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Immigration: The "H-2A" Temporary Agricultural Worker Program

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Summary

In recent years, there have been various legislative efforts to modify or supplement the existing H-2A temporary agricultural program authorized by the Immigration and Nationality Act (INA). Concern has centered on making the program easier for growers to use while still maintaining protections for domestic labor. Growers have made limited use of the program in the past and a few years ago program usage was in decline. Current trends, however, show an increase due in part to increased demand from tobacco growers. This report provides information on the H-2A program, illustrates current trends, discusses issues raised by the proposed changes, and tracks pending legislation.

Background

Throughout the 20th century, U.S. agricultural producers have depended on foreign workers as a significant part of their seasonal workforce. Between 1942 and 1964, Mexican farm workers generally 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 workers a year under the program at its peak in the last half of the 1950s. Since the end of the Bracero program, Mexican farm workers increasingly have worked here illegally. In what is believed by some to be a conservative figure, the U.S. General Accounting Office (GAO) recently estimated that approximately 600,000 farm workers were working in the United States without legal authorization.[1]

Since 1964, the only legal temporary foreign agricultural worker program in the U.S. has been the permanent but much smaller H-2/H-2A program. It was first authorized as the H-2 program in 1952 and amended as the H-2A program in 1986.

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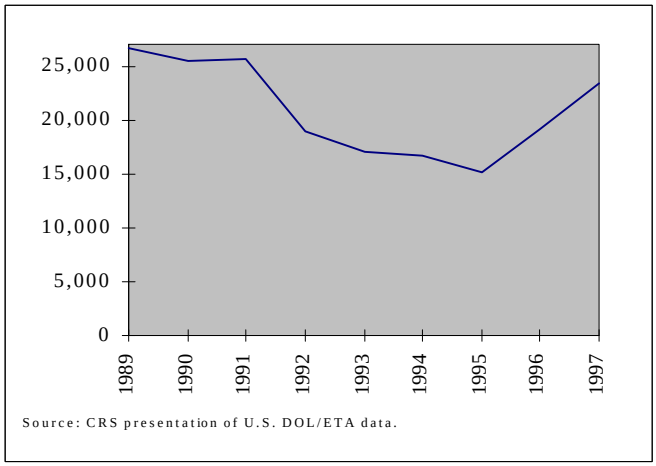
[1] *H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers* (GAO/HEHS-98-20), December 1997, p. 7.

The H-2A Temporary Agricultural Worker Program

The "H-2A" program is authorized by the Immigration and Nationality Act (Section 101(a)(15)(H)(ii)(A) — hence its name). It provides for the temporary admission of foreign agricultural workers to perform work which is itself temporary in nature, *provided U.S. workers are not available.* The program is administered by the Employment and Training Administration in the Department of Labor (DOL/ETA) and the Justice Department's Immigration and Naturalization Service (INS).

Figure 1. Number of H-2A Jobs Certified (1989-1997)



Numbers and Use. The H-2A program has always been very small in relation to the total number of U.S. farm workers. In its 1992 report, the U.S. Commission on Agricultural Workers estimated that there were 2.5 million hired farm workers in the United States.[2] Some experts believe the 1996 figure is approximately the same. In comparison, the Department of Labor approved only 23,352 H-2A job certifications in 1997.

The program's numbers have also varied over the years (see **Figure 1**). The increase in job certifications beginning in 1996 reversed the declining trend of previous years. The average annual number of approvals over the 3-year period 1989-1991 was about 26,000. The average for 1992-1994 declined to about 17,500. In 1995, there were 15,117 approvals. The decline in H-2A job certifications during these years was due mainly to reduced demand by Florida sugarcane producers because of mechanization. Between 1988 and 1992, H-2A certifications in Florida declined by 61%, from about 11,000 to 4,300 approvals.

Various factors accounted for the increase in approvals in 1996 and 1997. According to DOL/ETA, significant factors were applications from new participating states; and returning participants requesting certifications for new crops and services. Increased demand from tobacco growers accounted for the largest number of new job certifications. Of the 23,352 H-2A job certifications approved by DOL/ETA in 1997, 62% were in tobacco. North Carolina alone accounted for 26% of all H-2A job certifications awarded, most of which were in the tobacco industry (see **Table 1**). Led by North Carolina, 9 states accounted for 80% of H-2A activity. The other 8 states were Virginia (16%), Kentucky (10%), New York (9%), Connecticut (6%), Massachusetts (4%), Tennessee (3%), Idaho (2%), and Texas (2%).

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[2] *Report of the Commission on Agricultural Workers*, November 1992, p. 1.

Table 1. FY 1997 H-2A Workers Approved-by State and Crop

State	Crop/Agricultural Work	No. workers approved	State	Crop/agricultural work	No. workers approved
Alabama	Sheepherder	4	North Carolina	Tobacco, vegetables	6,444
Alaska	Animal slaughter	2	North Dakota	Sheepherder, custom combine	4
Arkansas	Vegetable harvest	14	Nebraska	Nebraska	17
Arizona	Sheepherder, farmwork, fruit harvest	197	New Hampshire	Apples, diversified crop, vegetables	334
California	Sheepherder, sheep shearer	441	New Jersey	None	
Colorado	Sheepherder, sheep shearer	212	New Mexico	Sheep shearer	1
Connecticut	Apples, Christmas trees, dairy/poultry diversified crop, nursery, sod tobacco, vegetables	1,290	Nevada	Sheepherder, onions, garlic, farmwork, livestock	427
			New York	Apples, horticulture, livestock	2,122
			Ohio	Vegetables, tobacco, nursery	113
Delaware	None		Oklahoma	Custom combine, vegetables, farm machinery	451
Dist. of Columb.	None		Oregon	Sheepherder, sheep shearer	74
Florida	Sugarcane	4	Pennsylvania	Diversified crops	8
Georgia	Greens/vegetables	170	Rhode Island	Apples, diversified crops	11
Hawaii	None		South Carolina	None	
Idaho	Sheepherder, sheep shearer, irrigators	557	South Dakota	Sheep shearer, custom combine	20
Illinois	Vegetables	185	Tennessee	Tobacco, tomatoes, nursery	755
Indiana	None		Texas	Farmworker, field crops, beekeeper, livestock, custom combine, pecans, horticulture, vineyard, horse trainer, sod, vineyard, farm machinery	521
Iowa	Dairy farm	6			
Kansas	Custom combine	92			
Kentucky	Tobacco, hay, straw, nursery	2,402	Utah	Sheepherder, sheep shearer	179
Louisiana	Sugar cane	173	Virginia	Tobacco, hay, cabbage, vegetables, produce, berries, apples	3,706
Maine	Apples, blueberries, diversified crop,	451			
Maryland	None		Vermont	Apples, diversified crops	449
Massachusetts	Apples, farmworker, diversified crop, nursery, sod, tobacco, vegetables	969	Washington	Sheepherder	16
			West Virginia	None	
Michigan	None		Wisconsin	None	
Minnesota	None		Wyoming	Sheep herder, sheep shearer	261
Mississippi	Nursery, watermelons	45			
Missouri	Sheep shearer	6			
Montana	Sheepherder, custom combine, irrigators	164			

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 this data but feels that it is a reasonable indicator of key H-2A activity in each state.

Procedures. The H-2A program requires an affirmative search for available U.S. workers and a determination that admitting alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Employers must apply to the Labor Department for certification that unemployed domestic workers are not available and that there will not be an adverse effect from the aliens' entry. The Labor Department's certification is advisory only; the final decision to admit H-2A workers is made by INS.

Employers seeking alien workers are required to apply for certification at least 60 days in advance of the estimated date of need.[3] (Prior to the 1986 amendments, applications were required 80 days in advance of the estimated need.) The Labor Department is required to approve or deny certification not later than 20 days before the date of need. Expedited procedures are provided for administrative review of denial 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 not to be true. Protections for alien workers include free housing and workers' compensation provided by the employer.

Issues and Debate

The small temporary agricultural worker program operating under the authority of the INA has been controversial since the Bracero program ended in 1964. The "H-2" program originated as the East Coast supplement to the much larger Mexican program. Western growers have long complained that the H-2/H-2A program is overly cumbersome, while farm labor advocates have argued that it provides too few protections for U.S. workers. In part, the ongoing debate reflects the inherent conflict in the program goals of expeditiously providing employers with foreign workers while protecting U.S. workers.

In a recent 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."[4] There is general agreement between advocates for U.S. farm workers (e.g., the Farmworker Justice Fund, Inc.) and representatives of agricultural interests (e.g., National Council of Agricultural Employers) that the H-2A program is marked by excessive administrative requirement and paperwork. However, this is one of the few points of agreement between growers and U.S. farm workers regarding the H-2A program.

Summarizing the current debate, agricultural employers have argued that the H-2A program in its current form is insufficiently flexible and entails burdensome regulations and potential litigation expenses for employers. Proponents of this view have supported extensive changes that they believe would increase the speed with which employers could hire foreign workers, and reduce the government's ability to delay or block such employment. More recently, proponents of an expanded program have argued that, in

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[3] This time period may be waived in emergency situations for employers who did not use the H-2A program the preceding year, provided that there is an opportunity to obtain sufficient labor market information on an expedited basis. See 20 C.F.R. § 655.101(f)(2) (1997).

[4] *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, p. iv.

light of recent reforms restricting immigration, there is a threat of an agricultural labor shortage. As a result, they believe that there is a need to further simplify the H-2A program. However, opponents of expansion contend that there is already a surplus of U.S. farm workers and that a sufficient number of seasonal agricultural workers would continue to be available in the unlikely event that illegal immigration is significantly reduced. Opponents also argue that further streamlining efforts such as reducing advanced filing deadlines and relaxing employment certification procedures would weaken protections for domestic workers.

A legislative measure to replace the labor certification requirement with a labor condition attestation was proposed but not adopted in the 104th Congress. As noted above, labor certifications require that employers attempt to recruit U.S. workers or demonstrate a worker shortage as conditions for Labor Department certification. The labor condition attestation, however, would have required only that employers state the specified wage rate and that the employment of the farm workers would not adversely affect U.S. workers. 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 measure would have supplemented the H-2A program with a large-scale, pilot "H-2B" temporary agricultural worker program. Opponents of the proposed new program, such as 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 defeated when offered as a House floor amendment to H.R. 2202, an omnibus immigration bill. Instead, Congress mandated a review of the program by GAO to determine if it provides 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. However, they stated that "localized labor shortages may exist for specific crops or geographical areas." In keeping with the subtitle of the report, "Changes Could Improve Services to Employers and Better Protect Workers," GAO suggested improvements in the H-2A program. These included shortening the notice required of employers petitioning for foreign workers from 60 to 45 days in advance of anticipated need, and adopting specific wage guarantees for workers.

Legislation in the 105th Congress

On March 12, 1998, the House Judiciary Subcommittee on Immigration and Claims approved H.R. 3410, the "Temporary Agricultural Worker Act of 1998," for full committee consideration. The bill was introduced on March 10 by by Representative Robert Smith, the Chairman of the Agriculture Committee, and closely resembled H.R. 2377, a bill he had introduced the previous August. The major changes were reportedly made at the request of House Immigration Subcommittee Chairman Lamar Smith.[5] These were the reduction in the number of workers who could be admitted annually from 25,000 to 20,000, and the 10,000 offset from permanent legal immigration numbers during the second year of the program.

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[5] William Branigan, "Republicans Back Measure to Import More Farm Workers," *Washington Post*, March 11, 1998, p. A5.

H.R. 3410 resembles the measure reported by the Agriculture Committee in the 104th Congress, discussed above. The major difference is that H.R. 3410 would establish the "alternative agricultural worker program" as a 2-year pilot program with a 20,000 cap on admissions or adjustments of "pilot program aliens" in a fiscal year. The program would cover a 24-month period beginning 6 months after enactment. The earlier bill also established a pilot program, but a much larger one. Admissions during the first year would have been capped at 250,000 and decreased each year by 25,000.

Major differences between the existing H-2A program and the "H-2C" program which would be established by H.R. 3410 include the following:

- H-2A employers must attempt to recruit U.S. workers before they can hire foreign workers. There is no comparable recruitment requirement under the H-2C program.
- Under the H-2A program, employers must apply for labor certification 60 days in advance of the estimated date of need for workers. Under the H-2C program, there is no advance filing requirement for the labor condition attestation, except that it must occur before the employer may petition for foreign workers.
- H-2A employers are required to provide free and approved housing for all workers who are not able to return to their residences within the same day. H-2C employers would be required to offer either housing or a housing allowance to H-2C workers recruited from beyond normal commuting distance, if this is the prevailing practice.

H.R. 3410 is strongly opposed by the Administration. In a letter to Representative Lamar Smith dated March 12, 1998, Secretary of Labor Alexis Herman indicated she would recommend that the bill be vetoed. Quoting from the letter:

> Consistent with the findings and recommendations of two bi-partisan commissions--the Commission on Agricultural Workers and the Commission on Immigration Reform--the President *opposes* a new guestworker program. He has, however, 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 requirement of our vital agricultural industry consistent with our obligations to American workers. In response to concerns regarding localized shortages, the Departments of Agriculture and Labor will work cooperatively to determine means of streamlining the current H-2A program to make it more responsive to the needs of agricultural producers, and more effective in protecting U.S. workers.

Secretary Herman also acknowledged that "there have been difficulties administering the H-2A program," but stated that "none of these difficulties require legislation; all can effectively be addressed administratively."

Other pending legislation related to H.R. 3410 includes S. 1563, introduced by Senator Gordon Smith on November 13, 1997. It is similar to H.R. 2377, the bill first introduced by Representative Robert Smith. H.R. 2595, introduced by Representative Chambliss on October 1, 1997 with Representative Pombo as a co-sponsor, is similar to the so-called Pombo-Chambliss amendment before it was marked up and reported by the House Agriculture Committee in the 104th Congress. For example, it does not include a 250,000 annual cap. S. 169, introduced by Senator Larry Craig on January 21, 1997, attempts to modify the current H-2A program to facilitate its use by agricultural employers.