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## **An Agricultural Law Research Article**

# **Farmworkers, Nonimmigration Policy, Involuntary Servitude, and a Look at the Shepherding Industry**

by

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# FARMWORKERS, NONIMMIGRATION POLICY, INVOLUNTARY SERVITUDE, AND A LOOK AT THE SHEPHERDING INDUSTRY

KIMI JACKSON\*

## INTRODUCTION

Congress has enacted various laws allowing foreign workers to harvest America's crops on nonimmigrant guest-worker visas. During World War II, Mexican farmworkers contracted their labor in the United States under the Bracero system.<sup>1</sup> The H-2 visa, created in 1952, allowed foreign temporary contract workers to perform unskilled labor—both agricultural and nonagricultural.<sup>2</sup> The current H-2A visa, developed in 1986 out of the H-2 visa, allows foreign workers to perform temporary agricultural labor in the United States on a contract basis.<sup>3</sup>

Nonimmigrant visas for farmworkers have been controversial since their inception.<sup>4</sup> The United States adopted its first guest-worker programs under great pressure from growers.<sup>5</sup> Congress abandoned the Bracero program in the 1960s due to its abusive

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1. See Act of Apr. 29, 1943, ch. 82, 57 Stat. 70; Act of Feb. 14, 1944, ch. 14, 58 Stat. 11; Act of Aug. 9, 1946, ch. 934, 60 Stat. 969.

2. See Immigration and Nationality Act, ch. 477, §§ 101(a)(15)(H)(ii), 214, 66 Stat. 163, 168, 189 (1952) (codified as amended at 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1186 (Supp. V 1987)).

3. See 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2000).

4. See generally CINDY HAHAMOVITCH, THE POLITICS OF LABOR SCARCITY: EXPEDIENCY AND THE BIRTH OF THE AGRICULTURAL "GUESTWORKERS" PROGRAM (Center for Immigration Studies Background, Dec. 1999).

5. See *id.* at 2-4.

nature.<sup>6</sup> Farmworker advocates harshly criticized the H-2 visa, both for the abusive treatment that H-2 workers experienced, and for its effect on farmworkers' wages and working conditions.<sup>7</sup>

This Note discusses the effectiveness of the H-2A visa and the problems associated with agricultural guest workers. Part I addresses the historical background of farm laborers, the Immigration Reform and Control Act ("IRCA") of 1986 that authorizes the H-2A visa, and case law interpreting IRCA. Part II analyzes the problems associated with H-2A workers, including the susceptibility of H-2A workers to abuse, the inability of H-2A workers to protect their rights, and the H-2A visa's adverse effects on U.S. workers, including loss of jobs and deteriorating wages and conditions. This Part also discusses whether H-2A workers enter a state of involuntary servitude and the absence of a need for the H-2A visa. Part II includes an underview, a close look at the H-2A visa as used in the sheepherding industry, and a discussion of possible solutions to the inadequacies of the H-2A visa. Part III concludes this Note with a look at the future of the H-2A visa system.

## I. LEGAL BACKGROUND

### A. Historical

Agricultural workers have long been treated differently from other workers in the United States. Since the end of slavery—with the exception of the "Okies"<sup>8</sup> during the Great Depression—agricultural workers have tended to be foreign-born and nonwhite.<sup>9</sup> Since the 1890s, employers have recruited Chinese, Filipinos, Japanese, and Mexicans to harvest American crops.<sup>10</sup> Growers

6. See *infra* notes 40-44 and accompanying text.

7. See generally H. Michael Semler, *Overview: The H-2 Program: Aliens in the Orchard: The Admission of Foreign Contract Laborers for Temporary Work in U.S. Agriculture*, 1 YALE L. & POL'Y REV. 187 (1983).

8. During the Great Depression, the drought in the central United States displaced a multitude of families from Oklahoma, Nebraska, Kansas, and Texas. JOHN STEINBECK, *THE HARVEST GYPSIES: ON THE ROAD TO THE GRAPES OF WRATH* 21 (1988). Their lands destroyed, they went west, searching for employment. See *id.* Many of these displaced families became migrant workers in California and other states, and were disparagingly known as "Okies." Charles Wollenberg, *Introduction to STEINBECK, supra*, at v, xi.

9. See, e.g., BRENT ASHBRANNER, *DARK HARVEST: MIGRANT FARMWORKERS IN AMERICA* 21-22 (1985); Wollenberg, *supra* note 8, at xi.

10. During the 1870s and 1880s, American born "bindlestiffs" harvested the great wheat farms. Wollenberg, *supra* note 8, at xi. But as large farms shifted to more labor-intensive fruits and vegetables, employers began to use Chinese workers. See *id.* As U.S. laws restricted Chinese immigration, employers recruited workers from Japan, southern Europe, and India,

tended to look to a new labor source each time a group of workers attempted to strike or collectively bargain.<sup>11</sup> Only in agriculture does the United States allow foreign contract workers to dominate the local work force.<sup>12</sup>

America's newest method of obtaining cheap, docile foreign farm labor is the H-2A visa.<sup>13</sup> This visa allows growers to import foreign workers on an employment contract for a period of temporary or seasonal work.<sup>14</sup> The visa's real value, from the growers' point of view, is that the workers may work only for the employer who petitioned for them and must return to their home country as soon as the contract period ends.<sup>15</sup> This places the H-2A visa workers in a powerless condition compared to U.S. workers who can leave an abusive employer and seek other work.<sup>16</sup> In addition, because the employee will have no opportunity to grow old in this country, the employer does not have to contribute to benefits such as social security. The H-2A worker has few rights and is unlikely to assert even those rights. For these reasons, H-2A visas provide a desirable source of labor for agribusiness.

and later from Mexico and the Philippines. *See id.* During World War II, Congress, through the Act of Apr. 29, 1943, authorized Mexican workers to enter the United States as contract agricultural workers, dubbed "Braceros." *See* ERASMO GAMBOA, *MEXICAN LABOR AND WORLD WAR II: BRACEROS IN THE PACIFIC NORTHWEST, 1942-1947*, at xii (1990). The Act of Apr. 29, 1943 brought 220,640 Mexican laborers to the United States during the Bracero period. *See id.* at 48. The word *bracero* means a worker who works with his hands or arms. *See id.* at 133 n.1; *see also* ASHABRANNER, *supra* note 9, at 65. In the late 1800s and early 1900s, migrant farmworkers came from China, Japan, and the Philippines to work in the West. *See id.* at 21-22. Immigrants from Ireland, Italy, and Scandinavia worked in the East. *See id.* at 22. Southern blacks and whites worked in southern fields and later replaced the European immigrants harvesting crops in the East and the Midwest. *See id.* Mexican Americans worked in the Southwest and California. *See id.*

11. "If they attempted to organize they were deported or arrested, and having no advocates they were never able to get a hearing for their problems." STEINBECK, *supra* note 8, at 21. During the depression, when the United States was repatriating Mexican migrant workers, the National Labor Board reported: "Fundamentally, much of the trouble with Mexican labor in the Imperial Valley [California] lies in the natural desire of the workers to organize." *Id.* at 54. Steinbeck wrote that, like Chinese and Japanese workers, Mexican migrants "committed the one crime that will not be permitted by the large growers. They . . . attempted to organize." *Id.* at 55.

12. *See generally* Semler, *supra* note 7, at 206-10.

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

14. *See id.*

15. *See* 20 C.F.R. § 655.90(b) (2000); Gail S. Coleman, Note, *Overcoming Mootness in the H-2A Temporary Foreign Farmworker Program*, 78 GEO. L.J. 197, 197-200 (1989).

16. *See* U.S. GEN. ACCOUNTING OFFICE, *H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS* 9-10 (GAO/T-HEHS-98-200, June 24, 1998) [hereinafter GAO/T-HEHS-98-200].

Since 1848, when the United States absorbed northern Mexico and its residents with the Treaty of Guadalupe Hidalgo,<sup>17</sup> U.S. immigration policy toward Mexico has fluctuated between recruiting and repatriating Mexican citizens, according to American demands for labor.<sup>18</sup> Following the 1848 treaty, most Mexicans living in the former Mexican territories automatically became U.S. citizens by remaining in the United States.<sup>19</sup> The United States paid little attention to immigration across the newly defined international border until the next century.<sup>20</sup>

Throughout the twentieth century, Mexican immigration to the United States was based on employment.<sup>21</sup> While the immigration has been continuous, the United States's response has varied depending upon economics.<sup>22</sup> The de facto policy has been, "bring [Mexican laborers] in when they are needed, send them back when they aren't."<sup>23</sup> John Steinbeck wrote, in 1936, that the Mexican worker could be treated as "scrap when it was not needed," and "if it offered any resistance to the low wage or the terrible living conditions, it could be deported to Mexico at Government expense."<sup>24</sup> The 1917 Immigration Act waived certain immigration requirements for temporary workers,<sup>25</sup> allowing U.S. growers to continue to rely on Mexican workers.<sup>26</sup> The United States legally admitted more than 300,000 Mexican immigrants between 1900 and 1930, and as many as

17. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922. For a discussion of the Treaty of Guadalupe Hidalgo, see Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 SW. J.L. & TRADE AM. 121, 127-30 (1998).

18. From 1910 to 1920, the booming American economy demanded labor. See GAMBOA, *supra* note 10, at xiii. The United States's open immigration policy allowed agricultural and railroad employers to recruit Mexican workers on a large scale. See *id.* But when the United States suffered a flattened economy during the depression, employers no longer needed Mexican immigrant labor. See *id.* During World War II, an American labor shortage again caused employers to look south of the border. See *id.* at xii. Mexican workers filled the tremendous need for farm production at a time when the agricultural economy was labor starved. See *id.* When the war ended, Braceros were no longer needed. Strikes and administrative changes in the Bracero program caused employers to replace the Mexican workers with "less troublesome Chicano workers." *Id.* at xiv.

19. See James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 242 (1995).

20. See *id.* at 242 & n.89.

21. See *id.* at 242.

22. See *id.*

23. Smith, *supra* note 19, at 242 (quoting Walter Fogel, *Illegal Alien Workers in the United States*, 16 INDUS. REL. 243, 246 (1977)).

24. STEINBECK, *supra* note 8, at 54.

25. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 877-78.

26. See Smith, *supra* note 19, at 243. The commissioner of immigration waived the literacy requirements, head tax, and contract labor laws for Mexican workers. See *id.*

one million undocumented immigrants moved north of the border during the same period.<sup>27</sup>

But during the depression of the 1920s and 1930s, the Mexican immigration pendulum swung to the other side, and Mexican workers found themselves no longer welcome in the United States.<sup>28</sup> Between 1929 and 1932, 345,000 Mexicans were repatriated to Mexico.<sup>29</sup> By strictly enforcing immigration laws, the United States reduced Mexican immigration from 4000 to 250 people per month.<sup>30</sup>

When the depression ended and labor was once again needed, the pendulum swung back and the United States welcomed Mexican workers. During World War II, the United States and Mexico signed a series of agreements known as the Bracero program.<sup>31</sup> The Bracero system allowed Mexican workers to enter the United States without paying a head tax or meeting contract labor provisions and literacy requirements.<sup>32</sup> California alone drew more than 100,000 Braceros annually.<sup>33</sup>

While many historians have written that the Bracero program resulted from a wartime labor shortage,<sup>34</sup> an article published by the Center for Immigration Studies asserts that no shortage existed.<sup>35</sup> Instead, growers who did not want to pay higher than depression-era wages pressured the federal government into signing the Bracero agreement.<sup>36</sup> Federal officials noted before the war that the farm labor surplus was so great that more than 1.5 million people could leave farm work without harming agricultural production.<sup>37</sup> During

27. See *id.* at 242 (citing Lawrence H. Fuchs & Susan B. Forbes, *Select Commission on Immigration and Refugee Policy [SCIRP], U.S. Immigration Policy and the National Interest*, reprinted in THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 40, 53 (2d ed. 1985)).

28. See *id.* at 243.

29. See *id.*

30. See *id.* at 243-44.

31. See Act of Apr. 29, 1943, ch. 82, 57 Stat. 70; Act of Feb. 14, 1944, ch. 14, 58 Stat. 11; Act of Aug. 9, 1946, ch. 934, 60 Stat. 969. American growers were ecstatic about the program, because it provided them with inexpensive and steady labor when American workers were busy in the armed forces. See ASHABRANNER, *supra* note 9, at 65.

32. See Smith, *supra* note 19, at 244 n.101.

33. See TONY DUNBAR & LINDA KRAVITZ, *HARD TRAVELING: MIGRANT FARM WORKERS IN AMERICA* 43 (1976).

34. See, e.g., GAMBOA, *supra* note 10, at xi.

35. See HAHAMOVITCH, *supra* note 4, at 2-4.

36. See *id.* at 3-4.

37. See *id.* at 2.

the war, officials recognized that wages needed to rise, and growers who lacked labor should provide safe housing and clean water.<sup>38</sup>

Faced with opposition from labor unions<sup>39</sup> and civil rights groups during the 1960s, Congress began to reevaluate the Bracero program.<sup>40</sup> After Edward R. Murrow's "Harvest of Shame" television documentary exposed "squalid living conditions and abuse,"<sup>41</sup> Congress became concerned about the condition of farm laborers and feared that the employment of Bracero workers gave growers little incentive to provide decent wages and living conditions.<sup>42</sup> The Bracero program culminated in "massive civil rights and labor violations and depressed wages in the Southwest."<sup>43</sup> Braceros "worked for whom they were told, at whatever tasks they were told, under whatever wages and working conditions . . . and when no longer wanted, they were shipped back to Mexico."<sup>44</sup> The Bracero system drove down wages for farmworkers from both sides of the

38. See *id.* at 2. Officials also noted that the growers who most boisterously insisted that a labor shortage existed were the growers who paid the lowest wages, contrary to the laws of supply and demand. See *id.* at 2. Growers, long "accustomed to 'a great over-supply of workers . . . consider[ed] any reduction in the surplus supply as a shortage.'" *Id.*

39. See ASHABRANNER, *supra* note 9, at 65. The use of Bracero workers impeded organized labor. See, e.g., OTEY M. SCRUGGS, *BRACEROS, "WETBACKS," AND THE FARM LABOR PROBLEM: MEXICAN AGRICULTURAL LABOR IN THE UNITED STATES 1942-1954*, at 525-26 (1988). In 1953, the displacement of local farm laborers by Braceros caused the National Agricultural Workers Union to lose its toehold in southern California's Imperial Valley. See *id.* at 526. In 1954, the increased use of Braceros, coupled with mechanization, "made union activity impossible" in California's Central Valley. *Id.*

40. See Smith, *supra* note 19, at 244-45.

41. Leah Beth Ward, *Desperate Harvest: N.C. Growers' Trade in Foreign Farm Workers Draws Scrutiny*, CHARLOTTE OBSERVER, Oct. 31, 1999, at A1.

42. See Smith, *supra* note 19, at 244-45. By 1947, the use of Braceros "contribute[d] noticeably to the plight of" American workers. SCRUGGS, *supra* note 39, at 500. An immigration official wrote in 1950, "The farmer's principal reason for demanding . . . contract aliens is the fact that this type of laborer is willing to work for much lower pay than the local or migrant can work for." *Id.* at 507. American workers had to either look for work elsewhere or accept work at Bracero wages. See *id.* at 510.

43. Stephen Yale-Loehr, *Foreign Farm Workers in the U.S.: The Impact of the Immigration Reform and Control Act of 1986*, 15 N.Y.U. REV. L. & SOC. CHANGE 333, 334 (1986-87); see also Johnson, *supra* note 17, at 135. Increasing the supply of unskilled labor in agriculture decreased wages. See *id.* The Bracero system purportedly protected farmworker wages and working conditions, but the United States failed to enforce the protections and instead allowed growers to pay substandard wages. See *id.* at 136.

44. HENRY P. ANDERSON, *THE BRACERO PROGRAM IN CALIFORNIA* [at unnumbered *Introduction to the 1976 Edition*] (1976). Anderson wrote of the Bracero system:

[I]njustice is built into the present system, and no amount of patching and tinkering will make of it a just system. . . . [F]oreign contract farm labor programs . . . by their very nature wreak harm upon the lives of the persons directly and indirectly involved and upon human rights which our Constitution still holds to be self-evident and inalienable.

border.<sup>45</sup> Congress allowed the Bracero program to expire in 1963,<sup>46</sup> and the Immigration Act of 1965 placed new limits on immigration.<sup>47</sup>

In 1952, Congress created the H-2 visa as part of the Immigration and Nationality Act.<sup>48</sup> Unlike the Bracero program, the H-2 visa allowed both agricultural and nonagricultural temporary contract workers to enter the United States and did not apply only to Mexican workers.<sup>49</sup> Although the H-2 program was only slightly used during the next twenty years, abuses became apparent, as they had with the Bracero program.<sup>50</sup> One author wrote of Jamaican sugarcane cutters who entered the United States on H-2 visas:

The Jamaican H-2 worker is for the cane growers the perfect farm laborer—a man of the barracks, a man in a camp who spends all of his time under supervision if not under surveillance, surrounded by barbed wire. A man without a family who will never be part of the larger community; who has no hope of a better job or indeed any job in this country other than swinging a machete eight hours a day. A man who will never vote in Florida, never join a union, and never go to court to correct an injustice.<sup>51</sup>

Agribusiness prefers guest workers to other workers—not because they are cheaper—but because the growers wield near “absolute control” over them.<sup>52</sup> The growers decide where the workers will be housed.<sup>53</sup> They control the workers’ movements, because the workers come without cars.<sup>54</sup> If a worker fails to meet his production quota, the grower can send him back home, and the worker has no “right of appeal.”<sup>55</sup> “The fear of being sent back before his contract is completed, or of not being selected for another year, ensures that almost every worker will exhaust himself at his labor.”<sup>56</sup>

45. See Johnson, *supra* note 17, at 135-36. Agribusiness benefited from cheap labor, while U.S. workers lost jobs. See *id.* at 136. Farmworker wages in California sank, farmworker housing deteriorated, and unions experienced increased barriers to organizing. See *id.* By hiring Braceros, agribusiness could avoid housing families because only solo workers were admitted. See *id.* at 136 n.76 (citing JULIAN SAMORA, *LOS MOJADOS: THE WETBACK STORY* 81 (1971)).

46. See Smith, *supra* note 19, at 245.

47. Act of Oct. 3, 1965, Pub. L. 89-236, 79 Stat. 911 (amending 8 U.S.C. § 1151).

48. Immigration and Nationality Act §§ 101(a)(15)(H)(ii), 214.

49. See *id.*

50. See Coleman, *supra* note 15, at 203.

51. ASHABRANNER, *supra* note 9, at 101.

52. *Id.* at 104.

53. See *id.*

54. See *id.*

55. *Id.*

56. *Id.*

In 1986, Congress split the H-2 program into two parts: the H-2A visa for agricultural workers, and the H-2B visa for nonagricultural workers.<sup>57</sup> This current legislation requires that nonimmigrant aliens, known as H-2A workers, have a residence in a foreign country that they have no intention of abandoning and that they temporarily come to the United States “to perform agricultural labor or services, as defined by the Secretary of Labor.”<sup>58</sup> The H-2A program is designed to meet the temporary needs of growers “who require temporary agricultural labor which cannot be met by the national labor force.”<sup>59</sup> The Department of Labor (“DOL”) adopted separate certification procedures for agricultural workers “because of its experience with employer abuse of migrant and seasonal agricultural workers.”<sup>60</sup>

The H-2A visa was purportedly designed to meet two conflicting policy goals: to protect U.S. workers and, concurrently, provide easy access to labor.<sup>61</sup> The creation of the H-2A program is consistent with Congress’s pendulum approach to immigrant workers. The H-2A visa allows workers to enter the United States when they are needed and forces them to leave at the expiration of their contract.<sup>62</sup> Like the Bracero system—which was created to alleviate an alleged wartime labor shortage, but was nevertheless used regularly for decades—the H-2A visa purports to be used only in emergency labor shortages, but instead is used as a general source of labor.<sup>63</sup>

## B. IRCA of 1986

### 1. IRCA, Legislative History, and Regulations

The H-2A visa is created by 8 U.S.C. § 1101(a)(15)(H)(ii)(a) of IRCA. The process for certifying H-2A workers is governed by 20 C.F.R. Part 655, Subpart B (2000). The regulations’ alleged purpose is to determine whether U.S. workers are available, and “whether the

57. See 8 U.S.C. § 1101(a)(15)(H)(ii)(a)-(b).

58. 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

59. Steven S. Mukamal & Martin L. Rothstein, *The “H” Visa Category*, in BASIC IMMIGRATION LAW: 1995, at 73, 76 (PLI Litig. & Admin. Practice Course, Handbook Series No. H4-5215, Apr.–May 1995).

60. *Martinez v. Reich*, 934 F. Supp. 232, 237 (S.D. Tex. 1996).

61. See 20 C.F.R. § 655.0(a)(1) (2000).

62. See *id.* § 655.90(b).

63. See U.S. GEN. ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS 8 (GAO/T-HEHS-98-20, Dec. 1997) [hereinafter GAO/T-HEHS-98-20]. From 1995 to 1997, the DOL certified ninety-nine percent of the 3,689 H-2A applications filed nationwide, enabling growers to regularly obtain H-2A workers. See *id.*

employment of H-2A workers will adversely effect the wages and working conditions of workers in the U.S.”<sup>64</sup> An employer petitioning for an H-2A worker must apply to the DOL for certification that a sufficient number of “able, willing, and qualified” workers are not available in the United States,<sup>65</sup> and that the certification “will not adversely affect the wages and working conditions of . . . similarly employed” U.S. workers.<sup>66</sup> The DOL may not issue a certification if (1) the shortage is due to a “strike or lockout,” (2) the grower violated a term of a past certification during the previous two years, (3) the grower failed to assure the secretary that it would provide workers’ compensation insurance, or (4) the grower did not make efforts to recruit U.S. workers.<sup>67</sup>

In addition to determining the availability of U.S. workers, the DOL must determine (1) “the minimum level of wages, terms, benefits, and conditions” necessary to not adversely affect U.S. workers and (2) whether the prospective H-2A workers will be offered that minimum.<sup>68</sup> The DOL sets the adverse effect wage rate (“AEWR”), a minimum wage that “must be offered and paid . . . to every H-2A worker and every U.S. worker” when H-2A workers are sought.<sup>69</sup> The secretary sets an AEWR for each area of the United States.<sup>70</sup> AEWRs for agricultural employment, excluding sheep-herding and other “special circumstances” described in 20 C.F.R. § 655.93, equal “the annual weighted average hourly wage rate” for the region’s farmworkers, as published by the U.S. Department of Agriculture.<sup>71</sup> If the prevailing wage in the area and type of agriculture is higher than the AEWR, employers must pay the

64. 20 C.F.R. § 655.90(a).

65. *Id.* § 655.90(b)(1)(A).

66. *Id.* § 655.90(b)(1)(B).

67. *Id.* § 655.90(b)(2). The employer must make positive recruitment efforts within a multistate region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer’s job offer. The obligation to engage in positive recruitment . . . shall terminate on the date the H-2A workers depart for the employer’s place of employment.

*Id.* § 655.90(b)(2)(4).

68. *Id.* § 655.90(c).

69. *Id.* § 655.100(b).

70. *See id.*

71. *Id.* § 655.107(a).

prevailing wage rate.<sup>72</sup> The AEWR may not be lower than the federal minimum wage rate.<sup>73</sup>

The grower must actively recruit U.S. workers "through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher."<sup>74</sup> The grower must file an H-2A application and job offer, describing the "terms and conditions of employment," with the Employment and Training Administration ("ETA")<sup>75</sup> at least forty-five days before the workers are needed.<sup>76</sup> At the same time, the employer must file a copy of the job offer with the local "[s]tate employment service agency."<sup>77</sup>

If an employer misses the forty-five-day deadline, the ETA will deny the certification because of insufficient time to check for the "availability of U.S. workers."<sup>78</sup> However, the ETA may waive the forty-five-day requirement in emergencies.<sup>79</sup> In case of a denial, the employer is entitled "to an administrative review or a de novo hearing before an administrative law judge."<sup>80</sup> After filing with the ETA, the employer and the state employment agency may begin recruiting U.S. workers.<sup>81</sup> If the employer complies with all the certification criteria, the ETA makes a determination to grant or deny certification thirty days before the workers are needed.<sup>82</sup>

If, during the two years after an H-2A certification is granted, the ETA has reason to believe that the "employer violated a material term or condition of the . . . certification," it must investigate.<sup>83</sup> If the ETA finds that a violation occurred, it must notify the employer that it will not be granted any certifications for the next season.<sup>84</sup> Multiple violations may cause denial of certifications for two or three years.<sup>85</sup> The grower must guarantee work for three-fourths of the total

72. *See id.* § 655.107(b).

73. *See id.* § 655.107(c). The current federal minimum wage is \$5.15 per hour. 29 U.S.C. § 206(a)(1).

74. 20 C.F.R. § 655.90(c). The Employment and Training Administration of the DOL is charged with making certification determinations. *See id.* § 655.92.

75. The ETA is a division of the DOL.

76. 20 C.F.R. § 655.100(a)(1).

77. *Id.*

78. *Id.* § 655.100(a)(3).

79. *See id.*

80. *Id.*

81. *See id.* § 655.100(a)(4)(i).

82. *See id.*

83. *Id.* § 655.110(a).

84. *See id.*

85. *See id.*

contract period.<sup>86</sup> If the employer fails to provide the required work, the employer must pay the worker for the guaranteed period.<sup>87</sup>

Recent cases show that H-2A workers are employed in apple<sup>88</sup> and fruit<sup>89</sup> orchards, sugarcane fields,<sup>90</sup> and tree farms,<sup>91</sup> performing work such as irrigation<sup>92</sup> and cultivating and harvesting vegetables.<sup>93</sup> They are also heavily employed by the shepherding industry.<sup>94</sup> H-2A workers historically come from Jamaica, Barbados, Saint Lucia, Saint Vincent, Dominica, and Mexico.<sup>95</sup> Recently, workers have also been recruited from the Philippines.<sup>96</sup>

## 2. Case Law

For several reasons, discussed below,<sup>97</sup> H-2A workers are unlikely to assert their rights in court. When H-2A workers do bring a case to court, they rarely meet with success. Courts have allowed growers who employ H-2A workers to contract out of statutory wage requirements<sup>98</sup> and to legally avoid complying with the Fair Housing Act ("FHA").<sup>99</sup> An attempt to secure statutorily required wages for H-2A workers met with fourteen years of delay within the DOL and the courts, and was finally dismissed for mootness due to a change in the industry.<sup>100</sup>

In *Sugar Cane Growers Cooperative of Florida v. Pinnock*, the appellate court allowed a growers association to contract out of its

86. *See id.* § 655.102(b)(6).

87. *See id.*

88. *See NAACP v. United States Sugar Corp.*, 84 F.3d 1432, 1434 (D.C. Cir. 1996); *Comité de Apoyo a los Trabajadores Agrícolas v. United States Dep't of Labor*, 995 F.2d 510, 512 (4th Cir. 1993).

89. *See Frederick County Fruit Growers Ass'n v. Martin*, 968 F.2d 1265 (D.C. Cir. 1992).

90. *See United States Sugar*, 84 F.3d at 1435.

91. *See Blake v. H-2A and H-2B Voluntary Employees' Beneficiary Ass'n*, 952 F. Supp. 927, 928 (D. Conn. 1997).

92. *See Trejo v. Snake River Farmers Ass'n*, No. 92-TAE-4, 1992 WL 205495, at \*1 (Bd. Alien Lab. Cert. App. Aug. 13, 1992).

93. *See In re Riggs Farm*, No. 92-TLC-13, 1992 WL 181950, at \*1 (Bd. Alien Lab. Cert. App. July 23, 1992); *In re Suzuki Farms*, No. 91-TAE-4, 1991 WL 172131, at \*1 (Bd. Alien Lab. Cert. App. Aug. 9, 1991).

94. *See discussion infra* Part II.A.5.

95. *See Semler, supra* note 7, at 201, 203-05.

96. *See Jim Steinberg, Farm Labor Imports Reap Controversy*, FRESNO BEE, Jan. 22, 1999, at A1.

97. *See infra* notes 139-44 and accompanying text.

98. *See Sugar Cane Growers Coop. of Fla. v. Pinnock*, 735 So. 2d 530, 531 (Fla. Dist. Ct. App. 1999), *cert. denied*, 744 So. 2d 456 (Fla. 1999).

99. *See Farmer v. Employment Sec. Comm'n of N.C.*, 4 F.3d 1274, 1275 (4th Cir. 1993).

100. *See NAACP v. United States Sugar Corp.*, 84 F.3d 1432, 1438 (D.C. Cir. 1996).

statutory responsibility to employ H-2A workers for three-fourths of the contract period.<sup>101</sup> Sugarcane hand-harvesters from Jamaica and other Caribbean islands entered the United States on H-2A visas.<sup>102</sup> Their contract, which was negotiated by the West Indies Central Labour Organization (allegedly on behalf of the workers) and the Florida Fruit and Vegetable Association (on behalf of the employers), provided that the workers would harvest from November 1988 to April 30, 1989, "unless work opportunity is sooner terminated" as provided by the agreement.<sup>103</sup> As required by regulations, the contract guaranteed the workers employment for at least three-fourths of the workdays during the contract period.<sup>104</sup> But the contract gave growers the power to terminate the employment at any earlier time, as long as they gave ten days notice.<sup>105</sup> Originally, employment under the contract was to terminate on April 30, 1989, but the employers provided notice and moved the termination date forward to March 16, 1989.<sup>106</sup> The growers claimed that the employment termination also terminated the period from which the three-fourths work guarantee was calculated, ending the growers' wage liability on March 16.<sup>107</sup> The workers, however, demanded wages amounting to the three-fourths guarantee for the period from March 16 through April 30.<sup>108</sup> The appellate court held in favor of the growers, reasoning that the contract was not ambiguous, and therefore the work guarantee terminated after the ten days' notice.<sup>109</sup>

The court in *Farmer v. Employment Security Commission of North Carolina*<sup>110</sup> allowed growers who hire H-2A workers to avoid complying with the FHA.<sup>111</sup> In *Farmer*, several female and child H-2A workers claimed that the defendants violated the FHA and discriminated against them based on familial status.<sup>112</sup> The

101. 735 So. 2d at 531.

102. *See id.* The growers in *Sugar Cane Growers Cooperative of Florida* employed approximately 10,000 H-2A workers during the years at issue. *See id.*

103. *Id.* at 532.

104. *See id.*; 20 C.F.R. § 655.102(b)(6). The regulation requires that the grower guarantee employment for at least three-fourths of the work contract. *See id.* If the employer does not offer work for three-fourths of the work period, the employer must pay the worker what the worker would have earned had he or she worked three-fourths of the work period. *See id.*

105. *See Sugar Cane Growers Coop. of Fla.*, 735 So. 2d at 533.

106. *See id.*

107. *See id.*

108. *See id.* at 534.

109. *See id.* at 535-36.

110. 4 F.3d 1274 (4th Cir. 1993).

111. *Id.* at 1284.

112. *Id.* at 1275.

defendants countered that IRCA governs the housing conditions of H-2A workers, and that agricultural employers must provide family housing to foreign workers only where it is the prevailing practice.<sup>113</sup> The court agreed with the defendants and held that H-2A employers must only provide benefits as detailed in 20 C.F.R. § 655.102,<sup>114</sup> even when their actions violate the FHA.<sup>115</sup> In short, where H-2A employers are concerned, IRCA trumps the FHA.<sup>116</sup>

In *NAACP v. United States Sugar Corp.*,<sup>117</sup> the plaintiffs, a class of H-2A sugarcane workers, filed suit against several growers and the DOL, contesting the DOL's interpretation of the H-2A piece-rate regulation.<sup>118</sup> Regulations require that the growers pay H-2A workers the AEW, which functions as a minimum wage for H-2A workers.<sup>119</sup> When employers pay workers on a piece-rate system, based on a standard unit of production, the rate must be high enough to ensure that the employee is still paid the AEW.<sup>120</sup> However, under the piece-rate system, employers can meet an increasing AEW by increasing the minimum productivity level required from workers instead of increasing the per-piece rate they pay workers.<sup>121</sup> In other words, a grower could require the employees to work faster to attain the AEW.<sup>122</sup>

In order to avoid such abuse, the DOL adopted a regulation requiring growers to raise their per-piece work rates, rather than their productivity expectations, when the AEW increased.<sup>123</sup> The problem in *United States Sugar* arose when sugarcane growers adopted a "task-rate" system, where workers were paid per row of cane harvested rather than by bushel or other typical piece-rate

113. *See id.* at 1279.

114. The regulations require that H-2A employers provide family housing only where it is the prevailing practice. *See* 8 U.S.C. § 1188(c)(4) (2000).

115. *See Farmer*, 4 F.3d at 1284.

116. *See id.*

117. 84 F.3d 1432 (D.C. Cir. 1996).

118. *NAACP v. United States Sec'y of Labor*, 846 F. Supp. 91, 93 (D.C. Cir. 1994). The piece-rate regulation at issue was contained in 20 C.F.R. § 655.207(c) (1983) (superceded in 1987).

119. *See United States Sec'y of Labor*, 846 F. Supp. at 93.

120. *See id.*

121. *See United States Sugar*, 84 F.3d at 1434.

122. *See id.* For example, a grower could "meet an AEW of \$5 per hour by paying 50 cents per bushel of apples, . . . if the farm worker picked 10 bushels per hour. But . . . if the AEW increased . . . to \$6 per hour, . . . the grower could [require the worker to] pick 12, rather than 10, bushels per hour," and thereby avoid paying an increased wage. *Id.* at 1434.

123. *See* 20 C.F.R. § 655.207(c).

unit.<sup>124</sup> The growers maintained that because they paid according to a task rate rather than a piece rate, they were not required to increase the rate in proportion to the annual AEWR increases.<sup>125</sup> The DOL allowed the growers to avoid increasing pay rates to keep up with the AEWR.<sup>126</sup> The H-2A workers sued for additional wages.<sup>127</sup>

The case languished in the courts and with the DOL for fourteen years and, due to changes in the sugarcane industry, was eventually dismissed for mootness and standing problems.<sup>128</sup> The case became moot because the sugarcane industry abandoned the challenged task-rate payment system, and because the growers adopted more mechanization and abandoned the use of H-2A workers.<sup>129</sup> In the end, the growers successfully avoided paying the AEWR during the years that they used the task-rate scam.<sup>130</sup>

In the few cases that H-2A workers manage to bring to litigation, the DOL and the courts fail miserably to protect the rights of H-2A workers. They fail to enforce the statutory requirements designed to protect H-2A workers, such as the three-fourths guarantee and the AEWR. They also fail to protect the civil rights of H-2A workers, such as those found in the FHA. This failure contributes to the problems that surround the H-2A system, discussed below.

## II. ANALYSIS

### A. *Problem*

#### 1. The Susceptibility of H-2A Workers to Abuse

H-2A workers are vulnerable to abuse and have little recourse when they are abused. H-2A workers have fewer rights and protections than U.S. workers.<sup>131</sup> Unlike other farmworkers, they are not protected by the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").<sup>132</sup> They do not benefit from the "detailed disclosure and recordkeeping" protections that the AWPA provides

124. 84 F.3d at 1435.

125. *See id.*

126. *See id.*

127. *See United States Sec'y of Labor*, 84 F. Supp. at 94.

128. *See United States Sugar*, 84 F.3d at 1434, 1437.

129. *See id.* at 1437.

130. *See id.*

131. *See Coleman, supra* note 15, at 200.

132. 29 U.S.C. § 1802(8)(B)(ii), (10)(B)(iii) provide that the terms "migrant agricultural worker" and "seasonal agricultural worker," as used in the AWPA, do not include temporary nonimmigrant aliens authorized to work under the H-2A statute.

to other workers.<sup>133</sup> H-2A workers may be excluded from state laws, such as landlord-tenant laws, as well.<sup>134</sup> Regulations allow H-2A workers to receive inferior pay during the first week of work.<sup>135</sup> While labor regulations guarantee wages for the first week of work to domestic workers referred through the interstate clearance system, these labor regulations do not afford the same protections to H-2A workers.<sup>136</sup> This disparity in treatment increases the “potential for personal hardship for foreign workers.”<sup>137</sup>

Secondly, H-2A workers are not likely to assert those few rights that they do have. They are unlikely to complain of abuses, because they legitimately fear retaliation if they file a complaint.<sup>138</sup> Growers historically blacklist those who are considered troublemakers.<sup>139</sup> Although guest workers have a paper guarantee of labor rights, they depend on keeping their jobs to stay in the United States.<sup>140</sup> This gives employers “the power not only to fire [workers] who agitate or organize,” or stand up for their rights in any other way; it also gives employers the power to, in effect, deport workers who make their voices heard.<sup>141</sup> The unwritten rules that H-2A workers must heed are: “Work fast, or lose your job to somebody who is faster. Complain about your living or working conditions, and you’re sent back to Mexico. Get sick or injured, and you’re off the list of workers invited back next season.”<sup>142</sup> Following the unwritten rules too strictly

133. Semler, *supra* note 7, at 207.

134. See Ward, *supra* note 41. H-2A workers are not protected by North Carolina laws governing landlord-tenant contracts. See *id.* Until a legal challenge in 1999, North Carolina H-2A workers lacked “the right to invite guests to their quarters after hours.” *Id.*

135. See GAO/T-HEHS-98-200, *supra* note 16, at 10.

136. See *id.*

137. *Id.*

138. See Coleman, *supra* note 15, at 200.

139. See *id.*; see also Semler, *supra* note 7, at 209 n.116. Semler wrote:

A worker who seriously displeases his employer, to the point that he is involuntarily repatriated during the season, is placed on the black or “u-list” of unacceptables who are forever barred from H-2 agricultural employment in the U.S. The H-2 who is u-listed is not only fired and banned from the industry, he is for all practical purposes barred from the U.S. labor market for life.

*Id.* Even H-1B workers, who are nonimmigrant professionals with postgraduate degrees, are unlikely to complain for fear they will be deported. See Constantine S. Potamianos, *The Temporary Admission of Skilled Workers to the United States Under the H-1B Program: Economic Boon or Domestic Work Force Scourge?*, 11 GEO. IMMIGR. L.J. 789, 808 n.175 (Summer 1997).

140. See David Bacon, *INS Declares War on Labor: Ethnic Cleansing Hits Immigrant Workers, Organizers*, in *Midwest Meatpacking*, NATION, Oct. 25, 1999, at 18.

141. *Id.*

142. Ward, *supra* note 41.

can cause death by heat stroke or pesticide poisoning.<sup>143</sup> But not following the rules can cause a worker to be blacklisted—not allowed to return for the next season.<sup>144</sup>

In 1998, a thirty-six-year-old tomato picker named Carmelo Fuentes, working in North Carolina on an H-2A visa, suffered severe brain damage due to heat stroke after his supervisor ignored the signs of heat stress.<sup>145</sup> Afraid of not being hired next season, Carmelo allegedly said all he needed was a quick break.<sup>146</sup> When Carmelo returned to Mexico, able only to lie “mute and motionless on a bed,” his father tried without success to learn what had happened.<sup>147</sup> The workers who went to North Carolina with Carmelo would say nothing.<sup>148</sup> Carmelo’s father believes they were told not to talk, or they could never return.<sup>149</sup>

The goal is “to keep workers silent and productive” and to prevent them from seeking legal help if their rights are violated.<sup>150</sup> The result: no H-2A worker in North Carolina has ever made a complaint with a government agency.<sup>151</sup> The only complaints have been made by “farm worker advocates or church groups.”<sup>152</sup>

In exchange for an H-2A visa, “workers give up considerable control over their lives.”<sup>153</sup> Most do not see their employment contract until they arrive in the state in which they will work.<sup>154</sup> Unlike traditional migrant workers, H-2A workers do not choose their employer, and they cannot negotiate their wages or hours.<sup>155</sup> The countries that send H-2A workers to the United States also have

143. *See id.*

144. *See id.*

145. *See id.*

146. *See id.*

147. *Id.*

148. *See id.*

149. *See id.*

150. *Id.* The *Charlotte Observer* reported that legal aid attorneys gave pamphlets to a group of H-2A workers when they entered the United States, but when the workers arrived in North Carolina the growers association told them that “they would be sent back to Mexico if they” did not throw away the pamphlets, or if they associated with Legal Services of North Carolina. *Id.* The pamphlets instruct the workers in how to calculate their wages and how the grower must live up to its part of the contract. *See id.*

151. *See id.*

152. *Id.* At least two H-2A workers have died in North Carolina since 1995. *See id.*

153. *Id.*

154. *See id.*

155. *See id.*

a limited ability to protect them, because H-2A employers may cease recruiting from a country and switch to a new source at any time.<sup>156</sup>

The DOL is responsible for enforcing H-2A workers' rights, but it seldom intervenes.<sup>157</sup> Part of the difficulty in enforcing H-2A workers' rights is that the workers are in the United States for only a short period of time before returning to their own countries. For example, employers must pay H-2A workers wages equivalent to at least three-fourths of the amount specified for the entire contract period.<sup>158</sup> However, since employers can fulfill that requirement only at the end of a contract period, and H-2A workers must leave the country as soon as the contract ends, the DOL cannot effectively monitor the three-fourths guarantee.<sup>159</sup>

According to a December 1997 government report by the General Accounting Office, Congress's investigative arm, the enforcement difficulties create an incentive for growers to request contract periods longer than needed: If H-2A workers leave the job before the contract ends, the grower is not required to honor the three-fourths guarantee or pay the workers' return transportation costs.<sup>160</sup> The regulations that exist to protect workers are difficult to enforce.<sup>161</sup> H-2A workers tend to be less aware of U.S. laws than domestic workers and are unlikely to complain of violations because of fear that they will lose their jobs or will not be hired in the future.<sup>162</sup>

When H-2A workers do attempt to enforce their rights, courts are reluctant to find in their favor.<sup>163</sup> In addition, an H-2A worker may have difficulty finding representation from the farmworker offices funded by the Legal Services Corporation ("LSC"), which typically represent agricultural workers. The LSC is only authorized to serve aliens who are present in the United States.<sup>164</sup> The LSC has

156. See Semler, *supra* note 7, at 208.

157. See GAO/T-HEHS-98-200, *supra* note 16, at 3; Semler, *supra* note 7, at 208.

158. See 20 C.F.R. § 655.102(b)(6); *supra* Part I.B.1.

159. See GAO/T-HEHS-98-200, *supra* note 16, at 9-10.

160. See *id.* at 10.

161. See *id.* at 6.

162. See *id.* at 9. During 1996, the DOL received zero complaints from H-2A workers, although it is likely that some workers were not paid their guaranteed wages. See *id.* Labor officials noted that "it is hard to ensure that abusive employers do not participate in the H-2A program." *Id.*

163. The court in *Sugar Cane Growers Coop. of Fla. v. Pinnock*, 735 So. 2d 530, 535 (Fla. Dist. Ct. App. 1999), discussed *supra* notes 101-09 and accompanying text, allowed the growers to terminate the sugarcane workers from Jamaica a month and a half before the contract period ended, without paying the three-fourths guarantee.

164. See Legal Services Corporation, Public Hearing; Comment Request Notice, 64 Fed. Reg. 8140, 8141 (1999) (citing Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134,

noted that this requirement particularly affects H-2A workers who must leave the United States before their legal problems are resolved, "making effective representation for [H-2A workers] questionable."<sup>165</sup>

## 2. The Modern State of Involuntary Servitude

It is not a new idea, particularly in agriculture, for employers to wield almost complete control over workers by making it nearly impossible for them to quit. Slavery is the most extreme example, but creative growers have found other ways to keep their workers in a state of involuntary servitude.<sup>166</sup> Involuntary servitude was a particularly frequent problem in the decades following the Civil War,<sup>167</sup> but it occasionally occurs now.<sup>168</sup>

The Thirteenth Amendment bans slavery and involuntary servitude, except as a punishment for duly convicted crimes.<sup>169</sup> The leading case defining involuntary servitude is *United States v. Kozminski*, decided in 1988. In *Kozminski*, the Supreme Court held that involuntary servitude occurs when an employer compels service through "the use or threatened use of *physical* or *legal* coercion."<sup>170</sup> The Court did not limit the meaning of legal coercion to penal compulsion.<sup>171</sup>

In *Kozminski*, the coercion was physical.<sup>172</sup> The Kozminskis operated a dairy farm, where two developmentally disabled men worked as farm hands for more than fifteen years.<sup>173</sup> The men worked "seven days a week, often [seventeen] hours per day," for no wages.<sup>174</sup>

§ 504(a)(11), 110 Stat. 1321, 1354, incorporated by reference in Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681). The LSC notes that it is not clear whether LSC-funded agencies may represent aliens who initiated the representation while in the United States, and then left the country, or whether the alien must be physically present in the United States at the time the representation is provided. See *id.* at 8141. The LSC has issued a request for comments and a public hearing to determine which is the correct interpretation of the statute. See *id.*

165. *Id.*

166. In a recent article, *The Nation* referred to guest-worker programs as indentured servitude. See Bacon, *supra* note 140.

167. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 504-06 (2d ed. 1985).

168. See *United States v. Kozminski*, 487 U.S. 931, 938-39 (1988).

169. See U.S. CONST. amend. XIII, § 1.

170. 487 U.S. at 952-53 (emphasis added).

171. See *id.*

172. *Id.* at 935-36.

173. See *id.* at 934-35.

174. *Id.* at 935.

The Kozminskis physically and verbally abused the men and did not allow them to leave the farm.<sup>175</sup>

A much earlier case stated that the nineteenth-century padrone system is a form of involuntary servitude, due to physical coercion.<sup>176</sup> Under that system, padrones brought young boys from Italy to the United States to work as street musicians or beggars.<sup>177</sup> Although the boys and their families generally agreed to the servitude and the padrones were not known to physically brutalize the boys, the court found that the boys had no actual means of escaping the padrone's control and, therefore, physical coercion existed.<sup>178</sup>

In the post-Civil War cases, the coercion was generally effected through legal sanction. The Black Codes of 1865, designed to tie workers to their "employers," criminalized breach of an employment contract.<sup>179</sup> The codes required black employees to enter written labor contracts.<sup>180</sup> Blacks caught without an employment contract were "arrested as vagrants."<sup>181</sup> Once arrested, they were "auctioned off to" growers "who paid their criminal fines."<sup>182</sup> Under the Black Codes, a "black laborer who quit 'without good cause' [was] arrested and taken back to [the] employer."<sup>183</sup> The result was that a black laborer had to enter an employment contract, and if he or she broke the contract, criminal sanctions ensued.<sup>184</sup>

When Congress eradicated the Black Codes with the Civil Rights Act of 1866 and the Fourteenth Amendment, passed in 1868, the South invented a new, similar system.<sup>185</sup> The new system was a set of laws designed to tie blacks to their employers, preventing them from

175. *See id.*

176. *See* United States v. Ancarola, 1 F. 676, 683-84 (C.C.S.D.N.Y. 1880).

177. *See id.* at 678-80. The padrones sometimes paid the families for the boys, and they were responsible for feeding, clothing, and sheltering them. *See id.*

178. *See id.* at 683-84. Circumstances leading to the conclusion that consent was a sham include the boys' "condition[s] in life," their ages and inexperience, their lack of any other means of support, and their inability to profit from their work. *Id.* at 683.

179. *See* FRIEDMAN, *supra* note 167, at 504.

180. *See id.*

181. Julie A. Nice, *Welfare Servitude*, 1 GEO. J. ON FIGHTING POVERTY 340, 344 n.96 (1994). Louisiana required "African American agricultural laborers . . . to make year-long binding contracts with" growers. *Id.* "If they refused [the] work," they were "arrested and forced to do uncompensated labor on public [projects] until they agreed to return to their employers." *Id.*

182. *Id.*

183. FRIEDMAN, *supra* note 167, at 504.

184. *See id.*

185. *See id.* at 505.

changing jobs.<sup>186</sup> The new laws did not mention race, but they were "directed only against black workers."<sup>187</sup> Enticement laws criminalized luring workers to new jobs, even by merely offering a higher wage.<sup>188</sup> Other laws made it a crime to quit a job "fraudulently."<sup>189</sup> The laws, by imposing criminal sanctions on employees who left before their contracts expired, prevented black workers from leaving their employers.<sup>190</sup>

In 1911, the Supreme Court held in *Bailey v. Alabama* that a statute that compelled completion of a contract, under the sanction of criminal law, violated the Thirteenth Amendment.<sup>191</sup> The Court concluded that a contract for service is not valid unless the employee can choose at any time to break it.<sup>192</sup> Additionally, laws compelling an employee to continue to perform the service violate the Thirteenth Amendment.<sup>193</sup> The focus in defining involuntary servitude is not on whether the contracting is involuntary or voluntary, but on whether the service is forced.<sup>194</sup> The Thirteenth Amendment prohibits the status or condition of involuntary servitude, regardless of the manner in which the condition was created.<sup>195</sup> It is the compulsion to serve that is prohibited.<sup>196</sup>

Like plantation owners in the Black Code era, modern growers control H-2A workers through legal coercion. Because an H-2A worker may work only for the employer who petitioned for him or

186. *See id.*

187. *Id.*

188. *See id.*

189. *Id.*

190. *See id.* at 504-05; *see also* William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 33 (1976).

191. 219 U.S. 219, 243-44 (1911). The Alabama statute made breach of an employment contract prima facie evidence of criminal fraud. *See id.* Bailey left his job before finishing his one-year labor contract and without repaying the \$15 advance he received when he began work. *See id.* at 228-29. Leaving the job created a presumption of fraud that Bailey could not rebut because Alabama's evidentiary laws prevented him from testifying on his own behalf, due to his race. *See id.* at 230-31. Bailey was convicted, fined \$30, and sentenced to 136 days of imprisonment and hard labor. *See id.* at 231.

192. *See id.* at 243-44.

193. *See id.*

194. *See* *Clyatt v. United States*, 197 U.S. 207, 215 (1905). *Clyatt* is a peonage case. *See id.*

195. *See id.* at 216.

196. *See* *Bailey*, 219 U.S. at 242. Three years after *Bailey*, in *United States v. Reynolds*, the Supreme Court held that an Alabama surety statute amounted to involuntary servitude. 235 U.S. 133, 150 (1914). The statute allowed fines for a criminal conviction to be paid by a third party. *See id.* at 142. In exchange, the convict was required to work for the third party for a set amount of time. *See id.* If the convict failed to complete the contract, he could be assessed additional fines and imprisonment. *See id.*

her,<sup>197</sup> H-2A workers are virtually precluded from leaving an abusive employer. An H-2A worker is “out of status,” and therefore deportable, if he or she leaves an employer, no matter how abusive the employer may be.<sup>198</sup> In many cases, deportation means not only that the workers must return to their native countries before the end of the contract period, but also that they will not recoup expenses incurred in traveling to the United States.<sup>199</sup> This gives growers a dangerous degree of control over H-2A workers. The grower controls a worker’s very right to stay in the United States.<sup>200</sup>

As blacks were forced to do in the late nineteenth century, H-2A workers must agree to work for a contract period.<sup>201</sup> Once they are in the United States, they must take whatever conditions they are given. Like the Black Codes, the H-2A system forces workers to finish their employment contracts through legal coercion. As the Court held in *Clyatt v. United States*, it is irrelevant whether a worker enters the contract voluntarily.<sup>202</sup> The issue is whether the worker is compelled, either through physical or legal force, to complete the period of employment.<sup>203</sup> The H-2A system is a form of modern involuntary servitude.

### 3. Adverse Effect on U.S. Workers

Although the H-2A visa is purportedly designed to comply with the policies of the Immigration and Nationality Act—that H-2A workers should not be admitted unless their admission “will not adversely affect the wages or working conditions of similarly employed U.S. workers”<sup>204</sup>—the presence of H-2A workers in the agricultural market does just that. The H-2A program miserably fails to protect U.S. workers in two respects. First, the visa certification procedure fails to determine whether U.S. workers are available and allows employers to hire H-2A workers when domestic workers are ready to take the job.<sup>205</sup> Second, the employment of H-2A workers has a strong adverse effect on wages for farmworkers—both domestic

197. See Semler, *supra* note 7, at 209.

198. *Id.*

199. See *id.* at 209-10.

200. See *id.* at 210.

201. See 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

202. 197 U.S. at 215-16.

203. See *id.*

204. 20 C.F.R. § 655.0(a)(1)(ii).

205. See *supra* note 63 and accompanying text; see also Semler, *supra* note 7, at 206.

and foreign.<sup>206</sup> A recent General Accounting Office report recommended changes in the H-2A program to “better protect the wages and working conditions of both domestic and foreign workers.”<sup>207</sup>

*a. Loss of Jobs to U.S. Workers*

When agricultural employers have an opportunity to secure the modern equivalent of indentured servants—H-2A workers who have little opportunity to protest their salaries and working conditions, and who are, as a practical matter, precluded from leaving their employers—the growers have little incentive to seek U.S. workers. While recruiting U.S. migrant workers requires that the employer build relationships with crew leaders, family representatives, and workers, and make binding commitments well before the season begins, an employer who recruits foreign workers is able to wait until the last minute before requesting and receiving “exactly the number requested, at exactly the designated time.”<sup>208</sup> In addition, some growers say that H-2A workers work harder and are easier to control than U.S. workers.<sup>209</sup>

Recruiting H-2A workers allows employers to hire only young men—a preferable choice for growers who do not wish to provide family housing for the typical U.S. migrant family group.<sup>210</sup> Employers who recruit H-2A workers are not bound by equal employment or affirmative action obligations.<sup>211</sup> Even when employers do recruit female H-2A workers who may travel with children, they are not required to provide family housing unless family housing is the “prevailing practice” in the area and in that type of employment.<sup>212</sup> Growers may deny family housing to H-2A workers even when that denial violates the FHA, because IRCA trumps the FHA.<sup>213</sup>

206. See Semler, *supra* note 7, at 211.

207. GAO/T-HEHS-98-200, *supra* note 16, at 2.

208. Semler, *supra* note 7, at 206. In addition, the grower may easily “replace any worker who [falls] ill or performs poorly.” *Id.*

209. See Ward, *supra* note 41. One North Carolina grower described an H-2A worker as a “machine in the fields,” while U.S. workers lean on their hoes. *Id.*

210. See Semler, *supra* note 7, at 206. U.S. migrant workers often travel in family units that include children and older relatives. See *id.*

211. See Semler, *supra* note 7, at 208.

212. Farmer v. Employment Sec. Comm’n of N.C., 4 F.3d 1274, 1276 (4th Cir. 1993).

213. See *id.* at 1284.

Because of these factors, agricultural employers elect to hire H-2A workers even when U.S. workers are available.<sup>214</sup> Growers favor contract workers who, like the Braceros, are guaranteed to be available and cannot quit until the employer is finished with them.<sup>215</sup> The DOL faces the task of “compel[ling] domestic recruitment by reluctant and sometimes hostile employers.”<sup>216</sup> The DOL’s “labor certification system is so flawed that it does not produce a meaningful indication of whether U.S. workers are available.”<sup>217</sup> Employers, who hope to avoid being required to hire U.S. workers, advertise openings at times and in places where U.S. workers are unlikely to notice the posting.<sup>218</sup> They may fail to advertise jobs in migrant home states such as Texas until well after the Texas migrants have left for other states.<sup>219</sup> Consequently, growers, who have little incentive to hire U.S. workers when H-2A workers are available, advertise in ways that make it unlikely that they will be forced to hire U.S. workers, and the DOL does little to oversee the process.<sup>220</sup> The U.S. General Accounting Office has accused the DOL of failing to oversee the H-2A program effectively.<sup>221</sup>

*b. Adverse Effect on Wages and Conditions*

In addition to causing less jobs to be available for domestic workers, the H-2A visa, like the use of Bracero workers,<sup>222</sup> causes an adverse effect on the wages and conditions of all agricultural laborers. The presence of H-2A workers dramatically increases the supply of

214. See Semler, *supra* note 7, at 210.

215. See SCRUGGS, *supra* note 39, at 511.

216. Semler, *supra* note 7, at 210.

217. Semler, *supra* note 7, at 206.

218. See DUNBAR & KRAVITZ, *supra* note 33, at 37. Sugarcane growers in Florida avoided being required to hire U.S. workers by advertising job openings in the summer, when the migrants had already gone north and would not see the advertisement. See *id.*

219. See *id.*

220. See *id.*

221. U.S. GEN. ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKER PROGRAM: RESPONSE TO ADDITIONAL QUESTIONS 4 (GAO/HEHS-98-120R, Apr. 2, 1998).

222. See SCRUGGS, *supra* note 39, at 508-09. The most frequent effect of the use of Braceros was the freezing of wages at the levels stipulated in the contract. See *id.* at 508. While wages in California’s Imperial Valley rose from thirty-five to sixty cents per hour between 1941 and 1945, when few Braceros were used in the area, wages stagnated at sixty cents during the war period, when Braceros harvested the area’s crops. See *id.* at 509. This wage stagnation occurred despite the fact that the war years were a period of great demand for labor, due to World War II, and despite the fact that wages in other industries, such as construction, increased dramatically during the period. See *id.*

agricultural workers. U.S. workers must work for lower pay in order to compete.<sup>223</sup>

Regulations require that employers provide H-2A workers with the same minimum wages, benefits, and working conditions as those provided to domestic workers employed in "comparable employment."<sup>224</sup> But when H-2A workers dominate a market, it becomes impossible to determine the prevailing conditions of U.S. workers in corresponding employment because the presence of the H-2A workers affects the market, causing conditions that are less favorable to workers.<sup>225</sup> In some industries, such as sugarcane, foreign contract workers have dominated the market for decades, creating a permanent, artificially low prevailing wage.<sup>226</sup>

The DOL determines the AEWR, to be paid to U.S. and alien workers by H-2A employers, by determining the average hourly wage rate for farmworkers in a region.<sup>227</sup> H-2A employers must pay the higher of the AEWR or the statutory minimum wage.<sup>228</sup> The AEWR is calculated based on prevailing wages in a particular state.<sup>229</sup> If H-2A workers are employed in the state, then the AEWR is based, in part, on their wages. Therefore, the AEWRs are artificially low, due to the long-time presence of H-2A workers in the agricultural market.<sup>230</sup> "[T]he AEWR methodology fails to recognize that when foreign workers are admitted in significant numbers, they depress

223. See DUNBAR & KRAVITZ, *supra* note 33, at 1. A Texas farmworker explained:

The free enterprise system works real good if you got money, education, or profession. You make a very good free enterprise if you got those three things. Now remember, the farm worker hasn't got money, we don't got profession many times, and we don't got education. So, by free enterprise, if I'm more hungry than you, I got to work cheaper than you.

*Id.*

224. 20 C.F.R. § 655.90(b)(2)(3), (c).

225. See Semler, *supra* note 7, at 211.

226. See DUNBAR & KRAVITZ, *supra* note 33, at 37. During the early 1970s, more than ten thousand Jamaican contract workers entered Florida annually to cut sugarcane. See *id.* Plantation owners preferred the Jamaican workers to United States-born workers, because they were "more manageable," and because they left their families in Jamaica. *Id.* at 38.

227. See Department of Labor, Employment and Training Administration, Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States: 1999 Adverse Effect Wages Rates, Allowable Charges for Agricultural and Logging Workers' Meals, and Maximum Travel Subsistence Reimbursement Notice, 64 Fed. Reg. 6689, 6690 (1999) [hereinafter Labor Certification Process].

228. See *id.*

229. 20 C.F.R. § 655.100(b).

230. Large numbers of undocumented farmworkers also cause wages to be unnaturally low. See Ky Henderson, *The New Slavery: Immigrants Hoping to Forge a Better Life Are at the Mercy of Greedy Smugglers*, 24 HUM. RTS. 12, 13 (Fall 1997).

agricultural wages throughout the state.”<sup>231</sup> Increasing the supply of workers by more than one hundred percent inevitably depresses wages.<sup>232</sup>

Current AEWRs range from \$6.21 per hour in Arkansas, Louisiana, and Mississippi to \$8.97 per hour in Hawaii.<sup>233</sup> The AEWRs for most states are between \$6.21 and \$7.25 per hour.<sup>234</sup> *NAACP v. United States Sugar Corp.* serves as an example of problems in applying the AEWR.<sup>235</sup> The case illustrates that, when forced to pay a fair AEWR, agricultural employers sometimes abandon their use of H-2A workers.<sup>236</sup> The use of H-2A workers, despite alleged statutory intent to the contrary, adversely affects wages in the United States due to the availability of foreign workers who will accept artificially low wages.<sup>237</sup> The DOL bows to the demands of agricultural employers, rather than accepting its duty to protect U.S. and H-2A workers.<sup>238</sup>

#### 4. The H-2A Program Is Not Necessary to Thwart a Shortage of Labor

The H-2A visa was created to allow growers to request guest workers in times of labor shortage.<sup>239</sup> But rather than using H-2A workers only when labor shortages occur, agricultural employers, until a recent expansion of H-2A worker use, have recruited H-2A workers fairly steadily.<sup>240</sup> From 1974 to 1978, the Immigration and

231. Semler, *supra* note 7, at 211. For a detailed discussion of the flaws in the calculation of the AEWR, see *id.* at 211-12.

232. See *id.* at 210. In 1992, approximately 10,000 H-2A certifications were granted for the sugarcane industry alone. *NAACP v. United States Sec’y of Labor*, 846 F. Supp. 91, 96 (D.D.C. 1994).

233. See Labor Certification Process, *supra* note 227, at 6690.

234. See *id.*

235. 84 F.3d 1432 (D.C. Cir. 1996).

236. See 84 F.3d at 1439.

237. See Semler, *supra* note 7, at 211.

238. The DOL allowed sugarcane employers to avoid paying the AEWR by characterizing their payment systems as task rate rather than piece rate, when DOL regulations only characterize H-2A wages as piece rate or hourly. See *United States Sec’y of Labor*, 846 F. Supp. at 93. Clearly, the task rate functions as a piece rate, and allows employers to avoid AEWR raises by manipulating the time it takes to complete the task. Several other cases in the past decade have focused on the DOL’s application of the AEWR piece rate, or problems in applying the AEWR when the employer changes the method of calculating payment, perhaps with the intention of paying a lower wage. See, e.g., *Comité de Apoyo a los Trabajadores Agrícolas v. United States Dep’t of Labor*, 995 F.2d 510, 512 (4th Cir. 1993); *Frederick County Fruit Growers Ass’n v. Martin*, 968 F.2d 1265, 1266-67 (D.C. Cir. 1992); *AFL-CIO v. Dole*, 884 F.2d 597, 598-99 (D.C. Cir. 1989).

239. See GAO/T-HEHS-98-200, *supra* note 16, at 3.

240. See Semler, *supra* note 7, at 187-88.

Naturalization Service ("INS") admitted approximately 10,500 agricultural H-2 workers per year.<sup>241</sup> From 1990 to 1996, INS admitted an average of 13,412.2 H-2A workers annually.<sup>242</sup> Recently, grower use of H-2A workers has expanded rapidly, "up from 17,000 . . . [five] years ago to approximately 30,000 in 1998."<sup>243</sup> H-2A visas are not granted only in times of labor shortage.<sup>244</sup> Indeed, it is on a rare occasion that the DOL denies a request for H-2A workers:<sup>245</sup> during 1996 and 1997, the DOL approved ninety-nine percent of all H-2A applications.<sup>246</sup>

A government study on the H-2A visa reports that "[a] sudden widespread farm labor shortage requiring the importation of large numbers of foreign workers is unlikely to occur in the near future."<sup>247</sup> The report concludes that, while localized labor shortages may occasionally occur in specific crops or locations, no widespread shortage is likely to occur.<sup>248</sup> This conclusion is based on a large number of farmworkers who are lawful, permanent residents and high, continuous unemployment rates in agricultural areas, lasting even during peak agricultural periods.<sup>249</sup> For example, in Florida in 1997, there were two U.S. farmworkers waiting to fill "every farm labor job."<sup>250</sup> H-2A workers are not necessary to alleviate localized

241. *See id.* at 187. Before 1986, when Congress created the H-2A and H-2B visas, agricultural and nonagricultural workers were admitted under the H-2 program. *See id.* at 187 & n.4. Approximately 30,000 H-2 workers were admitted each year between 1974 and 1978, and thirty-five percent of those were agricultural workers. *See id.* at 187 & n.3.

242. *See* IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 120 tbl.39 (1997). Yearly numbers of H-2A workers admitted were 18,219 in 1990; 14,628 in 1993; 13,185 in 1994; 11,394 in 1995; and 9,635 in 1996. *Id.* Statistics for 1991 and 1992 were not available in the INS report.

243. James S. Holt, Ph.D., Senior Economist, McGuiness & Williams, The H-2A Foreign Worker Recruitment Program: The Future of Agricultural Labor, Address at the Michigan State Horticultural Society Annual Meeting, Grand Rapids, Michigan (Dec. 9, 1998).

244. *See* GAO/T-HEHS-98-20, *supra* note 63, at 6.

245. *See id.*

246. *See id.* at 8. Between October 1, 1995, and June 30, 1997, the DOL certified ninety-nine percent of the 3,689 applications for H-2A workers filed nationwide. *See id.*

247. *Id.* at 5.

248. *See id.*

249. *See id.* at 7. The report's analysis of unemployment in "20 large agricultural counties," which produce "fruit, tree nut and vegetable[s]," indicated that

13 counties maintained annual double-digit unemployment rates, and 19 had rates above the national average during 1994 through 1996. As of June 1997, 11 counties still exhibited monthly unemployment rates double the national average of 5.2 percent, and 15 of the 20 counties had rates at least 2 percentage points higher than the national rate. Only two of the counties had unemployment rates below the June 1997 national average.

*Id.* at 6-7.

250. Henderson, *supra* note 230, at 13.

labor shortages. Employers should offer employment terms favorable enough to entice workers from other parts of the United States. Instead, excess U.S. workers result in farm labor wage rates that are stagnant or declining as adjusted for inflation.<sup>251</sup>

The report further explains that increased INS raids on undocumented workers, which could cause farm labor shortages, are unlikely to occur.<sup>252</sup> INS dedicates few of its resources to raiding agricultural employers, due to “competing enforcement priorities” and its policy of conducting raids only in response to complaints.<sup>253</sup> “INS officials around the country were unanimous in their statements that they do not expect their enforcement efforts to have any general impact on the supply of farm labor either nationally or regionally.”<sup>254</sup>

### 5. Underview: The Case of the Shepherding Industry

In the shepherding industry, the H-2A system fails miserably to protect both U.S. and foreign workers. Regulations allow the U.S. Employment Service to set special rules and procedures for handling H-2A applications from certain employers, when the employers demonstrate that the special procedures are necessary, or “in occupations characterized by other than a reasonably regular workday or workweek,” such as shepherding.<sup>255</sup> A DOL field memorandum outlines the special procedures for shepherders under the H-2A program.<sup>256</sup> The memorandum indicates that special procedures are necessary because:

The unique occupational characteristics of shepherding (spending extended periods of time grazing herds of sheep in isolated mountainous terrain; being on call to protect flocks from predators 24 hours a day, 7 days a week) have been recognized... as significant factors in limiting the number of U.S. workers who might be interested in and capable of performing these jobs.<sup>257</sup>

251. See GAO/T-HEHS-98-200, *supra* note 16, at 4.

252. See GAO/T-HEHS-98-20, *supra* note 63, at 7.

253. GAO/T-HEHS-98-200, *supra* note 16, at 2. INS receives few complaints involving agricultural employers. See *id.* INS focuses its raiding efforts on “identifying aliens who have committed criminal acts, including violent criminal alien gang and drug-related activity, and on detecting and deterring fraud and smuggling.” GAO/T-HEHS-98-20, *supra* note 63, at 7.

254. GAO/T-HEHS-98-20, *supra* note 63, at 7.

255. 20 C.F.R. § 655.93(b) (2000).

256. See Field Memorandum No. 74-89 from Donald J. Kulick, Administrator, Office of Regional Management, Employment and Training Administration, United States Department of Labor, to All Regional Administrators (May 31, 1989) (on file with the Chicago-Kent Law Review) [hereinafter Field Memorandum No. 74-89].

257. *Id.*

The United States admits shepherders as temporary farm-workers for three-year periods, although, by the DOL's own admission, "most shepherding jobs are neither temporary nor seasonal."<sup>258</sup> Congress agreed to admit shepherders on H-2A visas in response to a perceived problem with earlier statutes, which, since the 1950s, allowed U.S. employers to hire shepherders from Spain.<sup>259</sup> Congress agreed to admit shepherders under the H-2 visa<sup>260</sup> to prevent foreign workers from quitting their shepherding jobs to work in other occupations.<sup>261</sup>

H-2A workers dominate the shepherding industry in the western United States. The Western Range Association ("WRA"), which acts as an intermediary between potential H-2A workers and ranchers, serves the majority of western sheep ranchers who employ H-2A workers.<sup>262</sup> The DOL has authorized a special application procedure that allows master applications and job orders specifically for the WRA.<sup>263</sup> The special shepherd regulations specifically authorize an employer to require a worker to be "on call for up to 24 hours per day, 7 days per week," exempting that employer from the record-keeping requirements<sup>264</sup> of other H-2A workers.<sup>265</sup> In addition, shepherd employers are exempt from 20 C.F.R. § 655.102(d), which requires other H-2A employers to submit a "positive recruitment plan"—or plan to recruit U.S. workers.<sup>266</sup> Finally, sheep ranchers who employ H-2A workers enjoy different housing requirements than other H-2A employers.<sup>267</sup> Although shepherders

258. *Id.* at 2.

259. *See id.*

260. The IRCA of 1986 divided the H-2 visa into two categories, establishing the H-2A program for importing foreign workers to perform temporary agricultural jobs. *See supra* note 57 and accompanying text.

261. *See* Field Memorandum No. 74-89, *supra* note 256, at 2.

262. *See id.* at 3.

263. *See id.*

264. EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, SPECIAL PROCEDURES: LABOR CERTIFICATION PROCESS FOR SHEPHERDERS UNDER THE H-2A PROGRAM 2, *appended to* Field Memorandum No. 74-89, *supra* note 256.

265. 20 C.F.R. § 655.102(b)(7) and (8) require growers to record the number of hours offered and worked.

266. EMPLOYMENT & TRAINING ADMIN., *supra* note 264, at 7.

267. *See* 20 C.F.R. § 655.102(b)(ii). Range employers may certify their own housing. *See* EMPLOYMENT & TRAINING ADMIN., *supra* note 264, at 15. Mobile housing sites must be well drained, contain a water supply and individual drinking cups, and include facilities for disposal of excreta and liquid waste. *See id.* If outhouse facilities require burying waste, they must be kept fly-tight. *See id.* at 16. Heating must be provided when necessary for the safety and health of the worker. *See id.* The employer must also provide lighting or lanterns; "movable bathing, laundry and handwashing facilities" when running water is not feasible; a means of storing food, "such as a butane or propane gas refrigerator," or a means of salting food; cooking space,

work year-round for three-year periods, often in snowy, mountainous regions, tents are suitable housing under the regulations.<sup>268</sup>

The United States should not award such a subsidy to sheep ranchers, allowing them to hold workers in a state of modern involuntary servitude. The field memorandum shows that Congress *intentionally* created a system to prevent sheepherders from seeking work in other industries.<sup>269</sup> The United States should not subsidize agribusiness in such a way that it creates wages so low as to put U.S. workers out of work. If U.S. workers are not willing to be on call twenty-four hours a day, seven days a week, foreign workers should not be required to do so. Employers should be required to pay wages high enough and provide working conditions decent enough to attract workers within the United States.<sup>270</sup>

## B. Solutions

### 1. Discard the H-2A Program

Agricultural employers, like employers in other industries, should be forced to pay wages and provide working conditions sufficient to attract U.S. workers. Not all growers believe that economic necessity requires providing workers with the worst conditions allowable by the law.<sup>271</sup> Bill Grasmick, of Grasmick Incorporated, a large farm in Colorado between Lamar and Granada, attributes some of the success of his business to dedicated migrant workers, whose loyalty stems from the good treatment and housing his company provides.<sup>272</sup> He told the *Lamar Daily News* that, due to his company's attempts to make the workers' stays "as comfortable as possible," families who have worked for the Grasmicks since the 1950s will drop what they are doing in order to be available for the beginning of a season.<sup>273</sup> To create a pleasant atmosphere, the Grasmicks provide thirty well-maintained and air-conditioned mobile

garbage containers and disposal; insect sprays; a "bed, cot or bunk"; and a fire extinguisher and first-aid kit. *Id.* at 17-19. Housing standards for other agricultural workers are set out at 20 C.F.R. §§ 654.400-.417 (2000).

268. See EMPLOYMENT & TRAINING ADMIN., *supra* note 264, at 16. Tents are suitable when rough terrain does not permit the use of more substantial housing. *See id.*

269. *See supra* note 218 and accompanying text.

270. For example, ranchers could hire sheepherders in teams of two, rather than requiring one worker to be on call at all times.

271. *See* John Kennon, *Grasmick Brothers: Family Farm Life Filled with Trials and Tribulations*, LAMAR DAILY NEWS, July 31, 1997 (Progress Edition), at 1D.

272. *See id.*

273. *Id.*

homes throughout the farms.<sup>274</sup> Grasmick attests that making the families feel comfortable makes good business sense.<sup>275</sup> He told the *Lamar Daily News* that “[i]f we didn’t treat these people right, we wouldn’t have them coming back to us 30 years later.”<sup>276</sup>

## 2. Modify the H-2A Program

If the H-2A program is not discarded, it should be modified to better protect foreign and domestic workers, contain a more accurate AEW, and be used only in the event of a real shortage of domestic labor. Regulations should be modified to allow workers with abusive bosses an alternative to being deported. This result could be achieved by allowing the employee to switch to another employer.

Pay for agricultural workers should be allowed to rise to an adequate living wage, acceptable to U.S. workers. If we make the policy choice that we want to invite foreign workers to the United States, we must bring them in as workers with rights, not as modern indentured servants who have little recourse against employer abuse, and who remain in this country only at the will of the employer, even though they may have spent thousands of dollars in order to get to the United States.

H-2A visas should only be available when a domestic labor shortage actually exists. The DOL should remove the employers’ incentive to locate job advertisements where U.S. farmworkers are unlikely to see them. Employers should be required to make an earnest attempt to hire workers within the United States. The term “shortage” should not mean that no local worker is willing to work for a substandard wage under substandard conditions. Shortage should mean that no workers, anywhere within the United States, are willing to work at a reasonable price. A price is not reasonable when only foreign workers will accept it.

In addition to decent wages, growers should make farm work more attractive to domestic workers by providing acceptable conditions, such as adequate housing for workers. Employers should also develop systems to make it possible for local work forces to harvest an area’s crops, eliminating the need for a migrant work force. One possible solution is the development of complementary industries. For example, a community can develop two industries that

274. *See id.*

275. *See id.*

276. *Id.*

use the same labor pool. One industry could employ workers during the summer and fall, while the second industry employs the same workers during the winter and spring. This arrangement would eliminate the need for workers to migrate.

### CONCLUSION

The use of agricultural guest workers has long been known to breed worker abuse and allow agribusiness to maintain poor pay and working conditions. The H-2A visa is detrimental to farmworkers both abroad and within the United States. Current trends indicate that unless Congress acts, agribusiness will continue to expand its use of H-2A workers, exploiting this source of involuntary servitude. The number of H-2A workers who entered the United States rose from 15,000 in 1996 to 21,000 in 1997.<sup>277</sup> North Carolina, the largest user of H-2A workers, employed an estimated 10,500 H-2A workers during 1998, up from 168 in 1989.<sup>278</sup> An estimated 30,000 H-2A workers entered the United States in 1999, and growers are lobbying to expand the program.<sup>279</sup> According to a report presented at the Michigan State Horticultural Society's December 1998 annual meeting, the trend is likely to continue in future years.<sup>280</sup> The title of the report describes the H-2A foreign worker program as "The Future of Agricultural Labor."<sup>281</sup> If the H-2A program is allowed to continue in its current form, it is likely that the increased presence of H-2A workers will have a much more significant impact on domestic agricultural workers. Congress must act to modify or eliminate the H-2A visa.

277. See GAO/T-HEHS-98-200, *supra* note 16, at 1.

278. See Ward, *supra* note 41. The North Carolina Growers Association supplies H-2A workers to 1,050 North Carolina growers and to growers in sixteen other states. See *id.*

279. See *id.*

280. See Holt, *supra* note 243.

281. *Id.*