

NLWJC - Kagan

DPC - Box 033 - Folder 006

Immigration - H2A Workers

[2]

Maria → Hispanic groups → Gingrich.
(push bipart process)



Repub immig qps → Repubs.

Laber → Laber Repubs / Dems

Another target - Rogers

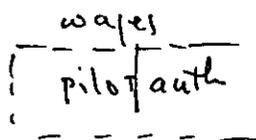
Tulic → Maureen Shea → religious groups.

Peter - work through to Wyden/Grahan.

Larry. Eukins, Tach - to communicate: of paramount imp.

Pollock →

OASB - recruitment



John - Canada

lunni - H2A

▶ Julie A. Fernandes
10/02/98 09:34:01 AM
.....

Record Type: Record

To: Elena Kagan/OPD/EOP, Maria Echaveste/WHO/EOP
cc: Laura Emmett/WHO/EOP, Marjorie Tarmey/WHO/EOP
Subject: H2A -- leg. update

According to the DOL, yesterday's 5pm meeting between Lamar and the Rep. Leadership turned out to be a meeting between Lamar and Bob Smith. B. Smith asked Lamar to support the Wyden-Graham bill. Lamar said no, but that he would -- as he has said before -- support B. Smith's pilot program. According to DOL, the decision about how to proceed with this issue will be a leadership call in the next few days. Also according to DOL, the Agriculture Approps bill has closed, and is no longer a possibility as a vehicle.

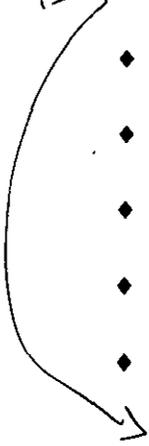
julie

Framework for Reform Discussions

H2A

Burdens and
Processes

- ◆ Administrative Processes
- ◆ Worker Recruitment
- ◆ Wages and Costs
- ◆ Housing
- ◆ Enforcement
- ◆ Immigration Management/Repatriation



Framework – Idea Inventory

1. Administrative Processes

Issues: From the growers' perspective, the principal issues involve the long lead time for application (currently 60 days before the "date of need") – which they contend is too long a period to make accurate predictions about timing and labor needs—and the paperwork burden involved in the application process. From workers' perspective, the primary issue is assuring adequate time for bona fide efforts to recruit U.S. farm workers so that they get a legitimate first crack at the agricultural jobs that will otherwise go to foreign workers.

Responsibilities

- a. Consolidate DOL Certification and INS petition approval (eventually including for replacement H-2A workers) into one process administered by DOL (GAO rec.; DOL/INS regulatory initiative)
- b. Consolidate responsibility within DOL in Wage and Hour for post-application examination and enforcement of employer compliance with H-2A program requirements, with resources shifted from ETA/USES (OIG rec.; DOL concurred)
- c. Government – not employer – responsible for reimbursing transportation costs of eligible workers (S.2260)

Process Time Frames

- d. Require employers' H-2A labor certification applications to be submitted 45 (rather than 60) days before the employer' "date of need" (GAO rec.; DOL reg. initiative)
- e. Reduce lead-time for employer applications to 30 (rather than 60) days before "date of need" (Georgia growers)
- f. Consistently meet 7 day deadline – after initial receipt of employer's labor certification application – to give written notification to the employer of deficiencies precluding adjudication of the application. (DOL request for reprogramming of resources to establish support/tracking system was denied)
- g. Consistently meet existing 20 day deadline – prior to employer's "date of need" – to issue approved certifications. (DOL request for reprogramming of resources to establish support/tracking system was denied)
- h. After consolidation of certification and petition adjudication processes in DOL, change the law to set deadline for DOL approval of employers' application/petition to 7 (rather than 20) days before the "date of need" (GAO rec.; DOL concurs)
- i. Reduce the deadline for employer-provided housing to be available for inspection to 15 (rather than 30) days before the "date of need" (DOL reg. initiative)
- j. Change the current labor certification process to one based on employers' attestations to comply with program requirements (S.2260)

- k. Allow certification of additional H-2A workers to replace farm workers with invalid SSN who are hired and subsequently abandon employment (Current emergency certification/redetermination procedures already accommodate)
- l. Regularly collect data on DOL performance in meeting program deadlines, using data to monitor and improve performance (GAO rec; DOL concurred; request for reprogramming of resources to establish support/tracking system was denied)
- m. Eliminate the requirement that certified H-2A employers provide notice of H-2A workers' departure for the place of employment (DOL reg. initiative)
- n. Simplify H-2A application and related documentation (DOL/INS administrative/regulatory initiative dependent on implementing application/petition consolidation)
- o. Update and revise the H-2A Handbook to include procedures for all agencies involved and key contact points (GAO rec.; DOL concurred)

2. Worker Recruitment

Issues: From the growers' perspective, the principal issues are avoiding bureaucratic, unproductive recruitment efforts and substantially reducing their vulnerability deriving from employing a partially illegal workforce. From the workers' side, the issue is effectively assuring bona fide efforts to fulfill the policy objective of first preference for hiring U.S. workers, including requiring H-2A employers to use whatever means to recruit U.S. workers their competitors – who do not use foreign workers – employ.

- a. Require "positive recruitment" of U.S. farm workers by growers only in areas where DOL finds that there are a significant number of qualified workers willing to make themselves available for employment at the time and place needed (DOL administrative change implemented)
- b. Count as "available" for employment – and thereby certify fewer H-2A workers than requested by an employer – only those U.S. workers who are identified by name, address, and SSN (DOL administrative change implemented)
- c. Post employers' H-2A job orders on America's Job Bank (DOL proposal; requires job order simplification)

Farm Labor Contractors (Crewleaders)

- d. Strengthen the [MSPA] program of registering farm labor contractors to require bonding; at least allow H-2A employers to require bonding as a condition of employing a farm labor contractor (Georgia growers)
- e. Allow H-2A grower to include a bonding requirement for FLCs they employ so as to protect against risk such as the FLC employing illegal workers or failing to perform (DOL future reg. initiative)
- f. Eliminate the requirement that farm labor contractors must be used by H-2A growers if the use of contractors is the prevailing practice of growers in the area (Georgia growers)

- g. Provide an exception from current program requirement – that growers use registered farm labor contractors as a source of U.S. workers where such use is the prevailing practice in the crop/area – for any FLC who has a demonstrated history of employing illegal workers or other serious labor abuses (DOL reg. Initiative; variant on Georgia growers' proposal)
- h. Require use of farm labor contractors as recruitment mechanism wherever use is “common” or “normal” (not prevailing) in an area, and require payment of competitive rates for farm labor contractors' services (FJF)

Employment Eligibility Verification

- i. Secretary of Labor work with Congress and other affected agencies to develop a reliable means of verifying individual's authorization to work as they are hired (OIG rec.; DOL concurred)
- j. Create a national employment eligibility verification system so that employers can check on the legal status of domestic workers who are hired during the H-2A process (Georgia growers)
- k. Require growers using the H-2A program to use INS pilot employment eligibility verification system
- l. Growers only responsible for recruiting and hiring farm workers in the U.S. through the DOL-administered Registries (and contacting former employees); Registries are responsible – and have only 14 (or 7?) days, or 3 days in the case of “emergency” applications – to locate, contact, verify employment eligibility, and refer U.S. workers to growers seeking foreign farm workers; failure to refer timely or to refer sufficient workers allows direct application for workers to Secy of State. (S.2260)
- m. Secy of State authorizes additional H-2A workers if Registry-referred workers fail to report; are “not ready, willing, able, or qualified” to do the work; or, abandon or are terminated from employment. (S.2260)
- n. Pilot test new Registry of available U.S. farm workers; growers share responsibility for positive recruitment of U.S. farm workers
- o. Require employers' “positive recruitment” to include: providing an 800 contact telephone number and accepting “collect” calls from worker job applicants; contacting other potential employers to link a series of job opportunities; and developing a long-term recruitment plan to reduce dependence on foreign guestworkers (FJF)
- p. H-2A workers covered by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), but disclosure only required at time of visa issuance. (S. 2260)
- q. DOL rulemaking regarding possible consolidation of agricultural job orders in the Interstate Clearance System. (OIG rec.; DOL concurred)

Productivity Standards

- r. H-2A employers allowed to set minimum production standards after a “3-day break-in period.” (S.2260)

- s. Employer-established productivity standards and quality requirements should be permitted only if they are the prevailing practice among non-H-2A employers, are *bona fide*, objective, justifiable, fully disclosed and implemented on a fair and equitable basis (FJF)

Experience (and related) Requirements

- t. H-2A employers should be allowed to specify "agricultural experience" as a condition for hiring U.S. farm workers (Georgia growers)
- u. Disallow job qualifications, experience and reference requirements unless they are the prevailing practice among non-H-2A employers and are otherwise job-related and *bona fide* (FJF)
- v. Allow H-2A workers to move from one certified H-2A employer to another, with the final employer responsible for return transportation costs [Current law] (Georgia growers)
- w. Prohibit H-2A job orders that consolidate seasons and different crops (FJF)
- x. Prohibit use of the H-2A program in designated labor surplus areas

3. Wages/Costs

Issues: From the growers' perspective, the principal issue involves managing costs so that they remain competitive in the international market. From the workers' side, the cost factor in the H-2A program should be the primary incentive to use U.S. farm workers (and disincentive to use foreign guest workers). The program should not operate to undercut wages, benefits and working conditions, but rather allow normal labor market forces improve these conditions.

Start

Deplaw
 equalize
 treatment
 of H-2A &
 US workers
Clarify

- a. (N) Revise H-2A regulations to require employers to guarantee H-2A workers' wages for the first week following "date of need," with payment no later than 7 days after the "date of need" (GAO rec.; DOL concurred)

*only for workers who arrive on original date of need?
 (original date of need ??)
 i.e., → not when cont. date*

Three-quarter Guarantee

- b. (N) Revise H-2A regulations regarding the existing three-quarter guarantee to remove incentives to growers to overestimate the contract period, including considering applying the three-quarter guarantee incrementally during the contract period. (GAO rec.; DOL evaluation)
- c. (N) Eliminate the existing three-quarter guarantee (S.2260)
- d. (N) Modify (effectively eliminate) the existing three-quarter guarantee to allow H-2A growers to limit the contract period to "duration of crop activity" and terminate the contract period offered due to changes in market conditions (Georgia growers)

*principle!
 3/4 not
 magic*

100% Contract guarantee under MSPA??

* Eliminate 3/4 guarantee where subsequent/similar employment arranged even without assoc. through sponsors

* Act of God → what included?

7

① offset 8 1/2 % ^{wage loss} advantage
② avoid wage depression
③ disincentive to use foreign workers

Adverse Effect Wage Rate

Must deal w/ user fee as total cost

- e. Eliminate Adverse Effect Wage Rate (AEWR); require payment of 105% of prevailing wage for crop/area where AEWR is higher than prevailing wage (S.2260)
- f. Eliminate Adverse Effect Wage Rate (AEWR); require payment of prevailing wage for crop/area (Georgia growers)
- g. Only require payment of Federal minimum wage (not AEWR) as "training wage" for inexperienced workers during training period stipulated in the grower's contract offer (Georgia growers)
- h. Require increases in piece rates to reflect increases in AEWR (FJF)
- i. Prohibit H-2A employers from increasing productivity requirements to offset increases in AEWR (FJF)
- j. Change AEWR methodology to set at 90th percentile of local market wage, or 80th percentile of regional market wage, or 30% above average wage; AEWR should apply to shepherders (FJF)
- k. Disallow any wage deductions by H-2A employers which reduce earnings below the highest required wage (FJF)
- l. Prohibit H-2A employers from fixing uniform wage rates across large areas – States or regions (FJF)

Resume 9/1/98 Spm

Fifty Percent Rule

- m. DOL rulemaking regarding possible changes in the existing "50 percent rule" – which requires hire of any U.S. farm workers who become available for during the first one-half of the work contract period (OIG rec.; DOL concurred)
- n. Modify the existing "50 percent rule" to only require hiring of local workers (who reside within commuting distance), but extend this obligation to the entire (100 percent of) contract period (Georgia growers)
- o. Eliminate existing "50 percent rule" except for workers referred through the Registries unless there are other substantially similar job opportunities in the area. (S.2260) *All modification (not through Registry)*
- p. Workers covered under State Unemployment Insurance system (if covered under State law?) [Current law?] (S.2260)

Payment Methods

- q. H-2A employers expressly authorized to pay hourly wage, piece rate, task rate, or "other incentive payment method, including a group rate," irrespective of prevailing payment method (S.2260)
- r. H-2A employers are in compliance with wage requirements if "the average of the hourly earnings of the workers, taken as a group," equals the required hourly wage. (S.2260)
- s. Prohibit payment by "task rate" or other variable piece rate method of pay (FJF)

- t. For employers converting from piece rate to hourly rate, protect earnings level; for employers converting from hourly to piece rate payment method, set piece rate to assure earnings at least 30% above AEW (FJF)

Transportation Reimbursement

- u. H-2A workers apply for transportation reimbursement to the government, not the employer (S.2260 intended)
- v. H-2A workers may apply to the employer for transportation reimbursement, but employer not obligated to provide such reimbursement (S.2260, as passed)
- w. H-2A workers not eligible for transportation reimbursement if distance traveled is less than 100 miles (S.2260)
- x. Pilot program for transportation advances for U.S. farm workers (S.2260)
- y. Require H-2A employers to provide travel advances to U.S. farm workers (FJF)

User Fees

- aa. Employers' cost incentive to employ foreign guestworkers (no payment of FICA/FUTA taxes) offset by charging equivalent user fee to finance certain program activities – e.g., administrative expenses for worker registries, transportation reimbursement and advance pilot program, increase farm worker housing stock (S.2260)
- bb. Impose user fees which reflect the true cost of the H-2A program and end subsidy and incentive to use H-2A workers (FJF)
- cc. Allow H-2A workers to opt out of employer-provided meal plans (FJF)
- dd. Require first-time H-2A employers to maintain at least wages/working conditions previously offered (instead of H-2A minimum requirements) (FJF)

4. Housing

Issues: Growers do not want to be required to provide – and throughout the Western U.S. that would mean incurring the capital expense of building – housing as a condition for access to foreign guestworkers. From the workers' perspective (and from the perspective of community impact), it is unfair to recruit workers from hundreds and thousands of miles away for short-term, low-wage jobs and expect them to be able to find and arrange for affordable housing, especially in rural areas where there is little rental housing stock.

- a. Federal housing standards no longer apply to any “rental or public accommodation housing or other substantially similar class of habitation”; rather, local or, if none, State standards apply (S.2260)
- b. H-2A employers can charge workers up to fair market value for the cost of maintenance and utilities of housing provided (S.2260) – *also a wages/cost issue*

- c. H-2A employers can charge workers reasonable amounts (perhaps up to \$25 per week) for the cost of maintenance, utilities, repair and clean-up of housing provided (Georgia growers) – *also a wages/cost issue*
- d. H-2A employers may charge workers a security deposit – up to \$50 – to protect against “gross negligence or willful destruction of property” (S.2260) – *also a recruitment issue*
- e. H-2A employers may require reimbursement (wage deduction) from responsible worker of reasonable cost of repairing damage to housing provided that is “not the result of normal wear and tear” [Current Law] (S.2260)
- f. Reduced user fee to H-2A growers providing housing as an incentive to build/provide housing (S.2260)
- g. H-2A employers may provide a minimum “housing allowance” in lieu of housing, unless – no earlier than 8 years after enactment – a State Governor certifies that there is inadequate farm worker housing available (S.2260)
- h. H-2A employers may provide a minimum “housing allowance” in lieu of housing, but must also arrange for decent housing at the allowance level
- i. Require free housing for all U.S. farm workers, including “local” workers (FJF)
- j. Require H-2A growers to make their housing available for U.S. workers who arrive early (FJF)

5. Enforcement

Issues: From the growers’ perspective, they want to clearly understand their compliance obligations and not be subject to compliance investigation – which they often regard as harassment – at their busiest time. Workers want rigorous enforcement.

- a. Extend to Wage and Hour the authority to debar violating employers which commit serious labor standards or H-2A program violations from future use of the H-2A program. (GAO and OIG rec.; DOL concurred, future reg. initiative)
- b. Issue final (to replace “interim final”) H-2A regulations. (OIG rec.; DOL concurred)
- c. Secretary of Labor’s enforcement authority narrowed – complaint-based (??); 12 month statute of limitations on complaints; “reasonable cause” threshold; penalties limited to certain kinds of violations (S.2260)
- d. Three-year and permanent debarment for repeated violations (S.2260)
- e. Associations not responsible for members’ violations; members not responsible for association’s violations (S.2260)
- f. Require hiring of former H-2A workers (where allowed) to offset disincentives to complain about labor violations (FJF)
- g. Require disclosure of terms/conditions of employment to be given to workers in their native language in plain language (FJF)
- h. More timely initiation and completion of DOL enforcement actions (FJF)

6. Immigration Management/Repatriation

Issues: Growers want a legal workforce to reduce their vulnerability to workforce disruption at critical times in the crop production cycle, and want no responsibility for assuring that foreign guest workers who they are allowed to import into the U.S. actually depart from the country after their employment ends. No one knows how much "leakage" there is from the current H-2A program into the ranks of the illegal resident population; a greatly expanded foreign guest worker program would certainly increase illegal immigration and the resident illegal population. At the same time, there is no effective system for collecting information to manage departures from the U.S.

- a. H-2A worker ineligible for continued participation in the program if, during the prior 5 years, the worker violates the terms of admission to the U.S. (S.2260)
- b. H-2A workers admitted to U.S. have 14 days after termination of employment contract to search for other legal work in the U.S. (S.2260)
- c. H-2A workers admitted must be issued fraud-resistant identification/work authorization documents (S.2260)
- d. An employer may file for extension of stay to employ an H-2A worker already in the country and may legally employ such worker from the date application is made (S.2260)
- e. Attorney General study whether H-2A workers timely depart the U.S. after period of authorized employment (S.2260)
- f. Legalization for H-2A workers who complete at least 6 months employment in the U.S. under the H-2A program for 4 consecutive years in compliance with program requirements (S.2260)
- g. Require withholding of percentage of H-2A workers wages, deposited in accounts reclaimable within limited time period in home country, as incentive to repatriate
- h. User fee offsetting FICA/FUTA advantage used as repatriation incentive
- i. Require entry-exit control system for all H-2A workers

Other issues:

- Expand the scope of the H-2A program to include agricultural – meat/poultry – processing employment (S.2260)
- Secretary authorized to establish cap on number of H-2A visas issued pursuant to applications from "independent contractors, agricultural associations and such similar entities" (Feinstein amend. to S.2260)
- Comprehensive report by Attorney General and Secretaries of Labor and Agriculture (S.2260)

- All H-2A employers non-wage practices and benefits should be subject to prevailing practice standards (FJF)
- Prevailing practice determination should not be based on “double majority” standard and should exclude all H-2A employers
- Assure that U.S. and H-2A workers are truly allowed to choose their employer (FJF)
- Cap the number of visas available under the H-2A program

Framework for H-2A Reform Discussions
September 15, 1998

Guiding Principles

The Administration's guiding principles for reform of the H-2A program intend to assure that our national policy achieves greater stability in the agricultural workforce in a way that agricultural producers and farm workers both benefit. Growers must have a more predictable and reliable legal labor supply, while adequate workplace protections are afforded domestic and foreign farm workers – who are among the poorest and most vulnerable in our society.

The Administration's guiding principles in reforming the H-2A program are designed to create a system:

1. Where the procedures for using the program are simple and the least burdensome for growers;
2. Which stabilizes the agricultural workforce so as to enable agricultural employers to recruit an adequate legal labor supply in a predictable and timely manner, and reduce competition with legal U.S. farm workers by illegal aliens;
3. That provides a clear and meaningful first preference for employment of U.S. farm workers, and a means for mitigating against the development of a structural dependency on foreign workers in a crop or area;
4. Which avoids the transfer of costs and risks from businesses to low-wage workers;
5. That encourages longer periods of employment – and, thus, higher annual earnings – for legal U.S. farm workers; and,
6. Which assures decent wages and working conditions for domestic and foreign farm workers, and that normal market forces work to improve wages, benefits and working conditions.



as the part

Further, reforms to the H-2A temporary nonimmigrant agricultural guest worker program must not:

- Increase illegal immigration to the United States;
- Reduce job opportunities for legal U.S. farm workers;
- Depress wages and work standards for American farm workers.

Immig - H2A

Karen Tramontano

09/30/98

07:32:47 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP, Sarah Rosen/OPD/EOP, Peter G. Jacoby/WHO/EOP

cc:

Subject: H2A

I have received distressing reports that there is a move in the Senate on H2a --- some southern d's joining w/ wyden ---- is this accurate? if so, i think we need to shut down h2a as soon as possible.

MEMORANDUM FOR ELENA KAGAN AND SALLY KATZEN

FROM: JULIE FERNANDES AND CECILIA ROUSE

SUBJECT: ASSESSMENT OF H-2A "IDEAS INVENTORY"

DATE: October 1, 1998

Attached is our assessment of the positions of USDA and DOL regarding the proposals put forth in DOL's "ideas inventory." The shaded boxes indicate important proposals for which there is agency disagreement and thus should be discussed at today's meeting. We have also attached a list of the current program requirements that includes definitions of the most important terms.

In order to better understand the agencies' positions, it is useful to understand the underlying policy tensions. Growers see themselves as having a choice between three categories of workers: legal U.S. workers, illegal workers, and H-2A workers. Which category they draw from is almost exclusively determined by total cost. For example, if the total cost of hiring a U.S. worker (including wages, taxes, housing, etc.) is higher than the total cost of hiring an H-2A worker, the grower will hire the H-2A worker. Therefore, the total compensation offered by the H-2A program becomes the effective total compensation ceiling for U.S. workers. In addition, the presence of large numbers of illegal farmworkers distorts the labor market such that the growers' response to an inability to find sufficient legal U.S. workers is to hire illegal workers, rather than increase wages or improve working conditions. Thus, though we may want to require fair wages and working conditions in the H-2A program, if the cost of using the program is too high, the growers will hire undocumented workers.

USDA's goal is to provide a steady, reliable source of farmworkers for U.S. growers. USDA believes that the domestic labor force can never completely satisfy the labor needs of agriculture, particularly during peak times, and therefore there will always be a need for temporary foreign agricultural workers. In a world in which the INS is increasingly cracking down on the employment of undocumented workers, the USDA (and the growers) would prefer that the foreign workers that they employ be authorized to work. Their goal is thus to set a wage (or total compensation) floor that is low enough that growers will readily use the H-2A program (rather than hire undocumented workers), but that is high enough to continue to attract existing U.S. farmworkers. However, they believe that an H-2A program that would set the wage (or total compensation) floor high enough to attract many more U.S. workers would drive growers into the illegal labor market.

DOL is concerned that a low wage (or total compensation) floor becomes a low ceiling for U.S. workers and therefore hurts these already impoverished workers. They are not as convinced that the domestic labor force could never satisfy growers needs at a reasonable wage; rather, they argue that agricultural wages have been kept artificially low because of the large presence of undocumented workers. Labor believes that if agricultural wages were allowed to rise, additional

U.S. workers would be willing to work in agriculture. They also assert that we can do a better job of facilitating matches between workers and employers that would give domestic farm workers more stable employment and growers access to a steady supply of workers.

As you read through the following list of proposals, you will notice that in many areas (e.g., wages, housing, transportation) the issue is whether the proposal increases the total cost to the employer or shifts those costs to the government or the farmworker. USDA generally opposes reforms that would increase grower costs. The Labor Department generally opposes reforms that transfer costs to the government or the farmworker, and favors reforms that aim at improving labor conditions or wages for U.S. and foreign farmworkers. Because the focus is on total costs (with wages and housing being the most significant areas of concern) we cannot decide on individual reform components in isolation.

Requirements (and Definitions) under the Current H-2A Program

- **Recruitment:** The agricultural employer must engage in independent positive (i.e., active) recruitment of U.S. workers, including newspaper and radio advertising in areas of expected labor supply. Such recruitment must be at least equivalent to that conducted by non-H-2A agricultural employers to secure U.S. workers.
- **Wages:** Employers must pay H-2A workers the “**adverse effect wage rate**” (AEWR), the applicable prevailing wage rate, or the statutory minimum wage rate, whichever is higher. The AEWRs are the minimum wage rates which the DOL has determined must be offered and paid to U.S. and H-2A workers, and they are established for each state. The region- or state-wide AEWR for all agricultural employment for which H-2A certification is being sought, is equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the USDA.¹ The AEWRs are designed to prevent the employment of these nonimmigrant alien workers from adversely affecting the wages of similarly employed U.S. agricultural workers.
- **Housing:** The employer must provide free and approved housing to all workers, both foreign and domestic, who are not able to return to their residences the same day.
- **Meals:** The employer must provide either three meals a day to each worker or furnish free and convenient cooking/kitchen facilities. If meals are provided, then the employer may charge each worker a certain amount per day for these meals.
- **Transportation:** The employer is responsible for the following types of transportation for workers: 1) After a worker has completed fifty percent of the work contract period, the employer must reimburse the worker for the cost of transportation and subsistence from the place of recruitment to the place of work; 2) The employer must provide free transportation between any required housing site and the work site for any worker who is eligible for such housing; 3) Upon completion of the work contract, the employer must pay return transportation to the worker’s prior residence or transportation to the next job.
- **Workers’ Compensation Insurance:** The employer must provide Workers’ Compensation or equivalent insurance for all workers, both foreign and domestic.
- **Three-fourths Guarantee:** The employer must guarantee to offer each worker employment for at least three-fourths of the workdays in the work contract and any extensions. In applying this guarantee and determining any additional wages due, the following facts must be established: 1) The beginning and ending dates of employment; 2) The number of workdays between the established beginning and ending dates of the

¹Some 1998 AEWRs: California, \$6.87; Florida, \$6.77; Georgia, \$6.30; Hawaii, \$8.83; Kentucky, \$5.92; and Ohio, \$7.18.

guarantee period; and 3)The hours of worktime for the guarantee. The guarantee is then established by computing seventy-five percent of the established total hours of work time in the contract period. Note that the employer may not count any hours offered on such days in which the worker refused or failed to work.

- **Fifty Percent Rule:** The employer must employ any qualified U.S. worker who applies for an available job until fifty percent of the contract period has elapsed.
- **Tools and Supplies:** The employer must furnish at no cost to the worker all necessary tools and supplies, unless it is common practice for the worker to provide certain items.
- **Labor Dispute:** The employer must ensure that the available job for which the employer is requesting H-2A certification is not vacant due to a strike or lockout.
- **Certification Fee:** A fee will be charged to an employer granted temporary alien agricultural labor certification. The fee is \$100, plus \$10 for each available job certified, up to a maximum fee of \$1,000 for each certification granted.
- **Farm Labor Contractors (Crewleaders):** A farm labor contractor is an organization or entity that either supervises, recruits, transports, houses, or solicits farm labor other than the owner of the work site. Bona fide registered farm labor contractors may be eligible to apply for and receive H-2A certification, although they generally deal with domestic laborers. Farm labor contractors would be required, as employers, to provide all the minimum benefits specified by the H-2A regulations, including the three-fourths guarantee and the fifty percent rule.

<u>Reform Proposal</u>	<u>WH</u>	<u>USDA</u>	<u>DOL</u>
Worker Recruitment			
Require “positive recruitment” of U.S. farmworkers by growers only in areas where DOL finds that there are a significant number of qualified workers willing to make themselves available for employment at the time and place needed.	Y	okay	DOL implemented this administrative change.
Count as “available” for employment only those U.S. workers who are identified by name, address, and SSN	Y	okay	DOL implemented this administrative change.
Post employers’ H-2A job orders on America’s job bank	Y	USDA would not oppose.	DOL proposal; requires job order simplification.
Strengthen the MSPA program of registering farm labor contractors to require bonding; allow H-2A employers to require bonding as a condition of employing a farm labor contractor.	Y	DOL and USDA agree to support this.	
Allow H-2A growers to include a bonding requirement for FLCs they employ.	Y	DOL and USDA agree to support this (essentially the same as the previous proposal).	
Eliminate the requirement that farm labor contractors must be used by H-2A growers if the use is the prevailing practice in the area.	N	USDA generally wants more flexibility for growers, however they are unlikely to strongly oppose DOL’s opposition.	DOL strongly opposes because the goal is for the H-2A program to track prevailing practices in areas of labor protection.
Provide an exception from current program requirement to use FLCs for any FLC who has a demonstrated history of employing illegal workers or other serious labor abuses.	Y	USDA agrees.	DOL regulatory initiative.
Require use of FLCs as recruitment mechanism whenever use is “common” or “normal” (not prevailing) in an area.	N	USDA will likely oppose because grower regulations should involve the highest standard.	DOL generally supports prevailing practice. This is not likely an issue about which DOL will take a strong position.
Require payment of competitive rates for FLC services.			

Employment Eligibility Verification			
DOL work with Congress and other affected agencies to develop a reliable means of verifying individual's authorization to work as they are hired.	Y	USDA would likely agree because of their goal to decrease growers' dependence on undocumented workers as long as growers had increased access to H-2A workers.	DOL agrees.
Create a national employment eligibility verification system so that employers can check on the legal status of domestic workers who are hired during the H-2A process.	Y	INS currently has a pilot program to do just that which we support and has encouraged growers to participate in the pilot.	
Require growers using the H-2A program to use INS pilot employment eligibility verification system.	Y	USDA would likely agree as part of an overall package.	DOL would likely agree.
Growers only responsible for recruiting and hiring farm workers in the U.S. through the DOL-administered Registries (and contacting former employees); Registries are responsible -- and have only 14 days -- to locate, contact, verify employment eligibility, and refer U.S. workers to growers seeking foreign farm workers; failure to refer timely or to refer sufficient workers allows direct application for workers to Secy of State	N	USDA likely supports this provision because it reduces the burden on employers.	DOL hates this provision because it leaves the burden of recruitment entirely to the Federal government.
Secy of State authorizes additional H-2A workers if Registry-referred workers fail to report; are "not ready, willing, able, or qualified" to do the work; or, abandon or are terminated from employment.	N	USDA likely supports this provision because it provides growers with quick access to H-2A workers if they have cannot recruit U.S. workers through the registry.	DOL would likely hate this provision because, again, it centralizes all recruitment through the Registry and absolves growers of any additional recruitment before applying for H-2A workers.
Pilot test new Registry of available U.S. farm workers; growers share responsibility for positive recruitment of U.S. farm workers.	Y	USDA would likely support a pilot of a mechanism to facilitate the hiring of U.S. workers for growers.	DOL supports a pilot of such a registry (as long as growers continue to share part of the responsibility for recruitment).

Require employers' "positive recruitment" to include: providing an 800 contact telephone number and accepting "collect" calls from worker job applicants; contacting other potential employers to link a series of job opportunities; and developing a long-term recruitment plan to reduce dependence on foreign guestworkers.	N	USDA would likely oppose such positive recruitment measures because it increases the costs to employers.	DOL would likely support these measures, but are unlikely to require that they be part of a final package.
H-2A workers covered by the MSPA, but disclosure only required at time of visa issuance.	N	USDA likely supports this measure.	DOL supports having H-2A workers covered by MSPA but likely believes that the workers should be informed of their rights when recruited rather than at the time of visa issuance (which could be after the worker has incurred significant costs).
DOL rulemaking regarding possible consolidation of agricultural job orders in the Interstate Clearance System.	Y	USDA agrees.	DOL agrees
Productivity Standards			
H-2A employers allowed to set minimum production standards after a "3-day break-in period."	?		
Employer-established productivity standards and quality requirements should be permitted only if they are the prevailing practice among non-H-2A employers, are bona fide, objective, justifiable, fully disclosed and implemented on a fair and equitable basis.		USDA generally opposes any additional regulations or restrictions on growers and would therefore likely oppose this idea.	DOL would likely support this idea as it is aimed at protecting U.S. workers.
Experience (and related) Requirements			
H-2A employers should be allowed to specify "agricultural experience" as a condition for hiring U.S. farm workers.		USDA would likely support because it ultimately gives the growers more flexibility in who they hire.	DOL would likely oppose arguing that it gives growers too much discretion for jobs that generally do not require substantial experience.

Disallow job qualifications, experience and reference requirements unless they are the prevailing practice among non-H-2A employers and are otherwise job-related and bona fide.		USDA would likely oppose for the same reasons that they would support specifying "agricultural experience."	DOL would likely support for the same reasons they would oppose specifying "agricultural experience."
Allow H-2A workers to move from one certified H-2A employer to another, with the final employer responsible for return transportation costs.	Y	This is current law.	According to DOL, this is current law.
Prohibit H-2A job orders that consolidate seasons and different crops.		USDA would likely oppose because consolidation would potentially decrease costs to growers by allowing them to group together and reduce the number of individual applications.	DOL would likely support because it protects U.S. farm workers by requiring growers to submit individual applications.
Prohibit use of the H-2A program in designated labor surplus areas.	N	USDA may not disagree in theory but would likely be concerned that the designation of a labor surplus areas would not necessarily reflect the short-term labor needs of particular growers with particular crops.	DOL would support this in theory, however it would likely have concerns about how areas are designated.
Wages and Costs			
Revise H-2A regulations regarding the 3/4 guarantee to remove incentives to growers to overestimate the contract period.	Y	Agrees.	Agrees.
Consider applying the 3/4 guarantee incrementally during the contract period.	N	Oppose.	Opposes.

Eliminate the 3/4 guarantee	N	Doesn't like the 3/4 guarantee b/c wants growers not to have to pay workers if their crop is disappointing (less work in fact than they anticipated). However, they understand that this is a <u>more</u> generous rule than under the MSPA (the statute that governs non-H2A farmworkers) and thus agrees that this reform is no good.	Opposes the elimination of the 3/4 guarantee (b/c protects farmworkers by ensuring that the work that they are promised in the contract is provided, thus allowing them to make fairer judgments when choosing between jobs). However, not sure that 3/4 is a magic number.
Modify the 3/4 guarantee to allow H-2A growers to limit the contract period to "duration of crop activity" and terminate the contract period offered due to changes in market conditions.	N	Agree that effectively eliminates the 3/4 guarantee.	Agree that effectively eliminates the 3/4 guarantee.
Eliminate AEW and instead require payment of 105% of prevailing wage for crop in the area.		Yes. They are in favor of eliminating the AEW b/c it provides a wage higher than the prevailing wage for some H2A workers. USDA does not agree that the prevailing wage is depressed by the presence of illegals in the workforce, but does not object to a small sweetener to the prevailing wage to replace the AEW (like the 105% proposed by Wyden)	No. The AEW is calculated to compensate for the presence of illegals that depress the prevailing wage rate. It calculates the required wage as the state-wide average of all non-managerial farmworkers, thus dispersing the impact of illegals. If the wage is calculated based on 105% of prevailing, it will still be a depressed wage in those industries or areas where the presence of illegals is large. However, DOL agrees that the AEW is a bit of an odd way to calculate, and that there is no magic to it. They want some way to calculate the wage that compensates both for the presence of illegals (wage depression) and for the fact that growers do not pay H2A workers FICA/FUDA (approx. 8%). AEW may not be magic, but 105% of prevailing does not even get the wage = to that of non-H2A workers.

Eliminate AEW and require payment of the prevailing wage for the crop in the area.		USDA likes this option. They want the H2A wages to be the same as the prevailing wage in the crop and area. They dispute that wages are depressed b/c of the presence of illegals. In addition, they maintain that if the program requires a higher wage than what is being paid locally, the growers will not use the H2A program and will access the undocumented workforce.	Labor hates this idea, for the reasons above. The wage paid to H2A workers should be a fair wage -- defined as one that compensates for the wage depression caused by the presence of illegals. Labor believes that growers should have to go to the U.S. market first, offer a fair wage and good conditions, and if not successful, access an H2A market that compels them to pay a fair wage under good conditions.
Only require payment of federal minimum wage (not AEW) as a "training wage" for inexperienced workers during a training period (in the K).		Another way to undercut the AEW that USDA likes.	Another way to undercut the AEW that Labor hates.
Require increases in piece rates to reflect increases in the AEW.	Y	USDA would likely not like. This would raise the total wage cost.	Labor would like. Most farmworkers are paid by the piece, so a conversion of the piece rate to the AEW is consistent with their desire to keep or strengthen the AEW.
Prohibit H-2A employers from increasing productivity requirements to offset increases in the AEW.	Y	USDA would likely not like b/c this would raise the total wage cost and require farmers to set productivity levels early in the season and not allow conditions to change expectations.	Labor would like this. It discourages the farmers from changing productivity levels in ways designed to keep the wage low.
Change AEW methodology to set at 90th percentile of local market wage or 80th percentile of regional market wage.		They are generally opposed to any change that would increase the overall wage cost. However, they may be open to setting the wage at some modest percentage higher than the local prevailing wage. Thus, though these numbers are high, there may be room to work here.	Labor is generally in favor of calculations that result in a higher wage, though they see no magic in the AEW. The conflict with USDA would be over how high to set the percentile.
Apply AEW to shepherders.	?	Opposed. Shepherders are different.	They want more for the shepherders.

Disallow any wage deductions by H-2A employers that reduce earnings below the highest required wage.		USDA would favor changes along these lines. They want to consider total cost of employing an H2A worker and compare that to total cost of hiring a non-H2A worker (legal or illegal).	Oppose. Though Labor is open to discussions that take into account total cost to growers to use the program, they do not want the farmworker wages to be too low.
Prohibit H-2A employers from fixing uniform wage rates across large areas -- states or regions.	?		
Reforms to the 50% rule as recommended by OIG.	Y	USDA agrees.	Labor agrees.
Modify existing 50% rule to only require hiring of local workers (that reside within commuting distance) but extend this obligation to the entire period of the contract.	N	Oppose. Blocks out of state U.S. crews from work.	Oppose. same reason.
Eliminate 50% rule except for workers referred through the registries <i>unless</i> there are other substantially similar job opportunities in the area.	Y	Would agree to apply the 50% rule only where equivalent jobs are not available in the area. This is currently the rule where the association in the employer. Also agrees that the 50% rule is good for U.S. workers.	Agrees.
H-2A workers should be covered under the State Unemployment Insurance System	Y	This could increase grower cost, but unlikely that they would oppose this.	Likely favor, though there is a question of whether this would only apply where U.S. farmworkers are covered under state law.
H-2A employers expressly authorized to pay hourly wage, piece rate, task rate, or "other incentive payment method, including a group rate," irrespective of the prevailing payment method.	N	USDA might like this b/c it gives flexibility to growers.	Labor will hate this, b/c they have asserted that the task rate is too variable to be susceptible to a prevailing wage determination. There are also likely problems with the "group rate."
H-2A employers are in compliance with the wage requirements if "the average of the hourly earnings of the workers, taken as a group," equals the required hourly wage.	N	USDA may like this, but fairness concerns weigh against it.	Labor will not like this b/c it allow the growers to pay some workers less than the required hourly wage.
Prohibit payment by "task rate" or other variable rate method of payment.	Y	May not like b/c like grower choice.	Would likely favor. Have spoken out against the task rate.
Protect earnings level when employers convert from a piece rate to an hourly rate.	Y	USDA likely would not oppose, b/c it only holds the rate the same.	Protecting wage rates would seem a good thing to Labor.

For employers converting from hourly rate to piece rate, set piece rate to assure earnings at least 30% above AEWB.		This is another way to sweeten the wage that USDA will likely oppose.	This is another way to sweeten the wage that DOL will like, but it is -- in a way -- difficult to defend (unless you assume that growers are setting piece rates at levels well below the AEWB conversion).
H-2A workers apply for transportation reimbursement to the government (rather than the employer).		This is a shift of cost from the grower to the government. USDA will like this.	Labor does not like, for the same reason. However, as long as the cost to the grower remains the same for a U.S. worker (working under fair wages and good conditions) and an H2A worker, DOL will not fight if some overall costs are picked up by the government (as long as the cost is not coming out of their budget!).
H-2A workers may apply to the employer for transportation reimbursement, but employer not obligated to provide such reimbursement.	N	USDA may like this, b/c lowers cost for the grower. However, growers are used to paying transportation costs in this program. This cost is just part of the overall cost, and thus would go into the overall cost calculation (which, according to USDA, determines whether a grower will participate or hire illegals).	DOL will oppose. They want H2A workers to have transportation paid for. However, as noted, they may be amenable to a system that has the government assume some of this cost.
H-2A workers not eligible for transportation reimbursement if distance traveled is less than 100 miles.	?	This is part of the cost calculation. USDA may think that this is a small step in the right direction.	Labor would likely oppose as eroding the transportation guarantee. Not likely a big issue for either side.
Pilot program for transportation advances for U.S. farmworkers.	Y	USDA would likely be open to this.	DOL would also likely be open to this (a <i>small</i> pilot).
Require H-2A employers to provide travel advances to U.S. farmworkers.			
Charge fee = FICA/FUDA taxes to finance certain program activities (housing; admin. costs; transportation).	Y	USDA is in favor. The question is how high is the fee.	Labor is not opposed to a fee that would fund certain activities. The question is how high is the fee (more than FICA/FUDA?)

Impose user fees that reflect the cost of the H-2A program.		First, we are not sure how to calculate this cost (particularly, the cost of housing). Even if we could, USDA would be concerned that it would be too high (and thus cost prohibitive for growers to use). They are open, though, to a modest user fee.	As noted, Labor is also open to a user fee. However, it is not clear that they would want to push for a fee that was a total reimbursement (making it cost neutral for the government). That would surely make it too expensive for growers to use.
Allow H-2A workers to opt out of the employer-provided meal plans.		Unclear how they would react to this.	Labor would likely think this is o.k., b/c under the current system the cost of meals is deducted from the farmworker wages. However, there is some concern about making sure that workers don't opt out and then not have adequate food for the harvest.
Require first time H-2A employers to maintain wages and working conditions previously offered.		USDA would oppose this as restricting grower flexibility.	Labor would likely favor, but it could be hard to administer.
Housing			
Apply local or state (rather than federal) housing standards to housing provided by H-2A growers.		USDA would likely favor (local laws could give more flexibility), but it is just a race to the bottom. They could be convinced that federal standards should apply in a federal program.	Labor would likely oppose. Would want federal standards to apply in this federal program. Also, would assume that federal standards are stricter.
H-2A employers permitted to charge workers up to fair market value for the cost of maintenance and utilities provided.		USDA likes as a way to reduce cost.	Labor would consider shifting some maintenance or modest utilities fees to the worker.
H-2A employers can charge workers reasonable amounts (up to \$25 per week) for the cost of maintenance, utilities, repair and clean-up of housing provided.		Same	Same
H-2A employers can charge a security deposit (up to \$50) to protect against "gross negligence or willful destruction of property."		USDA likes as a way to share some costs with farmworkers and make them responsible for taking care of grower-provided housing.	Labor in general would not like, b/c unnecessary under the current law (which allows for worker to pay for damage in some circumstances).

H-2A employers may require reimbursement (wage deduction) from responsible worker of reasonable cost of repairing damage to housing provided that is "not the result of normal wear and tear."	Y	According to DOL and USDA, this is current law.	
Reduced user fee to H-2A growers providing housing.		This is just another way to think about total cost to growers. If we have a user fee, we have to think about what we want it to pay for.	
H-2A employers may provide a "minimum housing allowance" in lieu of housing, unless (no earlier than 8 years after enactment) a state Governor certifies that there is not adequate farm worker housing available.		USDA would like as a cheaper way to meet the housing requirement. However, they may be open to the argument that this could result in strongly adverse impacts on local communities (migrant workers sleeping in parks, etc.)	Labor hates this. First, there is a shortage of affordable housing generally (which is particularly acute in rural areas). Second, it is unreasonable to expect a migrant worker from another country to be able to rent any housing on his own with a federal voucher.
H-2A employers may provide a "minimum housing allowance" in lieu of housing, but must also arrange for decent housing at the allowance level.		This option is really no different from the current system, except that the method of payment is a voucher, rather than directly paid for by the grower. Thus, to the extent that USDA does not like the current system (b/c the cost associated with providing housing is very high), they would not like this.	This is better than above, but does not address the fact of great shortages of decent, affordable housing in rural areas. Under this system, what happens if housing is not available? Labor would still like some kind of requirement that the employer provide for housing where it is not available.
Require growers to provide free housing to all U.S. farm workers (including local workers).		USDA would not like this additional cost burden on the growers.	Labor would like as an ideal, but unrealistic to add this additional burden on growers (unless heavily subsidized by the federal government).
Require H-2A growers to make their housing available for U.S. workers who arrive early.		Can't see the objection to this one.	Labor likely is in favor.
Enforcement			
Extend to Wage & Hour the authority to debar violating employers who commit serious labor standards or H-2A program violations.	Y	USDA and DOL agreed to this during our earlier process. Will be part of upcoming rulemaking.	

Issue final H-2A regulations.	Y	DOL has agreed to this.	
Narrow DOL enforcement to only allow investigations only pursuant to a complaint.	N	USDA may like this, but not sure. It would be difficult for them to argue in favor of less enforcement, when there is so little already.	DOL would hate this. They need more not less enforcement money and tools.
Institute a 12-mo. statute of limitations on complaints		USDA likely would favor.	DOL may think this is o.k.
Provide a "reasonable cause" threshold for investigations.		USDA would likely favor.	DOL may want to reserve the right to do random inspections.
Limit penalties to certain types of violations.		Unclear what this recommendation means.	
Institute a three-year and permanent debarment period for repeat violations.		USDA would likely favor.	DOL would likely favor, unless this is substantially less than current law.
Require hiring of former H-2A workers (where allowed) to offset disincentives to complain about labor violations.		USDA would oppose. This too greatly limits grower flexibility in hiring.	Not sure if DOL would see this as an effective tool to offset disincentives to complain about labor violations.
Require disclosure of terms and conditions of employment to be given to workers in their native language in plain language.		Can't imagine opposition, unless it costs a lot.	Labor would likely favor.
More timely initiation and completion of DOL enforcement actions.		We are all in favor of timeliness.	
Immigration Management			
H2A worker ineligible for continued participation in the program if, during the prior 5 years, the worker violates the terms of admission to the U.S.		USDA would not likely have an opposition to this in theory.	DOL would not likely have an opposition to this in theory.

H2A workers admitted to the U.S. have 14 days after termination of employment contract to search for other legal work in the U.S.	Y	USDA would not likely have an objection.	DOL would not likely have an objection.
H2A workers admitted must be issued fraud-resistant identification/work authorization documents.	Y	USDA would not likely have an objection.	DOL would not likely have an objection.
An employer may file for extension of stay to employ an H2A worker already in the country and may legally employ such a worker from the date application is made.		USDA would likely support this idea because it provides growers with easy and quick access to H-2A workers.	DOL would likely oppose this idea because it would allow growers to get around the recruitment requirement.
AG study whether H2A workers timely depart the U.S. after period of authorized employment.	Y		
Legalization for H2A workers who complete at least 6 months employment in the U.S. under the H2A program for 4 consecutive years in compliance with program requirements.	N	USDA would not likely oppose this idea. However, it does not advance their goals because they believe that growers need a ready supply of foreign workers to meet short-term labor needs. Once legalized these foreign farmer workers would likely move into other sectors of the labor market.	DOL is opposed because it a) it gives the employers additional leverage over the workers by empowering them to hold the promise of a green card out to the foreign worker and b) it undercuts our immigration policy.
Require withholding of percentage of H2A workers wages, deposited in accounts reclaimable within limited time period in home country, as incentive to repatriate.	N	USDA supports incentives to repatriate and if they believed that if this would work they would support it.	DOL would likely oppose this because 1) there is no guarantee that the workers would actually receive these wages and 2) there is no evidence that this amount of money would be an incentive to repatriate.
User fee offsetting FICA/FUDA advantage used as repatriation incentive	N	Same position as above.	Same position as above.
Require entry-exit control system for all H2A workers.	Y	If this were possible, USDA and DOL would support it. However, at this time INS is unable to operate an effective exit and entry control system on the land borders.	
Other issues			

Expand scope of the H2A program to include agricultural -- meat/poultry -- processing employment.			
Secretary authorized to establish cap on number of H2A visas issued pursuant to application from "independent contractors, agricultural associations and such similar entities."	Y	USDA would likely support this as long as it was a high cap.	DOL supports this provision since 80% of all H-2A applications are from independent contractors or agricultural associations.
Comprehensive report by AG and Secretaries of Labor and Agriculture.	Y		
All H2A employers non-wage practices and benefits should be subject to prevailing practice standards.		USDA will want more flexibility for growers.	DOL would likely favor tying all practices and benefits to prevailing practice standards.
Assure that U.S. and H2A workers are truly allowed to choose their employer			
Cap the number of visas available under the H2A program.		See above.	See above.
Administrative Processes			
Consolidate DOL certification and INS petition approval into one process administered by DOL	Y		
Consolidate responsibility within DOL in Wage & Hour for post-application examination and enforcement of employer compliance with H2A program requirements.	Y		
Government -- not employer -- responsible for reimbursing transportation costs of eligible workers.	Y		
Require employers' H2A labor certification applications to be submitted 45 (rather than 60) days before the employer "date of need."	Y		
Reduce lead time for employer applications to 30 (rather than 60) days before "date of need."	Y		

Consistently meet 7 day deadline -- after initial receipt of employer's labor certification application -- to give written notification to the employer of deficiencies precluding adjudication of the application.	Y		
Consistently meet existing 20 day deadline -- prior to employer's date of need -- to issue approved certifications	Y		
After consolidation of certification and petition adjudication process in DOL, change the law to set deadline for DOL approval of employers' application to 7 days before date of need.	Y		
Reduce the deadline for employer-provided housing to be available for inspection to 15 (rather than 30) days before the date of need.	Y		
Change the current labor certification to one based on employers' attestations to comply with program requirements.	?	Unsure how this changes employer obligations.	

▶ **Julie A. Fernandes**
10/01/98 01:03:16 PM
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Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP
Subject: H-2A

According to Peter, Gingrich is now interested in the H-2A issue. Likely b/c of calls that he has received from Georgia growers who were caught up in last year's Vidalia onions battle. Because of this pressue (and b/c Lamar is doesn't like the Graham-Wyden bill), he has rejoined with Bob Smith in an attempt to replace Graham-Wyden with the Smith guestworker bill. As you recall, we have a Secy of Labor veto threat on that bill. According to Linda Delgado, USDA heard that attempts to make this switch have been unsuccessful. She is going to check again with Dave Carlen and let us know.

julie

HOW U.S. EMPLOYERS FIND AMERICAN WORKERS

All U.S. employers, even primary producers, face the challenge of obtaining and retaining workers – like capital and customers. They typically do so through direct efforts and, sometimes, through intermediaries, both private and public. The process fundamentally involves finding ways to (1) effectively **communicate** the availability of employment opportunities to prospective workers and (2) **offer competitive wages and working conditions** that will attract prospective workers to meet their employment needs.

Direct Efforts

- ⇒ Advertisements at the place of business, and in newspapers, magazines, the Internet
- ⇒ Outreach to potential labor supplies – schools, universities, community-based organizations, even neighborhoods – through personal recruitment, job fairs, advertisements and such means
- ⇒ Outreach to potential labor suppliers (as described below) – labor unions, employment agencies, *etc.*
- ⇒ Recruitment among other employers' – especially competitors' – workforce
- ⇒ Using personal networks – relatives, friends, and relatives and friends of current and former employees

Use of Intermediaries

⇒ Private:

- Employment agencies – typically employers pay a fee for outreach, identification, screening and referral of qualified workers (Some employment agencies provide similar services to workers seeking employment opportunities and charge a fee to the worker)
- Temporary help agencies provide workers – employed by the agency – usually for short-term employment needs, such as replacement workers, temporary or seasonal jobs
- Labor unions refer members for employment opportunities
- Union and industry training and apprenticeship programs train and refer workers

- Labor brokers - such as agents and farm labor contractors - locate, recruit and supply (and sometimes supervise) workers for a fee (usually paid by the employer but sometimes extracted from the earnings of the workers)
- Community-based organizations - while not in the "labor exchange business," many CBOs are eager to facilitate information exchange and similar services to benefit the members of the community

⇒ **Public:**

- America's Job Bank provides employers the opportunity to post job openings nationally; more than 200,000 job openings are currently listed
- America's Talent Bank provides workers a vehicle to post their résumés which employers can search to find qualified employees
- State Employment Service Agencies operate almost 2,000 offices nationally to provide labor exchange services for local employers and workers, and access to information about interstate job opportunities
- The Agricultural Recruitment System helps agricultural employers recruit workers within the local area, the same State and from parts of other States that are traditional labor supply areas

Agricultural job search and recruitment strategies

Agricultural workers, agricultural employers, and farm labor contractors use a number of strategies to find work or workers. Many of these strategies parallel those used by other employers, but also differ in kind and degree in important respects.

Agricultural employers and employees use two basic strategies to find workers and work: direct hires – in which the recruitment and employment relationship is directly between the worker and grower – and use of farm labor contractors, labor intermediaries who typically recruit, supervise, transport and house workers on behalf of the grower. Regardless of whether a farm worker is employed directly by a grower or a farm labor contractor, a majority of farm workers report – through the National Agricultural Worker Survey (NAWS) – that they found their job through kinship/friendship networks.

The use of farm labor contractors has grown significantly over the last several years. Farm labor contractors employed approximately 16 percent of all migrant and seasonal farm workers in FY 1992-93, but that number grew to about 24 percent in FY 1996-97 – a nearly 50 percent increase in farm labor contracting employment.

Grower-hired farm workers tend to do different task than those employed by farm labor contractors – only 35 percent of grower employees are engaged in harvest tasks compared with 54 percent of farm labor contractor employees. A higher percentage of grower-hired workers are engaged in post-harvest (15 percent) and semi-skilled tasks (23 percent) than farm labor contractor employees (8 and 18 percent respectively). The actual method through which the employ is recruited – by either grower or farm labor contractor – does not vary significantly by task.

Farmworker job seeking strategies

- ⇒ 62% found their job through a kinship/friendship network.
- ⇒ 27% found employment on their own without the benefit of a network, employment service, or employer recruitment.
- ⇒ 10% found employment through employer (FLC or grower) recruitment.
- ⇒ Less than 5% found employment through the employment service or labor union.

Grower recruitment strategies:

- ⇒ 24% of all farm workers – and 29% of all migrants – are recruited and employed by farm labor contractors.
- ⇒ 10% were employed because they were directly recruited by the employer, recalled by their previous year's employer or have a year-to-year agreement with the grower.

- ⇒ Less than 2% of agricultural job placements are through the State Employment Service. Between June 1995 and July 1996, about 190,000 migrant and seasonal farmworkers sought employment through the U.S. Employment Service State offices and only about 65,000 were actually placed in agricultural jobs.
- ⇒ The remaining were recruited through a variety of other means, primarily kinship/friendship networks.

Direct efforts:

- ⇒ Growers rarely advertise in newspapers, magazines or on the Internet for workers. It is not uncommon for growers to advertise using signs posted along roads directing potential workers to the field where hiring is being done.
- ⇒ There is very little outreach to potential labor supply except through farm labor contractors who often recruit in labor supply areas.
- ⇒ Some growers recruit by contacting other employers to either refer workers once the work is complete or share workers where the employment is complementary.
- ⇒ The most common recruitment technique is for potential workers to find the employer through kinship/friendship networks. These kinship/friendship networks are often activated by a request from the employer to current employees for more workers. Over 60% of all farmworkers find employment through this method.

Use of intermediaries:

⇒ Private:

- ◆ Very few growers use traditional employment agencies, temporary help agencies, labor unions, community-based organizations, or training/apprenticeship programs as a means to secure workers.
- ◆ A substantial number of employers *[Is there any way to put dimensions on this?]* use farm labor contractors to secure workers, particularly those, who have short-term, high labor demand tasks.

⇒ Public:

- ◆ Very few workers are placed through the America's Job Bank/Talent Bank. For example, during a review of America's Job Bank on September 17, only about a dozen migrant or seasonal agricultural jobs were posted for the entire state of Oregon, a time of peak agricultural labor demand in that State.
- ◆ The employment service received about 188,000 farmworker applications *[Is there anything more we can do to characterize the kinds of agricultural jobs*

— e.g., more for full-time than harvest, more for long season than short? and placed about one-third of those applicants in agricultural jobs between June 1995-July 1996. Another approximately 30,000 farmworkers were referred to agricultural jobs but not hired. The placements represent less than 2% of all agricultural jobs.

H-2A Reform Meeting Agenda

Background

A key to the effectiveness of a farm labor program is matching farmworkers to growers in an effective and efficient manner. Currently, most farmworkers find jobs through use of a kinship/friendship network. Less than 5% of farmworkers found their job through the employment service or labor union; 10% found employment through employer recruitment (including through farm labor contractors). Under the current system, the DOL approves over 90% of grower requests for H-2A workers.

In addition, growers are concerned that workers that they recruit domestically (either through the DOL employment service or through their own positive recruitment efforts) are not authorized to work, and thus their employ leaves the grower vulnerable to INS enforcement (and losing their workers because of a raid).

Discussion

- I. How do we make recruitment more effective (matching U.S. workers to farmworkers)?
 - a. Role of growers
 - b. Role of intermediaries (farm labor contractors)
 - c. Role of government
- II. How do we make verification work?

10/01/98 H2A

▶ **Julie A. Fernandes**
10/01/98 03:12:09 PM
.....

Record Type: Record

To: Laura Emmett/WHO/EOP
cc:
Subject: H2A meeting this afternoon -- update

Laura,
The attached e-mail + the attached document are for EK's review for the 4pm meeting today. Pages 1-3 of the attached chart discuss the ideas related to worker recruitment and employment eligibility verification.

julie

----- Forwarded by Julie A. Fernandes/OPD/EOP on 10/01/98 03:31 PM -----

▶ **Julie A. Fernandes**
09/29/98 05:03:27 PM
.....

Record Type: Record

To: Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP
cc: Laura Emmett/WHO/EOP, Shannon Mason/OPD/EOP
Subject: H2A meeting this afternoon -- update

Elena/Sally:

B. Smith legislation?

According to DOL, some Republicans (including Lamar Smith) intend to replace the Wyden-Graham H2A amendment with the Bob Smith guestworker pilot bill. When that bill was marked up last march, we send a letter with a Secy of Labor veto threat. USDA had not heard this, but they are going to try to gather some intelligence. DOJ is also going to find out what they can (from their Judiciary committee contacts).

This afternoon's meeting

We agreed that our framework for discussing recruitment should have three parts: (1) the role of the government; (2) the role of the growers; and (3) the role of the private sector intermediaries (farm labor contractors). Al French (from USDA) would still like to see the registry replace the grower's obligation to recruit, but Linda Delgado said that the agency favors a continued requirement of positive recruitment by the growers as well as an enhanced effort by the government to assist in this recruitment.

There continue to be fundamental differences within the group on a basic question that affects recruitment; i.e., whether there exists an adequate legal domestic workforce to meet the needs of growers. USDA does not think that there are adequate legal U.S. workers to meet the needs of growers; DOL asserts that the supply would be adequate if growers would offer fair wages and

decent working conditions. Thus, DOL wants growers to have to try harder to recruit domestically, while USDA wants growers to have to meet certain minimums recruitment obligations and then have easy (and cheap) access to the H-2A program.

One thing we all agree on is that there needs to be a way for growers to verify whether a given worker is authorized to work in the U.S. This is the key to the success of any domestic recruitment effort.

The following reform ideas were floated:

- Use of community based organizations to help link migrant workers to employers. This could involve the federal government offering grants to CBOs to perform this task.
- More effective regulation of farm labor contractors (FLCs). The idea is to ensure that FLCs operate fairly and effectively to provide legal workers to growers. There are criticisms now that FLCs both provide illegal workers and skim wages/fees from workers.
- Consider what other entities (private or govt.) could assist growers in finding workers and vice versa (grower associations; state employment agencies; CBOs, etc.)
- Require participation in the INS's employment verification pilot program for growers who want to participate in the H-2A program. Are there other (better?) ways to verify eligibility to work?
- Build on America's Job Bank.
- Agreement between the federal government and the growers that if the grower uses the state employment service to verify all of its workers, the growers will not be subject to an INS enforcement action.

We asked USDA and DOL to think of other creative ideas on how to address these three areas (role of the grower, government and intermediaries) and get them to us by the end of the day tomorrow.

julie

Labor exchange international function
- use of visas?
- job bank

Verification - curious - won't come
after you -
we won't come after you

Immig-H2A visas

Talking Points

H-2A Agricultural Guest Workers -- Wyden-Graham Legislation

Background.

- Farm workers are among the poorest and most vulnerable in our society. Average annual earnings of farm worker families are only about \$6,500 and farm workers are employed on average only about 26 weeks per year.

Current Program.

- The H-2A "guest worker" program admits temporary nonimmigrant agricultural workers in order to provide farmers with an adequate supply of laborers during the growing season. There is no cap on the number of H-2A visas granted annually.
- Currently there are 1.6 million farm workers in the U.S. of which approximately 600,000 are illegal (unauthorized to work), 1 million are legal (citizens or authorized foreign labor), and 20,000 are in the H-2A program.
- Under the current program, in order to hire H-2A workers, an employer must demonstrate to the DOL that:
 - (a) there are not sufficient U.S. workers able, willing, qualified and available to perform the services; and,
 - (b) there will be no adverse effect on the wages and working conditions of similarly-employed U.S. workers.
- Employers also are required to:
 - pay workers an "adverse effect wage rate" (AEWR), determined by the average wage paid to non-managerial agricultural workers in the state;
 - provide free housing to workers coming from outside the commuting area;
 - reimburse workers' inbound transportation if they complete half the contract, outbound also if they complete the contract; and,
 - guarantee 3/4 of the hours of the contract; and,
 - hire any qualified U.S. worker who applies during the first half of the work contract.

State of Play.

- The H-2A program has been heavily criticized by the GAO, DOL's IG, and Congress due to the difficult administrative burdens placed on growers.
- The Administration has acknowledged the problems and is working administratively to reengineer and streamline the H-2A program to ease grower burdens while maintaining strong worker protections.
- In the recent letter to the Commerce, Justice, and State appropriations conferees, the Administration strongly urged deleting the Agricultural Job Opportunity, Benefits, and Security Act of 1998. The bill in its current form is unacceptable. However, the Administration is engaging in a bi-partisan process with the Congress to develop overall reform, including possible legislative reform.
- The Administration shares the goal of assuring an adequate, predictable labor supply of farm workers and will work with the Congress to develop reforms to the current program to ensure that it responds to agricultural needs while protecting U.S. farm workers.

Wyden-Graham Bill.

- As a result of growers' dissatisfaction with the current program, Senator Wyden (D/OR) and Senator Graham (D/FL) attached the Agricultural Job Opportunity Benefits and Security Act of 1998, to the Commerce, Justice, State appropriations bill.
- The Administration's overall concern with the Wyden-Graham bill is that it shifts costs and risks from employers to workers and/or the government.
- Although Wyden-Graham has been changed to remove some objectionable provisions (e.g., restores the requirement that growers reimburse workers for transportation; eliminates the provision that would have required withholding 20% of workers' wages to be refunded upon their return home as a repatriation incentive), the fundamental substantive objections noted below, remain.

Most significant issues with the revised proposal.

- Eliminates the current grower recruitment requirement and creates a government-run job registry.

--Responsibility for the recruitment of domestic farm workers would shift to a

new "job registry" for which the government and low-wage workers are entirely responsible.

--Growers would only need to check this registry before employing H-2A workers.

--The fundamental problems with the registry are:

(1) that use of the registry would relieve the growers of any obligation to do positive recruitment beyond searching the registry, making it easier to employ H-2A workers over U.S. workers; and,

(2) that the bill would require wholesale reliance on a method of recruitment that has not been tested or shown to be effective (it will be very difficult to maintain an accurate, up-to-date registry).

--In addition, although this registry would take years to create and implement effectively, employers could begin to hire H-2A workers within 6 months of enactment of the bill.

- Erodes U.S. worker wages.

--Caps the adverse effect wage rate¹ at 105% of the local prevailing wage.

--This cap is not set high enough to compensate for the depression of wages in areas where there is a heavy reliance on foreign workers, and not sufficiently high to attract new U.S. workers into agricultural employment.

- Provides an inadequate mechanism for housing foreign guest workers.

--Allows growers to provide a payment voucher in lieu of housing, unless the State certifies that adequate housing is not available in the area. The State is not required to make this determination nor has an incentive to do so.

--Requires growers to make a "good faith" effort to locate housing for the worker. Growers are not required to locate and secure the housing.

--Eliminates a fundamental grower obligation to assure that workers are adequately housed.

--Overlooks the basic problem of inadequate housing in many areas of the country (particularly in the West).

--It is unrealistic to expect low-wage foreign migrant farm workers to be able to secure housing using a federal voucher. Thus, many workers will likely

end up without housing, will overcrowd any available rental housing, or will end up on the street.

- Eliminates the requirement that growers guarantee $\frac{3}{4}$ of the work offered to recruit U.S. and foreign farm workers.

--May encourage growers to lure workers from hundreds or thousands of miles away with the promise of potentially high earnings without any obligation to fulfill any part of that promise.

--May encourage growers to recruit more workers than they actually need to hedge against uncertainties.

▶ **Julie A. Fernandes**
10/09/98 05:02:53 PM
.....

Record Type: Record

To: Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP, Maria Echaveste/WHO/EOP
cc: Laura Emmett/WHO/EOP, Shannon Mason/OPD/EOP, Leslie Bernstein/WHO/EOP, Marjorie
Tarmey/WHO/EOP
Subject: H2A -- phone calls

FYI. I have received calls today from the AFL-CIO, Farmworker's Union, and the National Association of Hispanic Priests and Deacons, urging us to reject any compromise on H-2A. Also, according to the AFL, Delores Huerta (co-founder of United Farm Workers of America) is apoplectic about how Wyden and Graham misrepresented her in their op-ed today. She intends to respond.

I have also, in the last day or so, received letters opposing any compromise on H-2A from the Farmworker Justice Fund and the National Hispanic Leadership Agenda (that has members on its board from LULAC, PRLDEF, MALDEF, and NCLR among many others). The sense that I have gotten from these letters and messages (and conversations with DOJ legislative affairs) is that a compromise by us on this would be nuclear.

julie

Immig - H2A

773-702-

Elena Kagan

10/9/98

834-0007

Calls

Friday, October 09, 1998 8:38:00 AM

she thinks it is important to mention Brady language in CJS bill in the Top Cops remarks- please call to discuss
Sylvia Matthews Planned
OMB
10/9/98 8:38 AM ✓
54742

Friday, October 09, 1998 9:30:00 AM

please call
Kitty Higgins Planned
DOL
10/9/98 9:30 AM ✓
219-6151

Friday, October 09, 1998 10:13:00 AM

please call
Geri Palast Planned
Labor Dept.
10/9/98 10:13 AM ✓
219-4692

Friday, October 09, 1998 10:17:00 AM

wants to touch base re: child care appropriations
Nicole Rabner Planned
DPC
10/9/98 10:17 AM ✓
67263

Friday, October 09, 1998 10:27:00 AM

he wants to make sure tha you know that conference deal with lamar Smith is a 5 year PILOT that is capped at either 60,000 or 100,000 visas per year. (Wyden does not care wehter it is 60 or 100, but that number has been in play) Thank you- call him w/ questions
David Blair Planned
Senator Wyden's office
10/9/98 10:27 AM ✓
224-3163

Friday, October 09, 1998 10:32:00 AM

Irish bill passed Senate last night unanimous vote- - she is also going to call Blair
Julie Fernandes Planned
DPC
10/9/98 10:32 AM ✓
66558

Friday, October 09, 1998 10:33:00 AM

please call re: FICA
Cynthia Rice Planned
DPC
10/9/98 10:33 AM ✓
62846

Friday, October 09, 1998 10:36:00 AM

please call
Jack Goldsmith Planned
University of Chicago Law School
10/9/98 10:36 AM ✓
773-702-3306

Friday, October 09, 1998 10:46:00 AM

she got a call from NSC- Visa bill passed the Senate last night so we do not have all of the troubles that she thought we did
Kitty Higgins Planned
DOL
10/9/98 10:46 AM ✓
219-6151

Friday, October 09, 1998 10:51:00 AM

tobacco question- deadline today
Alyssa Rubin Planned
LA Times
10/9/98 10:51 AM ✓
861-9297

Friday, October 09, 1998 11:14:00 AM

please call
David Blair Planned
Senator Wyden's office
10/9/98 11:14 AM ✓
224-3163

Friday, October 09, 1998 11:32:00 AM

calling you back
Bob Litt Planned
10/9/98 11:32 AM ✓
514-2105

Ginrich demand ~~Richard Lamm~~

Conf report proposal -- registry
Most imp change -- pilot program
hard must 5-6 yrs
current H2A must concurrently

plus all very previous

Syr: GAO report - recommendations -
new program

each yr / ~~total~~ for the 5 yrs.
capped at 60,000
changed in last 24 yrs → 100,000

STATEMENT OF PRINCIPLES H2-A REFORM

The Administration's guiding principles for reform of the H2-A program are intended to assure that these policies achieve greater stability in the agricultural workforce so that our agricultural producers and farm workers both benefit. Growers must have a more predictable and reliable labor supply, while we provide adequate workplace protections for domestic and foreign farm workers who are among the poorest and most vulnerable in our society.

The Administration's guiding principles in reforming the H-2A program are designed to create a system:

- where the procedures for using the program are simple and the least burdensome for growers;
- which assures an adequate labor supply for growers in a predictable and timely manner;
- that provides a clear and meaningful first preference for U.S. farm workers and a means for mitigating against the development of a structural dependency on foreign workers in an area or crop;
- which avoids the transfer of costs and risks from businesses to low wage workers;
- that encourages longer periods of employment for legal U.S. workers;
- which assures decent wages and working conditions for domestic and foreign farm workers, and that normal market forces work to improve wages, benefits, and working conditions.

Nonimmigrant Agricultural Worker (H-2A) Program Reform Discussions

September 23, 1998

Proposed Agenda

- Process
 - ⇒ Timetable
 - ⇒ Principals' Meeting
 - ⇒ Communications with Constituencies
 - ⇒ Press

 - Guiding Principles (attachment)

 - Non-H-2A Approaches to Underlying Problems

 - Principal Issues:
 - ⇒ Worker recruitment
 - ⇒ Wages and Costs
 - ⇒ Housing
 - ⇒ Enforcement
 - ⇒ Immigration Management/Repatriation
 - ⇒ Administrative Processes and Burdens
- } Any kind of total figure?

Latest Version of Wyden-Graham Bill

1. H-2A workers (agricultural workers) covered by MSPA
2. Clarified that state/federal wage laws apply if more than 105% of the prevailing wage.
3. Workers would receive a housing voucher and growers would have to make a good faith effort to assist workers to find housing.
4. Requires expedited investigation of flagrant violations of child labor statute or housing or wage provisions of the H2A law.
5. Growers must reimburse all inbound and outbound transportations (under same rules as current) for all domestic workers referred by the registry.
6. 50% Rule would apply for all U.S. workers referred by the registry.
7. A worker (or a worker advocate) can petition to change jobs within the H2A system.
8. Clarified that State Department cannot issue a visa unless the DOL says it is o.k.

Q: However, the only obligation is that the grower attest to having done the right things, then DOL must say o.k. If the grower makes the right promises, after X days, the visas can be issued.

9. Caps on the annual number of H-2A visas: \$60K the first year; up to \$600K in the 10th year.
10. Established a grower/worker advisory board
11. Reports to Congress in YR3 and YR5
12. Registry to take effect one year from enactment (rather than 6 months)

Q: How are the other aspects of the bill effected by the fact that the registry does not take effect until one year after enactment of the bill?

13. Lifts the three-year/ten-year ban for workers who want to work in the H-2A program (within a certain window of time)

Q: This creates an incentive to be a temporary worker forever. If deported, can return as an H-2A worker?

14. Legalization provisions (if after four years of six months each year, eligible to legalize).

15. Calls for the creation of an exit-entry visa system (linked the the consulate in the home country).
16. Modified the 3/4 guarantee. Grower would be on the hook for the 3/4 guarantee, unless the employer can arrange for other work for the worker.

Q: This is Wyden's proposal; others don't agree.

17. AG study of visa overstaying; determine options to ensure repatriation.

328 H

COMPARISON OF SENATE-PASSED H-2A REFORM AGJOBS AMENDMENT TO S. 2260 WITH PROPOSED CONFERENCE CHANGES

Senate-Passed Amendment

Proposed Conference Changes

Limitation on Covered Job Opportunities (Section 2)

Changes definition of "agriculture" to clarify that packinghouse and food processing jobs currently excluded from H-2A program are excluded from reformed program.

Wages (Section 2)

Clarifies that the premium prevailing wage rate cannot be less than the federal or applicable State minimum wage. (per CRS)

Housing (Section 7)

Requires employers to make a good faith effort to locate housing where a housing allowance is provided. Also shortens the period for State determinations of the sufficiency of housing from 3 to 1 year and requires that housing be provided 4 years rather than 5 years after a finding of insufficient housing.

Transportation (Section 7)

Eliminates any ambiguity that employers must reimburse inbound and outbound transportation costs after the required work commitments are met.

**Department of Labor Investigations,
Enforcement and Penalties (Section 8)**

Requires DOL to conduct expedited investigations and make findings within 10 days if a worker alleges the following serious violations: 1) violation of existing child labor laws; 2) failure to make wage payments; 3) failure to pay housing allowance; and 4) providing housing in violation of government housing safety standards that pose an immediate threat of serious bodily injury or death to workers. Hearing process provided if violation found.

**Transfer of Workers Dissatisfied with
Employer (Section 8)**

-Applies to Foreign worker

Provides DOL discretion to transfer a worker who has filed a complaint alleging an employer has violated program terms to another employer approved to participate in the program. Provides that employer from whom the worker is transferred must first obtain replacement worker and clarifies responsibility for transportation reimbursement in transfer situation.

**State Department Issuance of
Visas (Section 6)**

Clarifies that employers may voluntarily agree to transfer workers to other qualified employers. Clarifies alien workers may return home at any time. Clarifies that if the Secretary of Labor fails to act on an employer application within statutory timeframes that the Secretary of State may approve an application, but only if the employer meets all program requirements.

**Limitation on the Number of Visas
(Section 6)**

Places caps on the number of visas allowed during the first 4 years after the effective date as follows: 10%; 20%; 40% and ~~70%~~ of the number of unauthorized workers found working in agriculture by DOL's most recent National Agricultural Worker Survey. [After 4th year there is no cap] Secretary of Agriculture ensures that visas are allocated on a geographically diverse basis, considering seasonal demands in all parts of the country.

NOT WIDEN

50%

*Widen was
some limit
out years*

**Establishment of Employer/Worker
Advisory Board (Section 13)**

Establishes advisory board to consult with GAO in preparation of its reports on program operation. 4 employer representatives are selected by Secretary of Agriculture and 4 workers representatives are selected by Secretary of Labor.

Termination of Program (Section 13)

Requires reports to Congress by GAO on operation of program, including recommendations on program improvements and the continuation or termination of the program at the end of 5 years. If GAO recommends termination of program, an expedited and privileged joint resolution procedure is provided for prompt congressional action on termination. If Congress passes resolution ending reformed program, the existing H-2A will not sunset and will continue in its current form.

Effective Date of Program (Section 14)

The effective date for the program is 1 year rather 6 months after enactment to allow more time for government agencies to implement program. DOL is mandated to issue report within 6 months regarding measures being taken and progress made in implementation.

Initial Waiver of Ineligibility (Section 9)

States that otherwise admissible aliens are not deemed inadmissible to participate in program if they leave the US no later than within 1-year after the 4-year phase-in period.

Removal by Attorney General of Aliens Violating Program Terms (Section 9)

Requires AG to remove workers who abandon employment and fail to maintain legal status in US.

Identification Document and Document System (Section 9)

Establishes tamper- and counterfeit-proof identification document to verify employment eligibility of aliens. Such document must be compatible with existing government law enforcement and benefit eligibility databases and must measure whether aliens depart US as required by their visas.

Permanent Resident Status (Previous Section 10)

No
—

Provision providing employment-based preference for permanent resident status for aliens working 4 years in program is deleted.

NOT AGREED

User's Fee (Section 12)

Establishment of user's fee is being drafted by Legislative Counsel subject to Congressional Budget Office input.

Unemployment Insurance (Section 4)

Provision requiring payment of unemployment insurance to domestic workers as a condition of program participation is being considered by Legislative Counsel subject to Congressional Budget Office input.

09/16/98 13:47 P.007/011

Additional changes proposed by Wyden
and accepted.

Suggested Amendments to H-2A Draft BAI98.165

1. P. 5, after line 10, insert at the appropriate place a new subsection ()

✓ () to ensure that United States citizens and United States nationals enjoy the right of first refusal for any temporary or seasonal agricultural work available through the registries;"

2. P. 6, after line 5, insert a new subsection (3)

✓ "(3) COMPUTER DATABASE.--

(A) The Secretary of Labor may establish the registries as part of the computer database known as "America's Job Bank."

3. P. 7, on line 9 after "unless," strike the remainder of the sentence and insert the following:

✓ "the Secretary of Labor has requested and obtained from the Attorney General a certification that the person is authorized to be employed in the United States."

4. P. 9, at the end of line 4, insert

✓ "The Secretary shall assure that information about the registry is made available to eligible workers through all appropriate means, including appropriate State agencies, groups representing farm workers, and nongovernmental organizations."

5. P. 17, insert a new sentence after "employer"

✓ "The Secretary shall identify first eligible United States citizens and United States nationals who are qualified registered workers and shall contact such workers first."

6. P.21, after line 10, insert a new subsection "(v)"

(v) For the fifth year and for each year thereafter, the Secretary of Labor, in consultation with the Secretary of Agriculture, shall establish the number of aliens that may be employed pursuant to this Act based on....[insert guidelines]"

No

1 which the employer requests a registered worker
2 is temporary or seasonal.

3 (B) SEASONAL BASIS.—For purposes of
4 this title, labor is performed on a seasonal basis
5 where, ordinarily, the employment pertains to
6 or is of the kind exclusively performed at cer-
7 tain seasons or periods of the year and which,
8 from its nature, may not be continuous or car-
9 ried on throughout the year.

10 (C) TEMPORARY BASIS.—For purposes of
11 this title, a worker is employed on a temporary
12 basis where the employment is intended not to
13 exceed 10 months.

14 (3) ASSURANCE OF PROVISION OF REQUIRED
15 WAGES AND BENEFITS.—The employer shall assure
16 that the employer will provide the wages and bene-
17 fits required by subsections (a), (b), and (c) of sec-
18 tion ____07 to all workers employed in job opportu-
19 nities for which the employer has applied under sub-
20 section (a) and to all other workers in the same oc-
21 cupation at the place of employment.

22 (4) ASSURANCE OF EMPLOYMENT.—The em-
23 ployer shall assure that the employer will ^{not} refuse to
24 employ ^{Qualified} individuals referred under section ____05, ~~or~~ and will
25 terminate ^{Qualified} individuals employed pursuant to this

note: "qualified" individuals is a current term of art.



1 title, only for lawful job-related reasons, including
2 lack of work.

3 (5) ASSURANCE OF COMPLIANCE WITH LABOR
4 LAWS.—

5 (A) IN GENERAL.—An employer who re-
6 quests registered workers shall assure that, ex-
7 cept as otherwise provided in this title, the em-
8 ployer will comply with all applicable Federal,
9 State, and local labor laws, including laws af-
10 fecting migrant and seasonal agricultural work-
11 ers, with respect to all United States workers
12 and alien workers employed by the employer.

13 (B) LIMITATIONS.—The disclosure re-
14 quired under section 201(a) of the Migrant and
15 Seasonal Agricultural Worker Protection Act
16 (29 U.S.C. 1821(a)) may be made at any time
17 prior to the time the alien is issued a visa per-
18 mitting entry into the United States.

19 (6) ASSURANCE OF ADVERTISING OF THE REG-
20 ISTRY.—The employer shall assure that the em-
21 ployer will, from the day an application for workers
22 is submitted under subsection (a), and continuing
23 throughout the period of employment of any job op-
24 portunity for which the employer has applied for a
25 worker from the registry, post in a conspicuous place

1 (ii) the most economical and reason-
 2 able transportation and subsistence costs
 3 that would have been incurred had the
 4 worker or alien used an appropriate com-
 5 mon carrier, as determined by the Sec-
 6 retary.

7 (B) DISTANCE TRAVELED.—No reimburse-
 8 ment under paragraph (1) or (2) shall be re-
 9 quired if the distance traveled is 100 miles or
 10 less.

11 (d) CONTINUING OBLIGATION TO EMPLOY UNITED
 12 STATES WORKERS.—

13 (1) IN GENERAL.—An employer that applies for
 14 registered workers under section ____04(a) shall, as
 15 a condition for the approval of such application, con-
 16 tinue to offer employment to qualified, eligible Unit-
 17 ed States workers who are referred under section
 18 ____05(b) after the employer receives the report de-
 19 scribed in section ____05(b).

5706

20 (2) LIMITATION.—An employer shall not be ob-
 21 ligated to comply with paragraph (1)—

22 (A) after 50 percent of the anticipated pe-
 23 riod of employment shown on the employer's
 24 application under section ____04(a) has
 25 elapsed; or

1 (B) during any period in which the em-
2 ployer is employing no aliens in the occupation
3 for which the United States worker was re-
4 ferred; or

5 (C) during any period when the Secretary
6 is conducting a search of a registry for job op-
7 portunities in the occupation and area of in-
8 tended employment to which the worker has
9 been referred, or other occupations in the area
10 of intended employment for which the worker is
11 qualified that offer substantially similar terms
12 and conditions of employment.

13 (3) LIMITATION ON REQUIREMENT TO PROVIDE
14 HOUSING.—Notwithstanding any other provision of
15 this title, an employer to whom a registered worker
16 is referred pursuant to paragraph (1) may provide
17 a reasonable housing allowance to such referred
18 worker in lieu of providing housing if the employer
19 does not have sufficient housing to accommodate the
20 referred worker and all other workers for whom the
21 employer is providing housing or has committed to
22 provide housing.

23 (4) REFERRAL OF WORKERS DURING 50-PER-
24 CENT PERIOD.—The Secretary shall make all rea-
25 sonable efforts to place a registered worker in an

▶ **Julie A. Fernandes**
09/15/98 11:44:08 AM
.....

Record Type: Record

To: Cecilia E. Rouse/OPD/EOP, Sally Katzen/OPD/EOP, Elena Kagan/OPD/EOP, Maria Echaveste/WHO/EOP
cc: Shannon Mason/OPD/EOP, Laura Emmett/WHO/EOP, Marjorie Tarmey/WHO/EOP
Subject: H2A -- bipartisan meeting

I just spoke with Earl G. from DOL. He had what he described as a "good conversation" with Coverdell's staffer, who continued to press him not to hold the first meeting of the bi-partisan working group until after the recess. According to Coverdell's staffer, Wyden's staff has been telling him that they also do not want this process to start until after the recess. I told Earl that the meeting was going to take place this afternoon, with or without Coverdell. Also, that it is no surprise that Wyden's staff has been pressing to postpone this meeting. We have known all along that Wyden does not want our process to be credible. Without it, he can better persuade Dems. that his bill is the only way to reform the program.

julie