

# H-2A Workers Should Not be Excluded From The Migrant and Seasonal Agricultural Worker Protection Act

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## COMMENT

### H-2A WORKERS SHOULD NOT BE EXCLUDED FROM THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

CHRISTOPHER RYON\*

#### INTRODUCTION

Each year, agricultural employers request more H-2A workers<sup>1</sup> to harvest American crops.<sup>2</sup> The number of H-2A workers admitted into the United States has tripled between 1996 and 2001.<sup>3</sup> In an attempt to hire additional foreign laborers, growers have been lobbying for provisions to make it easier to hire foreign temporary guest workers.<sup>4</sup> The growers argue that the H-2A program is too

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1. H-2A worker means any nonimmigrant alien admitted to the United States for agricultural labor or services of a temporary or seasonal nature under 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)). CFR 655.100. The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens:

(H)(ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of the Internal Revenue Code of 1954 [26 USCS § 3121(g)] and agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country...

8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2001).

2. Under the H-2A visa program, if unable to find sufficient workers, an agricultural grower may petition the federal government to issue temporary visas to allow foreign workers to enter the country to perform agricultural work. If the government grants the petition, the grower typically recruits workers in their home country and provides them with transportation and housing upon arrival. *See generally* 8 U.S.C § 1188(a) (1984); 20 C.F.R. § 655.90-655.113 (2000) (Department of Labor Regulations); 8 C.F.R. § 214.2(h) (2000) (showing the INS regulations).

3. There were approximately 31,523 H-2A visas issued in 2001, 30,201 issued in 2000, 28,568 issued in 1999, 22,676 issued in 1998, 16,011 issued in 1997, and 11,004 in 1996. UNITED STATES DEPARTMENT OF STATE BUREAU OF CONSULAR AFFAIRS, *Report of the Visa Office*, 1998, 2001 (not yet published).

4. *See* Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 590 (2001) (In 1996, 1998, 1999, and again in 2000, Congress came close to passing legislation that

cumbersome to provide an adequate supply of workers to harvest their crops.<sup>5</sup>

At the same time, worker rights advocates have been highly critical of the H-2A program. Many complain that there is not a labor shortage and as a result these workers should not be admitted.<sup>6</sup> Furthermore, opponents assert that H-2A workers are particularly vulnerable because they work for only one employer.<sup>7</sup> If mistreated, H-2A workers do not have the option of looking for a new job and evidence suggests that employers often blacklist H-2A workers for making complaints.<sup>8</sup>

Another common criticism is that H-2A workers are excluded from protection under the *Migrant and Seasonal Agricultural Worker Protection Act* [hereinafter AWP].<sup>9</sup> AWP requires that migrant and seasonal agricultural employers meet certain standards in the housing, recruitment, and transportation of workers.<sup>10</sup> Moreover, AWP offers workers a private right of action in federal court.<sup>11</sup> Concerned about this lack of coverage under the AWP and the general vulnerability of farm workers, Senator Edward Kennedy (D-MA) and Congressman Howard Berman (D-CA) introduced immigration/labor legislation on August 2, 2001, in the Senate and House.<sup>12</sup> One of the bill's key provisions proposes ending the exclusion of H-2A workers under AWP.<sup>13</sup>

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would have relaxed housing and wage requirements for H-2A workers and streamlined certification procedures.)

5. See ECONOMIC RESEARCH SERVICE, U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL OUTLOOK, STATUS REPORT: HIRED FARM LABOR IN U.S. AGRICULTURE, at 19 (Oct. 1998).

6. A 1997 U.S. General Accounting Office report found that there is no national agricultural shortage, nor did it anticipate a sudden increase in the labor supply requiring the importation of large numbers of foreign workers. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, H-2A AGRICULTURAL GUESTWORKER PROGRAM – CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS, GAO/HEHS DOC. NO. 98-20 (1997).

7. See, e.g., *supra* Holley, note 4, at 595.

8. See, e.g., Barry Yeomen, *Silence in the Fields*, MOTHER JONES MAGAZINE, (January/February 2001), at [http://www.motherjones.com/mother\\_jones/JF01/farm.html](http://www.motherjones.com/mother_jones/JF01/farm.html).

9. 29 U.S.C. § 1801-1872 (1994).

10. *Id.*

11. 29 U.S.C. § 1854 (1994).

12. S. 1313, 107th Cong. (2001); H.R. 2736, 107th Cong. (2001) (Other provisions of the bill include: right of farm workers to organize and join a union, allows for undocumented farm workers to apply for permanent residency after completing 90 days of farm work in each of three out of the last four years, bans the importation of H-2A workers from being used to break strikes.)

13. S. 1313, 107th Cong. (2001); H.R. 2736, 107th Cong. (2001).

This provision begs the following questions: what was the initial justification for excluding H-2A workers from protection under the AWPAs? And is this justification still valid? How would H-2A workers benefit from coverage under AWPAs?

Part I of this paper describes the physical and legal vulnerability of agricultural workers in United States. Part II describes of the protections provided by AWPAs. Part III chronicles the development of the H-2A visa program and describes the federal regulations designed to protect H-2A workers. And part IV argues that (A) the premise for excluding H-2A workers from AWPAs is flawed, (B) that H-2A workers would benefit from coverage under AWPAs, and (C) that such coverage would be consistent with both the purpose of the H-2A program and the overriding goal AWPAs.

## I. VULNERABILITY OF AGRICULTURAL WORKERS IN THE UNITED STATES

### *A. Physical Vulnerability: The Demanding Nature of Farm Work*

Farm work is physically demanding. It typically requires the daylong performance of repetitive motions while stooping, kneeling, crawling, or walking. Moreover, farm work has often required working in extremely hot weather and with dangerous pesticides. Because of the nature of the work, farm work ranks consistently with mining and construction work as one of the most dangerous fields in the United States.<sup>14</sup> “Agriculture, forestry, and fishing” ranks second only to mining as the industry having the highest rate of occupational deaths in the United States.<sup>15</sup> When compounding the physical stress of farm labor with the lack of legal protection, agricultural workers are in an extremely precarious situation.

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14. Holley, *supra* note 4, at 577-78.

15. *Fatal Occupational Injuries—United States, 1980-1994*, MORBIDITY AND MORTALITY WEEKLY REPORT, (U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, Atlanta, Ga.) April 24, 1998, at 3.

*B. Legal Vulnerability: Exclusion of Agricultural Workers from Coverage Under Federal Labor and Employment Rights Laws*

Along with engaging in physically demanding work, agricultural workers also lack adequate legal protections. First, agricultural workers are excluded from protections under the National Labor Relations Act (NLRA).<sup>16</sup> Second, Agricultural workers are not provided overtime protection under the Fair Labor Standards Act (FLSA).<sup>17</sup> In certain situations, agricultural workers are not provided minimum wage protections under the FLSA.<sup>18</sup> Because they are excluded from the NLRA and certain provisions of the FLSA, agricultural workers lack substantive protections afforded to most nonagricultural workers.<sup>19</sup>

*1. Lack of Protection under the NLRA*

The National Labor Relations Act (NLRA) provides workers the right to strike, organize, and bargain collectively.<sup>20</sup> However, the NLRA explicitly excludes agricultural workers from its protections.<sup>21</sup> Some scholars have inferred from the legislative history that the exclusion was included in the NLRA because of strong opposition by agricultural growers in 1933.<sup>22</sup>

Only eight states provide collective bargaining rights to agricultural workers.<sup>23</sup> In some of these states, the legislation assists agricultural workers by providing for union elections and unfair labor

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16. 29 U.S.C. § 152(3) (2001) (“The term ‘employee’ [under the NLRA] . . . shall not include any individual employed as an agricultural laborer . . .”).

17. Fair Labor Standards Act of 1938, 29 U.S.C.A. § 207 (2001); 29 U.S.C.A. § 213(b) (2001).

18. 29 U.S.C.A. § 213(a)(6) (2001).

19. Unlike the NLRA and FLSA, agricultural workers are not excluded from coverage under the Occupational Safety & Health Act (OSHA) and Federal Equal Employment Laws. See Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 651-678 (1998).

20. 29 U.S.C. § 157 (2001).

21. 29 U.S.C. § 152(3) (2001).

22. See Paul D. Lall, *Immigrant Farmworkers and the North American Agreement on Labor Cooperation*, 31 COLUM. HUM. RTS. L. REV. 597, 601 (2000) (Some argue that the Southern Congressmen pushed for the exclusion to maintain the “social and racial plantation system in the South.” *Id.* at 602 (quoting Marc Lindner, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 64 TEX. L. REV. 1335, 1335 (1987)). Also, policy makers from agricultural states had claimed that without the exclusions, agricultural workers would have had excessive bargaining power since they could threaten to allow crops to rot in the fields. *Id.*

23. The states that provide collective bargaining rights are Oregon, Kansas, Arizona, Wisconsin, New Jersey, Massachusetts, South Dakota, and California. *Id.* (citing Michael Leroy & Wallace Hendricks, *Should “Agricultural Laborers” Continue to be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 513 (1999)).

practice proceedings.<sup>24</sup> In other states, despite the established rights to collective bargaining, legislation is more protective of agricultural employers.<sup>25</sup>

Despite the lack of coverage under the NLRA and state laws, agricultural workers continue to organize and bargain. But unlike most nonagricultural workers, agricultural workers face increased risk. Because agricultural workers are excluded from NLRA protection, unless there is state legislation, an agricultural grower can legally discharge workers who attempt to organize.

In sum, despite not being protected by the NLRA, agricultural workers continue to take collective action. However, they risk losing their jobs without legal recourse. As a result, agricultural workers are in a more precarious position than most nonagricultural workers.

## 2. *Lack of Protection under the FLSA*

In addition to not being protected by the NLRA, agricultural workers lack overtime and minimum wage protection under the FLSA.<sup>26</sup> The FLSA requires an employer to pay overtime to employees that work more than forty hours in a workweek.<sup>27</sup> The FLSA, however, explicitly excludes agricultural workers from receiving overtime protection.<sup>28</sup> The Code of Federal Regulations summarizes the law, stating that the FLSA provides “a complete overtime exemption for any employee employed in ‘agriculture’ . . .”<sup>29</sup> This exclusion negatively impacts many agricultural workers, who work in excess of forty hours per week during particular seasons. Again, agricultural workers lack a basic wage protection provided to most workers.

Along with failing to provide overtime, the FLSA explicitly excludes many agricultural workers from the minimum wage protection. The FLSA defines three categories of agricultural employees who are excluded from minimum wage coverage.<sup>30</sup> In the first category, the worker is excluded if “employed by an employer who did not, during any calendar quarter during the preceding calendar

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24. *Id.*

25. *Id.*

26. 29 U.S.C.A. § 207 (1998).

27. The statute provides that the employee is to be compensated at one and a half times their regular rate for the time worked over the standard forty hours. See 29 U.S.C.A. § 207(a)(1) (2001).

28. 29 U.S.C.A. § 213(b). (The FLSA overtime protection does not apply to “. . . any employee employed in agriculture. . .”).

29. 29 C.F.R. § 780.401 (2001).

30. 29 U.S.C.A. § 213(a)(6).

year, use more than five hundred man-days of agricultural labor.”<sup>31</sup> This impacts employees of small farmers; only a small percentage of the agricultural workforce. In the second category, a worker is excluded if she is “the parent, spouse, child, or other member of [her] employer’s immediate family.”<sup>32</sup>

In the third category, an employee is excluded if she:

- (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment,
- (ii) commutes daily from [her] permanent residence to the farm on which [she] is so employed, and
- (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year.<sup>33</sup>

Under this third exemption, however, the terms “customarily and generally recognized” in subsection (i) and “permanent residence” in subsection (ii) could potentially be manipulated to broaden the scope of the minimum wage exclusion.<sup>34</sup> The legislative history of the exemption suggests that the third exemption was intended to apply to the local worker who engages in agricultural labor on a short-term basis during the harvest season.<sup>35</sup> The exemption was not meant to apply to a full-time agricultural worker.<sup>36</sup> For example, “migrant laborers who travel from farm to farm were not intended to be within the scope of this exemption.”<sup>37</sup> Despite this intention, it may be difficult to distinguish between a local worker engaged in temporary work to supplement her income and a migrant laborer who earns her entire income from farming.<sup>38</sup> Although U.S. workers may have regularly engaged in temporary agricultural work to supplement other sources of income in the past, this is not usually the case today.<sup>39</sup>

Thus, some agricultural employers are able to evade the minimum wage requirements of the FLSA as it relates to agricultural

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31. *Id.* at § 213(a)(6)(A) (1998).

32. *Id.* at § 213(a)(6)(B) (1998).

33. *Id.* at § 213(a)(6)(C) (1998).

34. *See* Lall, *supra* note 22, at 603.

35. *See id.*

36. *Id.*

37. *Id.*

38. *See id.* at 604.

39. *Id.*

workers who earn their livelihood from farming.<sup>40</sup> These agricultural workers do not receive the FLSA minimum wage guarantee afforded to most nonagricultural workers.

In addition, under the FLSA, many agricultural growers avoid liability under the FLSA by alleging that agricultural workers are "independent contractors" as opposed to "employees."<sup>41</sup> Some growers seek to create an independent contractor relationship with workers by entering into profit sharing agreements.<sup>42</sup> Under these arrangements, workers use their own tools and the growers give them with a percentage of the profits they earn.<sup>43</sup> If a worker contends that the grower failed to pay the minimum wage or overtime in accordance with the FLSA, the grower can assert that the workers are involved in a profit sharing agreement and have control over the manner in which the work is performed, and are therefore independent contractors.<sup>44</sup> If a court accepts this argument, the grower would not be liable under the FLSA because an independent contractor is technically self-employed.<sup>45</sup>

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40. *Id.*

41. *Id.* at 605

42. *Id.*

43. *Id.*

44. *See* Lall, *supra* note 22, at 605.

45. *Id.*



## II. AGRICULTURAL WORKERS PROVIDED SOME PROTECTIONS UNDER AWWA

The lack of protection under the NLRA and the FLSA leaves agricultural workers in a vulnerable position. Migrant and seasonal agricultural workers, however, receive some protection under the *Migrant and Seasonal Agricultural Worker Protection Act (AWPA)*.<sup>46</sup> AWWA requires that agricultural employers; agricultural associations; farm labor contractors; and providers of migrant housing who recruit, solicit, hire, employ, furnish, transport or house agricultural workers meet certain minimum standards in their dealings with migrant and seasonal agricultural workers.<sup>47</sup>

### A. Farm Labor Contractor Registration

Under AWWA, farm labor contractors (and any employee who performs farm labor contracting functions) must register with the U.S. Department of Labor before recruiting, soliciting, hiring, employing, furnishing or transporting any migrant or seasonal agricultural worker.<sup>48</sup> An agricultural employer or association using the services of a farm labor contractor must first verify the registration status of the farm labor contractor, including that the contractor is properly authorized for all activities he or she will undertake.<sup>49</sup>

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46. 29 U.S.C. § 1801-1872 (1998). Passed in 1983, AWWA replaced the *Farm Labor Contractor Registration Act of 1963* [hereinafter FLCRA]. FLCRA was passed because of widespread concern that contractors were exaggerating conditions of employment when recruiting in their home base and failing to adequately inform workers of their working conditions; often transporting workers in unsafe vehicles; failing to furnish promised housing or furnishing substandard and unsanitary housing. FLCRA required that farm labor contractors register annually with the Department of Labor. The contractors were required to submit details concerning the nature of their recruitment activities. In addition, they were obligated to post written statements concerning the terms of housing and employment. Where the contractor paid the workers, he was to keep proper payroll records. The farm labor contractor's certificate of registration could be refused, revoked, or suspended *inter alia* for knowingly misrepresenting to migrant workers the terms and conditions of the agricultural employment or unjustifiably failing to perform working arrangements entered into with farm operators or with migrant workers.

However, Congress felt that FLCRA had largely failed in achieving fairness and equity for migrant workers. Congress considered employer objections that enforcement was often haphazard, burdensome, and often conflicting. H.R. REP. NO. 97-885, at 1 (1982). These sentiments led to the passage of AWWA.

47. 29 U.S.C. § 1801-1872 (1998).

48. 29 U.S.C. § 1811 (1998) (Agricultural employers and associations need not register as farm labor contractors).

49. 29 U.S.C. § 1842 (1998).

### *B. Initial Disclosures*

In addition, AWPAs provide that any farm labor contractor, agricultural employer, or agricultural association that recruits a migrant agricultural worker shall:

disclose in writing to each such worker who is recruited for employment the following information *at the time of the worker's recruitment*:

- (1) the place of employment;
- (2) the wage rates to be paid;
- (3) the crops and kinds of activities on which the worker may be employed;
- (4) the period of employment;
- (5) the transportation, housing, and any other employee benefit to be provided, if any, and any costs to be charged for each of them;
- (6) the existence of any strike or other concerted work stoppage, slowdown, or interruption of operations by employees at the place of employment;
- (7) the existence of any arrangements with any owner or agent of any establishment in the area of employment under which the farm labor contractor, the agricultural employer, or the agricultural association is to receive a commission or any other benefit resulting from any sales by such establishment to the workers.<sup>50</sup>

Also, the employer of any migrant worker must post in a conspicuous location at the place of employment, a poster provided by the Secretary, setting forth the rights and protections afforded such workers under AWPAs.<sup>51</sup> Furthermore, housing providers of migrant agricultural workers must present to the worker or post in a conspicuous place a statement of the terms and conditions, if any, of occupancy of such housing.<sup>52</sup> Finally, these disclosures must be in the language of the worker.<sup>53</sup> This is an important safeguard, as many agricultural workers are nonnative English speakers. By forcing employers to make these initial disclosures, there is a written

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50. 29 U.S.C. at § 1821 (1998).

51. 29 U.S.C. § 1821(b) (1998).

52. 29 U.S.C. § 1821(c) (1998).

53. 29 U.S.C. § 1821(g) (1998).

document stating the exact terms of the employment contract. This enables agricultural workers to better enforce their contractual rights. Also, AWPAs require that employers of any agricultural workers make payroll records for each worker containing the basis on which wages were paid, the number of piecework units earned, number of hours worked, total pay for each pay period, amount and reason for any deductions, and the net pay.<sup>54</sup> Each worker must be provided with this itemized statement and these records must be kept and preserved by the employer for three years.<sup>55</sup> And no farm labor contractor, agricultural employer, or association may knowingly provide false or misleading information to a worker concerning employment or the terms and conditions of employment.<sup>56</sup> This record keeping provision also assists agricultural workers in enforcing their contractual rights.

#### *D. Wages, Supplies, and Working Arrangements*

Each person employing agricultural workers must pay all wages owed when due.<sup>57</sup> Also, farm labor contractors, agricultural employers and associations are prohibited from requiring workers to purchase goods or services solely from such contractor, employer or association or any person acting as an agent for such a person.<sup>58</sup>

#### *E. Safety and Health of Housing*

Each person who owns or controls migrant housing is responsible for ensuring that the facility complies with the substantive Federal and State safety and health standards covering that housing.<sup>59</sup> Migrant housing may not be occupied until it has been inspected and certified to meet applicable safety and health standards.<sup>60</sup> The certification of occupancy must be posted at the site.<sup>61</sup>

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54. 29 U.S.C. § 1821(d) (1998).

55. 29 U.S.C. § 1821(e) (1998).

56. 29 U.S.C. § 1821(f) (1998).

57. 29 U.S.C. § 1822(a) (1998).

58. 29 U.S.C. § 1822(b) (1998).

59. 29 U.S.C. § 1823 (1998).

60. *Id.*

61. *Id.*

### *F. Transportation Safety*

Each vehicle used to transport agricultural workers must be properly insured, operated by a properly licensed driver, and meet Federal and State safety standards.<sup>62</sup>

### *G. Enforcement Provisions*

Any person who willfully violates the AWPA could be fined up to \$1,000 or sent to jail for up to a year, or both.<sup>63</sup> Upon conviction of any subsequent violation of the Act, the defendant could be fined up to \$10,000 or sentenced to prison up to three years, or both.<sup>64</sup>

The AWPA establishes a private right of action. Any person injured under AWPA by a farm labor contractor, agricultural employer, agricultural association, or other person may file suit in any United States District Court having jurisdiction of the parties. One may file suit in federal court regardless of the amount in controversy, the citizenship of the parties, or any failure to exhaust administrative remedies.<sup>65</sup> In other words, the courts have federal question jurisdiction to hear suits brought under AWPA. Upon finding a violation of the Act, the court may award an amount equal to the actual damages or statutory damages up to \$500 per plaintiff per violation, or other equitable relief.<sup>66</sup>

Finally, to aid enforcement, the AWPA also contains an anti-retaliation provision. Section 1855, the whistleblower provision, provides that “[n]o person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker” if the worker has filed a complaint with just cause.<sup>67</sup>

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62. 29 U.S.C. § 1841 (1998).

63. 29 U.S.C. § 1851 (1998).

64. *Id.*

65. 29 U.S.C. § 1854 (1998).

66. 29 U.S.C. § 1854(c)(1) (1998). Multiple violations of a single provision of AWPA shall count as only one violation for the purposes of calculating damages. 29 U.S.C. § 1854(e)(4)(C)(ii) (1998).

67. 29 U.S.C. § 1855 (1998).

### *H. Relation to State, Local and Other Federal Laws*

AWPA is meant to supplement any existing state or local law.<sup>68</sup> Compliance with AWPA does not excuse violation of applicable state law or regulation.<sup>69</sup> Overall, AWPA provides only limited protections. Agricultural workers may still be terminated for organizing and still lack basic FLSA wage protections afforded to most workers. On the positive side, AWPA does provide agricultural workers with substantive rights to safe housing and safe transportation. And through its initial disclosure and record-keeping provisions, which provide for written fixed term agreements, agricultural workers can better enforce their contractual rights. However, not all agricultural workers are protected under AWPA. H-2A workers are excluded from AWPA coverage.

### III. EXCLUSION OF H-2A WORKERS FROM AWPA PROTECTIONS

When Congress passed the AWPA in 1983, it expressly excluded H-2 workers from its protections. The Act provides:

Except as provided in subparagraph (B), the term “migrant agricultural worker” means an individual who is employed in agricultural employment of seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

...

(B) The term “migrant agricultural worker” does not include—

...

(ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 1101(a)(15)(H)(ii)(a) and 1184(c) of Title 8.<sup>70</sup>

Thus, H-2A workers are excluded entirely from AWPA, and for the most part, from generally applicable Federal labor and employment laws.

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68. 29 U.S.C. § 1871 (1998).

69. *Id.*

70. 29 U.S.C. § 1802(8) (1998).

Why did Congress exclude H-2A workers from AWPAs coverage? The legislative history suggests that Congress believed that H-2A workers were already afforded adequate protections under the then current immigration legislation. In fact, Congress addressed the H-2 exclusion issue in a 1982 House Hearing before the Subcommittee on Education and Labor.<sup>71</sup> Concerned that H-2 workers were not protected by the Act, Subcommittee Chairman George Miller (CA) feared that H-2 workers might “slip through the cracks,” and not receive adequate protection.<sup>72</sup> In response, Robert Collyer, Deputy Under Secretary of Labor for Employment Standards, stated, “all the H-2 protections are substantially more than the protections afforded under the FLCRA now or under the [AWPA] . . . [w]e believe strongly that immigration legislation is the place to deal with foreign workers, rather than [AWPA].”<sup>73</sup> Apparently persuaded that the Immigration Regulations provided sufficient protections to H-2 workers, Congress explicitly excluded H-2 workers from protection.

This premise for excluding H-2 workers raises important questions: What are the current protections provided to H-2A workers? More importantly, are these protections a valid justification for excluding H-2A workers from AWPAs coverage?

This section will describe the development of the H-2A program and the current protections afforded to H-2A workers. A comparison of AWPAs and the regulations concerning H-2A workers suggests that current regulations arguably provide H-2A workers with stronger rights on paper than workers covered under AWPAs. Yet,

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71. *Hearing on the Migrant and Seasonal Agricultural Worker Protection Act: Hearing on H.R. 7102 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong. (1982).

72. *Id.* at 51.

73. *See id.* at 51-52. In the same hearing, Craig Berrington, Associate Deputy Under Secretary of Labor for Employment Standards, further emphasized,

[t]here is no way in which H-2 workers could ever be brought into the country, even if you assumed that all the protections currently out there now were to be eliminated—which I think would be an erroneous assumption—but even if you assumed that, there is no way that H-2 workers could be brought into the country under conditions which were less than those required by employers to be provided for American workers. That is a clear adverse effect on American workers. It would be the same as saying you could bring in the H-2 workers for a wage less than the Federal minimum wage. That would never hold up. Under current law that would never hold up . . . [s]o there is no way that the protections afforded to H-2 workers could be less than those legally required for American workers.

*Id.* at 52.

because of the lax enforcement mechanisms, H-2A workers have more difficulty enforcing their rights.

*A. Historical Development of the H-2 Visa*

During World War II, because of a perceived labor shortage, the United States and Mexico entered into a series of agreements known as the Bracero program.<sup>74</sup> The Bracero system permitted Mexican laborers to enter the United States without paying a head tax or satisfying contract labor provisions and literacy requirements.<sup>75</sup> California alone imported more than 100,000 Braceros annually.<sup>76</sup>

However, during the 1960s, citing depressed wages and offensive living conditions, labor and civil rights organizations lobbied heavily against the continuation of the Bracero program.<sup>77</sup> Reacting particularly to Edward Murrow's "Harvest of Shame," a television documentary exposing the abusive working conditions, Congress permitted the Bracero program to expire in 1963.<sup>78</sup>

In 1952, as part of the Immigration and Nationality Act, Congress created the H-2 visa. Unlike the Bracero program, the H-2 visa permitted entry into the United States of both agricultural and nonagricultural temporary contract workers.<sup>79</sup> Moreover, the program did not just apply to Mexican workers.<sup>80</sup> Although the H-2 program was not widely used during the next twenty years, there were reports of abuse.<sup>81</sup>

In 1986, Congress divided the H-2 program into two parts: the H-2A visa for agricultural workers, and the H-2B visa for nonagricultural workers.<sup>82</sup> Under the current H-2A program, a grower may import guest workers to perform seasonal agricultural labor if, among other things, the grower: (1) gains certification from both the Labor Department and the Attorney General that there is a shortage of domestic workers and the employment of guest workers will not adversely affect domestic labor; (2) engages in affirmative and

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74. Holley, *supra* note 4, at 583.

75. See Kimi Jackson, *The Louis Jackson National Student Writing Competition: Farmworkers, Nonimmigration Policy, Involuntary Servitude, and a Look at the Shepherding Industry*, 76 CHI.-KENT L. REV. 1271, 1275 (2000).

76. *Id.*

77. *See id.* at 1277.

78. *See id.* at 1276-77.

79. *See id.* at 1277.

80. *Id.*

81. *Id.*

82. *See id.* at 1278.

adequate recruitment efforts to employ domestic laborers before importing H-2A workers; and (3) guarantees certain conditions of employment. Even after the H-2A workers have begun the farm work, the employer must ensure the preference for domestic workers by hiring any domestic worker who applies for the farm work during the first fifty percent of the H-2A employment season (the fifty percent guarantee).<sup>83</sup> In other words, the employer must hire any domestic worker until at least half the time period of the H-2A employment contract has elapsed.

Recent studies show that H-2A workers predominantly work in tobacco and apple production.<sup>84</sup> For example, in 1997, 62 percent of the certifications were for tobacco and 18 percent for apples.<sup>85</sup> H-2A workers are also employed in tree farms, sugarcane fields, and the shepherding industry.<sup>86</sup> H-2A workers historically come from Jamaica, Barbados, Saint Lucia, Saint Vincent, Dominica, and Mexico. Recently, workers have also been recruited from the Philippines.<sup>87</sup>

## *B. Strong Protections Provided to H-2A Workers on Paper*

### *1. Housing*

Under the Code of Federal Regulations, if an H-2A worker cannot reasonably return to her place of residence within the same day of work, the employer must provide housing without charge.<sup>88</sup> In addition, rental, public accommodations, and similar classes of habitation must meet local housing standards.<sup>89</sup> In the absence of local standards, state standards apply;<sup>90</sup> and in the absence of both local and state standards, Occupational Safety and Health Administration standards found in the Code of Federal Regulations apply.<sup>91</sup>

Thus, similar to the AWPAs, H-2A regulations require that the housing satisfy basic safety standards. However, in contrast to

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83. Holley, *supra* note 4, at 590.

84. See ECONOMIC RESEARCH SERVICE, U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL OUTLOOK, STATUS REPORT: HIRED FARM LABOR IN U.S. AGRICULTURE, at 19, 21 (Oct. 1998).

85. *Id.*

86. *Id.*

87. Jackson, *supra* note 76, at 1281.

88. 20 C.F.R. § 655.102(b)(1) (2001).

89. *Id.*

90. *Id.*

91. *Id.* (This housing must meet the “. . . full set of DOL Occupational Safety and Health Administration standards set forth at 29 CFR 1910.142, or the full set of standards at §§654.404-654.417 of this chapter . . .”).



AWPA, the vast majority of H-2A workers are entitled to receive free housing because they are unlikely to return to their place of residence within the same day of work. Under generally applicable labor and employment laws, most agricultural (and nonagricultural) workers do not possess this important substantive right.

### *2. Employer Provided Items*

Under the H-2A regulations, the employer must provide the worker with all “tools, supplies, and equipment” necessary to perform the job.<sup>92</sup> However, if it is common practice in the “area, crop activity and occupation for workers to provide tools and equipment,” employers may not have to reimburse the workers.<sup>93</sup> But in most instances, the employers must provide H-2A workers with tools, supplies, and equipment. In contrast, AWPA requires only that agricultural employers not force workers to purchase goods or services solely from such employer. In other words, the workers may have to buy goods and services, but do not have to buy goods or services solely from their employer. Thus, unlike most H-2A workers, AWPA workers are not entitled to receive “tools, supplies, and equipment” necessary to perform the job. Here, H-2A workers have the advantage.

### *3. Guarantee of Work*

Also, the employer must guarantee the H-2A worker employment for “at least three-fourths of the workdays” under the contract.<sup>94</sup> So for example, if the work contract is for 100 workdays, the employer must guarantee the H-2A worker 75 days of work. And if the employer does not provide 75 days of work, the employer must pay the worker wages for 75 days of work.<sup>95</sup> This three-fourths guarantee discourages employers from importing H-2A workers and abandoning them in a country where they are legally prohibited for working for another employer. Unlike H-2A workers, most agricultural and nonagricultural workers receive no such protection, because they have the legal right to seek alternative employment.

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92. 20 C.F.R. § 655.102(b)(3) (2001).

93. *Id.*

94. 20 C.F.R. § 655.102(b)(6) (2001).

95. *Id.*

#### 4. *Minimum Wage*

In addition, the regulations state that H-2A workers must receive the Adverse Effect Wage Rate (AEWR).<sup>96</sup> The AEWR for H-2A agricultural workers “shall be equal to the annual weighted average hourly rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey,” in effect, a “prevailing wage” standard.<sup>97</sup> If the prevailing wage in an area for a particular occupation is higher than the AEWR, the employer must pay this prevailing wage rate.<sup>98</sup> In addition, the AEWR shall never be below the federal minimum wage.<sup>99</sup> This wage is set high enough so the wages of similarly employed U.S. workers are not adversely affected.<sup>100</sup>

In contrast, AWPA provides no wage guarantee. In fact, many agricultural workers do not even receive minimum wage protections under the FLSA.<sup>101</sup> Thus, H-2A workers, who receive a prevailing wage, have an advantage over most agricultural workers. Moreover, because the prevailing wage is often higher than the minimum wage, H-2A workers receive more protection than many nonagricultural workers.

#### C. *Barriers to H-2A Workers Enforcing their Rights*

On paper, the protections afforded to H-2A workers are generally stronger than those afforded to AWPA workers. However, H-2A workers face greater barriers in enforcing their rights: isolation from local community, the need to pay prior debts, dependence on a single employer, and the fear of retaliation or blacklisting.<sup>102</sup> A 1997 GAO Report noted that the Labor Department received no complaints from H-2A workers in fiscal year 1996, even though GAO’s analysis suggests it is likely that some workers did not receive their guaranteed wages.<sup>103</sup> The Report noted that “[i]n general, [l]abor officials

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96. 20 C.F.R. § 655.107 (2001).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See discussion *supra* Part I.B.2.b (The FLSA created three categories of employees who are excluded from the minimum wage provision).

102. Holley, *supra* note 4, at 595-597.

103. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, H-2A AGRICULTURAL GUESTWORKER PROGRAM—CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS, GAO/HEHS DOC. NO. 98-20 (1997).

reported that it is hard to ensure that abusive employers do not participate in the H-2A program.”<sup>104</sup> The Report found that it is difficult to determine the effectiveness of worker protections in the H-2A program because “H-2A workers may be less aware of U.S. laws and protections than domestic workers and are less likely to file a complaint.”<sup>105</sup> In addition, the Report determined that the Department of Labor’s Wage and Hour Division (WHD) faces inherent obstacles in enforcing current protections when the worker is legally in the country only at the will of the employer and must leave the country shortly after finishing the work contract.<sup>106</sup>

### *1. Lengthy Administrative Process*

The Department of Labor has adopted regulations concerning the complaints of H-2A workers.<sup>107</sup> Yet there are no specific procedures for initiating or investigating complaints. Any person can report a violation. If an H-2A worker makes a complaint, the Labor Department may take whatever investigative or enforcement action it deems appropriate.<sup>108</sup> The Department of Labor can enforce the regulations by denying a labor certificate to the grower, instituting administrative proceedings to enforce contractual obligations, assessing a civil monetary penalty, or petitioning a federal district court for injunctive relief or specific performance.<sup>109</sup> However, there are no timetables or deadlines regarding the Department of Labor’s obligation to act on a complaint.<sup>110</sup> The Department of Labor has no obligation to initiate proceedings in response to a complaint, nor must it notify the worker that it has taken action or has declined to take action in response to the complaint.<sup>111</sup> This is problematic for the H-2A worker, who often has limited time to follow through with any legal action.

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104. *Id.*

105. *Id.*

106. *Id.* (The GAO Report stated, “. . . [b]ecause H-2A workers must leave the country within 10 days of the end of the contract, there is only a small window of opportunity to interview the workers in the United States.”).

107. See 29 C.F.R. 501.5 (2001).

108. Holley, *supra* note 4, at 599.

109. 29 C.F.R. § 501.16(a)-(d) (2001).

110. Holley, *supra* note 4, at 599.

111. *Id.*

## 2. Federal Court Remedies For H-2A Workers

Along with facing weak regulations, H-2A workers do not have the easy access to federal court. Unlike AWPA workers, federal courts have been unwilling to grant subject matter jurisdiction to H-2A workers attempting to enforce their employment contracts. In *Nieto-Santos v. Fletcher Farms*, a group of Mexican H-2A workers filed suit in the United States District Court for the District of Arizona seeking damages for breach of their employment contract.<sup>112</sup> In particular, the workers asserted that Fletcher Farms violated the H-2A regulations by not adhering to the guarantee to provide employment for at least three-fourths of the workdays of the total period of the contract.<sup>113</sup> However, despite the claim asserting a violation of federal regulations, the Ninth Circuit held this claim did not arise under federal law with the meaning of 28 U.S.C. §§ 1331 and 1337.<sup>114</sup> The court noted there was an absence of evidence suggesting that Congress intended to make these contractual rights enforceable in federal court.<sup>115</sup>

To enter federal court, H-2A workers usually must assert an independent ground for federal jurisdiction. The most probable ground is to claim a violation of the minimum wage guarantee provided by the Fair Labor Standards Act that applies to most workers within the United States, including alien workers.<sup>116</sup> For instance, it is possible that improper deductions taken from an H-2A worker's wages will force their wages below the minimum.<sup>117</sup> Diversity jurisdiction is also possible, but will only exist if there are substantial injuries. This is unusual considering the value of the ordinary H-2A contract is far below the federal jurisdictional minimum of \$75,000.

In sum, H-2A workers have much more difficulty entering federal court than most agricultural workers. Some suggest that H-2A workers run a considerable risk of suffering biased treatment in any state court system, particularly in the state trial courts in the rural regions where they are likely to work. Even acknowledging that there is often not a state court bias, this is problematic because it limits the H-2A worker's legal options.

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112. 743 F.2d 638 (9<sup>th</sup> Cir. 1984).

113. *See id.* at 640.

114. *See id.* at 642.

115. *See id.* at 641.

116. Holley, *supra* note 4, at 607.

117. *Id.*

#### IV. H-2A WORKERS WOULD BENEFIT FROM AWWA COVERAGE

##### *A. Flawed Premise for Excluding H-2A Workers From AWWA Coverage*

Because Congress believed that H-2 workers were already provided adequate protections, it expressly excluded H-2 workers from coverage under AWWA. On their face, H-2A regulations provide workers with substantive protections. Nevertheless, H-2A workers face serious enforcement barriers. Thus, the protection currently afforded to H-2A workers is not a sound reason for excluding these workers from AWWA coverage. By amending AWWA to cover H-2A workers, Congress would enable H-2A workers to better enforce the protections that already exist. Moreover, H-2A workers would benefit from some of the additional protections currently afforded to AWWA workers.

##### *B. How AWWA Protections Would Assist H-2A Workers*

###### *1. AWWA Enforcement Measures Would Benefit H-2A Workers*

If H-2A workers were covered by AWWA, they would have the option of filing suit in federal court for any violation of their rights under AWWA, regardless of the amount in controversy. This may eliminate the potential bias they might experience if forced to litigate at the state court level. Moreover, if agricultural employers faced the possibility of additional damage pay-outs, along with possible criminal sanctions, employers would be less likely to mistreat H-2A workers.

###### *2. The Initial Disclosure Requirements Would Help H-2A Workers*

Under the regulations, the employer must provide the H-2A worker with a copy of the employment contract “no later than on the date the work commences.”<sup>118</sup> So, in many instances, H-2A workers do not know the exact terms and conditions of the contract until they are in the United States and about to start work. However, under the AWWA, the employer, agricultural association, or farm labor contractor must disclose to the agricultural worker *at the time of*

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118. 20 C.F.R. § 655.102(b)(14) (2001) (“In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and application for temporary alien agricultural labor certification shall be the work contract.”).

*recruitment* the terms and conditions of employment.<sup>119</sup> Therefore, if H-2A workers were protected under AWPAs, they would be provided with the exact terms and conditions of their employment at the time of recruitment (in their home countries). As a result, they would have the opportunity to fully understand the contract before they spent time and money traveling to the United States. Moreover, because they would have additional time to peruse the agreement, they might be more likely to point out unsatisfactory terms. In sum, this AWPAs provision would better enable H-2A workers to enforce their contractual rights.

### 3. *AWPA's Anti-Retaliation Provision Would Assist H-2A Workers*

Under AWPAs, § 1855 provides that “[n]o person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker” if the worker has filed a complaint under the AWPAs with just cause.<sup>120</sup> Any worker may file a complaint with the Secretary of Labor alleging discrimination within 180 days after discrimination occurs.<sup>121</sup> The Secretary of Labor may investigate this complaint.<sup>122</sup> Upon a finding of discrimination, the Secretary may file suit in federal court.<sup>123</sup> If the court finds discrimination, it may enjoin the employer from further discrimination and order “all appropriate relief, including rehiring or reinstatement of the worker, with back pay, or damages.”<sup>124</sup>

This type of retaliation provision, however, is not provided under the H-2A regulations. Yet, there have been many reports that H-2A workers have been blacklisted for making complaints.<sup>125</sup> If protected by AWPAs, H-2A workers might feel more comfortable complaining about abusive conditions. For example, if an employer failed to pay the appropriate wages when due in violation of § 1822 of AWPAs, the H-2A worker could file a complaint in federal or state court. This Anti-discrimination provision under AWPAs would serve as a deterrent against any attempt to blacklist an H-2A worker for filing such a complaint.

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119. 29 U.S.C. § 1821(a) (1998).

120. 29 U.S.C. § 1855 (1998).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. See Leah Beth Ward, *Desperate Harvest: N.C. Growers' Trade in Foreign Farm Workers Draws Scrutiny*, THE CHARLOTTE OBSERVER, Oct. 30, 1999.

*C. Providing H-2A Workers with AWPAs Coverage Would Be Consistent with the Purposes of the AWPAs and the H-2A Program*

The *Migrant and Seasonal Agricultural Worker Protection Act* was designed to “assure necessary protections for migrant and seasonal agricultural workers.”<sup>126</sup> By amending AWPAs to protect H-2A workers, Congress would be assuring better protection for of an additional group of migrant workers. This in no way contradicts the underlying goal of the legislation, which is to protect migrant and seasonal agricultural workers.

The H-2 regulations were designed to provide American growers with an adequate labor supply to harvest their crops and to assure that domestic workers were not undermined by the influx of foreign labor. To encourage growers to hire available domestic worker, the Immigration Naturalization Service (INS) created the three-fourths guarantee and the AEWWR wage to make it costly to hire foreign temporary workers. Yet, because of the lax enforcement of the regulations, it may be cheaper to hire foreign workers. By providing H-2A workers with these stronger protections, H-2A workers would be more likely to receive the higher wages and additional work under the regulations. Thereby, Congress would deter growers from seeking foreign workers over American workers in an attempt to cut labor costs. Again, Congress would be promoting one of the core goals of the regulations.

#### V. CONCLUSION

H-2A workers should not be excluded from AWPAs coverage. By amending AWPAs to cover H-2A workers, Congress would enable H-2A workers to better enforce the protections that already exist. Moreover, H-2A workers would benefit from some of the additional protections currently afforded to agricultural workers under AWPAs. This would promote the underlying purposes of both AWPAs and the H-2A program.

Along with amending AWPAs to cover H-2A workers, Congress should also address legal obstacles that all agricultural works face. As it stands, AWPAs is a relatively weak law. Congress should strongly consider amending AWPAs to create a federal right to

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126. 29 U.S.C § 1801 (1998).

organize for all farm workers based on Section 7 of the National Labor Relations Act. Similar to nonagricultural workers, agricultural workers should have the right under federal law to organize and join a union, a right that nonagricultural workers have had for six decades.

Also, Congress should amend the overtime provision of the FLSA to include agricultural workers. It is inherently unfair that many agricultural laborers work in excess of forty hours per week without receiving overtime wages. Moreover, Congress should consider clarifying the FLSA to ensure that full-time agricultural workers are not excluded from the FLSA minimum wage provisions.



