

NLWJC - Kagan

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Immigration - H2A Workers

[4]

1/ Compl w/ More aggressive GAST effort? (Barbara)

immig-H2A
DRAFT

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**Ideas for Possible Temporary Nonimmigrant Agricultural (H-2A)
Guestworker Program Reform**
July 30, 1998

→ Recognizing that the step to legislation is a **BIG** one ...

- *Pilot test new Registry of available U.S. farm workers.*

The Smith-Wyden-Graham bill would shift responsibility for recruitment of U.S. farmworkers from growers seeking access to foreign guestworkers to the Department of Labor (intended to be financed by user fees from participating growers). Growers would have no obligation to recruit U.S. farmworkers beyond asking DOL to find the workers they need, and no obligation to hire any U.S. farmworkers except those delivered by DOL's Registry after confirming the workers are legally authorized to work in the U.S.. For several reasons, the Registry established by the bill can not function effectively.

Nonetheless, though it would be very expensive and complex, the idea of such a Registry - built on the infrastructure of America's Job Bank and America's Talent Bank, and the existing agricultural recruitment system operated by the U.S. Employment Service - should be tested for feasibility and effectiveness, though it should not be the sole mechanism for recruiting U.S. workers (see below). Growers, government, and NGOs would be responsible for recruiting workers to Register, and prospective H-2A employers would be required to use the Registry as one (of several) means of obtaining legal U.S. workers.

Feinstein wants to know it can work

- *User fees finance program operations.*

A user fee imposed on employers participating in the program would (1) provide an incentive to find and use U.S. farmworkers, and (2) finance the new costs of the Registry pilot, the travel advance fund, a housing construction fund, and the entry-exit system.

- *Growers share responsibility for recruiting legal U.S. farmworkers.*

In addition to using the Registry, growers using the H-2A program would have to make *bona fide* efforts to recruit and hire U.S. farmworkers including reemploying former/current legal workers, direct recruiting in labor supply areas, and creating partnerships with NGOs and worker organizations.

They'll say: makes life more difficult.

Farmworker advocates -
If 0 in wages, OK.
(Of course, they'd want caps)

It would
Growers: this pkg costs too much;
makes their

- ***Growers participating in the H-2A Program must use the INS pilot verification system.***

Growers advocating for the Smith-Wyden-Graham legislation argue that they want a stable, legal workforce that will reduce their vulnerability to work disruptions and crop/financial losses, but they refuse to use the INS pilot verification system because they expect this will reveal that their current workforce is illegal and they would then be forced to compete based on wages and benefits to attract legal U.S. farmworkers. Growers seeking access to foreign labor should be required to use the INS pilot verification system – instead of just relying on the DOL’s Registry to assure the legal status of their workforce.

- ***Reduce lead time for grower application from 45 to 30 days and the lead time for certification/petition approval from 20 to 7 days before grower’s “date of need.”***

Current law requires DOL certification decision at least 20 days before the employer’s first “date of need” for workers in order to allow time for INS petition processing and State Dept. visa processing. Consolidation of the certification and petition processes (in DOL) allows reduction of this lead time to seven days (as in the Smith-Wyden-Graham bill) and, consequently, reduction of the lead time for application/petition submission from 45 to 30 days before the date of need, and still allow (barely) adequate time for effective recruitment. (Possibly, shorter lead times could be allowed for: (1) established program users who demonstrate reduced reliance on foreign H-2A workers; and, (2) those growers who can provide estimates of labor needs and “date of need” 90 or 60 days prior so as to allow more time for recruitment efforts, including through the Registry.)

- ***U.S. and foreign farmworkers employed by growers participating in the H-2A program are covered under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).***

This provision of Smith-Wyden-Graham would extend MSPA coverage to H-2A foreign farmworkers – on the same basis as their U.S. co-workers – and simplifies (terms and conditions of employment) disclosure obligations.

- ***Authorize and fund travel advance pilot program for U.S. farmworkers recruited by growers participating in the H-2A program.***

This provision of Smith-Wyden-Graham, intended to be financed by user fees, helps overcome a common obstacle faced by U.S. farmworkers in accepting H-2A job offers – financing transportation to the job site until reimbursed after completing 50 percent of the contract period, at which time they are reimbursed by their employer for their inbound transportation costs. A travel advance fund (financed by user fees and administration to be determined) would largely be a relatively small, revolving fund

repaid by the worker when reimbursed for in-bound transportation as a condition of continued eligibility to participate in the program.

- *Allow housing allowance in lieu of grower-provided housing.*

A provision of Smith-Wyden-Graham would change the current H-2A requirement that growers provide safe housing – both as an incentive to U.S. workers taking these jobs and as a means of preventing adverse impact on the local communities – to allow, as an option, a housing voucher unless the State determines there is an inadequate housing supply in the area. However, Smith-Wyden-Graham does not require growers to assure that any housing is available, and allows growers to transfer some housing costs – for utilities, maintenance and repair – from the employer to the low-wage workers, ostensibly as an incentive for growers to build and provide farmworker housing.

This proposal would be improved by allowing an H-2A employer to provide a housing allowance in lieu of housing only if temporary rental housing is “reasonably available” at the HUD rate in the community where the workers are to be employed. To be “reasonably available” the housing must be available in sufficient quantity at the HUD rate, must be rentable by farmworkers, meet minimum standards (including occupancy limits), and must be reserved by the employer. The housing would be paid for through vouchers provided to the workers to prevent farmworkers from accepting a cash payment but not using it to secure housing or increasing earnings by reducing housing costs through overcrowding (perhaps reducing the availability of housing in the future).

- *Modify minimum wage requirements to prevent adverse effect.*

Under the current H-2A program, H-2A employers must pay the highest of the Federal/State minimum wage, the locally prevailing wage for the crop, or the “Adverse Effect Wage Rate” (AEWR) – which is the average agricultural wage rate for the State (or region). The AEWR is intended to prevent wage depression from the use of foreign workers, which can be reflected in local “prevailing wages” where significant numbers of foreign workers – legal or illegal – are employed, and is thus based on a larger labor market (even though this broader-based rate can be affected by a large proportion of illegal workers in the State-wide agricultural labor market).

TF: not nec a good idea / only thing
could come
up w/ on
wage side

Our principles dictate against reducing already stagnant farmworkers’ wages (or allowing transfer of employers’ costs or business risks to their workers), but – as cost is at the center of employers’ concerns – we may want to consider some modification in the AEWR. For example, we could consider requiring payment of the AEWR where the local, crop-specific agricultural workforce is not predominantly (*e.g.*, more than 90 percent) composed of legal U.S. workers. The AEWR would not apply elsewhere, but H-2A growers would have to pay the locally-prevailing wage plus ten percent, reflecting the fact that prevailing wage determinations always are based on wages paid in earlier periods and as an incentive to find and use legal U.S. workers. It must be

recognized, however, that such an approach will result in some minimum wage requirement reductions, and – at least in the foreseeable future – it will be extremely difficult to make reliable determinations about the threshold of legal U.S. versus foreign workers in a crop-area workforce.

- ***Eliminate the existing FICA/FUTA tax exemption for foreign H-2A farmworkers; use proceeds for repatriation incentive.***

Under current law and the Smith-Wyden-Graham bill, growers are not required to pay FICA (Social Security) and FUTA (Unemployment Insurance) taxes on the earnings of their H-2A employees, and H-2A workers are not required to pay the employee tax to contribute to the Social Security Trust Fund. This presents two major problems.

First, it creates real economic incentives for employers to favor foreign farm workers. The tax exemptions reduce the employer's gross payroll for these workers by about 8 percent compared to similarly-employed U.S. workers (and illegal workers). This creates an unfair competitive advantage for employers of foreign guestworkers over those who employ U.S. workers, and creates an obvious economic incentive to employ foreign workers and build a structural dependency on a foreign workforce.

Second, the H-2A guestworkers enjoy higher net compensation than similarly-employed U.S. workers – currently 7.6 percent of gross wages – by not having to pay the employee's portion of the Social Security tax. This is yet another reason that foreign guestworkers may find these jobs more attractive than U.S. workers, more of whom may be willing to take these jobs if they were paid as much as their foreign co-workers.

As many foreign guestworkers will eventually become U.S. residents and eventually use the Social Security system, one approach would be to recognize this reality and repeal the tax exemptions for both employers and employees. Another approach would be to require H-2A employers to pay the equivalent of their FICA/FUTA taxes into a "repatriation account" on behalf of each worker. This eliminates the economic incentive to employ and become dependent on foreign workers and may provide some additional incentive for guestworkers to return to their home country upon completion of their work in the U.S. Of course, another possibility is that the employer's portion of the taxes be paid as the user fee to finance the various governmental activities contemplated under such law.

- ***Prohibit use of the H-2A program by growers in designated labor surplus areas.***

Recognizing persistent high unemployment rates in many large agricultural areas of the country, growers in areas designated as "labor surplus" areas by the Secretary of Labor would be ineligible to participate in the program.

- *Require entry-exit control system for H-2A workers.*

Great concern centers on the question of whether large numbers of legal guestworkers entering the U.S. will overstay their visas and add to the large resident illegal population, with their labor replaced by a continuing turnover of new legal temporary foreign guestworkers. Any reformed H-2A program should have carefully crafted entry-exit controls, paid for from user fees, to assure this result is avoided.

Difi's #1 issue

- *Cap the number of visas under the program.*

The current H-2A program is not capped, but usage remains low because of the many incentives to employ legal U.S. workers. A reformed H-2A program with fewer such incentives could be capped, but any number picked would be highly contentious.

- *Adjustment of Status (Legalization) Provision?*

The single greatest incentive to foreign guestworkers to not remain illegally in the U.S. by overstaying their temporary visa would be the prospect of eventual legalization to permanent residency through adjustment of status (as reflected in the Smith-Wyden-Graham bill). At the same time - while being highly controversial politically and generally contrary to the thrust of immigration reform proposals to reduce unskilled employment-based immigration to the U.S. - this measure could actually increase foreign guestworkers' vulnerability to exploitation during their period of temporary work authorization because the "prize" of eventual legalization would depend on their continued participation in the program and, thus, in large part, on their employer's goodwill.

#1 issue for farmer/union advocates | may be ~~part of~~ place where consensus collapses: contrary to basic immigration policy

- *Other existing worker protections and incentives - e.g., the "50 percent rule," the "three quarter guarantee," transportation reimbursement, etc. - would remain unchanged.*

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.

To get an agreement:

We would have to give an -

Wages

Living obligations

3/4 guarantee

(They could live w/
housing after here;
& they'll pay for
transportation)

✓ Growth,

They'll say: w/ an this:

Disincentive to using proper

----- REV. DRAFT 8/20/98 REV. DRAFT -----

Proposal for Bi-Partisan Working Group on the H-2A Program

Purpose: To examine various policy proposals related to the H-2A foreign agricultural guestworker visa program, and determine whether and where consensus can be reached among a bipartisan working group of Members of Congress and the Administration.

Background: During the current Congress, a number of proposals have been put forward for changing the H-2A foreign agricultural guestworker program. Secretary Herman proposed to Senator Coverdell the establishment of a bipartisan group of Members of Congress and the Administration for the purpose of examining various policy options related to the H-2A program and determining where consensus for change could be achieved. The Senate has passed H-2A reform legislation – principally sponsored by Senators Smith (R-OR), Wyden (D-OR) and Graham (D-FL) – that the Administration has indicated it strongly opposes because it is inconsistent with principles articulated by the Administration to guide H-2A program changes.

Participants:

- For the Administration – Secretaries Herman (Labor) and Glickman (Agriculture), INS Commissioner Meissner (or delegate), and representatives of the Domestic Policy Council, National Economic Council, and OMB;
- From the Congress – Senators Cover^Rdell, Wyden, Graham, Kennedy, and Feinstein; Representatives Lamar Smith, Bishop, Beccera, and Berman.

Abraham
Watt
D. Smith

Proposed Process: The Secretaries of Labor and Agriculture will formally invite participation, generally outlining the intended goals and proposed process. Staff of the participating offices would initially be tasked to

(1) develop a set of principles to guide discussion of possible H-2A program revisions, and (2) compile an inventory of H-2A policy proposals to be examined with the objective of determining if it is possible to reach consensus on any of these proposals. The policy options would generally fall into the following categories:

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

An initial draft of proposed principles and policy proposals has been developed by DOL (copy attached) and can be circulated as a possible starting point to the participating offices for review. Participants' staff would meet to discuss and, if necessary, revise these documents.

The participating Members will meet with the Secretaries of Labor and Agriculture and INS Commissioner to review the draft principles and policy proposals for the purpose of directing the respective staff to initiate a series of meetings/discussions of the various policy proposals in light of the articulated, agreed-upon principles. These meetings – of the participating Members and Administration officials, and at the staff-level – will not include the participation of organizations outside of the Federal government.

The staff will meet weekly to review the policy implications of each of the proposals on the list of policy options accepted by the participants. The objective would be to rigorously examine each of the substantive proposals to consider the likely impact on both growers and domestic and foreign farm workers. The staff will provide periodic reports to the Administration and participating Members, and will outline areas where consensus can be achieved, identify policy proposals or areas where consensus cannot be achieved, and target proposals/areas that may warrant further examination and discussion.

When the staff-level discussions have addressed all the issue that were accepted for review by the Administration and participating Members, a report will be submitted to the participants outlining areas of potential consensus with recommendations for next steps, issues where consensus could not be reached, and issues where consensus was not reached but which may warrant further discussion among the principal participants.

After receiving the staff report, the participants may meet to consider the policy options which staff recommended for further discussion at the principal level. The process would conclude with a letter from the Secretaries of Labor and Agriculture to the participating Congressional Members outlining areas of consensus and the steps necessary/to be taken to effect the agreed-upon program changes.

Possible Timeline:

- ◆ Aug 25 Letter from Labor and Agriculture Secretaries to invite bipartisan participation, forwarding proposed principles and policy option inventory
- ◆ Sept 8 (week) Staff-level meeting to review/revise principles and policy options inventory
- ◆ Sept 21 (week) Principals' Meeting (Secretaries and Members) to bless principles/policy options for examination
- ◆ Sept 28 (week) Begin weekly staff-level policy option review/discussion meetings
- ◆ Oct 30 (tent.) Staff report to principals
- ◆ Nov 16 (tent.) Principals' meeting
- ◆ Dec 11 (tent.) Concluding letter

Framework for H-2A Reform Discussions
August 20, 1998

Guiding Principles

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.

The Administration's guiding principles for reform of the H-2A program are intended to assure that our 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 assures an adequate legal labor supply for growers in a predictable and timely manner;
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.

Framework for Reform Discussions

- ◆ 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.

- a. 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)

Three-quarter Guarantee

- b. 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. Eliminate the existing three-quarter guarantee (S.2260)

- d. 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)

Adverse Effect Wage Rate

- 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)

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)
- 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

July 31, 1998 (9:48am)

POSSIBLE RESOURCES FOR MIGRANT HOUSING AND TRANSPORTATION

I. Housing

Department of Housing and Urban Development (HUD). There are many resources in HUD that may be promising for aiding growers with their obligation to provide housing.

--Community Development Block Grant (CDBG). This program provides flexible funds to States and cities to address their community development needs. The use of CDBG funds must meet program requirements, including the national objective of benefiting low- and moderate-income persons, eliminating slum or blight, or meeting urgent needs posing an immediate threat to the health or welfare of a community where other financial resources are not available. The President's Budget requests \$4.725 billion for this program. The Senate version of the VA-HUD bill provides \$4.750 billion; and the House version provides \$4.725 billion.

-- Set-asides within CDBG. This program includes several set-asides. One option for funding needs for migrant housing would be to create another set-aside program within the CDBG appropriation. In 1998, CDBG included \$480 million in funding for set-aside programs, and allocated \$4.195 billion to States and cities by formula. The 1999 Budget reduced the number and funding for set-asides, thus increasing the amount of funds available for distribution to States and cities by \$238 million, to \$4.43 billion.

Both House and Senate versions of the VA-HUD bill include more set-asides than the President's Budget, but still increase funding available to distribute to States and cities slightly over 1998 enacted (the House provides about \$4.39 billion and the Senate about \$4.37 billion in formula funding -- rough estimates). In general, HUD argues to decrease the amount of set-asides within this program and in the HOME program (see description below). Still, this is an option for both CDBG and HOME.

--CDBG loan guarantee component. The Section 108 program allows States and cities to borrow 5 times their latest CDBG allocation for community development projects. The 1999 Budget proposed a similar component for the HOME program; under the HOME Loan Guarantee program, HUD would guarantee private loans to jurisdictions of up to five times their most recent HOME allocation for large-scale affordable housing developments in distressed communities. Section 108 receives about \$30 million in discretionary appropriations annually. For 1999, neither chamber has provided funding for the HOME Loan Guarantee program.

--HOME. This program makes funds available to States and localities to increase the supply and affordability of housing and home ownership for low-income families. States and localities have the flexibility to use HOME funds for a wide range of activities; and could decide to address housing needs related to migrant farm workers with these funds if the proposed activities were eligible. The President's Budget requested \$1.550 billion for this program. The Senate version of the VA-HUD bill provides \$1.550 billion; and the House version provides \$1.6 billion.

--Office of Rural Housing and Economic Development. Within the 1999 appropriations, the Senate provided \$35 million for an Office of Rural Housing and Economic Development within HUD; the House did not fund this initiative. This was NOT a Presidential request. Of these funds: \$10 million would be used to establish a clearinghouse of ideas for innovative strategies for rural housing and economic development, \$5 million would be provided as seed money to Indian tribes and community development corporations in states which have limited capacity in rural areas; and \$20 million would go to state housing finance agencies and Indian tribes to support innovative community development initiatives in rural communities.

--HUD Colonias Initiative. Of HUD's FY 1998 funds, \$5 million is currently available and has been targeted to support assistance to organizations administering projects to address the housing needs of colonia residents in rural areas. A colonia is any identifiable community that is within the border region and meets certain requirements. Of the total amount available, HUD anticipates making grants totaling \$4 to \$5 million to address housing needs in the four border states where colonias are found (California, Arizona, New Mexico, and Texas.); and providing up to \$1 million to one or more intermediary organizations that would provide capacity building loans, grants, or technical assistance to local nonprofit organizations serving colonia residents. Funds will be distributed on a competitive basis and applications are due August 14th, 1998.

United States Department of Agriculture.

--Rural Housing Service. The FY 1999 Budget includes \$45 million in farm labor housing program level funding (\$32 million in loans and \$13 million in grants), which is an increase of \$20 million over FY 1998. This is split into two different areas: (1) loans to growers which provides 100% rental assistance to the migrant worker, and (2) grants to the farmer used to lower their mortgage payments. The House and Senate loan levels, \$20 million and \$16 million, respectively, are more than the FY 1998 funding loan level of \$15 million. If the program received the House level of \$20 million, this would roughly equate into 100 more housing units (estimated 400-600 more migrants housed depending on the type of unit--family or single).

Department of Defense. It is doubtful that housing will be available from base closures. The Base Realignment and Closure process requires many steps prior to a building being made available including whether the military needs the property for something else, whether another federal agency wants it, whether the homeless need it (under the McKinney Act). If the answer

to each of these is no, it can then be sold (or sometimes conveyed) to a private party or to the local reuse authority. The majority of this process is managed at the local level. Unfortunately many of the facilities are in poor condition and are not safe for habitation. Information on precise number of housing units still habitable is decentralized and will take some time to consolidate. It may be possible to locate a few buildings if there was a list of specific areas of the country that would be useful (for example California, Florida, Texas, North Carolina, etc..).

Federal Emergency Management Agency (FEMA). Section 408 of the Stafford Act provides FEMA with the authority to provide temporary housing to disaster victims - this includes providing mobile homes. FEMA also has the authority to "sell or otherwise make available temporary housing units directly to States, other government entities, and voluntary organizations." However, the law indicates that the transfer or sale of temporary housing units can only be completed if the use of these units by the recipients (States or other government entities) is limited to the "purposes of providing temporary housing for disaster victims in major disasters or emergencies."* FEMA is also limited to providing temporary housing to victims of Presidentially declared areas.

*There was not enough time to look into the legal interpretation of this section.

Other Departments. The Department of Education, General Services Administration, and Department of Justice had nothing to offer.

II. Transportation.

Department of Transportation.

--Access to Jobs. This program provides transportation for moving people from welfare to work. It is a new discretionary grant program. It may be possible to stretch this program for use of transporting migrants. However, some groups will likely protest this idea given it was not within the initial purpose of the program and it is meant to be a local transit program.

--Formula Program for Other than Urban Areas. This program provides funds to localities for rural transportation. It is a formula grant program distributed according to a legislative formula. The Federal government cannot tell the localities how to direct the funds. It is unlikely that localities would want to use these funds for migrant transportation.

Possible "Pilot" Projects

- Worker Registry

- Employment Eligibility Verification:
 - ⇒ U.S. Employment Service
 - ⇒ INS Verification Pilot Program

- Housing Voucher with responsibility for arranging housing

- Transportation Advance Fund

- Different use of State Monitor Advocates

Immig - H2A

DATE: June 9, 1998

TO: Julie Fernandes, DPC

FROM: John Fraser, DOL *JF*

SUBJ: H-2A Program "Streamlining" Concepts and Possible Timeline

This forwards for your consideration and further discussion a summary of previously-discussed possible proposals for administrative and regulatory "streamlining" of the H-2A temporary nonimmigrant agricultural worker program based on DPC-led discussions among DOL, USDA and INS staff. The proposals are grouped in implementation packages, with discussion of estimated time frame for completion - obviously for further discussion.

As we discussed earlier, the Deputy Secretary wants to assure that future discussions of these proposals occurs in the context of broader concerns about additional steps that the Federal government can take to address other substantive impediments to use of the H-2A program - such as the limited availability of farm worker housing.

I'll take the liberty of forwarding a copy of the attachment to Keith Collins at USDA and Bob Bach at INS for their perusal and to facilitate their consideration/reaction. They have not seen this before or collaborated in its development though that certainly would have been desirable if time had allowed.

Please let me know if you have questions and how you would like to proceed from here.

Attachment

**TEMPORARY NONIMMIGRANT AGRICULTURAL (H-2A) WORKER
PROGRAM "STREAMLINING"**

Concepts and Timeline

Pursuant to:

- A 1997 request from Congressman Sanford Bishop (D-Ga) on behalf of Georgia farmers;
- The recommendations of - and agencies' response to - the GAO's December 1997 report, "*H-2A AGRICULTURAL GUESTWORKER PROGRAM: Changes Could Improve Services to Employers and Better Protect Workers*"; and,
- DPC-led discussions among various White House offices, DOL, USDA and INS about proposals for H-2A program "streamlining":

there is some consensus to consider proceeding with a package of proposed H-2A program reforms that could serve to streamline operations of the program without significantly weakening existing farm worker protections. These reforms - which, if adopted, could all be implemented through rulemaking or administratively - stand in contrast to legislative proposals that keep resurfacing which achieve H-2A program "streamlining" principally by eliminating and weakening existing worker protections.

The H-2A reform package consists of the following components - organized in categories relating to the manner in which they would need to be implemented - for ease of discussion of the associated time frame for implementation:

A. DOL Administrative Implementation

1. In the DOL/ETA/USES labor certification process, require "positive recruitment" of U.S. farmworkers 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.

This change in H-2A program procedures has already been implemented via ETA/USES General Administrative Letter (GAL) directive.

2. Post employers' H-2A job orders on America's Job Bank (AJB).

AJB provides this facility; some H-2A orders are already so posted. Greater exploitation of AJB depends on simplification of the job order information, as discussed below (see item 13. below).

3. ETA/USES count as "available" for employment - and, thereby, certify fewer H-2A workers than requested by the employer - only those U.S. workers who are identified by name, address and SSN.

This change in H-2A program procedures has already been implemented via ETA/USES General Administrative Letter (GAL) directive.

4. ETA/USES consistently meet existing seven (7) day deadline - after initial receipt of employers' application - to give written notification to the employer of deficiencies precluding adjudication of the application.

This performance improvement is to be facilitated by approval of a pending reprogramming request to provide automated support for the labor certification process. Such automation could be implemented within six-to-eight months of the availability of funding. Even additional resources may be required to achieve the performance goal.

5. ETA/USES consistently meet existing 20 day deadline - prior to the employers' "date of need" - to issue approved certifications.

Like 4. above, this performance improvement is to be facilitated by approval of a pending reprogramming request to provide automated support for the labor certification process. Such automation could be implemented within six-to-eight months of the availability of funding. Even additional resources may be required to achieve the performance goal.

6. Increase number of H-2A workers certified to replace ostensibly U.S. workers with invalid SSN who are hired and subsequently abandon employment.

Current H-2A program procedures accommodate additional certification within 72 hours of request.

B. DOL Rulemaking Proposals

7. Require employers' H-2A labor certification applications to be submitted 45 - rather than 60 - days before the employers' "date of need."

8. Reduce the deadline for employer-provided housing to be available for inspection (from 30) to 15 days before the "date of need."

9. Provide an exception from current program requirement – that growers use registered farm labor contractors (FLCs, or “crew leaders”) 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 (unauthorized) workers or other labor abuses.
10. Allow H-2A program applicant-employers to include a bonding requirement for FLCs they may employ so as to protect themselves from risks such as the FLC employing illegal workers or failing to perform.
11. ETA/USES extend to Wage and Hour the authority to temporarily debar violating employers which commit serious labor standards or H-2A program violations from future use of the H-2A program.
12. Eliminate requirement that certified H-2A employer provide notice of H-2A workers' departure for the place of employment.

With the absolutely minimum amount of time for DOL activities, a rulemaking process involving these proposals (nos. 7. - 12.) – which under more normal procedures would require at least 14 months to complete – could be completed within about 11 months of initiation, as follows:

- 30 days (1 month) – DOL draft and internally clear proposals
- 90 days (3 months) – OMB review/clearance
- 45 days (1.5 months) – Public review/comment period (NOTE: extension requests are likely)
- 60 days (2 months) – DOL review public comments and, based thereon, draft/ internally clear final rule
- 90 days (3 months) – OMB review/clearance
- 15 days (0.5 month) – Finalize for publication

Of course, this schedule could be substantially reduced by shortening OMB's review time at two stages in the process, but there are many factors that can contribute to delays in such timetable.

If there is a need to complete a rulemaking within the next 6-7 months – in time for most H-2A applications for next season – the only realistic approach would be to further reduce the scope of the rulemaking – for example, to items 7., 9., and 11. above. Even so, it will be extremely difficult to accomplish in such a timeframe.

Other H-2A reform proposals requiring DOL rulemaking include:

13. Simplify H-2A application and related documentation – both job order application and accompanying disclosure documentation – for ease of integration with AJB, to

accommodate electronic filing by employer-applicants, and to further ease application information burden on previous program users found in compliance with program requirements.

These proposals could be included in the rulemaking package (items 7. - 12.) discussed above but would likely be even more controversial and contentious, and therefore possibly slow down the entire process substantially. It is, therefore, suggested that these important reforms be approached on a separate track through an attempt at "negotiated rulemaking" involving principal stakeholders. This approach would add six months before any rulemaking process commenced.

DOJ/INS and DOL Rulemaking Proposal

14. INS delegate H-2A petition approval authority to DOL allowing reduction (from a three-) to a two-step process (DOL and State, without INS adjudication) and simultaneous approval of H-2A certification and petition approval (by DOL).
15. INS - or DOL - issue petition approval (I-797) for replacement of certified H-2A worker on proof of worker's repatriation.

It is DOL's view that proposed implementation of these proposals would require rulemaking by both DOJ and DOL. These rulemaking proceedings would not have to be sequential, but neither could they be simultaneous - at least without very substantial lead-time for coordination/preparation. DOL estimates that the timetable for completing companion rulemaking initiatives by INS and DOL would be about 20 months from initiation (subject to further consultations with INS and State).

MEMORANDUM

To: Elena Kagan
Sally Katzen

From: Julie Fernandes *JRF*

cc: Cecilia Rouse

Date: June 10, 1998

Re: Background memo for Deputy's meeting on H-2A guestworker reform

Agricultural "guestworkers" are admitted on H-2A visas for temporary jobs. In order to be allowed H-2A workers, an employer must prove 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 are further required to provide free housing to workers outside the commuting area; reimburse workers inbound transportation if they complete half the contract, outbound also if they complete the contract; 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.

The H-2A program is used primarily in the East Coast. Western growers have generally not tried to use the H-2A program and likely rely more heavily on unauthorized workers. There is no cap on the number of H-2A visas granted -- in FY 96, H-2A admissions totaled 9,635. There were 1,930 applications made to DOL in FY96 (each application petitions for multiple workers).

In June 1995, agreeing with the recommendation of the Commission on Immigration Reform, the President stated his opposition to a new guestworker program. He also made clear that if the crackdown on illegal immigration contributes to labor shortages, he would direct the Departments of Labor and Agriculture to work cooperatively to improve and enhance the existing H-2A program. On March 12th of this year, the House Judiciary Subcommittee on Immigration approved legislation, sponsored by Rep. Robert Smith (R-Ore), that provides for a new pilot guestworker program. This legislation establishes a 24-month pilot program to test new procedures for companies to secure approval to employ temporary foreign agricultural workers. The bill proposes the elimination of many of the worker protections in the existing H-2A program, including the housing requirement (only requires the provision of housing if that is the "prevailing practice in the occupation and area"), transportation allotment, and the use of

the adverse effect wage rate.¹ In a March 12, 1998 letter to Chairman Lamar Smith, Secretary Herman stated that if this legislation were presented to the President, she would recommend a veto.

Farmer advocates continue to argue that the crackdown on illegal immigration, coupled with the shortage of U.S. farmworkers, has caused them to have to rely on a dysfunctional H-2A program. However, though it is likely true that the INS is doing a better job at cracking down on the illegal farmworker population, it is also likely true that there is no overall shortage of farmworkers in the U.S. A recent (December 1997) GAO study concluded that agribusiness does not now and will not soon face an agricultural labor shortage. The GAO's finding of a labor surplus echoes the conclusions of the U.S. Commission on Agricultural Workers (1992), the U.S. Commission on Immigration Reform reports (1995 and 1997), and recent academic studies. While the GAO suggests that there could develop localized labor shortages, it noted the widespread belief that employers should respond to the market place by increasing wages, improving recruitment and modernizing their labor practices. Further, GAO cited a study which concluded that substantial wage increases would have little effect on consumer produce prices or international competitiveness.

The farmer advocates want reform of the H-2A program that would essentially legalizes their current workforce, under the current terms. That would mean a guestworker program that does not include the provision of housing or transportation, does not require domestic recruitment, and does not require the paying of the adverse effect wage rate. The farmers are willing to pay a little more to insure a workforce (now that they are getting raided by the INS) but not to go much further. The farmworker advocates are generally in favor of reforms, but will want us to go further to leverage for strengthening worker protections.

Our reform proposal is designed to streamline the H-2A program, to improve the ability of growers to obtain workers when needed and to better protect the wages and working conditions of both domestic and foreign workers. The two key political issues that this presents are: (1) whether our reform package serves as a good defense to new guestworker legislation; and (2) if so, does it go far enough?

I am sending you both copies of the Labor Department's reform proposal. As Fraser indicates, this proposal is the result of a collaborative effort between INS, DOJ and USDA (with a little facilitating from our end).

In advance of the meeting, I will forward you a detailed agenda.

¹ The Department of Labor determines the minimum rate to be paid by employers of H-2A workers, based on wage surveys conducted by USDA. This so-called "adverse effect wage rate" is designed to mitigate any negative effect employment of these workers may have on domestic workers similarly employed.

H-2A Reform Proposal

This proposal is for a NPRM in four parts. Part I would discuss the steps already taken by DOL to streamline the H-2A program. Part II would lay out the reforms that are being noticed for rulemaking. Part III would preview a proposed rule that is under development and would give a firm deadline for noticing that rule. Part IV would mention other areas where we are considering reform.

Part I

Actions accomplished

(by General Administrative Letter (GAL) directive)

- a. The Labor Department now requires "positive recruitment" of U.S. farmworkers 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.
- b. The Labor Department now counts as "available" for employment only those U.S. workers who are identified by name, address and social security number.
- c. The Labor Department has submitted a reprogramming request to Congress that would allow for the provision of automated support for the labor certification process. Such automation could be implemented within six to eight months of the availability of funding.

This automation would affect both the goal of meeting the existing 7-day deadline after receipt of initial application to notify employer of deficiencies precluding adjudication of the application and the 20-day deadline -- prior to the employers' "date of need" -- to issue approved certifications.

Part II

Rulemaking proposals -- Stage 1

- a. Require employers' H-2A labor certification applications to be submitted 45 (rather than 60) days prior to the employers' "date of need."
- b. Reduce the deadline for employer-provided housing to be available for inspection from 30 to 15 days prior to the employers' "date of need."
- c. Growers will no longer be required to use a registered farm labor contractors (FLCs or "crew leaders") as a source of U.S. workers if the FLC has a demonstrated history of employing illegal or unauthorized workers or of other labor abuses.
- d. Eliminate requirement that certified H-2A employers provide notice of H-2A workers' departure for the place of employment.

Part III

Rulemaking proposal -- Stage 2

This notice would set a deadline (120 days?) for noticing a rule that effects this reform. This reform would likely require rulemaking by both DOJ and DOL.

- a. INS to delegate H-2A petition approval authority to DOL. Removing the INS adjudication step will result in a two-step (State -- DOL) process, rather than a three-step (State -- INS -- DOL) process. DOL will then provide simultaneous approval of H-2A certification and petition approval.

Part IV

Rulemaking proposal -- Stage 3

This notice would mention the following other reforms as possibilities for future rulemaking.

- a. Allow H-2A program applicant-employers to include a bonding requirement for FLCs they employ. This will help protect employers from risks such as the FLC employing unauthorized workers or failing to perform.
- b. The Wage & Hour division at the Labor Department will have the authority to temporarily debar employers who commit serious labor standards or H-2A program violations from future use of the H-2A program.
- c. INS (or DOL) will issue petition approval (I-797) for replacement of certified H-2A workers upon proof of the worker's repatriation.
- d. Simplify H-2A application and related documentation -- both job order applications and accompanying disclosure documentation -- for ease of integration with America's Job Bank (AJB). This simplification will accommodate electronic filing by employer-applicants and will further ease application information burden on previous program users found in compliance with program requirements.

Issues

1. Does the substance and schedule seem reasonable?
2. Will this proposal be effective in staving off congressional efforts to enact new guestworker legislation?
3. Labor wants to be able to tell members of Congress that OMB has promised to expedite their review so that the new regulations will be in place by January or February of 1999 (next growing season). What kind of promise can Labor make?
4. Should we, as our proposal reflects, preview the reforms that we hope to pursue in a future rulemaking (Part IV)? Or should we wait until we are ready to issue the next NPRM?

Background on H-2A guestworker reform

1. H-2A — in general

Agricultural “guestworkers” are admitted on H-2A visas for temporary jobs. In order to be allowed H-2A workers, an employer must prove 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 provide free housing to workers outside the commuting area; reimburse workers’ inbound transportation if they complete half the contract, outbound also if they complete the contract; guarantee 3/4 of the hours of the contract (the 3/4 guarantee); and hire any qualified U.S. worker who applies during the first half of the work contract (the 50% rule). There is no cap on the number of H-2A visas granted. In in FY 1996, H-2A admissions totaled 9,635.

2. Recent legislative efforts

In June 1995, in response to efforts in Congress to pass legislation that would create a new guestworker program (without the worker protections present in the existing program) and agreeing with the recommendation of the Commission on Immigration Reform, the President stated his opposition to a “new guestworker program.” However, he also stated that if the crackdown on illegal immigration contributes to labor shortages, he would direct the Departments of Labor and Agriculture to work cooperatively to improve and enhance the existing H-2A program.

On March 12th of this year, the House Judiciary Subcommittee on Immigration approved legislation, sponsored by Rep. Robert Smith (R-Ore), that provides for a new pilot guestworker program. This legislation establishes a 24-month pilot program to test new procedures for companies to secure approval to employ temporary foreign agricultural workers. The bill proposes the elimination of many of the worker protections in the existing H-2A program, including the housing requirement (only requires the provision of housing if that is the “prevailing practice in the occupation and area”), transportation allotment, and the use of the adverse effect wage rate.¹ The bill further eliminates the requirement that the Department of Labor determine that there are not sufficient legal U.S. workers available at the time and place of need. Rather, the bill would require only that the grower file a “labor condition attestation” with the office of the state job service. The attestation would be deemed accepted within 7 days, unless the agency finds that it is “incomplete or obviously inaccurate.” In a March 12, 1998 letter to Chairman Lamar Smith, Secretary Herman stated that if this legislation were presented to the President, she would recommend a veto.

¹ The Department of Labor determines the minimum rate to be paid by employers of H-2A workers, based on wage surveys conducted by USDA. This so-called “adverse effect wage rate” is designed to mitigate any negative effect employment of these workers may have on domestic workers similarly employed.

In recent weeks, Senators Wyden and Graham have asked the Department of Labor to support their efforts to legislatively reform the existing H2A program, in ways similar to the Smith proposal.

3. A new guestworker program?

Grower advocates argue that they continue to experience difficulties in finding domestic farmworkers and that the H-2A program is slow, cumbersome, and expensive. However, a recent (December 1997) GAO study concluded that agribusiness does not now and will not soon face an agricultural labor shortage. The GAO's finding of a labor surplus echoes the conclusions of the U.S. Commission on Agricultural Workers (1992), and the U.S. Commission on Immigration Reform reports (1995 and 1997). While the GAO report suggested that there could develop localized labor shortages, it noted the widespread belief that employers should respond to the market place by increasing wages, improving recruitment and modernizing their labor practices. Further, the GAO report cited a study which concluded that substantial wage increases would have little effect on consumer produce prices or international competitiveness.

Many growers blame the INS's recent crackdown on undocumented farmworkers for the shortages of domestic farmworkers and their need to rely on a dysfunctional H-2A program.

4. The Administration's recent efforts

Our goal is to reform the H-2A program so that it works more effectively to provide temporary foreign workers when shortages exist. However, we also want the program's current regulations to be enforced and to explore reforms that would ensure that the program isn't being used to displace U.S. workers.

Earlier this month, the Administration put forth a proposal to streamline the H-2A program (OIRA is close to completing its review of the proposed rule). These reforms are targeted at improving how H-2A applications are processed and reducing paperwork and delay. However, there remain several substantive aspects of the program that are need of reform: wage requirements, housing, and the requirement of positive domestic recruitment by growers.

5. The Labor Department's position and the current legislative picture

Though the Labor Department understands and supports our position in opposition to legislation that would create a new guestworker program, they have asked us on a couple of occasions whether they could send a letter to Wyden and Graham that generally supports their efforts to enact new guestworker legislation. They have said that because Wyden and Graham are Democrats, we should respond in a generally positive way to what they are doing. We (DPC/NEC) have strongly opposed the Administration giving any indication of support for the Wyden/Graham legislation. Also, because there is little to no chance of the Wyden/Graham legislation going anywhere this year, we see no need to weigh in at this time.

6. Our next steps

Despite not wanting to in any way indicate support for any of the current legislative efforts to reform the H-2A program, we continue to want to engage in a process with the DOL, USDA and other agencies to find solutions to some of the difficult issues presented by this program, such as how to better guarantee fair wages for farmworkers; the issue of the lack of safe and decent housing for migrant farmworkers; and whether we need to develop better ways of ensuring that growers are making good faith efforts to access the domestic labor market.

We are recommending a meeting with DOL and USDA in order to make sure that we are all on the same page. Though the USDA agrees with our position, their career staff (who deal regularly with the program) has been pressing hard for ways to make the program cheaper and more efficient for growers. It is likely that USDA staff has been working with some Senators (like Wyden and Graham or Smith) in the development of alternative legislative proposals. Though the Labor Department would like to see increased worker protections, improved conditions, and wage reform, they are somewhat afraid of the bloody battle that would be pitched by the growers if any movement is made in that direction. They also seem eager to please Senator Coverdell (who has a hold on two of their nominations and wants lots of pro-grower reform to the H-2A program) and Senators Wyden and Graham (they say, because they are Democrats).

Thus, it is important that we reiterate to DOL and USDA that we do not and will not support any of the current legislative efforts, but that we are committed to cautiously proceeding with a process that looks at the most difficult issues, including wages, housing and enforcement of current regulations that protect U.S. workers, with the hope of proposing a new set of substantive reforms in the next couple of months.

Immig - H2A

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

July 30, 1998

The Honorable Paul Coverdell
United States Senate
200 Russell Building
Washington, D.C. 20510

Dear Senator Coverdell:

We have long been aware of your interest in reforming the current H-2A program, and I have appreciated our discussions on the changes your farmers feel are necessary to the current program. You have raised a number of important issues regarding migrant workers in agriculture which the Department needs to consider carefully.

In response to your recent correspondence related to the Georgia growers' "10-point" plan, I have outlined to you our concerns with these proposals, but have indicated a willingness to discuss them in greater detail. The Department of Labor takes your concerns very seriously and wants to respond constructively. I propose that we organize a bi-partisan working group to carefully examine your specific concerns along with others proposed by Members of Congress. It would be my intention to begin work on this in the fall.

If the efforts of this working group lead to a consensus on how best to address these important labor issues, I will give the group's views the most serious consideration with the understanding that this is becoming a concern among a growing number of Members of Congress.

We look forward to working with you on this important issue.

Sincerely,



Alexis M. Herman

Immig - HA

▶ Julie A. Fernandes

07/29/98 10:44:27 AM

.....

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc:

Subject: H1B -- Abraham compromise legislation

Gene and Peter met with Abraham yesterday afternoon to discuss H-1B legislation. According to Peter, Gene was tough (we need labor protections) and Abraham was intransigent. Peter got us a bootleg draft of the Abraham compromise. We then sat down with the DOL to analyze what it would mean.

Though the bill has moved in our direction, there are still some areas where we need to push back. For example: (1) the bill exempts from the attestations employers that are more than 15% H-1B and does not count more highly skilled workers (that earn more than \$60K) toward this number; (2) the legislation mandates that disputes over whether a U.S. worker was denied employment in favor of an H-1B worker (part of the good faith recruitment attestation) would be settled by binding arbitration. The worker would have to prove their case by clear & convincing evidence; it is unclear who would pay for this process; if the arbitration board determines that the U.S. worker was unfairly denied an employment opportunity, there is no sanction; and (3) the bill severely weakens the prevailing wage determination by allowing the use of private wage surveys, even if the Secy of Labor determines that the survey is no good.

We have discussed the problems with the bill with Peter. Peter is meeting with George Fishman (Smith's staff person) this afternoon (who, according to Peter, shares some of our concerns). Also, Smith is meeting with Gingrich this morning to try to convince him to intervene on his behalf (Smith is getting a lot of pressure from Abraham, etc. to further weaken the worker protections).

julie

lunny - H2A

▶ **Julie A. Fernandes**
07/24/98 09:42:36 AM
.....

Record Type: Record

To: Elena Kagan/OPD/EOP, Maria Echaveste/WHO/EOP
cc: Laura Emmett/WHO/EOP, Marjorie Tarmey/WHO/EOP
Subject: H2A vote in the Senate

FYI. Yesterday, the Senate voted 68 to 31 in favor of the Smith/Wyden H2A amendment. However, two secondary amendments were included: (1) a Feinstein amendment that permits the Secretary of Labor to limit the number of H2A visas issued; and (2) a Kennedy amendment that provides that the President, in implementing this title, shall not implement any provision that he deems to be in violation of any of the following principles (then attached the DOL list of principles). Also, the provision for a user fee was struck (this fee was to go into a fund to pay for the registry).

Also, Feinstein's office called the DOL late yesterday. They stated that Bob Graham wants to work on compromise legislation and asked to meet with DOL and the CA growers to try to work something out. Labor asked why a farmworker advocate was not also included in the mix. Feinstein's staff stated that she thought that the DOL was that advocate. DOL explained that the farmworkers don't see it that way, and that it would be best to have someone from that side also at the table.

julie

Immig - H2A

Senator Ron Wyden
United States Senate
Washington D.C. 20515-3703

Dear Senator: (not sent - Wyden rejected)

Thank you for sharing your concerns and your willingness to engage as a constructive partner in the ongoing development of our agricultural labor policy and addressing any H2-A program reforms.

The Administration shares your goal of assuring 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.

I believe that if we are able to work within these principles, we will be able to achieve our goals.

The Departments of Agriculture and Labor have committed to work cooperatively to improve and enhance existing programs to meet the labor requirements of our vital agricultural industry, consistent with our obligations to American workers and producers, particularly, if efforts to halt illegal immigration contribute to agricultural labor shortages. In response to concerns regarding localized shortages, these Departments will work cooperatively to determine means of streamlining the current H2-A program to make it more responsive to agricultural producers and more effective in protecting U.S. workers.

As a first step, the Administration has initiated a rule making process to streamline the H-2A program which is to be completed by the end of January, 1999. This would ensure that the changes are in place for next year's growing season. In addition, in response to the growing concerns regarding the supply, adequacy and cost of migrant worker housing, we are looking Administration-wide at alternatives available to address the issue.

We recognize the need for reform of the H2-A program. We are eager to engage in an inclusive, bi-partisan process involving all the major stakeholders to identify and craft appropriate program reforms, possibly involving legislative changes. We are committed to exploring innovative policy proposals, including provisions in your legislation which are designed to increase program efficiency without sacrificing worker protections. We would like to work with you in this spirit to accomplish appropriate reforms this year.

Sincerely,

Alexis M. Herman
Secretary of Labor

Daniel Glickman
Secretary of Agriculture

Immig-H2A

▶ **Julie A. Fernandes**
07/21/98 12:29:43 PM
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Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP
Subject: H2A

I just heard from Barbara Chow that Wyden and Graham are going to try to attach their H2A legislation to the CJS appropriations bill in the Senate this afternoon. Labor has drafted a statement in response (that they are faxing over) that may not be strong enough. The Secretary of Labor issued a veto threat on a similar bill introduced in the House several months ago.

julie

several Republican senators "want to offer amendments as well." Asked whether debate is likely to start within the next nine days, Daschle's aide said: "We certainly hope so."

Centrist Alternative Increasingly Likely. As Democrats and Republicans continue discussions, Sen. John Chafee appears increasingly likely to introduce a bill with Sens. Joseph Lieberman and Bob Graham, which has been described as a "centrist, bipartisan" approach. The Chafee/Lieberman/Graham version would reportedly include many less-controversial "patient protection" measures, while also omitting more controversial provisions like the Democrats' right to sue health plans, as well as the Republicans' malpractice caps and Medical Savings Account expansion. Chafee/Lieberman/Graham would reportedly also build upon the GOP appeals process with civil and monetary penalties. A House version of the centrist bill is reportedly being crafted by some "very prominent Republicans."

House Rules Committee Prepares To Meet. House members are preparing for the Rules Committee to consider managed care legislation tomorrow or Thursday, with the intent of starting floor debate on Friday. The Committee will decide the way in which floor debate will be conducted. Following efforts to push a vote on a Democratic bill through a discharge petition, House GOP leaders have announced that a petition is unnecessary because a vote will be held on the Democratic bill.

House Democrats – who have objected to GOP plans for moving directly to the floor with managed care legislation – are today and tomorrow hosting their own informal hearings on the Republican legislation. At today's event, HHS Secretary Donna Shalala criticized the GOP plans in both chambers, saying: "Sadly, the Republican proposals, while differing in some details, do not provide the kind of protection that the American people need and deserve. They are certainly too little. We hope they are not too late." Shalala reiterated a list of ways in which the Administration objects to the GOP House and Senate bills, adding: "Beyond what is missing from the Republican bills, I am troubled by some of what is included. The Republican leadership has purposely included several 'poison pills' designed to kill any chances we have of bipartisan legislation this year. For example...the Republicans want to push through an immediate expansion of [Medical Savings Accounts], these risky, untested insurance schemes. They also want to place a cap on malpractice awards, despite the fact that even the AMA has said that item should be taken off the table. And, finally, they want to allow small companies to drop out of the insurance market and self-insure. These provisions have no place in this legislation and should be dropped."

- o **Wyden, Smith Introduce Farm Workers Bill.** Sens. Ron Wyden and Gordon Smith are expected to hold a press conference this morning to introduce the Agricultural Job Opportunity and Security Act. "The fact is the current agricultural labor system, for both workers and growers, is a mess," Wyden says in prepared remarks. "It leaves too many workers in shoddy working conditions, and too many farmers on the brink of bankruptcy." The legislation would create a national computerized registry of available American farm workers, to which growers could turn before hiring migrant workers. "Growers have long contended there are not sufficient numbers of such workers, while farm worker advocates contend that there are," Wyden is expected to say. "The registry would answer and resolve this controversy." The legislation would also make "changes in the farm labor system that will improve benefits and working conditions for farm workers and their families," according to Wyden. These include changing the tax structure so that migrant and American workers "cost" the same to employers and requiring that growers provide either housing or housing vouchers for farm workers and that they pay "the communities' prevailing wage, which will always be higher than the minimum wage," according to Wyden. Asked whether the bill had the support of the Clinton Administration, a Democratic source told the Bulletin this morning, "We've been talking with them, we've made some changes that they've asked for, we're still working with them." Sens. Larry Craig, Bob Graham, Slade Gorton, Dale Bumpers, Mitch McConnell and Connie Mack, all co-sponsors of the legislation, are also expected to attend.
- o **Slow Progress In US-India Nuclear Talks, Both Sides Say.** Deputy Secretary of State Strobe Talbott today concluded a third round of talks with Indian officials over nuclear policy. Both sides reported they are making slow progress. US Embassy spokeswoman Kiki Munshi said there has been "steady movement" in the talks. Talbott and Jaswant Singh, a top foreign policy advisor to Indian Prime Minister

Immig - H2A

Bruce - FYI
Elena**U.S. DEPARTMENT OF LABOR**
SECRETARY OF LABOR
WASHINGTON, D.C.

The Honorable Ron Wyden
United State Senate
Washington, D.C. 20510-3703

Dear Senator Wyden:

This letter presents the Administration's views on your proposed amendment to the Commerce, Justice, State, and Judiciary appropriations bill, S. 2260. While the Administration shares your goal of assuring that our agricultural labor policy and any reform of the H-2A program both provides growers with a predictable and reliable labor supply, and assures adequate workplace protections for domestic and foreign farm workers who are among the poorest and most vulnerable in our society, the Administration strongly opposes your amendment.

The President opposes legislation that would create a new guest worker program. This position is consistent with the findings and recommendation of two bi-partisan commissions -- the Commission on Agricultural Workers and the Commission on Immigration Reform. However, he has directed that if efforts to halt illegal immigration contribute to agricultural labor shortages, the Departments of Agriculture and Labor should work cooperatively to improve and enhance existing programs to meet the labor requirements of our vital agricultural industry, consistent with our obligations to American workers. While the General Accounting Office has recently reported (December 1997) that "ample supplies of farm labor appear to be available in most areas" there is some possibility of localized shortages relating to specific crops or geographic areas.

The Administration's guiding principles in reforming the H-2A program are attached. We are currently engaged in a process of reform consistent with these principles, and we invite a constructive partnership.

In response to concerns regarding localized shortages, the Departments of Agriculture and Labor have been working cooperatively under the aegis of the Domestic Policy Council and the National Economic Council to develop administrative and regulatory reforms to the current H-2A program to make it more responsive to agricultural producers and more effective in protecting U.S. workers.

As a first step, the Administration has initiated a rulemaking process to streamline the H-2A program that is to be completed by the end of January 1999, for next year's growing season. In response to the growing concerns regarding the supply, adequacy and cost of migrant worker housing, we are looking Administration-wide at alternatives and resources available to address the issue.

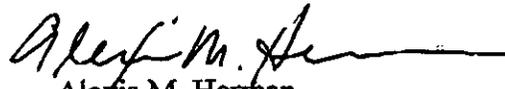
WORKING FOR AMERICA'S WORKFORCE

-2-

We want to continue to explore policy proposals which increase our ability to achieve our above stated goals. We would like to work with you in this ongoing process. However, we do not believe that your proposed amendment, which makes changes to the agricultural farm worker program that weaken the labor protections for migrant farm workers, accomplishes these goals.

The Office of Management and Budget advises that there is no objection to presentation of this report from the standpoint of the Administration's program.

Sincerely,


Alexis M. Herman



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.

luning - H2A

▶ **Julie A. Fernandes**
07/23/98 10:35:04 AM
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Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP
Subject: H2A

Elena,
According to the Labor Dept., Wyden tried to convince G. Smith not to offer the H2A amendment to the CJS bill. Wyden was unsuccessful, and Labor sent the "strongly opposed" letter. The H2A amendment is now listed as one of 13 amendments to be offered today. Senator Kennedy has reserved the ability to offer a second degree amendment and is looking for a poison pill. Labor is working with Kennedy on that. Labor is also going to try to work the Dems. to minimize the number of Democratic votes for this.

julie

Immig - H2A

▶ **Julie A. Fernandes**
07/21/98 12:57:15 PM
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Record Type: Record

To: Elena Kagan/OPD/EOP, Maria Echaveste/WHO/EOP, Cecilia E. Rouse/OPD/EOP, Sally Katzen/OPD/EOP
cc: Leslie Bernstein/WHO/EOP, Laura Emmett/WHO/EOP, Shannon Mason/OPD/EOP
Subject: H2A statement

I just spoke again with Barbara Chow. She has asked Labor to draft a letter in opposition to the Wyden/Graham bill (instead of this weak statement). Barbara spoke with Martha, who agrees that a statement like their earlier draft would encourage passage of the amendment. Barbara agrees that the letter should strongly oppose the legislation and, if it is similar enough to the Smith bill, should threaten a veto. Barbara also thinks that we should try to get USDA to sign on to the letter. I am going to speak to David Carlen (Asst. Secy. for Cong. Affairs).

julie

Immig- H2A

Senator Ron Wyden
United States Senate
Washington D.C. 20515-3703

Dear Senator:

Thank you for sharing your concerns and your willingness to engage as a constructive partner in the ongoing development of our agricultural labor policy and addressing any H2-A program reforms.

The Administration shares your goal of assuring 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.

I believe that if we are able to work within these principles, we will be able to achieve our goals.

The Administration charges the Departments of Agriculture and Labor to work cooperatively to improve and enhance existing programs to meet the labor requirements of our vital agricultural industry, consistent with our obligations to American workers and producers, particularly, if efforts to halt illegal immigration contribute to agricultural labor shortages. In response to concerns regarding localized shortages, these Departments will work cooperatively to determine means of streamlining the current H2-A program to make it more responsive to agricultural producers and more effective in protecting U.S. workers.

As a first step, the Administration has initiated a rule making process to streamline the

H-2A program which is to be completed by the end of January, 1999. This would ensure that the changes are in place for next year's growing season. In addition, in response to the growing concerns regarding the supply, adequacy and cost of migrant worker housing, we are looking Administration-wide at alternatives and resources available to address the issue.

We recognize the need for reform of the H2-A program. We are eager to engage in an inclusive, bi-partisan process involving all the major stakeholders to identify and craft appropriate program reforms, possibly involving legislative changes. We are committed to exploring innovative policy proposals, including provisions in your legislation which are designed to increase program efficiency without sacrificing worker protections. We would like to work with you in this spirit to accomplish appropriate reforms this year.

Sincerely,

Alexis M. Herman
Secretary of Labor

Daniel Glickman
Secretary of agriculture

Read this A

Immig - H2A

▶ **Julie A. Fernandes**
07/07/98 02:16:26 PM
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Record Type: Record

To: Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP, Cecilia E. Rouse/OPD/EOP, Peter G. Jacoby/WHO/EOP
cc: Laura Emmett/WHO/EOP, Shannon Mason/OPD/EOP
Subject: H2A legislation?

FYI. I just heard from the Labor Department that Sen. Graham's office called to say that he plans to introduce his H2A legislation this week (Friday). According to Earl (from DOL) this bill should look like the prior version -- creation of a registry of H2A workers; funded through H2A fees (equal to what the employer would have to pay under FICA if hired a U.S. worker); eliminates the adverse effect wage rate and instead requires payment of 105% of the prevailing rate (based on a regional survey by DOL). It is still not clear whether this kind of legislation has legs, though Earl remains skeptical. We hope to see a copy of this soon.

julie

Draft DOL H-2A Statement for the AP 7/21/98 12:18 p.m.

The Department of Labor has been working with Senators Graham and Wyden on their ideas for reforming the H-2A agricultural worker program. We share their goals of achieving greater stability in the agricultural workforce, so that our nation's agricultural producers and farm workers both benefit. Growers must have a more predictable and reliable labor supply, while we assure adequate workplace protections for domestic and foreign farm workers, who are among the poorest and most vulnerable in our society. We are reviewing their legislation and considering what further changes in the program are warranted, in light of administrative and regulatory reforms that the Department is already pursuing.

▶ **Julie A. Fernandes**
06/30/98 06:16:06 PM
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Record Type: Record

To: Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP, Cecilia E. Rouse/OPD/EOP, Maria Echaveste/WHO/EOP
cc: Leslie Bernstein/WHO/EOP, Laura Emmett/WHO/EOP, Shannon Mason/OPD/EOP
Subject: H2A

All:

FYI. The Department of Labor is drafting a response to the Coverdell memo re: reforms to the H2A program. This letter will discuss why the various reforms that Coverdell wants will not be included in the Department's first round of rulemaking. They are also drafting a more general document (2-3 pages long) that discusses both our general position/principles re: the H2A program and the various proposals to enact new guestworker legislation.

According to Labor (and we would need to confirm with Peter when he returns) neither of the Senate bills that would create a new guestworker program could pass the Senate. Lamar Smith in the House is not anxious to move on the House guestworker bill. He has indicated that he wants to wait and see what the Senate does. Thus, the Department's efforts are focused on freeing its nominee for Assistant Secretary for ETA.

We hope to have drafts of the two documents sometime tomorrow.

Julie

▶ Julie A. Fernandes
06/19/98 09:50:57 AM
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Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP
Subject: H2A -- meeting summary

Elena,

At yesterday's H2A meeting, it was decided that the Labor Department will draft a NPRM that includes the following six regulatory reforms:

1. Require employers' H2A labor certification applications to be submitted 45 (rather than 60) days prior to the employers' "date of need."
2. Reduce the deadline for employer-provided housing to be available for inspection from 30 to 15 days prior to the employers' "date of need."
3. Growers will no longer be required to use a registered farm labor contractor (FLC or "crew leader") as a source of U.S. workers if the FLC has a demonstrated history of employing illegal or unauthorized workers or of other labor abuses.
4. Eliminate requirement that certified H2A employers provide notice of H-2A workers' departure for the place of employment.
5. INS to delegate H2A petition approval authority to DOL.
6. DOL will issue petition approval for replacement of certified H2A workers upon proof of the worker's repatriation.

These last two reforms impact the INS, so they will also need to do rulemaking. Sally gave them (DOL and DOJ/INS) a deadline of COB Thursday (June 25th) to give us drafts of these rules.

Also, the Labor Department will draft a letter to Sen. Coverdell that expresses our intentions on these reforms. This letter will also commit the DOL to initiating a process to address the more substantive areas of concern with the program. This last statement will likely signal to growers and farmworker advocates that we are planning to take on the wage and housing issues. We should see a draft of this letter tomorrow (Friday).

The general sense was that these reforms (particularly #5) will adequately respond to growers' concerns re: timeliness in the processing of H2A applications. Our hope is that the letter's signal on the housing and wage issues will indicate that we see this rulemaking as a first step and that we intend to tackle the more difficult parts of the program that need reform soon.

Julie

▶ **Julie A. Fernandes**
06/26/98 12:36:34 PM
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Record Type: Record

To: Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP, Cecilia E. Rouse/OPD/EOP
cc: Laura Emmett/WHO/EOP, Shannon Mason/OPD/EOP
Subject: H2A letter

All:
I just spoke with Earl from Labor. Secretary Herman has had a couple of phone conversations with Sen. Coverdell today, and he was unpersuaded to release their nominee based on our reform commitments. Labor is sending out the letter that reflects what we are doing to Abraham, Smith, Kennedy and Watt (with cc: to the rest of the committee members) today.

Earl is also forwarding to me a summary of what Coverdell was asking for.

Julie

▶ Julie A. Fernandes
06/12/98 11:36:40 AM
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Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP
Subject: H2A

Elena,
John Fraser (from DOL) tells me that Sen. Coverdell has put a hold on the President's nomination for Asst. Secretary for ETA at Labor and is demanding a meeting with Secretary Herman on what can be done to reform the H2A program. Coverdell's interest likely stems from the recent issue involving vidalia onion growers in Georgia (INS raided; LOTS of illegal workers found; INS agreed to let them stay and finish the picking; growers claim they have to use illegals b/c they can't find U.S. workers and the H2A program is so slow and bad. According to the Labor Dpt., the company had rejected use of the H2A program b/c Labor had insisted that they pay the intrastate average wage of .80 per bag, rather than the interstate average of .70 - .75 cents per bag).

Kitty Higgins from Labor wants us to move quickly to determine what kind of reform package we can commit to, in the hopes that it will be enough to lift the hold on their nominee.

I am putting together a short document that will more simply explain the Labor proposal. You should have that by Monday am.

Julie