INSIDE

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IN FUTURE ISSUES

- INS enforcement issues

Ninth Circuit rejects "ability to pay" and Eighth Amendment challenges to marketing order penalties

The Ninth Circuit has upheld the assessment of a $225,500 civil penalty against a handler of almonds subject to a marketing order promulgated under the Agricultural Marketing Agreement Act of 1937 (AMAA). *Balice v. United States Department of Agriculture*, No. 98-16766, 2000 WL 135242 (9th Cir. Feb. 8, 2000). In doing so, it rejected various challenges to the penalty, including the contention that the statutory authority for the penalty, 7 U.S.C. § 608c(14)(B), incorporated a means test that required the USDA to consider the respondent's ability to pay the penalty. The court also rejected the argument that the penalty violated the Eighth Amendment excessive fines clause.

During the 1987-88 almond crop year, Vito Balice and two of his uncles were handlers of California almonds. As handlers, they were subject to the Almond Marketing Order. Among other requirements, the Order directed handlers to maintain certain records, to make certain reports to the Almond Board of California, to withhold certain quantities of almonds off the market by placing them in reserve, and to dispose of inedible almonds to the Almond Board or secondary outlets by a certain date. Under AMAA § 608c(14)(B), the Secretary had the authority to assess a civil penalty of up to $1,000 per violation against handlers who violated the Order.

Following the initiation of disciplinary proceedings against Mr. Balice, an administrative law judge (ALJ) found that Mr. Balice had violated the Order's recordkeeping, reporting, reserve, and disposition requirements and assessed a $216,000 penalty. Mr. Balice appealed to the USDA Judicial Officer (JO) who adopted some of the ALJ's findings, added new findings, and increased the penalty to $225,500. Mr. Balice then sought judicial review of the JO's decision in federal district court, which granted summary judgment in the Department's favor. An appeal to the Ninth Circuit followed.

Before the Ninth Circuit, Mr. Balice challenged the amount of the penalty on two grounds. First, he maintained the AMAA § 608c(14)(B) required the JO to consider his ability to pay the amount of the penalty assessed. The Ninth Circuit disagreed. It concluded that the statute did not expressly provide for a "means test." More specifically, unlike the penalty provision in the Packers and Stockyards Act, 7 U.S.C. § 213(b), that requires the USDA to

Continued on page 2

Payment limit effectively removed from marketing assistance loan gains

Since Februrary 22, 2000, the Farm Service Agency (FSA) has made commodity certificates available to producers to use in acquiring collateral pledged to the Commodity Credit Corporation (CCC) for nonrecourse marketing assistance loans. The practical consequence for eligible producers who use the certificates will be the elimination of a payment limit on marketing assistance loan gains. *See* FSA Notice LP-1723 (applicable to all crops except cotton); FSA Notices CMA-47 and CN-97 (applicable to cotton); *see also* FSA Notices LP-1724 (Commodity Certificate Exchange Questions and Answers), LP-1726 (Commodity Certificate Exchange Clarifications).

Nonrecourse marketing assistance loans are available for feed grains, wheat, upland and extra-long staple cotton, rice, and oilseeds. Eligible producers may obtain such a loan at the end of the crop year by using all or a portion of their eligible crop as collateral. The loans are made for a nine or ten-month period, depending on the commodity, at the basic loan rate established for the commodity. The loans may be repaid in cash or by forfeiting the crop securing the loan. Except for loans made on extra-long staple cotton, the Secretary may lower the repayment rate in certain circumstances. For most of the eligible crops, this repayment rate is the posted county price (PCP) for the commodity, a sum that represents the USDA's estimate of the local market price. When the repayment rate is lower than the basic rate, participants in the program receive a gain representing the difference between the two rates.

Continued on page 2

consider the effect of a sanction on the respondent's ability to remain in business, AMAA § 608c(14)(B) does not list factors for the Secretary to consider in assessing a penalty.

Notwithstanding the absence of a listing of factors in § 608c(14)(B), the Ninth Circuit concluded that the assessment of the penalty against Mr. Balice had been the product of "informed administrative decision making" involving a number of specific considerations such as the nature, number, and effect of the violations on the marketing order program. The penalty, therefore, was not the product of a "standardless exercise of discretion" of the kind condemned in the Food Stamp Act case of *Corder v. United States*, 107 F.3d 595 (8th Cir. 1997), on which Mr. Balice relied. In *Corder*, the court had invalidated a regulation that did not reflect the intent of Congress in amending the Food Stamp Act to alleviate the harshness of permanent disqualification in cases where the trafficker in food stamps was a first-time offender. While Mr. Balice relied on *Corder* for the proposition that the omission of mitigating circumstances in a penalty statute invariably required the USDA to follow the principles of fairness expressed in statutes such as the Packers and Stockyards Act, the Ninth Circuit disagreed with that interpretation of *Corder*. The JO, according to the Ninth Circuit, had considered the proper factors, and Mr. Balice's ability to pay the penalty was not one of them. *Balice,* 2000 WL 135242 at *2-5.

In reaching the conclusion that AMAA § 608c(14)(B) did not require the JO to consider Mr. Balice's ability to pay the penalty, the Ninth Circuit did not apply 5 U.S.C. § 601, a provision of the Small Business Regulatory Enforcement Act of 1966, because it was not in effect when the penalty was imposed. This provision, in addition to imposing certain requirements on federal agencies, provides that "[u]nder appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities." The Ninth Circuit left "for the future" the question whether this provision requires the USDA to consider a handler's ability to pay a civil penalty assessed under §608c(14)(B). *Balice*, 2000 WL 135242 at *4, n5.

Mr. Balice also argued that the penalty violated the excessive fines clause of the Eighth Amendment. The Ninth Circuit, however, rejected this contention by first noting that the JO had the statutory authority to fine Mr. Balice as much as $528,000 based on the number of violations he had committed. It then noted that Mr. Balice bore substantial responsibility for the violations. In addition, Mr. Balice had made an illegal profit of approximately $246,677 by unlawfully disposing of almonds that should have remained in reserve until the reserve requirements were lifted by the Secretary. Observing that the violations, including the violation of the reserve requirement, undermined the Almond Order and that the amount of the illegal profits exceeded the amount of the penalty, the court held that the penalty was not grossly disproportionate to the gravity of the offenses for which it was imposed. *Balice*, 2000 WL 135242 at *10-11.

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VOL. 17, NO. 4, WHOLE NO. 197 March 2000

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Agricultural Law Update is published by the American Agricultural Law Association, Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313. All rights reserved. First class postage paid at Des Moines, IA 50313.

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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, Rt. 2, Box 292A, 2816 C.R. 163, Alvin, TX 77511.

Payment limit/Cont. from page 1

This gain is known as a marketing assistance loan gain, and it is subject to a $75,000 payment limit that also covers loan deficiency payments (LDPs). *See* 7 U.S.C. § 1308(2).

For the 1999 crop year only, this $75,000 payment limit was increased to $150,000 to provide more financial assistance to producers facing low commodity prices. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-78, tit. VIII, § 813, 113 Stat. 1135, 1182. Apparently to avoid raising the limit again for the 2000 crop year and to discourage producers who have reached even the $150,000 payment limit from forfeiting their collateral to the CCC, Congress and the Secretary have now given producers the option of receiving unlimited marketing assistance loan gains through the use of commodity certificates.

Although it is called the commodity certificate option, no certificates are actually issued. Instead, a series of calculations and computer entries are made, all having the result that the producer repays the loan at the repayment rate and redeems the collateral without having any of the gain realized counted toward the payment limit. These calculations and computer entries essentially reflect a series of nearly simultaneous transactions in which the producer first repays the full loan amount; the CCC then buys the commodity that had secured the loan for the same sum; the CCC then sells the producer the amount of "commodity certificates" needed for their exchange for the commodity the CCC had just purchased; and the producer then redeems the certificates for the commodity. Because the second of these transactions cancels the first and the value of the certificates issued equals the amount needed to repay the loan at the repayment rate, the producer, in effect, repays the loan by purchasing commodity certificates which, in turn, are immediately exchanged for the commodity under loan.

The only economic difference between the series of transactions involving commodity certificates and the mere repayment of the loan at the repayment rate is that the gain realized in the former is not subject to a payment limit while the gain realized by the latter is subject to a payment limit. The amount of the gain is identical under either option. All that is different is that eligible producers now have the choice of whether they want their marketing assistance loan gains limited or unlimited. Since the limit applicable to marketing assistance loan gains also covers LDPs, most producers can be expected to use the commodity certificate option unless they are certain that they will not reach the limit under either or both programs.

—Christopher R. Kelley, Assistant Professor, University of Arkansas, Of Counsel, Vann Law Firm, Camilla, GA

Conference Calendar

Kansas State University Agricultural law Symposium
April 27-28, 2000
Garden City, Kansas Plaza Inn
Topics: bankruptcy taxation, Neil E. Harl; agricultural law update, Roger A. McEowen; oil and gas law, Chris Steincamp; ethics, Philip Ridenour.
For more information, call 785- 532-1501.

Liability for damages caused by fire started by defective combine engine

In *Jordan v. Case Corporation*, 993 P.2d 650 (Kan.1999), the plaintiff purchased a combine manufactured by the defendant and insured the combine against loss by fire with Farm Bureau Mutual Insurance Company. The combine and engine were destroyed in a fire along with the plaintiff's unharvested wheat crop. The fire was allegedly caused by the engine in the combine. Farm Bureau paid the plaintiff for his loss and the plaintiff was paid the balance of his uninsured loss by the defendant.

Farm Bureau, acting as the plaintiff's subrogee, sued the defendant to recover its insurance payment to the plaintiff on the basis that the defective engine in the combine caused the fire. The trial court granted summary judgment to the defendant, and the Kansas Court of Appeals affirmed. The court noted that *Koss Construction v. Caterpiller, Inc.,* 25 Kan. App. 2d 200, 960 P.2d 255, *rev. denied*, 1998 Kan. LEXIS 541 (Kan. Sup. Ct. Sept. 10, 1998), controlled in that a purchaser of defective goods cannot sue in negligence or strict liability where the only injury was damages to the goods themselves. The court also rejected Farm Bureau's argument that *Koss* did not apply because *Koss* limited the "economic loss" doctrine to commercial buyers of defective goods rather than consumer transactions. The court cited a 1986 decision of the United States Supreme Court to the effect that the economic loss doctrine applies to both consumer and commercial business transactions. Farm Bureau also argued that *Koss* did not apply because the engine was not a component part of the combine. The court rejected that argument and held that, *as a matter of law*, the engine was a component part of the combine. The court noted that the plaintiff bargained for the combine at a certain price and with certain warranty provisions, that the bargain was for a combine *with an engine*, and that after acquisition, the plaintiff insured it against fire loss.

Note: Product defects that damage only the product itself, or make the product useless are *not* within the domain of product liability law. See, e.g., Restatement 3d of Torts, Section 21. Similarly, the vast majority of courts at both the federal and state level have held that the economic loss doctrine applies to both consumers and business purchasers. See, e.g., *Clarys v. Ford Motor Company,* 592 N.W.2d 573 (N.D. 1999). Indeed, the United States Supreme Court has held that when a product injures itself, the loss is to be recovered through insurance. See, e.g., *East River SS Corp. v. Transamerica,* 476 U.S. 858 (1986). Consequently, these type of cases are to be decided under contract law with contract-based damages. The question is what the purchaser contracted for—if what was purchased was insured, the insurance company is liable for the loss.

—Roger A. McEowen,
Kansas State University

H-2A/*Cont. from page 7*

[28] 29 C.F.R. § 1910.142 (1999).
[20] 20 C.F.R. §§ 654.404-654.417 (1999).
[30] 8 U.S.C. § 1188(c)(4)(1999).
[31]2 20 C.F.R. §§ 654.403(a)(3)(1999).
[32] 20 C.F.R. §§ 654.403(c)(1999).
[33] 20 C.F.R. § 655.102(b)(5)(1999).
[34] 20 C.F.R. § 655.102 (1999).
[35] 20 C.F.R. § 655.102(b)(7)(1999).
[36] 20 C.F.R. § 655.102(b)(8)(1999).
[37] 20 C.F.R. §655.102(b)(7)(1999).
[38] Jingle Davis, *Vidalia Growers Vow to Shun Illegal Workers*, Cox News Service, April 1, 1999.
[39] Office of Inspector General, U.S. Department of Labor, Office of Audit, *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*. Report Number: 04-98-004-03-321, March 31, 1998, Appendix B.
[40] *Id.*
[41] U.S. General Accounting Office, H-2A Agricultural Guest Worker Program, *Changes Could Improve Services to Emploeyrs and Better Protect Workers*, Report Number: GAO/HEHS-98-20, December 1997, p. 59.
[42] 20 C.F.R. § 655.106(c)(1)(1999).
[43] 20 C.F.R. 655.106(c)(2)(1999).
[44] Office of Inspector General, U.S. Department of Labor, Office of Audit, Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers. Report Number: 04-98-004-03-321, March 31, 1998, at 13.
[45] Office of Inspector General, U.S. Department of Labor, Office of Audit, *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*. Report Number: 04-98-004-03-321, March 31, 1998, at 16.
[46] *Id.* at 18.
[47] *Id.* at 17.
[48] See U.S. General Accounting Office Report to Congressional Committees, *H-2A Agricultural Guestworker Program, Changes Could Improve Services to Employers and Better Protect Workers*, Report NumberGAO/HEHS-98-20, December 1997, and, Office of Inspector General, U.S. Department of Labor, Office of Audit, *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*. Report Number: 04-98-004-03-321, March 31, 1998.
[49] U.S. General Accounting Office, H-2A *Agricultural Guest Worker Program, Changes Could Improve Services to Employers and Better Protect Workers*. Report Number GAO/HEHS-98-20, December 1997, p. 29.
[50] *Id.* at 4.
[51] *Id*. at 7.
[52] Brent Lancaster, *Social Security Fraud Costly: Immigrants Can Easily Obtain Fake Identification,* The Times-News (Burlington, N.C.), December 21, 1999.
[53] U.S. General Accounting Office, H-2A Agricultural Guest Worker Program, *Changes Could Improve Services to Employers and Better Protect Workers*, Report Number: GAO/HEHS-98-20, December 1997, p. 35.
[54] *Id.* at footnote 27, p. 30.
[55] *Id.* at 30.
[56] *Id*. at 32, 33.
[57] 8 U.S.C. § 1324(a)(1999).
[58] Office of Inspector General, U.S. Department of Labor, Office of Audit, *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*. Report Number: 04-98-004-03-321, March 31, 1998, p. 25.
[59] U.S. General Accounting Office, H-2A *Agricultural Guest Worker Program, Changes Could Improve Services to Employers and Better Protect Workers*. Report Number GAO/HEHS-98-20, December 1997, p. 29.
[60] Office of Inspector General, U.S. Department of Labor, Office of Audit, *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*, Report Number: 04-98-004-03-321, March 31, 1998, Appendix B.

Membership Directory to appear on AALA website

The AALA Board of Directors is pleased to announce that it recently approved the posting of the AALA membership directory on our AALA Internet site. Initially, a listing of members and their practice areas will be posted in the "members only" section of the website. This is the area that can only be accessed by members with a valid AALA website password.

In addition, a membership directory will eventually be posted on the general website for access to anyone who visits the site. This general listing will not include practice areas, thus avoiding attorney advertising restrictions. We are confident that this membership listing will be helpful to members and to others with an interest in agricultural law matters. We are also hopeful that it will help to "spread the word" about the expertise of our members, enhancing the careers of our members and encouraging others to join with us.

If any member wishes to exclude their name from the general website listing, please contact Prof. Drew L. Kershen in writing at the University of Oklahoma, 300 W. Timberdell Road, Norman, OK 73072-6331; or by e-mail at dkershen@ou.edu by April 1, 2000.

All members are encouraged to explore the recent improvements to our website. The address is http://www.aglaw-assn.org. Drew Kershen's extensive agricultural law bibliography is now online in searchable format and the *Ag Law Update* is now available to members, also with a convenient search mechanism. We are expanding our links with other sites and our listings with various search engines. Once again, the Board thanks Drew for his continuing efforts to develop and improve our Internet presence.

Understanding H-2A

By Jeffrey A. Feirick

Farmers in the United States grow, harvest, and market the food that feeds the U.S. and most of the world. Historically, U.S. farmers face the same predicament every year, a shortage of workers when crops are ready to harvest. The Temporary Agricultural Guest Worker Program, commonly called H-2A, was created in response to this shortage of workers. The program is governed by the Immigration Reform and Nationality Act,[1] as amended by the Immigration and Control Act of 1986 (IRCA), Public Law 99-603, section 101(a)(15)(H)(ii)(a). The H-2A program allows agricultural employers who anticipate difficulty in obtaining domestic workers to petition the U.S. Attorney General, through the Immigration and Naturalization Service (INS), for permission to bring nonimmigrant aliens into the U.S. for temporary or seasonal work.

This report provides a basic understanding of the H-2A program requirements, the steps of implementing the H-2A program, the advantages/disadvantages of H-2A program, and the effects of illegal aliens on the H-2A program.

H-2A program requirements

The original H-2 program began in 1952, and is similar to the current H-2A program started in 1987.[2] In 1996, 15,235 foreign workers entered the United States as H-2A workers. Mexico provides sixty-eight percent of the H-2A workers, while twenty-eight percent come from Jamaica.[3] As detailed below, much time and effort is necessary to understand the program requirements.

Who may apply

The following categories of individuals or organizations may file an H-2A application:[4]

•Agricultural employer

An agricultural employer who anticipates a shortage of U.S. workers needed to perform agricultural labor or services of a temporary or seasonal nature may file an application requesting temporary alien agricultural certification. "Temporary or seasonal nature" means employment performed at certain seasons of the year. The phrase is usually used in relation to the production and/or harvesting of a crop, or for a limited time period of less than one year when an employer can show that the need for the alien worker(s) is truly temporary.[5]

•Sole proprietorship, partnership, or a corporation

The employer may be a sole proprietorship, a partnership, or a corporation. An association of agricultural producers may file as a sole employer. Associations may file master applications on behalf of their members.

•Agent, individual or entity

An authorized agent, whether an individual (e.g., an attorney) or an entity (e.g., an association), may file an application on behalf of an employer.

H-2A U.S. worker protection provisions

H-2A is designed to protect U.S. worker wages and working conditions from eroding because of the importation of H-2A workers. This protection occurs through "positive recruitment" and the fifty percent rule.

—Positive recruitment

Each H-2A employer has a statutory obligation to engage in "positive recruitment" within a multi-state region of traditional or expected labor supply of qualified U.S. workers.[6] The term "positive recruitment" is defined as "the active participation of an employer or its authorized hiring agent in locating and interviewing applicants in other potential labor supply areas and in the area where the employer's establishment is located in an effort to fill specific job openings with U.S. workers."[7] The obligation of positive recruitment terminates on the date the H-2A workers depart for the employer's place of employment from their country of origin.[8]

—Fifty percent rule

••The new obligation.

Following the departure of the H-2A workers from their homeland to their place of employment in the U.S., the employer assumes a new obligation under the so-called "fifty percent rule." The "fifty percent rule" mandates that the employer must employ any qualified U.S. worker who applies for a job until fifty percent of the contract period has expired, even though this may displace any H-2A worker.[9] Failure to follow these rules can result in the Secretary of Labor imposing penalties and seeking injunctive relief and specific performance of contractual obligations.[10]

••Potential fifty percent rule no-win situation.

The problem arises when an agricultural employer imports H-2A workers and invests money in their training. If at any time before completion of fifty percent of the contract, a domestic employee reports for work, the employer must hire him. Thus, an agricultural employer could be required to choose between paying more employees than needed or displacing trained workers with new untrained workers.

An employer who complies with the fifty percent rule and hires a domestic worker may dismiss any H-2A worker. This provision of H-2A overrules the three-fourths contract guarantee discussed later in this article.[11] The dismissal of the H-2A worker could result in unjust injury to foreign workers who were dismissed without the means to return home.

In one circumstance, an employer received H-2A certification and hired seventy-five H-2A workers. The employer transported, trained, and utilized the H-2A workers. However, before completion of the fifty percent period, thirty-six domestic applications were referred to him by the State Employment Service Agency (SESA). The employer was required to hire the domestic applicants. In this instance, the employer chose to retain the H-2A workers. However, had the employer been unable to pay the wages of both groups or meet other assurances, such as housing, the H-2A workers would have been dismissed.[12]

••Court litigation over the fifty-percent rule.

Seven poor migrant workers, all U.S. citizens and residents of Puerto Rico, sued Nourse Farms of South Deerfield, Massachusetts for refusing to employ them and hiring H-2A workers.[13] Five of the seven workers had worked on Nourse Farms for the 1997 growing season. In January 1998 the workers received a letter from Nourse Farms asking the workers to contact the local employment office if they were interested in working the 1998 season. Nourse Farms at the time requested eight farm workers via the H-2A program.

In January 1998, the workers attempted to accept the job offer to begin in March 1998. However, they were informed that the job order had not been entered into the interstate job clearance system. Later, the workers learned that the job order was not entered into the system because it was improperly filed and required supplementation and correction. Meanwhile, the H-2A workers departed from Jamaica to Nourse Farms, to begin employment. Nourse Farms refused to hire the workers in compliance with the fifty percent rule. The New England Apple Council offered to transfer the Puerto Rican workers to another farm in the area, which Nourse Farms claimed the workers repeatedly refused.

The workers filed a lawsuit, and Nourse Farms asked the court to dismiss the suit because there was not enough evidence to prove that Nourse Farms failed too comply with the terms and conditions of H-2A certification. The court noted that if Nourse Farms had really desired to accommodate the workers, it could easily have transferred the foreign workers and placed the Puerto Rican workers at their farm. This would have been consistent with the clear policy of the H-2A program. Instead, the record indicates that Nourse Farms offered empty promises of transfer to undisclosed locations subject to

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undisclosed employment terms. The court held that if these facts were proven at trial, the workers would prevail over Nourse Farms. The court refused to dismiss the lawsuit and allowed the complaint to go to trial.

Labor disputes

To protect U.S. workers, an employer must certify that the job opportunity for which the employer is requesting H-2A certification is not vacant due to a strike or lockout.[14]

Wages[15]

Employers must pay the higher of one of three choices:

1. the Adverse Effect Wage Rate (AEWR);
2. the applicable prevailing wage (the rate established by the state employment service for specific crops and labor markets); or
3. the statutory minimum wage, currently $5.15 per hour.[16]

Adverse Effect Wage Rates are the minimum wage rates which the Department of Labor (DOL) has determined must be offered and paid to U.S. and alien workers under the H-2A program.[17] The AEWR is equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the United States Department of Agriculture (USDA) based on the USDA quarterly wage survey.

Employers are required to pay workers on a regular basis in accordance with the prevailing practice in the area or at least twice a month, whichever is more frequent.[18]

Three-fourths guarantee

Each employer must guarantee to offer each worker employment for at least three-fourths of the workdays in the work contract period and any extensions.[19] For example, if a contract is for a 10-week period, during which a normal workweek is specified as 6-days a week, 8-hours a day, the worker would have to be guaranteed employment for at least 360 hours (e.g., 10 weeks x 48 hours/ week = 480 hours x 75% = 360 hours). Wages for the guaranteed seventy-five percent period are to be calculated at not less than the average hourly piece rate, the statutory minimum wage, or the AEWR for the state in which the work was being done, whichever is higher.

The Sugar Cane Growers Co-op of Florida[20] gave Jamaican H-2A workers a contract good for one month longer than needed. The additional time was to allow for unforeseen harvesting circumstances such as bad weather. The contract contained a clause stating that the Co-op could change the ending date of the contract provided that they gave workers a ten-day written notice. The Co-op gave the workers a ten-day written notice of termination before the end of the entire contract. The workers filed a class action lawsuit claiming that they were entitled to wages amounting to the three-fourths guarantee for the entire period. The Court of Appeal of Florida, Fourth District, upheld the contract, holding that the workers were entitled to pay through the time specified in the end of season termination notice and not through the previously stated contract.[21]

Allowable meal charges

—Employer provided meals

If the employer has centralized cooking and eating facilities, the employer must provide each worker with three meals per day. The employer can charge each worker a per day charge for the costs of the meals. The job offer must state the charge, if any, to the worker for meals.[22] The meals charge is adjusted annually based on the same percentage as the 12-month percent change in the Consumer Price Index for All Urban Consumers (CPI-U) for Food between December of the year just concluded and December of the prior year.[23]

The DOL has determined the percentage change between December of 1997 and December of 1998 for the CPI-U for Food was 2.2 percent. The charge to a worker for food shall be no more than $7.84 per day.[24]

An employer may petition for a higher charge of $9.70 per day,[25] if the employer can justify the charges and submits the necessary documentation to the Regional Administrator (RA). Documentation submitted shall include the cost of goods, and services directly related to the preparation and serving of meals, the numbers of workers fed, the number of meals served, and the number of days meals were provided. Charges for transportation, depreciation, overhead, and similar charges may not be included. Receipts and other cost records for a representative pay period shall be available for inspection by the RA for a period of one year.[26]

—Free and convenient cooking facilities

If the employer does not provide meals, the employer must furnish at no cost to the workers convenient cooking and eating facilities of sufficient size and capacity (including utensils) to enable workers to prepare their own meals.[27] The job offer shall clearly describe such facilities and state that the facilities and necessary utensils are provided at no cost to the workers.

Housing requirements and inspections

—Housing requirements

Employers seeking H-2A certification must provide free housing for non-local workers. The employer can provide the housing by erecting housing, or renting public accommodation type housing.

•Employer erected housing. Employer erected housing must meet the Occupational Safety and Health Administration (OSHA) standards specified for Temporary Labor Camps[28] or Employment and Training Administration regulations (ETA).[29]

•Public rental housing. Employers who rent public rental housing are not required to conduct OSHA inspections because local or state standards will apply. Absent local or state standards, the OSHA standards are applicable, and pre-occupancy housing inspections must be conducted.

— Inspection deadlines

Worker housing must pass inspection before an H-2A certificate can be granted.[30] Housing must be in full compliance with the applicable standards no later than twenty days before the date of need.[31] – (i.e., the date on which certification must ordinarily be granted). An employer whose housing fails to pass an inspection conducted on or before the twentieth day prior to the date of need will have five days to correct the deficiency[32] and the certification will be delayed for that period, if necessary.

Transportation costs/reimbursement

—Beginning and end of the job

Every non-local worker employed on an H-2A contract is entitled to be paid for all transportation costs related to travel from the place where the worker was recruited to the site of the job, and then back to the worker's homeplace. This includes both foreign and U.S. workers. Workers are "non-local" if they cannot reasonably return to their permanent residence every night. Expenses must be reimbursed according to the following schedule:

•For transportation to the place of employment, the employer must repay the worker when fifty percent of the contract period has been completed;

•For transportation "home," the worker must complete the agreed upon contract period. The employer has no obligation to pay return expenses should an employee abandon the employment unless some special provision in the worker's contract otherwise provides.

—Daily transportation

The employer shall provide free worker transportation, which meets all applicable safety standards, between the worker's living quarters (housing provided by the employer) and the employer's work site. This benefit does not apply to local workers who are not eligible for employer-provided housing.[33]

Paperwork requirements

—Contents of job offers[34]

Every worker must be provided a copy of the worker contract or, as a substitute for the worker contract, a copy of the job clearance order. This "official" document must include:

a. The beginning and ending dates of the contract period;

b. Any and all significant conditions of employment—such as payment for:

Continued on page 6

H-2A/Cont. from page 5

i. Transportation expenses incurred

ii. Housing and meals to be provided (and related charges),

iii. Specific days workers are not required to work (i.e., Sabbath, federal holidays),

c. The hours per day and the days per week each worker will be expected to work during the contract period;

d. The crop(s) to be worked—rate(s) for each crop/job;

e. The rate(s) of pay for each job to be performed;

f. Any tools required and that the employer pays for same; and

g. Workers' compensation insurance will be provided per state law of the state where the work is performed.

—Records required for individual workers

a. Employers certified under H-2A must keep accurate and adequate records[35] with respect to the workers' earnings including:

i. Field tally records;

ii. Supporting summary payroll records;

iii. Records showing the nature and amount of the work performed;

iv. The number of hours of work offered each day by the employer broken out by hours offered both in accordance with and over and above the three-fourths guarantee. If the number of hours worked by the worker is less than the number of hours offered in accordance with the three-fourths guarantee, the records shall state the reason or reasons for the difference;

v. The hours actually worked each day by the worker;

vi. The time the worker began and ended each day;

vii. The rate of pay both piece rate and hourly, if applicable;

viii. The worker's home address; and

ix. The amount of and reason for any and all deductions made from worker wages.

b. Each worker must be provided a wage statement on or before each payday[36] showing:

i. Total earnings for the pay period;

ii. The hourly rate and/or piece rate of pay;

iii. If piece rates are used, the units produced daily;

iv. The hours of employment which have been offered to the worker broken down by offers in accordance with and over and above the three-fourths guarantee;

v. The hours actually worked by the worker; and

vi. All deductions (along with an explanation as to why deductions were made).

c. Termination of workers

i. Employment records must be maintained on any worker who was terminated, including the reason for termination;

ii. The employer must notify the local Job Service Office by providing a report on any termination(s), the date of termination, giving the reason for each. The employer must indicate if replacement(s) will be sought for such workers.

d. Long-term record keeping: the employer shall retain the records for not less than 3 years after the completion of the work contract.[37]

H-2A advantages

The biggest advantage of using the H-2A program is the assurance that all of the workers are legal aliens. In 1998, part of the South Georgia Vidalia onion crop was lost during an INS illegal worker roundup. The INS entered onion fields during harvest, and hundreds, perhaps thousands, of workers fled, leaving the crop unharvested. The INS allowed the harvest to continue after employers agreed to obey employment laws.[38]

Employers are exempt from the sanctions and penalties related to hiring an authorized alien if the alien was referred by a SESA.[39] The employer has the burden of proving that the worker was referred by the SESA and must have documentation that the SESA has complied with IRCA procedures with respect to the referral. SESAs are not required to participate in the worker verification process but may choose to do so.[40]

Annually, nine agriculture employer associations request fifty-five percent of all H-2A workers.[41] Most agricultural employers participate in the H-2A program through a grower association specifically organized for this purpose. Some associations complete the INS and ETA administrative requirements including coordination of the requirement for positive recruitment of U.S. workers and arrange transportation and complete other activities related to the workers' arrival, employment, and departure.

Reasons for using a growers association

—Worker flexibility

Any changes to a worker's contract must be approved by the RA even if the employee agrees to the change. This requirement limits employers to the contract they agreed on at the beginning of the program.[42] However, members of an association may transfer workers among its members, as long as the worker is to perform work for which the H-2A certification was granted.[43] During a growing season, associations may file a series of orders that consolidate the applications of many employers over a period that encompasses the harvest season of all its members listed on the certification. In some instances, associations file "master orders," which include wide geographic areas and may involve the harvest of dozens of crops at widely varying piece rates.[44]

—Confusing regulations

•The cost of compliance: As a practical matter, most large employers or associations are the only businesses who can afford to have personnel dedicated to knowing and complying with the myriad of regulations and procedures involved in securing and employing H-2A workers. Failure to comply with procedures brings harsh penalties and possibly even a three-year ban from using the H-2A program.

•Ever-changing regulations: Daily updates are available from DOL concerning the H-2A program. Some changes are published in the Federal Register and the Code of Federal Regulations. Other changes come from congressional legislation. The average farmer lacks the sophistication to accurately incorporate the daily H-2A changes.

•Negative publicity: Membership in an H-2A grower association can provide support and insulation from attacks on the H-2A program by farm worker rights groups.

H-2A disadvantages

Increased government scrutiny

One major disadvantage of the H-2A program is increased government scrutiny. An employer who submits an application for H-2A workers must comply with the program requirements along with all other labor laws and regulations. To ensure compliance, government inspectors from all levels will inspect the operation. These inspections may turn up discrepancies not listed on the inspector's checklist.

Governmental inefficiency

The H-2A program has numerous deadlines an employer must comply with. As the time for harvest draws near, a missed deadline can mean a one-week delay in having the workers available to harvest crops. A one-week delay could spell economic disaster for the grower. Not only must employers meet deadlines in the application process, but ETA must also meet deadlines

—ETA frequently missed processing deadlines

The 1998 Department of Labor Inspector General's Report indicated the ETA frequently missed processing deadlines. IRCA requires that the employer must be notified, in writing, within seven days of filing an application for H-2A workers, whether ETA's review of the application indicates it has met standards and been accepted or has not met standards and has been denied. The report found that employers were not notified of ETA's actions within seven days on sixty percent (193 of 318) of the certifications in the group sampled. ETA missed the seven-day requirement by an average of fifteen days. An additional sixty-five files did not contain application acceptance or rejection dates for evaluation.[45]

—Enforcement of H-2A regulations

One purpose of the Immigration Reform and Control Act of 1986 (IRCA) is to assure employers an adequate labor force on the one

hand and to protect the jobs of U.S. workers on the other. A major thrust of the IRCA is the enforcement of all major provisions related to protections for workers. Effective enforcement of violators is hampered by the shortcomings of the system. The current system of enforcement fails to provide both ESA or ETA with complete knowledge of cases requiring government intervention.[46] When one agency does not know what the other is doing, the result can be irregular and unfair penalties.

• The Employer and Training Administration (ETA)

•• ETA administers sanctions for failing to comply with certification requirements

••• Substantial violations of the regulations (denial of certification for up to three years

••• Less than substantial violations of the regulations (reductions of one-fourth of job opportunities certified.)

•• ETA has the power to deny future labor certificates.

•• ETA has a period of two years after the date of certification to notify the employer of the action.[47]

• The Employer Standards Administration (ESA) of the U.S. Department of Labor (DOL) has a primary role in investigating and enforcing the terms and conditions of employment.

•• ESA can assess civil money penalties

•• ESA can recover unpaid wages

•• ESA can compel compliance with an employer's contractual obligations to employees

•• ESA's jurisdiction is limited to actual events transpiring when there is an employer-employee relationship

•• ESA does not have the power to deny fut ure labor certification and must ask ETA to deny a future labor certificate.

—H-2A program regulations have not been finalized

On June 1, 1987, ETA published an interim final rule and request for comments with the intention of issuing final rules and regulations governing the H-2A program. While more than ten years have passed, the H-2A regulations have not been issued in final form. The interim final rule is contained in ETA 398, the H-2A Handbook. The 325-page handbook was published in 1987, and has not been updated. An updated handbook is needed.

The effect of illegal aliens on the H-2A

Government reports fail to document a shortage of farm workers

Nationwide, agricultural studies show that there is no shortage of farm workers.[48] Most farmers obtain sufficient numbers of workers to meet their needs, although farmers in several areas do report labor shortages in workers for specific crops, or geographic areas. Several Nevada farms are so geographically inaccessible that farmers have trouble each year obtaining domestic workers. North Carolina and Virginia frequently use the H-2A program because most domestic workers refuse to work tobacco.[49] The abundant availability of farm workers lessens the appeal of the H-2A program. Annually, the H-2A program provides a small fraction of farm workers, about one percent out of the 1.3 million agricultural workers.[50]

Inability to control unauthorized foreign agricultural workers compromises H-2A

The glut of farm workers is partially attributable to illegal aliens. The General Accounting Office estimates that approximately 600,000 farm workers in the United States lack legal authorization to work.[51] High quality fraudulent documents, some available for as little as $20, can be obtained so readily that it is virtually impossible for employers to be certain that they are not hiring an illegal alien.[52] Furthermore, discrimination laws prohibit an employer from attempting to obtain additional verification.[53]

INS enforcement efforts are not likely to significantly reduce worker availability

Some growers and USDA officials fear that an INS crack down on agriculture could financially devastate farm operations. The Washington D.C. Center for Immigration Studies conducted a study to assess the long-term effects of removing all illegal farm workers from the United States and found that removal of the illegal farm workers would cause a short-term six percent price increase, and a long-term three percent increase in the cost of fruits and vegetables. However, the study assumed that unauthorized workers accounted for only seventeen percent of the agricultural workforce, while current estimates predict thirty-seven percent or more are unauthorized workers.[54]

In a 1997 General Accounting Office (GAO) report, the INS admitted that law-abiding employers are unlikely to be targeted for enforcement efforts because the INS focus is on aliens who commit criminal acts and employers engaged in criminal activities.[55] Prior to 1995, the Border Patrol assisted the INS in thirty percent of the raids on agricultural employers. That number has dropped to less than five percent, because Border Patrol funding was refocused on explicit border patrol.[56]

Unintentionally hiring illegal agricultural workers

Law-abiding employers may hire workers not legally authorized to work in the United States so long as they did not know that the required documentation was fraudulent.[57] Sometimes, even state labor departments are unable to tell the difference between legal and illegal workers. Ironically, eight of the thirty-six agricultural workers referred to one particular employer from the local SESA had unissued Social Security numbers (SSN) and may have been illegal aliens.[58] An agricultural employer who experiences an unexpected labor shortage as a result of an INS enforcement activitiy would be eligible for an emergency H-2A certification.[59]

Verification of a job applicant's legal status to work in the U.S. (Form I-9)

The Form I-9 is the Employment Eligibility Verification Form.[60] This form is used to verify an applicant's job status. The employee fills out the first section of the form by providing basic information and attesting that he or she is authorized to work in the U.S. The employer fills out the rest of the form after verifying the documents presented. The employer is forbidden to require more or less documentation from different groups of employees.

Editor's Note: Because of limitations of space, this article was necessarily shortened. Anyone interested in the complete article should e-mail the editor with his or her request.

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[1] 8 U.S.C.§ 1101 *et seq.* (1999).

[2] Office of Inspector General, U.S. Department of Labor, Office of Audit, *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*. Report Number: 04-98-004-03-321, March 31, 1998, Appendix B.

[3] 3 U.S. General Accounting Office, *H-2A Agricultural Guest Worker Program, Changes Could Improve Services to Employers and Better Protect Workers*. Report Number: GAO/HEHS-98-20, December 1997, p. 45.

[4] 20 C.F.R. § 655.101 (1999).

[5] 20 C.F.R. §655.100(g)(1999).

[6] 20 C.F.R. §§ 655.103(d), 655.105(a)(1999).

[7] 20 C.F.R. § 655.100(b)(1999).

[18] 20 C.F.R. § 655.105(a)(1999).

[9] 20 C.F.R. § 655.103(e)(1999).

[10] 8 U.S.C. § 1188(g)(2)(1999).

[11] 20 C.F.R. § 655.102(b)(6)(iv)(1999).

[12] Office of Inspector General,U.S. Department of Labor, Office of Audit, *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*, Report Number: 04-98-004-03-321, March 31, 1998, at 19.

[13] See *Vega v. Nourse Farms, Inc.*, 62 F. Supp.2d 334 (D. Mass. Aug. 25, 1999).

[14] 20 C.F.R. § 655.103(a)(1999).

[15] For further information on this topic, contact Director, U.S. Employment Service, U.S. Department of Labor, Room N-4700, 200 Constitution Avenue, N.W., Washington, DC 20210. Telephone: (202) 219-5257 or visit http://www.usda.gov/agency/oce/oce/labor-affairs/aewr99.htm.

[16] *Id.*

[17] 64 Fed. Reg. 6690 (to be codified at 20 C.F.R. pt. 655).

[18] 20 C.F.R. § 655.102(b)(10)(1999).

[19] 20 C.F.R. § 655.102(b)(6)(1999).

[20] See *Sugar Cane Growers Coop. of Florida v. Pinnock*, 735 So.2d 530 (Fla. Dist. Ct. App. 1999).

[21] *Id.* at 538.

[22] 64 Fed. Reg. 6690 (to be codified at 20 C.F.R. pt. 655).

[23] 20 C.F.R. § 655.102(b)(4)(1999).

[24] 64 Fed. Reg. 6690 (to be codified at 20 C.F.R. pt. 655).

[25] 64 Fed. Reg. 6690 (to be codified at 20 C.F..R. pt. 655)

[26] 20 C.F.R. § 655.111 (1999).

[27] 20 C.F.R. § 655.102(b)(4)(1999).