

# THE ROAD TO H-2A AND BEYOND: AN ANALYSIS OF MIGRANT WORKER LEGISLATION IN AGRIBUSINESS

*William M. Ross*

I.	Introduction .....	267
II.	The Scope of Migrant Labor in Agriculture.....	268
III.	Migrant Workers employed in the U.S. During the War Years .....	269
IV.	The Farm Labor Contractor Registration Act .....	270
	A. Limitations under the FLCRA .....	271
	B. Amendment Gives New Life to the FLCRA?.....	272
V.	The Fair Labor Standards Act .....	272
VI.	The Migrant and Seasonal Worker Protection Act .....	274
VII.	The Immigration Reform and Control Act .....	275
VIII.	The H-2A Program—Savior or Sadist?.....	276
IX.	Conclusion.....	278

## I. INTRODUCTION

In the spring of 1996, the National Council for Agricultural Employers (NCAE) and Representative Richard Pombo of California introduced a new guest worker program for agriculture to resolve labor shortages.<sup>1</sup> The legislation prompted members of Congress to ask, “What shortages?”<sup>2</sup> In fact, there were no real shortages, but the NCAE was anticipating the effects of the Illegal Immigration Reform and Immigrant Responsibility Act, signed into law in late 1995, which cracks down on illegal immigration.<sup>3</sup> The proposed NCAE program would resolve a number of limitations existing under the current H-2A program through which agricultural employers legally bring foreign workers into the country.<sup>4</sup> However, the proposed legislation was defeated by a vote of 242 to 180.<sup>5</sup> Agribusiness supporters tried again in August of 1997 by introducing a bill in the House of Representatives that would create a pilot program to provide more temporary foreign workers for the fruit, vegetable, and tobacco industry.<sup>6</sup> This proposed H-2C pilot program was a long and very detailed bill introduced by Representative Bob Smith of Oregon, chair of

---

1. See Geraldine Warner, *Congress May Reconsider Guest Worker Program*, GOOD FRUIT GROWER, June 1997, at 5

2. See *id.*

3. See *id.*

4. See *id.*

5. See *id.*

6. See *AGRIBUSINESS CONTRADICTS U.S. COMMISSION ON IMMIGRATION REFORM BY DEMANDING NEW GUESTWORKER BILL: THE H-2C “PILOT” FOREIGN-WORKER PROGRAM*, (Mar.10, 1999) <<http://www.flimpact.org/workarchives.html>>.

the Agriculture Committee.<sup>7</sup> The bill itself was almost identical to the Pombo-Chambliss amendment defeated once before by the House.<sup>8</sup> After lengthy testimony regarding the labor shortages in agriculture, the bipartisan guest worker bill became part of the omnibus budget proposal.<sup>9</sup> However, last minute changes to the budget proposal removed the pilot program, for fear that President Clinton would not sign the bill due to pressure from groups that strongly opposed any new guestworker legislation for agribusiness.<sup>10</sup>

This note analyzes some of the major past and present legislation which has been intended to assist agricultural producers in the use of migrant labor.

## II. THE SCOPE OF MIGRANT LABOR IN AGRICULTURE

Despite the ever increasing use of technology and advanced machinery in today's agriculture, farmers still rely on migrant agricultural workers to perform general labor in the fields.<sup>11</sup> Hired labor is a necessity for farming and migrant labor has been the traditional mainstay of the agricultural labor supply for decades.<sup>12</sup> The migrant farm worker population in the United States has established a standard of mobility and availability unsurpassed by any other working class.<sup>13</sup> These workers are literally available to travel at a moment's notice to harvest broccoli in northern Maine, asparagus in Washington and Missouri, Christmas trees in Michigan, and apples in Kansas.<sup>14</sup> Migrant farm workers are known as the "archetypical dependent employees, selling nothing but their labor."<sup>15</sup> However, the life of a migrant farm worker is difficult one, where most toil under harsh conditions for relatively little pay and benefits.<sup>16</sup>

The term migrant farm worker is not restricted to those who travel across national borders to pick fruits and vegetables; instead this term also includes the racial and ethnic minorities who work in such agricultural industries as the meat

---

7. *See id.*

8. *See id.*

9. *See id.*; *Spending Package Provides Farmers Tax Benefits, Not Labor Relief*, Food and Farm News (Mar. 10, 1999) <<http://www.cfbf.com/archive/ffn1022b.htm>> (the co-sponsors of this bill fought strong opposition to provide workforce retention and stability).

10. *See id.*

11. *See* David M. Saxowsky et al., *Employing Migrant Agricultural Workers: Overcoming the Challenge of Complying with Employment Laws*, 69 N.D. L. Rev. 307, 307 (1993).

12. *See Nonimmigrant Visa Issues: Hearing on S. 51-40.5 Before the Committee on the Judiciary United States Senate*, 104th Cong. 119 (1995) [hereinafter *Visa Hearings*] (Statement of James S. Holt).

13. *See* MARC LINDER, *MIGRANT WORKERS & MINIMUM WAGES* 1 (1992).

14. *See id.* at 2.

15. *Id.* at xiv.

16. *See* Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis*, 19 BERKELEY J. EMP. & LAB. L. 175, 177 (1998).

packing sheds of Iowa and Nebraska, who may or may not travel outside state borders.<sup>17</sup> The Office of Migrant Health estimates the number of U.S. migrant farm workers and their families to be about 4.1 million, with 1.6 million having migratory status between the U.S. and their home country.<sup>18</sup>

The relationships between migrant farm workers and the employer often encounter problems unique to this type of employment.<sup>19</sup> “Factors making this relationship unique include the seasonal or temporary nature of the employment, the transitory nature [] of the employees, language and custom differences between employers and employees, and the unequal negotiating position between employer and employee that generally results from these factors.”<sup>20</sup>

U.S. public policy is also concerned with controlling illegal immigration.<sup>21</sup> Agricultural producers fear that effective control of illegal immigration will reduce the seasonal labor supply<sup>22</sup> and seriously cripple the U.S. agricultural community, because the “[e]mployment of U.S. workers can not be expanded to replace the alien labor [currently employed in U.S. agriculture] . . . at costs that will enable the current level of U.S. agricultural production to be maintained in competitive world markets.”<sup>23</sup>

### III. MIGRANT WORKERS EMPLOYED IN THE U.S. DURING THE WAR YEARS

During WWII, the War Manpower commission was formed to administer the labor exchange functions in all industries throughout the United States in conjunction with the ongoing war effort.<sup>24</sup> Both the U.S. Department of Agriculture and the Farm Labor Service played a considerable role in the U.S. agricultural labor

---

17. See LINDER, *supra* note 13, at xiv, xv. Migrant farm workers also include those engaged in preparatory work such as weeding and thinning cotton, sugar beets, and soy beans, planting pine seedlings, and detasseling hybrid seed corn. *Id.* at xv. Excluded from the migrant agricultural worker class “are persons such as high-school-age children of white middle-class families in the Midwest who detassel corn . . . because they lack the marginality characteristic of the lifelong agricultural proletariat.” *Id.* at xiv.

18. See Miguel A. Perez, *Southern California Hispanic migrant farm workers health status: A case study*, MIGRATION WORLD MAGAZINE, Vol. 26 No. ½ (Jan 1, 1998). Generally the estimates are approximately 50% are illegal in this country. See *id.*

19. See Saxowsky et al., *supra* note 11 at 307.

20. *Id.* These factors increase the complexity of the employment relationship to the extent that it is often more difficult to comply with the federal and state laws governing the employment of migrant farm workers. See *id.*

21. See *Visa Hearings*, *supra* note 12 at 120-21.

22. See *id.* at 119.

23. *Id.* at 120.

24. See *Agricultural Guest Worker Programs: Joint Hearing on H. 104-24 and H. 27 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. On Agric. and the Subcomm. on Immigration and Claims of the House Comm. On the Judiciary*, 104th Cong. 82 (1995) [hereinafter *Guest Worker Hearings*] (statement of John R. Hancock).

market, particularly with the massive importation of farm workers during the war to work in the agricultural industries.<sup>25</sup>

During this time, the Farm Labor Service formed a special labor agreement between the United States and Mexico which became known as the Bracero program.<sup>26</sup> Between 1956 and 1959, the program peaked when approximately 450 thousand Mexican workers came to the United States each year to work in agricultural industries.<sup>27</sup>

In response to the policies that encouraged immigrants to work temporarily on farms, and in response to the developing evidence that these migrant farm workers were being exploited, Congress held hearings to learn about this transient labor market.<sup>28</sup> These hearings specifically singled out farm labor contractors (FLCs) as the primary culprits of migrant farm worker exploitation.<sup>29</sup> Congress based this justification on the fact that many agricultural producers were unable to find local employees to work in temporary jobs, such as crop harvesting and therefore contracted with FLCs to supply these workers.<sup>30</sup> FLCs recruited illegal immigrants to work in the United States and capitalized on the dependency created by their alienage.<sup>31</sup> Congress thus enacted the Farm Labor Contractor Registration Act in 1963 in an attempt to remedy these problems.<sup>32</sup>

#### IV. THE FARM LABOR CONTRACTOR REGISTRATION ACT

Congress began to recognize the dangerous conditions of the agriculture occupation and because of the mobility and alienage of migrant farmworkers, they are at high risk in the work place for lack of safeguards protecting their health and safety.<sup>33</sup> Thus in 1963, the first major effort to provide protections to migrant farm workers occurred with the passage of the Farm Labor Contractor Registration Act (FLCRA).<sup>34</sup> The FLCRA required those persons who were identified as FLCs under

---

25. *See id.*

26. *See id.* at 198.

27. *See id.* "During the period of 1955 to 1959, an average of 9.1 million farm labor placements were made each year by the Employment Service system. . . . The activity reached its peak in 1960, when about 9.5 million farm placements were made by the Employment Service system." *Id.*

28. *See Leroy, supra* note 16 at 178.

29. *See id.*

30. *See id.*

31. *See id.* at 178-79.

32. *See* Farm Labor Contractor Registration Act of 1963, Pub. L. No. 88-582, 78 Stat. 920 (1963)(amended 1974, repealed 1983).

33. *See* Karen Buck, *Confusion Created by Migrant and Seasonal Agricultural Worker Protection Act: Should Congress Revisit the Legislation?* 6 SAN J. AGRIC. L. REV. 117, 119 (1996).

34. *See* Farm Labor Contractor Registration Act of 1963, Pub. L. No. 88-582, 78 Stat. 920 (amended 1974, repealed 1983). To be registered as an FLC, applicants were required to present their methods of operation as an FLC, information of satisfactory conduct in operating as an FLC and proof of liability insurance on vehicles used in the Business as an FLC. *See id.* at 921-22.

this act, to register with the Department of Labor (DOL) to obtain a certificate to operate.<sup>35</sup> The FLCRA also required FLCs to disclose the housing, transportation, and payroll information to the migrant workers.<sup>36</sup> The main purpose behind the FLCRA was to promote fair and honest dealing between the FLCs and the migrant workers.<sup>37</sup>

#### A. *Limitations Under the FLCRA*

Aside from the revocation of a certificate or non-issuance of such, the limited enforcement scheme capped violations at five hundred dollars and classified these violations only as misdemeanors.<sup>38</sup> The FLCRA was also limited because of exemptions in the scheme of the law allowed a significant class agribusiness to bypass the FLCs and recruit for its own operations.<sup>39</sup> FLCs who recruited from any foreign nation that had an agreement to provide temporary workers to the U.S. were also considered exempt, as were the small FLCs that hired less than 10 migrant workers.<sup>40</sup>

Congress later realized that the law failed to achieve its objectives of improving the harsh working conditions of the migrant workers and to change FLCs' exploitative practices.<sup>41</sup>

Hearings on the failure FLCRA lead Congress to the conclusion that the substantive provisions were not at fault, but that the enforcement mechanism was the weak link in the act.<sup>42</sup> In particular, they blamed

The difficulty of proving that the contractor is engaged in recruitment across state lines; the absence of any requirement that those who benefit from the

---

35. See Beverly A. Clark, *The Iowa Migrant Ombudsman Project: An Innovative Response to Farm Worker Claims*, 68 N.D. L. REV. 509, 509 (1992).

36. See LeRoy, *supra* note 16, at 183.

37. See *id.* LeRoy further states that "The law required FLCs to (1) disclose to all migrant workers the terms and conditions of their employment when they were recruited, and post these terms and those related to housing at both the work site and labor camp; (2) abstain from certain specified conduct; (3) use safe, insured vehicles to transport the workers; and (4) keep accurate records of the hours or piece-rates for each employed worker." (citations omitted). *Id.*

38. See Farm Labor Contractor Registration Act of 1963, Pub. L. No. 88-582, § 9, 78 Stat. 920, 924 (1963)(amended 1974, repealed 1983).

39. See Farm Labor Contractor Registration Act of 1963 § 3(b)(2), 78 Stat. at 920; Leroy, *supra* note 16, at 183. The definition of a FLC does not include any farmer, processor, or package shed operator who personally engages in the regulated activity for his own operation. See Farm Labor Contractor Registration Act § 3(b)(2), 78 Stat. at 920.

40. See Farm Labor Contractor Registration Act § 3(b), 78 Stat. at 920; See LeRoy *supra* note 16, 183-84.

41. See Clark, *supra* note 35, at 510. Congress stated that "[i]t is quite evident that the Act in its present form provides no real deterrent to violations. Since the Act's inception, only four persons have been referred to the Department of Justice for criminal prosecution; and only one person has ever been convicted and sentenced." LeRoy, *supra* note 16, at 184.

42. See LeRoy, *supra* note 16, at 184.

work of migrant laborers assume responsibility for engaging only registered FLCs; the relatively mild penalties provided by the Act; and the lack of a private remedy for aggrieved workers.<sup>43</sup>

#### B. *Amendment Gives New Life to the FLCRA?*

In response to these failings, the FLCRA was amended in 1974.<sup>44</sup> The amendments included harsher penalties for contractors who employed illegal aliens.<sup>45</sup> Enforcement of the FLCs was increased by “creating a cause of action for migrant workers who were deprived of their statutory rights.”<sup>46</sup> Under the amendments, coverage was extended outside of FLCs to persons who directly benefited from migrant workers.<sup>47</sup>

Congress reviewed and strengthened the substantive provisions of the original FLCRA as well.<sup>48</sup> The record-keeping duties were expanded beyond the FLCs to the persons for whom the migrant farm labor was furnished.<sup>49</sup> FLCs were also required to supply all housing and employment information to the migrant worker in a language the worker understood.<sup>50</sup>

### V. THE FAIR LABOR STANDARDS ACT

The objectives of the 1974 FLCRA amendments were to expand the law’s provisions to all farmers and agricultural companies who used migrant labor.<sup>51</sup> However, the question that still remained from the FLCRA amendments was the identification of the legal employer.<sup>52</sup> One groundbreaking case attempted to answer that question by stating that the FLC was an employee of the agricultural business according to the Fair Labor Standards Act (FLSA) of 1938. Thus, by this decision it would be the farmer who would be responsible for providing the protections under

---

43. *Id.* (quoting S. Rep. No. 93-1295 at 2 (1974), reprinted in 1974 U.S.C.C.A.N. 6441, 6442).

44. *See* Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, 88 Stat. 1652 (1974)(repealed 1983)

45. *See* LeRoy, *supra* note 16, at 185.

46. *Id.* (citing Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, § 14(a), 88 Stat. 1652, 1657 (1974)(repealed 1983)).

47. *See* Farm Labor Contractor Registration Act Amendments of 1974 § 2, 88 Stat. at 1652-53; LeRoy, *supra* note 16, at 185.

48. *See* LeRoy, *supra* note 16, at 185. The amendments also outlawed what were known as “company stores”; scams run by FLCs that robbed workers of their earnings. *See id.*

49. *See* Farm Labor Contractor Registration Act Amendments § 11, 88 Stat. at 1656; LeRoy, *supra* note 13 at 185.

50. *See* Farm Labor Contractor Registration Act Amendments § 10, 88 Stat. at 1655; LeRoy, *supra* note 13, at 185.

51. *See* Clark, *supra* note 35, at 510.

52. *See id.*

the FLSA.<sup>53</sup> The FLSA worker protection provisions regulate the employers to provide certain health and safety standards, disability insurance, and certain protections against child labor.<sup>54</sup>

However, the original enactment of the Fair Labor Standards Act in 1938 did not afford the farm worker any coverage because it exempted the agricultural industry from such protections.<sup>55</sup> The exclusion was the result of powerful grower lobbies that promoted the idea that the agriculture industry was unique.<sup>56</sup>

In 1960, a broadcast of a documentary entitled “Harvest of Shame” depicted the life of the migrant farm laborer and made the general public aware of the harsh conditions these workers experienced.<sup>57</sup> This film was the battle cry for the movement to reform these conditions.<sup>58</sup>

Attitudes toward migrant farmworkers improved and both the Democratic and Republic party vowed to improve the conditions for migrant laborers.<sup>59</sup> The FLSA was amended in 1966 to raise minimum wages and extend protection to agricultural employees.<sup>60</sup> The amendments also prohibited oppressive child labor in agriculture.<sup>61</sup> This change of heart by congress in 1966 was prompted by the recognized correlation between the migrant farm worker’s harsh working conditions, poverty, and the original exemption from the FLSA, thus Congress believed that extending the act “would do much to relieve the plight of these working poor.”<sup>62</sup>

---

53. See *Beliz v. W.H. Mcleod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985); Clark, *supra* note 35, at 510.

54. See 29 U.S.C. §§ 201-219 (1997).

55. See Jeanne M. Glader, Note, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children*, 42 HASTINGS L. J. 1455, 1460 (1991).

56. *Id.* “Migrant farm workers may be the most vulnerable class of employees, statistically their health and malnutrition are the worst in the nation.” *Id.*

57. See *Harvest of Shame* (CBS television broadcast, Nov 30, 1960).

58. See Glader, *supra* note 55, at 1461.

59. See *id.*

60. See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, §203, 80 Stat. 830 (1966); Glader, *supra* note 55, at 1461.

61. See 29 U.S.C. § 213(c) (1997); Glader, *supra* note 55, at 1461; Child farmworkers were excluded from the 1938 Act and remained vulnerable to oppressive child labor practices. See *id.*; Despite a national outcry against children performing sweatshop labor, the country ignored the problem, influenced by the myth that the toil of children in the fields is somehow different from the sweat and strain of children in the textile mills—that some how this is cleaner, somehow more fun, less dangerous, and really educational—or at least healthy. See *id.* at 1462-63; The amendments that were adopted prohibited the employment of all children under the age of twelve in agriculture, but children working outside of school hours on a family farm or with parental consent were exempted. See *id.* at 1463; Because states such as Minnesota and North Dakota have laws governing child labor, employers must pay attention to which law establishes the higher standards, since the federal laws themselves are intended as a minimum threshold for child labor regulation. See Saxowsky et al., *supra* note 11, at 307.

62. See Glader, *supra* note 55, at 1461 (citing S. Rep. No. 1487, 89th Cong., 2d Sess. 1-3, reprinted in 1966 U.S.C.C.A.N. 3002, 3002-04).

## VI. THE MIGRANT AND SEASONAL WORKER PROTECTION ACT

The FLCRA was repealed and replaced by the Migrant and Seasonal Worker Protection Act of 1983 (MSPA).<sup>63</sup> Congress concluded that the same abuses the FLCRA was intended to remedy continued unabated.<sup>64</sup> With extension of coverage under the amendments, congress had hoped that the employment conditions of the migrant workers would be improved and the abuses reduced.<sup>65</sup> However under the amendments of 1974 the results have been mixed.<sup>66</sup> Although agricultural workers did benefit from the amendments' broader coverage, the FLCRA had now created uncertainty about the status of fixed situs employers which led to the registration of many farmers as FLCs.<sup>67</sup> In the end, congress concluded that the FLCRA was incapable of addressing the problems in the contractor-migrant worker relationship and that something more was required.<sup>68</sup> The substance of the MSPA is significantly different from the FLCRA, even though the same concepts remain.<sup>69</sup> In cases under the FLCRA, Agribusiness convinced the court that the FLCs were independent contractors, thus the agribusiness were not responsible for the FLCs' sins.<sup>70</sup> Agribusiness also argued that they were not FLCs when the courts and the DOL began construing the agribusiness to also be FLCs "in order to find accountability and to hopefully lessen the plight of farm workers, then agribusiness spent a lot of time arguing that the company was not a farm labor contractor."<sup>71</sup> The MSPA made the point moot.<sup>72</sup> This is because the MSPA eliminates the need for agribusiness to register as FLCs.<sup>73</sup> However, MSPA in conjunction with the doctrine of joint employment, holds the agricultural employer just as responsible as FLCs in carrying out the worker protection requirements.<sup>74</sup> The MSPA codified the joint employment analysis of several court decisions.<sup>75</sup> Congress also required the federal courts to examine several additional several factors in the given employment setting that could warrant a finding of a joint-employment relationship.<sup>76</sup> The factors to be examined in determining the joint-employment relationship under the MSPA were derived from the FLSA.<sup>77</sup> With the joint-employment doctrine as the keystone of the new

---

63. See 29 U.S.C §§ 1801-1872 (1997).

64. See LeRoy, *supra* note 16, at 186.

65. See *id.*

66. See *id.*

67. See *id.*

68. See *id.*

69. See Clark, *supra* note 35, at 511.

70. See *id.*

71. *Id.*

72. See *id.*

73. See 29 U.S.C. § 1803(b) (1997).

74. See Clark, *supra* note 35, at 512.

75. See LeRoy, *supra* note 16, at 187.

76. See *id.*

77. See Clark, *supra* note 35, at 513.



law, agribusinesses should strive towards compliance, however the system is not entirely foolproof and weak links still exist.<sup>78</sup>

## VII. THE IMMIGRATION REFORM AND CONTROL ACT

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which was observed as the greatest attempt to control the entry of undocumented workers in the U.S. in a quarter of a century.<sup>79</sup> The Congressional intent behind the IRCA was to prohibit the employment of undocumented workers, thus removing the incentive for illegal immigration.<sup>80</sup> There are two main parts to the IRCA, the first part sanctions employers for hiring undocumented aliens.<sup>81</sup> This was groundbreaking because employers, who knowingly hire undocumented aliens, now for the first time in U.S. history can be fined or jailed.<sup>82</sup> Only workers with a legal right to be in the U.S. may be hired.<sup>83</sup> The second part of IRCA establishes an amnesty provision whereby certain undocumented workers could obtain a legal residency status.<sup>84</sup> One such provision grants legalization status to aliens who have been unlawfully present in the United States since January, 1982.<sup>85</sup> Another provision, termed the Special Agricultural Workers program (SAW), allowed undocumented workers having perishable crop experience to apply for permanent resident alien status.<sup>86</sup> "SAW was premised upon Congressional recognition of U.S. agriculture's long-standing dependence upon foreign labor, and the unpredictable labor demands of perishable crop farming."<sup>87</sup> SAW sought to stabilize the labor supply for agribusiness.<sup>88</sup> The intent was that this one time only amnesty program for farm workers would result in the legalization of a sizable workforce and eliminate the threat of deportation.<sup>89</sup> The drafters of IRCA were concerned with the workers "historical vulnerability to exploitation and deprivation of legal rights," thus this transition to legal status was an attempt to remedy these hardships.<sup>90</sup> However, after years of implementation, there continued to be a countless presence of illegal workers in U.S. Agriculture.<sup>91</sup> Flaws in the structure of IRCA itself have resulted in fraud, bias, and a large number

---

78. *See id.*

79. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); Steven Alan Elberg, *Agriculture and the Immigration Reform and Control Act of 1986: Reform or Relapse?* 3 SAN. J. AGRIC. L. REV. 197, 197 (1993).

80. *See* Elberg, *supra* note 79, at 197.

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.*

87. *Id.* at 198-99.

88. *See id.* at 199.

89. *See id.*

90. *Id.*

91. *See id.* at 200.

of undocumented workers in agriculture.<sup>92</sup> The largest loophole for employers is an affirmative defense to the sanctions imposed by the law if the employer relied in good faith on false documentation provided by the worker.<sup>93</sup> As a result, the employers accrue no liability for hiring illegal workers whose documents simply appear genuine.<sup>94</sup> “Although employers should not be expected to become document experts, this program provides a disincentive for compliance, and an invitation to fraud.”<sup>95</sup>

#### VIII. THE H-2A PROGRAM—SAVIOR OR SADIST?

At the present, the only program that exists to meet agricultural labor shortages is the H-2A program.<sup>96</sup> In the early 1980’s, the predecessor of the H-2A program, H-2, was not widely used because of its “regulatory complexity and history of litigation instigated by legal aid lawyers and the U.S. Department of Labor.”<sup>97</sup> When IRCA was first introduced, agricultural producers realized that the H-2 program was the only thing standing between labor shortages and significant fines.<sup>98</sup> Agricultural producers worked to streamline the H-2 program and remove areas prone to litigation and bureaucratic delays.<sup>99</sup> The H-2 program was subsequently amended and renamed the H-2A program.<sup>100</sup> H-2A provides a way for U.S. agricultural producers to bring non-immigrant foreign workers into the country for the purpose of performing seasonal agricultural work on a short-term basis when domestic workers are unavailable.<sup>101</sup> In 1996, agricultural employers used H-2A to bring in approximately 15,000 workers.<sup>102</sup> The H-2A program provides employers with an adequate labor supply while “protecting the jobs, wages, and working conditions, of the domestic farm workers.”<sup>103</sup> Under the program, agricultural employers who are anticipating a shortage of domestic workers can request foreign workers.<sup>104</sup> The government issues non-immigrant visas for H-2A workers after the Department of Justice (DOJ), through the Immigration and Naturalization Service

---

92. *See id.*

93. *See id.* at 207.

94. *See id.*

95. *Id.*

96. *See Guest Worker Hearings, supra* note 24, at 171 (statement of Russell L. Williams on behalf of agricultural producers).

97. *Id.*

98. *See id.*

99. *See id.*

100. *See id.*

101. *See The H-2A Program: Is it Working? Hearing on S. J-105-111 Before the Senate Comm. on the Judiciary, 105th Cong. 68 (1998)* (statement of Carlotta C. Joyner, General Accounting Office).

102. *See id.* at 67.

103. *Id.* at 65.

104. *See id.* at 67.

(INS), approves the employer's petition to bring in workers.<sup>105</sup> The DOJ does not approve the petition until the DOL has approved the employer's application and verifies that a labor shortage indeed does exist.<sup>106</sup> The DOL must also approve the wages and working conditions before the application can be accepted.<sup>107</sup> This certification is based on, among other things, proof that the employer has actively recruited domestic workers, that the state employment service has certified a shortage of farm labor, and that housing meets health and safety requirements.<sup>108</sup> The Department of Agriculture (USDA) acts in an advisory role that includes conducting wage surveys for labor's determination of the minimum rate.<sup>109</sup>

In 1997, the General Accounting Office (GAO) presented a report to congress evaluating the status of the H-2A program.<sup>110</sup> The report found significant problems in the administration of the program.<sup>111</sup> First, the requirement to request workers sixty days in advance is problematic due to weather and other unforeseen events that either increase or decrease the immediacy of labor.<sup>112</sup> Often, employers will estimate the earliest possible date to ensure that workers are available, even if there is no work for the migrant workers when they arrive.<sup>113</sup> The negative impact to the worker in such instance is that he must wait, without income, for work to become available.<sup>114</sup>

The report also found that the DOL may not process the applications on time, thus it is difficult to ensure that the employer will get the workers when they are needed.<sup>115</sup> In 1996, the DOL failed to issue timely decisions in one-third of the total applications for workers.<sup>116</sup> The GAO also found problems with the materials used for requesting workers under H-2A.<sup>117</sup> The DOL's handbook and materials on H-2A were found to be outdated, hard to understand, and in some instances, incomplete.<sup>118</sup> Finally, the difficulty in understanding the program and the number of agencies involved make the program confusing to the participants and fosters the inability to determine compliance.<sup>119</sup>

---

105. *See id.*

106. *See id.* at 68.

107. *See id.*

108. *See id.*

109. *See id.*

110. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS GAO/HEHS-98-20 (1997).

111. *See id.* at 9

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.* at 8

116. *See id.*

117. *See id.* at 9

118. *See id.*

119. *See id.*

## IX. CONCLUSION

Although the H-2A program is very difficult to use, it is not totally impossible.<sup>120</sup> Somewhere between 15,000 and 20,000 workers are brought into the country each year, and groups like the New England apple growers have used the program for decades.<sup>121</sup> Growers in North Carolina, where INS officials have found approximately eighty percent of the workers on farms to be aliens, have also used the program to avoid using illegal immigrants.<sup>122</sup> The NCAE argues that a user-friendly program is needed and that because of the administrative burden the current H2-A program entails, it could not possibly be expanded to provide enough workers to fill the additional need created by the stricter enforcement of the immigration laws.<sup>123</sup> In the border patrol operations in Washington State, about half the workers have been removed as suspected illegal aliens.<sup>124</sup> This presents a problem for the growers in Washington because more than 40,000 workers are needed to harvest the apple crop in the fall.<sup>125</sup> Without improved legislation to allow agribusiness to establish a work force needed to plant and harvest crops, U.S. agriculture will fall behind.

---

120. See Warner, *supra* note 1, at 5.

121. See *id.*

122. See *id.*

123. See *id.*

124. See *id.* at 6.

125. See *id.* at 7.