THE CHANGING FARMWORKER POPULATION

Guestworkers and Implications for Service Delivery

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Gregory S. Schell
Migrant Farmworker Justice Project
Post Office Box 2110
Belle Glade, Florida 33430

Telephone: (800) 277-7447
HN2028@Handsnet.Org

THE H-2A PROGRAM IN A NUTSHELL

An Agricultural Guestworker Program

The "H-2A program" allows agricultural employers in the United States to hire foreign workers to perform farmwork on a temporary basis when insufficient numbers of United States workers are available. Temporary alien farmworkers are known as "H-2A workers" after section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act of 1952, as amended in 1986 by the Immigration Reform and Control Act (IRCA). They are also known as "guestworkers" because they hold "non-immigrant" status: H-2A workers do not acquire any rights to live or work in the United States beyond their temporary employment at a particular employer. H-2A workers must return to their home country at the termination of their employment in America, which may not exceed 11 months. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, 1188; 20 C.F.R. §§ 655.90-655.112 (Department of Labor Employment and Training H-2A implementation regulations), 29 C.F.R. Part 501 (DOL Wage and Hour Division H-2A enforcement regulations); 8 C.F.R. § 214.2(h) (Immigration and Naturalization Service regulations on temporary nonimmigrant visas).

For forty-five years the primary users of H-2A (formerly known as "H-2") workers were sugar cane companies in Florida and apple growers in several states on the east coast, who brought in citizens of Jamaica and nearby islands. In the early 1990's the Florida sugar cane growers mechanized the harvest. Other growers, especially tobacco growers in North Carolina, Virginia, Kentucky and Tennessee, have expanded their use of H-2A workers, primarily from Mexico. Western ranchers bring in approximately 1,500 workers from Peru, Mexico and Spain as sheepherders. In recent years, DOL has approved approximately 17,000-19,000 visas each

year. The number of persons who actually receive visas is somewhat lower because some jobs are filled by U.S. farmworkers and occasionally one person fills jobs at two different employers.

The Dangers of a Guestworker Program in Agriculture

There are many incentives for abusing a guestworker program. American agribusiness has a financial interest in hiring persons from poor nations, where many workers would gladly accept wages and working conditions that U.S. workers could never afford to accept due to the cost of living in the United States. In addition, foreign workers are preferred because they frequently labor under the realistic fear that if they stand up for their rights, join a union, or do not work at the limits of human endurance, they will be fired and deported immediately.

These and other improper motivations often have led growers to create artificial labor shortages for themselves by not recruiting U.S. workers, by offering low wages and poor working conditions so as to deter U.S. workers from applying for jobs, by forcing workers to quit their jobs, or simply by firing them.

The Law's Protections

The H-2A statute contains certain protections against employers' undercutting of wages and working conditions of U.S. workers. Most importantly, the law states that visas may not be issued for temporary foreign workers until the employer has applied to the U.S. Department of Labor for a "certification" that (1) there are not sufficient U.S. workers who are able, willing, qualified and available to perform work at the place and time needed, and (2) the wages and working conditions of workers in the United States similarly employed will not be "adversely affected" by the importation of H-2A workers. 8 U.S.C. § 1188(a)(1). The law also requires

shams. Yet some of those same growers conduct extensive recruitment abroad. In addition, DOL frequently permits adverse effects on U.S. workers by approving H-2A job offers whose

and working conditions are so unattractive that few, if any, U.S. workers will accept them. Although lawsuits against DOL and individual growers have been successful on some occasions, there is a need for Congress to demand more effective enforcement of current law by DOL and to strengthen the statute. However, any such legislative efforts will be opposed by the powerful agricultural industry, which has been pressing Congress to ease or eliminate safeguards in the H-2A law.

In March 1996, the House of Representatives defeated a proposal to create a new agricultural guestworker program that would have eliminated most of the labor protections and government oversight provided in the current law. In late 1997, the U.S. Commission on Immigration Reform rejected the suggestion of a new temporary foreign agricultural worker program as a "grievous mistake" and recommended retention of current worker protections in the current law. In addition, the U.S. General Accounting Office completed the report on guestworker issues that Congress has commissioned during the 1996 debate. The December 31, 1997 report concluded that there is an agricultural labor surplus that will continue; declining real wages; approval by DOL of 99% of employers' applications for H-2A workers, despite the surplus; and inadequate enforcement of workers' rights under the H-2A program.

Nonetheless, on March 12, 1998, the House immigration subcommittee – under heavy pressure from agricultural employer associations – approved a bill similar to the one defeated in

This "H-2C" program in H.R. 3410 would be "pilot project" which would issue up to 20,000

certification to the INS which arranges for visas to be issued by the U.S. consulate in the country where the employer is recruiting foreign workers. U.S. farmworkers who are qualified for the job, however, must be hired as long as they apply for work by the season's mid-point (the "50% rule").

The law and regulations contain additional labor protections to prevent displacement of U.S. farmworkers and exploitation of vulnerable guestworkers. Not all of these will be discussed in this brief memo.

For example, wages must be set at the highest of: (a) the local labor market's prevailing wage, (b) the state or federal minimum wage, and (c) the "adverse effect wage rate" (the "AEWR"). The AEWR is set by DOL and, though it has failed to do so, is supposed to alleviate the depressing effect on wages caused by the presence of foreign workers (both undocumented and guestworkers). In addition, employers may not discriminate against U.S. workers by offering them lower wages or fewer benefits than offered to foreign workers.

Another major protection is the "three-fourths guarantee." Employers must identify the length of the contract season and promise to provide workers with work opportunities for at least three-fourths of the work-days in the season. Absent an "Act of God," the employer must compensate workers for any shortfall. This provision offers workers some minimum amount of work for traveling a long distance and discourages employers from recruiting an over-supply of workers to drive down wages and working conditions.

Unfortunately, the Department of Labor has not complied with its responsibility to prevent employer abuses of the H-2A program. Many growers' efforts to recruit U.S. workers are mere

employers to recruit U.S. farmworkers for the jobs using the U.S. Employment Service's interstate job clearance order process, and through "positive recruitment," which means the use of private-market mechanisms in known areas of labor supply. The statute also requires such employers to provide free housing (with some exceptions detailed in the regulations).

One of the most basic concepts is the requirement that employers submit a proposed "job offer," in the form of a "job clearance order," to the Department of Labor. The job offer must contain all material terms and conditions of employment. Three important purposes are served by this requirement. First, the employer, which is claiming that it cannot find U.S. workers, uses the job offer to recruit U.S. farmworkers, and these potential job applicants are informed of the employment terms. Second, the DOL, as required by law, can determine whether the employment terms would adversely affect U.S. farmworkers' wages and working conditions. Third, the work terms form an employment contract that farmworkers may enforce through a state court breach-of-contract action (or an administrative complaint to the Department of Labor).

The employer must file the job offer and application for foreign workers at least 60 days before the beginning of the employment. DOL must review the job offer within seven days to determine whether the job offer meets the statutory and regulatory standards. If not, then the job offer must be amended promptly to correct the deficiency. The employer may also obtain an expedited hearing before an administrative law judge to appeal the DOL's decision. Once the job offer is approved, the employer must begin interstate recruitment.

No later than 20 days before the beginning of the employment, the DOL must determine ("certify") the number of jobs for which U.S. workers could not be found. The employer takes the

additional temporary agricultural work visas annually for two to three years. Most of the labor protections in the H-2A program would not be included in this H-2C program. The companion bill in the Senate is numbered S. 1563.

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