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## OVERVIEW: THE H-2 PROGRAM

### Aliens in the Orchard: The Admission of Foreign Contract Laborers for Temporary Work in U.S. Agriculture

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An employer may lawfully bring unskilled aliens to the United States for temporary labor only pursuant to §§ 101(a)(15)(H)(ii) and 214<sup>1</sup> of the Immigration and Nationality Act.<sup>2</sup> Approximately 30,000 aliens are admitted under these provisions each year<sup>3</sup> to fill a wide variety of temporary jobs.<sup>4</sup> This foreign labor program (commonly referred to as the "H-2 program") has a major impact in certain agricultural markets. Farm laborers constitute by far the largest single group of H-2 workers, recently amounting to over thirty-five percent of all admissions.<sup>5</sup> More-

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1. Codified at 8 U.S.C. §§ 1101(a)(15)(H)(ii) and 1184 (1976).

2. Pub. L. No. 82-414, 66 Stat. 163 (1952) (McCarran-Walters Act), as amended, 8 U.S.C. §§ 1101-1557 (1976 & Supp. IV 1980).

3. Annual H-2 admissions averaged 31,742 for the period 1974 through 1978, the five most recent years for which final INS figures are available. The yearly H-2 admissions were: 40,883 (1974); 37,460 (1975); 29,778 (1976); 27,760 (1977); and 22,832 (1978). ANNUAL REPORTS OF THE INS, 1974-1977, Table 16B; STATISTICAL YEARBOOK OF THE INS 1978, Table 16B. The INS estimates that 30,000 H-2's were admitted in 1980. *The H-2 Program and Nonimmigrants: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 12 (1981) (statement of Alan Nelson, Deputy Commissioner, INS).

4. The H-2 program is not limited by industry or type of employment. H-2 workers are admitted individually or in small groups for temporary work in many professional, managerial, clerical, service and labor categories, *e.g.*, as accountants, mechanics, musicians, construction laborers and professional athletes. *See, e.g.*, STATISTICAL YEARBOOK OF THE INS 1978, TABLE 16B.

5. ANNUAL REPORTS OF THE INS, 1976 AND 1977, TABLE 16B; STATISTICAL YEARBOOK OF THE INS 1978, TABLE 16B. If admissions for Guam and the Virgin Islands are excluded, farm laborers constitute 45-55% of all H-2 admissions. ANNUAL REPORTS OF THE INS, 1976 AND 1977, TABLE 16B AND 18.

over, only in agriculture are contract workers admitted *en masse* to form the dominant local workforce.

The H-2 program is currently the subject of intense controversy among those concerned with agricultural, labor, and immigration policies. The routine admission of West Indian laborers has virtually closed certain farm jobs in the Northeast and in Florida to U.S. workers. Further, the H-2 program has recently expanded into new crops and locations, dramatically increasing the importation of Mexican contract workers. The H-2 program has also emerged as a crucial element in the ongoing Congressional effort to stem illegal immigration. The comprehensive immigration bill now before Congress, the Immigration Reform and Control Act of 1983<sup>6</sup>, would amend the H-2 provisions to allow greater access to temporary foreign workers, particularly for farm jobs in the Southwest.

This article examines the operation of the H-2 program in agriculture. Parts I through III discuss the statutory framework, the certification system, and the current level of H-2 admissions. Part IV evaluates the efforts of the Department of Labor (DOL), the Immigration and Naturalization Service (INS), and the federal judiciary to protect U.S. farmworkers. The final section discusses whether the H-2 program is needed, recommends revisions, and analyzes the amendments proposed in the Immigration Reform and Control Act.

## I. The Statutory Framework

An alien<sup>7</sup> is eligible for admission under § 101(a)(15)(H)(ii) if he or she is "coming temporarily to the United States to perform temporary services or labor" and "unemployed persons capable of performing such service or labor cannot be found in this country."<sup>8</sup> Section 214 gives the Attorney General final authority to determine whether any such alien

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6. S. 529, 98th Cong., 1st Sess. § 211 (1983); H.R. 1510, 98th Cong., 1st Sess. § 211 (1983).

7. An "alien" is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (1976). U.S. immigration law distinguishes between aliens seeking permanent admission ("immigrants") and those seeking to remain in the U.S. only temporarily ("nonimmigrants"). Aliens are deemed immigrants unless they fall within one of the nonimmigrant classes listed in subsections A through M of 8 U.S.C. § 1101(a)(15). 8 U.S.C. § 1184(b) (1976). See 1 C. GORDON AND H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 2.5b (rev. ed. 1981).

Most aliens seeking permanent admission to the United States fall within numerical restrictions ("quotas"). 8 U.S.C. § 1151(a) (Supp. IV 1980). There are no numerical restrictions on the admission of nonimmigrants.

8. 8 U.S.C. § 1101(a)(15)(H)(ii) (1976). To be eligible for admission under any subsection of § 101(a)(15)(H) an applicant must be "an alien having a residence in a foreign country which he has no intention of abandoning." 8 U.S.C. § 1101(a)(15)(H) (1976 & Supp. IV 1980).

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shall be admitted.<sup>9</sup> These two provisions constitute the complete statutory authority supporting the temporary<sup>10</sup> admission of unskilled laborers for employment.<sup>11</sup> Because this language is so succinct, the Congressional intent must be drawn from the experience with contract labor programs prior to 1952, the legislative history of the H-2 provisions, and the unsuccessful effort to amend these provisions in 1965.

### A. *Contract Labor Prior to 1952*

U.S. immigration law expressly barred unskilled contract workers prior to 1952.<sup>12</sup> This ban was consistently enforced for most non-agri-

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9. (a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe . . .

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(c) The question of importing an alien as a nonimmigrant under [Section 101(a)(15)(H) or (L)] . . . shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

8 U.S.C. § 1184(a) and (c) (1976).

10. Aliens may be admitted under the H-2 provisions only temporarily, and only for jobs which are temporary. *Matter of Contopoulos*, 10 I. & N. Dec. 654 (1964); 1 C. GORDON AND H. ROSENFELD, *supra* note 7, at § 2.14a.

Permanent admission for the purpose of performing skilled or unskilled labor is governed by the "permanent labor certification" requirement, which is distinct from the H-2 program in terms of statutory language, decision-making authority, and governing regulations. *See* 8 U.S.C. § 1182(a)(14); 20 C.F.R. Part 656 (1982). *See also* Rodino, *The Impact of Immigration on the American Labor Market*, 27 RUTGERS L. REV. 245 (1974); Singhal, *Labor Certification Under Revised Regulations*, 51 S. CAL. L. REV. 823 (1978). Permanent labor certification has not been of particular significance in agricultural employment and is mentioned only incidentally in this article, for the purpose of comparison.

11. Aliens may be admitted for the purpose of temporary employment under other non-immigrant classifications, but only for positions requiring specialized education, skill, or achievement, or positions related to international travel or diplomacy. 8 U.S.C. § 1101(a)(15) (1976 & Supp. 1980). Nonimmigrants may sometimes work in the United States after being admitted for another purpose, *e.g.*, students, exchange visitors, and fiancées of U.S. citizens. 1 C. GORDON AND H. ROSENFELD, *supra* note 7, at § 2.6b. However, the H-2 provisions provide the only nonimmigrant classification open to aliens seeking temporary admission primarily for the purpose of performing unskilled labor. In this article the terms "laborers" and "workers" refer to persons performing this type of work.

12. The Contract Labor Act of 1885, one of the first federal efforts at regulating immigration, made it unlawful to bring aliens to the United States for unskilled employment. Ch. 164, 23 Stat. 332 (1885). This provision was intended to "exclude aliens who would be in competition with laborers already in the country." S. REP. NO. 1515, 81st Cong., 2nd Sess. 359 (1950). In contrast to many of the early "qualitative" restrictions on immigration, the contract labor provision "appears to have been enacted without ethnocentric overtones." D. NORTH & A. LEBEL, *MANPOWER AND IMMIGRATION POLICIES IN THE UNITED STATES* 25 (National Commission for Manpower Policy, Special Report No. 20, February, 1978).

The contract labor ban was strengthened in subsequent legislation, culminating in the Immigration Act of 1917. Pub. L. No. 301, 39 Stat. 874 (1917). Section 3 of the 1917 Act denied admission to all "persons . . . induced, assisted, encouraged, or solicited to migrate to this

cultural employment. Farm employers, however, were permitted to recruit foreign contract workers in large numbers during World Wars I and II and throughout the post-war period.<sup>13</sup> Farm labor was thus treated wholly apart from overall immigration policy.

By 1950 two factors were creating pressure for revision of this two-tiered approach to contract labor. First, there was widespread dissatisfaction with the post-war Mexican labor program. After the World War II program ended in 1947, foreign recruitment became a private matter between the grower and the sending country.<sup>14</sup> This satisfied neither the employers, who found it costly,<sup>15</sup> nor the Mexican government, which criticized the absence of employee safeguards. Further, labor representatives believed that the peacetime use of foreign workers was displacing U.S. migrants and depressing farm working conditions.<sup>16</sup> After a Presidential commission confirmed many of these complaints,<sup>17</sup> there

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country by offers of employment . . . or in consequence of agreements . . . to perform labor." 39 Stat. at 876.

13. More than 80,000 agricultural workers from Mexico, Canada, and the Bahamas were admitted during and immediately following World War I. CONG. RESEARCH SERV., LIBRARY OF CONGRESS, 96th Cong., 2nd Sess., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES 6-8 (Senate Judiciary Comm. Print 1980) [hereinafter cited as TEMPORARY WORKER PROGRAMS].

The contract labor ban was waived again from 1942 through 1947 in connection with World War II. An average of 61,000 farmworkers were admitted annually (1943 through 1947) from Mexico, Jamaica, the Bahamas, Canada, Newfoundland, Barbados, and British West Honduras. W. RASMUSSEN, A HISTORY OF THE EMERGENCY FARM LABOR SUPPLY PROGRAM, 1943-1947, 199 (U.S. Dept. of Agriculture Monograph No. 13, Sept. 15, 1951). Although aliens also worked in certain non-agricultural jobs during this period, most contract workers were employed in farm labor. See U.S. DEP'T OF LABOR, THE ADMISSION OF ALIENS FOR TEMPORARY EMPLOYMENT, reprinted in HOUSE COMM. ON THE JUDICIARY, 88th Cong., 1st Sess., STUDY OF POPULATION AND IMMIGRATION PROBLEMS 33, at 108-110 (Special Series No. 11, Comm. Print 1963) [hereinafter cited as 1963 DOL REPORT].

An average of 109,000 foreign workers from Mexico, Canada, the British West Indies, and the Bahamas were admitted from 1948 through 1952, solely for agricultural employment. TEMPORARY WORKER PROGRAMS, *supra* at 36.

14. During World War II the federal government was intimately involved in the foreign labor program, recruiting the workers in their native countries, transporting them to the United States and guaranteeing performance of the work contract. TEMPORARY WORK PROGRAMS, *supra* note 13, at 18-25. After 1947 aliens were recruited in countries other than Mexico without any intergovernmental agreement. The use of Mexican workers continued to be subject to an intergovernmental agreement, but the U.S. government was no longer directly involved in recruitment, transportation, or employment. *Id.* at 28.

15. See, e.g., *Admission of Foreign Agricultural Workers: Hearings on S. 272 Before a Subcomm. of the Comm. on the Judiciary*, 81st Cong., 1st Sess. 10-17 (1949) (statements of Keith Metz, George Pickering, and B.A. Harrigan) [hereinafter cited as 1949 Senate Judiciary Hearings].

16. See, e.g., *Farm Labor Program: Hearings on S. 949, S. 984, and S. 1106 Before the Senate Comm. on Agriculture and Forestry*, 82nd Cong., 1st Sess. 72-77, 123-135 (1951) (statements of H.L. Mitchell and Walter J. Mason) [hereinafter cited as 1951 Senate Agriculture Hearings].

17. President's Commission on Migratory Labor, Migratory Labor in American Agriculture (1951). This Commission strongly condemned the post-war contract labor program:

We have failed to adopt policies designed to insure an adequate supply of . . . [migratory] labor at decent standards of employment. Actually, we have done worse than that. We have used the institutions of government to procure alien labor willing to work under

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was wide agreement that the United States could not continue to admit farm workers in large numbers without greater government involvement. However, there was no comparable agreement on whether such peacetime admissions should continue.

Second, during the post-war period, Congress was pressing toward a comprehensive simplification and revision of immigration law. Toward this end, the Senate Judiciary Committee staff, under the direction of Chairman Pat McCarran, in 1950 completed an exhaustive report on the immigration system.<sup>18</sup> Noting that the absolute ban on unskilled contract labor was ineffective (because it was being routinely waived for farm employers), the Judiciary Committee recommended that it be replaced with provisions permitting the use of foreign workers if domestic workers would not be displaced.<sup>19</sup> This recommendation was incorporated in the immigration bill submitted by Senator McCarran in 1950.

### B. *The Immigration And Nationality Act of 1952*

Sections 101(a)(15)(H)(ii) and 214 of the McCarran-Walters Act addressed three issues raised by the uneven pattern of contract labor admissions prior to 1952: statutory authority, admission standards, and final agency responsibility.

The H-2 provisions established the first permanent statutory authority for the admission of unskilled contract labor. Foreign workers could previously be admitted only if the contract labor ban was temporarily waived by special legislation or by administrative fiat.<sup>20</sup> These waivers had produced a patchwork of *ad hoc* programs lacking a central statutory base. During the post-war period, farm employers argued for a permanent agricultural labor program outside the immigration framework.<sup>21</sup> The Judiciary Committee rejected such a separate pro-

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obsolete and backward conditions and thus to perpetuate those very conditions. This not only entrenches a bad system, it expands it.

*Id.* at 23.

18. S. REP. NO. 1515, 81st Cong., 2d Sess. (1950) [hereinafter cited as 1950 JUDICIARY COMMITTEE REPORT].

19. *Id.* at 362-363.

20. During World War I and from 1948 through 1952 unskilled contract workers were admitted solely by administrative waiver. This process was subject to serious legal question, for it rested on the ninth proviso to § 3 of the Immigration Act of 1917, a rulemaking provision making no specific reference to contract workers. *See* Pub. L. No. 301, § 3, 39 Stat. 874 (1917). In 1949 the State Department reported that "there may be some need for clarification of the statutory authority under which foreign workers are admitted temporarily for employment in the United States agricultural activities." Letter from Ernest Gross, Ass't Secretary of State, to Hon. Pat McCarran (May 4, 1949), reprinted in *1949 Senate Judiciary Hearings*, *supra* note 15, at 8-10.

21. *See, e.g., 1949 Senate Judiciary Hearings*, *supra* note 15, at 10-17 (statements of Keith Metz, George Pickering, and B.A. Harrigan).

gram, but recommended that "provisions . . . be made in permanent legislation which would permit the admission of temporary agricultural labor."<sup>22</sup> The 82nd Congress followed this middle course, authorizing admission of contract workers for agriculture but only on the same terms as for other industries. The H-2 provisions thus ended both the uncertainty as to the authority to admit unskilled workers and the justification for piecemeal creation of programs limited to agriculture.

Section 101(a)(15)(H)(ii) also set out standards to govern when temporary laborers might be admitted.<sup>23</sup> An existing statutory provision authorized the admission of craftsmen and other skilled workmen "if labor of like kind unemployed can not be found in this country."<sup>24</sup> The Judiciary Committee recommended that a similar standard govern the admission of all temporary workers under the new immigration law. Following this recommendation, the 82nd Congress provided that H-2 workers should be admitted only "if unemployed persons capable of performing such service or labor cannot be found in this country."<sup>25</sup> This language expressed a Congressional intent that foreign workers be admitted only "for the purpose of alleviating labor shortages," subject to "strong safeguards for American labor."<sup>26</sup>

However, Congress failed to assign clear responsibility for protecting U.S. workers. During the post-war period, no temporary workers could be admitted unless the Secretary of Labor "certified" that U.S. workers were unavailable.<sup>27</sup> As submitted to the 82nd Congress, § 214(c) provided simply that "the question of the necessity of importing any alien . . . under [§ 101(a)(15)(H)(ii)] . . . shall be determined by the Attorney General."<sup>28</sup> Labor representatives attacked this provision on the ground that only the Secretary of Labor had the expertise needed to make the certification decisions.<sup>29</sup> Senator McCarran then revised

22. 1950 JUDICIARY COMMITTEE REPORT, *supra* note 18, at 586.

23. Between 1948 and 1952 the Commissioner of Immigration had no statutory guidance as to when the contract labor ban should be waived for unskilled workers. The Judiciary Committee concluded that this "discretionary authority should be circumscribed by certain definite limitations." 1950 JUDICIARY COMMITTEE REPORT, *supra* note 18, at 387.

24. Pub. L. No. 301, § 3, 39 Stat. 874, 877 (1917).

25. 8 U.S.C. § 1101(a)(15)(H)(ii)(1976).

26. H.R. 1365, 82nd Cong., 2nd Sess. 44, 50, *reprinted in* [1952] 2 U.S. CODE CONG. & AD. NEWS 1653, at 1698 and 1705.

27. Letter from J. Donald Kingsley, Federal Security Agency, to Hon. Pat McCarran (April 29, 1949), *reprinted in 1949 Senate Judiciary Hearings, supra* note 15, at 7-8. In practice, however, the certification decisions were heavily influenced by the Department of Agriculture. "The United States Employment Service has delegated authority to certify to the individual state organizations, and, at the present time, county agents make the required local certification." 1950 JUDICIARY COMMITTEE REPORT, *supra* note 18, at 585.

28. S. 716, 82nd Cong., 1st Sess., § 214(c) (1951) (§ 215 of S. 716 became § 214 in the final bill).

29. *See, e.g., Revision of Immigration, Naturalization and Nationality Laws: Joint Hearings on S.*

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§ 214(c) to require that the Attorney General rule on H-2 petitions only “after consultation with appropriate agencies of the Government.”<sup>30</sup> But Congress stopped short of binding the Attorney General to the decision of any agency or even specifying the agencies to be consulted. The Attorney General soon provided for “advisory” certification by the Secretary of Labor.<sup>31</sup> Yet the failure to expressly delegate this authority to the Secretary by statute has encouraged employers to transform disputes over the number of admissions into attacks on the Labor Department’s participation in the certification process. Most importantly, as detailed in Section IV below, the failure of the 82nd Congress to provide for mandatory DOL certification has hampered the administration of the H-2 program by separating operating responsibility from final authority.

The H-2 provisions were enacted as part of the Immigration and Nationality Act in June, 1952, almost exactly as originally introduced.<sup>32</sup> The 82nd Congress never debated these provisions in detail,<sup>33</sup> because by mid-1951 Congress had enacted separate temporary legislation (known as the “bracero program”)<sup>34</sup> authorizing the admission of Mexican agricultural workers to deal with labor shortages arising out of the Korean War. Even while Congress was enacting the H-2 provisions, it was understood that their practical significance would be determined only after the termination of the bracero program.

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716, H.R. 2379, and H.R. 2816 Before Subcomms. of the Comms. on the Judiciary, 82nd Cong., 1st Sess. 122, 664-665 (1951) (statements of H.L. Mitchell and Walter Mason).

30. S. 2055, 82nd Cong., 1st Sess., § 214(c). The phrase “consultation with appropriate agencies” had been used in the Judiciary Committee’s 1950 recommendations. 1950 JUDICIARY COMMITTEE REPORT, *supra* note 18, at 586. That report did not identify the agencies deemed appropriate for consultation, but recognized that the Department of Labor had long played the primary role and that serious concerns had been raised as to “false certifications” by Department of Agriculture extension agents. *Id.* at 573-586.

31. See Part II *infra*.

32. Immigration and Nationality Act of 1952, Pub. L. No. 82-144, §§ 101(a)(15)(H)(ii) and 214, 66 Stat. 163 (1952) (McCarran-Walters Act). The only substantive difference in the H-2 provisions between Senator McCarran’s original bill, S. 3455, 81st Cong., 2nd Sess. (1950), and the statute as enacted was the amendment to § 214(c) discussed *supra* in text at note 30.

33. The H-2 provisions were discussed only briefly in the 1952 Committee Reports, H.R. 1365, *supra* note 26, at 44-45 and 50; S. REP. NO. 1137, 82nd Cong., 2nd Sess. 20-21 (1952), and were never mentioned in the extensive floor debates.

34. Act of July 12, 1951, Pub. L. No. 81-78, 65 Stat. 119. The term “*bracero*” was used in Mexico to refer to unskilled and semi-skilled workers who performed arduous manual labor. MEXICAN WORKERS IN THE UNITED STATES 30, at n.7 (G. and M. Kiser, eds. 1979). Although the phrase “bracero program” is sometimes used to refer to all uses of Mexican contract labor in the United States between 1942 through 1964, in this article “bracero program” refers only to the program established in 1951.

C. *The H-2 Program During the Bracero Period: 1952-1964*

Although originally scheduled to expire at the end of 1953, the bracero program was extended for eleven years. This led to a massive influx of Mexican farm laborers, far exceeding the number admitted during World War I, World War II, the post-war period or the Korean War. At the height of the bracero program, from 1956 through 1959, over 432,000 Mexican nationals were admitted annually for agricultural employment.<sup>35</sup>

The bracero program vastly overshadowed the H-2 provisions between 1952 and 1964. A small number of agricultural employers used the H-2 program during this period to import contract workers from the British West Indies, the Bahamas and Canada,<sup>36</sup> solely on the basis of private contractual agreements.<sup>37</sup> Between 7,000 and 14,000 West Indian and Bahamian workers were employed each year along the East Coast and in the Midwest, harvesting sugarcane, shade tobacco, apples, citrus fruit, strawberries, and a variety of vegetables.<sup>38</sup> Approximately 7,000 Canadians were admitted each year, primarily for work in potatoes and apples in New England.<sup>39</sup> Annual H-2 admissions for farm

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35. For the number of Mexican braceros admitted each year and their distribution by state and crop, see 1963 DOL REPORT, *supra* note 13 at 36, Tables 1-12; TEMPORARY WORKER PROGRAMS, *supra* note 13 at 36, Table 2. The United States government was directly involved in this program, recruiting workers in Mexico, transporting them to the border, and guaranteeing their employment contracts. See, e.g., Spradlin, *The Mexican Farm Labor Importation Program—Review and Reform* (pt. 1), 30 GEO. WASH. L.R. 84, 87-95 (1961).

36. U.S. employers began recruiting British West Indian, Bahamian, and Canadian contract workers during World War II. RASMUSAN, *supra* note 13 at 199. Only agricultural employers continued this recruitment during the post-war period. 1963 DOL REPORT, *supra* note 13 at 110-113.

A small number of Japanese and Filipinos were also admitted under the H-2 program for farmwork in California. SENATE SUBCOMM. ON IMMIGRATION, COMM. ON THE JUDICIARY, THE WEST INDIES (BWI) TEMPORARY ALIEN LABOR PROGRAM: 1943-1977, 95th Cong., 2d Sess. 27, Table 2 (Comm. Print 1973) [hereinafter cited as WEST INDIES LABOR PROGRAM]; 1963 DOL REPORT, *supra* note 13, at 147.

37. As originally proposed, the bracero program would have applied to all employers importing farmworkers from the Western Hemisphere. S. 984, 82nd Cong., 1st Sess., § 501, reprinted in 1951 Senate Agriculture Hearings, *supra* note 16 at 3-5. However, growers using non-Mexican contract workers successfully fought to be excluded from the bracero program. 1951 Senate Agriculture Hearings, *supra* note 16, at 15, 16-18 (statements of C.J. Bourn, Senator Spessard Holland, and Senator George Aiken). The growers sought to avoid the increased DOL supervision involved in the bracero program: "[W]e would like to continue this arrangement without disturbance from the Labor Department, which definitely is not a friendly governmental agency. . . ." *Id.* at 15 (statement of C.J. Bourn).

38. WEST INDIES LABOR PROGRAM, *supra* note 36, at 16; 1963 DOL REPORT, *supra* note 13, at 110-115. In 1962 West Indian and Bahamian farm workers were employed in fourteen states: Florida, Connecticut, Massachusetts, Virginia, West Virginia, New Jersey, New York, Indiana, Texas, Michigan, Wisconsin, Maryland, Minnesota, and New Hampshire. 1963 DOL REPORT, *supra* note 13, at 113.

39. TEMPORARY WORKER PROGRAMS, *supra* note 13, at 36; D. NORTH, NONIMMIGRANT WORKERS IN THE U.S.: CURRENT TRENDS AND FUTURE IMPLICATIONS 36 (1980) [hereinafter cited as NONIMMIGRANT WORKERS].

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labor never exceeded thirteen percent of the contemporaneous admissions under the bracero program.<sup>40</sup>

### D. 1965: *The Struggle To Shape the H-2 Program*

The bracero program was criticized for displacing U.S. farmworkers, depressing agricultural working conditions, and permitting the abuse of the Mexican workers.<sup>41</sup> These concerns gradually came to outweigh the support of agricultural interests and the bracero program was allowed to expire at the end of 1964.

When it became clear that the bracero program would be terminated, farm employers mounted a campaign to obtain Mexican workers under the H-2 program. Secretary of Labor Willard Wirtz moved in the opposite direction, seeking to end even the existing uses of H-2 workers.<sup>42</sup> These conflicting views led to a major confrontation in the Senate. Throughout the first six months of 1965 agricultural spokesmen attacked the “unfortunate and illogical position”<sup>43</sup> of the Secretary of Labor, urging that H-2’s be admitted to avoid agricultural “crises”. Although these efforts were occasionally successful, by the end of the summer it was apparent that contract workers would be unavailable on a large scale as long as the Labor Department controlled the certification decision. Consequently, agricultural interests tried to empower the Secretary of Agriculture to ultimately determine the need for or availa-

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40. From 1954 through 1959 H-2 admissions for agriculture averaged less than four percent of contemporaneous admissions under the bracero program. The ratio of H-2 to Mexican workers rose to over twelve percent in 1964. See TEMPORARY WORKER PROGRAMS, *supra* note 13, at 36.

41. See, e.g., *Extension of Mexican Farm Labor Program: Hearings on S. 1446, S. 1945, and H.R. 2010 Before the Subcom. on Agricultural Research and General Legislation of the Senate Agriculture and Forestry Comm.*, 87th Cong., 1st Sess. 103, 151, 258, and 159 (1961) (statements of Douglas Still, Rev. James Vizzard, Arnold Mayer, and Arthur Goldberg); *Mexican Farm Labor Program: Hearings on H.R. 1863 and H.R. 2009 Before the Subcomm. on Equipment, Supplies, and Manpower of the House Agriculture Comm.*, 88th Cong., 1st Sess. 143 and 192 (1963) (statements of Helen Gahagan Douglas and Andrew Biemiller); U.S. DEPT. OF LABOR, MEXICAN FARM LABOR PROGRAM: CONSULTANTS’ REPORT 3-7 (October, 1959), reprinted in *Extension of the Mexican Farm Labor Program: Hearings on S. 1446, S. 1945, and H.R. 2010, supra* at 267, 270-274.

For other contemporary discussions of the bracero program, see E. GALARZA, MERCHANTS OF LABOR (1964); Hadley, *A Critical Analysis of the Wetback Problem*, 21 LAW AND CONTEMP. PROB. 334 (1956); Spradlin, *The Mexican Farm Labor Importation Program—Review and Reform*, *supra* note 35, at 84.

42. In late 1964 the Department of Labor published restrictive new H-2 regulations. 29 Fed. Reg. 19,101 (1964). In an accompanying statement Secretary Wirtz predicted that the use of foreign workers “will be very greatly reduced, and hopefully eliminated.” Statement by Secretary of Labor Willard Wirtz on the Termination of Public Law 78 (December 19, 1964), reprinted in U.S. DEPT. OF LABOR, YEAR OF TRANSITION: SEASONAL FARM LABOR 1965, APPENDIX H at 4 (1965).

43. 111 CONG. REC. 3,629 (1965) (remarks of Senator Holland). See also 111 CONG. REC. 3,099, 4,472, 10,374, and 15,419 (1965) (additional remarks of Senator Holland).

bility of agricultural labor.<sup>44</sup>

The Senate debate on this provision remains the most complete Congressional consideration of the role of the H-2 provisions in agriculture. Agricultural spokesmen, led by Senator Spessard Holland of Florida, argued that the Secretary of Labor had "consistently misconstrued Congressional intent" in attempting to minimize or eliminate the use of foreign labor.<sup>45</sup> Opponents argued that the agricultural interests were trying to undo the decision to terminate the bracero program.<sup>46</sup> In September, 1965, on the tie-breaking vote of Vice-President Hubert Humphrey, the Senate decided to delete the provision transferring certification authority.<sup>47</sup> This was a clear, although exceedingly narrow, Congressional decision that the H-2 program should not be used to continue the bracero program or otherwise routinely admit large numbers of contract workers.<sup>48</sup>

Bolstered by this victory, the Secretary of Labor quickly phased out the use of Mexican workers.<sup>49</sup> Most existing uses of H-2 workers were also terminated.<sup>50</sup> However, Northeast apple orchardists and the Florida sugarcane producers continued to receive H-2 certifications. To block the admission of Mexican braceros under the H-2 program, Secretary Wirtz was compelled to continue the H-2 program for the two larg-

44. "[D]eterminations . . . of the amount of labor needed for the production and harvesting of any agricultural crop, or of the availability thereof . . . shall be made by the Secretary of Agriculture and shall be accepted by all agencies of the United States." H.R. 9811, 89th Cong., 1st Sess. § 703 (1953), *reprinted in* 111 CONG. REC. 23,504 (1965).

45. 111 CONG. REC. 23,512 (1965) (remarks of Senator Holland).

46. *See, e.g., id.* at 23,515 (remarks of Senator Williams) and 23,527-23,528 (remarks of Senator Bass).

47. *Id.* at 23,530.

48. Although the Senate was the focal point of the struggle over the H-2 program in 1965, labor representatives made two efforts in the House to add restrictive amendments, both of which were unsuccessful. First, the AFL-CIO urged that § 214(c) be amended to bar the admission of H-2 workers for farm jobs. *Immigration: Hearings on H.R. 2580 Before Subcomm. No. 1 of the House Judiciary Comm.*, 89th Cong., 1st Sess. 323 (1965) (statement of Andrew Biemuller). The Judiciary Committee did not adopt this amendment, but expressed concern that the H-2 provisions "not be abused." H.R. REP. NO. 745, 89th Cong., 1st Sess. 15 (1965). Second, Rep. Gilbert of New York introduced an amendment which would have made all H-2 admissions "subject to the approval of the Secretary of Labor." This amendment was also rejected. 111 CONG. REC. 21,805-6 (1965).

49. Mexican admissions were reduced from 1965 through 1967 and terminated completely at the end of 1967. WEST INDIES LABOR PROGRAM, *supra* note 36, at 27, Table 2.

50. The admission of West Indians in the Midwest and of Japanese in California ended in 1964. U.S. DEP'T OF LABOR, YEAR OF TRANSITION: SEASONAL FARM LABOR 1965, Appendix A (1965); WEST INDIES LABOR PROGRAM, *supra* note 36, at 27. The routine use of H-2's in the Florida vegetable, strawberry and citrus crops ended in 1965 (West Indians were admitted to pick citrus in Florida on several occasions in the late 1960's in response to short-term emergencies). NONIMMIGRANT WORKERS, *supra* note 39, at 43. No H-2's were admitted for New England shade tobacco after 1966. *Id.* at 44. The use of Canadian H-2's to harvest potatoes was phased out gradually, ending in 1976. *Id.* at 43.

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est and most influential groups of H-2 employers.<sup>51</sup>

The termination of the bracero program thus produced a strange pattern in the use of contract workers in the United States, due far more to the delicate political balance in the Senate in 1965 than to the language of the statute. The opponents of contract labor won a major victory in terminating the larger and more important program and barring all Mexican contract workers. Had the contract workers employed in apples and sugarcane been admitted under the bracero program, they too would have been barred. But because these workers were being admitted under the H-2 provisions, a separate effort would have been required to end these admissions. In 1965 this was not politically feasible.

The struggle to terminate the bracero program led to significant changes in the size and scope of the H-2 program, reducing admissions by forty percent over four years<sup>52</sup> and closing this program in all but two crops. Yet the most important change was a reversal of the role of the H-2 program in U.S. immigration policy. During the bracero period the H-2 program was but a footnote to a national policy encouraging the use of contract labor in agriculture. Since 1965 the H-2 program has been the sole exception to a national policy prohibiting the use of contract workers.

## II. The Administrative Structure

The Immigration and Naturalization Service<sup>53</sup> requires an employer seeking H-2 workers to first request the Secretary of Labor to certify that

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51. The importance of the Secretary of Labor's "flexibility" toward traditional H-2 users is illustrated by the following comments of Senator Edmund Muskie of Maine, whose support was essential to Secretary Wirtz's effort. Immediately prior to the Senate vote Senator Muskie stated:

Mr. President, my State has a direct interest in the farm labor question. Traditionally, Canadian workers have been recruited to help with the harvesting of potatoes and apples.

I am in agreement with the Secretary's objectives. . . .

At the same time, I have had questions about the Secretary of Labor's approach to the problem, this year. In the beginning of his efforts to curtail the importation of foreign laborers, there was a tendency to be arbitrary in calling for drastic reductions in the use of foreign labor. There was the clear implication that he planned to eliminate this source in one year. . . .

On the basis of our experience in Maine, however, it is clear that the Secretary of Labor has adopted a more realistic attitude toward the farm labor problem. When we were able to demonstrate that there were not sufficient domestic laborers available the Secretary authorized importation of Canadian workers.

111 CONG. REC. 23,529 (1965).

52. Total H-2 admissions fell from 22,286 in 1964 to 13,323 in 1968. WEST INDIES LABOR PROGRAM, *supra* note 36, at 27, Table 2.

53. The Attorney General has delegated to the Commissioner of the INS the authority to rule on H-2 visa petitions. 8 C.F.R. §§ 2.1 and 100.2 (1982).

(i) "qualified persons in the United States are not available" and that (ii) "the employment of foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed."<sup>54</sup> The INS regulations assign the certification function to DOL and establish the criteria,<sup>55</sup> but do not indicate how DOL's determinations should be made. DOL makes these determinations by requiring employers to "test the market" through the national network of public employment offices.

### A. *Employment Service System*

Under the Wagner-Peyser Act of 1933,<sup>56</sup> the U.S. Department of Labor funds and regulates approximately 2,000 state-operated "employment service" offices. These offices match employers and potential employees through the use of a "job order," an employment offer filed by the employer and displayed to potential employees.<sup>57</sup> Employers wishing to recruit outside their state can file an interstate job order, which is routed through DOL's interstate "clearance" system to employment service offices in other sections of the country.<sup>58</sup> Detailed regulations govern the use of the interstate clearance system to recruit farmworkers.<sup>59</sup>

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54. Either a certification from the Secretary of Labor . . . stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a)(15)(H)(ii) of the Act.

8 C.F.R. § 214.2(h)(3)(i) (1982).

55. The "availability" criterion is drawn directly from the statute. The "adverse effect" language rests on a long-standing DOL requirement and on language in related statutes. During the post-war period DOL guidelines provided that unskilled contract workers could be admitted only if this would not "detrimentally affect" U.S. workers. PRESIDENT'S COMMISSION ON MIGRATORY LABOR, *MIGRATORY LABOR IN AMERICAN AGRICULTURE* 36 (1951). In 1951 Congress incorporated this concept in the bracero program. Act of July 12, 1951, Pub. L. No. 82-78, § 503, 65 Stat. 119 ("will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed"). Soon thereafter the "adverse effect" language was set out in DOL regulations, 16 Fed. Reg. 9,142 (1951), and enforced as to both the bracero and H-2 programs. Dellon, *Foreign Agricultural Workers and the Prevention of Adverse Effect*, 1966 LABOR L.J. 739. See also § 212(a)(14) of the Immigration and Nationality Act of 1952, regulating permanent admission for employment. Pub. L. No. 82-414, 66 Stat. 163 (1952). From 1952 to 1966 INS regulations incorporated the adverse effect criterion by requiring compliance with DOL policies. In 1966 this standard was expressly set out in the INS regulations. 31 Fed. Reg. 11,744 (1966).

56. 29 U.S.C. §§ 49-49k (1976).

57. 20 C.F.R. § 653.5 (1982).

58. 20 C.F.R. § 651.10 (1982) (definition of "clearance").

59. 20 C.F.R. Part 653, Subpart F (1982). *E.g.*, all job orders must accurately describe the material elements of the job, assure compliance with all applicable employment related laws and offer at least the wages and working conditions prevailing among similarly employed agricultural workers in the area of intended employment. *Id.* at § 653.501(d) and (e)

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### B. Certification Regulations

The employment service offices form the foundation of DOL's temporary labor certification structure. Agricultural employers seeking H-2 workers must first attempt to recruit U.S. workers through the interstate clearance system, offering the minimum terms and assurances set out in separate H-2 certification regulations.<sup>60</sup> These regulations provide, *inter alia*, that growers seeking certification must offer to pay at least the "adverse effect [wage] rate" and to provide housing, occupational insurance, tools, and low-cost meals.<sup>61</sup> All benefits offered in the job order must be paid to any worker actually hired, domestic or foreign. An agricultural employer seeking H-2 workers must file a job order and an application for certification at least sixty days before the date on which the workers are needed.<sup>62</sup> These papers are sent to the appropriate DOL regional office and reviewed for the required terms and assurances. If these criteria are met and the application is timely, the job order is forwarded to the states believed by DOL to be "potential sources of U.S. workers."<sup>63</sup> The order (or a summary thereof) is then transferred to the local offices and made available to inquiring workers.

Sixty days after the application is filed or twenty days before the date the foreign workers are needed, whichever is later, DOL determines whether the employer has made the required recruitment efforts and hired all available U.S. workers.<sup>64</sup> If the employer has satisfied these requirements but a sufficient number of workers has not been located, certification will be granted for the aliens needed to fill the remaining positions.

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(1982). Much of the litigation arising out of the use of the interstate clearance system has dealt with these protective requirements. *See, e.g.*, *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969); *Jenkins v. S. & A. Chaissan and Sons, Inc.*, 449 F. Supp. 216 (S.D.N.Y. 1978); *Abraham v. Beatrice Foods Co.*, 418 F. Supp. 1384 (E.D. Wis. 1976); *Vazquez v. Ferre*, 404 F. Supp. 815 (D.N.J. 1975); *Galindo v. Del Monte Corporation*, 382 F. Supp. 464 (N.D. Ill. 1974).

60. 20 C.F.R. Part 655, Subpart C (1982).

61. 20 C.F.R. § 655.202(b)(1), (2), (3), (4), and (9) (1982). The "adverse effect [wage] rate" (AEWR) is a special minimum hourly wage designed to prevent an adverse effect on the wages of U.S. workers. *Id.* at § 655.200(b). *See infra* Section III(B).

62. 20 C.F.R. § 655.201(c) (1982). The regulations recommend that these papers be filed at least eighty days before the date of need, to allow the employer twenty days after the certification decision to bring the foreign workers to this country. *Id.*

63. *Id.* at § 655.205(a).

64. *Id.* at § 655.205(c) and .206(a). A worker is considered available if he has made a "firm commitment to work for the employer." This commitment may be made through a crewleader or other representative and need not be evidenced by a signed contract. *Id.* at § 655.206(a).

### C. *Final Decisions by INS*

Certification by DOL is the principal step in obtaining H-2 workers, but not the final one. An employer seeking temporary contract workers must also petition the district office of the Immigration and Naturalization Service to approve the issuance of H-2 visas.<sup>65</sup> This petition must be accompanied by a copy of DOL's ruling on the application for certification and a statement describing why it is necessary to use alien workers.<sup>66</sup> If DOL has denied certification, the employer may nevertheless seek INS approval by presenting "countervailing evidence" showing that "qualified persons in the United States are not available" and that "the employment policies of the Department of Labor have been observed."<sup>67</sup>

If INS approves the visa petition, notice of this decision is sent to the U.S. consulate in the country where the contract workers have been recruited. If the aliens selected by the employer have the necessary exit papers and are not barred under other immigration provisions,<sup>68</sup> H-2 visas are issued by the consul. Each worker must then display his H-2 visa at the border entry station.<sup>69</sup>

## III. The Scope of the Current H-2 Program

### A. *Northeast Apple Harvest*

Approximately 300 apple producers<sup>70</sup> in ten states<sup>71</sup> regularly use H-2 workers. Most of these growers are members of a cooperative or association which assists in the completion of the job orders, negotiates with employment service officials, and takes part in the distribution of the H-2 workers.<sup>72</sup> The job orders are filed in the Spring, often as late as mid-

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65. 8 C.F.R. § 214.2(h)(1) (1982).

66. *Id.* at § 214.2(h)(3)(i) and (iii).

67. *Id.* at § 214.2(h)(3)(i).

68. Like most immigrant and nonimmigrant aliens, temporary workers are subject to the "qualitative exclusions" at 8 U.S.C. § 1182(a) (1976 & Supp. IV 1980). 1 C. GORDON AND H. ROSENFELD, *supra* note 7, at § 2.32.

69. An approved H-2 visa petition is valid for the period covered by the DOL certification or one year, whichever is less. 8 C.F.R. § 214.2(h)(7) (1982). An H-2 visa may be extended, but only if the extension would not result in an unbroken stay in the U.S. of more than three years. *Id.* at § 214.2(h)(11).

70. In 1982, 317 Northeast apple producers sought H-2 certification. U.S. EMPLOYMENT SERV., U.S. DEP'T OF LABOR, DATA SHEET ON CERTIFICATION AND ADMISSION OF FOREIGN APPLE PICKERS (December 10, 1982) (unpublished document obtained from the Office of Technical Support, U.S. Employment Serv., U.S. Dep't of Labor, Washington, D.C.).

71. H-2 workers are used annually to harvest apples in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Maryland, West Virginia, and Virginia. *Id.*

72. The association is sometimes the primary employer, filing the job order in its own name, housing the workers and assigning the workers on a daily basis to association members.

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June, and sent to the states along the Eastern seaboard (and sometimes to Puerto Rico and Texas). In August DOL certifies that there is a need for foreign workers to fill the positions not filled by domestic workers. During the last six seasons, DOL has certified from 4,835 to 6,552 foreign workers for the Northeast apple harvest.<sup>73</sup>

These positions are filled by contract workers from Jamaica. Each Spring, the grower associations meet with the Caribbean Regional Labour Board,<sup>74</sup> represented in the United States by the British West Indies Central Labour Organisation,<sup>75</sup> to negotiate the terms of employment for the coming season. The terms agreed upon in these negotiations are set out in a "standard contract" which will govern the recruitment, transportation, housing, and employment of the foreign workers. Over eighty percent of the Jamaicans hired for the apple harvest are individually "pre-designated" by the apple producers on the basis of satisfactory prior performance.<sup>76</sup> The remaining workers are selected through a four-stage screening process. The Jamaican legislature<sup>77</sup> and the governments of Barbados, St. Lucia, St. Vincent, and Dominica nominate approximately 15,000 individuals for consideration

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*E.g.*, Tri-County Growers, Inc., Martinsburg, W.Va., which is controlled by local apple producers, seeks certification in its own name for over 500 foreign workers. These workers are housed in a single labor camp and assigned to work for apple producers within a twenty-mile radius. Tri-County Growers, Inc., Clearance Order No. 0417828, at 1 (1981).

73. U.S. EMPLOYMENT SERV., U.S. DEP'T OF LABOR, LABOR CERTIFICATIONS GRANTED FOR TEMPORARY FOREIGN WORKERS (H-2's) IN AGRICULTURAL AND LOGGING OCCUPATIONS, TABLE III (January 31, 1983) (unpublished document obtained from the Office of Technical Support, U.S. Employment Serv., U.S. Dep't of Labor, Washington, D.C.) [hereinafter cited as LABOR CERTIFICATIONS GRANTED]. In the 1982 apple season the 6,383 certifications were distributed as follows: Maine (480), New Hampshire (320), Vermont (329), Massachusetts (462), Rhode Island (18), Connecticut (145), New York (2,662), Maryland (370), West Virginia (555) and Virginia (1,042). *Id.*

The number of H-2 workers certified does not indicate the exact number admitted. Certifications are often slightly higher than admissions because employers decide not to use all the workers certified or, in the case of figures covering more than one crop, a particular contract worker remains in the country to work in more than one crop during the year. Occasionally the number of certifications is lower than admissions, because more than one H-2 works in the same job (the original worker is sent home and replaced by another) or H-2's are admitted despite DOL's denial of certification. Certification figures are used throughout this article because they indicate the number of positions DOL has been willing to allocate to foreign workers and are the best figures available for comparing the use of H-2's over time and among various states and crops.

74. The Caribbean Regional Labour Board is an intergovernmental body representing the West Indian governments. There are six seats on this board, four held by Jamaica and two held by the other Caribbean islands. BRITISH WEST INDIES CENTRAL LABOUR ORGANISATION, THE WEST INDIES PROGRAMME FOR TEMPORARY FARM LABOUR 2-3 (undated booklet obtained from the British West Indies Central Labour Organisation, Washington, D.C., in 1981).

75. The British West Indies Central Labour Organisation (BWICLO) is an unincorporated organization with headquarters in Washington, D.C. and permanent field offices in Florida. BRITISH WEST INDIES CENTRAL LABOUR ORGANISATION, TEMPORARY AGRICULTURAL LABOUR IN THE UNITED STATES 1 (1981).

76. *Rios v. Marshall*, 530 F. Supp. 351, 366 (S.D.N.Y. 1981).

77. The initial hurdle facing Jamaican workers interested in working as H-2's in the

by the apple and sugarcane producers. Representatives of the Florida sugar companies then travel to the islands to screen these men, designating approximately 8,000 they would be willing to employ.<sup>78</sup> By agreement with the apple producers, the Jamaican Ministry of Labor then selects from this group the approximately 1,000 Jamaicans needed to complete the apple harvest workforce.<sup>79</sup> Finally, all selected workers are given medical examinations and screened by the Jamaican Ministry of Labor in terms of police and employment records.

In late August or early September, after INS has approved the visa petitions, the H-2's are brought by chartered planes to Florida and transported by bus to orchards throughout the Northeast. During the harvest, which runs for six to eight weeks, the Jamaicans live in labor camps near the orchards and work six days a week, eight to ten hours per day. Payment is on a piece-rate basis.<sup>80</sup> At season's end the H-2's are bused back to Florida and returned to Jamaica by plane.<sup>81</sup>

The Jamaicans are intensely concentrated in certain markets. H-2's constitute 66% of the apple harvest workforce in the Hudson Valley,<sup>82</sup> 64% in western Maryland,<sup>83</sup> 36% in the Romney-Martinsburg area of West Virginia,<sup>84</sup> and 54% in the Winchester area of Virginia.<sup>85</sup>

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United States is political, *i.e.*, a worker cannot be considered unless he has been "nominated" by a member of the Jamaican Parliament on the recommendation of a local committee appointed for this purpose. This process was described as follows by Norman Manley, former Prime Minister of Jamaica:

In general, the committees pick these men with no regard to their fitness for the specific type of work involved. The whole thing is purely a political exercise . . . . [T]he committees select in such a manner as to favor local, grassroots political supporters of the party in power in the constituency. Thus, for instance, if an important man in a particular village asks the committee to let his son go to the U.S. on the program, the committee would submit the young man's name.

P. KRAMER, *THE OFFSHORES* 33 (1966). *See also* BRITISH WEST INDIES CENTRAL LABOUR ORGANISATION, *THE WEST INDIES PROGRAMME FOR TEMPORARY FARM LABOUR*, *supra* note 74, at 4; *NONIMMIGRANT WORKERS IN THE U.S.*, *supra* note 39, at 35.

78. *Rios v. Marshall*, 530 F. Supp. 351, 365-66 (S.D.N.Y. 1981). *See* T. MCCOY AND C. WOOD, *CARIBBEAN WORKERS IN THE FLORIDA SUGARCANE INDUSTRY* 11 (Center for Latin American Studies, U. of Florida, Paper No. 2, 1982) (in Jamaica growers select 7,000 workers from a pool of 10,000) [hereinafter cited as *CARIBBEAN WORKERS*].

79. *Rios v. Marshall*, 530 F. Supp. 351, 365-66 (S.D.N.Y. 1981).

80. For a discussion of piece rates in the apple harvest, *see infra* text following note 130.

81. A number of Jamaican apple workers remain in Florida during the winter for the sugarcane harvest. *NONIMMIGRANT WORKERS IN THE U.S.*, *supra* note 39, at 37.

82. *JOB SERVICE DIV., NEW YORK STATE DEP'T OF LABOR, 1981 DOMESTIC AGRICULTURAL IN-SEASON WAGE REPORT: HUDSON VALLEY APPLE HARVEST (FRESH MARKET) 1 (1982)* [hereinafter cited as *1981 HUDSON VALLEY WAGE REPORT*].

83. *RESEARCH AND ANALYSIS DIV., MARYLAND DEP'T OF EMPLOYMENT SECURITY, 1981 DOMESTIC AGRICULTURAL IN-SEASON WAGE REPORT: WESTERN AREA (APPLE HARVEST) 1 (1981)*.

84. *WEST VIRGINIA DEP'T OF EMPLOYMENT SECURITY, 1981 DOMESTIC AGRICULTURAL IN-SEASON WAGE REPORT: ROMNEY-MARTINSBURG (APPLE PICKING) 1 (1981)*.

85. *RESEARCH AND ANALYSIS DIV., VIRGINIA EMPLOYMENT COMM'N, 1981 DOMESTIC AGRICULTURAL IN-SEASON WAGE REPORT: WINCHESTER 1 (1982)*.

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### B. *Florida Sugarcane*

The Florida sugarcane harvest runs for six months, from October to April. Seven to ten sugarcane producers and producer cooperatives in the Lake Okeechobee area of southern Florida, acting individually or through the Florida Fruit and Vegetable Association,<sup>86</sup> request certification each year for approximately 8,500 cane cutters and 350 supervisors and cooks. Because few, if any, U.S. workers are hired during the recruitment period, in September DOL certifies almost exactly the number of foreign workers requested. For each of the last five seasons, DOL certified between 8,530 and 9,140 job openings in the sugarcane harvest.<sup>87</sup>

Eighty percent of the H-2's obtained to fill these positions are recruited in Jamaica, with the others drawn from Barbados, St. Lucia, St. Vincent, and Dominica.<sup>88</sup> The sugarcane producers pre-designate sixty percent of the workforce by name, based on their prior work in Florida sugarcane. The remaining workers are selected through the screening process discussed above: After the workers nominated by the West Indian governments have been "screened down" by the sugarcane producers, the governments select approximately 3,500 workers to complete the sugarcane workforce.<sup>89</sup>

The cane cutters live in large labor camps in or near the fields, often with limited access to the outside world.<sup>90</sup> Using a heavy machete, the workers cut the twelve-foot sugarcane stalks near ground level, chop them into sections and stack the pieces. Despite the tropical weather, the cutters must wear gloves, heavy clothing and metal foot and shin guards for protection against the machetes and sharp stalks.<sup>91</sup> Wages are paid on a piece rate basis, each worker being expected to cut eight

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86. The Florida Fruit and Vegetable Ass'n (FFVA) acts as the agent for its sugarcane producing members, submitting the certification application in its own name. In 1981 FFVA sought certification for 6,097 cane cutters, to be distributed among seven sugarcane producers and producer cooperatives. *See* Letter from Ralph Alewine, DOL Certifying Officer, Region IV, to George F. Sorn, at 1 (July 17, 1981).

87. LABOR CERTIFICATIONS GRANTED, *supra* note 73, at Table III.

88. BRITISH WEST INDIES CENTRAL LABOUR ORGANISATION, DISTRIBUTION BY STATES (1981) (unpublished document made available by the British West Indies Central Labour Organisation, Washington, D.C.).

89. *Rios v. Marshall*, 530 F. Supp. 351, 365-66 (S.D.N.Y. 1981).

90. *See, e.g., Petersen v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973).

91. NORTH AMERICAN CONGRESS ON LATIN AMERICA, CARIBBEAN MIGRATION, XI NACLA REPORT ON THE AMERICAS, 12 (Nov.-Dec. 1977) [hereinafter cited as CARIBBEAN MIGRATION].

tons of cane per day.<sup>92</sup> The producers vary the piece rates from day to day, based on the employer's estimate of the difficulty of the cutting.<sup>93</sup> Workers who do not earn the minimum hourly guarantee<sup>94</sup> through their piece rate work are repatriated.<sup>95</sup>

Three employers—U.S. Sugar Corporation, Gulf and Western Food Products Company, and the Sugar Cane Growers Cooperative—use two-thirds of the H-2 workers admitted for the sugarcane harvest.<sup>96</sup> None of the Florida sugarcane producers employ a significant number of U.S. cane cutters.

### C. *New Crops, Areas, and Workers*

From 1968 through 1976 the regular use of the H-2 program was limited, with one exception,<sup>97</sup> to the use of West Indians along the East Coast. However, during the last six years contract workers, including Mexican braceros, have been certified for work in several new crops and areas of the country.<sup>98</sup> Growers in the Presidio Valley of Texas used 800 Mexican H-2's in 1977 and 400 in 1978.<sup>99</sup> The next year, use of the program spread to four other states. In Colorado, Mexican contract

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92. See, e.g., U.S. Sugar Corp. Clearance Order No. 2723406, Attachment, at 2 (June 26, 1981); CARIBBEAN WORKERS, *supra* note 78, at 14.

93. Before beginning work each day a cutter is told what he will be paid for completing his assigned "task," which usually consists of cutting a quarter-mile row. The price varies according to the supervisor's estimate of the density and weight of the cane, the effectiveness of the burning, whether the stalks have fallen on their sides, and other factors. P. KRAMER, THE OFFSHORES 45-47 (1966).

94. The "adverse effect wage rate" in effect at the outset of the 1982-83 sugarcane harvest was \$4.69 per hour. 47 Fed. Reg. 37,980 (1982). In January, 1983, this was increased to \$4.73. 48 Fed. Reg. 232, 233 (1983). See *infra* text at note 125.

95. See, e.g., FLORIDA FRUIT AND VEGETABLE ASS'N, FFVA SUGAR CANE DOMESTIC PROGRAM AND H-2 PROGRAM, Part II, at 7 (1981) (FFVA instructions booklet for H-2 users) [hereinafter cited as FFVA SUGAR CANE PROGRAM].

96. CARIBBEAN MIGRATION, *supra* note 91, at 13.

97. Canadian H-2 workers were admitted in small numbers for work in the Maine potato harvest through 1976. NONIMMIGRANT WORKERS, *supra* note 39, at 43.

98. The certification figures used throughout the following discussion are drawn from LABOR CERTIFICATION GRANTED, *supra* note 73, at Table III.

99. In 1977 farmers in the Presidio Valley sought visas for 809 Mexican nationals to harvest onions, melons, peppers, and cotton. Because these growers refused to recruit at the required wage rate or provide housing, DOL could not certify that no U.S. workers were available. Nevertheless, INS admitted all the requested aliens. 809 Agricultural Workers, Beneficiaries of Two Visa Petitions Filed by Presidio Valley Farmers Ass'n, File Nos. ELP-N-1387 and ELP-N-1388 (June 9, 1977). The 1977 Presidio Valley decision is discussed *infra* at note 167.

When the Presidio Valley growers sought contract workers in 1978, again refusing to comply with the H-2 regulations, both DOL and INS ruled that there had been no showing that foreign workers were needed. The growers nevertheless obtained H-2 visas for over 400 Mexican workers by court order. Presidio Valley Farmers' Ass'n v. Marshall, No. EP-78-CA-95 (W.D. Tex. May 26, 1978) (order granting preliminary injunction), *appeal dismissed as moot*, 617 F.2d 294 (5th Cir. 1980).

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workers were admitted to pick apples.<sup>100</sup> Maryland growers have employed H-2's from Jamaica to harvest peaches each year since 1979.<sup>101</sup> Similarly, tobacco producers in southern Virginia have been using H-2's since that year. Over 1,000 Mexican contract workers are certified every Spring for six months of work in the tobacco harvest, where they make up thirty percent of the seasonal workforce.<sup>102</sup> Arizona citrus producers also began using H-2's in 1979. After a union organizing campaign led to the first collective bargaining agreement in the Arizona orchards, several producers sought contract workers from Mexico (and, in one case, Costa Rica). Although the farmworkers' union argued that the H-2 program was being used as a weapon in a labor dispute,<sup>103</sup> DOL certified 385 H-2's. Mexican contract workers are now admitted each October for the nine-month citrus harvest.

In 1980 Maryland nursery operators imported Mexican H-2's for tree pruning. In 1981 and 1982 Mexican H-2's were used to harvest vegetables in Colorado. An Arkansas corporation sought over 500 Jamaicans in 1982 to plant pine seedlings in commercial forests in Virginia, South Carolina, Florida, Alabama, Georgia, Mississippi, Texas, Arkansas and Oklahoma. DOL certified H-2's for this work in Florida and Alabama with little or no interstate recruitment.<sup>104</sup>

The growth of the H-2 program is continuing. In late 1982 the two largest lettuce producers in Florida sought 550 Mexican contract laborers for the 1982-83 winter season, admittedly seeking to replace undocumented aliens who had recently been deported. After nine days of domestic recruitment, solely in Florida, DOL certified a need for 202 foreign workers.<sup>105</sup> This was the first use of H-2's in Florida outside of

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100. *See generally* West. Colo. Fruit Growers v. Marshall, 473 F. Supp. 693 (D. Colo. 1979) (decision upholding denial of certification for 1978 apple harvest); Jones v. Edwards, No. 79-A-337 (D. Colo. April 24, 1979) (preliminary injunction reversing denial of certification for the 1979 peach harvest; no H-2's actually admitted); I-70 Fruit v. Edwards, No. 79-A-910 (D. Colo. July 16, 1979) (134 Mexican H-2's certified after suit filed but before judicial decision).

101. *See generally* Washington County Fruit Growers Ass'n v. Marshall, No. W79-1223 (D. Md., July 17, 1979) (order granting preliminary injunction).

102. Brief for the Secretary of Labor at 12, Rowland v. Marshall, 650 F.2d 28 (4th Cir. 1981). In 1981 these H-2's worked for 345 tobacco producers. U.S. DEP'T OF AGRICULTURE, OFFICE OF THE GENERAL COUNSEL, COST DIFFERENTIALS BETWEEN DOMESTIC WORKERS AND H-2 WORKERS IN VIRGINIA WORKING ON TOBACCO FARMS, 1 (undated, unpublished document obtained from the U.S. Dep't of Agriculture, Office of the General Counsel, in January, 1982) [hereinafter cited as COST DIFFERENTIALS IN VIRGINIA TOBACCO].

103. *See, e.g.*, Maricopa County Organizing Project v. Glasgow, No. 79-0916 (D. Ariz. November 13, 1980); Barrios v. Golding, No. 79-811 (D. Ariz. October 3, 1980).

104. By classifying this work as non-agricultural, non-logging employment, DOL exempted the employers from the domestic recruitment obligations of 20 C.F.R. § 655, Subpart C (1982). *See generally* AAA Forestry Services, Inc. v. Donovan, No. 82-0318 (D.D.C. Feb. 3, 1982).

105. *Cf.* Florida Fruit and Vegetable Ass'n, Clearance Order of Oct. 6, 1982, 1 (number

sugarcane in fifteen years.

#### IV. The Failure of the H-2 Program to Protect U.S. Farmworkers

In 1952 and again in 1965 Congress refused to either ban all contract workers or authorize their routine admission. The H-2 provisions were intended to set a middle course, admitting foreign workers on a case-by-case basis only to meet proven labor shortages. The crucial determination under this approach is whether the necessary labor "cannot be found in this country."<sup>106</sup> The H-2 program in agriculture must be evaluated in terms of how well this determination has been made and enforced.

By this standard the H-2 program has failed. DOL's temporary labor certification system is so flawed that it does not produce a meaningful indication of whether U.S. workers are available. The Immigration and Naturalization Service has compounded this weakness by undermining DOL's effort to restrict H-2 admissions and leaving a vacuum in post-admission enforcement. The federal courts have often played a similarly negative role, eviscerating DOL's regulations without suggesting how the statutory mandate could otherwise be fulfilled. These issues are discussed below under four headings: (A) incentives encouraging the use of H-2 workers; (B) DOL certification regulations; (C) the role of the INS; and (D) the impact of the federal courts.

##### A. *Incentives Encouraging The Use of H-2 Workers*

To recruit migrant workers in the United States an agricultural employer must build a network of relationships with crew-leaders, family representatives, and individual workers. He must also be willing to make binding commitments well in advance of the season. Under the H-2 program, however, most of the recruitment is done by the foreign government, allowing the grower to wait until the eve of the harvest before specifying the number of workers desired. The employer then receives exactly the number requested, at exactly the designated time, and is able to replace any worker who becomes ill or performs poorly. Access to foreign labor also frees growers from dealing with the heterogeneous American workforce. Many U.S. migrants travel in family groups which include women, children and older relatives, thus complicating the employer's housing, recordkeeping, and supervisory obligations. The H-2 provisions enable growers to hire only young men.

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requested) and *Miami Herald*, Jan. 12, 1983 (number certified). For growers' admissions regarding use of illegal aliens, *see id.*

106. 8 U.S.C. § 1101(a)(15)(H)(ii) (1976).

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The H-2 program allows employers to avoid or defeat efforts at collective bargaining. Because any worker demanding benefits above the DOL minimums is deemed "unavailable,"<sup>107</sup> the H-2 program precludes meaningful negotiations. This system is ideal for frustrating even the formation of a union, for outspoken U.S. workers can be replaced by aliens prior to the next season.<sup>108</sup>

Through the H-2 program employers can avoid many provisions of the most important federal law protecting migrant farmworkers, the Migrant and Seasonal Agricultural Worker Protection Act.<sup>109</sup> This statute imposes detailed disclosure and recordkeeping requirements on those recruiting or employing migrant workers, but provides no protection to H-2 workers. Similarly, major tax exemptions encourage growers to seek H-2 workers. The Federal Insurance Contribution Act<sup>110</sup> and, as implemented in most states, the Federal Unemployment Tax Act<sup>111</sup> exempt wages paid to H-2 workers in farm jobs. Consequently, many farm employers can realize a tax windfall of ten percent of their field labor payroll by switching to alien workers.<sup>112</sup>

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107. See *infra* text at note 142.

108. Foreign laborers may not be admitted if DOL certifies that "a strike or labor dispute involving a work stoppage is in progress" and that the admission of aliens would "adversely affect the wages and working conditions" of U.S. workers. 8 C.F.R. § 214.2(h)(10)(i) (1982). *Accord*, 20 C.F.R. § 655.203(a) (1982). These provisions provide some protection for organizing efforts by U.S. workers during the season, but do nothing to prevent the use of H-2's to replace such workers for the following season. Without established relationships between particular workers and the jobs at issue, which rarely exist in the fruit and vegetable harvests, it is virtually impossible to establish that a labor dispute in effect at the end of the prior season will continue into the coming season.

109. Pub. L. No. 97-470, 96 Stat. 2583 (1983), to be codified at 29 U.S.C. § 1801 (superseding the Farm Labor Contract Registration Act (FLCRA), 8 U.S.C. §§ 2041-2055).

110. The social security tax of 6.7% under the Federal Insurance Contribution Act does not apply to wages paid to "foreign agricultural workers". 26 U.S.C. § 3121(b)(1) (1976).

111. 26 U.S.C. § 3306(c)(1) (1976 & Supp. IV 1980). This exemption has been extended until January 1, 1984. Pub. L. No. 97-248, § 277 (1982). Thirty-two states have taken advantage of 26 U.S.C. § 3306(c)(1) to exempt wages paid H-2 agricultural workers. NATIONAL COMM'N ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT COMPENSATION: FINAL REPORT 24 (1980). This frees farm employers from both federal and state FUTA taxes, which together averaged 3.1% in 1980. *Id.* at 15, 18.

112. The Florida Fruit and Vegetable Association has estimated that the Florida sugarcane companies realized FICA/FUTA savings of \$474 per worker during the 1980-81 season. *Immigration Reform: Hearings before the House Subcomm. On Immigration, Refugees, and International Law*, 97th Cong., 1st Sess. 88, 95 (1981) (statement of George F. Sorn) [hereinafter cited as *House Hearings On Immigration Reform*]. This amounts to a tax savings of \$4,029,000 for the 8,500 H-2 workers in sugarcane.

Assuming an eight-week season, forty-eight hours per week at \$4.89 per hour (the average hourly earnings in the Hudson Valley in 1980), the Northeast apple producers realized a FICA savings of \$712,000 for the 5,700 H-2 positions certified in 1981. In the six Northeastern states where H-2 users are exempt from FUTA taxes, the growers also realized a FUTA savings (assuming a FUTA tax rate of 3.1%) of \$172,318 on 2,971 H-2 workers. Thus the total FICA/FUTA savings for the Northeast apple producers in 1981 can be estimated at \$884,000.

In 1981 the Mexican H-2's employed in Virginia tobacco averaged \$3,391 in total earnings.

Finally, the H-2 program grants employers an extraordinary degree of control over the foreign workers. Growers may select from a vast supply of willing laborers, in almost any country in the world, based solely on business needs. Firms hiring in the U.S. are bound by equal employment and affirmative action obligations, but H-2 employers avoid these restrictions by recruiting abroad. The United States treats foreign recruitment as if it were solely a private enterprise, devoid of implications for labor, civil rights, and diplomatic policies. Conversely, the sending countries are intimately involved in the H-2 program but have little leverage with which to protect their workers. Chronic unemployment makes the H-2 program an important source of revenue and a social "safety valve" for Jamaica, Barbados, and the other Caribbean nations.<sup>113</sup> Yet the H-2 employers may shift to new labor sources at any time.<sup>114</sup> Consequently, the sending governments must acquiesce in the

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COST DIFFERENTIALS IN VIRGINIA TOBACCO, *supra* note 102, at 1. Assuming a FUTA tax rate of 3.1%, the Virginia tobacco growers realized a FICA/FUTA savings of \$422,000 for the 1,271 H-2 workers certified for Virginia in 1981.

Growers argue that these tax savings are offset by "special costs" associated with the H-2 program. An employer seeking H-2 certification is required to provide certain benefits not otherwise required by law. However, the only question of economic significance is whether the H-2 benefits are above those which would be required by the forces of the market, *i.e.*, what would an employer be required to pay for labor if he did not use the H-2 program? This question can be answered only through a market-by-market analysis of the wages and working conditions offered by employers not using H-2's. Where this analysis has been done, the findings indicate that the H-2 program rarely imposes wage, housing, transportation, meal, or other costs which these growers would not be required to pay to recruit a U.S. workforce. *See, e.g.*, *The H-2 Program and Nonimmigrants: Hearings Before the Subcomm. On Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 177, 178, 180-190 (statement of H. Michael Semler) (Hudson Valley market). For discussion of the relationship between the H-2 terms and local "prevailing" conditions, see *infra* Section IV(B). The only expense clearly associated with H-2's but not U.S. workers is that growers using H-2's from certain Caribbean nations (including Jamaica) must pay one percent of the workers' wages in social security taxes to the sending country. *House Hearings On Immigration Reform*, *supra* at 94 (statement of George F. Sorn). Further, H-2 employers incur few special administrative expenses, for the standard contract provides that non-occupational medical insurance, unscheduled repatriations, and INS fines may be charged to the H-2 workers themselves. *See infra* note 122.<sup>3</sup>

113. *E.g.*, ninety percent of the West Indian H-2's in Florida pay for half their families' annual expenses with their U.S. earnings. NONIMMIGRANT WORKERS, *supra* note 39, at 91; "[A] total of about \$19 million was remitted to the Caribbean during 1980-81 as a result of the H-2 program." CARIBBEAN WORKERS, *supra* note 78, at 54.

114. Florida growers stopped accepting H-2's from Antigua after the government insisted that the workers be union members. P. KRAMER, *THE OFFSHORES* 6 (1966). Trinidad was also excluded, in part because its workers were too outspoken: "[T]he Trinidadian as an individual was a mistake for the program. He was not in the least docile, was quite capable of speaking up for himself and did so vigorously." *Id.* (statement of Fred Sikes, Vice Pres., U.S. Sugar Corp.). Guyana was similarly excluded, partially because the growers felt Guyanese were not sufficiently productive: "[D]espite our efforts to orient the Guyanese workers to the U.S. system of agriculture, where a high degree of productivity is required, they were either unwilling or unable to adjust themselves to our type of operation, since they were used to working at a more leisurely pace back home." *Id.* at 7 (statement of Fred Sikes, Vice Pres., U.S. Sugar Corp.).

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growers' demands or risk exclusion from the program. The H-2 growers take advantage of this regulatory vacuum to recruit a prime labor force in terms of age, ability, experience, and attitude.<sup>115</sup> Workers who performed unsatisfactorily in the past, filed complaints, or are otherwise considered "troublemakers" are blacklisted.<sup>116</sup> The foreign workers are without recourse against blacklisting for any reason, or for no reason other than the whim of the employer.

The nature of the H-2 visa further enhances employer control. An H-2 worker may work only for the petitioning employer. If this employment is terminated, for any reason, the worker is "out of status" and potentially deportable.<sup>117</sup> Thus the employer controls the worker's very right to remain in this country. The H-2 regulations provide many nominal protections, but these are of little value when the employer can render a complaining worker deportable and ensure that he never lawfully returns.<sup>118</sup>

H-2 workers are unable to protect themselves through collective action. Like all agricultural workers, contract workers are outside the protection of the National Labor Relations Act.<sup>119</sup> Moreover, a contract worker who engages in a strike or work stoppage is subject to deporta-

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115. The screening process was described by an agent of the U.S. Sugar Corporation as follows:

Three tables are set up, representing three stages of processing. At the first table we simply look at the man as a physical specimen and try to eliminate those with obvious physical defects. At the second table, we're trying to test intelligence and see if the man can understand English as we speak it by asking certain simple questions. The third table is where we attempt to find out about the man's work background. We also check our black book to see if a man has been in the U.S. on contract before and has been breached [*i.e.*, sent home for violating the contract].

*Id.* at 35. In 1980, a former H-2 worker described his experience in the Jamaican selection process as follows: "[T]he people doing the selecting looked at my hands and teeth, noted any scars or other physical marks, and asked if I was willing to work seven days a week and eat rice and pork." Affidavit of Karl Kerr, at 1 (Feb. 21, 1980), in *Rios v. Marshall*, 530 F. Supp. 351 (S.D.N.Y. 1981).

116. A worker who seriously displeases his employer, to the point that he is involuntarily repatriated during the season, is placed on the black or "u-list" of unacceptables who are forever barred from H-2 agricultural employment in the U.S. The H-2 who is u-listed is not only fired and banned from the industry, he is for all practical purposes barred from the U.S. labor market for life.

NONIMMIGRATION WORKERS, *supra* note 39, at 58.

117. 8 U.S.C. § 1251(a)(9) (1976).

118. The Florida sugarcane companies repatriate H-2's who are anything less than docile:

Some workers are repatriated for serious personal misconduct, theft, and violence, but most are sent home as the outgrowth of labor-management disagreements. Workers who refuse to cut cane at the piece rate offered . . . or who noisily seek end-of-the-season bonuses, are routinely shipped home, sometimes by the planeload.

NONIMMIGRANT WORKERS, *supra* note 39, at 58.

119. 29 U.S.C. § 152(3).

tion.<sup>120</sup> Even if striking H-2's are not deported, INS regulations provide them no protection against the importation of other alien strikebreakers.<sup>121</sup> The H-2 program thus brings the foreign worker to this country in a uniquely powerless position.<sup>122</sup>

These factors mean that many agricultural employers prefer H-2 workers even when Americans are available. As a result, DOL must struggle not only to measure the availability of U.S. workers but also to compel domestic recruitment by reluctant and sometimes hostile employers.

### B. *The Certification Process*

Only an extremely well-designed and vigorously administered recruitment system could protect U.S. workers when H-2's are so attractive. The Labor Department's certification process falls far short of this standard, for it fails to guarantee adequate employment conditions, ensure good faith domestic recruitment, or establish effective pre- or post-admission enforcement.

#### 1. *Minimum Terms and Conditions of Employment*

The Department of Labor may certify a need for foreign workers only if their employment would not have an "adverse effect on the terms and conditions of U.S. workers similarly employed."<sup>123</sup> But to increase the farm labor supply in a local market by more than 100 percent, as is common under the H-2 program, would inevitably depress prevailing wages if there were no further government intervention.<sup>124</sup> The "adverse effect" standard thus gives DOL the burden of preventing defla-

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120. 8 U.S.C. § 1251(a)(9) (1976); Interview with Thomas Simmons, Examinations Div., INS, Washington, D.C. (March 31, 1982).

121. INS approval of H-2 visa petitions can be denied or suspended only if the presence of the non-striking H-2 workers would have an adverse effect on "U.S. citizens or lawful permanent resident workers." 8 C.F.R. § 214.2(h)(10) (1982).

122. The powerlessness of the H-2 workers is also reflected in the standard work contract. *E.g.*, three percent of each worker's earnings may be deducted by the employer and transferred to the British West Indies Central Labour Organisation (BWICLO) to pay for health insurance and, in the "absolute discretion" of BWICLO, any extraordinary expenses incurred in transporting, housing, or caring for the workers. *See* Paragraphs 6(a)(i) and 8(a), Agreement for the Employment Of British West Indians In Agricultural Work In The United States of America (Form A) (1981). An additional twenty-three percent may be transferred to the Jamaican government and held as security to compensate BWICLO for any costs incurred in repatriating a worker or to compensate the growers for any transportation advances not recovered. The growers may also recover from this "compelled savings" for any INS fine or penalty. *Id.* at paragraphs 7 and 11.

123. 8 C.F.R. § 214.2(h)(3)(i) (1982).

124. For a discussion of the relationship between wages and labor supply in the H-2 context, *see* M. GRIFFING, IMPACT OF THE ADVERSE EFFECT WAGE RATE ON THE DOMESTIC FARM LABOR MARKET: A THEORETICAL DISCUSSION (1976) (unpublished report by the Bureau of Social Science Research, Washington, D.C.).

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tionary impact in a fundamentally deflationary program. As illustrated below, the minimum terms and conditions required by the H-2 regulations actually provided little or no protection for domestic workers.

*The Adverse Effect Wage Rate:* The centerpiece of DOL's effort to avoid wage deflation is the "adverse effect wage rate" (AEWR), a state-by-state earnings floor.<sup>125</sup> Agriculture employers seeking H-2 certification must guarantee that each worker, U.S. and foreign, will average at least the AEWR for each hour of work. The AEWR's for 1982 ranged from \$3.35 to \$4.73.<sup>126</sup>

Since 1968 DOL has set new AEWR's each spring by increasing the existing figures in proportion to the increase in agricultural earnings in the relevant state during the last full year.<sup>127</sup> This methodology is seriously flawed. First, the AEWR's are not based directly on current wages, but on a series of figures (that is, the earlier AEWR's) with only the most tenuous historical connection with actual farm earnings.<sup>128</sup> Second, the AEWR methodology fails to recognize that when foreign workers are admitted in significant numbers, they depress agricultural wages throughout the state. DOL acknowledges the impact on local wages, but attempts to offset this with an AEWR based on changes in a state-wide figure which is itself depressed. Third, basing the AEWR on

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125. 20 C.F.R. § 655.200(b) and .207 (1982). *See also* Williams v. Usery, 531 F.2d 305, 306 (5th Cir.), *cert. denied*, 429 U.S. 1000 (1976); Rowland v. Marshall, 650 F.2d 28 (4th Cir. 1981).

126. 47 Fed. Reg. 37980 (Aug. 27, 1982); 48 Fed. Reg. 232 (January 4, 1983). *See infra* note 127. Although AEWR's are calculated for all fifty states, DOL actually publishes AEWR's in the Federal Register only for those states in which H-2's have been or are expected to be used. 20 C.F.R. § 655.207 (1982).

127. 20 C.F.R. § 655.207(b) (1982). *E.g.*, the 1981 AEWR for New York was set by increasing the 1980 AEWR for New York by the percentage increase in average hourly earnings for field workers in New York between 1979 and 1980. In short, the AEWR's increase along with the average earnings of farmworkers.

The Secretary of Labor was unable to rely on the traditional formula to set AEWR's for 1982 because Department of Agriculture wage rate from 1981 had not been gathered. This led DOL to set no AEWR's for 1982 until suit was filed by U.S. farmworkers. In August, 1982, DOL agreed by consent order to begin a rulemaking to develop a new formula to set 1982 AEWR's for Maine, Vermont, and Florida (sugarcane) and to inform employers in these states that they must establish an escrow fund for the payment of back wages. *See* Bragg v. Donovan, No. 82-2361 (D.D.C. August 25, 1982). The rulemaking was completed in early 1983. 48 Fed. Reg. 2320 (Jan. 4, 1983). Farmworkers are currently seeking to compel DOL to develop an AEWR formula for 1983. *See* NAACP, Jefferson County v. Donovan, No. 82-2315 (D.D.C. 1982).

128. The early AEWR's were updated at various points without reference to farm wages, *e.g.*, through an adjustment tied to manufacturing wages (1965) and an across-the-board \$0.20 increase (1967). U.S. EMPLOYMENT SERVICE, U.S. DEP'T OF LABOR, HISTORY OF ADVERSE FORMULAS 2 (unpublished document obtained from the Office Of Technical Support, U.S. Employment Service, U.S. Dep't of Labor, Washington, D.C.) [hereinafter cited as HISTORY OF ADVERSE EFFECT FORMULAS]. Because each year's AEWR is based on the preceding AEWR, these early distortions are incorporated in the current AEWR's. For a valuable discussion of the evolution of the adverse effect wage rate concept from 1951 to 1966, see Dellon, *Foreign Agricultural Workers and the Prevention of Adverse Effect*, 1966 LABOR L.J. 739.

earnings in all crops encourages wage stagnation in those crops where earnings are above the average. Certain farm labor (including most work performed by H-2's) is physically difficult, performed in bad weather, located far from population centers, limited to a very short season, or otherwise so unattractive that the necessary labor will be drawn only by a wage which is high relative to other farmwork. The AEW is less than this wage. Knowing that they have access to an unlimited supply of aliens at existing earnings levels, H-2 employers in these crops have no economic reason to raise earnings over time.<sup>129</sup>

These factors have kept the AEW's extremely low.<sup>130</sup> Indeed, while the AEW appears to at least provide a special earnings floor, it is sometimes so low that it adds nothing to the federal minimum wage under the Fair Labor Standards Act.<sup>131</sup> Regardless of the level of the AEW, growers can defeat its purpose by manipulating piece rates and productivity requirements. The AEW is an hourly guarantee, but work in most H-2 crops is on a piece rate basis. When the AEW increases from year to year, many growers simply increase the number of units workers are required to pick. DOL regulations prohibit such "speed-ups," but enforcement is negligible.<sup>132</sup> As a result, piece rates fail to rise with changes in the AEW and U.S. workers are dismissed when they cannot meet the new "productivity minimums."

The failure of the AEW is illustrated by wage trends in the Hudson Valley, where Jamaican H-2's make up two-thirds of the apple harvest workforce. Each season the state government conducts a survey to identify the prevailing wage rate among domestic workers. The survey report for the Hudson Valley compares the piece rate paid to U.S. workers employed by growers also using H-2 workers ("users") with the piece

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129. Wages in H-2 states have declined relative to wages in states where H-2's have not been used. In 1960, prior to the first use of the statewide AEW's, the hourly wage for farmworkers was, on the average, higher in the ten states now regularly using H-2 workers than in the 38 continental states not regularly using H-2 workers. By 1977 farm wages in the H-2 states had fallen below those in the non-H-2 states. NATIONAL ASS'N OF FARMWORKER ORGANIZATIONS, ANALYSIS OF THE H-2 PROGRAM AND REQUEST FOR RULEMAKING AND OTHER RELIEF, Exhibit No. 2 (1979).

130. Agricultural piece rate workers earned a national average of \$4.61 per hour in 1980, Crop Reporting Board, Economics and Statistical Serv., U.S. Dep't of Agriculture, Farm Labor, February 23, 1981, at 3, but the 1980 AEW's were below \$4.00 for every state but Florida, where the AEW was \$4.09. 45 Fed. Reg. 30733, 30734 (1980).

131. 29 U.S.C. § 206(a)(1) (1976 & Supp. IV 1980). In 1978 the AEW's for seven states were less than \$0.18 above the Fair Labor Standards Act (FLSA) minimum of \$2.65. 42 Fed. Reg. 32306 (1979). In 1979, 1981 and 1982 the initial AEW's for Rhode Island and Massachusetts were below the FLSA requirements; DOL set the final AEW for these states by raising them to the FLSA minimum. 44 Fed. Reg. 32306 (1979); 46 Fed. Reg. 19110 (1981); 47 Fed. Reg. 37980 (1982).

132. See 20 C.F.R. § 655.207(c) (1982). A federal district court found in September, 1982, that DOL had wrongfully permitted apple producers in West Virginia to increase their productivity requirements from year to year to offset increases in the AEW. NAACP, Jefferson Co. v. Donovan, No. 82-2315 (D.D.C. Sept. 3, 1982).

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rate paid to U.S. workers employed by growers not using H-2 workers ("non-users"). The prevailing wage among H-2 users has consistently been *below* that paid by non-users.<sup>133</sup>

Further, because H-2 users dominate the Hudson Valley apple market, the overall prevailing wage is depressed. This effect can be illustrated by comparing the Hudson Valley with the two other areas in New York where H-2's are used. In both of these areas—the Champlain Valley in upstate New York and a five-county region in western New York—foreign contract workers constitute a smaller percentage of the workforce. The overall prevailing wage in the Hudson Valley has been consistently *lower* than in areas where fewer H-2's are used.<sup>134</sup>

Where H-2 growers dominate a market, they could block any increase in the prevailing wage by agreeing not to offer anything above the prior season's rate. One purpose of the AEWL is to offset this power by requiring that wages increase a specified percentage each year. But the Hudson Valley apple growers have not increased their rates in proportion to the increase in the AEWL. Between 1977 and 1981 the AEWL for New York increased twenty-eight percent, but the piece rates paid by the Hudson Valley H-2 users increased only thirteen percent.<sup>135</sup>

133.

	<u>1977</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>
<u>Users</u>	\$ .38	\$ .38	\$ .40	\$ .43	\$ .43
<u>Non-Users</u>	\$ .40	\$ .42	\$ .45	\$ .46	\$ .48

JOB SERV. DIV., NEW YORK STATE DEP'T OF LABOR, DOMESTIC AGRICULTURAL IN-SEASON WAGE REPORTS: HUDSON VALLEY APPLE HARVEST (FRESH MARKET), No. 1 (1977-1981) (separate reports from 1977 through 1981 seasons) [hereinafter cited, by year, as HUDSON VALLEY WAGE REPORTS].

134.

	<u>H-2 %</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>
Hudson Valley	66%	\$ .38	\$ .40	\$ .43	\$ .43
Champlain Valley	49%	\$ .45	\$ .45	\$ .50	***
Western New York	8%	\$ .45	\$ .46	\$ .50	\$ .55

1977-1981 HUDSON VALLEY WAGE REPORTS, *supra* note 133, at No. 1; JOB SERV. DIV., NEW YORK STATE DEP'T OF LABOR, DOMESTIC AGRICULTURAL IN-SEASON WAGE REPORTS: CLINTON, ESSEX/WASHINGTON COUNTIES APPLE HARVEST (FRESH MARKET), No. 1 (1977-81) (separate reports for 1977 through 1981 seasons in Champlain Valley); JOB SERV. DIV., NEW YORK STATE DEP'T OF LABOR, DOMESTIC AGRICULTURAL IN-SEASON WAGE REPORTS: AGRICULTURAL AREAS I AND II (FRESH MARKET) No. 1 (1977-1981) (separate reports for 1977 through 1981 seasons in western New York). No prevailing rates were published for the 1981 harvest in the Champlain Valley, but no grower in this area paid less than \$.50 per box. The percentage of H-2 penetration refers to the 1981 season.

135. The New York AEWL increased from \$2.70 in 1977, to \$3.48 in 1981. 42 Fed. Reg. 40192, 40193 (1977); 46 Fed. Reg. 19110-11 (1981). Piece rates increased from \$.38 to \$.43. See *supra* note 133.

Even more telling is the disparity between the increase in the AEWL and the change in actual earnings: Between 1977 and 1981 the average hourly earnings of the domestic apple workers surveyed in the Hudson Valley increased only four percent, from \$4.76 to \$4.95. 1977 AND 1981 HUDSON VALLEY WAGE REPORTS, *supra* note 133, at No. 5.

*Family Housing:* Agricultural employers seeking H-2 certification must offer free housing to workers not within commuting distance. However, separate sleeping quarters for families must be provided only when this is the "prevailing practice" in the area.<sup>136</sup> Most growers offer only barracks housing. The lack of privacy inherent in common sleeping quarters closes these jobs to women and to workers traveling in family units.

This situation illustrates two problems running throughout the H-2 regulations. First, identical treatment of U.S. and foreign workers is not automatically sufficient to prevent an adverse effect on U.S. workers. The expectations of domestic workers are often different, and in some areas more demanding, than those of the foreign workforce selected by the growers.<sup>137</sup> Second, the certification regulations frequently require only that the grower conform to local "prevailing practice." Because agricultural working conditions have historically been depressed, this prevailing practice standard operates as a grandfathering provision, permanently tying farm jobs to outdated employment conditions.

*Travel Advances:* H-2 growers must offer "travel advances" to assist U.S. workers in reaching the orchards if this is the common practice in the local area or if the H-2 workers receive advances.<sup>138</sup> The apple producers traditionally provided advances to the Jamaican workers and, consequently, to any domestic workers needing advances. In 1977 these growers refused to offer advances to U.S. workers on the ground that Jamaican workers would not receive advances. Yet it was subsequently learned that the H-2's were provided travel advances by the Jamaican government. DOL then revised its regulations to prevent this type of manipulation, requiring that transportation funds be advanced to U.S. workers "if . . . foreign workers receive such advances directly from the employer or indirectly from any person, agency, or other entity which is collaborating with the employer."<sup>139</sup> Nevertheless, the apple growers continue to refuse to offer advances to U.S. workers, claiming that since 1978 the advances to the Jamaicans have been provided by a source in

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136. 20 C.F.R. § 655.202(b)(1) (1982).

137. The different housing needs of U.S. and foreign workers arise out of the employers' recruitment practices, *i.e.*, although INS regulations permit H-2 workers to bring their dependents, 8 C.F.R. § 214.2(h)(1) (1982), employers will hire only males willing to travel alone. Most other differences in the needs of U.S. and foreign workers are rooted in the vast economic and social disparities between the United States and the sending countries. H-2 employers recruit among the rural poor in pre-industrial societies, taking advantage of high unemployment, low expectations and, the fact that U.S. dollars are more valuable in the Caribbean or Mexico than in the U.S. *See generally* CARIBBEAN WORKERS, *supra* note 78, at 15-61 (sociological analysis of the background of the Jamaican sugarcane cutters).

138. 20 C.F.R. § 655.202(b)(5) (1982). *See also* 20 C.F.R. § 653.501(d)(5) (1982).

139. *See* 20 C.F.R. § 655.202(a) (1982) (promulgated at 43 Fed. Reg. 10306, 10308 (1978)).

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Jamaica unrelated to the growers or the Jamaican government.<sup>140</sup> The growers are at least partially responsible for this arrangement and the Jamaican funding source is clearly “collaborating with the employers,”<sup>141</sup> but DOL nevertheless accepts the apple orders with no provision for travel advances for U.S. workers. Thus, only alien workers are regularly able to obtain financial assistance to reach the apple orchards.

*DOL Minimums As A “Ceiling”*: The minimum employment terms were designed to set a floor on working conditions, but DOL also uses these provisions as a ceiling. A domestic farmworker who demands a higher wage or better conditions—no matter how slight the demand—is deemed unavailable. H-2 employers are thus assured an unlimited supply of labor (U.S. or foreign) at the minimums set by the government.

This anomalous application of the H-2 regulations was upheld by the First Circuit in *Hernandez Flecha v. Quiros*.<sup>142</sup> Puerto Rican farmworkers challenged DOL’s decision to certify apple growers who refused to recruit in Puerto Rico because the Commonwealth was attempting to negotiate better terms for its workers.<sup>143</sup> The First Circuit rejected plaintiffs’ argument, finding that “a worker who is not able and willing to enter into a contract of employment upon the U.S. conditions is not available within the statutory meaning. . . .”<sup>144</sup> In fact, the court barred all bargaining by U.S. workers within the H-2 program.<sup>145</sup>

The *Hernandez Flecha* opinion is strangely blind to the pricing mechanism which would set wages if U.S. workers were free to negotiate. The First Circuit assumed that wages must be either frozen at the DOL minimum or set at the highest level demanded by any worker. But there is an intermediate position: determination by the market. If earnings were increased to the point that growers could satisfy their labor needs

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140. Letter from Harold F. Edwards, Chief Liaison Officer, British West Indies Central Labour Organisation, to William B. Lewis, U.S. Employment Serv., U.S. Dep’t of Labor (May 25, 1978).

141. *Supra* note 139. For example, during the negotiations between the H-2 users and the Caribbean Regional Labor Board each Spring the parties discuss “[r]equests by Jamaican banks that employers honor the voluntary assignments to . . . banks of any travel expense reimbursement as collateral for travel advance loans.” Stipulations and Admissions by Florida Sugar Defendants, (submitted by Florida Fruit and Vegetable Ass’n and Florida Sugar Producers Ass’n) at 15, *Rios v. Marshall*, 530 F. Supp. 351 (S.D.N.Y. 1981).

142. 567 F.2d 1154 (1st Cir. 1977), *cert. denied* 436 U.S. 945 (1978).

143. For discussion of the role of the Commonwealth in recruitment in Puerto Rico, *see infra* text accompanying note 155.

144. 567 F.2d at 1157.

145. [T]he question is the same whether the Puerto Rican workers’ insistence upon [Puerto Rican] conditions was made for them by the legislature, or by the P.R. Secretary, or was due to insistence by a union to which they all belonged, or was merely the result of Puerto Rican workers not finding U.S. conditions sufficiently attractive, and demanding more on an individual basis. Our decision covers all these matters . . . .

567 F.2d at 1155-56.

with U.S. workers, there would be no need to rule on the availability of an individual willing to work only at some higher rate. Further, the First Circuit was needlessly disturbed by the workers' attempt to negotiate for higher wages while their employers had no reciprocal right to argue for wages below the DOL minimums.<sup>146</sup> Negotiation within a minimum wage framework is, of course, routine. Nothing in the Immigration and Nationality Act or its legislative history suggests that the H-2 provisions were intended to bind U.S. farmworkers to work only at a wage set by the government.<sup>147</sup>

Finally, *Heranadez Flecha* ignores the freedom of the sending countries to contract for any additional benefits they can extract from the growers. Benefits obtained for foreign workers must then also be provided to domestic workers. This means that growers, the U.S. government, and the sending nations may affect the conditions under which the U.S. workers are employed, but domestic workers themselves cannot.

## 2. *Domestic Recruitment Requirements*

The intensity of the growers' recruitment effort largely determines whether U.S. workers can be hired. The domestic recruitment required of H-2 employers appears imposing on paper, but in reality it is narrow, passive, and often intentionally unproductive.

*Exclusive Reliance on the Employment Service:* The certification process rests almost entirely on recruitment through the employment service system. This cripples the effort from the outset for the interstate clearance system is cumbersome and slow. The complexity of the job orders, employer reluctance to cooperate with DOL procedures, and the delays inherent in a multi-level bureaucratic process mean that the job orders are rarely accepted by DOL until three weeks after they have been filed. At least another week is consumed in sending the orders to the appropriate states in the South and Southwest. Thus, one-half of the sixty-day recruitment period has often elapsed before the orders are even received in the states likely to have available workers. Additional delays then arise in these "labor supply" states, where the employment service personnel are tied to the farm community and often share the growers' interest in retaining local labor.<sup>148</sup> As a result it is not unusual for the job orders to be actually available in the local offices for only two or three

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146. See 567 F.2d at 1156 n.1.

147. Cf. 20 C.F.R. § 656.40(a)(2)(ii) (1982) (in the permanent labor certification context, employers must offer at least the local union wage even if this exceeds what would otherwise be the prevailing rate).

148. For a discussion of the traditional ties between state employment service agencies and agricultural employers, see *NAACP, Western Region v. Brennan*, 360 F. Supp. 1006, 1009-10 (D.D.C. 1973).

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weeks of the mandated sixty-day recruitment period. In some cases the job orders are never made available.<sup>149</sup>

Moreover, most migrant farmworkers do not frequent the employment service offices. Relatively few out-of-state agricultural jobs are offered through this system,<sup>150</sup> and most workers arrange their employment through crewleaders or set out as "free wheelers," finding work as they travel. Consequently, even the job orders displayed in the employment service offices on a timely basis never come to the attention of the majority of domestic migrants.<sup>151</sup>

*Pro Forma Recruitment:* Most migrant farmworkers have little formal education, are intimidated by written material, and choose their work on the basis of oral commitments. The interstate clearance system functions on an entirely different level, asking workers to commit themselves to a job hundreds of miles away on the basis of a complex document submitted by a stranger.<sup>152</sup> This system can work only if employers make aggressive, good faith efforts to bridge the gap between offer and acceptance. Growers seeking certification rarely make these special efforts, for their goal is to establish that no U.S. workers are available. Most H-2 employers do not send recruiters to the labor supply states, accept collect telephone calls, provide travel advances, encourage crewleaders to bring crews to the worksite<sup>153</sup> or otherwise make affirmative efforts beyond the minimums required by DOL. The job orders are usually submitted only at the filing deadline, even though this means they do not reach Texas and Florida until well after the workers have joined

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149. *E.g.*, although North Carolina is a major employment area for farmworkers in June and July, the North Carolina employment service officials each year refuse to display orders for the apple harvest in Virginia or West Virginia, on the ground that there are no available workers in the state. Interview with Richard Panati, Certifying Officer, U.S. Employment Serv., U.S. Dep't of Labor, Philadelphia, Pa. (August 12, 1981).

150. In FY 1980 there were 2,600 agricultural job orders circulated through the interstate clearance order system. EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEP'T OF LABOR, REPORTS H AND K: INTERSTATE AND INTRASTATE CLEARANCE ORDERS, PERIOD ENDING 9/80, 2 (1980).

151. There are an estimated 800,000 domestic migrant farmworkers and their dependents. *See*, PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, 1978 MIGRANT HEALTH PROGRAM TARGET POPULATION ESTIMATES 3 (1980). In FY 1980 these workers filed 75,990 applications at employment service offices. EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEP'T OF LABOR, EMPLOYMENT SERVICE AUTOMATED REPORTING SYSTEM: TABLE 06, at 002 (1980).

152. The H-2 job orders often run more than fifteen tightly spaced pages, using difficult and legalistic language. *See, e.g.*, Florida Fruit and Vegetable Ass'n, Clearance Order No. 2723402 (June 26, 1981) (37 pages); Rinehart Orchards, Inc., Clearance Order No. 3007916 (1981) (24 pages).

153. In some instances growers actively discourage crewleaders, *e.g.*, Max Sontheim, Clearance Order No. 2504703 (1978) ("No crew will be accepted"); Sprong Fruit Farm, Clearance Order No. 2504401 (1978) ("No crew leader accepted"); Allbright Farm, Clearance Order No. 2504003 (1978) ("No labor contractor accepted").

the migrant stream.<sup>154</sup>

*Refusal To Hire Puerto Rican Workers:* As U.S. citizens, Puerto Ricans are entitled to preference in U.S. employment. Much of the recent history of the H-2 program has been written in terms of the struggle over whether Puerto Rican farmworkers would be recruited for work in the apple harvest. The focal point of this conflict has been Puerto Rico's Public Law 87, which provides that no person may be recruited on the island except under a contract approved by the Commonwealth.<sup>155</sup> From 1975 through 1977 the Commonwealth attempted to place its farmworkers under a contract calling for benefits above the DOL minimums,<sup>156</sup> but DOL ruled that the Puerto Rican workers were "unavailable."<sup>157</sup> In 1978, however, the growers lost any claim that Puerto Rican workers were unavailable, for the Commonwealth waived its demand for benefits above the regulatory minimums. DOL then assisted in transporting 992 workers from Puerto Rico to orchards throughout the Northeast. Many were never given an opportunity to work,<sup>158</sup> while others were quickly dismissed or given such poor assignments that they left voluntarily. Only ninety-seven Puerto Ricans were still employed fifteen days after the beginning of the harvest.<sup>159</sup>

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154. DOL requires sixty days of domestic recruitment before certification, 20 C.F.R. § 655.201(c) (1981), and the employers need two to three weeks after certification to bring the H-2 workers to the orchards. Thus the job orders must be filed approximately eighty days before the date of need. Most apple orders are filed only at this time. *See, e.g.*, Chick Orchards, Inc., Clearance Order No. 0610972 (filed June 19, 1981) (largest H-2 user in Maine; 90 days before date of need); Tri-County Growers, Inc., Clearance Order No. 0417828 (filed June 18, 1981) (largest H-2 user in W. Va.; 81 days before date of need). More than 70 percent of the migrant workers wintering in Florida have set out for work by the end of May. LEGAL SERVICES CORP., AN ESTIMATE OF THE NUMBER OF MIGRANT AND SEASONAL FARMWORKERS IN THE UNITED STATES AND THE COMMONWEALTH OF PUERTO RICO 60-61 (1977).

155. Act No. 87 of June 22, 1962, 29 L.P.R.A. §§ 526-534.

156. *E.g.*, in 1975 the Commonwealth made four demands which exceeded the H-2 minimums: that contract disputes be adjudicated in Puerto Rico; that hot meals be served; that more extensive insurance protection be provided; and that the growers post a performance bond. *Galan v. Dunlop*, 411 F. Supp. 268, 270 (D.D.C. 1976).

157. In 1976 the Commonwealth ultimately acquiesced to the growers' contract demands and approximately 600 Puerto Ricans were recruited. COMPTROLLER GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE, RECRUITING AND PLACING PUERTO RICAN WORKERS WITH GROWERS DURING THE 1978 APPLE HARVEST WERE UNSUCCESSFUL, APPENDIX I at 9 (1980) [hereinafter cited as COMPTROLLER'S REPORT ON 1978 APPLE HARVEST].

158. *E.g.*, of the 554 Puerto Ricans sent to Virginia and West Virginia, 198 (35%) were never hired. *See* COMPTROLLER'S REPORT ON THE 1978 APPLE HARVEST, *supra* note 157, at 2.

159. COMPTROLLER'S REPORT ON THE 1978 APPLE HARVEST, *supra* note 157, at 2. Approximately \$275,000 in Comprehensive Education and Training Act (CETA) funding was used to transport these workers to and from the mainland and to purchase room and board. *Id.* By terminating the workers before fifty percent of the harvest was completed, the employers avoided responsibility for the transportation and subsistence costs.

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The refusal to accept Puerto Rican workers in 1978 was a direct challenge to DOL's control of the certification process. DOL retreated from this challenge. Over 200 formal administrative complaints were filed by Puerto Rican workers,<sup>160</sup> but not one employer was sanctioned. Fearing reenactment of this fiasco, the Commonwealth refused to waive Public Law 87 in 1979 and no Puerto Ricans worked in the apple harvest. The Puerto Rican contract requirements have been waived each year since 1979, but few Puerto Ricans have been hired.<sup>161</sup> The apple producers have thus largely succeeded in closing the harvest jobs to U.S. citizens in Puerto Rico, solely on the basis of their preference for alien workers.

### 3. *Sanctions and Enforcement*

The Department of Labor can compel growers to solicit U.S. workers only by threatening to withhold certification. In one sense this is a powerful tool, for an unexpected denial of access to H-2's could seriously disrupt traditional H-2 users. Yet the very power of this sanction limits its usefulness, for DOL is understandably wary about causing (or being blamed for) the failure of a harvest. In another sense denial of certification is too weak to be effective, for both the INS and the federal courts have failed to provide consistent support for DOL's certification decisions.<sup>162</sup> Consequently, employers know that they will not necessarily lose access to H-2 workers if DOL refuses to certify. This has deprived DOL of much of its control over H-2 admissions.

The absence of adequate sanctions also cripples post-admission enforcement. DOL has disavowed any authority under the H-2 provisions to enjoin ongoing violations, sue for back-wages, or impose fines.<sup>163</sup> The only remaining penalty for post-certification abuses is denial of certification for future seasons. But even this is more theory than practice. DOL has never actually barred a grower from using H-2's as a consequence for violations committed during a prior season.<sup>164</sup>

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160. *Id.*, Appendix I, at 19-20.

161. No more than 250 workers have been recruited from Puerto Rico for any apple harvest since 1979. Telephone interview with Kenneth Bell, Labor Cert. Div., U.S. Employment Service, Washington, D.C. (Sept. 23, 1981).

162. *See infra* Section IV(C) and (D).

163. *Cf.* *West. Colo. Fruit Growers Ass'n v. Marshall*, 473 F. Supp. 693 (D. Colo. 1973), where DOL filed counterclaims after the season to recover wages due U.S. workers and enjoin future violations. The monetary counterclaims were dismissed on the ground that DOL had no authority to pursue such claims. 473 F. Supp. 696-700.

164. Telephone interview with Gil Apodoca, National Monitor Advocate, Employment Service, U.S. Dep't of Labor, Washington, D.C. (March 23, 1983); Telephone interview with Aaron Bodin, Manpower Development Specialist, U.S. Employment Service, U.S. Dep't of Labor, Washington, D.C. (March 23, 1983). *See infra* note 230.

### C. *The Role of the Immigration and Naturalization Service*

Although final responsibility lies with the Commissioner of the Immigration and Naturalization Service, the administration of the H-2 program has been transferred to the Department of Labor. This is a sound administrative decision, well-grounded in the prior temporary labor programs, the legislative history of the H-2 provisions, and the relative expertise of the agencies. However, this structure has been undermined by INS's failure to support the efforts to restrict H-2 admissions. INS has never refused H-2 visas after DOL certified a need for agricultural workers.<sup>165</sup> Similar deference to decisions denying certification would give DOL meaningful control of the H-2 program. But INS is willing to intervene to protect grower interests. For example, in 1977 workers in the Presidio Valley of Texas requested 809 Mexican workers but refused to provide housing, pay the adverse effect wage rate, or comply with other H-2 requirements. Nevertheless, at the urging of President Carter,<sup>166</sup> the Commissioner of the INS overruled his regional office and admitted all the H-2's requested.<sup>167</sup>

The refusal of INS to play any role in post-admission enforcement also has hobbled the H-2 program. INS makes no effort to monitor the treatment of the foreign workers and rarely imposes sanctions for violations identified by other agencies. In fact, some immigration officials doubt that INS could terminate an approved H-2 visa petition despite an employer's disregard of his statements in the petition.<sup>168</sup> In any

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165. Interview with Thomas Simmons, Examinations Div., INS, Washington, D.C. (March 31, 1982); Interview with Kellogg Whittick, District Director, INS, Washington, D.C. (April 2, 1982).

166. "But the farmers' past record of lawbreaking, and their unwillingness to provide proper living conditions and wages for workers, did not stop Carter from intervening personally to overturn the decisions of both the INS and the Labor Department." *Los Angeles Times*, June 24, 1977, Part II, at 6, col. 1.

167. 809 Agricultural Workers, Beneficiaries of Two Visa Petitions Filed By Presidio Valley Farmers' Ass'n, Nos. ELP-N-1387 and ELP-N-1388 (INS, U.S. Dep't of Justice, June 9, 1977). Wage and hour investigators subsequently reported that many of these H-2 workers earned less than the federal minimum wage of \$2.20 per hour, some receiving as little as \$0.60 per hour. Transcript of Proceedings at 174-175 (May 25, 1978) (testimony of James L. Williams, Wage and Hour Div., U.S. Dep't of Labor), *Presidio Valley Farmers' Ass'n v. Marshall*, No. EP-78-CA-95 (S.D. Tex. May 26, 1978) (order granting preliminary injunction), *appeal dismissed as moot*, 617 F.2d 294 (5th Cir. 1980).

INS overruled DOL's denial of certification on at least two other occasions: in extending the visas of West Indian H-2's in Florida in 1965 and in admitting Canadian H-2's for logging jobs in New England during the Nixon Administration. *NONIMMIGRANT WORKERS*, *supra* note 39, at 27.

168. *E.g.*, in discussing the options available when he was told that the Presidio Valley growers were not complying with their statements in the visa petitions, *see infra* note 169, the Commissioner of the INS stated that he had "no other authority" than to refer the matter to DOL. Deposition of Leonel J. Castillo, October 11, 1977, at 44, *Montelongo v. Bell*, No. B-77-167 (S.D. Texas, filed July 11, 1977). Other immigration officials suggest, persuasively, that a revocation could be effected pursuant to INS's authority to "reopen" its prior approval

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event, an effort to terminate approval of a H-2 petition definitely would require a lengthy administrative effort. INS has never attempted to deprive a farm employer of his H-2 workers after the season has begun, even in the face of egregious violations.<sup>169</sup>

Nor has INS exercised its authority to impose monetary sanctions. In lieu of posting bond, many H-2 employers sign an agreement providing that the foreign workers will be employed only "in strictest compliance with the terms of the visa petition."<sup>170</sup> This agreement further provides that "liquidated damages" of \$10.00 shall be paid to INS for each violation of its terms. Thus the government has an enforcement tool which penalizes only the employer (that is, the H-2 worker need not be denied further employment), imposes potentially significant but not catastrophic penalties, and is free from legal question. Yet the liquidated damages agreement is used solely to ensure that the H-2 workers depart after the season, not to enforce the promised terms and conditions of employment.<sup>171</sup>

### D. *The Role of the Federal Courts*

In 1974 a New England apple producer obtained H-2 workers by court order,<sup>172</sup> the first time since at least 1965 that a grower successfully attacked DOL's certification decision.<sup>173</sup> Judicial challenges have grown steadily since that ruling. During the last nine years at least fifty

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of a petition. 8 C.F.R. § 103.5 (1982). Interview with Thomas Simmons, Examinations Div., INS, Washington, D.C. (March 30, 1982); Interview with Michael Heilman, Office of the General Counsel, INS, Washington, D.C. (April 7, 1982).

169. *E.g.*, an INS investigation in July, 1977, showed that the Mexican H-2 workers admitted to Presidio, Texas, were working only 25-30 hours per week and were compelled to pay their own transportation, both in violation of the employer's promises in the visa petition. On this basis the investigator recommended that approval be revoked. Memorandum from Arnold Flores to Leonel Castillo, Commissioner of the INS, at 3-5 (July 12, 1977). The INS neither withdrew its approval nor imposed any other sanction.

170. INS, U.S. DEPT OF JUSTICE, FORM 1-320B No. 1 (Rev. 9-1-75).

171. Interview with Thomas Simmons, Examinations Div., INS, Washington, D.C. (March 30, 1982); Interview with Kellogg Whittick, District Director, INS, Washington, D.C. (April 2, 1982).

172. *Elton Orchards, Inc. v. Brennan*, No. 74-276 (D.N.H. Sept. 17, 1974) (order granting preliminary injunction). The First Circuit reversed, but only after the employer had enjoyed access to H-2 workers for the full season. 508 F.2d 493 (1st Cir. 1974).

173. Research reveals only five cases filed between 1965 and 1974 dealing with H-2 certification decisions in agriculture. In 1965 Florida growers unsuccessfully challenged DOL's refusal to certify H-2's in Florida. *Chase Glades Farms v. Wirtz*, No. 65-86 (M.D. Fla. July 19, 1966). Three cases were filed in 1967 and 1968 on behalf of California farmworkers seeking to halt the admission of Mexican H-2's. These cases were settled and no H-2's were admitted. *Alaniz v. Wirtz*, No. 478-07 (N.D. Cal. Sept. 21, 1967); *Ortiz v. Wirtz*, No. 47803 (N.D. Cal. Sept. 21, 1967); *Ortiz v. Wirtz*, No. 48685 (N.D. Cal. March 27, 1968). Finally, in 1972 the United Farm Workers' union unsuccessfully challenged a DOL decision to certify H-2 workers for the sugarcane work in Florida. *United Farm Workers v. Kleindeinst*, No. 72-1439 (S.D. Fla. Feb. 26, 1973).

cases have been filed in connection with the use of foreign labor in agriculture, many of which have affected an entire harvest. This litigation has sorely tested the judicial system. Certification cases often reach the courts only days before the season, under conditions which would strain the most able and dispassionate jurist. Even allowing for these conditions, however, a number of courts have shown surprisingly little regard for the purpose of the H-2 program, DOL's labor market expertise, or even the normal limits of judicial review. Consequently, the federal judiciary has largely impaired and destabilized the certification process. The following section identifies three problems confronted by the courts in H-2 litigation and illustrates these problems through discussion of five related cases from the Western District of Virginia.

1. *Absence of an Administrative Record*

The DOL certification requirement is intended to ensure that the agency with the greatest labor market expertise makes the initial finding as to whether U.S. workers are available. This system assumes that judicial review will be based on the combined DOL/INS administrative record. Yet when DOL refuses to accept a job order because the employer has not offered the required terms, the dispute is often in litigation before any recruitment has been done. If these cases were filed well before the harvest, the court could rule on the disputed issue and return the matter to DOL for recruitment. But negotiations over the job order often continue for weeks after the filing deadline. Moreover, some growers engage in deliberate brinksmanship, refusing to either amend their orders or move promptly to challenge DOL's rejection. If DOL refuses to concede, the growers turn to the courts for "emergency" relief, citing the prospect of crops "rotting in the fields." Regardless of the merits of the dispute over the job order, the court must confront the ultimate question—whether to admit H-2 workers. But the court has no record of recruitment, no administrative finding as to availability, and no time for a remand. This last-second fact finding defeats the purpose of the certification system. The federal judiciary does not have the expertise or the mechanisms to determine in the first instance whether U.S. workers can be found.

2. *Disregard of Preliminary Relief Standards*

Litigants are ordinarily entitled to preliminary relief only after establishing, *inter alia*, that they will suffer irreparable harm absent judicial intervention.<sup>174</sup> In certification cases the growers base their request for

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174. *Brown v. Chote*, 41 U.S. 452, 455-457 (1973); 11 C. WRIGHT AND A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2948, at 431-441 (1973).

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relief on sweeping claims of imminent crop loss.<sup>175</sup> Rarely is detailed information offered to support these claims. Moreover, even if it were shown that the full crop could not be harvested by U.S. workers, this would not prove serious financial loss, for farmers frequently limit the supply of agricultural produce to raise or maintain prices. The financial significance of a labor shortage depends on the relative size of the crop, the current demand, the competing supply, shipping costs, price elasticity, alternative marketing possibilities, and a complex variety of other factors. Rather than delving into these issues, the courts have accepted the employer's financial claims at face value.

The judiciary has been unresponsive, however, to the harm caused by preliminary orders admitting foreign workers. When aliens are admitted without the required domestic recruitment, U.S. farmworkers are denied employment.<sup>176</sup> When contract workers are admitted on terms below the DOL minimums, working conditions are undermined. Improvidently granted relief also frustrates consistent administration of the certification system, particularly in view of the difficulty of overcoming the mootness barrier to appellate review.

### 3. Mootness

An appeal of a preliminary order admitting foreign workers will rarely be heard before the visas have expired. Mootness is avoided in comparable situations on the rationale that the problem is "capable of repetition, yet evading review."<sup>177</sup> Nevertheless, three of the four circuits which have faced this issue have ruled that the end of the harvest moots the appeal of a preliminary order affecting H-2 certification.

The First Circuit is willing to hear an appeal in this situation. In *Elton Orchards v. Brennan* that court reversed a preliminary order affecting certification even though the season had ended, on the ground that "the

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175. *E.g.*, "[A]bsence of the required labor force to harvest plaintiff growers' crops commencing in early September will result in the ruination of an estimate (sic) one-half (1/2) or better of the total crop, a loss of several million bushels of apples." Complaint at 6, *Frederick County Fruit Growers' Ass'n v. Marchall*, 436 F. Supp. 218 (W.D. Va. 1977).

176. Two factors obscure the harm caused U.S. migrants by the admission of H-2 workers without the required recruitment. First, because the jobs have not been adequately advertised, few interested domestic workers have been identified. Second, DOL regulations appear to guarantee that all workers who appear at the worksite will be hired, even after certification has been granted. 20 C.F.R. § 655.203(e) (1982) (employer shall hire all qualified U.S. workers who apply before half of the H-2 contract period has elapsed). But this provision has little operative impact, for employers have not been required to discharge the H-2 workers or to provide additional housing. *See* COMPTROLLER'S REPORT ON THE 1978 APPLE HARVEST, *supra* note 157, APPENDIX I, at 18 (Puerto Ricans turned away from the labor camps because the housing was filled by Jamaicans). Once the H-2's are admitted, U.S. migrants are guaranteed only jobs and beds which are already filled.

177. *See, e.g.*, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *U.S. v. Oregon*, 657 F.2d 1009, 1012 n.7 (9th Cir. 1981).

district court's opinion in this case, if allowed to stand, would have a substantial impact on the Department of Labor's treatment of . . . [future] requests."<sup>178</sup> No other circuit has followed this reasoning. In *Galan v. Usery* the District of Columbia Circuit refused to review an order upholding DOL's certifications for the 1975 apple harvest, even though the appeal involved "questions of law which conceivably can recur as another harvest season approaches."<sup>179</sup> In three cases filed in 1977 and 1978, all captioned *Frederick County Fruit Growers' Association v. Marshall*, the Fourth Circuit dismissed efforts by DOL to appeal preliminary orders affecting certification,<sup>180</sup> finding that "[w]ith the passage of the . . . apple season, the . . . injunction is obviously mooted."<sup>181</sup> Finally, in *Presidio Valley Farmers' Association v. Marshall*, the Fifth Circuit refused for the same reason to review a preliminary order compelling DOL to admit Mexican H-2's for the 1978 season.<sup>182</sup>

The mootness barrier could conceivably be overcome through expedited appeal. In practice, however, even expedited processing is unlikely to bring a decision before the termination of the H-2 visas. In *Elton Orchards, Hernandez Flecha*,<sup>183</sup> and two of the *Frederick County* cases the appellate courts did expedite the appeal, yet no decision was reached until after the season. No H-2 case has been found in which an appeal was decided before the end of the harvest. A preliminary injunction may, of course, be brought before an appellate court on a motion to stay, but this gives the petitioner a significantly greater burden.<sup>184</sup> In the H-2 context this burden has proven insurmountable. Although DOL routinely requests this relief, no case has been found in which an appellate court has stayed an order admitting H-2 workers.

Rigid application of the mootness doctrine has thus made it virtually impossible to challenge preliminary orders compelling the admission of H-2 workers—orders which ordinarily determine the final outcome of the litigation. As a result, the federal trial courts exercise broad author-

178. 508 F.2d 493, 498 n.6 (1st Cir. 1974). The First Circuit reached this conclusion again three years later in *Hernandez Flecha v. Quiros*, 567 F.2d 1154, 1157 (1st Cir. 1977), *cert. denied* 436 U.S. 945 (1978).

179. No. 76-1019, slip op. at 2-3 (D.C. Cir. March 10, 1977), *dismissing appeal from Galan v. Dunlop*, 411 F. Supp. 268 (D.D.C. 1975).

180. Nos. 77-2042 and 77-2170 (consolidated) (4th Cir. Nov. 9, 1977) (order dismissing appeals of preliminary injunctions); No. 78-1608 (4th Cir. March 20, 1979) (order dismissing appeal of preliminary injunction). *See infra* Section IV(D)(4).

181. No. 78-1608, slip op. at 4-5 (4th Cir. March 20, 1979).

182. 617 F.2d 294 (5th Cir. 1980).

183. 567 F.2d 1154 (1st Cir. 1977), *cert. denied* 436 U.S. 945 (1978). *See supra* text accompanying note 141.

184. The parties seeking a stay must establish, *inter alia*, that they will suffer irreparable harm, that no substantial harm will be suffered by other interested parties, 11 C. WRIGHT AND A. MILLER, *supra* note 174, § 2904, at 316, and that the district court abused its discretion in not issuing the stay, 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 62.05, at 62-22 (2d ed. 1979).

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ity over H-2 admissions without the benefit of either prior appellate guidance or the sobering expectation of appellate review.

### 4. “*The Virginia Connection*”

Five H-2 cases have been decided by the U.S. District Court for the Western District of Virginia since 1977,<sup>185</sup> giving this court a powerful influence on the recent operation of the H-2 program. This influence has been used to defend employer interests and limit DOL’s control over the admission of foreign workers. The government has never won an agricultural H-2 case in this court.

The first H-2 litigation to come before the Western District of Virginia was *Frederick County Fruit Growers’ Association v. Marshall (Frederick County I)*, an action filed by Virginia apple producers in July, 1977, to compel DOL to accept job orders without any provision for travel advances for U.S. workers.<sup>186</sup> The central question was whether employers in the area of intended employment had “commonly provided” travel advances. H-2 employers in Virginia had clearly been offering advances.<sup>187</sup> Nevertheless, the day after the growers’ complaint was filed, Judge Ted Dalton entered a temporary restraining order compelling DOL to accept the disputed job orders. Two weeks later the court entered a preliminary injunction to the same effect, based on a finding that Virginia growers not using H-2 workers ordinarily provided travel advances only through their crewleaders. This decision failed to recognize DOL’s principal contention that if the crewleader is not provided an advance, the grower must be willing to do so. The decision also mistakenly emphasized protecting consumers from high prices rather than the intended goal of the H-2 program—preventing the displacement of U.S. workers.<sup>188</sup> Nevertheless, the Fourth Circuit denied DOL’s request to stay the preliminary injunction. When finally heard three months later, the appeal was dismissed as moot because the season had ended. Anticipating a decision on the merits, the Fourth Circuit remanded to the district court with instructions “to decide promptly whether or not to issue a *permanent* injunction, so that, if necessary, this court can resolve the dispute in ample time before the 1978 harvest.”<sup>189</sup> However, on remand Judge James Turk granted the growers’ motion to dismiss as

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185. The Western District of Virginia encompasses the apple producing regions near the Shenandoah Mountains and much of the tobacco area along the Virginia-North Carolina border. During the period relevant here there were two active judges in this district, James C. Turk and Glen M. Williams, and one senior judge, Ted Dalton.

186. 436 F. Supp. 218 (W.D. Va. 1977) (order granting preliminary injunction). The travel advance issue is discussed *supra* in text accompanying note 138.

187. 436 F. Supp. at 224.

188. *Id.* at 225.

189. No. 77-2042, slip op. at 2 (4th Cir. Nov. 9, 1977) (emphasis in original).

moot.<sup>190</sup> Thus, there was never a decision on the merits as to the travel advance question in Virginia.

In August, 1977, the apple growers filed a second suit in the Western District, *Frederick County Fruit Growers' Association v. Marshall (Frederick County II)*,<sup>191</sup> seeking to compel DOL to issue certifications for the entire Northeastern apple harvest. At 11:15 AM on the day the complaint was filed, Judge Turk entered a temporary restraining order requiring the government to admit the number of workers sought by the growers. The Fourth Circuit refused to stay the district court order or to expedite the appeal. When the preliminary order was considered in November, the appeal was dismissed because the season had ended.<sup>192</sup> On remand DOL sought to secure a final ruling on the obligation to hire Puerto Rican workers, but Judge Turk held that the entire case was moot.

In 1978 apple producers from New York, Maryland, Virginia and West Virginia filed a third suit in the Western District, *Frederick County Fruit Growers' Association v. Marshall (Frederick County III)*,<sup>193</sup> challenging DOL's decision denying certification to certain growers because Puerto Rican workers were available. On the day the complaint was filed, Judge Turk entered a temporary restraining order (TRO) granting the growers all the H-2's sought. DOL's request to reduce the number of Jamaicans by the number of Puerto Rican workers already on their way to the mainland was denied. The Fourth Circuit refused DOL's request for a stay, but entered an order providing that "available domestic workers shall not be denied employment."<sup>194</sup> The growers nevertheless refused to hire or quickly fired many of the Puerto Ricans who were brought to the Northeast apple orchards.<sup>195</sup> DOL's appeal was not heard until after the end of the season and was again dismissed as moot. Again the Fourth Circuit remanded with instructions to the Western District to "decide promptly whether or not to issue a permanent injunction so that, if necessary, this court can resolve the dispute in ample time for future apple harvests."<sup>196</sup> Prior to the 1979 harvest, DOL moved for summary judgment, but Judge Turk never ruled. When

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190. No. 77-0092 (W.D. Va. May 3, 1978). Judge Turk concluded that new DOL regulations had mooted the travel advance controversy. But the amendments did not affect the provisions at issue in the 1977 litigation. See 43 Fed. Reg. 10312, 10315 (March 10, 1978). Current regulations continue to require that transportation be provided as "commonly provided by employers in the area of intended employment . . ." 20 C.F.R. § 653.501(d)(5) and .501(e)(1) (1982). The question at issue in *Frederick County I* arises every time an interstate job order is filed.

191. No. 0104 (W.D. Va. April 28, 1978).

192. No. 77-2170 (4th Cir. Nov. 9, 1977).

193. No. 0086 (W.D. Va. June 16, 1980).

194. No. 78-1608, slip op. at 3 (4th Cir. Sept. 8, 1978).

195. See *supra* text accompanying note 158.

196. No. 78-1608, slip op. at 5 (4th Cir. March 20, 1979).

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neither DOL nor the courts penalized the growers for the 1978 fiasco, the Commonwealth refused to send its workers to the mainland in 1979. This case was subsequently dismissed as moot, on the ground that the availability of Puerto Rican workers was no longer an issue. Thus, Judge Turk again substituted his judgement for that of DOL and INS, granted the growers all the relief requested, and avoided both appellate review and final decision on the merits.

This race to the orchards in 1978 lead Puerto Rico to seek declaratory and injunctive relief against the Virginia apple growers in *Puerto Rico v. Snapp*.<sup>197</sup> Proceeding *parens patriae*,<sup>198</sup> the Commonwealth claimed that Puerto Rico and its citizens were suffering continuing harm as a result of the apple growers' concerted refusal to hire Puerto Ricans. Judge Turk made swift work of the Commonwealth's effort, dismissing the case for lack of standing. The Fourth Circuit reversed, noting that "deliberate efforts to stigmatize the labor force as inferior carry a universal sting."<sup>199</sup> In July, 1982, the Supreme Court unanimously upheld the Fourth Circuit, holding that Puerto Rico had standing both to defend its residents "from the harmful effects of discrimination" and to pursue "full and equal participation in the federal employment service scheme."<sup>200</sup>

Finally, tobacco growers in southern Virginia sought the assistance of the Western District to challenge the "adverse effect wage rate" (AEWR). In 1980 these growers were certified for over 1,000 Mexican H-2 workers, based in part on their promise to pay the applicable AEWR. After the season began, however, they sought in *Rowland v. Marshall*<sup>201</sup> to bar enforcement of any minimum wage above the local prevailing wage. Judge Turk granted the relief requested, reducing the guaranteed earnings for both U.S. and foreign workers by \$.31 per hour. The Fourth Circuit vacated this order, holding that DOL may set an hourly guarantee above the prevailing rate and that the AEWR is a reasonable way of doing so.<sup>202</sup> Nevertheless, the Virginia tobacco growers benefitted significantly from Judge Turk's ruling. Roughly \$100,000 was deducted from the wages of the Mexican H-2's and held by the growers for eighteen months, interest free. Further, Judge Turk's decision demonstrated that H-2 users would receive a warm reception in the Western District if they challenged a more stringent AEWR methodol-

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197. 469 F. Supp. 928 (W.D. Va. 1978), *rev'd* 632 F.2d 365 (4th Cir. 1980), *aff'd* 102 S. Ct. 3260 (1982). The Commonwealth filed a companion case against certain New York apple producers. *Puerto Rico v. Bramkamp*, 654 F.2d 212 (2nd Cir. 1981), *cert. denied*, 102 S. Ct. 3509 (1982).

198. That is, Puerto Rico acted in furtherance of its "quasi-sovereign" interests as guardian of its citizenry. *See Louisiana v. Texas*, 176 U.S. 1 (1900).

199. 632 F.2d at 370.

200. 102 S. Ct. 3260, 3270 (1982).

201. 650 F.2d 28 (4th Cir. 1981).

202. *Id.* at 30.

ogy then being considered by DOL. This type of pressure caused DOL to delay implementation of the new AEW, setting the stage for its permanent withdrawal by the Reagan Administration.<sup>203</sup>

These five cases suggest the extent to which the federal judiciary must share the blame for the debilitated state of the temporary labor certification system. With consistent and thoughtful support from the courts, the Department of Labor might have overcome the many flaws in the certification structure to shape a workable H-2 program. However, with the exception of *Elton Orchards*, *Snapp*, and *Rowland*, DOL has received very little constructive guidance from the federal courts.

## V. The Future of the H-2 Program

The 98th Congress is conducting a comprehensive review of U.S. immigration law and policy, focusing on the problem of illegal immigration. One of the central questions in this effort is whether the United States should establish a system for the lawful admission of contract laborers on a large scale, possibly along the lines of the European "guestworker" programs. In 1981 the Reagan Administration proposed an experimental guestworker system to admit 50,000 Mexican laborers annually.<sup>204</sup> Other proposals would have established much larger programs.<sup>205</sup> However, because broad opposition has made creation of an entirely new system unlikely, agricultural interests have recently focused on amendment and expansion of the H-2 program. The following sections discuss whether the H-2 program should be continued, the revisions which are necessary if it is continued, and the amendments proposed in the pending legislation.

### A. Termination

There is no need for short-term supplementation of the agricultural workforce through the H-2 program. Only 15,000 to 20,000 additional

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203. See 46 Fed. Reg. 32437 (1981). See *infra* note 223.

204. S. 1765, 97th Cong., 1st Sess., Title VI (1981) reprinted at IMMIGRATION REFORM: HEARINGS BEFORE THE SUBCOMM. ON IMMIGRATION, REFUGEES, AND INTERNATIONAL LAW OF THE HOUSE JUDICIARY COMM., 97th Cong., 1st Sess. 1073, 1080-82 (1981). Under the Reagan Administration proposal the Mexican guestworkers would have been admitted for up to twelve months of employment with a designated employer. The governor of each state would have determined whether his state participated in the program and, if so, identified the industries or occupations to be involved. *Id.* at § 601(b)(1). The guestworkers would have been assigned to employers by the governor on a first-come, first-served basis. *Id.*

205. "I am proposing that each year for five years temporary worker visas be issued for up to one million Mexican nationals every year." TEMPORARY WORKERS: HEARINGS BEFORE THE SUBCOMM. ON IMMIGRATION AND REFUGEE POLICY OF THE SENATE COMM. ON THE JUDICIARY, 97th Cong., 1st Sess. 77 (October 22, 1981) (statement of Senator S.I. Hayakawa discussing S. 930, 97th Cong., 1st Sess (1981)).

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U.S. workers are needed in apples, sugarcane, and other H-2 crops to eliminate the use of foreign labor. This number is miniscule in terms of the overall farm workforce (1.8 million hired workers),<sup>206</sup> the number of migrant farmworkers (at least 800,000 workers including dependents),<sup>207</sup> the rate of unemployment among farmworkers (16.4 percent)<sup>208</sup> or any other measure of the labor pool already available in the United States. Moreover, illegal entry adds an estimated 500,000 permanent residents to the U.S. workforce annually, while at least one million undocumented aliens come to this country on a temporary basis each year.<sup>209</sup> Most of these aliens are seeking work and many are experienced in agriculture. This influx cannot be halted in the near future without severe penalties on employers and draconian border enforcement, neither of which is likely in the current political and fiscal climate.<sup>210</sup> Thus the supply of farm labor is large and increasing. But the demand for farm labor is decreasing. Agriculture is the only major employment sector expected to experience an absolute decline in the number of jobs during the 1980's.<sup>211</sup>

The real issue is not labor availability, but employment standards. Current H-2 users could satisfy their labor needs without this program if their wages and employment practices were brought up to 20th century standards. The H-2 program allows a few favored agricultural employers to avoid this painful process by recruiting a workforce from another economic and social era.

H-2 users defend this program by criticizing the skill of U.S. workers. Apple growers, for example, sometimes claim that U.S. farmworkers are unable to harvest apples. But picking apples is not significantly different from picking grapefruit, oranges, lemons, peaches, pears, cherries,

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206. CROP REPORTING BOARD, ECONOMICS AND STATISTICS SERV., U.S. DEP'T OF AGRICULTURE, FARM LABOR, May 22, 1981, at 1. This figure does not include the 2.6 million farm operators and unpaid family members. *Id.*

207. PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, 1978 MIGRANT HEALTH PROGRAM TARGET POPULATION ESTIMATES 3 (1980).

208. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, THE EMPLOYMENT SITUATION (Feb. 1983).

209. Memorandum from David Hiller, Special Ass't to the Attorney General, to the President's Task Force On Immigration Policy, at 18 (May 19, 1981).

210. The two principal immigration bills considered by Congress in the last two years purport to penalize employers who knowingly hire aliens illegally in this country, but neither would establish a meaningful enforcement mechanism. The Reagan Administration's Omnibus Immigration Control Act, S. 1765, *supra* note 204, would have permitted employers to establish a "good faith" defense by viewing an applicant's birth certificate, driver's license, or social security card—all of which are easily forgeable. The Immigration Reform and Control Act, *supra* note 9, would, at least for the foreseeable future, similarly immunize employers as long as "the document reasonably appears on its face to be genuine." *Id.* at § 101.

211. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 1982-83, at Charts 8 & 10 (1982).

and other tree crops now harvested by tens of thousands of workers recruited from within the United States. Farmworkers who have worked in tree corps, as well as many able-bodied persons who have not done any farm labor, could learn to pick apples if provided training and encouragement. The growers simply prefer that this work be performed under conditions acceptable only to a hand-picked foreign workforce.<sup>212</sup> Growers also argue that the H-2 program protects the consumer against increased fruit and vegetable costs. But the field labor component in the price of farm produce is small,<sup>213</sup> and there is little reason to believe that any wage reductions are passed on to the consumer. H-2 users paying lower wages than their non-user neighbors may simply continue to sell at the going rate.

In no other industry are employers permitted to engage in mass importation of aliens in direct competition with U.S. workers. Yet without union representation or significant political power, farmworkers cannot protect themselves. The H-2 program also legitimizes exploitation of aliens. Many Jamaicans, Mexicans, and other foreign nationals want to work in the United States and will do so under the H-2 program if necessary. But it does not follow that the United States should admit these workers under any conditions they will accept. The United States has the right, and the duty, to enforce humane employment conditions within its borders. U.S. immigration policy has traditionally opposed contract labor programs in part because they create a legal subclass which is denied the rights accorded "first-class" citizens. Yet H-2 workers are admitted to the U.S. under terms which place them outside the scope of most employment-related legal protections.

The use of H-2 workers in agriculture should be phased out over a five-year period. This would allow the affected growers to shift gradually to a domestic workforce or to become more capital intensive. Some H-2 users may not be able to remain in operation if compelled to compete for U.S. workers. For such employers the H-2 program is an indirect federal subsidy, supporting inefficient or otherwise non-competitive

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212. A study of productivity in the Champlain Valley of New York over a five-year period showed that U.S. migrant workers were more productive on an hourly basis than the Jamaican H-2 workers, but that the H-2's were willing to work more hours. Local workers were less productive and worked fewer hours than the U.S. migrants or the Jamaicans. D. Fisher, *Labor Productivity of Apple Harvest Workers In the Champlain Valley: 1970-1975*, at 4-8 and Tables A-1, A-3, A-4, and A-6 (July, 1977) (Dep't of Agricultural Economics, Cornell U.).

213. *E.g.*, Northeastern apple pickers receive approximately \$0.45 for each 30 lb. apple box filled or roughly \$0.015 per pound. Apples are sold at 10 to 20 times that figure in retail outlets. *Cf.* Rinehart Orchards, Inc., Clearance Order No. 4060978 (June 2, 1982) (offering \$0.45 per box in Maryland apple harvest) *with* The Washington Post, March 11, 1983, A10 (apples advertised by retail outlet at \$0.22 per pound).

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business operations. If Congress believes that financial support of these producers is in the public interest, a direct subsidy program should be established.<sup>214</sup> In any event there is no rational basis for subsidizing these firms at the expense of the most disadvantaged U.S. workers.

### B. *Revision of the H-2 Program*

If the H-2 program is continued on any scale, major reforms are required. Many of these changes follow directly from the problems identified in Section IV.<sup>215</sup> This section outlines the more complex statutory or administrative revisions required to limit the H-2 program to true labor shortages, prevent depression of U.S. working conditions, and protect the H-2 workers.

#### 1. *Government Control of Foreign Recruitment*

No certification system can compel good faith U.S. recruitment as long as the alternative is wholly unfettered foreign recruitment. The grower's control over the contract workers should be offset by direct government participation in recruitment, hiring, and transportation of the

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214. The sugarcane producers are already heavily subsidized through strict quotas on the importation of foreign sugar. See 19 U.S.C. § 1821(a) and Presidential Proclamation No. 4941, 47 Fed. Reg. 19,661 (1982). This costs U.S. consumers "approximately \$3 billion a year." The Washington Post, June 6, 1982, at A6, col. 1 (quoting Rep. Peter A. Peyser, D-N.Y.). Thus, the sugarcane companies are twice favored, *i.e.*, the government protects them against competition from inexpensive sugar produced abroad (including sugar produced in Jamaica) and permits them to import inexpensive foreign labor.

215. *E.g.*, (i) the Migrant and Seasonal Agricultural Worker Protection Act should be amended to cover foreign contract workers; (ii) employers should be required to offer transportation advances and family housing; (iii) DOL should end manipulation of piece rates and productivity requirements; (iv) H-2 users should be required to pay the costs of the recruitment and monitoring efforts of the employment service; and (v) the INS regulations should be amended to protect H-2's as well as U.S. workers against the use of other H-2's as strikebreakers.

Further, the tax rewards encouraging the use of H-2's should be eliminated. The exclusion of H-2 wages from the social security (FICA) tax should be replaced by a provision requiring H-2 workers and their employers to pay into a fund established for this purpose. Upon departure from the United States, each H-2 worker should be paid the entire amount credited to his account. Similarly, the exclusion of H-2 wages from the unemployment insurance (FUTA) tax should be deleted. The FUTA provisions ensure that the burden of unemployment will be shared by all industries. Conversely, the system recognizes that maintaining consumer purchasing power during periods of high unemployment is of benefit to all businesses. For these reasons the unemployment insurance system has never recognized a connection between a particular employee's future eligibility and an employer's obligation to pay taxes. To continue the exclusion for H-2 wages also unfairly discriminates against employers who use only U.S. workers, for these growers incur higher labor costs than their neighbors who use H-2's. NATIONAL COMMISSION ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT COMPENSATION: FINAL REPORT 27 (1980). The FUTA exemption for wages paid to H-2 workers is a temporary provision which must be renewed periodically. Congress should refuse to extend this provision beyond its current termination date of January 1, 1984.

foreign workforce.<sup>216</sup> However, because this seems politically unattainable for the foreseeable future, reform efforts must focus on obtaining better control of the existing private recruitment system. Formal government-to-government agreements with the sending nations should specify standards and procedures to govern recruitment practices, transportation arrangements, performance criteria, and many other issues not adequately addressed in the regulations.<sup>217</sup> Recruitment should not be permitted in a nation which has not executed and honored such an agreement. Enforcement costs, including supervision by U.S. personnel in the sending countries, should be borne by the employers.

## 2. *Mandatory Department of Labor Certification*

If contract workers are to be admitted only when U.S. workers are not available, the government must be able to defend its finding on "availability" against political interference. The H-2 program can best be strengthened against this type of pressure by ending the ambiguous participation of INS. Section 214(c) should be amended to provide that foreign workers may be admitted only if DOL certifies a need for these workers. An analogous change was made in the permanent labor certification provisions in 1965, so that no alien seeking permanent admission primarily for the purpose of employment may be admitted "unless the Secretary of Labor has determined and certified" that no U.S. workers are available.<sup>218</sup> Similar language should be inserted in § 214(c).

## 3. *Removal of the Ceiling on Working Conditions*

DOL should abandon its use of the minimum employment terms as a "ceiling" and permit farmworkers to negotiate for better employment conditions.<sup>219</sup> No agricultural employer should be certified without first establishing that (i) negotiations with U.S. workers have identified a wage level at which a sufficient number of workers would accept this work and (ii) the employer could not remain in business if compelled to

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216. This was done during World War II, *see supra* note 14, and during the bracero program, *see supra* note 35.

217. The intergovernmental agreement should also cover (i) negotiation of the work contract; (ii) issuance of exit papers; (iii) processing of complaints; (iv) imposition of additional costs or deductions; (v) discharge procedures; (vi) legal representation in the United States; and (vii) repatriation procedures.

218. 8 U.S.C. § 1182(a)(14) (Supp. IV 1980). *See* Rodino, *The Impact Of Immigration On The American Labor Market*, 27 RUTGERS L. REV. 245, 253 (1974).

219. DOL should specifically recognize and encourage the efforts of the Commonwealth of Puerto Rico to protect its migrant farmworkers. *See supra* text accompanying note 155. Although Puerto Rican workers are U.S. citizens, the distance from their homeland and their inability to speak English makes them especially vulnerable to exploitation. Public Law 87 is an effort by the Commonwealth to stabilize a potentially chaotic recruitment situation by supplementing and improving the H-2 certification process.

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pay this wage.<sup>220</sup> Such a provision would acknowledge that H-2 users are receiving a subsidy which should be available, if at all, only after a showing of financial need. The market would play a greater role under this approach than under the existing system, because the forces of supply and demand would ordinarily determine the job terms. A significant, one-time increase in wages might result, but only to the point where earnings become competitive with earnings in comparable agricultural or nonagricultural employment.<sup>221</sup>

### 4. *Revision of the Adverse Effect Wage Rate*

If DOL continues to use the H-2 minimums as a ceiling, these terms must be dramatically improved. The Carter Administration moved in this direction in 1981 by publishing a single, nationwide AEW, based on the actual average hourly earnings of all piece-rate agricultural workers.<sup>222</sup> The weakness in this approach was political. That is, DOL was portrayed as imposing a special minimum wage for all of agriculture. This weakness proved fatal when the Reagan Administration withdrew the new methodology within days of taking office.<sup>223</sup>

DOL can provide the same protection by other means. The Carter Administration proposal began with the broadest possible base figure, but it is equally feasible to begin at the other end of the spectrum, with the piece rates actually being paid in the specific area and crop at issue. Any AEW must at least (i) ensure that no employer obtains H-2 workers without offering a wage equal to the highest wage offered by his neighbors and (ii) correct for the salary depression resulting from the presence of H-2 workers. These goals could be attained by calculating the AEW in two steps. First, a "base rate" should be identified. This would be the piece rate paid in the local area and crop during the prior season to the domestic worker at the 90th percentile in terms of rates.<sup>224</sup>

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220. That is, the grower should be required to pay the lower of (i) the wage which is sufficient to satisfy his labor needs or (ii) the highest wage which he can provide and still remain in business.

221. Hourly earnings in the H-2 crops are well below earnings in other outdoor manual jobs. In the apple regions of New York State the average hourly earnings of domestic workers in 1980 were \$4.89 (Hudson Valley), \$4.16 (Champlain Valley), and \$6.87 (Western New York). See *supra* note 179. Unskilled laborers in construction work were guaranteed \$11.20 in Albany, \$10.65 in New York City, \$10.63 in Syracuse, and \$10.00 in Rochester (July, 1981 figures). U.S. Dep't of Labor, Bureau of Labor Statistics *News Release* No. 81-381 (August 4, 1981), at Table 3. In Baltimore, Philadelphia, and Richmond, all potential labor-sending areas for the Northeast apple harvest, construction laborers averaged \$8.80, \$9.80, and \$7.00 respectively. *Id.*

222. 46 Fed. Reg. 4568 (1981).

223. 46 Fed. Reg. 32437 (1981).

224. DOL already gathers information on the various piece rates being paid in many markets, in order to set the "prevailing rate." The prevailing rate is, by DOL definition, the rate paid to forty percent of the domestic workforce or to the worker at the median (51st

Second, the base rate would be increased in proportion to the penetration of the market by H-2 workers (*e.g.*, by .5 percent for each one percent of market penetration).<sup>225</sup> This approach to the AEW is conceptually straightforward, tied to the wages actually paid for the relevant job, and immune from criticism for imposing a single wage on all farm employers. Most importantly, the AEW would have its greatest impact in the areas of greatest H-2 penetration and would provide a strong incentive to decrease reliance on H-2 workers.<sup>226</sup>

##### 5. *Tightening the Domestic Recruitment Process*

The H-2 regulations should be amended to require that recruitment begin earlier, when U.S. migrants can be reached in Florida, Texas, and the other homebase states. Further, to ensure that the various rulings along the path to certification are made without delay, the regulations should incorporate the following processing deadlines: (i) the job order must be filed six months before the harvest; (ii) DOL must accept or reject the order within two weeks of submission; (iii) if the order is rejected, the employer must, within two weeks, amend the order to DOL's satisfaction or file suit; and (iv) DOL must ensure that the job information is available in the supply state offices within two weeks of the date the order is accepted. Adherence to this timetable would ensure that the job orders are either made available to U.S. workers or brought before the courts at least four and one-half months before the harvest.

In 1977 DOL proposed that job orders be submitted ninety days before the harvest, but even this modest change was abandoned when the growers argued that "it was not possible to estimate their labor needs so far in advance."<sup>227</sup> This objection is neither correct nor sufficient. The traditional H-2 users import virtually the same number of contract workers each year,<sup>228</sup> and thus could make an accurate esti-

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percentile). U.S. EMPLOYMENT SERV., U.S. DEP'T OF LABOR, EMPLOYMENT SERVICE MANUAL, PART III, § 6612 (1981).

225. There is no way to determine the exact degree of wage depression caused by the use of H-2 workers. In this sense the adjustment formula offered here is arbitrary. However, because this approach is based on the wage structure in the local market and is tied directly to the degree of penetration, it is more defensible than alternative measures such as reference to wages in comparable markets where H-2's are not used, reference to wages in other crops in the same area, or reference to trends in non-agricultural wages.

226. The methodology suggested here is consistent with *Williams v. Usury*, 531 F.2d 305 (5th Cir. 1976), in which the Fifth Circuit rejected the claim that the Secretary of Labor must set the AEW at the wage level required to attract an entirely domestic workforce. The purpose of the proposed methodology is to offset wage depression caused by the use of H-2's and prevent further deflation. These are permitted functions of the AEW. 531 F.2d at 306-307. If U.S. workers cannot be recruited at the wage established after the correction for the past use of H-2's, the employer would be free to use foreign labor again. The wage which might be sufficient to attract U.S. workers is irrelevant to this analysis.

227. 43 Fed. Reg. 10306, 10307 (March 10, 1978).

228. During the last five years the number of H-2's admitted for Florida sugarcane has

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mate of their labor needs six months before the harvest. Moreover, the exact number of workers need not be determined at the outset. Employers should be allowed to change the number of aliens requested by twenty-five percent three months before the harvest. This would allow the job orders to be circulated much earlier while providing flexibility.

The regulations should also provide for piecemeal certification. Two months before the harvest DOL would grant certification for fifty percent of the positions not yet filled. Two weeks before the harvest DOL would again certify for fifty percent of the openings not filled by U.S. workers (or previously certified to foreign workers). Three days after the beginning of the season, DOL would make its final certification decision, reflecting the number of U.S. workers hired at the last moment as well as the U.S. workers recruited earlier but failing to appear.<sup>229</sup> Such a timetable would end the last-second, "all or nothing" nature of the existing certification system.

### 6. *Post-Admission Supervision and Enforcement*

The Department of Labor should be given unambiguous responsibility for supervising the treatment of U.S. and foreign workers by H-2 employers. DOL must then aggressively pursue complaints, conduct systematic inspections in the fields and camps, audit payroll records, and interview workers after the season. To back up this responsibility, DOL should be given a range of sanctions not tied to the certification decision. For example, the Secretary of Labor should have authority to sue for back wages on behalf of workers not paid the adverse effect wage rate and to levy fines for violations of other H-2 guarantees.

Even without new authority, DOL could gain greater control over the post-admission aspects of the H-2 program through more flexible use of its power to deny certification. DOL should institute a system of "partial certifications" to restrict recalcitrant growers to a percentage of the workers admitted the previous season. Similarly, aggressive use of "conditional certifications" could compel H-2 users to either correct abuses or forego future certification.<sup>230</sup> Sanctions of this type would impose

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never varied more than four percent from the preceeding year. LABOR CERTIFICATIONS GRANTED, *supra* note 73, at Table III. During this period the number of H-2's certified for the apple harvest only once varied more than nine percent from the preceeding year. *Id.*

229. This piecemeal certification system would guarantee that the employer obtains seventy-five percent of his requested workforce at the beginning of the harvest and the remaining twenty-five percent within ten to twenty days thereafter. This matches the ordinary harvest schedule, since the peak harvest period is usually several weeks after the first workers are needed.

230. DOL has recently attempted to condition future certification on payment of "restitution" in the form of the wages due. *See, e.g.,* Donaldson v. Tri-County Labor Camp, Inc. No. 82-TAE-00003 (May 5, 1983). However, most of these efforts are still entangled in DOL's labyrinthian administrative complaint process. *See generally* 20 C.F.R. § 658.400-504 (1982).

credible penalties without inviting judicial intervention by threatening the harvest.

### C. *The Immigration Reform and Control Act*

Senator Alan K. Simpson and Representative Romano L. Mazzoli, chairmen of the respective immigration subcommittees, reintroduced the Immigration Reform and Control Act in February, 1983.<sup>231</sup> This bill seeks to control illegal immigration through increased border enforcement, penalties for employers hiring illegal aliens ("employer sanctions"), a legalization program for aliens already in the United States, and new procedures for handling refugees. As originally submitted in the 97th Congress, the Simpson-Mazzoli package would have made only minor changes in the H-2 program.<sup>232</sup> However, grower representatives, supported by the Reagan Administration, have pressed for major amendments to ease access to foreign workers. Many of these amendments have been incorporated in the current versions of the bill:

*Restricted Recruitment:* Section 101(a)(15)(H)(ii) provides that foreign labor may be admitted only if no U.S. workers are available "in this country."<sup>233</sup> Both the House and Senate version of the pending bill would delete the phrase "in this country," on the ground that growers should not be required to recruit in every state. But the existing language has never required nationwide recruitment. DOL sends the job orders (at no cost to the grower) to the states surrounding the job site and to a small number of other states thought to have available U.S. workers. Deleting this phrase would encourage growers to contest efforts to circulate the job orders outside the state of employment, especially where there is no established pattern of interstate recruitment through the employment service. It is difficult to understand why farm jobs in the United States should be offered to workers in Jamaica and Mexico but not to domestic migrants in Florida and Texas.

*DOL "Ceilings":* The original Simpson-Mazzoli bill did not address the question of whether U.S. workers can be deemed "unavailable"

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Research has revealed only one case in which U.S. workers actually received monetary payment for back wages in connection with a conditional denial of certification. *See Secretary of Labor v. Chick Orchards, Inc.*, ETA No. 1 (1980).

231. S. 529, *supra* note 6; H.R. 1510, *supra* note 6. The Simpson-Mazzoli bill passed the Senate on August 17, 1982, 128 CONG. REC. 10618-19, but died on the House floor in the final days of the 97th Congress. As introduced in February, 1983, S. 529 is identical to the bill passed by the Senate in the 97th Congress; likewise, H.R. 1510 is substantively the same as the bill reported favorably by the Judiciary Committee in late 1982.

232. *See, e.g.*, H.R. 5872, 97th Cong., 2nd Sess., § 211 (1982).

233. 8 U.S.C. § 1101(a)(15)(H)(ii) (1976 & Supp. V 1981).

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when they seek wages above the DOL minimums. Both the House and Senate versions now incorporate DOL's administrative interpretation setting a "ceiling" on what U.S. workers can demand.<sup>234</sup>

*Hiring Restrictions:* Under current regulations a grower must continue to hire any U.S. worker who appears at the job site during the first half of the season. The pending bills would terminate the grower's obligation at the time the foreign workers leave for the United States.<sup>235</sup> Because this is often seven to ten days before the season begins, U.S. workers who arrive as the season starts could be turned away.

*Rulemaking Authority:* The pending bills give the Attorney General—not the Secretary of Labor—final control over the certification regulations.<sup>236</sup> This substantially weakens DOL's control of the certification process.

*Able, Willing and Qualified Workers:* Both the House and Senate bills would insert language emphasizing that employers have no obligation to hire workers unless they are "able, willing, qualified."<sup>237</sup> This amendment would reinforce employer efforts to turn away all but the most able U.S. workers.

*Employer Liability:* The original Simpson-Mazzoli bill would have authorized DOL to certify H-2's to an association of employers if (i) the employment was to be in one crop and (ii) the grower remains liable for compliance with the petition. This would be consistent with existing practice. However, the current Senate version eliminates both of these requirements. This would encourage growers to immunize themselves from liability for the treatment of the foreign workers by creating labor contracting associations to import foreign workers and move them freely among various farms and crops.<sup>238</sup>

*Consultation with USDA:* The House version designates the Depart-

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234. See, e.g., S. 529, *supra* note 6, at § 211(b) (the Secretary of Labor shall certify unless the employer has been referred U.S. workers "who have agreed to perform such labor or services on the terms and conditions of a job offer which meets the requirements of the Secretary"). See *supra* text accompanying note 143.

235. See, e.g., S. 529, *supra* note 6, at § 211(b)(3) (the certification will remain effective only if the employer continues to accept U.S. workers for employment "until the date the aliens depart for work with the employer").

236. See, e.g., S. 529, *supra* note 6, at § 211(d).

237. See, e.g., S. 529, *supra* note 6, at § 211(b)(3).

238. S. 529, *supra* note 6, at § 211(b). Such an association would be exempt from the Migrant and Seasonal Agricultural Worker Protection Act, see *supra* text accompanying note 109, if it recruited only H-2 workers.

ment of Agriculture as one of the "appropriate agencies of government" to be consulted in evaluating petitions for foreign labor.<sup>239</sup> Coupled with the withdrawal of DOL's final rulemaking authority, this amendment would substantially transfer control of the H-2 program from the Labor Department. In effect, the Simpson-Mazzoli bill would carry out the transfer of authority proposed and rejected in 1965.<sup>240</sup>

*Reduction of U.S. Recruitment:* The House bill would reduce the maximum domestic recruitment period from eighty to fifty days,<sup>241</sup> further undermining the effort to seek out U.S. workers.

If enacted with these or similar amendments, the Immigration Reform and Control Act would create a substantially different H-2 program, with even fewer protections for American workers. This "streamlined" program would become the vehicle for the admission of several hundred thousand Mexican farmworkers in California, Arizona, New Mexico, Texas, and other parts of the Southwest.<sup>242</sup> In short, the large-scale "guestworker" proposal has not been withdrawn but merely reshaped to fit the guise of the H-2 program.

Few members of Congress believe that the United States needs additional unskilled laborers at this time. Indeed, the immigration bill draws its strongest support from those who feel that the influx of aliens is "out of control." However, powerful agricultural interests have vowed to oppose any comprehensive immigration legislation unless provision is made for easy access to foreign labor. Congress has, to date, given the Reagan Administration a free hand in rewriting the H-2 provisions to suit these growers.

Some advocates of an expanded temporary labor program argue that it will be only temporary, helping farmers make the transition from illegal aliens to domestic labor. But foreign labor programs, both here and in Europe, have proven to be self-perpetuating. The existing H-2 program provides the best evidence against the likelihood of early termina-

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239. H.R. 1510, *supra* note 6, at § 211(b)(3).

240. *See supra* text accompanying note 44.

241. H.R. 1510, *supra* note 6, at § 211(b). Delays in certification are in fact a problem, but "streamlining" the recruitment period is exactly the wrong solution. As noted above, actual domestic recruitment is already so brief that few U.S. workers learn of the available work. *See supra* text accompanying note 148.

242. Attorney General William French Smith has already concluded that growers in the Southwest will need temporary workers in "significantly larger" numbers than have been admitted under the H-2 program. Address by Attorney General William French Smith, California Chamber of Commerce (May 20, 1982). Labor Department officials are gearing up for the admission of 50,000 agricultural H-2's during the first year of the expanded program and 300,000 annually within three years. Telephone interview with John Hancock, U.S. Employment Serv., U.S. Dep't of Labor, Washington, D.C. (March 8, 1983).

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tion. Throwing their political strength behind the status quo, a few East Coast growers have been able to continue using contract workers for thirty years without any economic justification. If the 98th Congress enacts the H-2 amendments now in the Simpson-Mazzoli bill, a much larger version of this distasteful program will become a lasting feature of U.S. immigration policy.<sup>243</sup>

## VI. Conclusion

Congress enacted §§ 101(a)(15)(H)(ii) and 214(c) to provide a permanent framework for the case-by-case admission of foreign workers to alleviate demonstrated labor shortages. The H-2 program has never fulfilled this intent. H-2 workers are routinely admitted for agricultural jobs without any meaningful determination of whether qualified U.S. workers could be found. This program has been an anomaly in U.S. immigration law, a special interest subsidy serving no purpose other than to supply a small number of agricultural employers with cheap foreign labor.

The piecemeal growth of the H-2 program since 1977 and the ongoing efforts to expand the program by legislation have signaled the end of the tacit agreement forged in 1965. Congress once again must decide whether the United States should provide for the short-term admission of contract workers for farm labor. Ideally, Congress would take this opportunity to terminate the use of contract workers in agriculture. However, because termination is not politically feasible, the H-2 program must be substantially revised, as detailed in Part V above. Congress should emphatically reject the effort to convert the H-2 program into a massive guestworker system and return the program to its original goal. The admission of alien contract workers should be a truly exceptional remedy, available only to meet unexpected and temporary labor shortages.

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243. Conversely, there is no need for an expanded H-2 program even during a short transition period, for the Immigration Control and Reform Act is likely to include a special three year "transitional program" for agricultural employers, wholly apart from the H-2 program. As favorably reported by the House Judiciary Committee in May, 1983, H.R. 1510 provides that during the first three years following the effective date of the new law all agricultural employers may obtain "work permits" from the Attorney General authorizing them to employ 100%, 67% and 33%, respectively of the undocumented aliens traditionally employed. See H.R. 1510, *supra* note 6, at § 211(b)(4).