Double Denial: How Both the DOL and Organized Labor Fail Domestic Agricultural Workers in the Face of H-2A

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Double Denial: How Both the DOL and Organized Labor Fail Domestic Agricultural Workers in the Face of H-2A

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ABSTRACT: The Department of Labor ("DOL") is not complying with the spirit of the agency's regulations governing the H-2A temporary agricultural guest-worker program. With the increasing use of the program, the DOL must reform its H-2A procedures and regulations to better protect the domestic workforce from adverse effects. Such changes should include: (1) a more localized review of H-2A applications prior to their submission to the regional DOL offices, (2) increased transparency in the application process, and (3) the establishment of an appeal procedure for farmworkers and their advocates. In order to effectuate these changes, organized labor needs to reevaluate its role within the domestic farmworker community. Farmworker unions have the potential to be powerful advocates on behalf of all agricultural workers and should use their resources to help change the way in which the DOL administers the H-2A program. While representing H-2A workers will greatly increase membership in agricultural unions, unions must be careful not to harm their domestic constituencies through such representation.

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I. INTRODUCTION

For decades, agricultural employers have been complaining about a pending shortage of labor in the fields.[1] The importation of guest workers, or foreign laborers who work under temporary visas in the United States, is often their proposed solution.[2] As the regular use of guest workers has spread across the country, however, the Department of Labor ("DOL"), the entity responsible for administering the H-2A guest-worker program, has failed to ensure that the importation of foreign workers does not adversely affect the wages and working conditions[3] of the domestic workforce.[4] These adverse affects have intensified as farmworker unions have begun to sidestep their traditional domestic constituencies in order to represent the increasing number of guest workers entering the country.[5]

This Note begins by discussing the history of the United States' guest-worker programs and the history of organized labor in the fields.[6] Part II describes the current federal temporary agricultural guest-worker visa program and its statutory and regulatory requirements.[7] Part III addresses the deficient manner in which the DOL currently administers the H-2A program, focusing specifically on the agency's failure to analyze applications for foreign workers adequately in light of the program's statutory criteria.[8] Part III further highlights the impact that the DOL's mistaken approval of

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1. *See Agricultural Guest Worker Programs: Joint Hearing Before the Subcomm. on Risk Management and Specialty Crops of the H. Comm. on Agriculture and the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 2 (1995) (statement of Richard M. Estrada, Comm'r, U.S. Commission on Immigration Reform), *available at* http://www.utexas.edu/lbj/uscir/120795.html (outlining grower demands and complaints).

2. Lee Romney, *Immigration Reform Efforts Reinvigorate Support for Guest Worker Program*, L.A. TIMES, Sept. 18, 2006, at A1. Generally, "guest worker programs are meant to assure employers . . . of an adequate supply of labor . . . while not adding permanent residents to the U.S. population." LINDA LEVINE, CONG. RESEARCH SERV., THE EFFECTS ON U.S. FARM WORKERS OF AN AGRICULTURAL GUEST WORKER PROGRAM, REPORT 95-712, at 1 (2006), *available at* http://leahy.senate.gov/issues/Immigration/GuestWorker.pdf. Guest-worker programs "provide limited access to [the U.S.] labor market, but not to our society." DAVID S. NORTH, NONIMMIGRANT WORKERS IN THE U.S.: CURRENT TRENDS AND FUTURE IMPLICATIONS 13, 25 (1980); *see also* ANDORRA BRUNO, CONG. RESEARCH SERV., IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS, REPORT RL32044, at 1 (2006), *available at* http://trac.syr.edu/immigration/library/P333.pdf ("[*G*]*uest worker* has typically been applied to foreign temporary low-skilled laborers, often in agriculture or other seasonal employment.").

3. For the purposes of this Note, "working conditions" refers to the conditions of employment, particularly with regard to the requirements for hire and retention, as well as the actual conditions under which employees labor.

4. *See infra* Part III.

5. *See infra* Part IV.B.

6. *See infra* Part II.A–B.

7. *See infra* Part II.C.

8. *See infra* Part III.

applications for foreign workers has on the domestic labor force and proposes certain changes to the program that may mitigate this negative impact.[9]

Part IV contends that to effect these changes, organized labor must assume a greater advocacy role.[10] It then outlines the ways in which farmworker unions currently fail to help protect local workers by readily contracting with entities that bring H-2A workers into the United States.[11] This Note concludes by detailing how farmworker unions can better ensure that their representation of H-2A workers does not compromise their role as advocates for the domestic labor force.[12] With a few changes to the H-2A guest-worker program and its implementation under the supervision of the DOL, as well as changes within organized labor, agricultural employers may be able to obtain much-needed labor without adversely affecting the domestic workforce.

II. GUEST-WORKER PROGRAMS AND FARMWORKER ORGANIZING

Fields and orchards filled with foreign workers are nothing new for the United States.[13] For many of these foreign laborers, however, the dangerous and arduous nature of working in the fields[14] often makes agricultural labor the "last resort."[15] At its core, a worker's decision to work in the field in the United States stems from discrimination and lack of education and opportunity, as opposed to occupational preference.[16] Still, the workers arrive in record numbers,[17] both with and without the sanction of the U.S.

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9. *See infra* Part III.B.

10. *See infra* Part IV.

11. *See infra* Part IV.B.2.

12. *See infra* Part IV.B.3.

13. *See* PHILIP L. MARTIN, PROMISE UNFULFILLED: UNIONS, IMMIGRATION AND THE FARM WORKERS 35–43 (2003) (discussing the use of Chinese, Japanese, South Asian, European, and Mexican labor in the agricultural industry over time).

14. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 577–78 (2001) (highlighting the fact that farm work is as dangerous as mining or construction because of the taxing and repetitive motions farm work requires while in back-breaking positions and the constant exposure to toxic pesticides).

15. MARTIN, *supra* note 13, at 35.

16. *See id.* (discussing California's farm-labor history, where "most farmers were white local residents, while many migrants were minorities far from their usual homes").

17. *See* MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES 1 (2005), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf (indicating that there were 10.5 million "unauthorized immigrants residing in the United States in January 2005," nearly 6 million of whom were from Mexico); OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T. OF HOMELAND SEC., TEMPORARY ADMISSIONS OF NONIMMIGRANTS TO THE UNITED STATES: 2006, at 2 (2007), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/NI_FR_2006_508_final.pdf (indicating that

government.[18] Sometimes foreign workers are welcomed into the farmworker movement with open arms; sometimes they are shunned.[19] A history of guest-worker programs and the programs' relationship to the organized-labor movement is helpful in understanding the situation of the domestic farmworker today and the impact of temporary guest-worker programs on the local labor force.[20]

A. THE BRACERO PROGRAM: 1940S AND 1950S

While the United States has a long history of using foreign labor for domestic agricultural needs,[21] the historical labor initiative that had the largest impact on the nation was the Bracero Program.[22] As men left the country to fight in World War II, growers struggled to find hands to harvest their crops.[23] In 1942, these growers looked to Mexico to provide the labor that the United States lacked.[24] Faced with the powerful political pressure of an agricultural industry without sufficient labor, the U.S. government quickly approved the Bracero Program, one of the country's most expansive agricultural guest-worker programs to date.[25]

Under the program, the United States helped ease growers' fears of an impending labor shortage by issuing temporary work visas for Mexican

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180,503 authorized temporary seasonal workers entered the United States in 2006, of whom 46,432 were admitted under an H-2A seasonal agricultural-worker visa).

18. *See generally* Philip L. Martin, *Guest Workers: Past and Present*, *in* 3 MIGRATION BETWEEN MEXICO AND THE UNITED STATES: BINATIONAL STUDY 877 (1998), *available at* http://www.utexas.edu/lbj/uscir/binpapers/v3a-3martin.pdf (discussing legal and non-legal entry of workers). According to the most recent DOL study, fifty-three percent of agricultural farmworkers in the United States during 2001–2002 lacked authorization to work. U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2001–2002, at 6 (2005) [hereinafter NAWS 2005 STUDY], *available at* http://www.doleta.gov/agworker/report9/naws_rpt9.pdf. *But see* JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 10–11 (2006), *available at* http://pewhispanic.org/files/reports/61.pdf (indicating that in 2005, twenty-four percent of agricultural workers were undocumented).

19. *See infra* Part IV (discussing the current situation of farmworker unions in relation to guest workers and domestic labor, both documented and undocumented).

20. For the purposes of this Note, "domestic" or "local" labor force refers to farmworkers living in the United States at the time they apply for employment.

21. *See* MARTIN, *supra* note 13, at 35–43.

22. *See* NORTH, *supra* note 2, at 13 (discussing the impact of the Bracero Program in comparison to other nonimmigrant labor programs).

23. KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S. 19 (1992).

24. MARTIN, *supra* note 13, at 46; *see also* Martin, *supra* note 18, at 880 (indicating that California farmers wanted the United States to admit between 40,000 and 100,000 Mexican agricultural workers).

25. Martin, *supra* note 18, at 880; *see also* Agreement Respecting the Temporary Migration of Mexican Agricultural Workers, U.S.-Mex., Aug. 4, 1942, 56 Stat. 1759, E.A.S. No. 278 (bilateral agreement establishing the Bracero Program).

nationals who were willing to work in agriculture.[26] President Truman's Commission on Migratory Labor spoke about the agreement purely in labor terms.[27] The agreement was a "collective bargaining situation in which the Mexican Government [was] the representative of the workers and the Department of State [was] the representative of our farm employers."[28] And even though the labor shortage caused by World War II provided the original justification for the Bracero Program, the program continued after troops began arriving home.[29] Between 1942 and 1964, it brought close to 400,000 Mexican workers per year into the United States.[30] By the program's end, the United States had authorized entry for close to 4.6 million Mexican farmworkers.[31]

While the Bracero Program seemingly included provisions designed to protect the local labor force,[32] its existence coincided with a general "depression of agricultural wages and . . . displacement of domestic workers."[33] This displacement happened, in part, because the agencies overseeing the program failed to enforce the substantive provisions of the

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26. *See* NORTH, *supra* note 2, at 13–23 (outlining the Bracero Program). *See generally* CALAVITA, *supra* note 23 (providing a comprehensive history of the Bracero Program).

27. *See* CALAVITA, *supra* note 23, at 19 (citing PRESIDENT'S COMM'N ON MIGRATORY LABOR, MIGRATORY LABOR IN AMERICAN AGRICULTURE (1951)).

28. *Id.*

29. Holley, *supra* note 14, at 583; *see also* Mexican Agricultural Workers Importation Act, Pub. L. No. 78-223, § 501, 65 Stat. 119, 119 (1951) (reauthorizing the wartime Bracero Program). For a general discussion of the numerous incarnations of the program, see CALAVITA, *supra* note 23, at 24–31, 43–45.

30. Holley, *supra* note 14, at 583 (citing *Temporary Agricultural Work Visa Programs: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 37 (1997) (statement of Bruce Goldstein, Co-Executive Director, Farmworker Justice Fund, Inc.)).

31. *But see* MARTIN, *supra* note 13, at 46–47 (pointing out that only one to two million workers may actually have crossed the border into the United States because of possible repeat returning laborers).

32. The authorizing statute for the Bracero Program stated:

> No workers recruited under this title shall be available for employment . . . unless the Secretary of Labor has determined and certified that (1) sufficient domestic workers who are able, willing, and qualified are not available at the time and place needed to perform the work . . . (2) the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed, and (3) reasonable efforts have been made to attract domestic workers for such employment at wages and standard hours of work comparable to those offered to foreign workers.

Mexican Agricultural Workers Importation Act, § 503, 65 Stat. at 120.

33. Holley, *supra* note 14, at 584 (citing ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 199–200, 203 (1964)). One author noted that "the Labor Department had so few statisticians it could not determine what the actual 'prevailing wages' were for farm workers, so it ended up simply adopting the growers' representation of what the proper wage should be." *Id.* at 584; *see also* NORTH, *supra* note 2, at 18–19 (comparing cotton wages in states with varying concentrations of braceros).

braceros' contracts,[34] which outlined and mandated basic wage and working conditions. The agencies' inattention to the program's requirements allowed growers to undercut its provisions, provisions that the U.S. government had established (in its "collective bargaining" role with the Mexican government) as the minimum required to protect the local workforce while still providing employers with labor.[35]

Despite hopes to the contrary, the Bracero Program also failed to discourage undocumented laborers from entering the United States.[36] This failure worked to undercut wages and working conditions for the local labor force. To obtain a work visa under the Bracero Program, the U.S. government required Mexican workers to jump numerous bureaucratic hurdles at a time when those same workers could easily move across the border without authorization; consequently, workers often did so.[37] Additionally, when Congress reauthorized the Bracero Program, it made undocumented workers already in the United States the preferred recipients of the new bracero visas.[38] Not surprisingly, workers realized that clandestinely crossing the border was the easiest way to become eligible for a visa.[39] Confronting an undocumented workforce that was willing to work for less and free from the contractual requirements of the Bracero Program, growers hired without regard for whether a worker had authentic work permission.[40] Consequently, a poorly enforced program and incentives to circumvent the program altogether combined to affect the local labor pool by lowering wages and creating sub-par working conditions.

Although numerous methods existed for growers and undocumented workers to undercut the Bracero Program, many Mexican nationals were active participants.[41] By the time the Bracero Program ended in 1964, it had become one of the forces that ultimately "institutionaliz[ed] the

34. *See* NORTH, *supra* note 2, at 20 (discussing the failings of the various agencies in charge of the Bracero Program).

35. *See* Mexican Agricultural Workers Importation Act, § 501, 65 Stat. at 119 (implying that everything below those wages and conditions approved would have an adverse impact on the local workforce).

36. Martin, *supra* note 18, at 881–82.

37. *Id.*

38. CALAVITA, *supra* note 23, at 28 (indicating that Mexican officials agreed to an amendment to the 1949 bilateral agreement that granted preference to undocumented workers already in the United States over foreign applicants).

39. *Id.* at 35, 62 (describing the difficulties and expenses involved in obtaining work authorization under the Bracero Program).

40. Martin, *supra* note 18, at 881–82.

41. *See supra* notes 30–31 and accompanying text.

dependence of many rural Mexicans on the U.S. labor market"[42] and helped set the stage for the future influx of foreign agricultural labor.[43]

B. THE EMERGENCE OF FARMWORKER UNIONS

Although farmworkers are seemingly an ideal union constituency, organized labor only recently emerged in the agricultural industry and was not heavily involved in farmworker issues during the days of the braceros.[44] Early organizers faced several barriers when dealing with farmworkers. First, farmworkers generally have found that "exiting the farm labor market [is] a surer path to upward mobility than joining or forming a farm labor union to voice demands for higher wages and benefits."[45] In other words, farmworkers look to improve life by leaving the field, not by bargaining. The geographically dispersed nature of farm work poses additional barriers to effective organizing.[46] Perhaps most detrimental to organizers' efforts, however, is the government's slow recognition of farmworkers' need for legal protection. In fact, the National Labor Relations Act ("NLRA"), which governs the legal regulation of collective bargaining in the private sector,[47] expressly excludes "any individual employed as an agricultural laborer" from its provisions.[48]

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42. MARTIN, *supra* note 13, at 46.

43. *See* NORTH, *supra* note 2, at 22–23 (noting that the end of the program did not "end the desire of Mexican workers to work in the U.S., nor the desire of growers and other employers to employ the undemanding Mexican worker, now an illegal alien").

44. MARTIN, *supra* note 13, at 66–80 (outlining the emergence of farmworker unions in the 1960s and 1970s and discussing their gains and losses through the 1980s and 1990s).

45. *Id.* at 57. Such a perception is reflected in the comments of Victoria Bradshaw, Secretary of the California Labor and Workforce Development Agency, who explained "that construction [is] a competitor for farm workers that offers 'higher wages and long-term employment.'" *Farm Labor Shortages*, RURAL MIGRATION NEWS (U.C. Davis Migration Center, Davis, Cal.), Jan. 2007, *available at* http://migration.ucdavis.edu/rmn/more.php?id=1182_0_4_0 (quoting Bradshaw). Bradshaw said that she wants to have workers "'look at agriculture, not just as a job, but a vocation and not a job of last resort.'" *Id.*

46. MARTIN, *supra* note 13, at 58.

47. WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 29 (2004) ("The Wagner Act provided that employees were to be protected in their free choice to protest working conditions . . . to organize into unions and select representatives, and to oblige management to bargain in good faith with the union that represented a majority of workers . . . .").

48. National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(3) (2000). The legislative history is not clear about why the NLRA excludes agricultural workers. *See* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 31–32 (2d ed. 1976) (citing concerns that the "perishability of crops is such that strikes would give agricultural employees too strong a bargaining weapon and unionization would make farm operations unduly costly"); MARTIN, *supra* note 13, at 57–58 ("Federal and state governments were slow to extend labor relations rights to farm workers because of the agrarian ideology that most farm workers were family members or hired hands on family farms, making factory labor laws 'inappropriate' and organizing and bargaining difficult.").

The NLRA's farmworker exclusion does not legally prevent farmworkers from bargaining with employers; it just means that if they choose to do so, they are not protected by

Despite these obstacles to organizing, throughout the Bracero Program's existence some unions attempted to organize non-bracero farmworkers but were generally unsuccessful.[49] Ernesto Galarza, the head of the National Farm Labor Union, which became the National Agricultural Workers Union in 1956, frequently complained to the DOL about growers "borrowing" braceros from neighbors during local-worker labor strikes in order to harvest their crops.[50] The braceros generally completed the work before the DOL had a chance to respond to the complaints, which left the striking workers without any bargaining power.[51] As Galarza stated, "[U]nionization was futile while the *bracero* [p]rogram remained."[52] The U.S. government provided farmworker unions with a long-awaited opportunity to organize when the program expired in 1964. It was then that many of the farmworker unions that exist today began to emerge forcefully.[53]

The height of organized farmworker labor occurred in the mid-1960s when the United Farm Workers Union ("UFW"), led by Cesar Chavez, stepped to the forefront with one of the "most effective consumer boycotts in U.S. history."[54] The UFW gained national recognition by relying on boycotts instead of strikes, leading many growers to "match or exceed 'union wages' so their workers would not join the UFW."[55] Despite occasional inter-

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the federal government. GOULD, *supra* note 47, at 35–36. Because the government is not involved, however, the exclusion "leaves employers a free hand to threaten and to carry out reprisals against workers who seek to form and join a union to bargain collectively." HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 136 (2000). A minority of states, such as California, have enacted a state version of the NLRA to cover farmworkers. *See* Agricultural Labor Relations Act of 1975, CAL. LAB. CODE §§ 1140–1166.3 (West 2005). The Washington State Supreme Court has also recognized the right of farmworkers to join a union. HUMAN RIGHTS WATCH, *supra*, at 136 (citing Bravo v. Dolsen Cos., 888 P.2d 147 (Wash. 1995)).

49. MARTIN, *supra* note 13, at 65.

50. *Id.*

51. *Id.* at 65–66.

52. *Id.* at 66. Many unions also prohibited braceros from joining in the first place. *See id.* at 202 n.13.

53. F. AUTURO ROSALES, CHICANO!: THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT 130–51 (1996) (highlighting the rise of the United Farm Workers of America).

54. MARTIN, *supra* note 13, at 68. The boycott began in March of 1966 when Chavez, under the auspices of the UFW, led a three-hundred-mile march to draw attention to a table-grape dispute that had occurred the previous year. *Id.* In that dispute, Chavez and the National Farm Workers Association had joined the Filipino-dominated Agricultural Workers Organizing Committee ("AWOC") to protest a move by California's grape growers to pay Filipino pickers less than they had paid the Mexican braceros. *Id.* at 67. The boycott ended with a series of table-grape growers either signing the UFW's proposed contract or agreeing to negotiate with the union. *Id.* at 68. The American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") had established AWOC in 1959, but many AWOC members felt the union did little more than collect mandatory dues. *Id.* at 66. In 1967, AWOC and the UFW merged, keeping the UFW name. *Id.*

55. *Id.* at 52.

union conflict,[56] union protection resulted in minimum-wage and insurance increases for farmworkers.[57]

C. THE TEMPORARY AGRICULTURAL GUEST-WORKER PROGRAM (H-2A)

The Bracero Program's end not only brought increased union activity, but it also resulted in greater use of another of the United States' temporary agricultural-visa programs, the H-2 guest-worker program.[58] Congress initially enacted the H-2 program in 1952 to cover both agricultural and nonagricultural guest workers.[59] Congress later separated the program into two different divisions, a distinction that continues today. The H-2A program covers agricultural guest workers,[60] while the H-2B program covers other low-skilled workers generally.[61]

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56. *See id.* (discussing conflicts between two unions: the Teamsters and the UFW).

57. *Id.* Despite these successes, unions have never been able to eliminate the farm and non-farm wage gap. *Id.* at 83. The farm and non-farm wage gap is the difference between salaries of workers of comparable skill in the agricultural workforce and those outside of that workforce. The non-farm wages are consistently higher than the farm wages. *See* Jack L. Runyan, *Hired Farmworkers' Earnings Increased in 2001 but Still Trail Most Occupations*, RURAL AM., Fall 2002, at 66, 66–73, *available at* http://www.ers.usda.gov/publications/ruralamerica/ra173/ra173j.pdf (presenting statistics that outline the disparities in the salaries between farmworkers and all other wage-and-salary workers).

Currently, there are a number of active farmworker unions throughout the United States. MARTIN, *supra* note 13, at 81–88. Comparatively, however, there are relatively fewer union members in farm work than in other industries. *See* News Release, U.S. Dep't of Labor, Union Members in 2006 tbl.3 (Jan. 25, 2007), *available at* http://www.bls.gov/news.release/pdf/union2.pdf (indicating that out of approximately one million agriculture and related-industry workers, 2.3 percent are members of a union). A few of the more prominent farmworker unions include the UFW, which has a strong presence in the West and Pacific Northwest; Pineros y Campesinos Unidos del Noroeste (Northwest Treeplanters and Farmworkers United) ("PCUN"), an Oregon-based union; and the Ohio-based Farm Labor Organizing Committee ("FLOC"), which has been successful in representing workers throughout the Southeast and, most recently, in Mexico. *See* United Farmworkers of America Union Offices, http://www.ufw.org/_page.php?menu=about&inc=about_office.html (last visited Sept. 23, 2007) (listing their offices and geographical focus); Pineros y Campesinos Unidos del Noroeste, http://www.pcun.org/ (last visited Sept. 23, 2007) ("Oregon's Farmworker Union"); Farm Labor Organizing Committee, http://www.floc.com/FLOCabout.htm (last visited Sept. 23, 2007) (providing information on the organization).

58. MARTIN, *supra* note 13, at 50. The H-2 program ran simultaneously with the Bracero Program for a number of years, but growers preferred the Bracero Program. CALAVITA, *supra* note 23, at 134. This is likely because Mexicans were not eligible for H-2 visas while the Bracero Program was operational. *Id.* Thus, when it was first implemented, the primary users of the H-2A program were "East Coast growers of perishable labor-intensive crops," i.e., those outside of the geographical area that used the Bracero Program. LEVINE, *supra* note 2, at 4.

59. *See* Immigration and Nationality Act, 8 U.S.C. § 1101(H) (2000) (establishing the H-2 program).

60. *Id.* §§ 1101 (a)(15)(H)(ii)(a), 1188(a)(1).

61. *Id.* § 1101 (a)(15)(H)(ii)(b). This Note deals exclusively with the H-2A visa. For a detailed description of the policies and procedures relating to the H-2B visa, see generally Jacob Wedemeyer, Note, *Of Policies, Procedures, and Packing Sheds: Agricultural Incidents of Employer Abuse of the H-2B Nonagricultural Guestworker Visa*, 10 J. GENDER RACE & JUST. 143 (2006).

Presently, the Employment and Training Administration ("ETA") of the DOL and the U.S. Citizenship and Immigration Services ("USCIS") of the Department of Homeland Security ("DHS") administer the H-2A visa program.[62] The H-2A visa program does not have a numerical cap, and in fiscal year 2006, preliminary data show that the USCIS issued 37,149 visas under the program.[63] In order for growers to bring foreign workers to the United States under the H-2A program, the grower, growers association, or farm-labor contractor[64] must present an H-2A application for temporary foreign workers to (1) the ETA's Office of Foreign Labor Certifications ("OFLC")[65] and (2) the DOL-funded state employment service office, the State Workforce Agency ("SWA").[66] The submissions are simultaneous, and the application must include a job offer setting forth all "material terms and conditions of employment to be offered and afforded to U.S. workers and H-2A workers."[67]

There is a two-step approval process. First, the DOL decides whether to consider the application; if so, the agency then decides whether to certify the application.[68] Before the OFLC can ultimately certify an H-2A application, however, the grower must show that (1) using H-2A workers will not adversely affect the labor market of domestic workers and (2) an adequate supply of labor in the country "able, willing and qualified" to perform the work at the time and place needed does not exist.[69] The OFLC

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62. BRUNO, *supra* note 2, at 2.

63. U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2006: XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION: FISCAL YEARS 2002–2006 tbl.XVI(B) (2006), *available at* http://travel.state.gov/pdf/FY06AnnualReportTableXVIB.pdf. This is almost a five-fold increase over the past decade. BRUNO, *supra* note 2, at 4. From 2005 to 2006 alone, the number of visas issued increased by over 5000. U.S. DEP'T OF STATE, *supra*, at 1.

64. *See infra* Part IV.B.1 (discussing the role of growers associations and farm-labor contractors in the H-2A process).

65. Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. § 655.100(a)(1) (2006) (stating that growers may submit applications for H-2A workers no less than 45 days from the date that the work is set to begin).

66. *Id.* § 655.104.

67. *Id.* § 655.100(a)(1).

68. *Id.* §§ 655.90–655.113 (outlining DOL regulations for H-2A workers); *see also* Leslie Green, Comment, *H-2A Guest Worker Program: Employer Certification Process in Need of a Change*, 73 TENN. L. REV. 81, 81–94 (2005) (providing a detailed narrative outline of the certification procedures).

69. The precise language of the statute mirrors that of the Bracero Program discussed *supra* notes 29 and 32. The DOL may not certify an H-2A application unless

> (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition, and (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

focuses on the first of these requirements in determining whether to accept the application for consideration[70] and must base its determination on considerations outlined in the regulations. For example, the regulations require that employers using the program pay H-2A workers the highest rate from among the following: the adverse-effect wage rate ("AEWR"),[71] the prevailing-wage rate,[72] and the federal or state minimum wage.[73] If the grower pays piece rate, or price per unit of output, instead of an hourly rate, the piece rate must equal at least the AEWR.[74]

The regulations also impose additional conditions of employment "in order to protect similarly employed U.S. workers from adverse effect,"[75] including requirements that the employer provide (1) safe housing for the workers,[76] (2) workers' compensation insurance,[77] (3) any necessary tools for the job,[78] (4) food, travel, and subsistence costs,[79] and (5) a guarantee that the worker will be employed for at least three-fourths of the time listed on the contract.[80] The statute also requires that employers certify that they are not seeking to import labor because of a strike or lockout.[81] These basic guarantees are the minimum requirements that an application must meet in order for the OFLC to accept an H-2A application for consideration.[82] If,

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Immigration and Nationality Act, 8 U.S.C. § 1188(a)(1)(A)–(B) (2000); 20 C.F.R. § 655.90(b)(1)(A); *see also infra* notes 71–81 and accompanying text (explaining the criteria that the DOL will consider in making this determination).

70. 20 C.F.R. § 655.100(b) ("[A]ccept for consideration means . . . the OFLC Administrator . . . notif[ies] the employer that a filed . . . application meets the adverse effect criteria necessary for processing.").

71. The AEWR is set by the DOL and is based on data regarding the wages of agricultural workers throughout the United States gathered by the Department of Agriculture ("DOA"). WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., FARM LABOR: THE ADVERSE EFFECT WAGE RATE (AEWR), REPORT RL32861, at 5 (2006), *available at* http://www.nationalaglawcenter.org/assets/crs/RL32861.pdf. The AEWR "is a weighted average of the DOA findings, calculated on a regional basis." *Id.* The purpose of the AEWR is to "mitigate any 'adverse affect' [of the H-2A workers] for the domestic workforce." *Id.* at 1. The highest AEWR rate for 2007, $10.32 per hour, is in Hawaii, while Arkansas, Louisiana, and Mississippi are tied for the lowest with an AEWR rate of $8.01 per hour. U.S. Dep't of Labor, Adverse Effect Wage Rates – Year 2007, http://www.foreignlaborcert.doleta.gov/adverse.cfm (last visited Oct. 6, 2007).

72. *See* BRUNO, *supra* note 2, at 3 n.8 ("The prevailing wage rate is the average wage paid to similarly employed workers in the occupation in the area of intended employment."); *see also* 20 C.F.R. § 655.100(b) (defining "prevailing" for the purposes of the H-2A regulations).

73. 20 C.F.R. § 655.102(b)(9).

74. *Id.* § 655.102(b)(9)(ii)(A).

75. *Id.* § 655.102(b).

76. *Id.* § 655.102(b)(1).

77. *Id.* § 655.102(b)(2).

78. 20 C.F.R. § 655.102(b)(3).

79. *Id.* § 655.102 (b)(4), (b)(5)(i)–(ii).

80. *Id.* § 655.103(b)(6).

81. Immigration and Nationality Act, 8 U.S.C. § 1188(b)(1) (2000).

82. 20 C.F.R. § 655.102(b).

after considering the above factors, the DOL refuses to consider an application,[83] the regulations allow employers to amend an application and resubmit it for further review.[84] The regulations also provide growers with the opportunity to appeal the denial of consideration via an expedited administrative review or a de novo administrative hearing before an administrative law judge ("ALJ").[85]

After the OFLC accepts an application for consideration, but before the office certifies that application, the employer and the SWA must work together to recruit local workers to take the positions for which the growers want to import the H-2A workers.[86] This mandatory recruitment ensures that the employer's perceived worker shortage is legitimate and that hiring H-2A workers will not displace the local workforce.[87] Following active recruitment,[88] but no more than twenty days before the start of the work date listed on the labor request form, the OFLC Administrator will decide whether to certify the petition.[89] If the Administrator has deemed the recruiting efforts insufficient or if a grower was able to find sufficient local laborers, the DOL will deny certification.[90] The employer may appeal this determination through the same administrative hearing procedure that the regulations afford an employer if the DOL initially refuses to accept an employer's application for consideration.[91]

III. DOL ADMINISTRATION OF THE H-2A PROGRAM

Many critics of the H-2A guest-worker program have highlighted the program's negative impact on the guest workers themselves.[92] Concerns

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83. *See id.* § 655.104(b) (outlining the reasons for which the OFLC Administrator can refuse to consider applications).

84. *Id.* § 655.104(c)(2).

85. *Id.* § 655.104(c)(3); *see also id.* § 655.112 (setting out the procedures of the administrative review).

86. *See* 8 U.S.C. § 1188(b)(4) (stipulating that the employer must recruit within a multi-state region until the H-2A workers leave for their place of employment); 20 C.F.R. § 655.105(a) (requiring that recruitment for workers take place locally, intrastate, and interstate and mandating that it must continue until the day that the H-2A workers leave their home country for the United States).

87. BRUNO, *supra* note 2, at 2.

88. 20 C.F.R. § 655.102(d) (referring to "positive recruitment" techniques).

89. *Id.* § 655.105(d).

90. *Id.*

91. *Id.* § 655.104(c)(3); *see also id.* § 655.112 (setting out the procedures of administrative review).

92. Given its treatment elsewhere, an in-depth discussion of the negative impact that the H-2A program has on guest workers is beyond the scope of this Note. It is important to recognize that complying with the H-2A certification procedures and regulations is expensive. *See* Holley, *supra* note 14, at 593 (calculating the additional costs of the H-2A program); *Making H2A Work for Washington Growers*, EMPLOYER ESSENTIALS (Wash. Farm Bureau, Lacey, Wash.), Oct. 2006, at 2 [hereinafter EMPLOYER ESSENTIALS] (citing grower complaints about costs of H-

about the program do not stop with the treatment of the foreign workers, however. The DOL's administration of the H-2A program has grave consequences for the domestic labor force as well. This is because the manner in which the DOL administers the H-2A program does not comply with the program's statute and regulations.[93] In administering the program, the DOL skirts regulatory requirements and often disregards the implementation procedures outlined in the agency handbook.[94]

The H-2A program's inherently contradictory policy goals form the root of the problem that the DOL has in ensuring the proper administration of the H-2A program. Ideally, the H-2A program is designed to protect

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2A). Yet, despite the additional costs that the H-2A program imposes on growers and the fact that a true domestic-worker shortage has yet to be substantiated, employers increasingly use guest workers instead of a local workforce. BRUNO, *supra* note 2, at 4. A number of factors give rise to this preference. For instance, H-2A workers are less likely to complain about exploitative labor practices because of fears of deportation. U.S. GEN. ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS 9–10, 60 (1997) [hereinafter GAO REPORT], *available at* http://www.gao.gov/archive/1998/he98020.pdf. Such workers also fear being blacklisted from future employment in the United States. Lisa Guerra, *Modern Day Servitude: A Look at the H-2A Program's Purposes, Regulations and Realities*, 29 VT. L. REV. 185, 208 (2004) (discussing the use of blacklisting for workers who complain about employment conditions). Additionally, H-2A workers arguably provide a more stable and productive work source. Unlike local workers who are able to change employers throughout the growing season in order to find the best wages and working conditions, H-2A workers are tied to one particular employer. *Id.* Some scholars have referred to this as a form of indentured servitude. *Id.* at 208; *see also* Bernett v. Hepburn Orchards, No. JH-84-991, 1987 WL 16939, at *5 (D. Md. Apr. 14, 1987) ("[I]t appears that U.S. workers generally are less productive in menial fieldwork than are H-2's, causing defendant to need to pay domestic employees more money for nonproductivity in order to be compensating them at DOL-established minimum field wages."). H-2A workers are also more easily controlled. *See* Mary Ann Dutton, *Guest Workers Allege Slavery Locally*, SOUTHWEST DAILY NEWS (Sulphur, La.), Feb. 15, 2007, *available at* http://www.smfws.com/articles2007/february/art02162007e.htm (documenting guest-workers' claims that they were "'trapped for months . . . after their employer illegally confiscated their passports'" (quoting Saket Soni, spokesperson for the Alliance for Guest Workers for Dignity)); *H-2A, Global, H-2B*, RURAL MIGRATION NEWS (U.C. Davis Migration Center, Davis, Cal.), July 2007, *available at* http://migration.ucdavis.edu/rmn/more.php?id=1225_0_4_0 (quoting a grower who "prefers to hire H-2A workers because local workers 'get on their cell phones and figure out where the best pay was- and some would leave' for slightly higher wages. H-2A workers, by contrast, 'aren't allowed to go anywhere'"). Lastly, employers are not required to pay Social Security and unemployment-compensation taxes on the labor of H-2A workers. *Bernett*, 1987 WL 16939, at *5; Philip L. Martin & Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, FOREIGN AFF., Nov.–Dec. 2001, at 117, 129–30. Despite these purported benefits to the grower, however, farmworker advocates are extremely skeptical that any grower would spend additional money to hire foreign workers. Holley, *supra* note 14, at 593. For those critics, the logical conclusion is that the substantive rights under the H-2A contracts, which make it a more expensive option, are not being enforced. *Id.* As a result, using—and abusing—guest workers is economically viable. *Id.*

93. *See generally* GAO REPORT, *supra* note 92 (addressing problems in the program's administration).

94. *See generally* EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, ETA HANDBOOK NO. 398: H-2A PROGRAM HANDBOOK (1988) [hereinafter ETA HANDBOOK].

domestic workers "from unfair competition by the migrant workforce" by way of "statutorily imposed preferences," while simultaneously ensuring that the agricultural industry can have its "crops harvested by hand before they spoil."[95] In the DOL's implementation of the certification procedure for H-2A visas, however, the domestic workers' interests often give way to those of the agricultural industry. This compromise of local workers' rights is most visible when considering (1) the OFLC's approach to determining whether the conditions of employment set forth in the H-2A application will adversely affect domestic workers,[96] (2) the OFLC's approach to determining whether growers truly need H2-A workers,[97] and (3) the appeal procedure open to employers when the OFLC refuses to consider or certify an application.[98]

A. Questionable Determinations of Adverse Effect on Wages and Working Conditions

Before the OFLC accepts an application for consideration, it has a statutory duty to determine whether allowing a grower to use foreign workers will have an adverse effect on the wages and working conditions of the local labor force.[99] If the hiring criteria the grower sets forth on the application does not threaten domestic workers, the DOL accepts it for consideration.[100] Conversely, if the application does not contain the information sufficient to determine whether a threat to domestic workers exists, or indicates that allowing a grower to use foreign workers will harm the local workforce, the OFLC must reject the submission and provide the grower with the opportunity to amend the application or appeal the agency's decision.[101]

Despite these regulations, the increasing number of applications for H-2A workers[102] and the pressure the agricultural industry places on the DOL

95. Theodore C. Simms II, Note, *A Fighting Chance: An Examination of Farmers' New Freedoms and Familiar Problems Under the H-2A Guestworker Program*, 5 DRAKE J. AGRIC. L. 501, 506 (2000); *see also* United Farmworkers of Am. v. Chao, 227 F. Supp. 2d 102, 108 (D.D.C. 2002) (stating that the "competing goals of the statute [are] providing an adequate labor supply to growers and protecting the jobs of domestic farmworkers").

96. *See supra* Part II.C (outlining these requirements and procedures); *infra* Part III.A.1–3 (discussing application distortions and their effects).

97. *See infra* Part III.A.1–2 (addressing application review).

98. *See supra* Part II.C (outlining the appeal procedure); *infra* Part III.B.2 (criticizing the absence of such a procedure for workers and advocates).

99. *See supra* notes 71–82 and accompanying text (spelling out what the DOL is required to consider).

100. Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. § 655.100(b) (2006).

101. *See supra* notes 83–91 and accompanying text (discussing the appeal procedure).

102. *See supra* note 63 and accompanying text.

to provide growers with quick resolutions to perceived labor problems[103] cause the OFLC to overlook many deficiencies in the applications.[104] In fact, the OFLC Administrator often accepts for consideration, and later certifies, applications that fail to comply with the adverse-effect regulations and, thus, fail to comply with the minimum standards Congress set forth to protect local agricultural workers.[105]

Farmworker advocates often cite two principal problems when discussing the agency's approval of deficient applications. First, growers often omit the appropriate wage rate.[106] Second, growers may include working conditions on their applications that are not the normal conditions for that area or that foreign workers applying for the same H-2A jobs abroad do not have to meet.[107] By failing to ensure that information on H-2A applications is accurate, the OFLC thereby causes the very problems that the H-2A program's policies seek to prevent.

1. Distortion of Prevailing-Wage Rates

Under the H-2A regulations, the grower must pay the highest rate of a number of different payment methods.[108] Typically, the AEWR is higher than both the state and the federal minimum wages,[109] thus precluding the grower from considering either of those rates. When left with a choice between the AEWR and the prevailing wage, however, the potential for deception emerges. During harvest, employers typically pay workers by piece rate,[110] and the hourly earnings of each person working for piece rate can

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103. *See* Romney, *supra* note 2 (highlighting growers' desires).

104. *See infra* notes 122–24 and accompanying text (discussing these deficiencies). Observations are based on the author's conversations with farmworker legal advocates at the Northwest Justice Project ("NJP") and Columbia Legal Services ("CLS") in Washington State from May through August 2006.

105. Both conditions express a clear congressional intent to protect U.S. workers. In Alfred L. Snapp & Son v. Puerto Rico *ex rel.* Barez, 458 U.S. 592 (1982), the Supreme Court held that "the obvious point" of the statutory language was to provide U.S. workers with preference over foreign workers and to maintain domestic laborers' working conditions. *Id.* at 596.

106. *See infra* Part III.A.1.

107. *See infra* Part III.A.2.

108. *See supra* notes 71–74 and accompanying text.

109. Washington State has the highest state minimum wage in the country at $7.93. Wash. State Dep't of Labor & Indus., Minimum Wage, http://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/default.asp (last visited Sept. 23, 2007). The federal minimum wage is $5.85 per hour. U.S. Dep't of Labor, Minimum Wage, http://www.dol.gov/dol/topic/wages/minimumwage.htm (last visited Sept. 23, 2007). AEWR rates are generally much higher. *See supra* note 71 (stating the highest and lowest AEWRs for 2007). For a state-specific list of AEWRs, see U.S. Dep't of Labor, Adverse Effect Wage Rates – Year 2007, http://www.foreignlaborcert.doleta.gov/adverse.cfm (last visited Sept. 23, 2007).

110. Piece rate is defined as the "price per identifiable and measurable unit of production." ETA HANDBOOK, *supra* note 94, at I-35.

vary greatly depending on each worker's speed and capacity.[111] These variations under the piece-rate system make it difficult to determine the exact prevailing-wage rate for each crop.

Advocates believe, however, and firsthand experience in the fields shows, that the incentive nature of the piece rate allows workers to earn more than the AEWR during peak harvest.[112] For example, an H-2A worker in Washington during the 2006 Golden Delicious apple-picking season generally earned $9.01 per hour, which was the AEWR.[113] Workers not working on an H-2A contract, however, could earn a much higher rate based on their productivity per hour. In the Yakima Valley, employers paid local pickers as much as $18.00 per bin, picking up to five bins in an approximately six-hour workday.[114] Thus, apple pickers were earning $15.00 per hour, an amount much higher than the AEWR.[115]

While the prevailing-wage rate (because it is properly calculated by considering the piece rate) can result in higher per-hour wages during harvest time, growers often omit the prevailing-wage rate from H-2A applications that they submit to the OFLC.[116] The H-2A regulations do not

111. For example, during the 2006 cherry-picking season in Washington State, this author encountered workers who were making $2.00–$3.00 per bucket of cherries, picking as many as seven buckets per hour. The fastest pickers could make $80–$100 per day, while the slower pickers made as little as $40 per day.

112. Based on discussions with migrant farmworkers, this author learned that during non-harvest times when workers are paid hourly for jobs such as pruning or cleaning the orchard, the AEWR typically exceeds the prevailing wage. This is because the prevailing hourly wage is typically the state's minimum wage and because the AEWR is generally greater than the minimum wage. *See* Wash. State Dep't of Labor & Indus., *supra* note 109 (noting that Washington's minimum wage for 2007 is $7.93 per hour). The AEWR can also exceed the prevailing wage in crops such as berries and asparagus because the piece rate is extremely low for these crops and the labor more time consuming. For example, this author encountered migrant workers who were earning only thirteen cents per pound for asparagus and unable to harvest enough to make minimum wage in Washington State. *But see* Bruce Goldstein, Guestworker Policy: H-2A Program Adverse Effect Wage Rates Are Too Low 2 (May 2006), http://farmworkerjustice.org/Immigration_Labor/H2abDocs/AEWRTooLow.doc (unpublished manuscript) ("When the prevailing wage is a piece rate, the AEWR frequently is higher than workers' piece-rate earnings.").

113. Observations are based on the author's conversations with farmworkers in Washington State from May through August 2006.

114. Shannon Dininny, *Washington Growers Bemoan Labor Shortage as Apple Harvest Begins*, DAILY HERALD (Provo, Utah), Sept. 23, 2006, at D2, *available at* http://www.heraldextra.com/content/view/194109/4/; *Washington, Oregon*, RURAL MIGRATION NEWS (U.C. Davis Migration Center, Davis, Cal.), Jan. 2007, *available at* http://migration.ucdavis.edu/rmn/more.php?id=1177_0_3_0.

115. *See* Dininny, *supra* note 114, at D2 (discussing the piece-rate and hourly rate in Washington).

116. Observations are based on the author's conversations with farmworker legal advocates at the NJP and CLS in Washington State from May through August 2006.

explicitly require employers to use the prevailing method of payment.[117] If a grower submits an application with an hourly wage for harvesting what is normally a piece-rate crop, however, the OFLC must ensure that the hourly wage is no less than what a similar worker doing similar work would earn working for piece rate.[118]

The regulations state that SWA offices "should conduct prevailing-wage surveys . . . in order to comply with the regulations,"[119] but the SWA offices do not do so regularly.[120] Furthermore, the DOL does not appear concerned with developing an accurate methodology to convert hourly rates into piece rates in order to obtain a prevailing wage when growers submit applications with only an hourly rate.[121] The OFLC's approval of deficient applications is not surprising, however, given that the DOL once stated that it would not reject applications

> *solely* on the grounds that it is the prevailing practice for apple growers to pay by the piece or that the change in method of payment *may have an adverse effect on U.S. workers* because actual hourly earnings may not be as high as they had been previously when workers were paid by piece rate.[122]

This policy directly contradicts the regulatory and statutory requirements that the use of H-2A workers not adversely affect domestic workers' wages. Facing litigation because of this policy, the DOL reversed its position that the application's use of the AEWR "satisfied both the adverse

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117. *See* Agricultural Clearance Order Activity, 20 C.F.R. § 653.501(d)(4) (2006) (requiring only prevailing wage, if highest, but not the prevailing *method* of payment).

118. *See* Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. § 655.102(b)(9) (2006) (requiring the employer to pay the highest rate of those listed).

119. ETA HANDBOOK, *supra* note 94, at II-3.

120. The DOL publishes an online wage library with the local offices' prevailing-wage findings. U.S. Dep't of Labor, Agricultural Online Wage Library, http://www.foreignlaborcert.doleta.gov/aowl.cfm (last visited Sept. 23, 2007). While the DOL has recently published data gathered from 2006–2007, prior to doing this, the only information available was from 2003–2004. Additionally, to use Washington as an example, prior to the 2007 data, there was no wage rate listed for cherries, indicating that there were not sufficient domestic workers in the industry to do a proper wage survey. *See* Williams v. Usery, 531 F.2d 305, 307 (5th Cir. 1976) (indicating that when there are insufficient local workers, the DOL is not required to compute a prevailing wage). The conclusion that sufficient cherry pickers were not available prior to 2007 to establish the piece rate should be met with some suspicion, however, given that cherries are one of the state's largest crops and are harvested throughout the entire state. *See* Shannon Dininny, *State Sets Record with $6.41 Billion in Crops*, SEATTLE POST INTELLIGENCER, Oct. 13, 2006, *available at* http://seattlepi.nwsource.com/business/288543_crops13.html.

121. Interview with Michele Besso, Managing Attorney, Nw. Justice Project, in Yakima, Wash. (Sept. 10, 2006) [hereinafter Besso Interview] (on file with the Iowa Law Review).

122. Morrison v. U.S. Dep't of Labor, 713 F. Supp. 664, 667 (S.D.N.Y. 1989) (second emphasis added).

effect wage regulations and the prevailing-wage regulations."[123] But despite this admission, the agency continued approving wage rates that did not comply with the prevailing-wage regulations. In *Comite de Apoyo a los Trabajadores Agricolas v. U.S. Department of Labor*, the DOL again confessed that it had erred in approving a per-hour wage for the apple harvest, since apple harvesting is a piece-rate industry.[124] In light of the agency's mentality, its continued approval of non-complying applications, which end up harming the local workforce, is not surprising.

2. Distortion of Prevailing Working Conditions

The H-2A statute additionally prohibits employers from imposing employment qualifications on the H-2A workers that are not normal practice in the area of intended employment.[125] For example, if the grower wishes to impose productivity standards, those standards "shall be no more than those normally required . . . by other employers for the activity in the area of intended employment, unless the OFLC Administrator approves a higher minimum."[126] Advocates, however, have documented instances in which the DOL approved for consideration applications that required workers to harvest enough of a particular crop under the piece-rate to satisfy the minimum-wage requirement or the AEWR, despite the fact that the state's normal practice did not include any productivity requirement.[127] Moreover, in these cases, the OFLC Administrator had not approved the higher standard,[128] which, according to the agency handbook, would have had to

123. *Id.*

124. *See* Comite de Apoyo a los Trabajadores Agricolas (CATA) v. U.S. Dep't of Labor, 995 F.2d 510, 512 (4th Cir. 1993) (involving a situation where the DOL approved a wage rate that allegedly violated 20 C.F.R. §653.501(d)(4) and later admitted that the rate was incorrect). Farmworker advocates have come across other concrete examples of the DOL's failure to perform the necessary calculations of appropriate rates as well. *See* Green, *supra* note 68, at 95 (discussing a letter an advocate sent to the DOL that pointed out that the office had accepted for consideration a pay rate at forty cents per 5/8 bushel bag, while the prevailing wage was 1.8 cents per pound).

125. Immigration and Nationality Act, 8 U.S.C. § 1188(c)(3)(A) (2000); Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. § 655.102(c) (2006) ("[O]ccupational qualifications . . . shall be consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops, and shall be reviewed by the OFLC Administrator for their appropriateness.").

126. 20 C.F.R. § 655.102(b)(9)(ii)(B)(2).

127. Green, *supra* note 68, at 94–95 (citing a letter from a farmworker advocate to the DOL); *Northwest, Northeast*, RURAL MIGRATION NEWS (U.C. Davis Migration Center, Davis, Cal.), July 2007, *available at* http://migration.ucdavis.edu/rmn/more.php?id=1220_0_3_0 (indicating that for the 2007 season, H-2A productivity for "apple picking jobs . . . workers are expected to pick at least 1.3 to 1.4 bins an hour, that is, fast enough to earn the $9.77 AEWR.")

128. Green, *supra* note 68, at 94–95.

have been "justified by technological, horticultural or other labor saving means."[129]

In addition to productivity standards, the regulations do not permit growers to impose employment tests upon domestic workers if those tests do not relate to the skills required of a minimally qualified worker.[130] An employer's preference for a more skilled or experienced worker is also not a sufficient reason for rejecting a local worker.[131] Despite these prohibitions, growers continue to submit H-2A applications specifying uncommon or abnormal conditions of employment.[132] For example, during the 2006 cherry and apple season in Washington, a grower in the Wenatchee area submitted an H-2A application that included a provision requiring workers applying for picking and pruning positions to present references.[133] According to farmworkers and advocates in the area, a references requirement can be fairly characterized as unusual or rare.[134] Michele Besso, an attorney at the Northwest Justice Project's Farmworker Division who has worked with farmworkers for more than two decades, stated that she had never encountered a reference requirement in her experience with farmworker employment.[135] As Besso elaborated, "There can be no explanation [for this requirement] other than the fact that the grower is trying to discourage local workers from applying for these jobs."[136] Not only are advocates concerned that requiring farmworkers to present references is not a common or normal condition of employment, but many are skeptical as to whether growers are enforcing the same requirement against the H-2A workers recruited abroad.[137] Requiring domestic workers laboring under an

129. ETA HANDBOOK, *supra* note 94, at I-37.

130. Bernett v. Hepburn Orchards, No. JH-84-991, 1987 WL 16939, at *5 (D. Md. Apr. 14, 1987) (holding that a test requiring orchard workers to pick up and manipulate a twenty-four-foot ladder "as administered by [the] defendant does not reasonably and fairly test initiates for job-related skills").

131. Elton Orchards v. Brennan, 508 F.2d 493, 500 (1st Cir. 1974).

132. Occupational qualifications do not have to be the prevailing practice in order to be imposed validly. ETA HANDBOOK, *supra* note 94, at II-7. Instead, "[c]ertain requirements are measured by the degree to which they are 'normal' or 'common.'" *Id.*

133. U.S. Dep't of Labor Emp. and Training Admin., Application for Alien Employment Certification, Attachment to ETA-790 Agricultural Clearance Order 5 (July 3, 2006) (on file with the Iowa Law Review) ("A verifiable reference indicating that the worker has the required experience will be required at the time of referral [by the local SWA], and will be verified prior to making a hiring commitment.").

134. Practices that can be fairly classified as "unusual or rare" are not acceptable occupational qualifications. ETA HANDBOOK, *supra* note 94, at II-7; Besso Interview, *supra* note 121.

135. Besso Interview, *supra* note 121.

136. *Id.*

137. *Id.*

H-2A contract to present references while not requiring foreign H-2A workers to do the same would directly violate the H-2A regulations.[138]

3. Impact of the Wage and Working-Condition Distortions

The impact of the OFLC's failure to verify grower-submitted wages and working conditions is twofold. First, inaccurate wage data and abnormal working conditions or requirements facilitate the growers' fulfillment of the second mandate of the H-2A regulations—proving that a sufficient local workforce capable and willing to perform the job does not exist.[139] This is because once the grower submits the application for H-2A workers to the OFLC, the application sets the conditions upon which the grower must recruit local workers.[140] Thus, when the OFLC fails to verify the information included in the application, the grower directly benefits from the deficiencies in its local recruitment: the potentially lower wages and more stringent working conditions specified in the grower's application discourage local workers from applying for or accepting these jobs.[141] Consequently, despite the fact that growers may technically satisfy their obligation to recruit actively,[142] growers will find few local workers willing to do the jobs outlined in the H-2A contract because of the low pay and odd working requirements.[143] After all, local workers who insist on wages or job terms in excess of those required by the H-2A regulations are not considered available for employment under the statute and regulations.[144]

By regularly failing to ensure that the wages contained in H-2A applications are the prevailing wages and that the listed employment conditions are part of the areas' normal practices, the OFLC essentially guarantees that an employer will be able to import a workforce composed

138. Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. § 655.102(a) (2006) ("[N]o job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's H-2A workers.").

139. Immigration and Nationality Act, 8 U.S.C. § 1188(a)(1)(A) (2000).

140. *See supra* notes 86–88 and accompanying text (discussing recruitment procedures and criteria).

141. Interview with Migrant Farmworker, in Mattawa, Wash. (July 20, 2006) (on file with the Iowa Law Review).

142. *See supra* notes 86–88 and accompanying text (discussing recruitment procedures and criteria).

143. The H-2A regulations impose additional barriers to effective recruitment. For instance, the H-2A statute requires multi-state recruiting, but the implementing regulations leave the OFLC Administrator the discretion to determine in what areas an employer must engage in positive local recruitment. 8 U.S.C. § 1188(b)(4); 20 C.F.R. § 655.105(a). There have been proposals to require broader recruitment efforts, including requiring such efforts specifically in areas known to be "supply states." Simms, *supra* note 95, at 511. Other proposals include establishing a nation-wide database of available workers. BRUNO, *supra* note 2, at 25 (discussing legislation proposed in the 109th Congress).

144. Hernandez-Flecha v. Quiros, 567 F.2d 1154, 1156 (1st Cir. 1977).

largely of H-2A workers.[145] In essence, the OFLC's failure to evaluate properly the H-2A applications creates the perception that a work shortage exists, exactly what many growers hope will happen: "whenever employers claim that 'they are not able to find workers, they fail to complete the sentence. What they really mean is that they can't find workers at the extremely low wages and working conditions they offer.'"[146] Such a faulty process also helps explain the extraordinarily high approval rates of H-2A applications,[147] despite no confirmed worker shortage.[148]

The second concern stemming from OFLC's approval of deficient applications is that using incorrect wage-rate and working-conditions data, over time, may change the prevailing practice or the status quo in a

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145. *See supra* note 92 (discussing the reasons that growers may prefer H-2A workers).

146. PETER KWONG, FORBIDDEN WORKERS: ILLEGAL CHINESE IMMIGRANTS AND AMERICAN LABOR 208 (1997) (quoting *Agricultural Guest Worker Programs: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Richard M. Estrada, Comm'r, U.S. Commission on Immigration Reform), *available at* http://www.utexas.edu/lbj/uscir/120795.html). Labor analysts often claim that growers "deliberately use the program to avoid paying market wages," and they further explain that "'[t]o low-wage seasonal industries, a shortage of labor is a lack of surplus labor . . . [and growers] like surplus because it keeps wages down.'" Felicia Mello, *Coming to America*, THE NATION, June 25, 2007, at 20, *available at* http://www.thenation.com/doc/20070625/mello/4 (quoting anthropologist David Griffith); *see also infra* note 148 (addressing the various ways to define labor "shortage").

147. In fiscal year 2005, the DOL approved ninety-eight percent of employers' requests for H-2A visas. *H-2A, H-2B Programs*, RURAL MIGRATION NEWS (U.C. Davis Migration Center, Davis, Cal.), July 2006, *available at* http://migration.ucdavis.edu/rmn/more.php?id=1134_0_4_0.

148. *See* LINDA LEVINE, CONG. RESEARCH SERV., FARM LABOR SHORTAGES AND IMMIGRATION POLICY, REPORT RL30395, at CRS-17 (Sept. 5, 2007) (concluding that "indicators of supply-demand conditions generally are *inconsistent* with the existence of a nationwide shortage of domestically available farm workers" (emphasis added)); *see also* GAO REPORT, *supra* note 92, at 24 (indicating no farm-labor shortage in 1997 and anticipating that a farm-labor shortage is unlikely to occur in the near future); *see also Status of Changes to Improve Program Services: Testimony on H-2A Agricultural Guestworker Program Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 3 (2000), *available at* http://www.gao.gov/archive/2000/he00134t.pdf (statement of Cynthia M. Fagnoni, Director, Education, Workforce, and Income Security Issues, U.S. Gen. Accounting Office) (reaffirming the findings reached in the GAO's 1997 report); *Farm Labor Shortages*, RURAL MIGRATION NEWS (U.C. Davis Migration Center, Davis, Cal.), Oct. 2006, *available at* http://migration.ucdavis.edu/rmn/more.php?id=1155_0_4_0 ("Unemployment rates are a widely accepted measure of labor surpluses, but no government agency certifies labor shortages. . . . [S]hortage assertions [may] reflect a temporary production surge, lagging wages, or . . . an example of 'an age-old quest for a surplus farm labor supply.'"); *see also* Goldstein, *supra* note 112, at 3 (revealing unemployment rates for farmworkers in California in 2005 in support of the establishment of higher AEWRs). *But see* James Mayse, *Labor Shortage Frustrating Farmers: Some Tobacco May Be Left in the Field for Lack of Workers*, MESSENGER-INQUIRER (Owensboro, KY), Sept. 21, 2006, *available at* 2006 WLNR 16361890 ("Tobacco farmers across the state have scrambled to find workers to harvest this season's large crop."); Julia Preston, *Pickers Are Few, and Growers Blame Congress*, N.Y. TIMES, Sept. 22, 2006, at A1 ("Stepped-up border enforcement . . . [is] putting new strains on [California's] shrinking seasonal farm labor force. Labor shortages have also been reported by apple growers in Washington and upstate New York.").

particular geographical area.[149] Since the DOL-accepted wage rate may be significantly lower in a specific area than the prevailing rate, the DOL rate may depress wages in the long-term, ultimately allowing growers to determine unilaterally the conditions of employment.[150] If H-2A wages and working conditions were to become the norm, in a competitive marketplace, growers not using H-2A workers could still use the programs' wage and condition indicators. By lowering their labor costs to mirror those of the H-2A-using competitor, the non-H-2A grower would remain competitive, while simultaneously depressing wages for local workers. Placing more control over wages and working conditions in the hands of employers would compromise the gains that farmworker advocates have made in this area and would be catastrophic for a population that already has limited legal protection and recourse.[151]

B. POTENTIAL SOLUTIONS TO OFLC'S DEFICIENT APPROVALS

Given the direct impact that the approval of deficient applications has had upon the local workforce, there are a number of ways that the DOL can help remedy approval inconsistencies and, thus, provide better protection for domestic workers. First, the SWAs should conduct a more localized review of applications prior to their submission to the OFLC. Second, the DOL should develop an appeal procedure—similar to the procedure the regulations already offer to employers—that would be open to local workers and their advocates. Third, the agency should readily disclose applications already approved for consideration to farmworker advocates.

1. Localized Review of H-2A Applications Pre-OFLC Submission

In 2005, the DOL centralized labor-certification procedures.[152] Currently only two offices in the United States handle H-2A applications, one in Atlanta and the other in Chicago.[153] While the DOL believes consolidation will increase efficiency and standardization,[154] many advocates posit that centralization has adversely affected domestic workers and will continue to do so.[155] Primarily, advocates are concerned that because the OFLC failed to check applications thoroughly when the offices were more

149. Besso Interview, *supra* note 121.

150. *Id.*

151. *See infra* note 224.

152. Information Regarding the Relocation of Foreign Labor Certification Staff, 70 Fed. Reg. 1473-01 (Jan. 7, 2005).

153. U.S. Dep't of Labor, National Processing Centers, http://www.h2a.doleta.gov/centers.htm (last visited Sept. 23, 2007) (outlining the geographical oversight of those centers).

154. Memorandum from Emily Stover DeRocco, Assistant Sec'y, Employment & Training Admin., to OFLC-Nat'l Processing Ctr. Dirs. & State Workforce Agency Dirs. 1 (Sept. 29, 2006), *available at* http://wdr.doleta.gov/directives/attach/TEGL/TEGL06-06_508.pdf.

155. Besso Interview, *supra* note 121.

regionally based, funneling applications to geographically distant offices in greater numbers "will provide even less oversight."[156] The remote location of the OFLC offices makes it difficult for advocates and growers to access the offices and generally lessens the DOL's responsiveness to advocates' and workers' complaints about the program's administration.[157] While officials in these two offices are responsible for reviewing a variety of temporary work-visa programs, it is odd that the DOL has not stationed an office in the western United States to serve geographical areas that include a particularly high concentration of agricultural laborers.[158] The eastern and midwestern locations of the OFLC offices are particularly striking since the Pacific Northwest has seen a recent increase in H-2A applications.[159] While critics may contend that the application-review office's location is irrelevant, if the DOL intends to effectuate the congressional intent behind the H-2A program,[160] the agency must develop a more formal localized approval procedure. The review that the H-2A regulations require—and that local farmworkers have a right to demand—will not be accurate if the agency does not account for the particulars of local and regional labor markets.

Currently, the ETA's handbook on the administration of the H-2A program provides that the OFLC and local offices receiving H-2A applications "should carefully examine any unusual qualifications imposed by the employer."[161] The handbook requires that if questionable information, such as an unusual employment qualification, is included in the application, the office is required to do "[a]n expedited survey . . . of non-H-2A employers . . . as to the minimal qualifications necessary to perform the occupation for which certification is being sought."[162] The handbook further instructs the OFLC Administrator to "examine sources of occupational information . . . in determining the appropriateness of the qualifications."[163] Given the short timeframe within which the OFLC must approve for consideration or reject applications,[164] the DOL is unlikely to conduct an extensive review.[165] A practice of allowing the DOL-funded statewide SWA office to review H-2A applications for prevailing-wage

156. *Id.*

157. *Id.*

158. *See* Econ. Research Serv., U.S. Dep't of Agric., Rural Labor and Education: Farm Labor, http://www.ers.usda.gov/Briefing/LaborAndEducation/FarmLabor.htm#Numbers (last visited Sept. 23, 2007) (showing the geographical distribution of farmworkers, and indicating that almost half of those workers live in just five states, including Washington and California).

159. Besso Interview, *supra* note 121.

160. *See supra* note 95 and accompanying text (indicating the intent to balance the interests of both local workers and growers).

161. ETA HANDBOOK, *supra* note 94, at I-40.

162. *Id.*

163. *Id.*

164. *See infra* notes 174–77 and accompanying text (outlining the approval procedure).

165. *See supra* Part III.A (outlining DOL mistakes).

standards and normal working conditions before forwarding those applications to the OFLC for consideration would limit the number of deficient applications the growers ultimately submit for consideration to the agency. This, in turn, would likely decrease the number of deficient applications that the agency certifies. Theoretically, given the fact that the SWA is located within the labor market on which a particular H-2A application from that region bases its wages and working-condition standards, the SWA office should have a better idea than the regional OFLC office about what is accurate data and what is not. Local offices are also in a much better position to conduct a rapid and effective investigation if the reliability and accuracy of the information in an application is not readily apparent.

This proposal would not be a burdensome re-conception of the current role that SWAs are supposed to play under the regulations. In Washington, for example, the Employment Security Division (the local administrator of the H-2A program) already maintains a policy of "provid[ing] information and assistance to employers regarding H-2A applications, while ensuring adherence to the U.S. Department of Labor (DOL) regulations governing this activity."[166] Additionally, the processing time of the applications would not likely increase as a result of these changes. If the OFLCs are currently reviewing the applications pursuant to the regulatory requirements but are simply failing to review the applications accurately, then implementing these changes would lead to a transfer of duties from the OFLC to the DOL-funded statewide SWA office rather than an increase in the volume of work.[167]

Greater localized review would simply require clearer guidance from the National Processing Centers about the meaning of the H-2A regulations. Specifically, the National Processing Centers must emphasize the fact that the SWA office does not exist only to assist employers in finding labor, but its mission also includes safeguarding the local workforce. Such instruction could limit the number of deficient applications growers and others submit to the OFLC and help remedy the problems caused by deficient applications; namely, the perception of a work shortage when none actually exists and the long-term lowering of standards for the normal or common practices.

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166. EMPLOYMENT SEC. DEP'T, STATE OF WASH., TEMPORARY ALIEN AGRICULTURAL LABOR CERTIFICATION POLICIES AND PROCEDURES 1 (2002), *available at* http://www.wa.gov/esd/policies/documents/4062.htm.

167. On the other hand, if the OFLC is not doing any of this review, then it is violating the regulations and any additional time that more localized approval would take cannot be considered time wasted, as it is already required by law. *See supra* notes 161–63 (outlining the required process).

2. Establishment of an Administrative Appeal Procedure for Farmworkers and Advocates

By granting farmworkers and their advocates the right to appeal an OFLC decision to consider an H-2A application, the DOL can take an additional step to minimize the tension between the H-2A program's conflicting goals.[168] Currently, if the OFLC or SWA denies an employer's request for foreign labor, that employer is able to appeal the decision at two different stages of the application process.[169] The statute and regulations, however, do not provide a similar procedure for a worker or advocate who wishes to challenge an application's approval.[170] Moreover, when the DOL denies certification of a grower's application and the grower appeals, no authority permits workers or labor organizations affected by a labor-certification decision to intervene in the grower's expedited administrative appeal.[171] Currently, the domestic workers' or labor organizations' right to participate in an appeal is limited to the submission of legal memoranda; however, the regulations do not provide advocates with a right to even receive notice of the impending decision.[172] Such notice is necessary, however, if the agency is to make the advocates aware of the need to submit commentary regarding the appeal in the first place. In light of the present system and its flaws, establishing an appeal procedure for farmworkers would serve three purposes. First, it would deter growers from misusing or abusing the H-2A program.[173] Second, it would encourage the DOL to take more care in its review of H-2A applications. Finally, the appeal procedure would increase the agency's awareness of particular application deficiencies that generally go unnoticed or unaddressed.

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168. Green, *supra* note 68, at 97.

169. Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. § 655.104(c)(3) (2006); *see also id.* § 655.112 (setting out the procedures for administrative review).

170. *See id.* §§ 655.90–655.113 (containing no mention of a labor-side appeal).

171. *See* Ariz. Farmworkers Union v. Buhl, 747 F.2d 1269, 1272 (9th Cir. 1984). The Ninth Circuit explained that

> [t]he certification decision requires rapid resolution because usually a highly perishable crop awaits harvesting. . . . [Requiring that] the ALJ defer review until sufficient notice has been given to all those who possibly would be affected by his decision and the provision of a right to be heard before that review was completed would frustrate the purpose of the procedure being challenged.

Id.

172. *Id.* at 1273 (Browning, J., concurring) ("[T]he regulations do not require that the Union be notified of the employer's request for review.").

173. *See* Green, *supra* note 68, at 97 (stating that an appeal procedure "would advance the Employment and Training Administration's watchdog function and force employers to be more conscientious in their efforts to satisfy the H-2A requirements, for fear of challenge by adversely affected U.S. workers").

Under the present regulatory framework, should the OFLC catch a deficiency in a grower's application and deny consideration or certification of the application, the agency must forward any request for an appeal to an ALJ immediately.[174] Within five days of receiving the complaint, the ALJ must make a decision based on the written record.[175] If the grower requests a de novo hearing, the ALJ must hear the case within five days of receiving the file and render a decision within ten days.[176] The appeal procedure progresses swiftly to decrease the chance that the agency will disrupt a grower's business by delaying legitimate requests.[177]

This expeditious appeal procedure, coupled with the OFLC's less-than-rigorous approval standards, has the potential to spell disaster for local workers. The OFLC's general ability to catch an error in an application is limited.[178] If the OFLC does notice a problem, however, the grower may amend the application or quickly appeal the OFLC's decision not to consider the application.[179] At present, because of the increasing volume of applications, only a dedication to following the letter of the law prevents a grower from submitting an intentionally deficient application with the hopes that the OFLC will mistakenly approve it.

Allowing a farmworker or advocate to challenge consideration through an appeal, however, would raise the stakes associated with submitting an error-laden application. If an advocate or worker were to notice an error and decide to appeal the DOL's decision to consider the application, the appeal process would further delay an application's ultimate certification, increasing the chance that normal farm operations would be affected. Critics who oppose additional appeals for workers in the H-2A certification procedures claim that workers will abuse the system and use the appeals to "delay the process" and "harass agricultural employers."[180] No evidence supports these claims, however. Nevertheless, if current regulations require that an application contain certain information and the application clearly

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174. 20 C.F.R. § 655.112(a)(1) (requiring the agency "to send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery").

175. *Id.* § 655.112(a)(2).

176. *Id.* § 655.112(b)(1)(ii)–(iii).

177. *See* Holley, *supra* note 14, at 598–604 (addressing how all administrative remedies under the H-2A regulations benefit the grower in terms of both substance and procedure).

178. *See supra* Part III.A (outlining DOL mistakes).

179. *Supra* notes 83–84.

180. Green, *supra* note 68, at 97–98. Green stated:

> [A]llowing . . . workers and their advocates to challenge the decision[] . . . would increase the delay in the already drawn out H-2A certification process. . . . [A] formal avenue of appeal . . . would [also] be a waste of . . . resources because U.S. workers would bring meritless challenges to harass agricultural employers and delay the process.

Id.

does not contain that information, the worker affected by that omission should have the right to grieve the omission, regardless of the delay.

If such an appeal procedure existed, a deficient application would threaten an employer's economic bottom line, forcing the employer to become more vigilant about complying with the provisions of the H-2A in his or her initial application. Because an agricultural employer is easily able to anticipate the legal consequences of a deficient application, providing workers with the right to appeal would effectively deter grower misbehavior and decrease grower mistakes or omissions at the outset.[181] Growers deliberately choose the terms that they will set forth in an H-2A application, making the inclusion of false information a perfect example of deterrable behavior.[182]

In addition to operating as a general deterrent to growers, an appeal procedure for workers and worker advocates will help vindicate workers' rights by providing a check on the DOL as well. Faced with the likelihood of an increased number of appeals—caused by the creation of an adversarial party with the power to police the application process through appeals—the OFLC would be more likely to review applications carefully, knowing the significant burdens associated with referring certification decisions to an ALJ on appeal. While administrative appeals are generally more costly than self-regulation and regulatory oversight, in the case of the H-2A regulations, those methods have continually failed local workers.[183]

At the core of the debate over the viability of a worker-appeal mechanism is a fundamental issue of fairness. The DOL recognizes the need for an administrative appeal for agricultural employers when it denies their H-2A applications, yet it has not recognized the value in providing for an additional check on the agency's already-overburdened offices by allowing farmworkers and their advocates to monitor the process as well. Both a grower-side and employee-side appeals process would help fulfill the goals of the H-2A program. Despite concerns about increased delay, if the DOL can conduct an administrative review on a truncated timeline for the growers' sake, given what is at stake for the worker, there is very little reason that such a process cannot be extended to those who suffer the direct and indirect effects of an application's deficiencies.

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181. *See* Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 99 (1997) ("Deterrence, after all, is achieved only to the extent that actors can anticipate ex ante the legal consequences of their actions.").

182. *See* Ann Marie Herron, Comment, *The Antitrust Sentencing Guideline: Deterring Crime by Clarifying the Volume of Commerce Muddle*, 51 EMORY L.J. 929, 929 (2002) (discussing deterability in the context of white-collar crime, and claiming that "'because it requires planning, [it] "is a wonderful prototypical example of deterrable conduct"'" (quoting Michael Higgins, *Sizing Up Sentences*, A.B.A. J., Nov. 1999, at 42, 47 (quoting Frank Tuerkheimer, former U.S. Attorney in the Western District of Wisconsin))).

183. *See supra* Part III.A.

3. Increased Transparency in H-2A Applications and Policies

As discussed above, perhaps the greatest obstacle to creating an employee-side appeal procedure is the general fear that additional non-grower appeals will delay unnecessarily the H-2A application process[184] and, thus, jeopardize employers' perishable crops[185] or impose too great an administrative burden on the DOL. Increasing the transparency of the H-2A application process generally and providing farmworkers and advocates with information about specific applications earlier in the process would provide an alternative manner for workers and advocates to bring H-2A application deficiencies to the OFLC's attention before resorting to burdensome administrative remedies. Farmworker advocates' participation is particularly important given the need to balance the H-2A program's two goals and the DOL's dwindling resources.[186] As Michael Holley, a staff attorney in the Migrant Farmworker Division of Texas Rural Legal Aid, stated,

> Since the Department [of Labor] requires many resources to fulfill its role of protecting farmworkers, yet needs few resources to approve growers' labor certificates and to place a seal of approval on growers' actions, an understaffed Labor Department is *de facto* a Labor Department with a pro-grower bias.[187]

Increasing the transparency of various parts of the H-2A application process will help alleviate the problems caused by an understaffed DOL experiencing a shortage of resources and increase the possibility that the H-2A program is able to carry out its two goals of protecting local workers and ensuring that growers are able to harvest their crops.

a. Basis of a Decision to Consider or Certify an Application Under FOIA

Farmworker advocates have the ability to request documents related to DOL decisions on H-2A applications under the Freedom of Information Act ("FOIA").[188] Advocates have requested such documents in an effort to determine the general policies behind the DOL's approval of H-2A applications on the whole and why the agency often fails to comply with the regulations and the ETA handbook in this process.[189] Generally, the agency has responded with hostility to these requests, delaying for months before

184. Green, *supra* note 68, at 97.

185. Ariz. Farmworkers Union v. Buhl, 747 F.2d 1269, 1272 (9th Cir. 1984).

186. Holley, *supra* note 14, at 604.

187. *Id.* (internal citations omitted).

188. 5 U.S.C. § 552 (2000); *see also* Production or Disclosure of Information or Materials, 29 C.F.R. pt. 70 (2006) (containing the DOL regulations for implementing FOIA).

189. Besso Interview, *supra* note 121.

providing advocates with the requested documents.[190] These delays occur despite the fact that the DOL's official disclosure policy states that the DOL will make "all agency records" not covered by a FOIA exemption "promptly available to any person submitting a written request."[191] Under this statutory scheme, the DOL must disclose information relating to how its employees evaluate and approve H-2A applications since such instructions directly "affect a member of the public"—namely the local agricultural worker and grower communities—and none of the exemptions to FOIA disclosure applies.[192] Likewise, the DOL is obligated to disclose its interpretations of the H-2A regulations and the ETA handbook, as well as agency policy statements regarding the program's administration generally.[193]

Greater transparency in the standards that the DOL uses in the application-approval process is important because, fundamentally, "the free flow of information among public agencies and private individuals[] allow[s] input, review, and criticism of government action, and thereby increases the quality of governance."[194] With more information about the DOL's administration of the H-2A program, advocates could maintain a

190. *Id.*; *see also* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 891–92 (2006) (discussing the frustrations associated with disclosure statutes and the corresponding process).

191. 29 C.F.R. § 70.3; *see also* 29 C.F.R. pt. 70, subpt. B (outlining the DOL's disclosure procedure under FOIA).

192. 5 U.S.C. § 552(a)(2)(C). The purpose of the FOIA is to encourage full disclosure. U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991). Accordingly, unless a document is protected by one of the exemptions from mandatory disclosure, the DOL must release all information or materials relating to the administration of the H-2A program. 5 U.S.C. § 552(b). This provision exempts DOL from disclosing "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." *Id.* § 552(b)(5). The memoranda exemption is meant to be narrowly construed. U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 151 (1989) (stating that these exemptions are to be "given a narrow compass"). Accordingly, to invoke the exemption, the DOL must show that a particular memorandum was "pre-decisional" and "deliberative." Judicial Watch, Inc. v. U.S. Postal Serv., 297 F. Supp. 2d 252, 259 (D.D.C. 2004). In other words, the only memoranda that are exempt from disclosure are those that were (1) antecedents to the adoption of an agency policy and (2) an integral part of the deliberative process. Evans v. U.S. Office of Pers. Mgmt., 276 F. Supp. 2d 34, 38 (D.D.C. 2003). Consequently, a field memorandum relating to the administration of the H-2A program and policy statements regarding the DOL's H-2A policy likely would not fall within this category. According to its own regulations, the DOL is obligated to disclose "administrative staff manuals and instructions to staff that affect a member of the public." 5 U.S.C. § 552(a)(2)(C); 29 C.F.R. § 70.4(a)(3). This includes disclosure of "statements of policy and interpretations which have been adopted by the agency." 5 U.S.C. § 522(a)(2)(B); 29 C.F.R. § 70.4(a)(2).

193. 5 U.S.C. § 552(a)(2)(B).

194. Fenster, *supra* note 190, at 900 (citing SECRECY: REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at xxi (1st Sess. 1997)).

better dialogue with the agency about their approval-procedure concerns.[195] This would help maintain the integrity of the highly criticized program for both growers and workers alike by ensuring that the agency respects the aims of the H-2A program. If the DOL responded more quickly to advocates' information requests and more readily supplied information when advocates so requested, the program's transparency would greatly increase with little other expense. Publishing up-to-date policies and procedures in an easily accessible format, such as on the Internet, would allow advocates and workers to monitor more easily the program's administration.

b. Approval of Specific H-2A Applications and the Obligation to Disclose Under FOIA and the H-2A Statute and Regulations

In addition to increasing the transparency of the DOL's general decision-making process, the agency or Congress should also clarify that the OFLC is required to disclose information about individual H-2A applications and job openings to concerned parties in a timely manner so that advocates are able to assist the agency in uncovering deficient applications.

The period between a grower's submission of an application and the OFLC's decision to either grant or deny consideration is extremely short.[196] If the agency grants consideration, during the time period reserved for local-worker recruitment but before the application's certification, the regulations empower the OFLC Administrator to require an employer to modify a job offer that "does not contain all the provisions relating to . . . wages and working conditions required" by the regulations.[197] In essence, this regulation provides the OFLC with the ability to remedy any inadequacies in its initial decision to consider an application before it ultimately decides whether to certify that application.[198] This provides the OFLC with a second chance to comply with the H-2A regulations.

Presently, during the time when amendments are possible, advocates do not readily have access to applications already approved for consideration but not certification. By granting such access, however, the DOL will provide for an additional check on the process before certification. This would give advocates an opportunity to share their concerns with the agency before it certifies a questionable application. The time between consideration and certification is relatively limited, however. If the application procedure were moving smoothly in favor of the grower, a time window of fewer than three

195. The last time that the ETA published its handbook was in 1988. ETA HANDBOOK, *supra* note 94. Despite numerous changes to the H-2A program in the past two decades, the agency has not published an updated version.

196. Immigration and Nationality Act, 8 U.S.C. § 1188(c)(2)(A) (2000) (requiring notification of deficiencies within seven days); Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. § 655.101(c)(2).

197. 20 C.F.R. § 655.105(c).

198. *Id.*

weeks would exist prior to agency certification.[199] It would be during this time when advocates would be able to provide input with regard to the sufficiency of an application, thereby helping to determine whether the application is deficient.

Despite the benefits of giving advocates the ability to engage in a pre-certification review, it presently remains unclear whether the agency is obligated to disclose information regarding specific applications already accepted for consideration. Arguably, however, both FOIA and the H-2A regulations themselves require the DOL to release such information. With regard to FOIA, according to internal DOL policy, if requested, the agency requires disclosure of "H-2A applications and related materials formally filed by an agricultural employer or agent," as well as "documents related to the application."[200] The agency's policies also require that the offices "not delay their decision regarding release of the requested documents" for more than the twenty working days stipulated by FOIA.[201] No exceptions to this timeline exist—the agency must disclose the documents and may not delay disclosure for any reason, including delaying a disclosure decision "until the application is analyzed and accepted or not accepted, or until a corrected copy is received from the employer."[202] While agency policy does provide advocates a right to receive and review pending applications, by the time an advocate files a FOIA request, (even if the DOL follows the twenty-day timeline) the OFLC likely has already certified the H-2A applications when the agency turns them over to the advocates.[203]

Furthermore, because FOIA prohibits advocates from filing open-ended requests, gaining access to pending applications before certification is also problematic. According to an ETA memorandum, "What is in the [OFLC's] possession on the date the FOIA request is received is what is subject to the request."[204] Since advocates are precluded from filing an open-ended request that asks for any and all applications that any particular grower has

199. The timeline is as follows: No more than forty-five days prior to the date of need, the employer must submit an application for H-2A workers. 8 U.S.C. § 1188(c)(1). Within seven days of submission, the OFLC must render a decision regarding whether to consider the application. *Id.* § 1188(c)(2)(A). Assuming that OFLC accepts the application for consideration, the employer must begin recruitment of local workers. *Id.* § 1188(b)(4). No later than twenty days before the date of need, the OFLC must certify the application if the employer has complied with the certification criteria. 20 C.F.R. § 655.101(c). According to this timeline, the time between when the OFLC agrees to consider the application and the time by which the OFLC must make a decision to certify is likely to be only slightly more than two weeks.

200. Memorandum from Thomas M. Dowd, Deputy Assistant Sec'y, to Regional Admin'rs, H-2A Orders and FOIA Requests (July 18, 2003), *available at* http://www.foreignlaborcert.doleta.gov/fm/fm_14-03.htm.

201. *Id.*

202. *Id.*

203. Besso Interview, *supra* note 121.

204. Memorandum from Thomas M. Dowd to Regional Admin'rs, *supra* note 200.

submitted or will submit, advocates are forced to file multiple FOIA requests over time to obtain all the necessary information. These additional steps extend an already-slow process.[205]

In addition to a disclosure obligation under FOIA, the H-2A program regulations may also require the DOL to disclose H-2A applications.[206] While the obligation is not explicit, analyzing the content of the H-2A regulatory scheme and the purpose underlying the program implies that a disclosure requirement exists. First, the H-2A regulations require that the DOL administer the program in a way that "effectuate[s] the purpose of the [Immigration and Nationality Act] that U.S. workers rather than aliens be employed wherever possible."[207] To ensure that growers provide workers residing in the United States with preference for these jobs, the statute requires "positive recruitment efforts" directed toward local workers.[208] A grower must engage in local recruitment under an H-2A contract to the same extent as "non-H-2A agricultural employers of comparable or smaller size in the area of employment."[209] The H-2A provisions, therefore, reflect congressional intent that growers make local workers aware of available agricultural positions under the H-2A program. In addition to awareness of available positions, growers must also apprise workers whether the terms and conditions of employment comply with the law.[210]

Farmworker advocates are in a unique position to ensure that workers are aware of H-2A jobs and apprised of whether the employment contracts comply with the law. Without farmworker advocates participating in the process, workers cannot be made truly aware of the availability of these positions as required by law. For example, some agricultural employers presently attempt to satisfy the H-2A recruiting requirement by placing small advertisements about the positions in local newspapers or by way of other

205. This Note does not argue that open-ended requests should be permitted but simply uses this point to highlight the fact that the agency is well-shielded from information requests to the detriment of local workers.

206. Thank you to Michelle Besso at the Northwest Justice Project for help in developing this argument.

207. Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. §655.90(d) (2006).

208. Immigration and Nationality Act, 8 U.S.C. §1188(b)(4) (2006) (requiring "circulation through the interstate employment service system of the employer's job offer" as well).

209. 20 C.F.R. § 655.102(d).

210. *Id.* § 655.106(a) (requiring that job applicants be "made aware of the terms and conditions of and qualifications for the job"); Agricultural Clearance Order Activity, 20 C.F.R. § 653.501(c), (d)(2), (d)(3) (mandating that the job order provide "all the material terms and conditions of employment"). The regulations further require that agency "staff shall assist all agricultural workers, upon request, to understand the terms and conditions of employment set forth in intrastate and interstate job orders," and must even do so in Spanish if requested. *Id.* § 653.501(h).

low-impact efforts.[211] The SWA office also plays a small role in worker recruitment by referring workers who arrive at its office to employers who have applied for H-2A employees.[212] These recruitment methods, however, are out of touch with the way that people in the industry typically secure work,[213] and they do not advance the program's preference for local workers. Migrant and seasonal farmworkers generally travel from orchard to orchard searching for employment.[214] It is unlikely that a farmworker will search for work through the SWA office or that an office would even be located close to where that worker is living.[215]

Knowledge of employment possibilities spreads by word of mouth—initiated in large part by farm-labor advocates or through farm-labor contractors.[216] Farmworker advocates are well positioned to help disseminate work notices, as they are more likely to reach large groups of workers.[217] Through a combination of orchard-outreach programs, know-your-rights presentations, or union informational sessions, advocates can spread information about jobs more effectively than an administrative office or isolated grower relying on a small advertisement or a referral from the SWA office. These advocate actions help ensure compliance with the H-2A regulations that require that local workers be apprised of the availability and conditions of the positions before the grower looks abroad. Advocates cannot spread information effectively, however, if the agency precludes them from receiving copies of H-2A applications before they have been certified. In order to make this disclosure obligation explicit, the DOL should revise the H-2A regulations to reflect the spirit of the H-2A program by affirmatively requiring the agency to notify farmworker advocate organizations of job openings.

The difficulty that farmworker advocates have faced in obtaining specific H-2A job applications—despite the agency's obligation to respond to such requests in a timely manner under FOIA and the possible obligation to release the information under the H-2A program—has forced advocates to seek access to applications from either the local SWA or a growers

211. Guerra, *supra* note 92, at 193 ("Growers' associations and employers provide the DOL with examples of positive recruitment such as tiny, half-inch classified ads run during the middle of the week or radio ads run at 4 A.M. when nobody is listening." (quoting 20 C.F.R. § 655.102(d))).

212. *See supra* note 86 and accompanying text (discussing how the SWA and employers work together to recruit workers).

213. Besso Interview, *supra* note 121.

214. Interview with Migrant Farmworker, *supra* note 141.

215. *Id.* (expressing doubt that the SWA office even exists); Besso Interview, *supra* note 121.

216. *See infra* Part IV.B.2 (discussing the role of farm labor contractors).

217. For example, during the summer of 2006, farmworker advocates in Washington State conducted weekly outreach efforts to registered and unregistered farm-labor housing, as well as to farmworker educational and health-care facilities. Similar outreach efforts are conducted by farmworker advocates throughout the country during peak harvest times.

association.[218] Success with both organizations is mixed,[219] and the history of animosity between farmworker advocates and the growers' associations, in addition to the fact that the associations may have helped the employer apply for H-2A workers,[220] makes reliance on such associations for information undesirable. To combat the de facto DOL preference for growers[221] and thereby protect local workers, advocates must have access to the H-2A applications that the OFLC has accepted for consideration in their region. Such access would better enable advocates to monitor the agency's approval procedures and ensure general compliance with the H-2A regulations regarding specific applications for foreign workers.[222]

IV. FARMWORKER ADVOCATES AND THEIR ROLES

Many of the proposed changes to the H-2A application procedure and approval process require the participation of farmworker advocates, both legal and labor. These advocates are needed to fight the pro-grower bias in the DOL and the bureaucratic nature of the H-2A program generally. Advocate participation is also important because farmworkers themselves are marginalized and hold very little political power.[223]

A. ROLE OF LEGAL ADVOCATES IN PUSHING FOR PROGRAMMATIC CHANGE

At present, legal advocates play a limited role in the H-2A application process on behalf of local workers.[224] If the DOL were to adopt some of the policies discussed in this Note, however, these legal advocates would assume a more active role as they would have the ability to access and scrutinize

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218. Besso Interview, *supra* note 121.

219. *Id.*

220. *See infra* Part IV.B.2 (discussing the role of growers' associations).

221. Holley, *supra* note 14, at 604.

222. The Washington State WorkSource office has recently begun to post H-2A job openings on its web site, a welcome development in the dissemination of H-2A applications that have been accepted for consideration. WorkSource, H-2A Jobs, http://www.wa.gov/esd/farmworkers/h2a_jobs.htm (last visited Sept. 23, 2007). In an effort to reach the local workforce, Farmworker Legal Services of Michigan also posts the job orders for employers who are seeking to bring in H-2A workers. Farmworker Legal Services of Michigan, H2A Guestworker Program, http://www.farmworkerlaw.org/document.2005-05-29.4205311684 (last visited Sept. 23, 2007).

223. Holley, *supra* note 14, at 588 (lamenting the "downward spiral" of farmworker rights and bargaining power because of their exclusion from the Fair Labor Standards Act's ("FLSA") overtime provisions and the NLRA).

224. These legal advocates generally include employees from both federally funded Legal Services Offices as well as privately funded poverty-law centers. *See, e.g.*, Columbia Legal Services, Program Highlights, http://www.columbialegal.org/highlights.html (last visited Sept. 23, 2007) (non-federally funded); Friends of Farmworkers, http://www.friendsfw.org/friendsfw.html (last visited Sept. 23, 2007) (non-federally funded); Nw. Justice Project, http://www.nwjustice.org/about_njp/index.html (last visited Sept. 23, 2007) (federally funded).

pending and approved H-2A applications for deficiencies.[225] Under a more transparent system, legal advocates could also better disseminate information regarding H-2A jobs to local workers through outreach and community-based education programs,[226] thereby helping the agency comply with the H-2A regulations and statutes. Additionally, if the DOL established an appeal procedure for farmworkers under the H-2A regulations, legal advocates would actively participate in the process by filing some of those appeals on behalf of farmworkers.[227]

Unfortunately, despite supporting changes to the H-2A program, most farmworker legal advocates do not possess the resources required to actually push for such changes. Many farmworker legal-services programs in the United States are federally funded, preventing employees from lobbying the government.[228] Additionally, legal-services organizations receive such limited funding that legal advocates often cannot afford to operate outside of their traditional role in the adversarial system, that of individual counsel.[229] Because of the limitations that legal advocates face, organized labor must increase its presence in the H-2A process on behalf of domestic labor in hopes of changing the certification process and structure of the H-2A program.

B. ROLE OF ORGANIZED LABOR IN PUSHING FOR PROGRAMMATIC CHANGE

As in the past, the current presence of organized labor in the fields is fairly limited.[230] The national political scene also reflects this void, ultimately resulting in unfortunate consequences for domestic agricultural workers.[231] Not only does labor's absence affect the type of protections the law affords farmworkers, but labor's limited presence also allows other organizations to claim an advocacy role that they may not be fit to fulfill. For example, the North Carolina Growers Association ("NCGA"), an organization that represents over one thousand growers, markets itself as an "organization

225. *See supra* Part III.B.3.a (discussing agency delay in providing requested documents).

226. *See supra* Part III.B.3.b (arguing for timely compliance with requests).

227. *See supra* Part III.B.2 (arguing for an appeal procedure for farmworkers under H-2A regulations).

228. BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY ONE HALF A LAWYER 16–17 (2000), *available at* http://www.brennancenter.org/dynamic/subpages/atj2.pdf (outlining the restrictions placed on the federally funded Legal Service Corporation ("LSC") programs).

229. Congressional reforms in 1996 drastically cut funding to LSC organizations and severely limited their ability to represent low-income clients other than on an individual basis. *Id.* at 3.

230. *See supra* Part II.B.

231. KWONG, *supra* note 146, at 185 ("The fact that the U.S. Congress can pass laws that are detrimental to the interest of American workers shows the absence of powerful organized labor to oppose them.").

that exists to safeguard workers' rights."[232] The head of the association, Stan Eury, frequently calls himself a "farm worker advocate" while at the same time brazenly admits "deal[ing] in Mexicans."[233] When pro-grower organizations such as the NCGA label themselves farmworker advocates, the farmworker voice becomes increasingly overshadowed by a national focus on the agricultural employers' first priority—the economic bottom line.

1. Emerging Union Preference to Organize H-2A Workers

Despite an overall decrease in union action in the fields, farmworker unions have proven very successful in organizing H-2A workers in the United States as of late.[234] Given the frequent exploitation of H-2A workers,[235] the unions' success in organizing the H-2A workers is undoubtedly a positive development.[236] Unfortunately, these organizing drives frequently leave out local workers,[237] despite the fact that local workers are vulnerable to similar employer exploitation as the H-2A workers and face the mounting pressures associated with a growing guest-worker labor force.[238] Despite avoiding foreign workers during the bracero years,[239] there are many reasons why unions have turned their efforts to representing H-2A workers, including the fact that it may be a more efficient use of resources in a time of dwindling union support. Unions may also turn to H-2A workers because they are frustrated by the problems associated with organizing undocumented workers and because there is a general perception that most of the domestic workforce is comprised of such workers.

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232. Stan Eury, Editorial, *H2A Program Helps Workers, N.C. Farms*, NEWS AND OBSERVER (Raleigh, N.C.), Sept. 5, 1999, at A34.

233. Esther Schrader, *Widening the Field of Workers: North Carolina Man Is Among Leaders Seeking to Expand Program that Lets U.S. Farms Hire Foreign Employees on Temporary Visas, but Officials Who Oversee It Cite Problems*, L.A. TIMES, Aug. 26, 1999, at A1.

234. *See* Steven Greenhouse, *North Carolina Growers' Group Signs Union Contract for Mexican Workers*, N.Y. TIMES, Sept. 17, 2004, at A16 (outlining the agreement between the FLOC and the NCGA); Paul Nyhan, *Guest Farm Workers Get Contract*, SEATTLE POST-INTELLIGENCER, Apr. 12, 2006, at E1 (discussing a contract between the UFW and the farm-labor contractor Global Horizons).

235. Guerra, *supra* note 92, at 202–08.

236. *See generally* Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007) (praising the union of national and international labor forces in protecting H-2A workers).

237. There is no mention of the local workforce in any of the latest articles about recent union successes on the H-2A front. *See, e.g.*, Greenhouse, *supra* note 234, at A16 (discussing the FLOC–NCGA contract); Nyhan, *supra* note 234, at E1 (discussing the UFW-Global Horizon contract); *UFW-Global, Oregon*, RURAL MIGRATION NEWS (U.C. Davis Migration Center, Davis, Cal.), Apr. 2006 [hereinafter *UFW-Global*], *available at* http://migration.ucdavis.edu/rmn/more.php?id=1108_0_3_0 (same).

238. *See supra* Part III.A (discussing the impact of guest workers on wages and working conditions).

239. *See supra* note 52.

a. Focusing on H-2A Workers as a More Efficient Use of Resources

While organizing H-2A workers is not easy,[240] farmworker unions may focus their efforts on H-2A workers instead of the local labor force because unions are able to organize H-2A workers more efficiently than they can organize the local labor force.[241] Given farmworker unions' dwindling resources and diminished political clout,[242] it seems logical that they engage in a cost-benefit analysis when deciding where to focus their resources.[243] Unlike the local labor force, which may be dispersed geographically and difficult to reach,[244] H-2A workers are increasingly brought to the United States in large numbers through centralized organizations acting as brokers between the growers and the DOL.[245] Additionally, because federal law prohibits H-2A workers from moving from one employer to another,[246] if a union enters a contract with a growers association or large farm-labor contractor ("FLC") to represent the H-2A workers under their care, the agreement automatically guarantees the union a large increase in its membership without having to confront the problems typically associated with unionization.[247] For example, the contract between the Farm Labor Organizing Committee ("FLOC") and the NCGA, an organization designed to recruit H-2A workers for its members, covers approximately 8,500 H-2A workers.[248] In 2004, when H-2A workers joined the union rolls, the union's membership nearly doubled.[249] The recent contract between Global Horizons, an FLC, and the UFW currently covers one thousand H-2A

240. FLOC's success in organizing H-2A workers was the result of a five-year boycott of the Mt. Olive Pickle Company. *See* Greenhouse, *supra* note 234, at A16. The union hoped to put pressure on the farmers that sold cucumbers picked by H-2A workers to Mt. Olive. *Id.*; *see also* HUMAN RIGHTS WATCH, *supra* note 48, at 208–15.

241. The author recognizes that unions are also driven by the true desire to improve the working conditions of the terribly exploited H-2A workers but posits that there are other factors that unions consider when deciding where to focus their resources.

242. *See* Miriam Pawel, *Farmworkers Reap Little as Union Strays from Its Roots*, L.A. TIMES, Jan. 8, 2006, at A1 (discussing the union's focus on raising money rather than organizing); *see also* Nyhan, *supra* note 234, at E1 (indicating that the agricultural union membership is on the decline).

243. *See* Nyhan, *supra* note 234, at E1 (referring to the union's perception of H-2A workers as "fertile ground for a U.S. labor movement trying to regain its footing").

244. *See* Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 12 (2005) (discussing the "difficulty of winning contracts for mobile, replaceable farm workers").

245. *See infra* Part IV.B.2 (discussing this phenomenon).

246. *See* Holley, *supra* note 14, at 595 ("Unlike any other farmworker in the United States, an H-2A worker is tied to a single employer.").

247. *See generally* MARTIN, *supra* note 13 (providing a background of the problems that unions historically have faced when organizing farmworkers).

248. Press Release, Mt. Olive Pickle Co., Boycott of Mt. Olive Ends (Sept. 16, 2004), *available at* http://www.mtolivepickles.com/Company/Press013.html.

249. Jon Chavez, *Pact to Affect 8,000 Migrants*, TOLEDO BLADE (Toledo, Ohio), Sept. 16, 2004, at 1.

workers nationwide.[250] And as Global Horizons places more H-2A workers throughout the country, the UFW will continue to gain members under the contract.[251] Adding H-2A workers to membership rolls required neither FLOC nor UFW to do on-the-ground field recruitment, and in neither case did the unions hold elections to determine whether the "workers wanted to be represented by the unions to which they [would be] paying dues."[252]

Unions' historical aversion to organizing workers within the secondary labor market[253] may partially explain the decision to start organizing H-2A workers, as well as what appears to be the present preference for such workers: "to unionize low-income workers in small, separate workplaces often costs more and requires more organizing effort than to unionize large centralized plants."[254] While H-2A workers are still technically operating within the secondary labor market individually, their ties to large growers associations or FLCs make their work situation more analogous to large centralized plants. The secondary labor market thus becomes fragmented and hierarchical, and local farmworkers remain marginalized by their independent status. In courting growers associations or FLCs, farmworker unions reap the benefits of a greater membership, i.e., increased dues payments, without having to expend the incredible energy required to rally local workers and successfully convince them to unionize.[255]

b. Frustrations Associated with Organizing Undocumented Workers

Unions may also turn to H-2A workers because labor has experienced great frustration when attempting to organize undocumented agricultural workers.[256] The historical union view of the undocumented workforce was that any attempt to unionize people working without proper documentation in the United States was futile.[257] As an AFL-CIO official articulated, undocumented workers "'seldom join unions and they almost never go on

250. Nyhan, *supra* note 234, at E1.

251. *Id.*

252. *UFW-Global*, *supra* note 237.

253. The secondary labor market is generally "characterized by low wages, unattractive working conditions, and minimal opportunities for investment." Elizabeth M. Dunne, Comment, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 641 (2000).

254. KWONG, *supra* note 146, at 187.

255. *See UFW-Global*, *supra* note 237 (positing that the recent union-H-2A contracts represent a certain sense of "desperation" on the part of unions to add some sort of membership).

256. While it is almost impossible to get an accurate count of the number of undocumented workers in the United States, according to a study based on the March 2005 Current Population Survey, approximately twenty-four percent of the workers employed in farming operations are undocumented. PASSEL, *supra* note 18, at 11.

257. *See* KWONG, *supra* note 146, at 209 (describing union sentiment); *cf.* Gordon, *supra* note 236, at 543–44 (discussing how the protections provided by the California Agricultural Labor Relations Act increased the UFW's willingness to organize undocumented workers).

strike or otherwise complain about their wages or working conditions, because they fear deportation and the return to the poverty in their homeland.'"[258] A 1996 joint organizing drive between the UFW and the Teamsters in Wenatchee, Washington, failed largely because undocumented workers feared that the government would be more likely to conduct raids and deport undocumented workers if the company were unionized.[259] The company's anti-union consultant promoted this fear when, according to one employee, he "told the workers: 'there hasn't been a union here yet, and the INS hasn't done any raids. But with a union, the INS is going to be around.'"[260]

The unions' mistake, however, may be in the failure to realize that leaving undocumented workers "outside of the labor movement plays right into the hands of capital."[261] Ignoring industry sectors where a large portion of the labor force may be undocumented ends up "dividing the working class and thereby thwarting [the union's] attempt to build a powerful labor movement" all around.[262] Many farmworkers currently maintain proper documentation,[263] and those workers suffer greatly from organized labor's failure to include them actively in their campaigns. In fact, these documented workers may feel a twofold pressure. Not only do they suffer from the H-2A workers' negative impact on the labor market when the DOL does not properly administer the program, but undocumented and non-unionized farmworkers may also undercut the pay of those who are unionized or who have proper documentation.[264]

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258. KWONG, *supra* note 146, at 209 (quoting HECTOR L. DELGADO, NEW IMMIGRANTS, OLD UNIONS: ORGANIZING UNDOCUMENTED WORKERS IN LOS ANGELES 10 (1993)).

259. Sarah Cleveland et al., *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. SOC. JUST. 795, 807 (2003). Such fears of deportation have increased since the immigration raids on the Swift plants in December 2006. *See generally Enforcement: Swift Fallout, Mismatches*, RURAL MIGRATION NEWS (U.C. Davis Migration Center, Davis, Cal.), Jan. 2007, *available at* http://migration.ucdavis.edu/rmn/more.php?id=1180_0_4_0 (providing information about the raids).

260. Cleveland et al., *supra* note 259, at 807.

261. KWONG, *supra* note 146, at 209.

262. *Id.*; *see also* Dick Meister, *Influx of Immigrants Offers U.S. Unions a Great Opportunity*, BUFFALO NEWS (New York), Sept. 2, 2001, at H1 (discussing the potential that immigrant communities hold for struggling unions).

263. The percentage of documented agricultural workers is the subject of debate. If, according to a Pew Center study, twenty-four percent of the labor force of farming operations is undocumented, then the other seventy-six percent must be authorized to work in the United States legally. *See* PASSEL, *supra* note 18, at 11. *But see* NAWS 2005 STUDY, *supra* note 18, at 6 (discussing the employment eligibility of foreign-born workers).

264. Meister, *supra* note 262, at H1 ("The AFL-CIO knows that if the undocumented workers are not unionized, they will continue undercutting other workers, but that unionizing them will be very difficult unless they are granted the legal rights and protections granted others—above all, the right to unionize.").

2. The Case of Global Horizons and the UFW

One example of the interplay of H-2A workers, domestic workers, and unions is the case of Global Horizons, an FLC, and its recent contract with the UFW. Predictably, the increasing demand for H-2A workers has exacerbated the already-growing use of FLCs and other labor-supply entities.[265] Taking advantage of growers' complaints about the bureaucratic hassle and cost of the H-2A program,[266] these supply organizations essentially serve as outsourced human-resources departments.[267] Their aim is to keep the employers' costs and risk low. By navigating them through the H-2A application process and physically recruiting the labor for the employers abroad, these supply organizations are able to reduce employers' costs.[268] Another way that these organizations help decrease employer costs is by preventing the grower from assuming any of the risk associated with hiring farmworkers.[269] Under the FLC system, the legal employer is the FLC and

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265. *Farms Increasingly Rely on Subcontracted Farm Workers*, INS. J., June 29, 2006 [hereinafter *Subcontracted Farm Workers*], *available at* http://www.insurancejournal.com/news/west/2006/06/29/69962.htm ("In 1983, about 28 percent of California's farmworkers were supplied by a contractor; the rest were hired directly by farmers. By 2002, about 43 percent of workers in the state's fields were hired by a third party."); *US, CA, Employment & Earnings, MEP*, RURAL MIGRATION NEWS (U.C. Davis Migration Center, Davis, Cal.), Jan. 2007, *available at* http://migration.ucdavis.edu/rmn/more.php?id=1178_0_3_0 (citing a U.S. Department of Agriculture 2006 report that found 300,000 agricultural workers were "brought to farms by labor contractors and other intermediaries" and that from the 1.1 million workers hired, twenty-eight percent were brought by FLCs).

266. *See* Romney, *supra* note 2 (discussing a California grower's concerns about the H-2A program).

267. *See* EMPLOYER ESSENTIALS, *supra* note 92, at 2 (discussing two Washington organizations designed to help growers file complaints); *see also, e.g.*, Adkinson Staffing, About Us, http://atkinsonstaffing.com/index.php?option=com_content&task=view&id=15&Itemid=27 (last visited Sept. 23, 2007) (outlining its services as a labor provider); Basin Employment Service & Training, Inc., http://www.basinemployment.com/index.html (last visited Sept. 23, 2007) (same); másLabor: The H2 Labor Specialists, MAS Differences, http://www.maslabor.com/pages/masLeadership.html (last visited Sept. 23, 2007) (same); 3 B's Forestry, Inc., Services, http://www.3bsforestry.com/3bs_forestry_002.htm (last visited Sept. 23, 2007) (same). A new organization called the Washington Farm Labor Source was recently established in Yakima, Washington. *Farm Labor Shortages*, RURAL MIGRATION NEWS (U.C. Davis Migration Center, Davis, Cal.), Apr. 2007, *available at* http://migration.ucdavis.edu/rmn/more.php?id=1204_0_4_0. The organization "is offering to handle the paperwork for farmers who want H-2A workers in 2007" and "charges growers $800 for each H-2A worker recruited." *Id.*

268. Michael Carlin, *Even Tougher on Farm Labor?*, NEWS & OBSERVER (Raleigh, N.C.), July 28, 1999, at A13 (revealing that the North Carolina Growers Association helps bring in the majority of the state's H-2A workers by way of its "extensive network of recruiters throughout Mexico"). Typically, when using an FLC, an employer will enter into an agreement with the contractor to provide a certain amount of labor. Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 162 (2003). All other negotiation surrounding the contract takes place between the FLC and the farmworker. *Id.*

269. Ontiveros, *supra* note 268, at 163.

not the grower: "By securing labor through a farm labor contractor, the grower insulates himself from the legal . . . responsibility for the workers."[270]

Running an FLC can be a lucrative business. Often, workers must pay high prices to join an FLC crew and come to the United States under an H-2A visa.[271] Additionally, FLCs stand to earn a great deal of money by charging the growers who want to use H-2A workers.[272] Logic suggests that because of the financial payoffs for FLCs under the H-2A program, FLCs such as Global Horizons have an incentive to ensure that employers use their services, even if that means flooding the local labor market at the expense of non-H-2A workers. By entering into agreements with FLCs—entities with a principal motivation in the H-2A context to bring guest workers into the market—unions such as the UFW cannot dodge accusations that they are, in part, perpetuating the harmful impact of the H-2A program on the local workforce.[273] Minimal doubt remains that the "increased availability of labor dilutes the domestic workers' collective bargaining power by providing employers with a ready and willing alternative labor force in the form of immigrant workers."[274]

Because a worker who is unwilling to work on the employer's terms is not considered available for work under the H-2A program,[275] if an employer uses a labor force that demands an increase in pay or improved working conditions, he or she will be able to undercut those demands by

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270. *Id.* For example, Washington's Department of Labor and Industries held the FLC, Global Horizons, liable for violating numerous labor laws as the contractor. Shannon Dininny, *License Revoked for Farm Labor Contractor*, SEATTLE POST-INTELLIGENCER, Jan. 4, 2006, *available at* http://seattlepi.nwsource.com/business/254365_farmworkers04.html. Ultimately, the Department of Labor revoked its license when the company failed to comply with the terms of a settlement agreement. *Id. See generally* Andrea L. Schmitt, Comment, *Ending the Silence: Thai H-2A Workers, Recruitment Fees, and the Fair Labor Standards Act*, 16 PAC. RIM L. & POL'Y J. 167 (2007) (discussing Global Horizons' abuses).

271. *See* Schmitt, *supra* note 270, at 175–76 (indicating that Global Horizons required Thai workers to pay thousands of dollars in recruitment fees before coming to the United States); Schrader, *supra* note 233, at A1 (detailing an instance in which a worker recruited in Mexico under the H-2A program for the NCGA had to pay about $300, taking out a loan from a loan shark to whom he was paying twenty-percent interest).

272. *See* Schrader, *supra* note 233, at A1 (indicating that NCGA's president established a successful business through H-2A); *see also* másLabor: The H2 Labor Specialists, MAS-H2A's Comprehensive Service for a Single Flat Fee, http://www.maslabor.com/pages/h2aServices.html (last visited Sept. 23, 2007) (marketing H-2A recruitment services).

273. The UFW denies that domestic workers will lose work because of the new contract. Nyhan, *supra* note 234, at E1.

274. Shannon Leigh Vivian, Note, *Be Our Guest: A Review of the Legal and Regulatory History of U.S. Immigration Policy Toward Mexico and Recommendations for Combating Employer Exploitation of Nonimmigrant and Undocumented Workers*, 30 SETON HALL LEGIS. J. 189, 205 (2005).

275. Hernandez-Flecha v. Quiros, 567 F.2d 1154, 1156 (1st Cir. 1977); *see also supra* note 249 and accompanying text.

turning to an FLC.[276] And if the domestic workers' wage or working-condition demands are more restrictive or exacting than the H-2A program requirements, guest workers provide a ready, viable alternative for future seasons.[277] Consequently, an FLC can bring in H-2A workers—who are dues-paying members of the UFW—to replace domestic workers who may have been attempting to secure better wages and working conditions. The oddity of the UFW representing H-2A workers who were granted temporary work visas in order to benefit growers at the expense of domestic labor is readily apparent.[278] Even if some domestic workers are willing to work under the conditions set forth in an H-2A contract,[279] growers may often turn away eligible workers so that they and their FLCs can bring in a greater number of H-2A workers.[280] A recent suit filed in the Eastern District of Washington provides an example of this phenomenon.[281] In that case, Columbia Legal Services filed on behalf of a class of local workers who allege that under an H-2A contract in 2004, Global Horizons rejected domestic workers for jobs that they were eligible and able to perform.[282]

Given these new partnerships, the remaining question is whether the UFW and other farmworker unions will take the steps necessary to curb the harm that abusive FLCs like Global Horizons can cause domestic and H-2A workers. It is still unclear what role the unions will play in this project, and discussions between the UFW and Global Horizons concerning their new partnership have not addressed the need to protect local workers' rights in the face of the H-2A program. On this point, the UFW and Global Horizons

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276. *See Subcontracted Farm Workers*, *supra* note 265 (detailing the Krug-Mondavi decision to refuse to negotiate with then-current workers and, instead, deciding to replace them with labor obtained by FLCs).

277. Unlike domestic workers employed by FLCs, farmers cannot use guest workers in the event of a strike or a lockout. Immigration and Nationality Act, 8 U.S.C. § 1188(b)(1) (2000). Farmworkers are not contract employees, however, and if growers have problems with their labor force one year, there is nothing preventing them from looking to use guest workers in the coming year. *See* ETA HANDBOOK, *supra* note 94, at II-21–23 (outlining the process by which the SWAs must determine if a grower is requesting labor because of a dispute).

278. Commentators have noted the irony of this relationship. *See Union, Contractor Form Curious Coalition*, FARM EMPLOYERS LABOR SERVICE MONTHLY NEWSLETTER (Farm Employers Labor Service, Sacramento, Cal.), July 2006, *available at* http://www.fels.org/news/news0607.htm#TOC1_6 (noting that only two months prior to the contract, the two groups were "at war").

279. Domestic workers hired after a grower submits an application to the DOL for consideration will work under the terms of the H-2A contract along with the guest workers.

280. *See supra* note 92 (highlighting the reasons why growers prefer H-2A workers).

281. Complaint, Perez-Farias v. Global Horizons, Inc., 2006 WL 2377406 (E.D. Wash. July 19, 2006) (No. 05 CV 3061 MWL).

282. *See id.* (alleging that Global Horizons violated federal and state law by illegally denying or terminating agricultural workers from employment); Dininny, *supra* note 270 (revealing that the state of Washington believed that there were enough workers available and that the growers' use of guest workers was not needed); *see also* Nyhan, *supra* note 234, at E1 (detailing other labor-law violations that Global Horizons has committed).

have provided only a broad assertion that local workers will not lose their jobs because of the contract.[283] At its worst, this silence could reflect the union's disinterest in preventing the H-2A program's use, despite the program's negative impact on local and foreign workers. The failure to address this issue directly is not particularly surprising, however, given that the union's membership rolls will now include the relatively hassle-free H-2A workers.[284]

Furthermore, since the contract between the UFW and Global Horizons is relatively new, it is unclear exactly what role the UFW will play in attempting to increase the rights and working conditions of the H-2A workers it now represents. Because federal statutes and regulations set H-2A workers' contracts,[285] the UFW's main role will likely be promoting compliance with federal law.[286] The UFW has highlighted the fact that it negotiated a two-percent pay increase for its H-2A workers; however, the new UFW dues equal two percent of the workers' pay, meaning that the workers will not greatly benefit from the pay increase.[287] According to the UFW, H-2A workers can expect some additional changes under the contract, including medical care above that already guaranteed by the workers' compensation system and a seniority system for hiring.[288] Undoubtedly, these additional benefits are important for the H-2A workers, but the question about what the UFW's representation of these H-2A workers costs the local labor force when they are not also included in the bargaining remains unanswered. Strikingly, some of the protections that the UFW

283. Nyhan, *supra* note 234, at E1.

284. *See supra* notes 237, 273 and accompanying text. Washington state apple pickers have had a history of difficulty in union organizing. HUMAN RIGHTS WATCH, *supra* note 48, at 135–46. Interestingly, many of these problems took place when Global Horizons employed H-2A workers during the 2004 season. *See* Nyhan, *supra* note 234, at E1 (stating that Global Horizons' workers were employed in the Yakima Valley, the same area in which FLCs recently have filed numerous deficient H-2A applications).

285. *See supra* Part II.C.

286. Although workers were already eligible for workers' compensation, the contract between the H-2A workers (i.e., Global Horizons) and the UFW also includes employer-paid medical care while in the United States. *See Union, Contractor Form Curious Coalition*, *supra* note 278 (describing the contract's provisions for agricultural guest workers). It also includes paid work breaks, paid bereavement, and a seniority system. *Id.*

287. *Lou Dobbs Tonight* (CNN television broadcast Apr. 11, 2006), transcript *available at* http://transcripts.cnn.com/TRANSCRIPTS/0604/11/ldt.01.html.

288. *UFW-Global*, *supra* note 237 (listing also the possibility of a grievance procedure). Possible additional benefits include paid bereavement and paid work breaks. *Union, Contractor Form Curious Coalition*, *supra* note 278. The exact benefits, however, are cited differently in a number of sources. *Compare UFW-Global*, *supra* note 237, *with Union, Contractor Form Curious Coalition*, *supra* note 278. Neither the UFW nor Global Horizons has released the actual language of the contract.

successfully obtained for H-2A workers have been the subject of local apple pickers' requests in Washington for the past decade.[289]

3. Role of Farmworker Unions in Ensuring Programmatic Compliance

Given the abysmal conditions associated with farm labor at the present,[290] it is clear that farmworker labor advocates are needed to help protect the rights of both guest workers and the local labor force. Because of the potential conflict of interest between the two groups, however, it may be unwise for unions to form alliances with FLCs that specialize in bringing H-2A workers to areas where domestic labor is still readily used.[291] If these partnerships continue, however, farmworker unions should engage in activities more closely devoted to protecting the local workforce in addition to contracting with FLCs to represent H-2A workers. Principally, these unions should place pressure on the DOL to ensure that local workers' rights are protected under the H-2A program.[292] This would help unions fulfill the role that legal advocates are unable to perform because of their restricted funding,[293] as well as ensure that farmworker unions hold true to their historical purpose.[294] In addition to pushing for some of the changes addressed in this Note,[295] farmworker-union efforts beyond the U.S. border can also help ensure the protection of local workers' rights in the United States.[296] For example, as part of FLOC's representation of North Carolina's

289. *See* HUMAN RIGHTS WATCH, *supra* note 48, at 140 ("'We need the union for job security, a grievance procedure, seniority, respect, not just for higher wages.'" (quoting a long-time Yakima-valley farmworker who was threatened when he contacted the UFW)).

290. *See generally* OXFAM AMERICA, LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE (2004), *available at* http://www.oxfamamerica.org/newsandpublications/publications/research_reports/art7011.html/OA-Like_Machines_in_the_Fields.pdf (discussing abusive practices); *see also* HUMAN RIGHTS WATCH, *supra* note 48, at 135–60 (same); Christine Ahn, *Migrant Farmworkers: America's New Plantation Workers*, BACKGROUNDER, Spring 2004, at 1, *available at* http://www.foodfirst.org/pubs/backgrdrs/2004/sp04v10n2.pdf (same).

291. In this sense, the union contract between FLOC and the NCGA is somewhat different. The majority of the agricultural labor force in North Carolina at the present is comprised of H-2A workers. *See supra* note 58 (indicating the historical origin of H-2A was on the East Coast); *see also* HUMAN RIGHTS WATCH, *supra* note 48, at 150 (stating that North Carolina growers are the biggest employers of H-2A workers).

292. *See supra* Part III.B (outlining some possible changes).

293. *See supra* Part IV.A.

294. *See supra* Part II.B (outlining the role of farmworker unions); *see also* AM. FED'N OF LABOR-CONG. OF INDUS. ORGS., AFL-CIO PRINCIPLES ON IMMIGRATION: ENSURING WORKER RIGHTS AND A BETTER LIFE FOR ALL WORKING FAMILIES 2, *available at* http://www.aflcio.org/issues/civilrights/immigration/upload/immigrationpolicy.pdf (asserting that the guest-worker program should be reformed, not expanded).

295. *See supra* Part III.B (advocating for changes to the H-2A program).

296. *See* Gordon, *supra* note 236, at 509 (discussing the need for the transnationalization of labor citizenship because of the increasing reliance on foreign labor and proposing a model whereby immigration status would be tied "to membership in organizations of transnational

H-2A workers, FLOC established a union-hiring hall in Monterrey, Mexico, to monitor the conditions of recruitment and hiring of H-2A workers.[297] Advocates hope that FLOC will be able to curb some of the abusive recruiting techniques that go on outside of the United States, as well as prevent the use of employment blacklists.[298] While protecting the H-2A workers before they arrive in the United States is important, unions with a presence abroad possess the unique ability to monitor the types of conditions enforced on the foreign side of the H-2A contract. Because H-2A regulations prohibit an employer from imposing a job restriction or obligation on U.S. workers that it does not impose on H-2A workers,[299] a union presence in countries that send workers to the United States could help curb this type of abuse.

V. CONCLUSION

"Farmworkers feed the world, but we treat them as if they were expendable."[300] Poor treatment of farmworkers stems from personal as well as institutional bias,[301] and in order to improve farmworker treatment, the United States must change the way it regulates foreign agricultural labor. The current H-2A program exploits guest workers and threatens to leave local workers laboring under inferior employment conditions or without work. The program, in its current form, benefits neither guest workers nor local workers. In order to curb H-2A exploitation, ensure the adequate employment of the domestic workforce, and protect the conditions of its work, the DOL should establish an appeal procedure for farmworkers and their advocates.[302] Additionally, the DOL must make the application and appeal process more transparent.[303]

Farmworker legal advocates cannot be the sole entities promoting change within the H-2A program. Unions must also play a role in H-2A reform.[304] Furthermore, the unions must reflect on the adequacy of their protection of local workers when they enter into agreements with FLCs and

workers rather than to a particular employer"). *See generally* Manuel Pastor & Susan Alva, *Guest Workers and the New Transnationalism: Possibilities and Realities in an Age of Repression*, 31 SOC. JUST. 92 (2004) (discussing the transnational existence of immigrants).

297. Greenhouse, *supra* note 234, at A16; Gordon, *supra* note 236 at, 574–75 (discussing FLOC's work in Mexico and citing to the actual contract between the union and the NCGA).

298. Greenhouse, *supra* note 234, at A16.

299. *See supra* notes 137–38 and accompanying text (discussing different procedures used in recruiting workers abroad).

300. Interview with Lisa Guerra, Staff Attorney, Nw. Justice Project, in Yakima, Wash. (July 8, 2006) (transcript on file with the Iowa Law Review).

301. Holley, *supra* note 14, at 603–04.

302. *See supra* Part III.B.2.

303. *See supra* Part III.B.3.

304. *See supra* Part IV.B.1.

other labor-supply organizations under the current system.[305] Unions may receive short-term benefits from the agreements, but organized labor has a duty to ensure that by representing H-2A workers in geographical areas where an adequate domestic labor supply exists, it is not damaging the local workforce's livelihood. Successful union advocacy to ensure strict compliance with the H-2A program could help dissipate fears that union representation of H-2A workers harms domestic workers. Only then would it be fair to say that neither the DOL nor the unions have failed to protect local workers in the face of H-2A.

305. *See supra* Part IV.B.2.