220. Employers eluded IRCA's penalties by relying on contractors who would recruit Mexican farm laborers. *Id.*

87. *See id.*

88. *Id.*

89. *Id.*

Flaws in the structure of IRCA have resulted in fraud, bias, and a large number of undocumented workers in agriculture.[90] Another IRCA loophole allows employers to claim an affirmative defense to the sanctions, provided they show good faith reliance on the false documentation presented by the worker.[91] As a result, employers encounter no liability for hiring undocumented workers if the documents presented reasonably appear genuine.[92] Though it is not expected for employers to become document experts, the program provides ample opportunity to commit fraud.[93]

IV. The Current H-2A Temporary Agricultural Guest Worker Program as Codified in the Federal Regulations and Governed by the Department of Labor

A. *Who May Apply*

The Department of Labor governs the application process for the authorization and importation of temporary agriculture workers.[94] The Secretary of Labor certifies petitions for H-2A workers and approves petitions based on the statutory standards set out in the INA.[95] The standards include: i) whether there are sufficient able, willing, and qualified United States workers available to perform the temporary and seasonal agricultural services for which an employer desires to import nonimmigrant foreign workers (H-2A workers); and ii) whether the employment of H-2A workers will adversely affect the wages and working conditions of workers in the United States similarly employed.[96] The Secretary of Labor determines whether these standards are met.[97]

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90. *See generally* Hoffman Plastic Compounds, Inc. v. NLRB, 208 F.3d 229, 233 (D.C. Cir. 2000) (discussing a case in which an employer claims to be "innocent" in his employment of an undocumented alien do to contract fraud).

91. Steven Alan Elberg, *Agriculture and the Immigration Reform and Control Act of 1986: Reform or Relapse?*, 3 San Joaquin Agric. L. Rev. 197, 207-08 (1993).

92. *Id.*

93. *Id.*

94. 20 C.F.R. § 655.90 (a) (2002).

95. 20 C.F.R. § 655.90 (b) (2002).

96. 20 C.F.R. § 655.90 (b)(1)(A)-(B) (2002). *See* Elton Orchards, Inc. v. Brennan, 508 F.2d 493, 499-500 (1st Cir. 1974) (interpreting the policy of the immigration statutes to mean that domestic workers, rather than immigrant workers, be given priority when employment decisions are made); Williams v. Usery, 531 F.2d 305, 306 (5th Cir. 1976) (stating that the Secretary of Labor's authority in determining the wage that must be paid to all workers is limited to neutralizing any adverse effect the influx of immigrants would have on the economy).

97. 20 C.F.R. § 655.90 (b)(2) (2002).

Agricultural employers who need workers to carry out services or labor of a seasonal or temporary nature are eligible to apply for the program.[98] The term "employer" includes persons, corporations, firms, and associations of agricultural producers.[99] Applicants must submit two applications: 1) an Application for Alien Employment Certification (Form ETA 750, Part A. Offer of Employment) and 2) an Agricultural and Food Processing Clearance Order (Form ETA 790).[100]

B. *When to Apply*

Applications must be received 45 calendar days before the first date on which the employees are needed.[101] The Regional Administrator (RA) will grant or deny the certification application no later than 20 calendar days before the employment date of need.[102] Applications may be filed in person, may be mailed (certified, return receipt requested), or delivered by guaranteed commercial delivery to the appropriate RA and local office of the State Employment Service.[103]

C. *Notification of Acceptance of Application and Final Determinations*

The RA will promptly notify the applicant in writing whether the application is acceptable as filed, or whether modifications are required.[104] If the RA determines that the application is acceptable, a copy of the notice will also be sent to the related state agency.[105] The pertaining state agency must then immediately begin recruiting United States workers to fill the jobs offered by the applicant.[106] The applicant must also engage in positive recruitment efforts to locate United States workers to fill these jobs.[107]

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98. 20 C.F.R. § 655.101 (a) (2002).

99. 20 C.F.R. § 655.100 (b) (2002).

100. AGRICULTURAL LABOR AFFAIRS, U.S. DEP'T OF AGRICULTURE, TEMPORARY FOREIGN WORKER PROGRAM – SUMMARY: HIGHLIGHTS OF LABOR CERTIFICATION PROCESS FOR THE TEMPORARY EMPLOYMENT OF ALIENS IN AGRICULTURE IN THE U.S. – H-2A PROGRAM (1988), *at* http://www.usda.gov/oce/oce/labor-affairs/h2asumm.htm (last visited January 30, 2003) (providing a practical guide to the H-2A application process, which includes the proper applications interested employers must file with the DOL).

101. 20 C.F.R. § 655.101(c) (2002).

102. *Id.*

103. 20 C.F.R. § 655.101(c)(1) (2002).

104. *Id.*; 20 C.F.R. § 655.104(e) (2002); 20 C.F.R. § 655.105(a) (2002).

105. 20 C.F.R. § 655.105(a).

106. *Id.*

107. *Id.*; 20 C.F.R. § 655.103(d) (2002) (explaining how applicants must independently engage in recruiting efforts of United States workers as well as assist their state agencies by placing newspaper and radio advertisements which describe the related job offers).

After such efforts, and within the 20-day guideline, the RA will approve the application if the employer has complied with the recruitment assurances and adverse effect criteria.[108] The RA shall then grant enough temporary guest workers to fill the job positions needed.[109] In short, the decision to approve the importation of temporary workers will not only be based on the availability of United States workers, but also on whether the employers took gallant measures to recruit United States workers to fill the jobs.[110]

After certification, the recruitment process must continue until the H-2A workers have departed from the place of work.[111] In addition,

> from the time the foreign workers depart for the employer's place of employment, the employer . . . shall provide employment to any qualified, eligible U.S. worker who applies to the employer until 50% of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed.[112]

D. *Conditions to be Followed by the Employers*

1. Food and Housing

Among the mandatory recruitment efforts and the mandatory wage guidelines employers must comply with, certain standards must also be afforded to the imported foreign workers. For example, free and OSHA approved[113] housing must be given to employees if they cannot return to their residences on the days they work.[114] Additionally, employers must either provide three meals a day to each worker, or provide kitchen facilities where the workers can prepare their own meals.[115]

2. Transportation and Supplies

Employers may advance transportation costs for their employees when initially coming to the worksite, if that is the prevailing practice in that area by non H-2A agricultural employers.[116] Alternatively, after fifty percent of the work contract period has been completed, employers must

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108. 20 C.F.R. § 655.106(b)(1) (2002).
109. *Id.*
110. 20 C.F.R. § 655.105(d) (2002).
111. *See id.*
112. 20 C.F.R. § 655.103(e) (2002).
113. 20 C.F.R. § 655.102(b)(1)(i) (2002).
114. 20 C.F.R. § 655.102(b)(1) (2002).
115. *See* 20 C.F.R. § 655.102(b)(4) (2002) (explaining that if employers provide meals for their workers, they shall set a charge for the meal no more than $5.26 per day, unless the RA has approved for more).
116. 20 C.F.R. § 655.102(b)(5)(i) (2002).

reimburse their workers the cost of transportation that they incurred coming to the worksite.[117] The employer must also provide adequate transportation.[118] Such transportation provisions must be in accordance with applicable laws and regulations.[119]

3. Workers' Compensation and Contract Guarantees

Employers must provide free insurance to their employees which covers injury or disease arising from employment in accordance with state workers' compensation laws.[120] Further, employers must guarantee each worker employment for at least three-fourths of the workdays during the agreed work period outlined in their work contract.[121] Employers must provide each worker a copy of their work contracts[122] and a statement of work hours completed and their related earnings for the day.[123] Employees must be paid at least on a bi-monthly period.[124]

V. WHY THE CURRENT H-2A TEMPORARY AGRICULTURAL GUEST WORKER PROGRAM IS INEFFECTIVE AND UNJUST

A. *Guest Worker Programs Fail to Reduce Illegal Migration*

The current H-2A guest worker program was solidified under IRCA in 1986. One of the major policies behind developing new immigration programs and guidelines under IRCA was to curtail illegal immigration.[125] However, IRCA was unsuccessful in meeting its goal.[126] In 1990, there were between three million and four million undocumented immigrants in the United States.[127] By 1995, the number of undocumented aliens in the United States was comparable to the pre-IRCA number, illustrating the nonexistent effect on the influx of illegal aliens.[128]

In response to the failed efforts of IRCA to reduce illegal immigration, the Immigration and Naturalization Services (INS) developed new tactics

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117. *Id.*
118. 20 C.F.R. § 655.102(b)(5)(iii) (2002).
119. *Id.*
120. 20 C.F.R. § 655.102(b)(2) (2002).
121. 20 C.F.R. § 655.102(b)(6) (2002).
122. 20 C.F.R. § 655.102(14) (2002).
123. 20 C.F.R. § 655.102(8) (2002).
124. 20 C.F.R. § 655.102(10) (2002) (stating that an alternative to the bi-monthly pay requirement is adopting a local customary pay period).
125. Evangeline G. Abriel, *Ending the Welcome: Changes in the United States' Treatment of Undocumented Aliens (1986 to 1996)*, 1 RUTGERS RACE & L. REV. 1, 11 (1998).
126. *Id.* (discussing the data derived from the House Committee on the Judiciary).
127. *Id.*
128. *Id.*

to tighten entry and decrease the inflow of undocumented aliens.[129] In August 1994, a national deterrence plan[130] called for the building of tall walls along the 2,000-mile border separating the United States and Mexico, as well as an increase of 800 armed agents guarding the posts, and a budget increase of 148 percent.[131] However, tightened entries of the safer routes have forced the undocumented immigrants to choose more formidable entrance routes like "Devil's Path" in the Arizona desert.[132]

Since the INS issued the new policy, immigrant deaths have risen, including 367 deaths in 2000, mainly due to heat exhaustion and exposure.[133] In addition to the sun and dehydration, undocumented immigrants attempting to cross into the United States have also faced violence from private landowners.[134] In the last three years there have been six reported cases of undocumented immigrants shot while crossing through private land, each victim shot in the back.[135] The shootings have left two dead and one permanently paralyzed.[136] No convictions of murder have been handed down and only one of the assailants has been imprisoned.[137]

B. *Guest Workers are not Afforded Complete Rights in the United States*

Other problems that have risen under the H-2A program stem from the minimal protections and the limited benefits temporary visas afford foreign workers.[138] For example, farmers are required to provide foreign workers with housing and pay for transportation to their job sites.[139] In addition, farmers are required to pay their employees the higher rate from a group of prevailing average wage rates paid for a similar job.[140]

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129. *See* Dane Schiller, *Tighter Grip on Frontier: Border Patrol's Strategy Forces Illegal Crossings Away From Urban Areas*, S.A. EXPRESS NEWS, Sept. 2, 2001, at 1A, *available at* 2001 WL 26837951.

130. Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L & POL'Y 121, 127 (2001). The deterrence plan included the use of lighting and motion sensors and metal fences to keep undocumented aliens from crossing the border. *Id.*

131. *See* Schiller, *supra* note 129.

132. *See id.*

133. See *id.*

134. *See* Lisa Sandberg, *Shootings Inflaming Tensions Along Border*, S.A. EXPRESS NEWS, May 28, 2000, at 1A, *available at* 2000 WL 27524130.

135. *See* Pamela Colloff, *The Battle for the Border*, TEXAS MONTHLY, Apr. 2001, at 98.

136. *See id.*

137. *See id.* (noting that a former DEA agent pled guilty to aggravated assault and deadly conduct and received a fifteen-year prison sentence).

138. *See* Farmer v. Employment Sec. Com'n of N.C., 4 F.3d 1274, 1276 (4th Cir. 1993).

139. 20 C.F.R. § 655.102(1) (2002); 20 C.F.R. § 655.102(5)(iii) (2002).

140. *Farmer*, 4 F.3d at 1276.

However, housing need only be provided when that is the prevailing practice in the area.[141] In North Carolina housing only needs to be offered to the workers, not their families.[142] Therefore, temporary workers are exploited more than those who come illegally because temporary workers are bound by the H-2A visa program.[143]

Additionally, temporary foreign workers are unable to switch jobs and are bound to the contractors who hired them.[144] Contracts are usually not available to the workers until they arrive in the states in which they are employed.[145] Unfortunately, many of these foreign workers give up considerable control of their lives.[146] Unlike migrant workers, H-2A workers do not have the right to choose their employer or negotiate wages and hours.[147]

In 1983, Congress recognized that migrant farm workers needed "whistle blowing" protection.[148] Consequently, AWPA[149] was enacted. The Act afforded migrant farm workers protection when they were retaliated against for complaining about substandard conditions.[150] However, under AWPA, H-2A workers are excluded, and thus they lack even this basic protection.[151]

A new guest worker program would have to call for organized housing and transportation provisions, as well as the freedom to contract with alternate employers. Such rights, though, have been exceptionally slow in coming to temporary foreign workers.

C. *Employer Sanctions Cause Discrimination*

Another provision under the current guest worker program requires employers to verify workers' employment eligibility, and imposes strict

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141. *Id.*

142. *Id.* at 1282 (acknowledging that family housing is not the prevailing practice in North Carolina).

143. *New York's Harvest of Shame/First of a Two-Part Series on the Plight of Farm Workers*, N.Y. DAILY NEWS, Aug. 1, 1999, *available at* 1999 WL 17239765.

144. Id.

145. Leah Beth Ward, *Desperate Harvest: N.C. Grower's Trade in Foreign Farm Workers Draws Scrutiny*, CHARLOTTE OBSERVER, Oct. 30, 1999, *available at* http://are.berkeley.edu/APMP/pubs/agworkvisa/desperate103099.html (last visited Jan. 14, 2003) (stating that mistreated workers are likely to remain silent rather than be put on an employer's blacklist).

146. *See id.*

147. *Id.*

148. 29 U.S.C. § 1855(a) (2000).

149. Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, 96 Stat. 2584 (1983) (codified as amended at 29 U.S.C. §§ 1801 to 1872 (2000)).

150. 29 U.S.C. § 1855(b) (2000).

151. 29 U.S.C. § 1802(10)(B)(iii) (2000).

civil[152] and criminal penalties against employers who violate this provision by knowingly hiring unauthorized workers.[153] Under IRCA, the General Accounting Office (GAO) must issue three annual reports to Congress evaluating the employer sanctions provision.[154] The annual reports determine whether the sanctions create unnecessary burdens on employers, whether these sanctions are being carried out satisfactorily, and if the sanctions result in a pattern of discrimination against eligible workers.[155] If the GAO reports widespread patterns of discrimination "against eligible workers seeking employment solely from the implementation of that section," IRCA provides an option for Congress that would allow for the repealing of sanctions and anti-discrimination parts of the law.[156] While IRCA does not define the terminology "widespread pattern of discrimination," the legislative history indicates that it was intended to mean "a serious pattern of discrimination," and not "just a few isolated cases of discrimination."[157]

In their third report to Congress, the GAO surveyed over 9,400 domestic employers, which is representative of a total of approximately 4.6 million employers within the United States.[158] The GAO estimated that 227,000 employers did not hire applicants with foreign appearances or accents due to suspicion that the applicant might be an unauthorized alien.[159] Also, an estimated 346,000 employers reported a practice by which they only applied IRCA's verification system to applicants who had a "foreign" accent or appearance.[160] Additionally, the GAO estimated that 430,000 employers began hiring only people who were born in the United States or not hiring applicants with temporary work eligibility documents because of IRCA.[161]

Though the GAO report clearly indicated discrimination resulted from the employer sanctioning sections of IRCA, Congress refused to repeal

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152. 8 U.S.C. § 1324a(e)(4)(A) (2002). IRCA imposes civil fines ranging from $250 to $10,000 for each alien employed illegally. *Id.*

153. 8 U.S.C. § 1324a(f)(1) (2002). Criminal penalties of IRCA include a fine of up to $3000 for each employed illegal alien and up to six months imprisonment for repeated offenses. *Id.*

154. Letter from Charles A. Bowsher, Comptroller General of the United States, to the President of the Senate and the Speaker of the House of Representatives (Mar. 29, 1990) (on file with the United States General Accounting Office).

155. *Id.*

156. *Id.*

157. *See* GENERAL ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 2 (1990).

158. *See id.* at 3.

159. *See id.* at 6.

160. *See id.*

161. *See id.* at 7.

the legislation, finding the results unpersuasive enough to revamp the existing law.

D. *The Exploitation of the Guest Worker by the American Employer*

Domestic labor organizations assert that, under the H-2A program, growers prefer to hire temporary foreign laborers over domestic farm workers, which effectively takes jobs away from United States citizens.[162] One reason foreign farm workers are preferred is that they normally travel without their families, and can therefore be easily housed.[163] Additionally, foreign workers are often in extreme economic need, which allows employers to manipulate wage rates.[164] As a result, employers are able to take advantage of vulnerable temporary workers.[165]

For example, in *Marquis v. United States Sugar Corp.*,[166] domestic farm workers were hired for field positions.[167] However, those positions were allegedly going to be discharged and given to foreign workers.[168] The domestic workers asserted that they were fired without cause, and that employers maintained a blacklist among the industry of domestic workers who had not completed a prior work contract.[169]

Also, in *Montelongo v. Meese*,[170] cantaloupe, onion, and pepper growers were forced to recruit domestic farm workers when the INS tightened entry on the border.[171] Prior to this, the growers had relied heavily on foreign farm workers.[172] In early June, the growers spoke with domestic crew leaders and offered them and their farm workers jobs by mid-

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162. Andrew W. Baker, *Immigration Reform – Provisions in the Proposed Immigration Reform and Control Act of 1985 Permitting the Use of Temporary Foreign Workers in the United States – Importing Labor from Mexico*, 15 GA. J. INT'L & COMP. L. 671, 678-79 (1995).

163. *See* Danger, *supra* note 16, at 430.

164. *See id.*

165. *See* U.S. v. Booker, 655 F.2d 562, 563-64 (4th Cir. 1981) (noting a case in which a camp owner kept foreign farm workers captive and repeatedly threatened and beat the guest workers). *See generally Six (6) Mexican Workers v. Arizona Citrus Growers*, No. Civ. 77-329 PHX CAM (D. Ariz, 1985) (showing extreme grower abuse among the foreign farm workers, in which no housing was provided, the workers slept in the fields, and were given water from irrigation ditches).

166. 652 F. Supp. 598 (S.D. Fla. 1987).

167. *Marquis v. United States Sugar Corp.*, 652 F. Supp. 598, 599-600 (S.D. Fla. 1987); Coleman, *supra* note 21.

168. *Marquis,* 652 F. Supp at 599-600; Coleman, *supra* note 21.

169. *Marquis,* 652 F. Supp at 599-600; Coleman, *supra* note 21.

170. 803 F.2d 1341 (5th Cir. 1986).

171. *Montelongo v. Meese*, 803 F.2d 1341, 1345 (5th Cir. 1986); Coleman, *supra* note 21.

172. *Montelongo,* 803 F.2d 1345; Coleman, *supra* note 21.

June.[173] But by June the growers were certified to receive temporary foreign guest workers.[174] The deal between the growers and the domestic laborers was called off when the domestic crew leaders returned for instructions, and domestic farm workers who had relied on the jobs were left unemployed.[175] These cases indicate there are some instances foreign workers are preferred over domestic workers because of the employers position to exploit the conditions of the guest worker program.

From 1995 to 1996 the Department of Labor conducted a study in an attempt to determine whether United States employers were filling jobs with domestic employees before recruiting temporary foreign workers.[176] The report found that only 18,000 H-2A crop workers were certified to work in the United States during 1996, while 600,000 workers were illegal immigrants.[177] The conclusion of the report was that the H-2A program's hiring process was ineffective, and characterized as having extensive administrative requirements that often seemed counterproductive to the Department of Labor's mandate to protect American worker's jobs.[178]

Temporary work programs should be established to bring workers to the United States in an effort to fill vacated jobs, and compensates those who are currently working and adding to the United States economy. They should not exploit these workers, and in the process take jobs from domestic workers and thus become a determent to wages and the economy.

In its 1997 report, the GAO made recommendations to Congress, the Attorney General, and the Secretary of Labor on how to improve the H-2A programs.[179] The report illustrated how the program could balance the needs of agricultural employers while protecting the wages and working conditions of farm workers.

By examining the faults of the H-2A program, the GAO report concluded that "[a] sudden widespread farm labor shortage requiring the importation of large numbers of foreign workers is unlikely to occur in the near future."[180] Also, the GAO determined that farmers who have sought

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173. *Montelongo,* 803 F.2d 1345; Coleman, *supra* note 21.

174. *Montelongo,* 803 F.2d 1345; Coleman, *supra* note 21.

175. *Montelongo,* 803 F.2d 1345; Coleman, *supra* note 21.

176. Danger, *supra* note 16, at 430.

177. *Id.*

178. *Id.*

179. HEALTH, EDUC., AND HUMAN SERVICES DIV., U.S. GEN. ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKER PROGRAM – CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS (1997), *available at* 1997 WL 835214, at *10 [hereinafter AGRICULTURAL GUEST WORKER PROGRAM]. See also Danger, *supra* note 16, at 435.

180. Danger, *supra* note 16, at 428.

workers using the H-2A program have obtained foreign agricultural workers both regularly and in an emergency basis.[181] However, the report also found that the Department of Labor has problems processing applications on time, thus making it difficult for employers to ensure that workers will be placed where needed.[182]

Employers who use the H-2A program must apply 45 calendar days before the first date on which the employees are needed.[183] The RA will grant or deny the certification application no later than 20 calendar days before the employment date of need.[184] However, farmers claim that the weather and other factors make it impossible to hypothesize when workers will be needed.[185] The farmers assert that such conditions make it difficult to estimate in advance when workers will be needed, especially for crops with short harvest periods.[186]

Furthermore, the study found that the Department of Labor does not keep adequate data to determine the cause of its failure to meet regulatory and statutory deadlines for both emergency and regular applications.[187] The GAO also found that the Department of Labor's handbook on the H-2A worker protection provisions was confusing, outdated, and incomplete.[188] Additionally, foreign guest workers are unlikely to complain about worker protection violations, such as the three-quarter guarantee.[189] The GAO asserts that guest workers are fearful that complaining about working conditions will result in their termination or deter employers from rehiring them in the future.[190]

VI. The Prospectus of the Proposed Amendments to the Guest Worker Program

"We look at workers as workers, not at their nationalities."

—Cesar Chavez, United Farm Workers leader[191]

Since 1995, legislators with close ties to agricultural employers have repeatedly introduced bills creating a new agricultural guest worker pro-

181. *Id.*
182. *Id.*
183. 20 C.F.R. § 655.101(c) (2002).
184. *Id.*
185. Danger, *supra* note 16, at 428-29.
186. *Id.* at 429.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. Cockcroft, *supra* note 28, at 175.

gram or attempting to substantially revise the current H-2 programs.[192] In 2000, negotiations developed among the National Council of Agricultural Employers (NCAE), the United Farm Workers (UFW), and members of Congress, to develop a compromise that would protect both employer and employee.[193] However, its passage failed in the last moments of the 106th Congress.[194]

One year later in 2001, both the Republican and the Democratic parties introduced bills with guest worker provisions.[195] The proposed Democratic bills afford more rights to the workers and have been advocated by organizations such as the Farmworker Justice Fund, and the California Rural Legal Assistance.[196]

Additionally, the proposed legislation would end the exemption of H-2A workers from coverage under the Migrant and Seasonal Agricultural Protection Act (AWPA), which would be the biggest victory for the guest worker.[197] Under the bills, the H-2A workers would finally be protected under a federal act concerning their pay, working conditions, and work-related conditions, and most importantly, the AWPA would give H-2A workers a private right of action in United States district courts.[198]

Contrarily, bills introduced by Republicans Senator Larry Craig and Representative Chris Cannon emphasize provisions that protect the United States employer rather than the worker.[199] The Republican bills focus on an effort to transform the agricultural labor force into a market of guest workers.[200] Sen. Craig's bill would lower wages at H2-A employ-

192. *See* Goldstein, *supra* note 24. Congress has been wary to adopt the proposals in fear that they would transform the agricultural labor market into a compilation of vulnerable guest workers and undocumented participants, rather than a market of legal immigrants and citizens. In addition, the bills previously proposed were viewed with suspicion particularly as they might eliminate or substantially weaken the laws, which protect the wages and working conditions at employers that hire guest workers. *Id.*

193. *See* Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT'L L. & COM. REG. 521, 535 (2002).

194. *See id.* (noting that the deal was killed by Senator Phil Gramm of Texas, who was ardently opposed to any farm worker-earned legalization program).

195. *See* Letter from Bruce Goldstein, Director of Farm Worker Justice Fund, to the 107th Congress (July 2, 1999) (on file with the California Rural Legal Assistance), *available at* http://www. fwjustice.org/summary_s1313.htm (last visited Mar. 27, 2003).

196. *See id.*

197. See S. 1313, 107th Cong. (2001). The counterpart bill has been proposed by Representative Howard Berman. H.R. 2736, 107th Cong. (2001).

198. 29 U.S.C. § 1854 (a) (2000).

199. *See* S. 1161, 107th Cong. (2001); H.R. 2457, 107th Cong. (2001); *see also* Letter from Bruce Goldstein, Director of Farm Worker Justice Fund to the 107th Congress, *supra* note 195.

200. *See* S. 1161; H.R. 2457. *See also* Letter from Bruce Goldstein, Director of Farm Worker Justice Fund to the 107th Congress, *supra* note 195.

ers, and substantially weaken or remove labor protections.[201] Rep. Cannon's bill would eliminate the Adverse Effect Wage Rate (AEWR), which is intended to stifle an employer's ability to depress the wage rate.[202] The bill also has various loophole provisions that would enable many employers to escape paying the new lower minimum wage.[203]

After evaluating the four bills members of Congress have introduced it is clear that revisions made by the Democratic Party will be the most fair and just legislation.

VII. Proposal: A Combination of a Blanket Amnesty and a Revised H-2 Program as Outlined in Senator Kennedy's and Representative Berman's bills will be Just and Compensating to the Migrant Worker

In 1986, during the debates and discussions of the amnesty provisions of IRCA, the Congress recognized that the United States had a large undocumented alien population living and working within its borders.[204] But because of their undocumented status the foreign workers were not afforded just and fair rights.[205] The foreign workers, ". . .live[d] in fear, afraid to seek help when their rights were violated, when they [were] victimized by criminals, employers or landlords or when they [became] ill."[206]

Congress urged that ignoring the situation would be detrimental to the United States and the aliens themselves.[207] They felt that alternatives to solving the problem, such as intensifying interior enforcement or attempting a mass deportation of the illegal immigrants would be "costly, ineffective, and inconsistent with our immigrant heritage."[208]

The Committee therefore enacted an amnesty provision of IRCA, which gave permanent residency status to illegal aliens that met certain

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201. *See* S. 1161; H.R. 2457. *See also* Letter from Bruce Goldstein, Director of Farm worker Justice Fund to the 107th Congress, *supra* note 195.

202. *See* S. 1161; H.R. 2457. *See also* Letter from Bruce Goldstein, Director of Farm worker Justice Fund to the 107th Congress, *supra* note 195.

203. *See* S. 1161; H.R. 2457. *See also* Letter from Bruce Goldstein, Director of Farm worker Justice Fund to the 107th Congress, *supra* note 195.

204. H.R. Rep. No. 99-682, at 49 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5653.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

criteria.[209] The provisions granted legalization status to aliens who had been unlawfully present in the United States since January 1982.[210]

The 1986 amnesty program for farm workers resulted in the compensation of a sizable workforce and eliminated the threat of deportation.[211] "The drafters of IRCA were concerned with the workers historical vulnerability to exploitation and deprivation of legal rights, thus this transition to legal status was an attempt to remedy these hardships."[212]

The amnesty provision recognized that it was the past failures of enforcing immigration laws that allowed illegal immigrants to settle in the United States.[213] The amnesty program also sought to enable the INS to target its enforcement efforts on the new inflow of illegal aliens.[214]

During its implementation, many unions became involved in assisting amnesty-eligible workers with their legalization applications.[215] Several individual labor unions, in areas such as Los Angeles and Houston, set up education and training sessions for members.[216] The union also helped find legal assistance for members who needed assistance.[217]

A similar program would currently be beneficial to the United States government and to current undocumented immigrants who contribute to the workforce. Opponents suggest that the United States has relied haphazardly on amnesty rather than directed labor immigration policies.[218] However, because the influx of immigrants is again at an all time high, and the current labor policies have become ineffective, a combination of amnesty and a revised legislation, such as the one proposed by Senator Kennedy and Representative Berman would best compensate immigrants.

VIII. CONCLUSION

The truest act of courage
The strongest act of manliness
Is to sacrifice ourselves

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209. *See* William M. Ross, *The Road to H-2A and Beyond: An Analysis of Migrant Worker Legislation in Agribusiness*, 5 DRAKE J. AGRIC. L. 267, 275 (2000).

210. *See id.*

211. *See id.*

212. *See id.*

213. H.R. REP. NO. 99-682, at 49 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5653.

214. *Id.*

215. *See* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1039 (1988).

216. *See id.*

217. *See id.*

218. *See* ARTHUR B. MURPHY ET AL., LATINO WORKERS IN THE CONTEMPORARY SOUTH 31 (1999).

In a totally nonviolent struggle
For justice
To be man is to suffer
For others.
God help us be men.

—Cesar Chavez, March 1968[219]

Temporary agricultural workers are often placed at the mercy of their employers, including abusive situations from which escape is difficult.[220] Unfortunately, many farm workers ultimately enter the employment relationship in a condition of dependency on their employers.[221]

Guest worker programs, by their very nature, have subjected foreign agricultural workers and their domestic counterparts to poor wages and working conditions.[222] Unfortunately, the H-2A program is responsible for the inequities which lead employers to prefer immigrant agricultural workers.[223]

A revised guest worker program as introduced by Sen. Kennedy and Rep. Berman accompanied by an amnesty provision will justly compensate those foreign workers who continue to add to the United States economy. The current guest worker program does not fulfill the goal of bringing in needed workers without adding to the population.[224] Instead it creates unfair wages for hardworking contributing laborers, while subjecting them to discrimination by their employers.[225] The guest workers are isolated from others in secluded societies and are cruelly stigmatized.[226] They are denied several of the basic rights other employees are afforded in the United States.[227] They cannot compete economically for the best available jobs, and they are stifled from asking for better wages.[228] The guest worker in essence becomes an indentured servant.[229]

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219. TAYLOR, *supra* note 31, at i.

220. *See* U.S. v. Booker, 655 F.2d 562, 563-64 (4th Cir. 1981) (noting a case in which a camp laborer operator was convicted for creating a working condition which paralleled slavery).

221. Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to be Excluded from the National Labor Relations Act?,* 48 EMORY L.J. 489, 503 (1999).

222. GOLDSTEIN, *supra* note 24.

223. *See* Baker, *supra* note 162, at 678-79.

224. *See* GOLDSTEIN, *supra* note 24.

225. *See id.*

226. *See id.*

227. *See id.*

228. *See id.*

The United States government has refused to fully acknowledge the significance of the immigrant laborers to the domestic economy.[230] The immigrant laborers do the unpleasant but necessary jobs that most United States workers shun.[231] They build United States buildings, bus United States tables, mind United States children, and wash dirty United States dishes and clothes.[232] Without the immigrant laborers, a significant number of these jobs would go unfilled.[233] The human beings who contribute to this country should be given respect and dignity as employees of the United States. Therefore, a revision of the current guest worker programs, which affords generous rights to temporary laborers and an amnesty provision given to those workers who are currently working in the United States will be the most effective and just long-term solution to the illegal immigration controversy.

229. *See* Pia Orrenius, *Guest Worker Plan a Middle Course*, DALLAS MORNING NEWS, Feb. 25, 2001, *available at* http://www.senate.gov/~gramm/pross/guestworkerdmn2.html (on file with The Scholar: St. Mary's Law Review on Minority Issues).

230. *Warming to the Idea: Guest Worker Program*, AUSTIN AMERICAN STATESMEN, Jan. 28, 2001, *available at* http://www.senate.gov/~gramm/press/guestworkerads.html (on file with The Scholar: St. Mary's Law Review on Minority Issues).

231. *Id.*

232. *Id.*

233. *Id.*