A FIGHTING CHANCE: AN EXAMINATION OF FARMERS' NEW FREEDOMS AND FAMILIAR PROBLEMS UNDER THE H-2A GUESTWORKER PROGRAM

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I. INTRODUCTION

For more than two decades, Congress and the federal court system have been unable to resolve one of the most important issues of agricultural policy in the United States. At the center of the controversy is a statutory framework that over the years has attempted to provide agricultural growers in the United States with the number of migrant farm workers growers needed during the peaks of the harvest season, while still giving priority in employment to domestic laborers and farm workers.[1] In the agricultural community, many feel that the U.S. Department of Labor's failure to enforce the provisions of the statute has caused a tremendous loss of employment among domestic workers, while making foreign migrant farm workers seem like the targets of abuse and mistreatment.[2] As such, in July of 1999,

1. *See* 8 U.S.C. § 1188 (1994).

2. *See* Ned Glascock, *Foreign Labor on Home Soil*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 29, 1999, at 1A.

Congress made several very important changes to the statutory scheme to address the difficulties encountered over the last twenty years.[3]

It is well known among agricultural growers that the demand for temporary farm workers has not diminished, even in the face of legal problems.[4] Foreign farm workers are easier to manage, less expensive, and less litigious than their domestic counterparts.[5] But in order for foreign farm workers to be hired, the Department of Labor must certify that there are an insufficient number of domestic workers available to the grower.[6] Throughout the decades, the Department of Labor has been in numerous legal and administrative battles with growers on the certification of foreign farm workers.[7] Subsequently, it began "rubber-stamping" the request for certifications, which resulted in decreased resistance to the certification process. [8] However, despite the current changes that Congress made to the foreign farm worker program, renewed disputes concerning the certification process, as well as procedural requirements under the statute, are inevitable.[9]

In the past, disputes arose when the Department of Labor would not grant a farmer's application for certification.[10] These denials were based on several factors, including failure to provide allotments to workers for transportation, ability or inability to meet adequate minimum housing standards, as well as low wages and lack of benefits.[11] Under the new foreign farm worker statute, the farmer has several new recruiting freedoms that were unavailable in the past.[12] This Note discusses and critiques the earlier statutory framework of the H-2A guestworker program and compares it to the recent amendments and new provisions, which have virtually rewritten the statute. Part II of this Note outlines the historical background of the foreign farm worker program and discusses why growers prefer to hire a temporary foreign workforce instead of domestic workers, who are given a statutorily imposed preference. Part III compares the pros and cons of the statutory framework of the old H-2A program with the new provisions of the 1999 statute using a discussion of

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3. *See* 8 U.S.C.A. § 1188 (West 1999 & Supp. 2000); *New Rules Aid Growers Using Foreign Workers*, NEWS & RECORD (Greensboro, N.C.) (Rockingham County edition), July 28, 1999, at B5 (highlighting the major changes to the H-2A program).

4. *See* Glascock, *supra* note 2, at 1A.

5. *See generally id.* (supporting the proposition that domestic workers do not want "to do this kind of work anymore"); H. Michael Semler, *Overview: The H2 Program: Aliens in the Orchard: The Admission of Foreign Contract Laborers for Temporary Work in U.S. Agriculture*, 1 YALE L. & POL'Y. REV. 187, 208-10 (1983) (discussing the extraordinary control over foreign workers that the H-2 program has granted to growers).

6. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (1994).

7. *See* Semler, *supra* note 5, at 193.

8. *See* 20 C.F.R. § 655.104 (1988).

9. *See New Rules Aid Growers Using Foreign Workers*, *supra* note 3.

10. *See generally* 8 U.S.C.A § 1188(b) (West 1999) (detailing conditions for denial of labor certification).

11. *See id*.

12. *See New Rules Aid Growers Using Foreign Workers*, *supra* note 3.

potential abuses to the program and the problems that could lead to increased litigation. Part IV examines the ability of the statute to do what it was intended to do–balance grower preference with domestic and foreign farm worker rights. It will also preview some of the employers' new recruiting freedoms under the revised statute and what is sure to be widespread criticism of the H-2A program by immigration rights activists. Finally, Part V analyzes whether the new program makes effective changes.

II. HISTORICAL BACKGROUND

A. *The Bracero Program*

In July 1999, the new H-2A program became effective.[13] Originally the H-2A program (formerly the H-2 program) was passed as a rider to the 1952 Immigration and Nationality Act.[14] Under the 1952 Act, farmers and agricultural growers in the United States were allowed to import temporary labor from foreign countries, mainly Mexico and parts of Central America, to work during the planting and harvest seasons.[15] In order to maintain this system, Congress chose to statutorily impose an employment preference in favor of domestic farm workers.[16] Because of this preference, Congress worded the statute so the Department of Labor would only certify workers under the H-2A program if a sufficient number of "able, willing, and qualified" farm workers were not available, and if employment of H-2A workers would not adversely affect the working conditions (especially wages) of workers already in the United States.[17]

The H-2A program, however, is not the first attempt by Congress to legislate a foreign guestworker program. In 1951, the bracero program allowed the temporary admission of Mexican farm workers into the United States as contract labor for a specified amount of time.[18] The subsequent H-2 program was Congress's first major effort to legislate a statutory provision that permanently authorized admission of temporary foreign laborers across American borders.[19] The H-2 program also allowed agricultural and nonagricultural foreign workers to find employment in the United States, which was prohibited under the bracero program.[20] But by 1962,

13. *See New Rules Aid Growers Using Foreign Workers*, *supra* note 3.

14. *See* Immigration and Nationality Act of 1952, Pub. L. 82-414, § 101(a)(15)(H), U.S.S.C.A.N. (66 Stat.) 1653, 1697-98 (explaining the new classification of "temporary workers") (codified as amended at 8 U.S.C. § 1188 (1994)).

15. *See* 8 U.S.C. § 1101 (1952). *See also* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101(a)(15)(H), U.S.C.C.A.N. (66 Stat.) 1653, 1697-98.

16. *See* 8 U.S.C. § 1188(a)(1)(B) (1994).

17. *Id*. at § 1188(a)(1)(A).

18. *See* Pub. L. No. 78-223, 65 Stat. 119 (1951).

19. *See* Semler, *supra* note 5, at 192.

20. *See* 8 U.S.C. § 1188 (1994); Pub. L. No. 78-223, § 503, 65 Stat. 119 (1951).

when the H-2 program began to flourish, the bracero program started to lose favor. In the wake of the H-2 program, many perceived the bracero program as a mistake.[21] As a result, Congress ended the bracero program in 1964, which started a political and judicial battle over the H-2 program stretching over the next thirty years.[22]

B. *Life After the Bracero Program: The H-2 Program*

At the end of 1988, the Department of Labor reported that there were at least 23,745 certified temporary foreign farm workers in the United States.[23] Since then those numbers have increased.[24] Many commentators believe that there is a reason for this pattern.[25] Federal protections for foreign workers under the Migrant and Seasonal Agricultural Worker Protection Act do not extend to temporary foreign farm workers admitted under the H-2 program.[26] More importantly, because of the extreme poverty levels in the countries bordering the United States, and their lack of an economic infrastructure, agricultural workers and nonagricultural employers are given more latitude when it comes to hiring migrant workers.[27] As a result, growers have a greater ability to manipulate foreign farm workers in ways that they could not manipulate workers already residing in the United States.[28] For example, if a grower considered a foreign worker to be lazy or unproductive under the old system, the worker could be blacklisted and barred from participating in the program for several years.[29] Also, growers were able to adopt a "barracks" housing system, stacking workers on top of workers, because most of the temporary farm workers do not travel with their families or loved ones.[30] Furthermore, because of their low socio-economic status, lack of education, and inexperience with the U.S. legal system, it is often too overwhelming for the average guestworker to obtain legal assistance, making the invocation of any rights whatsoever nonexistent.[31] When H-2 workers

21. *See* Semler, *supra* note 5, at 195.
22. *See id.* at 221-22.
23. *See* U.S. EMPLOYMENT SERV., DIV. OF FOREIGN LABOR CERTIFICATIONS, 1988 ANN. REP.: LABOR CERTIFICATIONS FOR TEMPORARY FOREIGN AGRICULTURAL WORKERS (H-2A PROGRAM) 1 tbl.I (1989).
24. *See* DIVISION OF FOREIGN LABOR CERTIFICATIONS, U.S. DEP'T OF LABOR, FISCAL YEAR 1999 H-2A REPORT 1 (2000).
25. *See, e.g.*, Editorial, *New York's Harvest of Shame: First of a Two-Part Series on the Plight of Farm Workers*, DAILY NEWS, Aug. 1, 1999, at 40 (asserting that the number of illegal aliens is growing dramatically in the United States because of greater wages); William L. Francisco, Dialogue, *A Maquiladora Near You*, FORUM FOR APPLIED RESEARCH AND PUB. POL'Y, Summer 1999, at 129, 132 (stating increased enforcement of immigration laws by INS has convinced many growers to participate in the U.S. government's temporary program for foreign agricultural workers).
26. *See* Semler, *supra* note 5, at 189 n.10-11.
27. *See id.* at 223.
28. *See id.*
29. *See id.* at 209.
30. *See id.* at 214.
31. *See* Francisco, *supra* note 25, at 132.

were hired, growers received a "workforce bound to a specific job."[32] H-2 workers were allowed to work in the United States, but only for the grower who sought their admission.[33] As a result, if an employer underpaid or mistreated them, H-2 workers could not easily change jobs the same way American citizens could.[34] They were subject to repatriation without cause by the employer, and the employer had the ability to obtain replacement H-2 workers upon request.[35]

Over the next twenty years, the H-2 program was somewhat of a paradigm. The program became the center of major controversy, largely due to the fact that the Secretary of Labor openly rejected the H-2 program.[36] By 1986, Congress began to impose rigid penalties on employers who knowingly hired illegal aliens, including those hired as farm workers.[37] Because of the outcry by agricultural employers, Congress uncharacteristically made a concession. When the Immigration and Nationality Act was amended, Congress delegated authority to approve petitions for H-2 workers to the Attorney General.[38] As a result of the complete overhaul of the Immigration Act, those growers who urged Congress to allow the use of an inexpensive labor force were able to do so. This scheme became known as the H-2A Temporary Guestworker Program.

III. H-2 VS. H-2A: THE REAL CONCERNS

The H-2A program's inherent controversy stems from the fact that the framework may ultimately lead to litigation over the minimum wage and housing requirements that an agricultural employer must comply with in order to make a price bid for the retention of domestic American farm workers.[39] It is possible, however, that American workers would migrate to agricultural centers of the country to do farmwork if the wages were high enough.[40] As a result, the need to hire and maintain constant certification for H-2A workers from season to season would become moot.[41] Regardless, the minimum rates established by the Secretary of Labor were originally supposed to make the rates that existed without an H-2A increased workforce equivalent to each other.[42] Nevertheless, the H-2A program

32. *Id.*
33. *See id.*
34. *See id.*
35. *See id.*
36. *See* Semler, *supra* note 5, at 195 n.42.
37. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3366-67 (1986).
38. *See* 8 U.S.C. § 1103(a)(1) (1994 & Supp. 1998).
39. *See* Michael Carlin, Editorial, *Even Tougher on Farm Labor?*, NEWS AND OBSERVER (Raleigh, N.C.), July 28, 1999, at A13.
40. *See* Jim Barnett, *Senators Plan Aid for Fieldworkers*, PORTLAND OREGONIAN, Sept. 25, 1999, at C5.
41. *See* Semler, *supra* note 5, at 225.
42. *See* 8 U.S.C. § 1188(a) (1994).

would seem to many to have somewhat contrary goals. On the one hand, the H-2A program is meant to protect, via statutorily imposed preferences, American workers from unfair competition by the migrant workforce.[43] On the other hand, it is also a tool by which American farmers and agricultural corporations can ensure that they have their fruits, vegetables, and other crops harvested by hand before they spoil.[44] The ultimate goal, of course, is to provide the public with fresh food produced in the United States.[45] Because these goals are imprecise and polar opposites, they have become fuel for litigation. As one commentator has noted, "[t]hese conflicting goals have made the H-2A program among the most litigious in the United States."[46]

A. *Grower Rights vs. Worker Rights*

Examples of litigation sparked by these conflicting agendas are plentiful. In *Marquis v. United States Sugar Corp.*,[47] growers were accused of discharging domestic farm workers who were already hired and working in the fields.[48] The workers banded together and asserted that the growers had raised the production levels for the domestic workers while keeping the level of production the same for H-2A workers.[49] In *Montelongo v. Meese*,[50] pepper and cantaloupe growers using mostly undocumented Mexicans as laborers were forced to recruit domestic workers as a result of the changes in the Immigration and Nationality Act.[51] The employers made an agreement with crew leaders of teams of domestic workers that provided the workers return for further instructions in June.[52] However, by the beginning of June, the employer had received certification to hire temporary foreign workers.[53] Unfortunately, when the domestic workers returned in June, the employer called off the deal because he had already hired foreign workers.[54] Consequently, those workers who were a part of the domestic crews were left unemployed for the season.[55]

Many onlookers feel that these same types of cases will continue to surface due to the 1999 changes in the H-2A program.[56] Take New York for example, where

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43. *See* PHILLIP C. MARTIN, HARVEST OF CONFUSION: MIGRANT WORKERS IN U.S. AGRICULTURE 136 (1988).
44. *See id.*
45. *See id.*
46. *Id*.
47. Marquis v. United States Sugar Corp., 652 F. Supp. 598 (S.D. Fla. 1987).
48. *See id*. at 599.
49. *See id*. at 600.
50. Montelongo v. Meese, 803 F.2d 1341 (5th Cir. 1986).
51. *See id*. at 1344.
52. *See id.* at 1345.
53. *See id.*
54. *See id.*
55. *See id.*
56. *See New York's Harvest of Shame: First of a Two-Part Series on the Plight of Farm*

in 1999 there were twenty thousand individuals laboring in the fields, orchards, and poultry processing plants.[57] The conditions were harsh and the average pay for a field hand was $7.20 per hour.[58] Because of the way the state laws (which are primarily based on the federal statutes) are written, these horrible conditions and low wages are encouraged.[59] "Farm laborers are effectively denied the right to join unions" and expressly excluded from any remedies relating to employer retaliation by state laws.[60] Consequently, if workers wish to unite in an attempt to change their situation by demanding better working conditions or contracts, they are on their own. They cannot even invoke any protections granted to every other worker under the state constitution because they are not U.S. citizens.[61] As a result, some refer to this situation as "New York's Harvest of Shame."[62]

Not surprisingly, H-2A litigation has proven to be a double edged sword. For example, a Kentuckian who employed three Texans for the tobacco harvest in 1996 is now the defendant in a lawsuit filed by Texas Rural Legal Aid.[63] Billy Wyatt hired three workers under the H-2A program.[64] He eventually fired the workers and sent them back to Texas, citing the allegation that they walked away from the job and spent most of the day lounging at a country store.[65] Two years later, he received a letter from Rural Legal Aid demanding $65,335 to settle the workers' claims.[66] The workers alleged that they were forced to live in poor facilities and that they were not allowed to buy groceries.[67] As a result of a federal judge's decision to allow the action to be tried in Texas, Mr. Wyatt will have to defend himself in a court room located more than 1,200 miles away from his home.[68]

B. *Is More Legislation on this Issue the Answer?*

Some of the anticipated changes that may result from litigation deal with procedural requirements of the statute that, if not followed to the letter, could leave an employer with no workers.[69] Congress's response to these types of litigious

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Workers, *supra* note 25.

57. *See id.*
58. *See id.*
59. *See id.*
60. *Id.*
61. *See id.*
62. *See, e.g.*, *id.*
63. *See Laborers Sue Kentucky Farmer in Texas: Accusations Fly on Both Sides Years Later*, CINCINNATI ENQUIRER, June 29, 1999, at B1, *available in* 1999 WL 9443327.
64. *See id.*
65. *See id.*
66. *See id.*
67. *See id.*
68. *See id.*
69. *See* 20 C.F.R. § 655.104 (2000). For a list of the procedural requirements of the application, see 20 C.F.R. §§ 655.101-.103 (2000).

situations affecting both the worker and the grower was to make some of the certification requirements under the 1999 H-2A program less stringent.[70] For example, the time of notice that a grower must give to labor officials before hiring temporary farm workers has been cut from sixty days to forty-five days to ensure that all domestic labor sources have been exhausted. [71] In the spirit of fairness, the amount of time that state migrant housing inspectors have to certify the fitness (meaning the health and safety) of camps where workers live has been cut from thirty days to twenty days.[72] More importantly, the new revisions have eliminated the grower's obligation to tell state employment officials in writing the exact date on which H-2A workers are supposed to leave Mexico and other Central American countries for their jobs.[73]

Another example of the new certification requirements involves job offers. If a grower's job offer meets the minimum rate criteria, the Secretary must determine whether there are enough domestic farm workers available to fulfill the contract.[74] Such determinations are based on the employer's ability to recruit domestic farm workers and offer them either the minimum rate or the rate offered to H-2A workers, whichever is greater.[75] This effort is made because even though the regulations require that the grower make every effort to ensure that domestic workers are notified of job openings through advertisements, contractors, and other means, growers usually make very few attempts to recruit domestic farm workers.[76] If an insufficient number of domestic workers are found, the Secretary then certifies the need for H-2A workers.[77]

C. *Are these Changes a Solution or the Cause of Illegal Immigration?*

Opponents to the new changes, and to the program in general, believe that guestworker programs cause illegal immigration.[78] Bruce Goldstein of the Farmworker Justice Fund feels that "so many H-2A workers [will] go AWOL before the end of their contract that they contribute to the illegal supply of foreign workers."[79] On the opposite end of the spectrum, Stan Eury, president of the North Carolina Growers Association, one of the largest and more influential agricultural interest groups, believes that guestworker programs have been expressly developed

70. *See* 8 U.S.C.A. § 1188(c)(1) (West 1999 & Supp. 2000) (reducing the minimum number of days required to file an application from sixty days to forty-five days).
71. *See New Rules Aid Growers Using Foreign Workers*, *supra* note 3.
72. *See id.*
73. *See id.*
74. *See* 8 U.S.C. § 1188(c)(3)(A)(ii) (1994).
75. *See id*.
76. *See* Semler, *supra* note 5, at 193.
77. *See id.*; 8 U.S.C. § 1188(c)(3)(A) (1994).
78. *See* Semler, *supra* note 5, at 193.
79. *Id.*

to curb illegal immigration.[80] He boasts that because his workers arrive with a visa, they are not illegal.[81]

Despite these and many other changes to the program resolving certification issues, historically, growers have been unwilling to work within the statutory scheme set up by Congress.[82] Instead of amending their applications for certification or offering additional housing or unrequired perks, growers have let it be known that they will not hesitate to file lawsuits.[83] Typically though, after rulings on interlocutory appeals to the circuit court, growers have dismissed their cases without prejudice after they have been remanded back to the district court. [84]

Bob Krauter, spokesman for the California Farm Bureau Federation, stated that "we see an expanded H-2A program as a way to lessen the problems farmers are having getting their crops harvested on time . . . We have to do something. These are perishable commodities."[85] Members of certain growers associations also support a revamping of the H-2A program.[86] Others believe that a brief review of the proposed amendments reveals the growers' true motives: to bring in more farm workers without any of the old bracero program protections.[87]

D. *Brokering the Workforce and the Old Bracero Program*

Another problem facing the H-2A program are the repercussions of having middlemen brokering the importation of workers.[88] Stan Eury, mentioned previously, in addition to being the executive director of the North Carolina Growers Association, has also been dubbed "the undisputed king of the U.S. guestworker program."[89] This year alone, the number of guestworkers Eury will bring from Mexico to the southeastern United States is about one-third of the nation's total foreign guestworkers.[90] As a guestworker middleman, the one who connects the migrant workers to the growers needing labor, Eury brokers laborers in eighteen states.[91] At the end of the year, the North Carolina Growers Association is expected

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80. *See id.*
81. *See id.*
82. *See, e.g.*, Semler, *supra* note 5, at 218-19 (discussing the refusal of growers to hire Puerto Rican workers in 1978 despite a Department of Labor order to do so).
83. *See id.* at 221-22.
84. *See id.* at 225-28.
85. Esther Schrader, *Widening the Field of Workers,* L.A. TIMES, Aug. 26, 1999, at A1.
86. *See* Jonathan J. Higuera, *Relaxed Foreign-worker Program Sought*, TUCSON CITIZEN, June 11, 1999, at 15C.
87. *See* Kitty Calavita, *No Excuse for Creating a Second 'Harvest of Shame,'* HOUSTON CHRONICLE, July 27, 1999, at 19A.
88. *See* Glascock, *supra* note 2.
89. *Id.*
90. *See id.*
91. *See id.*

to gross a minimum of five million dollars.[92] This astounding number sparked complaints from members of the Association because of the amount of money Eury charges each worker to get into the country.[93] This figure does not include the money that the farmer has to pay for wages and housing allowances.[94]

The fight between Eury and immigration activists epitomizes the conflicts that take place under an employment structure such as the H-2A program. Activists say Eury uses his knowledge of the H-2A program to profit from a desperate workforce.[95] Eury, like other growers, believes that he is just following the spirit of the capitalist system.[96] These brokers are exploiting a loophole to their benefit and the only ways to change this type of conduct are to go to court and have the entire program declared unconstitutional, or to convince Congress to close the loophole during its next term.

In some ways, what brokers like Eury are doing is a throwback to the old days of the Bracero program. One observer said that

> "for the growers the program was a dream of heaven: a seemingly endless army of cheap, unorganized workers brought to their doorstep by the government." But growers' greed should not drive social policy, because such large-scale temporary worker programs increase undocumented immigration, undermine the laws of supply and demand and throw more workers into poverty. The *bracero* program was a bad idea the first time around; it remains a bad idea.[97]

According to the Domestic Policy Council, Congress should stay out of the issue for the time being and should refrain from implementing new legislation.[98]

E. *Cultural Concerns*

Members of the Republican Party are also concerned that uneducated workers could adversely affect the economy.[99] For instance, a spokesman for Lamar Smith, a Texas Representative, says that "[h]is top concern right now is that we're already admitting too many people who lack a high school education."[100]

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92. *See id*.
93. *See id.*
94. *See id.*
95. *See id.*
96. *See id.*
97. Calavita, *supra* note 87.
98. *See* Barnett, *supra* note 40.
99. *See id*.
100. *Id.*

IV. BALANCING GROWER PREFERENCES WITH DOMESTIC AND FOREIGN FARM WORKER RIGHTS

As with any temporary guestworker program, there is always concern about the potential balancing of preferences and rights. In the case of the H-2A program, the preference and rights being balanced are those of the grower, the American farm worker, and the foreign guest worker. Growers are avid in their opposition to programs like the 1986 Immigration Reform and Control Act, under which workers are eligible to receive green cards and leave the agricultural industry without consequence.[101] The rule changes that took effect on July 29, 1999 gives growers, such as those who work in North Carolina, more freedom in recruiting farm workers.[102] However, there are also those who believe that there are more than enough U.S. farm workers available and that foreign workers are unnecessary.[103]

As with any new national controversy, public interest groups can be expected to provide their commentary.[104] Bruce Goldstein is one such advocate.[105] As a member of the Farmworker Justice Fund, an advocacy group based out of Washington D.C., Goldstein believes that there is "no need for a new program or major changes to the old one because there is a surplus of agricultural workers here in the United States."[106] Goldstein is of the opinion that growers and farmers should better use the existing program to recruit workers from the United States.[107] One way to do this, he suggests, is for farmers and growers to recruit from the so-called "supply states," specifically California and Texas.[108] The most obvious reason for doing this is to curb illegal immigration caused by workers leaving the fields before the end of their contracts.[109]

On the opposite end of the spectrum is Paula Gupta, a spokeswoman for the Farm Bureau in Raleigh, North Carolina.[110] Gupta believes that North Carolina growers and farmers will not be able to hire enough qualified U.S. farm workers.[111] Because many qualified workers reside on the west coast, Gupta reasons that they will not want to leave their families for a seasonal job on the other side of the country.[112]

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101. *See* Alfredo Corchado, *Shortage of Workers Spurs Talk of Amnesty*, MORNING STAR (Wilmington, N.C.), June 22, 1999, at 1A.
102. *See New Rules Aid Growers Using Foreign Workers*, *supra* note 3.
103. *See id.*
104. *See id.*
105. *See id.*
106. *Id.*
107. *See id.*
108. *See id.*
109. *See id.*
110. *See id.*
111. *See id.*
112. *See id.*

Somewhere in the middle is the American Farm Bureau, which lobbies for growers and farmers nationwide.[113] While acknowledging that the July 29 changes to the program are "minimally helpful," the American Farm Bureau also recognizes that "these changes in no way fix the many problems of the H-2A program."[114] Brian Little, a well-known lobbyist for the American Farm Bureau, claims that the flaws and shortcomings of the H-2A program can only be corrected through changes in the current legislation.[115] This assertion would seem to be meritorious, considering that members of Congress have publicly announced they will propose new legislation in the wake of the July 29 changes to the program.

For instance, Kentucky Senator Mitch McConnell has sponsored legislation in the past aimed to streamline the H-2A guestworker program.[116] The proposed legislation, in effect, would have given growers and farmers a guaranteed supply of temporary farm labor.[117] The bill was dropped during heated budget negotiations.[118] California Senator Diane Feinstein has also proposed legislation that gives amnesty to illegal resident workers.[119]

Senator Feinstein is not the only member of Congress who has considered a plan which grants amnesty to immigrant workers. Senators Gordon Smith of Oregon and Bob Graham of Florida planned to endorse legislation in 1999 to grant residency to more illegal immigrants who have fled the H-2A temporary guestworker program.[120] Their motivations for this position are still unclear. Under their proposed plan, up to a half-million workers without green cards or temporary worker visas could become permanent residents.[121] The Senators intended to offer a plan to "ease a labor shortage on farms and orchards across the nation while protecting workers."[122] States like Oregon have a lot to lose in this debate.[123] Of its estimated 150,000 farm workers, half or more are thought to be illegal immigrants.[124] The crux of the proposed bill would give undocumented workers the ability to stay in the U.S. after working in agriculture.[125] The potential minimum target time frame would be probably four or five years.[126]

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113. *See id.*
114. *Id.*
115. *See id.*
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.*
120. *See* Barnett, *supra* note 37.
121. *See id.*
122. *Id.*
123. *See id.*
124. *See id.*
125. *See id.*
126. *See id.*

In the words of Michael Carlin, "for some lobbyists the panacea is to urge Washington to allow wages and working conditions of foreign laborers to slip to even lower levels."[127] But this seems contrary to the facts. In 1997, the United States General Accounting Office reported that there is no national farm labor shortage.[128] In 1998, a report issued by the Department of Labor reached the same conclusion.[129] Nonetheless, countless U.S. farm workers remain unemployed around the country while growers associations broker their labor from outside the U.S.[130] This seems inconsistent considering domestic farm laborers have more experience working for farmers and growers in the United States, and they enjoy many more legal protections than H-2A workers.[131] However, because American workers enjoy more protections, in reality this would probably make them less desirable to growers and farmers, mainly because of the susceptibly to lawsuits. "On the other hand, H-2A workers who have even the slightest complaints often find themselves on the next bus back to Mexico."[132] It is not hard to understand why farmers and growers would prefer temporary foreign farm workers over American labor, especially in the absence of any true mandatory scheme of regulation.

Another issue which has to be balanced is the status of the farm labor economy. In states like North Carolina and Florida, the "tight market" in agricultural labor is a fiction.[133] At the height of the harvesting season, approximately two thousand migrant workers will be in the fields.[134] In recent years, North Carolina guestworkers have seen a decline in their earnings.[135] Those who opt not to accept the wages and conditions offered by growers are quickly replaced by other eager workers from Mexico.[136] As a result, approximately "20,000 individuals labor in New York's vegetable fields, in the apple orchards, and in the factories where poultry is processed, endure conditions so harsh that they are prohibited in all other lines of work."[137] It is as if workers are in a time warp where they refer to the growers or farmers as "patrones" and some of the farms and orchards may be run like medieval fiefdoms.[138]

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127. Carlin, *supra* note 39.
128. *See id.*
129. *See id.*
130. *See id.*
131. *See id.*
132. *Id.*
133. *See id.*
134. *See id.*
135. *See id.*
136. *See id.*
137. *New York's Harvest of Shame: First of a Two-Part Series on the Plight of Farm Workers*, *supra* note 25.
138. *See id.*

And then there are those who have made a living out of recruiting temporary farm labor. Take for example Stan Eury, who is said to "deal in Mexicans."[139] Because of the inconsistencies in the immigration laws and the shortcomings of the temporary migrant farm worker programs, the sixteen thousand Mexican workers Eury recruits to work on farms in the United States each year do not have to cross the border illegally in the dead of night.[140] Eury's recruits ride over in chartered buses with stamps on their passports to validate their presence.[141] Once they arrive, they do work that no other laborer will do, knowing that they will leave with more money than they have ever earned before.[142] Eury says that makes him a guestworker advocate.[143] Many civil rights lawyers trying to keep check of Eury's business tend to disagree with that assessment.[144] Nevertheless, growers continue to use brokers like Eury because the current system is hassle-free, and growers do not have to worry that the Immigration and Naturalization Service will come knocking, or worse, kicking, down their doors.[145] Based on these issues, it is evident that striking a balance between legalization and expanding a guestworker program will be the key to finding a resolution.

V. DOES THE NEW PROGRAM MAKE EFFECTIVE CHANGES?

Some farmers pay H-2A workers from Mexico up to seven dollars per hour.[146] As a result, nearly thirty thousand workers in North Carolina are imported and employed under that program.[147] Major changes to the H-2A program that took effect in July 1999 include shortening the lead time in which a grower can seek regulatory approval to hire temporary foreign workers.[148] In the past, farmers had to apply sixty days before the workers were needed, but the new rule cuts that to forty five days, giving growers the option of shortening the time for state housing inspections of their migrant camps to days before the workers arrive.[149] The old rule also said inspections had to occur at least thirty days beforehand, whereas the new rules have shortened the time frame to just twenty days in advance.[150] The new

139. Schrader, *supra* note 85.
140. *See id.*
141. *See id.*
142. *See id.*
143. *See id*.
144. *See id.*
145. *See id.*
146. *See* Corchado, *supra* note 101.
147. *See id*.
148. *See New Rules Aid Growers Using Foreign Workers*, *supra* note 3.
149. *See id.*
150. *See id.*

program also puts an end to many of the formal notifications relating to H-2A workers.[151]

Other controversial changes to the H-2A program include eliminating a requirement to supply housing to workers, lowering wage rates (possibly below state and federal minimum wages), ending any obligation to hire U.S. workers who apply directly to employers, and removing mandatory recruitment of U.S. workers before seeking H-2A workers.[152] While the effectiveness of the changes to the H-2A program will be evaluated during the peak of the agricultural seasons, there are clearly some problems that have to be addressed before any of these measures can be effective. First, it seems illogical not to require these groups to make a good-faith effort to recruit workers from the United States. If growers and farmers can spend substantial sums of money on recruitment networks, then surely "they should be required to find the money to seek workers in Florida, Texas, and California," as well as in other surplus states.[153]

Both state and federal agencies are required to regulate agricultural activities such as field conditions, housing, and the use of pesticides.[154] Enforcement of these regulations should be beefed up in spite of the fact that workers believe that the growers are tipped off as to when on-farm inspections will occur.[155] Additionally, more bilingual inspectors need to be hired to effectively communicate with the labor force.[156] Under the current system, the result is farms that are nothing less than third world scenes where housing consists of cinderblock barracks with communal toilets and other horrible conditions.[157] As Mary Lee Hall, an attorney at the federally funded Legal Services of North Carolina, noted, "the fundamental problem underlying the program is the degree of control that the employer has over the workers, which is greater even than over the undocumented workers."[158] Hall further explains that "if you are undocumented and you don't like your job, you can walk away. These workers are coming out of economic necessity and place a premium on returning [to the United States] and being able to bring back that money again."[159]

For many years this type of problem was seen in Florida, where the sugar cane growers recruited Jamaicans for the excruciating job of cutting cane, and in the northeast, where apple growers had trouble finding help.[160] In the 1980s, a series of lawsuits filed against sugar cane growers by farm worker advocates contended that

151. *See id.*
152. *See* Carlin, *supra* note 39.
153. *Id.*
154. *See* Schrader, *supra* note 85.
155. *See id.*
156. *See id.*
157. *See id.*
158. *Id.*
159. *Id.*
160. *See id.*

the Jamaican workers were subjected to extraordinarily harsh conditions.[161] In response, the growers stopped hiring Jamaicans directly and began using middleman like Eury.[162]

Then there is the darker side of the new H-2A program. There is a side that everyone knows exists but does not want to talk about. Believe it or not, there are some that are of the opinion that not implementing this new program will have the effect of perpetuating a black market for farm workers and farm laborers.[163] Douglas, Arizona mayor Ray Borane believes that such a black marker "has surpassed the drug trade in scope . . . [and] it has fueled an economy of its own that is less risky and more profitable."[164] Borane maintains that a guest worker system could help end the human smuggling industry that has eroded the quality of life for many residents. In fact, the Mexico advisor to Arizona governor Jane Hull made it clear that Hull supports a guest worker program and would like Arizona to serve as a pilot state for the new program.[165] In 1998, one hundred thirty Arizona employers received approval, bringing in 570 workers.[166] "Nationally, 3,200 employers brought in 35,000 foreign workers."[167]

Another area of unrest lies within the "spin-off" programs. Regulatory agencies were experimenting with programs that were spin-offs of the H-2A program.[168] For example, growers in Idaho protested and contended that Operation Gatekeeper, coupled with enforced employer sanctions, would deprive them of their workforce.[169] As such, a secondary pool of labor is needed.[170] As Kitty Calavita notes, "this line of reasoning has a number of problems."[171] The most compelling problem with the growers' position is that "employer sanctions have been on the books since 1987 and have had no effect on either illegal immigration nor [*sic*] the supply of farm workers."[172] This is because once a labor shortage has been certified, growers can hire H-2A workers as an alternative to hiring undocumented workers.[173]

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161. *See id.*
162. *See id.*
163. *See* Higuera, *supra* note 86.
164. *Id.*
165. *See id.*
166. *See id.*
167. *Id.*
168. *See* Kitty Calavita, *Worker Imports Will Fail*, IDAHO STATESMAN, July 22, 1999, at 8B.
169. *See id.*
170. *See id.*
171. *Id.*
172. *Id.*
173. *See id.*

VI. CONCLUSION

In many respects, the controversy and debate surrounding the virtues and disadvantages of a temporary foreign guestworker program, such as the H-2A program, sounds a lot like the free trade debate reincarnated.[174] The only difference is that, in this case, it is not about free trade but the concept of guest labor, mainly importing Mexicans and other foreign laborers on temporary work permits to fill jobs in industries with worker shortages.[175] It seems to be a bit of an oxymoron to have a worker shortage in an industry, but yet the domestic labor force is up in arms about not being given the preference they deserve because of their status as U.S. citizens. In the end, the most logical and realistic method of change is making the corrections through legislation. Lest we forget, we are talking about human beings– people, after all, like you and myself and Lorenzo Uscanga Campos. Lorenzo is from a small town in the Mexican state of Veracruz, and he works here in the U.S. where he earns only $6.54 an hour for doing backbreaking work for eighteen hours a day. [176] People like Lorenzo, nevertheless, have no doubts about their decision to work in America, because "It's basic economics . . . . They told me how hard the work would be. I knew that I'd be far away from my family and living with a lot of other men. But we are soldiers. We are here to complete a mission. I am fighting for my family."[177]

174. *See* Higuera, *supra* note 86.
175. *See id.*
176. *See* Schrader, *supra* note 85.
177. *Id.*