

# Report for Congress

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## **Immigration of Agricultural Guest Workers: Policy, Trends, and Legislative Issues**

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# Immigration of Agricultural Guest Workers: Policy, Trends, and Legislative Issues

## Summary

Several major proposals to revise U.S. immigration policy on agricultural guest workers were introduced in the 107<sup>th</sup> Congress. Though prior Congresses had debated but not enacted such bills, there appeared to be more momentum in 2001. President George Bush and Mexican President Vicente Fox established a Cabinet-level immigration working group that was expected to offer a guest worker program as part of its package. The September 11 terrorist attacks, however, shifted the immigration policy focus, and the 107<sup>th</sup> Congress did not act on guest worker bills.

Although the current mechanism for bringing in agricultural guest workers, the H-2A nonimmigrant visa, has experienced a modest surge in recent years, the 28,560 H-2A nonimmigrants admitted in 1999 comprise only a tiny fraction of the 1.2 million farm workers in the United States. While 61% of farm workers in the United States worked in fruit, nut, or vegetable production, a disproportionate number of H-2A workers — 42% — worked in tobacco cultivation. States in the southeastern United States account for more than half of all H-2A job certifications.

Agricultural employers argue that the H-2A visa in its current form is insufficiently flexible, entails burdensome regulations, and poses potential litigation expenses for employers. They point out that the growing cycle is the actual deadline and that workers must be available when the crops are ready or food costs will rise. Proponents of this view support extensive changes that they believe would increase the speed by which employers could hire foreign workers and reduce the government's ability to delay or block employment. Proponents of an expanded program express concern that the large number of illegal aliens in agriculture, in combination with stepped up enforcement of immigration laws, is resulting in an unstable workforce and a potential labor shortage.

Opponents of revising the H-2A visa requirements contend that there is a surplus of U.S. farm workers and that a sufficient number of seasonal agricultural workers would continue to be available even if illegal migration abates. While many agree that the H-2A process has excessive administrative paperwork, opponents also argue that much of the streamlining proposals, such as further reductions in filing deadlines and relaxation of employment certification procedures, would weaken protections for domestic workers and make foreign workers more vulnerable to exploitation. They warn that an expansion of the H-2A visa would suppress wages of domestic workers and exacerbate “unfair” working conditions for all workers.

Some of the opponents as well as supporters of expanding the H-2A visa agree that unauthorized farm workers who meet certain conditions should be allowed to legalize their immigration status. While some see a legalization provision as an essential part of the legislation, others view it as a deal breaker. Any “amnesty” for illegal migrants, they maintain, only fosters further flows of illegal aliens. Another option — rather than legalizing the current unauthorized work force — would establish ground rules for guest workers employed in agriculture for a specified period of time over several years to adjust in the future to legal permanent residence.

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# Immigration of Agricultural Guest Workers: Policy, Trends, and Legislative Issues

## Background

### Introduction

Farm work is arduous and seasonal, and it does not sustain a permanent, year-round work force. The work life of a farm worker is relatively short; few work in agricultural production beyond the age of 44, reportedly due in large part to the physical demands of the work. Seasonal farm jobs, moreover, pay relatively less than many other occupations. The migratory nature of the work poses additional difficulties for workers who have families. As a consequence, farm work has typically not been an attractive choice for most people entering the labor market.<sup>1</sup>

During the 20<sup>th</sup> century, U.S. agricultural producers often turned to foreign workers as a source of labor. Between 1942 and 1964, Mexican farm workers worked legally in the United States under the auspices of the Mexican Bracero program, a temporary foreign agricultural worker program established initially to meet World War II labor shortages. U.S. agricultural producers employed more than 400,000 foreign workers a year during the Bracero program's peak in the last half of the 1950s.

Since the end of the Bracero program, Mexican farm workers increasingly have worked here illegally.<sup>2</sup> In 1997, the U.S. General Accounting Office (GAO) estimated that approximately 600,000 farm workers were working in the United States without legal authorization, an estimate some consider to be a conservative figure.<sup>3</sup> U.S. Department of Labor (DOL) data estimate that, by 1999, over half (52%) of U.S. farm workers were unauthorized, up from 37% in 1995.<sup>4</sup>

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<sup>1</sup> For analysis of the composition of the seasonal farm labor force and trends in wages and employment, see CRS Report 95-712, *Immigration: The Labor Market Effects of a Guest Worker Program for U.S. Farmers*, by Linda Levine; and CRS Report RL31614, *Labor Market Characteristics of Agricultural Workers in the United States, 1996-2000*, by Gerald Mayer.

<sup>2</sup> For further discussion, see CRS Report RL30395, *Farm Labor Shortage and Immigration Policy*, by Linda Levine

<sup>3</sup> *H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers* (GAO/HEHS-98-20), December 1997, p. 7.

<sup>4</sup> U.S. Department of Labor, *Findings from the National Agricultural Workers Survey 1997-1998*, Research Report No. 8, March 2000.

## H-2A Nonimmigrant Visa

Since 1964, the only legal temporary foreign agricultural worker program in the United States has been the nonimmigrant visa program known as H-2/H-2A. A nonimmigrant is an alien legally in the United States for a **specific purpose** and a **temporary period of time**, such as foreign students, tourists, or diplomats. There are 70 nonimmigrant visa categories specified in the Immigration and Nationality Act (INA), and they are commonly referred to by the letter that denotes their section in the statute.<sup>5</sup> The major nonimmigrant category for temporary workers is the H visa.<sup>6</sup> The temporary foreign agricultural worker program was first authorized as the H-2 program in 1952 and amended as the H-2A program in 1986.<sup>7</sup>

The H-2A program provides for the temporary admission of foreign agricultural workers to perform work that is itself temporary in nature, *provided U.S. workers are not available*. In contrast to the H-1B nonimmigrant visa for professional specialty workers, the H-2A visa is not subject to numerical restrictions. It is administered jointly by the DOL's Employment and Training Administration and the Department of Justice's Immigration and Naturalization Service (INS). The prospective H-2A worker also must file an application for a nonimmigrant visa with the U.S. Department of State (DOS) consulate abroad.

In 2001, the Mexican state of Zacatecas organized a new agency, the state migration institute, to coordinate recruitment activities between U.S. growers, the Mexican consulate, and workers seeking agricultural jobs in the United States. In this pilot program the provincial government has established, potential H-2A workers register with state officials who, in turn, assist them with the documentation needed for an H-2A visa. The Zacatecas pilot project reportedly is aimed at reducing fraud and illegal migration as well as matching up agricultural workers with employers in the United States.

## Procedures and Requirements

### Labor Certification

The H-2A visa requires that employers conduct an affirmative search for available U.S. workers and that DOL determine that admitting alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. This process — known as labor certification — is similar but not identical to the process required of employers who seek to bring in workers as permanent,

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<sup>5</sup> For a full discussion and analysis of nonimmigrant visas, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

<sup>6</sup> Temporary **non-agricultural** workers in seasonal occupations are admitted on H-2B visas.

<sup>7</sup> INA §101(a)(15)(H)(ii)(a).

employment-based immigrants.<sup>8</sup> Employers must apply to DOL for certification that unemployed domestic workers are not available and that there will not be an adverse effect from the alien workers' entry.<sup>9</sup> Employers seeking alien workers are required to apply for certification at least 45 days in advance of the estimated date of need. DOL is required to act on H-2A certification requests at least 30 days in advance of the date of need, establishing a limited 15-day domestic recruitment period.

## Required Benefits

Beyond the procedural requirements mentioned above, the H-2A visa has requirements aimed at protecting the alien H-2A workers from exploitive working situations and preventing the domestic work force from being supplanted by alien workers willing to work for sub-standard wages. The H-2A visa requires employers to provide their temporary agricultural workers the following benefits.

- The employer must offer the H-2A workers the same wages as similarly situated U.S. workers, known as the "adverse effect wage rate."<sup>10</sup>
- The employer must provide the worker with an earnings statement detailing the worker's total earnings, the hours of work offered, and the hours actually worked.
- The employer must provide transportation to and from the worker's temporary home, as well as transportation to the next workplace when that contract is fulfilled.
- The employer must provide housing to all H-2A workers who do not commute. The housing must be inspected by DOL and satisfy the appropriate minimum federal standards.
- The employer must provide the necessary tools and supplies to perform the work (unless it is generally not the practice to do so for that type of work).
- The employer must provide meals and/or facilities in which the workers can prepare food.
- The employer must provide workers' compensation insurance to the H-2A workers.

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<sup>8</sup> In a 1998 audit, the Labor Department's Office of the Inspector General concluded that "the H-2A certification process is ineffective. It is characterized by extensive administrative requirements, paperwork and regulations that often seem dissociated with DOL's mandate of providing assurance that American workers' jobs are protected." *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*, Report 04-98-004-03-321, March 31, 1998.

<sup>9</sup> The labor market test required for H-1B temporary professional workers, known as labor attestation, is less stringent than labor certification. Attestation was part of a compromise package on H-1B visa that included annual numerical limits in the Immigration Act of 1990 (P.L.100-649). See CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty Workers (H-1B) Workers*, by Ruth Ellen Wasem.

<sup>10</sup> For a more complete explanation of this provision and how it works, see CRS Report RS21015, *The Adverse Effect Wage Rate (AEWR)*, by William Whittaker.

H-2A workers, however, are exempt from the Migrant and Seasonal Agricultural Worker Protection Act that governs agricultural labor standards and working conditions as well as from unemployment benefits (Federal Unemployment Tax Act) and Social Security coverage (Federal Insurance Contributions Act). Farm workers in general lack coverage under the National Labor Relations Act provisions that ensure the right to collective bargaining.

## Enforcement and Penalties

The Secretary of Labor has the authority to investigate and impose penalties upon H-2A employers to assure compliance with the program's contractual obligations. The regulations provide for the following enforcement actions:

- denial of labor certifications against any person for a violation of the H-2A obligations of the INA or the regulations;
- administrative proceedings to recover unpaid wages, the enforcement of contractual obligations, and the assessment of a civil monetary penalty against violators of the H-2A obligations or the regulations;
- temporary or permanent injunctive relief; and
- specific performance of contractual obligations.

Concurrent enforcement actions may be taken to assure compliance with the contractual obligations and the law and regulations. Civil monetary penalties may be assessed for each violation of the work contract or the regulations. The penalty may be up to \$1,000 for each violation against each worker. Further, any interference with the DOL's investigative actions or enforcement authority is cause for a civil monetary penalty not to exceed \$1,000.<sup>11</sup>

## Visa Processing

After DOL approves the labor certification petition, the employer files a petition with INS for named or unnamed alien beneficiaries. When INS approves the petition, it forwards the notice of the approval to the appropriate DOS consular office.<sup>12</sup> The alien who is the intended beneficiary then applies for the H-2A visa at the consular office abroad. DOS issues the visa for a period up to 1 year in duration. Extensions of the H-2A visa may be granted for up to a total of 3 consecutive years.

In an effort to streamline the process, the Clinton Administration proposed a regulatory change to transfer authority to adjudicate as well as certify H-2A requests from INS to DOL, which was to take effect on July 13, 2000.<sup>13</sup> This transfer of

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<sup>11</sup> INA § 218(g)(2); 29 CFR Part 501.

<sup>12</sup> For more background and discussion of visa processing, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

<sup>13</sup> *Federal Register*, v. 65, no. 135, July 13, 2000, pp. 43528-43534, and 43538-43544.

authority, however, has been deferred.<sup>14</sup> Under the proposed regulations, INS would continue to retain the authority to adjudicate requests by aliens to extend their H-2A status, as well as to make determinations about an alien's admissibility to the United States at a port of entry. Expedited procedures are provided for administrative review of denials of certification, as well as for a new determination if an application is rejected on the grounds that U.S. workers are available and this proves to be untrue.

## Trends in H-2A Certifications

The number of H-2A workers has always been small in relation to the total number of hired U.S. farm workers. In 1999, almost 1.2 million workers were employed as farm workers and agricultural service workers.<sup>15</sup> In FY1999, DOS's Bureau of Consular Affairs issued 28,560 H-2A visas to foreign agricultural workers, and many of these workers may have ended up working at several locations authorized to employ H-2A workers. The DOL certified 41,827 jobs for H-2A workers.

The trends in H-2A job approvals and visas issued were upward over the past decade. Since FY1995, the number of approved H-2A certifications has been increasing steadily. As **Figure 1** illustrates, the gap between jobs certified by DOL and visas issued by DOS has narrowed considerably over the past decade, due in part to a shift away from recruitment of agricultural workers from certain Caribbean countries where a visa is not required for entry to the United States.<sup>16</sup> Specifically, the increased mechanization of the harvesting of crops, notably sugar cane, appears to have altered recruitment patterns. In the late 1980s, there were four times as many H-2A workers from the Caribbean as Mexico. By FY1999, 96% of all H-2A visas issued by DOS went to workers from Mexico.

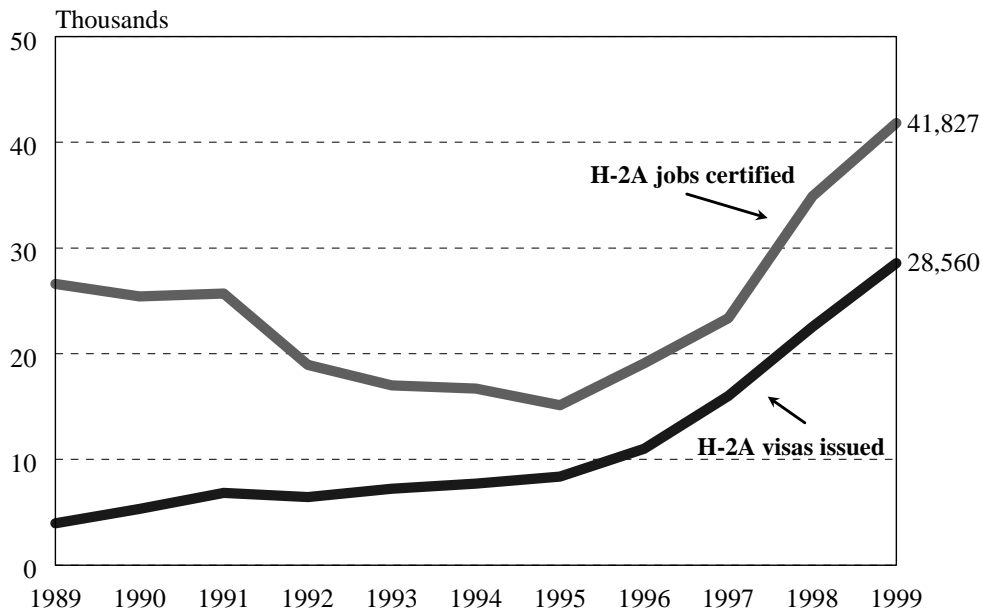
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<sup>14</sup> *Federal Register*, v. 65, no. 219, November 13, 2000, p. 67628. See also §104 of P.L. 106-1033.

<sup>15</sup> For additional information on the data, see CRS Report RL30395, *Farm Labor Shortages and Immigration Policy*, by Linda Levine.

<sup>16</sup> This convergence could be attributable to several other factors as well, such as: H-2A workers are less likely to work multiple jobs; employers are more likely to actually obtain the number of H-2A workers they are certified for; and the H-2A program is operating more effectively, providing more efficient linkages between certified employers and available H-2A workers.



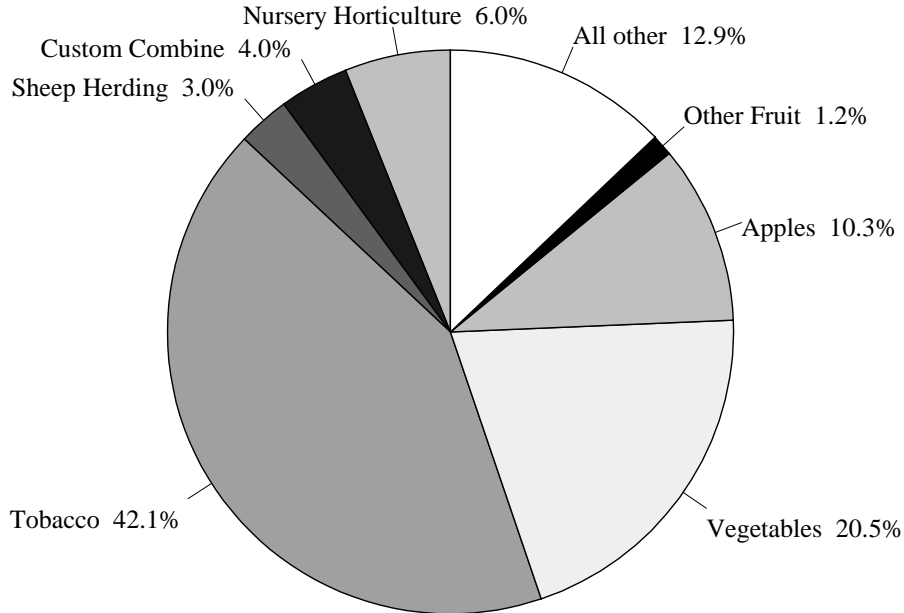
**Figure 1. H-2A Jobs Certified and Visas Issued, FY1989-FY1999**

Source: CRS presentation of data from DOL Employment and Training Administration and DOS Bureau of Consular Affairs.

Various factors have accounted for the increase in H-2A job certifications that began in 1996, most obviously the tighter U.S. labor market and growing familiarity of employers with the H-2A application process. Presumably, the booming economy has provided the domestic agricultural work force with alternatives to farm employment, which in turn prompted growers to rely more on foreign sources of labor. Since a growing portion of farm workers in the United States are unauthorized, i.e., illegal aliens, employers might be more cautious in their hiring practices. For some employers, the H-2A process — even if considered cumbersome — might seem preferable to the risk of legal sanctions for hiring unauthorized workers, especially now that new verification systems using Social Security numbers are going on line. In addition, there have been increased applications from newly participating states, and returning participants have requested certifications for new crops and services.

Work in tobacco overwhelmingly dominated the H-2A jobs certified in FY1999, accounting for about 42% of all certifications. Following at some distance were vegetable harvesting (21%) and apple harvesting (10%), as **Figure 2** illustrates. Other principal crop and livestock activities were: nursery/horticulture, farm machinery (custom combine), sheep herding, and fruit (other than apple) harvesting.<sup>17</sup>

<sup>17</sup> In some instances, vegetable harvesting includes job certifications for mixed crop activities, such as tobacco, hay, straw, and vegetables.

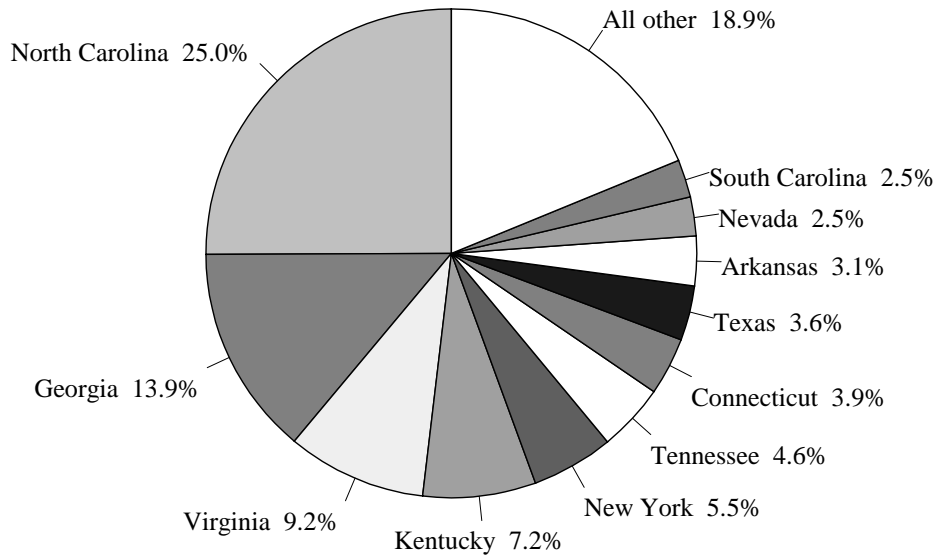
**Figure 2. H-2A Jobs Certified by Principal Activity**

Source: CRS presentation of data from DOL Employment and Training Administration.

The pattern for H-2A workers by crop activity differed from the general pattern of U.S. agricultural workers. Specifically, 61% of agricultural workers were employed in fruit, nut, or vegetable production during 1997-1998. Field crops, of which tobacco is one, accounted for only 16% of farm worker employment.<sup>18</sup> It appears that H-2A workers have been disproportionately employed in field work such as tobacco.

As presented in **Figure 3**, states in the southeastern United States accounted for more than half of all H-2A job certifications in FY1999. North Carolina led in H-2A use, with 10,475 job certifications or 25% of the total. Following North Carolina in number of approved job certifications in 1999 were Georgia (5,825) and Virginia (3,856). The other states receiving more than 1,000 H-2A job certifications were Kentucky, New York, Tennessee, Connecticut, Texas, Arkansas, Nevada, and South Carolina.

<sup>18</sup> U.S. Department of Labor, *Findings from the National Agricultural Workers Survey 1997-1998*, Research Report No. 8, March 2000.

**Figure 3. H-2A Jobs Certified by State**

Source: CRS presentation of data from DOL Employment and Training Administration.

The interrelationship between crop activity and states with the largest numbers of H-2A workers is apparent in more detailed data presented in **Appendix A**. Tobacco is the leading crop in most of the top states with certified H-2A jobs, states mostly in the southeast. On the other hand, H-2A jobs in the cultivation and harvesting of apples, other fruits, and vegetables are spread throughout the United States. As measured by jobs certified, H-2A use has become more diversified by state and activity. For example, from FY1996 to FY1999, the number of states receiving at least one H-2A job certification increased from 31 to 47.

## Legislation in Recent Congresses

In recent years, there have been legislative efforts to modify or supplement the H-2A temporary agricultural program. Agricultural employers have long complained that the program is overly cumbersome, while farm labor advocates have argued that it provides too few protections for U.S. workers. The only legislation enacted dealt with expediting the processing of H-2A applications.

Although media reports at the close of the 106<sup>th</sup> Congress indicated that a new temporary agricultural worker program with a legalization provision would be included in the FY2001 appropriations bill, it was not in the final agreement. The following is a brief overview of the recent legislative efforts concerning the H-2A program.

## Legislation in the 104<sup>th</sup> Congress

A legislative measure to replace the labor certification requirement with a labor condition attestation was proposed but not adopted in the 104<sup>th</sup> Congress. DOL would have been authorized to enforce the attestations in response to complaints that they were not being met or that they misrepresented the facts. This bill would have supplemented the H-2A program with a large-scale, pilot temporary agricultural worker program. Opponents, including organized labor, argued that it would result in temporary foreign workers taking jobs from U.S. workers and remaining in the country as illegal immigrants. The measure was approved by the House Agriculture Committee, but it was defeated when offered as a House floor amendment to an omnibus immigration bill.

Instead, the 104<sup>th</sup> Congress mandated a GAO review of the existing program to determine if it provided an adequate supply of agricultural labor in the event of shortages of domestic workers. In its report issued in December 1997, GAO found that no national agricultural labor shortage then existed or was likely in the near future. They did state, however, that “localized labor shortages may exist for specific crops or geographical areas.”

## Legislation in the 105<sup>th</sup> Congress

Legislation to supplement and eventually replace the current H-2A visa was adopted by a vote of 68-31 on July 23, 1998, as a Senate floor amendment to S. 2260, the FY1999 Commerce, Justice, State (CJS), and Judiciary appropriations bill. It proved controversial during conference negotiations, and was not retained in the final law. Opinions differed widely on the likely impact of the Senate-passed provision on both U.S. workers and illegal immigration.

The Senate amendment would have established a nationwide system of registries to be maintained by DOL. These registries would have operated both as a database of currently available, legal U.S. workers and as the gateway to the employment of foreign workers. If domestic workers were not available through the registries, the employer could petition for H-2A workers to make up the shortage. Another departure from current practice would have allowed H-2A workers to apply for legal permanent residence (LPR) status under the current numerical limits after 4 consecutive years of employment for periods of 6 months in H-2A status.

## Legislation in the 106<sup>th</sup> Congress

P.L. 106-78, the FY2000 Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, §748, amended the INA to reduce from 60 to 45 days the maximum period of time prior to need that employers must file H-2A labor certifications; and increased from 20 to 30 days the minimum days in advance of need before DOL must act on H-2A certification requests. DOL had already amended its regulations, effective July 29, 1999, to reduce from 60 to 45 days the period of time prior to need that employers must file labor certifications. In combination, the two changes shortened the domestic recruitment period to 15 days, a move not favored by DOL. The Clinton

Administration reportedly would have preferred that the H-2A program be streamlined through administrative rather than legislative changes.

Legislation that formed the basis of a bipartisan compromise that failed to be accomplished in the final days of the 106<sup>th</sup> Congress was S. 1814, the “Agricultural Job Opportunity Benefits and Security Act of 1999” that Senator Gordon Smith introduced. It evolved from legislation passed by the Senate in the 105<sup>th</sup> Congress, with the notable addition of language providing for “amnesty,” i.e., the legalization of unauthorized guest workers. A companion bill to S. 1814 (H.R. 4056) was introduced in the House. Another Senate bill (S. 1815) included only the amnesty title of S. 1814. On May 4, 2000, the Senate Judiciary Committee’s Immigration Subcommittee held a hearing on S. 1814.

S. 1814 consisted of three interrelated parts that would have authorized, in addition to the amnesty provision, a system of agricultural registries and revision of the current H-2A visa, as described briefly below:

- Title I would have established a time-limited amnesty program for aliens who have worked here illegally in seasonal agriculture, and who continue to do so for a specified time. To be eligible to participate in a *temporary* status, they must have worked for 150 days during a 12-month period prior to October 27, 1999. They could have applied to adjust to lawful *permanent* resident status, outside existing numerical limits, after working in seasonal agriculture for 180 days during 5 of the next 7 years.
- Title II would have required the Department of Labor to maintain a system of agricultural worker registries that would list U.S. citizen and immigrant workers as well as workers participating in the amnesty program. The legal status of workers listed on the registry would have been guaranteed. Agricultural employers seeking H-2A workers would first have been required to apply for workers from this registry before their H-2A applications could be considered.
- Title III would have streamlined the current H-2A program by, among other things, eliminating the domestic job search requirement — which would have been replaced by use of the agricultural registry — and allowing employers to offer a housing allowance in lieu of the guaranteed housing currently required.

S. 1814 was the subject of considerable controversy, with then House Immigration Subcommittee Chairman Lamar Smith characterizing the amnesty program as “indentured servitude.” In support of his bill, Senator Gordon Smith said, “We should not have illegal workers. We should have a legal system.”

A related bill, the “Agricultural Opportunities Act” (H.R. 4548), would have established a pilot “H-2C” alien agricultural worker program to supplement the existing H-2A program. Like S. 1814/H.R. 4056, H.R. 4548 would have required DOL to maintain a system of agricultural worker registries containing a database of authorized U.S. workers. Under H.R. 4548, agricultural employers would have had to apply for registry workers before being allowed to import H-2C workers. Unlike S. 1814/H.R. 4056, however, H.R. 4548 would not have provided amnesty. On

September 20, 2000, the House Judiciary Committee completed its markup of H.R. 4548 and ordered the bill reported, as amended, by a vote of 16-11. No further action was taken once the bill was reported.

## **Legislation in the 107<sup>th</sup> Congress**

On February 16, 2001, President George Bush met with Mexican President Vicente Fox, and immigration was a major part of their discussions. As a result, the two presidents established a Cabinet-level working group to develop “an orderly framework for migration that ensures humane treatment [and] legal security, and dignifies labor conditions.” U.S. Secretary of State Colin Powell, Mexican Foreign Minister Jorge Castaneda, U.S. Attorney General John Ashcroft, and Mexican Interior Secretary Santiago Creelto are leading the group. Media reports in the summer of 2001 indicated that this group might recommend a broad guest worker program with Mexico. There was considerable speculation that the bi-lateral proposal would cover temporary employment in sectors of the economy in addition to agriculture and may include an avenue for the guest workers to become LPRs.

Several H-2A reform bills were introduced in the 107<sup>th</sup> Congress, but there was considerable variation in scope and effect of the proposed revisions. Media reports indicated that various other Members of Congress considered drafting legislation on agricultural guest workers as well.

S. 1161, the “Agricultural Job Opportunity, Benefits, and Security (AgJOBS) Act of 2001,” had some features similar to legislation with the same name in the 106<sup>th</sup> Congress (S. 1814). The bill, sponsored by Senator Larry E. Craig, included the following major elements:

- It would have allowed foreign agricultural workers to become legal temporary residents if they worked 150 days in any consecutive 12-month period during the 18 months prior to July 4, 2001 and are otherwise admissible as immigrants.
- It would have allowed these temporary residents to adjust to LPR status after working 150 days annually in 4 years over a 6-year period and after certain other requirements are met.
- It would also have allowed H-2A visa holders who are adjusting status to work in other industries as long as the agricultural work requirement was met.
- It would have permitted an annual renewal of the temporary work visa for up to 3 consecutive years, after which workers would return for a pro-rated period before reapplying.
- It would have replaced the H-2A labor certification process with a labor attestation process similar to the H-1B process, notably streamlining the process for jobs covered by collective bargaining agreements.

- It would have replaced the “adverse effect wage rate” with a requirement that employers pay the minimum wage or the prevailing wage for agricultural workers in that area.<sup>19</sup>
- It would have allowed employers to provide housing allowances rather than housing itself in areas where the governor of the state determines that housing for migrant workers is available.

Senator Ted Kennedy, chairman of the Senate Committee on the Judiciary Subcommittee on Immigration, and Representative Howard Berman introduced the “H-2A Reform and Agricultural Worker Adjustment Act of 2001” (S. 1313/H.R. 2736). Although this legislation shared many major features with S. 1161, those key elements that differed from S. 1161 are noted in italics below.

- It would have allowed foreign agricultural workers to become legal temporary residents if they have worked in agriculture for at least *90 days* in the *18-month* period prior to July 2001 and are otherwise admissible as an immigrant.
- It would have allowed these temporary residents *as well as their spouses and minor children* to adjust to LPR status after certain other requirements are met.
- It would have permitted an annual renewal of the temporary work visa for up to 3 consecutive years, after which workers would return for a pro-rated period before reapplying.
- It would have replaced the H-2A labor certification process with an attestation process, notably streamlining the process for jobs covered by collective bargaining agreements.
- It would have *retained* the “adverse effect wage rate” but would mandate studies of it.
- It would have allowed employers to provide housing allowances rather than housing itself in areas where the governor of the state determines that housing for migrant workers is available.
- *It would have amended the Migrant and Seasonal Agricultural Worker Protection Act to include H-2A workers and to give all agricultural workers the right to collective bargaining.*
- *It would have required employers to pay a user fee equivalent to the taxes for unemployment benefits (Federal Unemployment Tax Act) and Social Security coverage (Federal Insurance Contributions Act) to fund projects aimed at improving farm labor-management issues and conditions.*

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<sup>19</sup> The adverse effect wage rate is the minimum wage that must be paid to both foreign and domestic agricultural workers when the employer is using nonimmigrant workers. It is intended to be sufficiently high to prevent job substitution by foreign workers and is calculated annually on a state-by-state basis by the U.S. Department of Agriculture. For a more complete explanation, see CRS Report RS21015, *The Adverse Effect Wage Rate (AEWR)*, by William Whittaker.

Although he did not introduce legislation before retiring, former Senator Phil Gramm publicized his “prospectus” for a U.S.-Mexico guest worker program. This prospectus outlined a series of elements, including:

- the expansion of the guest worker program beyond the agricultural sector;
- a 6-month grace period in which unauthorized workers could apply for guest worker visas and employers would not be penalized for having hired illegal workers;
- the option for an annual renewal of the temporary work visa for up to 3 consecutive years, after which workers would return to Mexico for a year before reapplying;
- the establishment of a computer registry to monitor the entry and exit of guest workers;
- the issuance of identification cards for all guest workers to use as employment authorization cards;
- the strengthening of enforcement and penalties for employment of illegal aliens; and
- the requirement that employers show a good faith effort recruit to U.S. workers and offer guest workers the same pay and benefits given to other workers in the same job.

The Gramm prospectus would not have offered legalization or status adjustment opportunities for foreign agricultural workers. Instead of having a direct pathway for guest workers to become LPRs, it would have required that they return to Mexico and apply to immigrate through the normal channels.

In addition to these broad H-2A proposals, Representative Chris Cannon introduced a bill (H.R. 2457) that would have limited the wages that DOL may require an employer to pay H-2A workers. The bill would have amended the INA to replace the “adverse effect wage rate” with a requirement that employers pay the minimum wage or the prevailing wage for agricultural workers.

## **Current Issues and Debate**

A range of issues and controversies has shaped the debate over agricultural guest workers. The questions that follow are not meant to be exhaustive, but to convey the main cleavages in legislative discussion. If legislation advances in the 108<sup>th</sup> Congress, additional questions may arise.

### **Is There an Adequate Supply of Domestic Farm Workers?**

This question dominates the debate over an agricultural guest worker program. Employers argue they must go abroad because there is not an adequate supply of farm workers in the United States, and advocates for farm workers contend there is a surplus. Opponents of broadening the H-2A visa maintain that a sufficient number of seasonal agricultural workers will continue to be available, even in the unlikely event that illegal immigration is curbed. Employers point to the large number of



unauthorized migrants in the agricultural work force and assert that it is too risky to rely on undocumented workers.<sup>20</sup>

## **Is the H-2a Visa Responsive to the Work Force Needs of Agriculture?**

Many argue that the H-2A visa in its current form is insufficiently flexible, entails burdensome regulations, and poses potential litigation expenses for employers. Proponents of this view support extensive changes — particularly moving from labor certification to labor attestation — that they believe would increase the speed with which employers could hire foreign workers and reduce the government’s role in delaying or blocking such employment.

Opponents to statutory changes argue that the attestation process may be adequate for the H-1B visa because those foreign workers must meet educational and work experience requirements, but that an attestation process would be an insufficient labor market test for jobs that do not require a baccalaureate education and skilled work experience. They already express concern that the recently enacted legislation reducing the number of days DOL has to process labor certifications will undermine the integrity of the process.

Some maintain that employers who have collective bargaining agreements with their domestic workers should be afforded a streamlined attestation process. Proponents of this position argue that collective bargaining agreements would enable the local labor-management partnerships to develop the labor market test for whether foreign workers are needed.

## **Should Alien Guest Workers Be Able to Adjust to LPR Status?**

Supporters of an “amnesty” for those unauthorized farm workers in the United States argue that those who have been working in the fields thus far should be allowed to legalize their status before the United States expands the admission of new guest workers. Supporters maintain it is only fair to provide LPR status to those already here before admitting new workers. On the other hand, others assert it is unfair to allow those who entered illegally to jump ahead of the millions of people waiting abroad for an LPR visa. Opponents to a legalization program warn that it would only serve as a magnet for future flows of migrants hoping for another legalization program.<sup>21</sup>

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<sup>20</sup> For a complete analysis and discussion of this question, see CRS Report RL30395, *Farm Labor Shortages and Immigration Policy*, by Linda Levine.

<sup>21</sup> The Immigration Reform and Control Act of 1986 included a provision that legalized 1.1 million farm workers — known as the “special agricultural workers” (SAWs) — and added a formula-based program for future admissions of farm workers — referred to a “replenishment agricultural workers” (RAWs) — that was never triggered.

Rather than provide a blanket legalization, many would establish ground rules for unauthorized workers currently employed in agriculture for specified periods of time over several years to adjust to legal permanent residence. Others maintain that even “earned” legalization undermines the temporary nature of guest worker visas because, they argue, it fosters hope of future amnesties. Some opponents label such proposals as “indentured servitude.” Still others express concern that the work histories required by some proposals are too high a threshold for most migratory farm workers to meet and will result in raised expectations of LPR status that the foreign workers will not be able to achieve.<sup>22</sup>

## **Are Domestic Farm Workers Sufficiently Protected from Adverse Effects of Foreign Workers?**

Supporters of protections for domestic farm workers maintain that these workers already face depressed wages and rough working conditions, with an unemployment rate well above the national average and most living below the poverty level. A larger and less restrictive guest worker program, they assert, would only further drive down employment, wages, and working conditions of domestic farm workers.

Others argue that the current H-2A requirements are over-protective of workers and have the potential to create situations in which the foreign workers get better treatment than domestic workers.<sup>23</sup> For example, they are especially critical of the adverse effect wage standard, arguing that it ensures that employees at sites with H-2A workers get above-average wages and that it ultimately has an inflationary effect.

Some offer the expansion of collective bargaining rights to agricultural workers as the best protection for domestic farm workers. Advocates of this view assert that as employers recognize and negotiate contracts with labor organizations, the wages and working conditions for all farm workers will improve.

## **What Benefits Should Employers Provide Agricultural Guest Workers?**

Some question whether the current set of required benefits that employers provide H-2A workers makes sense in today’s economy. Some stakeholders see the program requirements as burdensome to verify and would prefer a standard in which employers attest that they are providing the same benefits to foreign workers that they now provide to domestic workers. While some would replace the requirement to provide housing and transportation, for example, with housing and transportation vouchers, others maintain that vouchers are useless in rural areas where housing and transportation are not available. The latter often argue that foreign as well as domestic farm workers should have better compensation, and broader benefits (such

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<sup>22</sup> For background on related legislation, see CRS Report RL30780, *Immigration Legalization and Status Adjustment Legislation*, by Ruth Ellen Wasem.

<sup>23</sup> For a synthesis of research studies on the labor market effects, see CRS Report 95-712, *Immigration: Labor Market Effects of Temporary Alien Farm Worker Programs*, by Linda Levine.

as healthcare and Social Security), and that foreign workers should be covered by the Migrant and Seasonal Agricultural Worker Protection Act and the collective bargaining provisions of the National Labor Relations Act.

## **Can DOL Develop and Maintain a Registry of the Farm Labor Force?**

Some advocates for revising the H-2A program offer the establishment of a registry of U.S. farm workers available for employment as the key component of the alternative to labor certification.<sup>24</sup> Supporters maintain that this option would prioritize the employment of domestic farm workers, would assure the employers that the workers are authorized to work, and would streamline the H-2A process. Others express concern that the agricultural labor force does not lend itself to an automated registry system, given that farm workers probably are on the losing side of the “digital divide.” They question whether a plan hinging on farm workers “searching the web” for employment is viable. Skeptics of this option also ask whether the U.S. Employment Service or any other government entity is willing and able to reach out to workers on an on-going basis to ensure that the registry is inclusive and up-to-date. Some argue that adequate funding for the registry is essential for its effectiveness and that Congress should appropriate money or institute a fee that employers who hire foreign workers would pay to establish and maintain the registry.

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<sup>24</sup> Under this option, employers would first go to a U.S. Employment Service automated registry to find domestic farm workers; if an insufficient number were available when and where the employer needed them to work, the employer would seek to hire guest workers.

### Appendix A. FY1999 H-2A Workers Approved, by State and Crop

State	Crop/agricultural work	Number workers approved	State	Crop/agricultural work	Number workers approved
Alabama	Horticulture, fruit, sweet potatoes, sheep	364	Nevada	Onions/garlic, irrigation, shepherd, livestock	1,063
Alaska	Sheep shearer	6	New Hampshire	Apples, diversified crops, vegetables	318
Arizona	Shepherd, citrus, farm machinery	92	New Jersey	Fruits, nursery	54
Arkansas	Vegetables, livestock, farm machinery	1,313	New Mexico	Farm work, sheep shearing	9
California	Shepherd onions, grapes	514	New York	Apples, nursery, greenhouse, cabbage, cranberry	2,304
Colorado	Sheep, livestock, farm machinery, orchard work	186	North Carolina	Tobacco, hay/straw, vegetables, Christmas trees, fruits, horticulture	10,279
Connecticut	Tobacco, diversified crops, apples, nursery, Christmas trees, sod, dairy/poultry, vegetables	1,613	North Dakota	Farm work, beekeeping, goatherder	22
Delaware	None		Ohio	Horticulture, vegetable, tobacco, fruits	551
D. C.	None		Oklahoma	Farm machinery, strawberries, farm work	447
Florida	Strawberry, tomato, horticulture, trees, sugar	237	Oregon	Nursery, shepherd, farm work	137
Georgia	Vegetables, fruits, tobacco, pecans, sod, hay	5,845	Pennsylvania	Nursery, Christmas trees	39
Hawaii	None		Rhode Island	Apples	12
Idaho	Shepherd/shearing, irrigation, farm worker	807	South Carolina	Fruits, vegetables, horticulture, grain	1,040
Illinois	Horticulture	26	South Dakota	Shepherd, farm machinery, livestock	8
Indiana	None		Tennessee	Tobacco, horticulture, hay/straw, vegetables, sod, grain, fruits	1,908
Iowa	Poultry, dairy, farm work, farm machinery	72	Texas	Farm machinery/work, diversified crops, cabbage, livestock, vegetables, horticulture, citrus, berries	1,502
Kansas	Farm machinery nursery	200		hay, apples, sod, shepherd	
Kentucky	Tobacco, vegetables, horticulture, sod, hay/straw	3,029	Utah	Shepherd, sheep shearing	162
Louisiana	Farm work, horticulture, nursery, sugar cane	784	Vermont	Apples, diversified crops, poultry, dairy	418
Maine	Apples, blueberries, horticulture	416	Virginia	Tobacco, produce, hay, apples, vegetables, nursery, fruits, Christmas trees, vineyard, sod	3,856
Maryland	Nursery, vegetables, tobacco, dairy, vineyard	320	Washington	Shepherd	13
Massachusetts	Apples, diversified crops, tobacco, vegetables horticulture, farm work, sod	737	West Virginia	Apples, tobacco	93
Michigan	Horticulture, Christmas trees, vegetables	180	Wisconsin	Grain, dairy, vegetables	10
Minnesota	Grain, horticulture, vegetables	36	Wyoming	Shepherd, sheep shearing, wool grading, livestock	201
Mississippi	Fruits, horticulture, fish, vegetable, soybean	438			
Missouri	Goat herding, dairy	8			
Montana	Irrigation, shepherd, farm work/machinery	261			
Nebraska	Potatoes, farm work, livestock, dairy	60			

**Source:** CRS presentation of U.S. DOL/ETA data. In most cases, the data in this chart are from hand counts of regional files. DOL does not guarantee the accuracy of these data but maintains that they are a reasonable indicator of key H-2A activity in each state.