The Potential Compromise on Immigration Policy and Agriculture

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Congress has been considering "guest worker" legislation during the past six years based on strenuous lobbying by agricultural employers. In late 2000, the National Council of Agricultural Employers, the United Farm Workers, and several members of Congress from both political parties reached a compromise. The compromise may be the basis of legislation during the 107th Congress. No bill has been introduced yet.

There are two parts to the compromise. One part would change the procedures and job terms under the H-2A temporary foreign agricultural worker program, which is the current guestworker program. The other part establishes a new legalization program or "agricultural worker adjustment" program, based both on past agricultural work in the United States and a prospective work requirement.

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THE AGRICULTURAL ADJUSTMENT PROGRAM: A TARGETTED LEGALIZATION FOR EXPERIENCED FARMWORKERS

- Undocumented farmworkers could apply to become immigrants in the status of "temporary resident aliens." To satisfy this past-work requirement, they would show that they worked at least 100 days in U.S. agriculture during one of the two seasons before the law was passed. Generally, eligibility exists for work in fields, orchards, ranches, greenhouses, and certain other operations performed on farms.

- The application period would begin six months after the law's enactment and would last for eighteen months. Applications will be made either to the INS (through a licensed attorney) or to one of the organizations to be selected by the INS as a Qualified Designated Entity to accept applications.

- As temporary resident aliens, they would be immigrants and generally treated as permanent resident aliens. They would *not* be nonimmigrant guest workers. These temporary residents could work in any job, travel across the border, and be eligible for federally-funded legal services regarding their immigration applications. Generally, they would *not* be eligible for public benefits. But payroll taxes and related programs (e.g. Social Security, workers' compensation) would be applicable.

- Temporary residents would be converted to permanent resident alien status -- receive "green cards" -- upon completion of a three-part agricultural-work requirement. To earn a green card, they must work (1) at least 360 days in agriculture within about five and one-half years, (2) at least 240 of those work-days during the first three years of the program, and (3) at least 75 days per year in each of at least three years. If disabled due to work-related injury, or if fired from an agricultural job without just cause, the Department of Justice will credit the worker with the lost days of work toward this requirement. Non-agricultural employment would be permitted but would not be counted toward the work requirement.

- To help workers prove their employment, employers must provide the temporary resident workers and the INS with records of employment.

- Temporary resident status will be terminated if the worker does not apply for permanent status by a certain date (probably within six years), or is convicted of a felony or three or more misdemeanors, or commits other acts deportable acts.

- Participants must meet the eligibility standards for immigration, but several requirements are waived (including the 3-year/10-year bars against admitting persons who have been in the U.S. unlawfully) or modified (such as the "public charge" rule).

- Family members. Once the farmworker gains *temporary* resident status, the spouse and minor children of the farmworker may not be deported by the INS if they lack immigration status. However, the INS may *not* give work permits to family members of temporary resident aliens during their required work period (unless the family members have some other status that allows them to work). Upon the farmworker's completion of the multi-year work requirement, the *spouse and minor child* are entitled to *permanent resident status* at the same time as the farmworker. Numerical limits and waiting lists are not applicable at that point. The farmworker's children remain "minors" even if they became adults during program.

CHANGES TO THE H-2A PROGRAM

The proposed compromise would make substantial changes to the H-2A temporary foreign agricultural worker program, but these changes differ significantly from recent agribusiness-supported bills.

- The H-2A system would be streamlined to become a "labor attestation" program modeled after the H-1B program, with less paperwork and government oversight.

- Recruitment procedures would be reduced, but employers must still hire qualified U.S. workers who apply by the time one-half the season has elapsed ("50% rule").

- Most of the basic H-2A requirements to protect U.S. workers from adverse effects and to protect foreign workers from exploitation will continue, including the ¾ minimum work guarantee, workers' compensation coverage (even if state law would exclude the farmworkers), and transportation cost reimbursement.

- Some provisions that are in the H-2A regulations will now appear in the statute, which prevents the Secretary of Labor from strengthening or weakening them.

- Wages. The H-2A "adverse effect wage rate" will remain frozen at current (probably at year 2000) levels. The employers will continue to be required to pay the highest of the adverse effect wage rate (AEWR), the local prevailing wage for the particular job, or the federal or state minimum wage. The wage freeze will last three additional

years while studies are performed by the U.S. General Accounting Office and a new Commission on Agricultural Wage Standards. When the AEWR freeze ends, the current AEWR methodology would apply after that date unless *Congress* has acted. The AEWRs for 2000 generally are $6.50 to $7.50 per hour and are supposed to increase modestly in most (but not all) states during the year 2001.

- Housing. Employers must provide free housing that meets federal and state housing standards to non-local workers. However, if the Governor of the state certifies that there is adequate housing available for US and H-2A farmworkers in the area of employment, employers may provide a housing allowance. Depending on location of job, the housing allowance is the statewide average of either the metropolitan, or non-metropolitan, fair market rental for HUD Section 8 subsidized housing, assuming 2 bedrooms, two workers per bedroom.

- Labor unions. The statute recognizes the situation where a bona fide labor union has entered into a collective bargaining agreement that was negotiated at arm's length with the H-2A employer. Where such an agreement already is in place and the employer applies for permission to hire H-2A guestworkers, most of the wage, benefit, housing, working conditions and recruitment procedures do *not* apply

- Effective Date. Generally, H-2A changes will be made effective in one year.

- New labor protections for guestworkers. *There will be coverage of H-2A workers under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C.. § 1800, for the first time.* AWPA's coverage, among other things, will provide H-2A workers with a clear right to file suit in federal (rather than state) courts to enforce their "working arrangement." AWPA also contains disclosure requirements, transportation and housing standards, and a licensing system for farm labor contractors. One exception will continue: Disclosure of job terms may be made at any time prior to the time the H-2A worker obtains a visa to enter the US, instead of at the time of recruitment; , but if the H-2A worker pays a fee to a recruiter retained by the H-2A employer, the disclosure must occur at time the fee is paid.

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