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**From Bracero to H-2A San Joaquin
Valley Shepherders: Lessons
Learned from the Failure of Our
Nation's Guest Worker Programs**

by

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FROM BRACERO TO H-2A SAN JOAQUIN VALLEY SHEEPHERDERS: LESSONS LEARNED FROM THE FAILURE OF OUR NATION'S GUEST WORKER PROGRAMS

INTRODUCTION

The need for a farm labor force willing to take jobs most Americans are not willing to do or accept at the present wage is well documented.¹ To begin with, farm labor is dangerous and ranks consistently with mining and construction as one of the most hazardous occupations in the nation.² In addition, farm work is physically demanding, requiring repetitive tasks while stooping, bending over and crawling.³ These factors and others make this low wage work unattractive to most Americans. Consequently, “[f]armworkers in the United States are, and have always been, comprised of workers from all over the world.”⁴ A majority of this immigrant workforce currently arrives in the United States illegally.⁵ Alternatively, guest workers could meet the need for a high quantity, short term, but legal farm workforce⁶ and Federal Statutes authorize their use.⁷ Agricultural guest workers are designated H-2A guest workers, due to the defining statute’s reference: 8 U.S.C. § 1101(a)(15)(H)(ii)(a).⁸

¹ See CHARLES D. THOMPSON, JR., Introduction to *THE HUMAN COST OF FOOD, FARMWORKERS’ LIVES, LABOR, AND ADVOCACY* 2-3 (Charles D. Thompson, Jr., & Melinda F. Wiggins eds., University of Texas Press 2002); see also Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 577-578 (Spring, 2001); see also Lisa Guerra, Ballenger-Green Diversity Paper: *Modern-Day Servitude: A Look at the H-2A Program’s Purposes, Regulations, and Realities*, 29 VT. L. REV. 185, 186 (Fall, 2004).

² Holley, *supra* note 1, at 577-78.

³ *Id.* at 577.

⁴ Guerra, *supra* note 1, at 186.

⁵ Thompson, *supra* note 1, at 7.

⁶ Holley, *supra* note 1, at 579-83.

⁷ See Immigration Reform and Control Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, 1188 (2006).

⁸ 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2006).

Although these workers currently make up just two percent of the country's farm labor work force, their use could be expanded.⁹ The question is: how would we as the world's leader in encouraging ideals of democracy treat these workers while they are guests in our country?

Several recent Congressional initiatives suggest negative consequences for America's illegal farm workforce. One initiative recently passed by the House, proposes an expenditure of \$2.2 billion in an effort to secure the border between Mexico and the United States.¹⁰ The bill further proposes making felons¹¹ of the estimated eleven million illegal immigrants residing in the United States.¹² Another provision in this initiative proposes to criminalize actions offering services or assistance to illegal immigrants residing in the United States.¹³

In the Senate's latest effort, border fences and increasing Border Patrol agents are proposed, but the bill also proposes a three-tier system of classification and corresponding requirements.¹⁴ For those living in the United States longer than five years, citizenship would be granted as long as they were working, passed background screening, paid back taxes, and enrolled in English classes.¹⁵ Those residing in the United States between two and five years, would be forced to leave and possibly return as guest workers.¹⁶ Those here less than two years, would be expected to exit the country if they were not admitted as guest workers.¹⁷ Critics of

⁹ Oxfam American Report, *Like Machines in the Fields: Workers without Rights in American Agriculture* (2004) at 42, available at http://www.oxfamamerica.org/pdfs/labor_report_04.pdf.

¹⁰ Border Protection, Antiterrorism and Illegal Immigration Act, H.R. 4437, 109th Cong. (2005) noted in Michael Doyle and Dennis Pollock, *Bills wade toward comprehensive reform*, FRESNO BEE, Jan. 29, 2006, at A18.

¹¹ See 8 U.S.C. § 1325 (a) (2006) and 18 U.S.C. § 3559 (2006) (the crime of illegal entry into the United States is currently classified by the statutes as a Class B Misdemeanor).

¹² Doyle, *supra* note 10, at A1.

¹³ Border Protection, Antiterrorism and Illegal Immigration Act, H.R. 4437, 109th Cong. (2005), noted in Rachel L. Swarns, *House bill on illegals sparks a commotion, Priests, nurses, social workers could face prosecution under bill's provision*, FRESNO BEE, Dec. 30, 2005, at A1, A18.

¹⁴ Comprehensive Immigration Reform Act, S. 2611, 109th Cong. (2nd Sess. 2006).

¹⁵ Charles Babington, *Senate Approves Immigration Bill*, WASH. POST, May 26, 2006, at A01.

¹⁶ *Id.* at A01.

¹⁷ Rachel L. Swarns, *Senate Oks immigration bill*, FRESNO BEE, May 26, 2006, at A1, A20. (approximately seven million illegal aliens have resided in the country longer than five years, about three million have been in the United States between two and five years and approximately one million illegal aliens have resided in the country less than two years. *Id.* at A20).

this bill attacked the difficulties associated with the proposed law's implementation.¹⁸

Perhaps partly because of Congressional efforts to improve the nation's security and revamp immigration law, agricultural employers in California and Arizona reported during the Winter of 2005, that they were experiencing some of the worst labor shortages in recent times.¹⁹ From the Sulphur Springs Valley in Southeastern Arizona to as far west as Yuma, agricultural leaders predicted crop losses would reach into the millions of dollars.²⁰ Congressional action increasing the number of border agents to improve security has potentially produced at least one unintended effect: "For decades, . . . [farmers] didn't have to look far for workers That has changed since the late 1990s, when fewer than 10 Border Patrol agents patrolled the [Sulphur Springs] valley. Now, the Wilcox Border Patrol Station has 120 agents to police the border"²¹ In California, growers in an area that stretches all the way from the Imperial Valley to the Arizona border reported they would hire only fifty percent of the 50,000 workers needed to gather the region's produce.²²

Researching actual losses resulting from labor shortages reported by California and Arizona farmers during the Winter of 2005 produced little in the way of data supporting the farmers' predictions. According to Howard Rosenberg, a farm-labor specialist with University of California Cooperative Extension at Berkeley, the available labor force may have been somewhat tighter than in years past, but this is likely explained by the hiring of workers for non-farm industries such as construction.²³ Further, Professor Rosenberg suggests it is at least possible that farmers claimed an inadequate labor force and predicted crop losses in an effort to influence the on-going immigration debate and support increased ac-

¹⁸ Babington, *supra* note 15, at A01.

¹⁹ Susan Carroll, *State farmers lose workers, profits to border sweeps*, ARIZONA REPUBLIC, Nov. 3, 2005, at A1, available at <http://www.azcentral.com/arizonarepublic/news/articles/1103farmersOLP03a1.html>.

²⁰ *Id.* at A1.

²¹ *Id.* at A1 ("[As a result,] similar stories about worker shortages . . . [exist]: override apples falling to the ground in orchards north of Wilcox, pumpkins softening in the fields in the Cochise Stronghold, a dairy farmer so desperate for workers he applied to import three legally from South Africa.").

²² Jerry, Hirsch, *Farmworker shortage feared, Southwest growers worry crops will go unpicked*, FRESNO BEE, Dec. 25, 2005, at D1 (information provided by the Western Growers trade group, farmers belonging to this group produce 90% of the U.S. winter crop).

²³ Telephone interview with Dr. Howard Rosenberg, Cooperative Extension Specialist in Agricultural Labor Management, Department of Agriculture and Resource Economics, University of California at Berkeley, in Berkeley, Cal. (Jun. 7, 2006).

cess to guest workers.²⁴ If legislation passes that dramatically increases border security without a corresponding increase in wages or introduction of a program to increase guest workers, labor shortages and resulting crop losses might well occur.

In light of the proposed increased border security as the demand for farm labor continues, Congress is reconsidering United States policy²⁵ regarding guest workers.²⁶ Our past and current experience with the employment of guest workers has not been positive for the workers.²⁷ Our first guest worker regime, known as the Bracero Program, ran between 1942 and 1964 and was ultimately terminated as a result of abusive policies and actions taken under the program.²⁸ Following the Bracero Program, Congress enacted new legislation to create today's current guest worker program,²⁹ but workers' substantive rights have largely continued to be ignored.³⁰ For the past ten years, farm interests have lobbied Congress to simplify the guest worker application process in an attempt to bring in a larger foreign workforce.³¹ If meaningful reform in this area is to be accomplished, a review of previous failures in this area is needed.

This Comment will examine America's experience with the Bracero Program as well as short falls associated with the current H-2A guest worker program. The discussion will then turn to a focus on the plight of H-2A shepherders working in California's San Joaquin Valley. Their experiences provide some of the worst possible accounts of guest worker abuse.³² The Comment will also examine California's attempts to ad-

²⁴ *Id.*

²⁵ Dennis Pollock, *A growing concern, Valley farmers worry over how to address a shortage of workers*, FRESNO BEE, Jan. 29, 2006, at A1.

²⁶ Michael Doyle, *House approves Contentious border bill, Measure would build new fences and make illegal immigration a felony*, FRESNO BEE, Dec. 17, 2005, at A1. Congress has been debating proposed legislation in this area for some time, just within the last year alone, proposed acts have included: The Reducing Immigration to a Genuinely Healthy Total Act, H.R. 3700, 109th Cong. (1st Sess. 2005), The Enforcement First Immigration Reform Act, H.R. 3938, 109th Cong. (1st Sess. 2005), and The Secure America and Orderly Immigration Act; H.R. 2330, 109th Cong. (1st Sess. 2005); see also Mike Allen, *Immigration Reform on Bush Agenda*, WASH. POST, Dec. 24, 2003, at A1 (President Bush had proposed changes to immigration law shortly after he was elected).

²⁷ See generally Lorenzo A. Alvarado, Comment: *A Lesson from my Grandfather, the Bracero*, 22 CHICANO-LATINO L. REV. 55, 57-59 (Spring 2001).

²⁸ *Id.* at 57.

²⁹ Immigration Reform and Control Act, *supra* note 7; see also 20 C.F.R. §§ 655.90-655.113 (2006) (Code provides Department of Labor regulations governing the H-2A program).

³⁰ Guerra, *supra* note 1, at 186.

³¹ Thompson, *supra* note 1, at 4.

³² Chris A. Schneider, et al., *Suffering in the Pastures of Plenty: Experiences of H-2A Shepherders in California's Central Valley*, An Issue Paper of Central California Legal

dress the shepherders' unique concerns. Finally, the Comment examines how the options for H-2A workers seeking to vindicate their rights in federal court are severely limited.

I. GUEST WORKER PROGRAMS PAST AND PRESENT

A. *The Bracero Program, a History not Worth Repeating*

The agricultural industry historically has been afforded special consideration in the area of immigration policy, with Congress providing many programs allowing agricultural employers to augment domestic labor sources with foreign guest workers.³³ At the start of World War II, with the combination of the military's need for manpower and the industrial labor demand, the country faced a potential agricultural labor shortage.³⁴ To alleviate these shortages, the United States entered into a series of agreements with Mexican authorities known as the Bracero Program, which operated between 1942 and 1964.³⁵

Though the agreements came with several safeguards for both the Braceros themselves and United States domestic workers, many of these safeguards were disregarded or went unenforced.³⁶ Essentially, the Bracero Program operated as follows. First, farmers would estimate the number of workers needed and the duration of the work season.³⁷ The employers were instructed to request workers only if there was a shortage of domestic workers available to perform the work at the wages offered by the farmers.³⁸ The Department of Labor "DOL" would then certify these needs and requirements including the wages and living con-

Services (March 15, 2000), <http://www.centralcallegal.org/news/sheep/sheepfinal1.pdf>, [hereinafter Schneider, et al., *Suffering in the Pastures*], and Chris A. Schneider, et al., *Watching Sheep and Waiting for Justice: An Update on the Experiences of H-2A Shepherders in California's Central Valley* (March 30, 2005), <http://www.centralcallegal.org/news/sheep2/sheep2.pdf>, [hereinafter Schneider, et al.; *Watching Sheep*]; compare with Guerra, *supra* note 1, at 203-209 (discussing H-2A experiences in North Carolina which Guerra characterized as a "Modern-Day Servitude").

³³ U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES: H-2A AGRICULTURAL GUESTWORKER PROGRAM, CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS 98-20 (1997) at 18.

³⁴ Garry C. Geffert, *H-2A Guestworker Program: A Legacy of Importing Agricultural Labor in THE HUMAN COST OF FOOD, FARMWORKERS' LIVES, LABOR, AND ADVOCACY*, *supra*, note 1, at 115.

³⁵ Alvarado, *supra* note 27, at 55-57 ("Because these . . . workers worked with their arms, they were given the name 'Braceros' - derived from the Spanish word "brazos," which means 'arms.'").

³⁶ Guerra, *supra* note 1, at 190.

³⁷ Alvarado, *supra* note 27, at 59.

³⁸ *Id.* at 59-60.

ditions the employers intended to provide.³⁹ Braceros were then brought to reception centers, inspected, and selected by the employers or their associations.⁴⁰ Once the contract ended, Braceros were required to return to Mexico as soon as possible.⁴¹

Initially, farmers were reluctant to utilize the Braceros; agricultural employers were not required to provide housing or wage guarantees to illegal workers, therefore illegal workers were much more appealing than Braceros.⁴² However, in the 1940s through the 1950s, the Immigration and Naturalization Service began to restrict the flow of illegal workers crossing the borders.⁴³ As a result of these restrictions, employers began to seek alternative solutions, such as the use of Braceros.⁴⁴

On paper the Braceros had considerable rights.⁴⁵ Their contracts guaranteed they were to be paid the prevailing wage and provided a minimum number of hours to work.⁴⁶ Unfortunately growers did not always pay the prevailing wage and failed to provide the guaranteed hours.⁴⁷ Other contract violations included growers withholding wages for transportation despite their contracts' guarantee of free transportation⁴⁸ and deductions for spoiled or poor quality food.⁴⁹ Some workers were charged for the use of a mere blanket.⁵⁰ Farmers overbooked Braceros to maximize the speed with which their crops could be harvested.⁵¹ As a result, Braceros who were promised a six month contract often would only be allowed to work two months.⁵²

Braceros' living quarters were often unsuitable.⁵³ Many farmers converted their existing farm structures, such as abandoned barns, into housing for the workers.⁵⁴ The DOL's enforcement of the contract guarantees for wages, housing, and suitable food and water was virtually nonexistent.⁵⁵ Due to the lack of any meaningful DOL response to the work-

³⁹ *Id.* 60.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Alvarado, *supra* note 27, at 61.

⁴³ *Id.* at p. 61.

⁴⁴ *Id.*

⁴⁵ Holley, *supra* note 1, at 584.

⁴⁶ Alvarado, *supra* note 27, at 60.

⁴⁷ *Id.* at 61-62.

⁴⁸ *Id.* at 63.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 62-63.

⁵² *Id.* at 63.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 61-62.

ers' complaints, many of the contract provisions were largely ignored.⁵⁶ As one commentator noted: "Growers profited from this vulnerability by importing an excessive number of Braceros, giving them minimal work, over-charging them for meals of the poorest quality, and housing them in squalid quarters. All of these violations effectively meant more money in the growers' pockets."⁵⁷

At the height of the program in 1954 over 300,000 Braceros were employed. These numbers were sustained annually until 1961, when 291,420 were employed, decades after the end of WWII.⁵⁸ One Bracero described the experience: "'[T]hey treated us like animals But as a Bracero, you knew you couldn't complain.'"⁵⁹ Braceros who complained were immediately returned to Mexico and blacklisted from future employment.⁶⁰

In 1960, an Edward R. Murrow documentary, *Harvest of Shame*, revealed the abuses of the program.⁶¹ Due to increased public awareness, the Bracero program was officially terminated in 1964.⁶²

B. *The Current H-2A Guest Worker Program*

Today's guest worker program was enacted in 1952 as part of the Immigration and Nationality Act (INA).⁶³ This program allows the Attorney General to approve the U.S. Citizenship and Immigration Service's ("USCIS")⁶⁴ issuance of visas to foreign workers to accomplish temporary agricultural labor.⁶⁵ The purpose of the program is "to assure agricultural employers an adequate labor force while at the same time protecting the jobs of U.S. workers."⁶⁶

⁵⁶ *Id.* at 62-64.

⁵⁷ Holley, *supra* note 1, at 585.

⁵⁸ Alvarado, *supra* note 27, at 61.

⁵⁹ Holley, *supra* note 1, at 585.

⁶⁰ *Id.*

⁶¹ Guerra, *supra* note 1, at 190-91.

⁶² *Id.*

⁶³ Immigration and Nationality Act of 1952, Pub. L. No. 85-316, § 101, 66 Stat. 166, (1952), *amended by* Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101 (a)(15)(H)(ii)(a) (2005).

⁶⁴ Reorganization Plan, 6 U.S.C. § 542 (2006) (as of March 1, 2003, the Immigration and Naturalization Service (INS) transitioned into the Department of Homeland Security, as the US Citizenship and Immigration Service (USCIS)); *see also* <http://uscis.gov/graphics/aboutus/index.htm>.

⁶⁵ 8 U.S.C. § 1184 (a) (1) (2006).

⁶⁶ U.S. GEN. ACCOUNTING OFFICE, *REPORT TO CONGRESSIONAL COMMITTEES: H-2A PROGRAM, PROTECTIONS FOR U.S. FARM WORKERS 89-3* (1988) at 12.

From 1998 to 2003, the agricultural industry employed on average over 25,000 H-2A guest workers per year, with the number of guest workers employed reaching a peak of 33,292 workers in 2000.⁶⁷ Annually, approximately 1700 guest workers are employed as sheepherders in the western states.⁶⁸ Although, H-2A workers represent less than two percent of the total agricultural worker population, these current guest worker numbers are important as they represent a preference on the part of the farm industry for foreign based labor over increasing wages and other benefits for U.S. workers.⁶⁹

Today, guest agricultural workers, as defined by the statute, are those workers "having a residence in a foreign country which [they have] no intention of abandoning, who [are] coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor"⁷⁰ Seasonal employment of foreign workers for crop production of a single season or for a time less than one year is permitted where the agricultural employer can demonstrate a temporary need.⁷¹

The USCIS issues visas to foreign workers upon certification by the DOL that all of the law's provisions are met.⁷² This means the employer must first demonstrate to DOL the existence of an insufficient labor force to accomplish the employer's work. In addition, the employer must show the foreign workers' arrival in the country will not negatively impact either the wages or work conditions of U.S. workers.⁷³

Employers seeking workers must apply forty-five days before the identified need, with the Employment and Training Administration ("ETA"),⁷⁴ for a "temporary alien agricultural labor certification."⁷⁵ In

⁶⁷ U.S. DEPARTMENT OF JUSTICE, *2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE* (2001) at 158, <http://www.uscis.gov/graphics/shared/aboutus/statistics/ybpage.htm> (yearbook reprints available for purchase) and U.S. DEPARTMENT OF JUSTICE, *2003 Statistical Yearbook of the Immigration and Naturalization Service* (2002) at 101, <http://www.uscis.gov/graphics/shared/aboutus/statistics/ybpage.htm> (yearbook reprints available for purchase).

⁶⁸ Oxfam American Report, *supra* note 9, at 42.

⁶⁹ *Id.*

⁷⁰ 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2005).

⁷¹ DEPT. OF LABOR, OFFICE OF INSPECTOR GENERAL, Report No. 06-03-007-03-321, *Overview and Assessment of Vulnerabilities in the Department of Labor's Alien Labor Certification Programs* (2003).

⁷² U.S. GEN. ACCOUNTING OFFICE, *supra* note 66, at 12 and 6 U.S.C. § 542 *supra* note 64.

⁷³ U.S. GEN. ACCOUNTING OFFICE, *supra* note 66, at 13.

⁷⁴ Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. § 655.100 (2006) (ETA is an agency within the DOL); see also <http://www.dol.gov/> (follow "Agencies" hyperlink for the Department of Labor's Organizational Chart and the ETA's Mission statement).

the application, the employer must include a job offer that he will make to both domestic and foreign workers.⁷⁶ The employer must offer “. . . U.S. workers no less than the same benefits, wages, and working conditions which the employer is offering, . . . to H-2A workers.”⁷⁷ Essentially, the employer’s filing with the ETA is an assurance by the employer that the programs’ requirements of insufficient U.S. workers, zero impact to domestic wages, and standards for work conditions will be met.⁷⁸ A copy of the job offer included in the ETA’s application is also submitted to the “state employment service agency which serves the area of intended employment.”⁷⁹ California’s Employment Development Department (“EDD”) establishes specific recruiting procedures that an employer must follow in an effort to fill his employment needs with domestic workers.⁸⁰

Once the DOL issues an approved labor certification, the employer petitions the USCIS for the H-2A temporary visas.⁸¹ With the DOL’s approval, the USCIS issues the visas. The employer may then notify the foreign workers or their representatives⁸² to begin the process to acquire their visas from the U.S. Consulate located in the workers’ home country.⁸³ If the Consular Officer approves, the employee is issued a visa and the USCIS inspects the employee at the point of entry.⁸⁴ Once the employee passes inspection, the USCIS will allow the employee to enter the country.⁸⁵

Employers seeking to employ H-2A workers must offer both U.S. and foreign workers the higher of the prevailing wage rate, a special monthly Adverse Effect Wage Rate “AEWR” or the legal federal or state minimum wage.⁸⁶ The AEWR is defined as the rate which the ETA “has determined must be offered and paid . . . to every H-2A worker and every

⁷⁵ 20 C.F.R. § 655.100, *supra* note 74.

⁷⁶ Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. § 655.102 (2006).

⁷⁷ *Id.*

⁷⁸ DEPARTMENT OF LABOR, OFFICE OF INSPECTOR GENERAL, *supra* note 71, at 16.

⁷⁹ 20 C.F.R. § 655.100, *supra* note 74; *see also* the State of California’s Employment Development Department website at <http://www.edd.ca.gov/edddescp.htm> (California’s Employment Development Department is the state’s employment service agency accomplishing this function).

⁸⁰ U.S GEN. ACCOUNTING OFFICE, *supra* note 66, at 13.

⁸¹ U.S GEN. ACCOUNTING OFFICE, *supra* note 33, at 41; *see also* Geffert, *supra* note 34, at 119-21.

⁸² U.S GEN. ACCOUNTING OFFICE, *supra* note 33, at 41.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 20 C.F.R. § 655.102, *supra* note 76.

U.S. worker for a particular occupation and/or area in which an employer employs or seeks to employ an H-2A worker so that the wages of similarly employed U.S. workers will not be adversely affected.”⁸⁷

Employers must also provide housing at no cost to the worker, as well as three meals a day.⁸⁸ If the employer does not provide prepared meals, then he must provide kitchen facilities for the workers.⁸⁹ Housing provided to the worker must meet standards developed by the DOL.⁹⁰

The worker’s initial costs for travel to the United States are reimbursed if the worker completes fifty percent or more of the period contracted.⁹¹ Additionally, costs for transportation to and from the work site and funds for daily subsistence are paid to the worker only if the worker completes the contract period.⁹²

One significant drawback for the worker is his tie to the employer who sponsored him to come into the country.⁹³ One researcher summarized this position as follows: “Unlike any other farmworker in the United States, an H-2A worker is tied to a single employer If the work is insufficient, the employer is abusive, or the housing is intolerable, the H-2A worker does not have the option of finding another job.”⁹⁴ A worker’s option in the face of these conditions is to accept the conditions or return to his country;⁹⁵ even our undocumented work force does not face these same vulnerabilities.⁹⁶

C. *Shepherd-Specific Regulations and Guidance under Federal Law*

Federal regulations governing guest workers do not attempt to take into account all of the possible work settings and environments that foreign workers may encounter. Instead, the regulations allow for the establishment of special procedures.⁹⁷ One such set of special procedures that

⁸⁷ 20 C.F.R. § 655.100, *supra* note 74.

⁸⁸ 20 C.F.R. § 655.102, *supra* note 76.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Geffert, *supra* note 34, at 120; *see also* Holley, *supra* note 1, at 595.

⁹⁴ Holley, *supra* note 1, at 595.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. §§ 655.92-93 (2006). Under 20 C.F.R. § 655.93, the Administrator of the Office of Foreign Labor Certification (“OFLC” is a component of the ETA within the DOL and is defined at 20 C.F.R. § 655.100) prior to originating or making changes to these procedures “may consult with employer representatives and worker representatives.” As a result of this language, it is apparent the DOL (at least)

has been promulgated by DOL involves the certification and employment of sheepherders.⁹⁸ DOL's Field Memorandum No. 24-01 include attached Special Procedures which provide general guidance for the employment of sheepherders under the H-2A program.⁹⁹ For example, the procedures identify the Western Range Association ("WRA") as a "joint employer for H-2A program purposes with its rancher members."¹⁰⁰ Additionally, the special procedures provide specific wage determination guidance for state agencies to follow.¹⁰¹

Like other H-2A workers, who can only work for one employer,¹⁰² a sheepherder cannot work for ranchers who do not belong to the WRA. However, ranchers may trade or transfer workers to other Western Range members.¹⁰³ A refusal by the sheepherder to agree to a transfer is grounds for his dismissal.¹⁰⁴

One significant aspect of sheepherding employment is that it is possible for sheepherders to be admitted as permanent resident aliens.¹⁰⁵ These procedures require employers to "attest" to the worker's employment over a three-year period for the purposes of obtaining "permanent"

believes these special procedures fall outside of the "notice and comment" requirements mandated by the Administrative Procedures Act, *see* 5 U.S.C. § 553 (2006). Published case law on this issue was not available and it is unclear how the DOL would fare were these procedures reviewed by a court.

⁹⁸ EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPT. OF LABOR, FIELD MEMORANDUM NO. 24-01, ATTACHMENT: SPECIAL PROCEDURES: *LABOR CERTIFICATION FOR SHEEPHERDERS AND GOATHERDERS UNDER THE H-2A PROGRAM*, (Aug. 1, 2001), http://workforcesecurity.doleta.gov/dmstree/fm/fm2k1/fm_24-01.htm and the attachment *Labor Certification for Sheepherders Under the H-2A Program* http://workforcesecurity.doleta.gov/dmstree/fm/fm2k1/fm_24-01a.pdf.

⁹⁹ *Id.*

¹⁰⁰ See EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPT. OF LABOR, *supra* note 98 at 8. The WRA is an association comprised of sheep ranchers.

¹⁰¹ See EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPT. OF LABOR, *supra* note 98 at 3. (in California, Sheepherders' wages are also governed by statute: CAL LAB. CODE § 2695.2 (2003)).

¹⁰² See *supra* p. 12.

¹⁰³ See EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPT. OF LABOR, *supra* note 98 at 11.

¹⁰⁴ *Id.*

¹⁰⁵ Labor Certification Process for Permanent Employment of Aliens in the United States (H-2A Workers), 20 C.F.R. § 656.16 (2006) ("An employer may apply for a labor certification to employ an alien (who has been employed legally as a nonimmigrant sheepherder in the United States for at least 33 of the preceding 36 months) . . .").

employment status.¹⁰⁶ As few sheepherders are aware this possibility even exists, this option is rarely employed.¹⁰⁷

Most importantly, due to the unique work hours of sheepherders and their austere work sites,¹⁰⁸ the procedures provide guidance on the workers' accommodations.¹⁰⁹ Standards for housing, heating, water and food storage, wash facilities and waste disposal are all provided.¹¹⁰

The federal standards regarding the sheepherders' living conditions appear to be significant. Unfortunately, the oversight mechanisms to ensure these standards are met are less than substantial. This problem is exemplified by Field Memorandum 24-01's attached Special Procedures, which allow the employer to "self-certify" the housing he intends to provide to incoming workers.¹¹¹ With self-certification, employers can house workers in available housing until the employer is made aware of an upcoming inspection.¹¹² Once notified, an employer has time to correct any deficiencies.¹¹³

Similarly, the Special Procedures require California's EDD to inspect a third of all available housing annually, and inspect all housing at least once every three years, but local non-enforcement can render this protection illusory.¹¹⁴ California's Industrial Welfare Commission's Wage Order 14¹¹⁵ indicates that if inspectors are not available, then the EDD is allowed to avoid the inspections altogether by notifying the ranchers by letter.¹¹⁶ Consequently, although H-2A housing inspections could ensure adequate living conditions, inspections are frequently not completed prior to the approval of the petitioning employer's certification for work-

¹⁰⁶ *Id.*

¹⁰⁷ Alvaro Bedoya, *Welcome to the First World: The Exploitation of Peruvian Sheepherders in the American West* (Nov. 15, 2002) (unpublished B.A. dissertation, Harvard University) (on file with author) *noted in* Schneider et al., *Watching Sheep*, *supra* note 32, at 13.

¹⁰⁸ Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. § 655.93 (2006).

¹⁰⁹ *See* EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPT. OF LABOR, *supra* note 98 at 13-16.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 13.

¹¹² Bedoya, *supra* note 107, at 8.

¹¹³ *Id.*

¹¹⁴ *See* EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPT. OF LABOR, *supra* note 98 at 13.

¹¹⁵ *See infra* pp. 18-19.

¹¹⁶ California Industrial Welfare Commission's *Statement as to the Basis for Wage Order No. 14 Amendments Relating to Sheepherders*, at 4, available at <http://www.dir.ca.gov/lwc/StatementBasisWageorder14.htm>.

ers.¹¹⁷ This appears to be an especially serious problem for the sheepherders, because of their remote work locations.¹¹⁸

II. SAN JOAQUIN VALLEY H-2A SHEEPHERDERS

Since the early 1900s, California ranchers have employed foreign workers to herd their sheep.¹¹⁹ While many of the early workers moved from their initial jobs to take work in other areas of the U.S. economy, subsequent generations of foreign sheepherders did not fare as well.¹²⁰ After the INA's passage in 1952, the federal government allowed agricultural employers to import guest workers. During this time, ranchers began employing sheepherders from the Basque country of northern Spain.¹²¹ In the 1970s, when Spain's economy improved, these same ranchers turned to new sources of labor: the economically depressed countries of South America.¹²² Today, the majority of this workforce originates from Peru with a few herders coming from Chile.¹²³

The WRA, functioning as the sheepherder's joint employer,¹²⁴ works closely with member employers¹²⁵ to coordinate and facilitate the acquisition of sheepherders.¹²⁶ The sheepherders are generally contracted for three-year periods.¹²⁷

¹¹⁷ Department of Labor, Office of Inspector General, *supra* note 71, at 19.

¹¹⁸ Bedoya, *supra* note 107, at 8.

¹¹⁹ Mimi Lozano, *Peruvian Shepherds in California*, SOMOSPRIMOS, Sep. 2000, at 10, <http://www.somosprimos.com/spsep.htm> and Mario Compe, *Basque Americans in the Columbia River Basin*, <http://www.vancouver.wsu.edu/crbehalba/ba.htm>.

¹²⁰ Compe, *supra* note 119.

¹²¹ Alvaro Bedoya, *Captive Labor, The plight of Peruvian sheepherders illuminates broader exploitation of immigrant workers in U.S. agriculture*, Dollars & Sense, The Magazine of Economic Justice Sept./Oct. 2003, <http://www.dollarsandsense.org/archives/2003/0903bedoya.html> and *see* discussion regarding INA *supra* p. 8.

¹²² Bedoya, *supra* note 121.

¹²³ Interview with Chris A. Schneider, Executive Director of the Central California Legal Services, in Fresno, Cal. (Oct. 14, 2005).

¹²⁴ See EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPT. OF LABOR, *supra* note 98 at 8.

¹²⁵ 20 C.F.R. § 655.100, *supra* note 74 (an association is considered "a joint employer if it shares with an employer member one or more of the [employer] definitional indicia," which includes the ability to "hire, pay, fire, supervise or otherwise control the work of any such employee").

¹²⁶ See EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPT. OF LABOR, *supra* note 98 at 8.

¹²⁷ *Id.* at 3.

Workers are required to remain at the work site twenty-four hours a day, seven days a week receiving under \$2.00 an hour.¹²⁸ Shepherders are provided all the equipment necessary to perform their work, as well as housing and meals.¹²⁹ The DOL job offer specifies the duties included in the work: “Attends sheep grazing on range or pasture. Herds sheep using trained dogs. Guards flock from predators and from eating poisonous plants. May examine animals for signs of illness and administer vaccines, medications and insecticides. May assist in lambing, docking, and shearing”¹³⁰

Living conditions in these remote locations are frequently well below state and federal standards.¹³¹ Many shepherders live in dilapidated trailers,¹³² but in more remote areas where the trailers are not available, herders live in tents.¹³³

Although transportation is sometimes provided for the workers, shepherders rarely leave their work sites.¹³⁴ While most employers visit their herders twice a week, the herders themselves can remain isolated for months.¹³⁵ More importantly, workers lack access to emergency medical facilities should they become injured.¹³⁶

Frequently, the ranch employer holds the herders’ immigration documents, the workers’ only proof they are in the United States legally under the H-2A provisions.¹³⁷ Maintaining the workers’ documents allows the employer to maintain a level of control experienced by relatively few people in this country.¹³⁸ As with other H-2A guest workers, the ability of the employer to return the guest worker to his home country should he complain, and the inability of the worker to work for any other employer keeps H-2A shepherders from successfully asserting their statutory rights.¹³⁹

¹²⁸ CAL LAB. CODE § 2695.2 (2001). The Labor Code mandates the shepherders receive a minimum of \$1200 a month. Calculating 30 days times 24 hours divided by \$1200 produces a wage of \$1.67 per hour.

¹²⁹ See EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPT. OF LABOR, *supra* note 98 at 9.

¹³⁰ *Id.*

¹³¹ *Id.* at 13-17 (discussing federal standards for living and housing) and *infra* p. 20-21 (discussing state standards for living and housing).

¹³² Schneider et al., *Watching Sheep*, *supra* note 32, at 16.

¹³³ Schneider interview, *supra* note 123.

¹³⁴ Schneider et al., *Watching Sheep*, (2005) *supra* note 32, at 19.

¹³⁵ Bedoya, *supra* note 107, at 5.

¹³⁶ *Id.* (“[T]here are reliable reports of several deaths due to minor ailments or accidents—such as snakebites, choking, or exposure [to] sub-freezing temperatures . . .”).

¹³⁷ Schneider et al., *Watching Sheep*, (2005) *supra* note 32, at 19.

¹³⁸ Schneider interview, *supra* note 123.

¹³⁹ *Id.*

III. STATE GOVERNMENT EFFORTS: A PASSIVE RESPONSE

California's efforts to provide these workers with fair wage protections and working conditions have produced mixed results.¹⁴⁰ As few judicial decisions have been published regarding shepherders' rights, most if not all of the accessible records involve efforts to obtain relief from state agencies.¹⁴¹

In 1989, shepherders, with the aid of California Rural Legal Assistance ("CRLA"), requested that the California Industrial Wage Commission ("IWC") lift an exemption from the state's minimum wage law for shepherders.¹⁴² The IWC rejected CRLA's request. The IWC took the position that since workers were governed by federal law, their employment was not the state's concern.¹⁴³

In 1996, California voters passed Proposition 210, the Living Wage Act, which provided a "minimum wage for all industries."¹⁴⁴ The initiative further provided that: "The Industrial Welfare Commission shall, at a public meeting, adopt minimum wage orders consistent with this section without convening wage boards"¹⁴⁵ Initially, the IWC failed to issue a wage order for shepherders.¹⁴⁶ As a result, according to Chris Schneider of Central California Legal Services, Inc. ("CCLS"), the shepherders in California did not benefit from Proposition 210's protection for several years.¹⁴⁷

As a result of growing concerns, in 2000, CCLS surveyed San Joaquin Valley shepherders and "publicly documented, for the first time, the story of shepherders brought to California primarily from Peru, Chile, and Mongolia through the United States Department of Labor . . . H-2A Program."¹⁴⁸ Their report documented the working and living conditions of shepherders in Central California.¹⁴⁹ CCLS surveyed forty-one shepherders employed by San Joaquin Valley ranchers and highlighted

¹⁴⁰ Schneider et al., *Watching Sheep*, (2005) *supra* note 32, at 21.

¹⁴¹ Lexis search conducted Aug. 1, 2006 produced no California State Court opinions involving H-2A Shepherders.

¹⁴² Carl Nolte, *An Odd Little State Hearing On the Rights of Shepherds*, S.F. CHRON., Dec. 22, 1990, at A4.

¹⁴³ *Id.*

¹⁴⁴ CAL. LAB. CODE § 1182.11 (2003).

¹⁴⁵ *Id.*

¹⁴⁶ Schneider et al., *Suffering in the Pastures*, (2000) *supra* note 29, at 7; *see also* California Industrial Welfare Commission's *Statement supra* note 116, at 1-2 ("The IWC deleted former paragraph F of this section which provided that this Order 'shall not apply to shepherders.'").

¹⁴⁷ Schneider, interview, *supra* note 123.

¹⁴⁸ Schneider et al., *Watching Sheep*, *supra* note 32, at 1.

¹⁴⁹ *Id.*

the workers' working and living conditions, including the lack of access to potable water sources, refrigeration to retard food spoilage, the lack of access to health care, and diminished outside contact.¹⁵⁰ The report pointed to both a lack of inspections accomplished by EDD and the fact that EDD inspectors, when they did accomplish the inspections, "routinely" certified that living conditions met DOL standards though the camps lacked "heating, . . . air conditioning, or bathing facilities."¹⁵¹

The CCLS study motivated interest groups to take action to provide better treatment for sheepherders in California.¹⁵² In 2001, the IWC finally published a specific wage order for California's sheepherders, almost five years after the passage of Proposition 210.¹⁵³ The new wage order mandated that sheepherders receive a \$150 per month raise, as at that time they were being a paid a monthly wage of \$900.¹⁵⁴ Keeping this increase in perspective, the new wages were less than half of what could be earned by other farm workers working the same number of hours.¹⁵⁵

The state commission's wage order was consistent with existing DOL special procedures¹⁵⁶ which required the EDD to inspect living conditions.¹⁵⁷ Noteworthy as well was the requirement for an "appropriate form of communication, including but not limited to a radio and/or telephone, to communicate with employers, health care providers, and government regulators"¹⁵⁸

Inaction prior to 2001 was justified by a common theme: WRA officials and employers believed they were justified in paying sheepherders low wages because back in the workers' home country they would earn far less than the minimum wage that California provided.¹⁵⁹ Additionally, industry representatives "painted a picture of idyllic pastoral working conditions and happy workers."¹⁶⁰

¹⁵⁰ Schneider et al., *Suffering in the Pastures*, *supra* note 32, at 4, 11-16.

¹⁵¹ Schneider et al., *Suffering in the Pastures*, *supra* note 32, at 12.

¹⁵² Schneider et al., *Watching Sheep*, *supra* note 32, at 3 (discussing the impact of the 2000 study).

¹⁵³ *Id.* at 9; *see also* California Industrial Welfare Commission's *Statement*, *supra* note 116, at 3 (" . . . [E]ffective July 1, 2001, the minimum wage for sheepherders will be \$1,050.00 per month, and increase to \$1200.00 per month effective July 1, 2002.").

¹⁵⁴ California Industrial Welfare Commission's Wage Order *supra* note 116, at 3.

¹⁵⁵ Schneider et al., *Watching Sheep*, *supra* note 32, at 9.

¹⁵⁶ *See supra* p. 14.

¹⁵⁷ California Industrial Welfare Commission's *Statement*, *supra* note 116, at 4.

¹⁵⁸ *Id.*

¹⁵⁹ Schneider et al., *Watching Sheep*, *supra* note 32, at 4 ("[As one employer put it] [w]hen they come here . . . they think it's a better lifestyle They're making more money. You send them back to Chile, it takes them three months to make \$200").

¹⁶⁰ *Id.* at 7.

Finally, as a result of the CCLS study and the work of advocacy groups, in October 2001, the California legislature passed new law to protect shepherders.¹⁶¹ The new legislation maintained the current wages provided by the Wage Order, but provided for increases to wages after July 1, 2002.¹⁶² Additionally, the state adopted several of the working and living conditions standards that had been adopted by the DOL¹⁶³ and provided for:

- (1) Toilets and bathing facilities, which may include portable toilets and portable shower facilities.
- (2) Heating.
- (3) Inside lighting.
- (4) Potable hot and cold water.
- (5) Adequate cooking facilities and utensils.
- (6) A working refrigerator [or in the alternative, ice when a refrigerator wasn't available but "for not more than a week"].¹⁶⁴

The statute also included language for the provision of emergency communication.¹⁶⁵

While these standards strengthened the workers' position, one important part of the law was left unchanged by the new statute: oversight and enforcement provisions and inspections were left as outlined by the Department of Labor's Field Memorandum 24-01.¹⁶⁶ Without a revision providing increased oversight of the program, the workers' substantial rights to wages and conditions were left largely in the hands of the employers.¹⁶⁷

¹⁶¹ CAL. LAB. CODE §§ 2695.1- 2695.2 (2003).

¹⁶² *Id.* ("After July 1, 2002, the amount of the monthly minimum wage permitted under paragraph (1) shall be increased each time that the state minimum wage is increased and shall become effective on the same date as any increase in the state minimum wage. The amount of the increase shall be determined by calculating the percentage increase of the new rate over the previous rate, and then by applying the same percentage increase to the minimum monthly wage rate.").

¹⁶³ See EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPT. OF LABOR, *supra* note 98, at 13-17 (discussing federal standards for living and housing).

¹⁶⁴ CAL. LAB. CODE § 2695.2 (2003).

¹⁶⁵ *Id.* (" . . . A means of communication through telephone or radio solely for use in a medical emergency affecting the shepherd or for an emergency relating to herding operation. If the means of communication is provided by telephone, the shepherd may be charged for the actual cost of nonemergency telephone use.").

¹⁶⁶ CAL. LAB. CODE §§ 2695.1-2695.2 (2003) (new statute provided standards and requirements but oversight and enforcement provisions are clearly absent from this statute).

¹⁶⁷ Schneider interview, *supra* note 123.

Given this new legislation, CCLS went back to the workers in 2004 and conducted a new survey to gauge the new provisions' effects.¹⁶⁸ Twenty-one of twenty-two workers surveyed were H-2A guest workers recruited from Peru.¹⁶⁹ The CCLS report concluded that while all of the workers were being paid according to the new statute, many of the workers still labored under the very same conditions that had been documented in its earlier 2000 study.¹⁷⁰ While provisions for storing food had improved, many shepherders still had no working refrigerator to keep perishable food items.¹⁷¹ Water was still being delivered in steel drums and often not potable.¹⁷² While toilet and wash facilities were now required by both state and federal law,¹⁷³ the study revealed that twenty of twenty-two workers surveyed were without facilities and instead were provided with a shovel.¹⁷⁴ The report concluded that the abuse agricultural workers had experienced under the Bracero program was continuing for at least one group of workers in the state: the shepherders.¹⁷⁵

IV. CHALLENGES FACING H-2A WORKERS SEEKING TO LITIGATE IN FEDERAL COURT: THE COURT HOUSE DOOR ALL BUT SHUT

In light of the enforcement failures discussed above, litigation might be seen to be a natural alternative for shepherders. As this section explains, however, the obstacles to successful litigation are numerous. As previously discussed, there are few published state court opinions involving guest working shepherders attempting to enforce their rights.¹⁷⁶ Accordingly, it may be speculative to suggest that shepherders would receive less favorable treatment in state courts. Nevertheless, researchers examining suits brought by H-2A workers in other states have noted a

¹⁶⁸ Schneider et al., *Watching Sheep*, *supra* note 32, at 13.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 21 (much of what was found in 2000 still existed: lacking toilet facilities-91%, absent heat-64%, absent shower or bathing facilities-77%, lack of reliable means of communication-68%. Most were isolated and rarely able to get away from their work).

¹⁷¹ Schneider et al., *Suffering in the Pastures*, *supra* note 32, at 12 *compare with* Schneider et al., *Watching Sheep*, *supra* note 32, at 17. (In 2000, 22% of those surveyed were without a working refrigerator; in 2005, 14% of those surveyed had no working refrigerator).

¹⁷² Schneider et al., *Watching Sheep*, *supra* note 32, at 17; *see also* Bedoya, *supra* note 107, at 5.

¹⁷³ *See* EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPT. OF LABOR, *supra* note 98, at 13-17. (discussing federal standards for living and housing) *and supra* p. 20 (discussing state standards for living and housing standards).

¹⁷⁴ Schneider et al., *Watching Sheep*, *supra* note 32, at 16.

¹⁷⁵ *Id.* at 21.

¹⁷⁶ *See supra* 17.

bias which favors the employers.¹⁷⁷ Therefore, when choosing between state or federal court, it might be advantageous for a shepherd to sue in federal court. This would prove to be a formidable task.

Shepherders, and guest workers in general, seeking to bring suit in federal courts, must meet the requirements of subject matter jurisdiction.¹⁷⁸ As no single claim of a guest worker is likely to exceed \$75,000 in damages, workers would be unable to sue within the federal courts' diversity jurisdiction.¹⁷⁹ Additionally, the H-2A governing statutes do not provide for an explicit private right of action.¹⁸⁰

Workers might attempt to sue¹⁸¹ upon an implied private right of action in the guest worker statutes.¹⁸² Given the Supreme Court's line of decisions that address when a court should recognize an implied a private right of action, however this appears unlikely to succeed, and the Ninth Circuit has already rejected this strategy.¹⁸³ In *Nieto-Santos*, the court rejected Plaintiff's argument for an implied right of action. *Nieto-Santos* found both the statute and its legislative history silent as to a right of action and held that the main purpose of the statute was to protect the interests of the domestic workers, not the interests of the guest workers.¹⁸⁴

¹⁷⁷ For a thorough discussion of this point see Holley, *supra* note 1, at 608. (" . . . [W]hile it would be rash to assert that H-2A workers cannot get fair treatment in any state court system, it should be recognized that Mexican guest workers run a considerable risk of suffering biased treatment in many of the state trial courts in the rural regions Some modern commentators have suggested that local bias is no longer a significant danger in today's state court systems. However, a 1992 survey of practicing attorneys shows that the perception of bias against non-local or out-of-state litigants remains widespread and palpable").

¹⁷⁸ 28 U.S.C. §§ 1331-1332 (2005).

¹⁷⁹ 28 U.S.C. § 1332 (2005) (requiring \$75,000 minimum amount in controversy).

¹⁸⁰ 28 U.S.C. § 1331 (2005) and 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, 1188 (2006).

¹⁸¹ A guest worker might also sue the DOL directly under the Administrative Procedures Act, 5 U.S.C. §§ 551-559 (2006), ("APA") for failing to respond to their complaints. See Holley, *supra* note 1, at 601. (Holley used the term "black hole complaint system" to describe DOL's typical response to an H-2A's complaint.) Unfortunately, the Supreme Court, in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004), stated that while "failure to act" under the APA included failure to make a decision by a deadline, "the only agency action that can be compelled . . . [by a court] is action legally required." *Id.* at 63. As there are no deadline requirements for the DOL to respond to the guest workers' complaints, guest workers suing the DOL under the APA would be unlikely to prevail. See also *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985) (providing a general presumption against judicial review of an agency decision not to take enforcement action).

¹⁸² *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

¹⁸³ *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638, 641 (9th Cir. 1984).

¹⁸⁴ *Id.* at 641.

Over the past forty years, the Supreme Court's approach toward implying a private right of action in federal statutes has grown increasingly restrictive. Beginning with *J.I. Case Co. v. Borak* in 1964, the Court was initially receptive toward finding an implied private right of action.¹⁸⁵ In *Borak*, the plaintiff, a stockholder, brought suit challenging a corporation's merger as a violation of section 14(a) of the Securities Exchange Act, which prohibited use of false material in proxy solicitations.¹⁸⁶ While section 14(a) made no explicit reference to a stockholder's private right of action, the Court found a private right of action which flowed from the purpose of the act.¹⁸⁷ *Borak* reasoned that since one of the main purposes of the act was the "protection of investors," the purpose implied "the availability of judicial relief where necessary to achieve that result."¹⁸⁸ *Borak's* approach regarding implied private rights of action was best summarized by the Court when it noted: ". . . it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."¹⁸⁹

A decade later, the Supreme Court in *Cort v. Ash* provided a major course correction to this approach.¹⁹⁰ *Cort* provided a set of factors for use in evaluating whether an implied right of action exists.¹⁹¹ In *Cort*, plaintiff, stockholder, sued the corporation for authorizing the use of corporate funds for campaign contributions.¹⁹² Plaintiff claimed the corporation was civilly liable for violating a criminal statute which prohibited a corporation from making federal election campaign contributions.¹⁹³ Holding the stockholder did not have an implied private right of action to bring a civil claim under the criminal statute,¹⁹⁴ *Cort* stated the test for an implied private right of action as follows:

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted, . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And fi-

¹⁸⁵ *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

¹⁸⁶ *Id.* at 429.

¹⁸⁷ *Id.* at 432.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 433.

¹⁹⁰ *Cort v. Ash*, 422 U.S. 66, 68-69 (1975).

¹⁹¹ *Id.* at 78-79.

¹⁹² *Id.* at 68-70.

¹⁹³ *Id.* at 68.

¹⁹⁴ *Id.* at 69.

nally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?¹⁹⁵

Just as *Cort* signaled a shift away from *Borak's* receptive approach favoring implied rights of action, the Court restricted its doctrine even further in 1979 with *Touche Ross & Co. v. Redington*.¹⁹⁶ In *Touche*, trustees, representing the interests of brokerage firm customers, sued the brokerage firm's accountants for making misstatements in their filings.¹⁹⁷ The accountants' filings were required by section 17(a) of the Security Exchange Act.¹⁹⁸ Finding no implied private right of action, *Touche* found that section 17(a) was merely a record keeping provision and therefore did not imply the right. In reaching its decision, the Court in *Touche* provided further refinement of the *Cort* factors.¹⁹⁹ *Touche* stated that the *Cort* factors were not necessarily meant to be equally weighted.²⁰⁰ The Court explained that if the statute and the legislative history were silent in regards to finding a right of action then the analysis should end there.²⁰¹

Applying the foregoing discussion to the H-2A statutes, we first note the statutes make no mention of a private right of action for the guest workers.²⁰² Examining the statutes' legislative history reveals a similar result.²⁰³ However, the history does provide some indication of what Congress expected regarding the workers' rights.²⁰⁴ The House Judiciary Committee reporting favorably on the bill acknowledged: "Because the Committee is fully cognizant, however of the problems that occurred under the Bracero program of the 1940s and 1950s, the Committee believes . . . the workers must be fully protected under all federal, state and

¹⁹⁵ *Id.* at 78-79.

¹⁹⁶ *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

¹⁹⁷ *Id.* at 562-66.

¹⁹⁸ *Id.* at 566.

¹⁹⁹ *Id.* at 575-76.

²⁰⁰ *Id.* at 575.

²⁰¹ *Id.* at p. 576; *see also* *California v. Sierra Club*, 451 U.S. 287, 298 (1981). Under-scoring what it had said in *Touche*, the *Sierra Club* Court discussed the *Cort* factors and found the language and history of the statute did not suggest an implied right of action. *Sierra Club* further stated ". . . it is unnecessary to inquire further to determine whether the purpose of the statute would be advanced by the judicial implication of a private action or whether such a remedy is within the federal domain of interest. These factors are only of relevance if the first two factors give indication of congressional intent to create the remedy."

²⁰² *See* Immigration Reform and Control Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, 1188 (2006).

²⁰³ H.R. REP. NO. 99-682, pt. 1, at 51-52 (1986).

²⁰⁴ *Id.* at 51.

local labor laws.”²⁰⁵ Even with this history, a court would be unlikely to find a private right of action for at least two reasons.

First, cases following *Touche* have emphasized the importance of finding clear Congressional intent to provide a private remedy.²⁰⁶ In *Massachusetts Mutual Life Insurance v. Russell*, the Supreme Court suggested this intent can be found in the “language of the statute, structure, or some other source.”²⁰⁷ In *Massachusetts Mutual*, plaintiff, a retirement plan beneficiary, sought extracontractual damages and brought suit against the fiduciaries for breach of duties under the federal statutes that regulate pension plans.²⁰⁸ The statutes provided for a private right of action to enforce rights under the plan, but not for a suit for damages against the fiduciaries.²⁰⁹ The Supreme Court considered the Legislator’s statements that suggested a concern for “strict fiduciary obligation[s]” and “fiduciary standards to insure that pension funds . . . [were] not mismanaged.”²¹⁰ Even with this history, *Massachusetts Mutual* decided against finding an implied private right of action.²¹¹ *Massachusetts Mutual* stated: “because neither the statute nor the legislative history made any reference to an implied private right of action . . . we need not carry the *Cort v. Ash* inquiry further.”²¹² Similarly, while the H-2A legislative history reflects precatory language expressing Congressional concern for the workers, the history makes no specific reference to a private right of action. Therefore, a court reviewing the H-2A statutes would likely find Congressional intent to imply the right was lacking.²¹³

²⁰⁵ *Id.* (Attorney General Meese’s statement included in the House Report reflected a similar sentiment: “We seek a balanced program that would ensure an adequate source of labor, but would not exploit employees or provide an added incentive to hire foreign rather than resident workers. The program should also protect the rights and welfare of all workers.”).

²⁰⁶ See *Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1102 (1991) (Justice Souter delivering the opinion of the Court and joined in part III by Justices Rehnquist, White, O’Connor, and Scalia, stated: “The rule that has emerged in the years since *Borak* and *Mills* came down is that recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent . . .”).

²⁰⁷ *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 145 (1985).

²⁰⁸ *Id.* at 136-38.

²⁰⁹ *Id.* at 144.

²¹⁰ *Id.* at 140.

²¹¹ *Id.* at 140, 148 (additionally, the *Massachusetts Mutual* Court examined history that included remarks of one Senator who stated: the bill included “provisions to insure fair handling of a worker’s money.” Given the high bar set by the court in *Massachusetts Mutual* it is unlikely that guest workers would prevail here.

²¹² *Id.* at 148 (citing *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981) at n. 31).

²¹³ See *supra* p. 25 and see also *Bratton v. Shiffrin*, 635 F.2d 1228, 1230-1231 (1980) *Bratton* provides at least one example of the legislative history needed to imply a right of

Second, as *Touche* reasoned, where Congress omits the right of action in a statute which is “flanked” by statutes that provide for such rights, courts can infer that Congress knew what it was doing in making the omission.²¹⁴ For example, the statute at issue in *Touche* (section 17(a)), required CPAs to file financial statements for stockbrokers²¹⁵ and was seen as part of an overall “statutory scheme” provided by the Securities Exchange Act of 1934.²¹⁶ Since section 17(a) made no mention of a private right of action but was part of a scheme that included other statutes authorizing private rights of actions, *Touche* reasoned that Congressional intent to provide a right of action did not exist.²¹⁷

In similar fashion, The Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”) together with the H-2A statutes, can be seen as parts of the whole scheme regulating U.S. farm labor.²¹⁸ The AWPA provides protections for farm workers legal or otherwise but specifically excludes guest workers from its protections.²¹⁹ Included in the AWPA is a worker’s explicit private right of action to enforce its provisions in federal court.²²⁰ The current guest worker statutes were enacted in 1986, just four years after the passage of the AWPA.²²¹ As Congress provided a right of action for farm workers under the AWPA but omitted this same right in the guest worker statutes, a court would likely find, just as in

action where the statute is silent. On remand in light of *Touche*, the Seventh Circuit, in *Bratton*, found a right of action for travelers suing an air carrier. Federal law required the carrier to post a bond ensuring the traveler’s compensation should the carrier fail to perform. The Federal Aviation Agency Administrator had testified: “By requiring a . . . carrier to furnish a performance bond, . . . review of the carrier’s financial responsibility will have to be made . . . and some recourse will have been supplied to those who are otherwise helpless.” *Bratton* found these statements supportive of finding the required congressional intent to imply a right of action.

²¹⁴ *Touche Ross & Co.*, 442 U.S. at 571-72.

²¹⁵ *See supra* at pp. 24-25.

²¹⁶ *Touche Ross & Co.*, 442 U.S. at 571-72.

²¹⁷ *Id.* at 571-72.

²¹⁸ Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (2005).

²¹⁹ 29 U.S.C. § 1802 (10) (B) (iii) (2005) (This portion of the statute defines seasonal agricultural worker for the purposes of the AWPA as not including “any temporary non-immigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii)(a) and 214(c) of the Immigration and Nationality Act [8 USCS § § 1101(a)(15)(H)(ii)(a), 1184(c)].”).

²²⁰ 29 U.S.C. § 1854 (2005) (This section of the statute provides a private right of action for workers other than guest workers to sue under the provisions of the AWPA).

²²¹ Immigration Reform and Control Act, *supra* note 7.

Touche, that it was the intent of Congress to leave guest workers without a private right of action.²²²

V. CONCLUSION AND RECOMMENDATIONS

Given the competing goals of maintaining protections for domestic workers seeking employment and providing protections for guest workers, Congress has produced increasingly complex legislation to govern the use of guest workers. Most guest workers whether isolated as sheepherders, or even if not isolated, fear retribution, lack language skills, and generally are afforded little opportunity to successfully enforce what rights they have. A combination of the complexity of legislation and the nature of guest work employment produces a scenario where basic fairness and decency are lacking.

To address these problems, State and Federal officials should make every effort to enforce existing laws protecting guest workers. To that end, these agencies must be staffed appropriately to provide for this oversight. Further, Congress should amend the guest worker statutes to provide an explicit private right of action. Enforcement of an H-2A worker's substantive rights will likely require the independence provided by the federal judiciary.

To further reduce the workers' vulnerability Congress should also eliminate the worker's current tie to a specific employer and allow them to seek employment with other farmers or ranchers. Finally, making workers aware of a defined, attainable path to citizenship would recognize the workers' contributions and bring long overdue fairness to the process.

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²²² Of course this leaves the state of the law under both the AWPAs and the guest worker statutes with a rather curious result: illegal undocumented workers have an express right of action to sue their employers in federal court, while guest workers that arrive in this country through legal means do not.