

POLICY BRIEF

Agricultural Immigration Legislation

September 2004

Understanding Legislative Proposals on Farmworker Immigration Policy

This Policy Brief summarizes pending proposals on immigration policy regarding migrant and seasonal farmworkers. The legislative summaries here also appear on our website's section on immigration legislation. Please visit us online at www.fwjjustice.org.

Inside:

AgJOBS	2
H.R. 3604 / S. 2435	4
Pres. Bush Proposal	6
Guestworker Basics	8

The most important legislative proposal could be debated and voted on by the Senate in Fall 2004. It is the Agricultural Jobs, Opportunity, Benefits and Security Act of 2003, called iAgJOBS. With 63 cosponsors in the Senate, including a majority of both Democrats and Republicans, and 115 House cosponsors, AgJOBS has the best chance of moving forward. AgJOBS enjoys strong support from a diverse group, including the United Farm Workers, the National Council of Agricultural Employers, the U.S. Chamber of Commerce, the AFL-CIO, and the National Council of La Raza.

Alternative proposals pending before Congress, which are summarized here, offer competing approaches to resolving farmworker immigration policy. These latter bills do not have widespread support but could be used in efforts to defeat AgJOBS.

President George W. Bush has not taken a position on AgJOBS or the other bills. In a speech on immigration policy in January this year, the President discussed a set of principles regarding immigration policy that have not yet been converted into a particular piece of legislation. His speech is summarized on page six.

The White House reportedly asked Senate Republicans to delay debating and voting on AgJOBS until after the presidential election because immigration is a controversial issue. Senate Majority Leader Bill Frist did prevent a debate on AgJOBS in July, but Senators Larry Craig (R-Idaho) and Edward Kennedy (D-Mass.) are seeking a vote in September. After a Senate vote, Rep. Chris Cannon (R-Utah) and Rep. Howard Berman (D-Calif.) would try to win passage in the House. Immigration restrictionists in the House hold key committee positions that they use to oppose AgJOBS, but they are a minority. A vigorous AgJOBS campaign in 2004 could succeed.

Congress has debated these issues since 1995. Meanwhile, farmworkers remain the poorest of the working poor. A vicious cycle characterizes the agricultural labor force in the U.S.: low wages and poor working conditions lead to high employee turnover. After working five or ten years in agriculture, many farmworkers who can flee the farm do so. Most replacement workers are new immigrants from poor countries with few options. Most lack authorized immigration status and, fearing detection and deportation, will not challenge employers to improve wages and benefits or organize labor unions. As a result, working conditions decline for all farmworkers.

AgJOBS represents a reasonable compromise on immigration policy. It is good for workers, employers and the nation. The alternatives -- other legislative proposals or simply doing nothing -- are unacceptable. We hope this publication helps readers understand the competing visions for farmworker immigration policy and enables them to reach their own conclusions.



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Brief are also available
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on our webSite at
www.fwjjustice.org*

Summary of AgJOBS: Agricultural Job Opportunity, Benefits and Security Act of 2003



After years of conflict in Congress on farmworker immigration and labor policy, the principal parties in these disputes (including the United Farm Workers of America and major agribusiness employer organizations) reached a legislative compromise. This compromise is now before Congress in the form of a proposed law (S. 1645 and H.R. 3142), called the Agricultural Job, Opportunity, Benefits and Security Act (AgJOBS). The bill's major sponsors are Senators Larry Craig (R.-Idaho) and Edward Kennedy (D.-Mass.), and Reps. Chris Cannon (R.-Utah) and Howard Berman (D.-Cal.).

If enacted, this legislation would create an earned adjustment program enabling some undocumented farmworkers and H-2A guestworkers to obtain temporary immigration status with the possibility of becoming permanent residents of the U.S.; and revise the existing H-2A temporary foreign agricultural worker program.

Earned Adjustment for Farmworkers

This compromise only applies to workers in the agricultural industry. Undocumented farmworkers and former H-2A guestworkers wishing to become immigrants would have to complete a two-step process.

Step One: Apply for Temporary Resident Status. Under this law, a farmworker could apply for temporary residency through a government-approved organization or a licensed attorney. Eligible workers are those who can prove they:

- worked in U.S. agriculture 100 work days during any 12 consecutive months between March 1, 2002 and August 31, 2003; and
- are not excluded by certain immigration laws (for example, no criminal convictions).

Temporary residents would be able to work in any job, not only in agriculture,

and to cross the border. The temporary status would last up to 6 years.

Step Two: Earn Legal Permanent Resident Status. After becoming a temporary resident, a worker must do the following to earn permanent resident status:

- work in agriculture for at least 360 days in the six-year period ending in 2009; and
- work in agriculture at least 240 of those work days during the first 3 years of the program; and
- in at least three of the six years, work at least 75 days per year in agriculture.

Workers who don't meet these requirements or don't apply for permanent status would lose their temporary resident status and would be required to leave the country. Conviction of a felony or three misdemeanors also would end the temporary resident status.

Immediate Family of Farmworkers. When the worker becomes a temporary resident, his/her spouse and minor children who are living in the U.S. will be protected from deportation if they are undocumented, but will not be given a legal immigration status and will not qualify for employment authorization. Once the worker fulfills the requirements of the earned adjustment program and receives permanent resident status, his/her spouse and minor children also will be granted immigration status as long as they meet other requirements under immigration law. (Minors who become adults during the process are covered too.)

Reform of H-2A Temporary Foreign Agricultural Worker Program

The compromise would modify the H-2A temporary foreign agricultural worker program, which permits employers to hire guestworkers to fill agricultural jobs that last no longer than ten months.

AgJOBS represents a reasonable compromise on immigration policy. It is good for workers, employers and the nation.

AgJOBS (continued)

Most basic H-2A requirements to protect U.S. workers from adverse effects and to protect foreign workers from exploitation would continue, including the 150% rule on hiring U.S. workers who apply during the first half of the season, a minimum work guarantee, workers' compensation coverage, and transportation cost reimbursement.

The bills would modify some current H-2A requirements in important ways.

- The program's application process will be streamlined to become a labor attestation program, rather than the current labor certification program, to respond to employers' demands to reduce paperwork, delay and government intrusion.
- H-2A employers must provide free housing to non-local U.S. and foreign workers but, under AgJOBS, could choose to provide a monetary housing allowance if the state's Governor has certified that there is sufficient farmworker housing

available in that area.

- Employers would still offer the highest of the Adverse Effect Wage Rate (AEWR), the prevailing wage or the federal or state minimum wage. AgJOBS would set the AEWR at the levels that were in effect in 2002 for a period of 3 years. During this 3-year period, the U.S. General Accounting Office and a special commission would issue studies and recommendations as to the appropriate wage rate formula. If Congress fails to enact a new formula within 3 years, the AEWRs will be adjusted in late 2006, and at the beginning of each year thereafter, based on the previous year's change in the consumer price index, up to 4% per year.

For the first time, H-2A workers would have the right to file a federal lawsuit to enforce their wages, housing benefits, transportation cost reimbursements, minimum-work guarantee, motor vehicle safety protections, and the other terms of the written H-2A job offer.



Farmworker Demographics

An estimated 4.17 million farmworkers and their family members live and work in the U.S. Of the 2.5 million hired U.S. farmworkers, about 1.6 million perform seasonal work on fruits, vegetables and other crops. Among seasonal crop workers, the U.S. Department of Labor has found that:

- ✦ The large majority (81%) is foreign-born, mostly from Mexico. Increasing numbers of farmworkers are indigenous people from southern Mexico and Guatemala that speak languages other than Spanish or English.
- ✦ As of 1997-98, 22% were U.S. citizens, 24% were legal permanent residents, and 52% were undocumented immigrants. In 1989, only 7% of farmworkers were undocumented.
- ✦ Two-thirds are younger than 35. About 290,000 are youth below the age of 18.
- ✦ Twenty percent are women.
- ✦ The median income is between \$7,500 and \$10,000 per year, and 61% live below the poverty level.
- ✦ Farm work is rated as the second or third most dangerous occupation in the U.S. Few migrant farmworkers have health insurance or are covered through Medicaid.

Sources: U.S. Dept. of Labor; National Agricultural Workers Survey; U.S. Dept. of Health & Human Services; U.S. Dept. of Agriculture; U.S. General Accounting Office; U.S. Bureau of Labor Statistics.

Summary of HR 3604: Temporary Agricultural Labor Reform Act of 2003

Representative Robert Goodlatte (R-VA) introduced this bill in the House of Representatives in November 2003. Goodlatte chairs the House Agriculture Committee and serves on the House Judiciary Committee, which has jurisdiction of immigration issues.

If enacted, this legislation would revise the H-2A program, reducing governmental oversight, allowing agricultural employers to displace U.S. workers, and subject foreign guestworkers to substandard wages and working conditions. None of the proposed changes would benefit farmworkers, either foreign or domestic. This bill would not provide a way for undocumented farmworkers in the U.S. or former H-2A guestworkers to gain permanent immigration status.



Proposed Changes to H-2A Program

H.R. 3604 would make significant changes to the H-2A program. The most important changes include the following:

- **Employers' application procedure.**

The program's application process would be streamlined to become a "labor attestation" program, rather than the current "labor certification" program. Under this Bill, employers simply promise to comply with certain requirements (temporary nature of work, benefits, wages, working conditions, sufficient recruitment of domestic workers, etc.). The U.S. DOL would have 7 days to review the application for accuracy, and 7 days to approve the applicant's petition for workers.

- **Recruitment.** The employer would still need to engage in "positive recruitment" (i.e., private market efforts) in areas of labor supply but would no longer be required to recruit U.S. workers through the government job service.
- **Wages.** Currently, employers must pay workers the highest of three wage rates, including the state or federal minimum wage, the "Adverse Effect Wage Rate" (AEWR), or the local prevailing wage. The AEWR was

created under the Bracero program as a necessary protection against the depression in prevailing wages that results from guestworker programs. This bill would slash the H-2A program's already inadequate wage rates by abolishing the AEWR. A special "prevailing wage" would apply, and it could be determined by the employers' own prevailing wage survey. Farmworkers would lose tens of millions of dollars in wages.

- **Employee housing.** Currently, H-2A employers must provide free housing to non-local U.S. and foreign workers, but under Goodlatte's bill, employers could choose to provide a monetary housing allowance if the state's Governor has certified that there is sufficient farmworker housing available in that area.
- **Contract violations.** Currently, if an employer violates a term or condition of employment under the H-2A program, the DOL may seek remedies through administrative procedures or in federal court. This bill would restrict the DOL's authority to sue in federal court, and would limit the amount of civil money penalties it could impose on a violating employer. In addition, the bill would create an "H-2A Ombudsman" in the U.S. Department of Agriculture (USDA) to resolve disputes between workers and their employers. Historically, the USDA has considered its "customers" to be agricultural employers, not agricultural workers. It is not clear if this is intended to be the only means of remedy available to workers. The H-2A guestworkers would continue to be deprived of the right to bring a federal lawsuit to enforce their employment contracts.
- **Emergency grants to employers.** This bill directs the U.S. Secretary of Agriculture to make grants to employers to help them pay return transportation costs of workers if the season ends prematurely due to a natural disaster.

Summary of S. 2185: Temporary Agricultural Work Reform Act of 2004

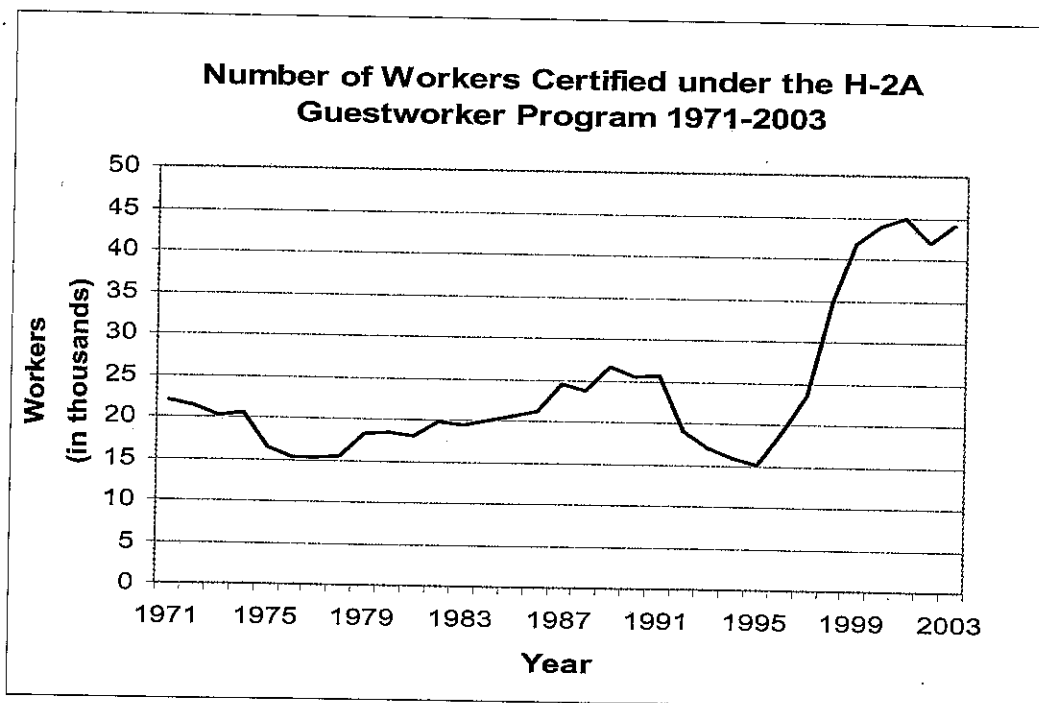
Senator Saxby Chambliss (R-GA) introduced this bill in the Senate in March 2004. Chambliss chairs the Senate Immigration Subcommittee. This bill is almost identical to Representative Goodlatte's bill (HR 3604). There are some minor differences between the two bills. Most importantly, Chambliss adds the following provisions.

- Transportation costs.** Currently, employers must reimburse workers for their transportation costs to and from their place of recruitment. This bill would allow employers to pay for travel costs to and from the place where the worker was approved to enter the U.S., which could be a U.S. consulate hundreds of miles from the worker's home. In addition, Chambliss's bill seeks to overrule a U.S. Court of Appeals decision in *Arriaga v. Florida Pacific Farms*, regarding the Fair Labor Standards Act. It would essentially allow H-2A employers to reduce the workers' wages below the federal minimum wage by imposing on the workers the obligation to absorb visa, transportation and other costs related to entering the U.S.

- Legal assistance for workers.** The Legal Services Corporation's legal aid programs would be prohibited from representing an H-2A worker once the worker is outside the U.S. Since H-2A workers only remain in the U.S. for a few weeks to a few months, this effectively means that there can be no representation of H-2A workers whose rights are violated. In the few instances where representation is possible, the legal aid attorney, unlike any other attorney, would be required to submit a request for mediation with the Federal Mediation and Conciliation Service before filing any lawsuit for an H-2A worker.

- Definition of seasonal employment.** Although the current H-2A program is intended to fill agricultural jobs that last less than 11 months, Chambliss's bill would permit year-round employment. This bill attempts to distort the definition of "seasonal" employment by allowing an agricultural employer to file an unlimited number of applications for guestworkers during a 12-month period. The bill does not impose a limit to the length of a worker's stay.

iFarmers, unions and workers made a concerted effort to reach agreement on this measure and succeeded. The president shouldn't be the one breaking up that consensus.
- Los Angeles Times editorial on AgJOBS



The H-2A program provides only a small percentage of the farm labor force. The Florida sugar cane industry dominated the H-2A program from World War II until it mechanized the harvest, reducing the number of H-2A jobs. Then, in the mid-1990s, the program increased as it spread to other states and crops.

Summary of President Bush's Immigration Reform Proposal

On January 7, 2004, President Bush proposed a new temporary worker program based on several principles. He asked Congress to pass new immigration laws reflecting these principles, but Congress has yet to act. The Bush administration has not presented a bill to Congress but said it is willing to negotiate.

- **Protect the Rights of Legal Immigrants.** The program should not provide a way for currently undocumented workers to gain permanent immigration status. Guestworkers wanting to obtain permanent immigration status would have to use the existing immigration process.

For twenty-three years, the Farmworker Justice Fund, Inc. has been helping empower migrant and seasonal farmworkers to improve their wages and working conditions, labor and immigration policy, health and safety, and access to justice.

President Bush stated a willingness to permit several million undocumented workers to obtain a lawful guestworker status. **The President's proposed guestworker program would not give undocumented workers full legal status or any new way to achieve permanent residency or citizenship.** Guestworkers who wish to obtain permanent residency can do so only if they qualify under existing visa categories.

- **Provide Incentives for Return to Home Country.** New laws should provide incentives for temporary foreign workers to return permanently to their home countries after their period of work in the U.S. has expired.

Temporary Worker Program

If it becomes a law, the President's proposal would create a temporary foreign worker program. The guestworker program would include the following components:

The President's proposal would cover all occupational groups. There would be no specific program for agriculture or any other sector.

Principles of Immigration Reform

President Bush contends that any new temporary worker program should be based on the following basic principles.

- **Control U.S. Borders.** Countries whose nationals participate in a temporary worker program should agree to cooperate with border control efforts.
- **Serve U.S. Economic Needs.** Immigration laws should allow U.S. employers who are unable to find workers domestically to bring in foreign workers in a way that is clear, streamlined, and efficient.
- **Promote Compassion.** The program should grant currently undocumented workers a temporary worker status to prevent exploitation and allow them to move freely across the border.

- **Temporary Work Visas.** The program would offer 3-year temporary worker visas to undocumented men and women now employed in the U.S. and to those in foreign countries who have been offered employment here. In the future, only people outside the U.S. may join the temporary worker program. There would be an opportunity to renew the visas at least once, but it is unclear how many renewals would be permitted.

All participants would be issued a temporary worker card that would allow them to travel back and forth between their home and the U.S. Employers must report to the government the temporary workers they hire, and who leave their employ.

- **Labor Protections.** Guestworkers would be entitled to coverage under U.S. labor laws. Employers could not hire guestworkers unless they demonstrated an inadequate supply of U.S. workers.

Bush Proposal (continued)

- **Economic Incentives to Return Home.** The program will require the return of guestworkers to their home country after their period of work has ended. There would be financial incentives for them to return home. The U.S. would work with other countries to allow guestworkers to receive credit in their country's retirement system and would work to create tax-preferred savings accounts they can collect when they return home.

The President's proposal lacks the labor protections against

exploitation that are present in the abusive H-2A and H-2B temporary foreign worker programs. Employers will maintain ultimate control over a temporary worker's ability to remain in the U.S. Consequently, workers will be reluctant to challenge unfair or illegal conduct for fear of losing their work visas. Employers will gain docile workers who often will work for lower wages and fewer benefits, thereby depressing wages for all workers, both foreign and domestic. In addition, the program lacks an opportunity to earn legal immigration status.

Summary of H.R. 1606: Wage Equity Act of 2003

Rep. Virgil Goode (R-VA) introduced this bill in the House in April 2003. Goode is a member of the "Congressional Immigration Reform Caucus," whose principal goal is to "promote legislation to reduce the overall number of immigrants allowed into the country each year."

If enacted, this legislation would make significant changes to the wages paid to workers under the H-2A program, and subject U.S. workers and guestworkers to substandard wages and working conditions. None of the proposed changes would benefit farmworkers.

The proposed changes include the following:

- **Eliminate the Adverse Effect Wage Rate (AEWR).** This bill would slash the H-2A program's already inadequate wage rates by abolishing the AEWR. Currently, employers must pay workers the highest of three wage rates, including the state or federal minimum wage, the AEWR, or the local prevailing wage. The AEWR formula is the regional average hourly wage rate for field and livestock workers combined in the previous calendar year, as determined by USDA wage

surveys. The AEWR was created under the Bracero program as a necessary protection against the depression in prevailing wages that results from guestworker programs.

- **Redefine the Prevailing Wage.** Currently, the local "prevailing wage" is often lower than the AEWR. Under this legislation, the prevailing wage is vaguely defined as "the prevailing wage for seasonal agricultural workers in the occupation in the area of intended employment," and could be determined by the employers' own prevailing wage survey. The result would be that tens of thousands of domestic and foreign farmworkers would lose tens of millions of dollars in wages.
- **Redefine the Piece Rate Methodology.** In addition, the bill would create loopholes from the methodology, so that workers paid on a piece rate or "task rate" would not actually be entitled to the prevailing wage rate. An employer could comply with the law by showing that, on average, its employees earned the wage rate, meaning that some workers could be paid less than the minimum.

Recent Media Coverage on AgJOBS Legislation:

Editorials

Salinas Californian
July 13, 2004

Miami Herald
July 18, 2004

San Jose Mercury News
July 21, 2004

Arizona Republic
July 26, 2004

Los Angeles Times
July 26, 2004

Miami Herald
July 26, 2004

Kansas City Star
July 27, 2004

Milwaukee Journal-Sentinel
August 12, 2004

Op-Eds

Washington Post
Harold Meyerson
July 21, 2004

Washington Times
Richard Gilder, Club for Growth
August 3, 2004

Articles

Wall Street Journal
Farm-Worker Bill Becomes a Hot Potato
David Rogers
July 14, 2004

Los Angeles Times
Bush Is Taken to Task on Immigration
Elizabeth Shogren
July 17, 2004

Fresno Bee
Growers, Farmworkers Team up for Bill
Dennis Pollock
August 20, 2004

The Basics about Guestworker Programs

Guestworker programs in the U.S., by their very nature, have subjected the foreign workers and corresponding U.S. workers to poor wages and working conditions. In affected occupations, guestworker status also has contributed to the foreign and domestic workers' lack of economic and political bargaining power.

This lack of bargaining power arises largely from the foreign workers' status as "non-immigrants" on temporary visas. They are dependent on the employers for their ability to stay in the country and their opportunity to obtain a visa in the following year. That status usually prevents workers from demanding better wages or working conditions, forming a labor union, or challenging illegal conduct. In fact, once the Department of Labor certifies an employer's wage rates as acceptable, a worker who refuses to work at that wage level is considered "unavailable" for work and can be replaced by a guestworker.

Employers often prefer guestworkers because they will work to the limits of human endurance and for low wages. Consequently, many employers 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 them to quit their jobs, and by firing them. Such conduct is illegal but widespread.

Congress has recognized that the hiring of guestworkers can displace U.S. workers and "adversely affect" the wages and working conditions of U.S. workers. Consequently, there are labor protections under the H-2A temporary foreign agricultural worker program. There are fewer labor protections under the H-2B temporary foreign non-agricultural worker program. Congress and the Administration should substantially strengthen both the H-2A and H-2B labor protections to improve the abysmal wages and working conditions in most of these jobs.

Even the current labor protections are inadequately enforced. The political will has never been present for strenuous enforcement by the U.S. Department of Labor or state agencies. The H-2A employers are important political constituents, well-organized into trade associations and active in opposing labor law enforcement. The workers are not.

Private-practice lawyers rarely take guestworkers' cases because the wage losses are too small to make the cases economically viable. H-2A workers are eligible for federally-funded legal services. Diminished resources and restrictions on their activities, however, limit the effectiveness of legal services offices. H-2B workers are ineligible for such assistance.

The human beings who contribute to this country through their labor deserve immigration status. Guestworker programs should not supply this nation's labor.

Help us help migrant farmworkers. Your donation to the Farmworker Justice Fund pays for analysis and dissemination of information and other efforts for farmworker justice. Donations are tax-deductible to the full extent of the law, as FJF is a 501(c)(3) organization. You may send a check or donate with a credit card online at www.fwjjustice.org.

A brief history of guestworker programs

The H-2A program began in 1943 when the Florida sugar cane industry obtained permission to hire Caribbean workers to cut sugar cane on non-immigrant temporary visas.

The *bracero* program began at the same time to respond to alleged wartime labor shortages. It started small but grew to 400,000 visas per year at its peak. A total of about 4.5 million jobs were filled by Mexican citizens by the time the *bracero* program ended in 1964.

The *bracero* program evolved over time, but generally was based on a government-to-government (U.S.-Mexico) agreement that regulated recruitment and job terms. The H-2A program was not part of an international agreement, although Caribbean nations formed a consortium (the West Indies Central Labor Organization) to monitor and assist the program.

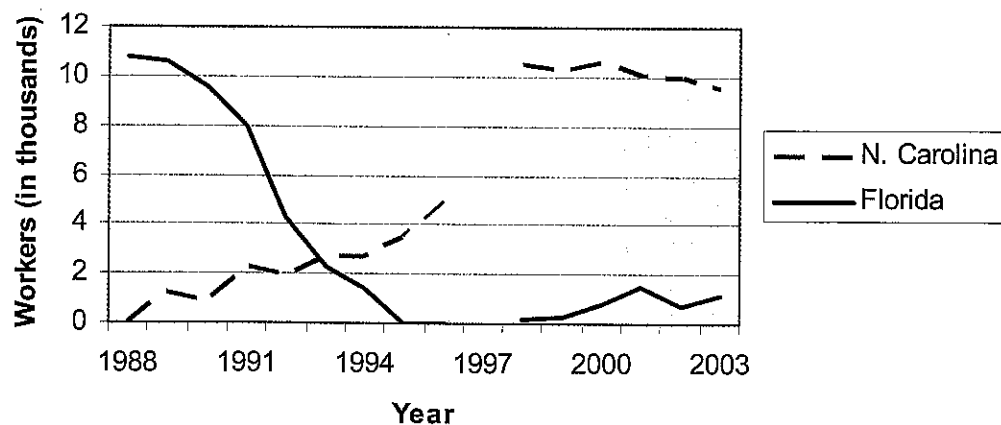
Critically important to understand is that the two guestworker programs contained similar statutory, regulatory and

contractual labor protections for recruitment, wages, benefits, transportation, minimum-work guarantees, working conditions and housing.

Recent agribusiness legislative efforts, if successful, would have made the H-2A program worse than the *bracero* program by reducing substantive labor protections and government law enforcement. Some proponents of these new guestworker programs contend that they "would not create another *bracero* program." Such statements are wrong.

The *bracero* program ended in 1964 after years of controversy. The little-known H-2 program remained. It was revised in 1986 and divided into the H-2A agricultural program and the H-2B non-agricultural program. Unlike the H-2A program, the H-2B program has an annual numerical limit on visas (65,000). The H-2A program has doubled in the last six years to over 40,000 guestworkers. As it increases, its reputation for abuse will spread.

H-2A Workers Certified in North Carolina and Florida 1988-2003*



Florida had been the principal user of the H-2A guestworker program. Now, North Carolina brings in almost 25% of all H-2A foreign workers.

* The US DOL has no state data for 1997.

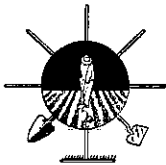
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Additional reading on the H-2A Guestworker Program

Several recent accounts of the H-2A Program reveal some of the problems inherent in agricultural guestworker programs.

- Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States* (2000) (available at www.hrw.org/campaigns/uslabor/, see chapter with case study on North Carolina Farmworkers and the H-2A Program)
- "Desperate Harvest," by Leah Beth Ward, an October 1999 series of articles on migrant farmworkers in North Carolina by the *Charlotte Observer* (available at <http://are.berkeley.edu/APMP/pubs/agworkvisa/charlotteseries.html>)
- "Silence in the Fields," by Barry Yeoman, in *Mother Jones Magazine* (Jan.-Feb. 2001), on the H-2A program in North Carolina. (available at http://www.motherjones.com/mother_jones/JF01/farm.html)
- "In the Kingdom of Big Sugar," by Marie Brenner in *Vanity Fair Magazine*, February 2001

More sources available on our website, www.fwjjustice.org, under "H-2A Program" and "Links."

IMMIGRATION POLICY BRIEF

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**Understanding Legislative Proposals on
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