

AgJOBS: New Solution or New Problem?

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INTRODUCTION: AGJOBS: SOLUTION OR PROBLEM?

Over half of the workers employed on U.S. farms are not authorized to work in the United States. In September 2003, employer and worker advocates in Congress reached a compromise in the Agricultural Job Opportunity, Benefits, and Security Act of 2003 ("AgJOBS") that would give legal resident status to some unauthorized farm workers. In addition, AgJOBS would make it easier for farm employers to recruit additional workers via the H-2A guest worker program.¹ AgJOBS, however, would not change agriculture's dependence on seasonal workers from outside the United States. Past experience reveals that while legalization initially helps some unauthorized farm workers to get out of farm work, the percentage of unauthorized workers may climb again. Although AgJOBS did not pass in 2003 or 2004, similar proposals are sure to arise during the Bush Administration's second term.

A major goal of AgJOBS is to ensure that the workers employed on U.S. farms are legally authorized to work in the United States. Worker advocates hope that legal status will make farm workers more likely to join unions and press for wage increases, and thereby reverse the past decade's slide in farm worker wages and, especially, benefits. Also, farm employers anticipate easier access to legal foreign workers under the revised H-2A program included in AgJOBS.

The goals of AgJOBS are similar to those of the agricultural provisions of the Immigration Reform and Control Act of 1986 ("IRCA"). IRCA also sought to provide farm workers with increased wages and benefits. IRCA's Special Agricultural Worker ("SAW") program legalized 1.2 million foreigners. These newly legalized farm workers were then free to leave the farm work force and work in other industries. Unauthorized immigration continued, however, and led to such a glut of farm workers that the number of union contracts and farm worker wages fell, despite legalization.² Furthermore, the mechanization of sugar cane harvesting in Florida, in response to a dispute over the piece rate wages paid to H-2A cane cutters, added to the glut of available unauthorized workers.³

¹ The H-2A program allows farm employers, for which the U.S. Department of Labor ("DOL") has certified a need for temporary foreign workers, to recruit workers in any country they choose to work on their farms. A description of the H-2A program is available on the U.S. Department of Labor web site at <http://atlas.doleta.gov/foreign/h-2a.asp> (last visited Nov. 9, 2004).

² See generally IMMIGRATION REFORM AND U.S. AGRICULTURE (Univ. of Cal., Div. of Agric. & Natural Resources No. 3358 1995) (Phillip Martin et al., eds., 1995) [hereinafter IMMIGRATION REFORM].

³ See *Florida: Sugar Settles*, 4 RURAL MIGRATION NEWS 4 (Oct. 1998), at http://migration.ucdavis.edu/rmn/more.php?id=314_0_3_0 (last visited Nov. 9, 2004).

Few new farmers, except for tobacco growers in the southeast, obtained legal workers via the revised H-2A guest worker program.⁴ Thus, unauthorized workers were readily available throughout the United States, and they replaced the SAWs who left the farm work force.

This Article asks whether AgJOBS and similar proposals are more likely to provide a new solution or cause new problems in the farm labor market. As with the SAW program fifteen years ago, the answers depend largely on how the proposed program is implemented, how workers and employers respond, and whether unauthorized entry and employment continue. AgJOBS is being touted as a model for earned legalization programs for nonfarm workers in construction, meatpacking, and services. Therefore, it is important to understand how legalization can help individuals, without changing the underlying structure and operation of a labor market that depends on a steady influx of newcomers. There can be significant shares of unauthorized farm workers despite a series of successful legalizations.

I. THE LONG ROAD TO AGJOBS

Agriculture is the nation's oldest industry. The first U.S. census in 1790 reported that ninety percent of the four million U.S. residents lived in rural areas, and most were farmers or farm workers.⁵ Since 1910, the United States Department of Agriculture ("USDA") has tracked employment on farms, distinguishing between operator, family, and hired workers. In recent years, farmers reported that they hired an average of 1.2 million workers during the four quarters in which they report data.⁶ Farm operator and unpaid family worker employment averaged two million, but many operators and family workers also have nonfarm jobs.

Jim Beckley, of River Gold Inc., a Fort Pierce citrus harvesting company, said: "When the state's sugar industry went through legal problems with workers a few years ago, mechanical harvesting caught on real quick. It became cheaper to buy machines. Once that happens in citrus, you won't be able to build the machines fast enough." *September 11 and Farm Workers 2002*, 8 RURAL MIGRATION NEWS 1 (Jan. 2002), at http://migration.ucdavis.edu/rmn/more.php?id=563_0_4_0 (last visited Nov. 9, 2004)

⁴ IMMIGRATION REFORM, *supra* note 2, at 74.

⁵ PHILIP MARTIN, PROMISE UNFULFILLED: UNIONS, IMMIGRATION, AND FARM WORKERS 9-31 (2003).

⁶ These hired farm workers include agricultural service workers, persons brought to farms by labor contractors, and similar persons involved in nonfarm-based operations, such as custom harvesters who move from farm to farm harvesting crops. NATIONAL AGRICULTURAL STATISTICS SERVICE, USDA FARM LABOR SURVEY (Aug. 2004), available at <http://usda.mannlib.cornell.edu/reports/nassr/other/pfl-bb/> (last visited Nov. 4, 2004).

Average employment, however, does not indicate the number of workers employed during the entire year. For example, a worker might be employed on a farm, but not during a particular survey week. In the past, USDA estimated the total number of hired farm workers by attaching questions to the December Current Population Survey ("CPS"), the source of monthly unemployment data.⁷ These questions asked whether anyone in the sample household performed farm work for wages during the preceding twelve months, under the theory that migrants would be "at home" in December. The CPS, which was sent to a random sample of U.S. housing units, found that 2.5 million persons were employed for wages on U.S. farms during a typical year in the 1970s and 1980s. Eight percent of this 2.5 million included "migrants," who are defined as those who crossed U.S. county lines and stayed away from their usual homes overnight in order to perform farm work for wages.⁸

In the early 1980s, immigration reforms, which included sanctions on U.S. employers who knowingly hired unauthorized workers, threatened to curb rising reliance on such workers. The Grand Bargain that became the heart of the Immigration Reform and Control Act of 1986 included employer sanctions to discourage unauthorized entry and employment and provided legalization for unauthorized aliens who had developed an equity stake in the United States.⁹ Western crop farmers strongly opposed this Grand Bargain when the Select Commission on Immigration and Refugee Policy proposed it in 1982.¹⁰ They argued that they had a unique dependence on unauthorized workers. They further contended that the guest worker program available to farmers, known as the H-2 program, was too inflexible for "perishable western agriculture" because it required farmers to ask the U.S. Department of Labor ("DOL") to certify their need for foreign farm workers sixty days before the workers were needed, to provide foreign farm workers with free approved housing, and to meet other criteria. In 1984, in the U.S. House of Representatives, and in 1985, in the U.S. Senate, Western farmers demonstrated that they had the political clout to block immigration

⁷ VICTOR OLIVERA, TRENDS IN THE HIRED FARM WORK FORCE: 1945-87 (U.S. Dep't of Agric. Econ. Research Serv., Agricultural Information Bulletin No. 561, 1989).

⁸ LESLIE A. WHITENER, COUNTING HIRED FARMWORKERS: SOME POINTS TO CONSIDER (U.S. Dep't of Agric. Econ. Research Serv., Agricultural Economic Report No. 524 1984).

⁹ See generally Philip L. Martin & J. Edward Taylor, *The Initial Effects of Immigration Reform on Farm Labor in California*, 9 POPULATION RES. & POL'Y REV. 255, 255-83 (1990).

¹⁰ Philip L. Martin, *Select Commission Suggests Changes in Immigration Policy: A Review Essay*, 105 MONTHLY LAB. REV. at 31-37 (Feb. 1982).

reforms that did not address their concerns.¹¹

A compromise in the summer of 1986, that was later echoed in AgJOBS, allowed IRCA to be enacted. IRCA's Schumer compromise, named for then Representative, now Senator, Charles Schumer (D-NY), allowed unauthorized farm workers who had performed at least ninety days of farm work in 1985-86 to become legal immigrants. This satisfied worker advocates. To satisfy western farmers, however, who were fearful that labor shortages would develop if newly legalized SAW farm workers left farm work quickly, IRCA allowed legal foreign workers to be admitted in two ways. First, it created a revised, more employer friendly H-2A program. Second, it created a new Replenishment Agricultural Worker ("RAW") program. The result should have been a relative increase of legal workers to unauthorized workers employed on U.S. farms.¹²

There were no farm labor shortages in the early 1990s, however, and the RAW program was allowed to expire without ever being used. Instead, continued unauthorized entries led to a surplus of workers and falling wages. The average hourly earnings of farm workers fell relative to average manufacturing wages in the early 1990s, despite a recession and rising health care costs that held nonfarm wages in check (Figure 1).¹³ In 1992, these farm labor market trends prompted the U.S. Commission on Agricultural Workers ("CAW") to conclude that there was "a general oversupply of farm labor nationwide" and, "with fraudulent documents easily available," employer sanctions were not deterring the entry or employment of unauthorized workers.¹⁴ Researchers emphasized that the number of unauthorized workers was rising, wages and benefits were falling, and farm labor contractors were increasing their share of worker-job matches in agriculture.¹⁵

¹¹ Philip L. Martin, *Good Intentions Gone Awry: IRCA and U.S. Agriculture*, 534 ANNALS AM. ACAD. POL. & SOC. SCI. 44, 46 (1994).

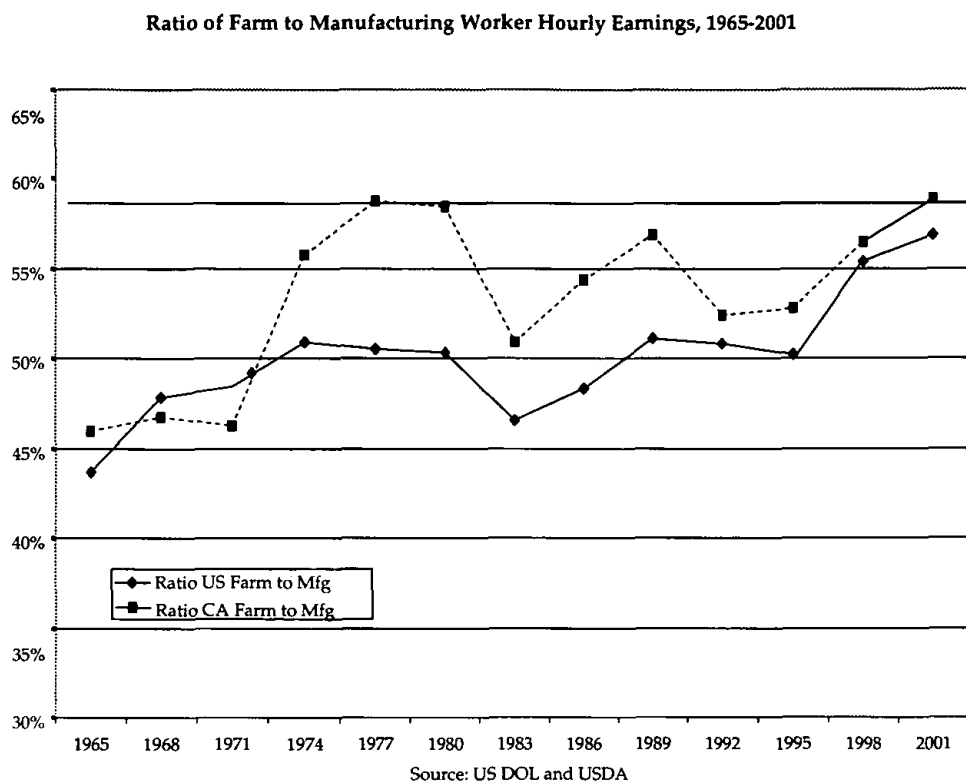
¹² Under the H-2A program, farmers had to attempt to recruit workers under DOL supervision before DOL certified their need for foreign workers. These H-2A workers were tied to their farms by contracts. Under the RAW program, by contrast, a certain number of foreign workers were allowed to "float" from farm to farm, and farmers could simply attest that they needed to hire RAW workers by promising to pay prevailing wages. RAW workers could earn immigrant status by continuing to do farm work.

¹³ Steven Greenhouse, *US Surveys Find Farm Worker Pay Down For 20 Years*, N.Y. TIMES, Mar. 31, 1997, at A1.

¹⁴ U.S. COMM'N ON AGRIC. WORKERS, FINAL REPORT (Government Printing Office, 1992).

¹⁵ See generally IMMIGRATION REFORM, *supra* note 2.

**Figure 1. Ratio of Farm to Manufacturing Hourly Earnings:
1965-2001**



Newly arrived unauthorized foreigners soon became a significant share of the hired farm work force.¹⁶ They were often brought to farms by farm labor contractors who were willing to be “risk absorbers,” absorbing fines that could otherwise be levied on the farms where the workers were employed in the event of immigration enforcement.¹⁷ Legalized SAWs soon recognized that economic mobility would require occupational and often geographic mobility. Many moved to cities to find jobs in services, construction, and manufacturing.¹⁸ In a national survey of farm workers, the SAW share of the U.S. crop work force fell

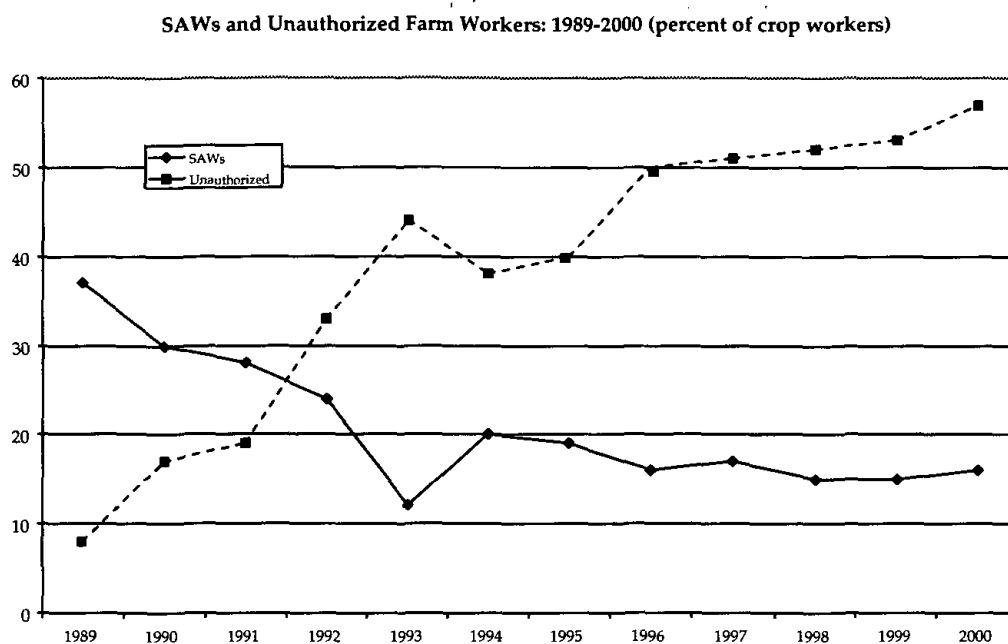
¹⁶ See generally Philip L. Martin, *Immigration and Agriculture: An Endless Debate*, 74 PHI KAPPA PHI J. 23 (1994).

¹⁷ See generally Philip L. Martin & Gregory P. Miller, *Farmers Increase Hiring Through Labor Contractors*, 47 CAL. AGRIC., at 20-23 (July 1993); Dawn Thilmany & Ed Taylor, *Worker Turnover, Farm Labor Contractors and IRCA's Impact on the California Farm Labor Market*, 75 AM. J. OF AGRIC. ECON. 350, 350-60 (1993).

¹⁸ Martin, *supra* note 11, at 47; Edward J. Taylor & Philip L. Martin, *Immigration Reform and U.S. Agriculture*, Third Quarter CHOICES 25, 25-28 (1995).

sharply during the 1990s, and the unauthorized share rose (Figure 2).

Figure 2. SAWs and Unauthorized Crop Workers: 1989-2000



Source: NAWS, <http://www.dol.gov/asp/programs/agworker/naws.htm>

Farmers worried that immigration enforcement could lead to crops rotting in the fields. Therefore, after several ex-administrators of the H-2A program opened labor brokerages and offered, for a fee, to provide them with H-2A workers, farmers in some regions, particularly tobacco growers in the southeastern states, turned to the H-2A program to obtain legal foreign workers. As these brokers expanded in states such as Georgia and North Carolina in the mid-1990s, the number of jobs the DOL certified as needing to be filled with foreign workers began to rise, as seen in Table 1. Also, Mexican workers harvesting tobacco replaced Jamaicans cutting sugar cane as the major group of H-2A workers in the United States.

Table 1. U.S. DOL H-2A Certifications: 1985-2000

	Farm Jobs Certified	Major Commodities		
		Sugarcane	Tobacco	Sheep
1985	20,682	10,017	831	1,433
1986	21,161	10,052	594	1,043
1987	24,532	10,616	1,333	1,639
1988	23,745	10,751	2,795	1,655
1989	26,607	10,610	3,752	1,581
1990	25,412	9,550	4,666	1,677
1991	25,702	7,978	2,257	1,557
1992	18,939	4,271	3,080	1,522
1993	17,000	2,319	3,570	1,111
1994	15,811	1,419	3,720	1,305
1995	15,117		4,116	1,350
1996	19,103		9,756	1,366
1997	23,562		14,483	1,667
1998	34,898		16,984	1,961
1999	41,827		16,206	1,443
2000	44,017		14,554	1,865

Source: U.S. Department of Labor, Employment and Training Administration. Annual Reports.

Farm jobs certified by DOL as needing to be filled with H-2/H-2A workers.

Western growers were still unwilling to undergo DOL-supervised recruitment and to satisfy the housing requirements of the H-2A program.¹⁹ They, therefore, proposed variations of the expired RAW program to obtain legal foreign workers. For example, Representative Bob Smith (R-OR) introduced the Temporary Agricultural Worker Act of 1997. This act would have created an H-2C nonimmigrant worker program as a two-year pilot program "to admit non-immigrants to perform temporary or seasonal agricultural services," with "temporary" defined as "a job intended to last less than 10 months."²⁰ The Smith

¹⁹ Philip Martin & Bert Mason, *Hired Workers on California Farms*, in CALIFORNIA AGRICULTURE, UC-DIVISION OF AGRICULTURAL AND NATURAL RESOURCES 191 (Jerry Siebert ed., 2004).

²⁰ HR 2377, *Other Guest Worker Issues*, 4 RURAL MIGRATION NEWS 1 (Jan. 1998), at http://migration.ucdavis.edu/rmn/more.php?id=256_0_4_0 (last visited Nov. 9, 2004). Smith's bill was a scaled-down version of a 1996 bill introduced by Representative Richard Pombo (R-CA), which would have admitted up to 250,000 nonimmigrant farm workers per year outside the current H-2A program. The House rejected the bill on a 242-180 vote on

proposal would have satisfied a major employer demand: avoiding the requirement of the H-2A program to recruit U.S. workers under the supervision of the U.S. DOL.

There was widespread union, church, and Hispanic advocacy opposition to the Western grower guest worker bills in Congress. The U.S. Commission on Immigration Reform had concluded in June 1995 that, "[A] large-scale agricultural guest worker program. . . is not in the national interest. . . such a program would be a grievous mistake."²¹ President Clinton tried to head off Congressional consideration of guest worker bills by issuing a statement: "I oppose efforts in this Congress to institute a new guestworker or 'bracero' program that seeks to bring thousands of foreign workers into the United States to provide temporary farm labor."²²

Nonetheless, in July 1998, the Senate approved the first version of AgJOBS as Amendment 3258 to the Commerce-Justice-State Department appropriations bill. This version of AgJOBS used a registry rather than a DOL certification procedure. Under this first version of AgJOBS, legally authorized farm workers would have had to register with local Employment Service ("ES") offices and indicate whether they were willing to migrate out of the area for farm jobs. Farm employers would have submitted job offers to the ES registry. The ES, in turn, would have verified that the jobs employers offered paid prevailing wages before listing them. That is, the new registry would have assumed responsibility for: (1) verifying the legal status of farm workers seeking jobs and (2) verifying that employer job offers satisfied the requirements of any new program. Under this proposal, if an employer requested one hundred workers at least twenty-one days before they were needed, and ES had only forty workers registered and willing to go to the employer

March 21, 1996. *Id.*

²¹ U.S. COMM'N ON IMMIGRATION REFORM, LEGAL IMMIGRATION: SETTING PRIORITIES 173 (1995) available at <http://migration.ucdavis.edu/mn/cir/95Report7/pages161-174/page161.htm> (last visited Jan. 11, 2005); see also U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 94-95 (1997). The Commission on Agricultural Workers, in its final report in 1992, also recommended against a new guest worker program. Instead, it made recommendations to stabilize the agricultural work force by improving wages and working conditions to attract and retain farm workers and sustain improvements in productivity. U.S. COMM'N ON IMMIGRATION REFORM, FINAL REPORT 3 (1992).

²² Press Release, White House, [Guest Workers] (June 23, 1995). Clinton's statement continued: "If our crackdown on illegal immigration contributes to labor shortages . . . I will direct the departments of Labor and Agriculture to work cooperatively to improve and enhance existing programs to meet the labor requirements of our vital agricultural industry consistent with our obligations to American workers."

seven days before the need date, the employer would receive a "shortage report" from the registry that would grant permission to bring sixty foreign farm workers into the United States. AgJOBS, however, was removed from the appropriations bill in conference committee, in part because of a threatened presidential veto.²³

During the summer of 1999, growers hired the founding executive director of the National Immigration Forum, a major pro-immigrant group, to create a guest worker compromise proposal. His activities led the Carnegie Endowment to issue a paper that recommended approval of most of the proposals advanced by growers, including eliminating DOL certification of the need for foreign workers through the use of a registry and allowing farm employers to provide housing vouchers to foreign workers instead of providing housing.²⁴ Furthermore, cracks in the once solid alliance of church, worker, and other groups opposed to a new guest worker program reduced resistance to a new guest worker program.

The election of Vicente Fox in Mexico and George W. Bush in the United States changed the dynamics of the guest worker debate. Prior to the elections, worker advocates had shown that they could block grower demands for a new guest worker program that dealt primarily with the concerns of employers. Growers, however, could block efforts to simply legalize unauthorized workers, fearing newly legalized workers would quit farm work and leave them with labor shortages. A compromise between worker and grower representatives, in December 2000, included a new form of earned legalization. Unauthorized workers who performed at least 100 days of farm work would receive temporary legal status.²⁵ Furthermore, they could earn full authorized immigrant status if they continued to do farm work for at least 360 more days over the next six years.²⁶

Worker advocates found the compromise acceptable, because unauthorized workers and their families eventually gained authorized status. Employers also accepted the compromise because experienced farm workers would not leave immediately. Congressional Republicans, however, who opposed "rewarding lawbreakers," led by Senator Phil

²³ *Congress: Guest Workers*, 4 RURAL MIGRATION NEWS 4 (Oct. 1998), at http://migration.ucdavis.edu/rmn/more.php?id=320_0_4_0 (last visited Nov. 18, 2004).

²⁴ *Guest Workers: Advocates Change*, 5 RURAL MIGRATION NEWS 3 (July 1999), at http://migration.ucdavis.edu/rmn/more.php?id=392_0_4_0 (last visited Nov. 18, 2004).

²⁵ *Guest Workers, Braceros*, 7 RURAL MIGRATION NEWS 3 (July 2001), at http://migration.ucdavis.edu/rmn/more.php?id=526_0_4_0 (last visited Jan. 11, 2005).

²⁶ *Id.*

Gramm (R-TX), blocked approval of AgJOBS in the waning days of the Clinton Administration.²⁷

Upon their election, the focus of the farm labor debate shifted from Congress to Presidents Bush and Fox. The Presidents met in February 2001 and established a binational "migration working group" to create "an orderly framework for migration that ensures humane treatment [and] legal security, and dignifies labor conditions."²⁸ Mexican Foreign Minister Jorge Castaneda said, "The final goal is to regularize the situation of those Mexicans who are without documents."²⁹ He went on to say that Mexico's four-pronged immigration agenda included legalization, a guest-worker program, ending border violence, and exempting Mexico from visa quotas, and added, "It's the whole enchilada or nothing."³⁰

During the spring and summer of 2001, Mexican and U.S. officials met to discuss improving conditions for unauthorized Mexicans in the United States, which was Mexico's top foreign policy priority. Several proposals were introduced in Congress to legalize farm and other workers. The debate over the proposals centered largely on whether the United States should grant currently unauthorized workers guest-worker status, a proposal favored by Senator Phil Gramm (R-TX), an immigrant status, as favored by the AFL-CIO and most immigrant organizations, or a temporary resident status that would enable them to eventually "earn" an immigrant status, as proposed in AgJOBS.³¹ Within the grower coalition that supported AgJOBS, an important new player emerged: the American Nursery & Landscape Association, representing over 2200 firms that hire farm workers to grow, sell, and use landscape plants. The September 11, 2001 terrorist attacks stopped the debate over these proposals. While there was debate over the proposals in 2002, no Congressional action was taken.

II. AGJOBS 2003: TRS AND H-2A CHANGES

The AgJOBS proposal introduced by U.S. Senators Edward Kennedy (D-Mass) and Larry Craig (R-Idaho) in September 2003 is considered to

²⁷ Ginger Thompson & Steven Greenhouse, *Mexican 'Guest Workers': A Project Worth a Try?*, N.Y. TIMES, Apr. 3, 2001, at A1.

²⁸ *Guest Workers: Mexico-US Negotiations*, 7 RURAL MIGRATION NEWS 2 (Apr. 2001), at http://migration.ucdavis.edu/rmn/more.php?id=507_0_4_0 (last visited Jan. 11, 2005).

²⁹ *Id.*

³⁰ *Terrorism, Guest Workers*, 7 RURAL MIGRATION NEWS 4 (Oct., 2001), at http://migration.ucdavis.edu/rmn/more.php?id=545_0_4_0 (last visited Jan. 11, 2005).

³¹ *Guest Workers, Braceros*, *supra* note 25.

be the immigration reform legislation with the best chance of enactment. As of September 2004, there were sixty-three Senators and 115 Representatives supporting its enactment. Under AgJOBS, unauthorized foreigners who did the lesser of at least 575 hours or 100 days of farm work (one hour or more constitutes a day of work) in any consecutive 12-month period between March 1, 2002 and August 31, 2003, and who are not disqualified by specified exclusions such as criminal convictions, could receive a six-year Temporary Resident Status ("TRS"). The TRS would grant the right to live and work in the United States to unauthorized foreign workers. Applications for TRS could be filed within the United States or at U.S. ports of entry with Mexico. In addition, to avoid dealing directly with the Department of Homeland Security, unauthorized foreigners could file their applications with Qualified Designated Entities ("QDEs") or licensed attorneys.

TRS workers could earn permanent immigration status by performing at least 2060 hours, or 360 days, of farm work in a six-year period ending in 2009. At least 1380 hours, or 240 work days, must be completed during their first three years and, in at least three of the six years, the farm worker must perform at least seventy-five days of farm work per year. The spouses and minor children of TRS workers would not be deportable if they are in the United States. They would not be allowed to work legally until the TRS worker became an immigrant, however, at which time spouses and minor children could also receive immigrant visas, regardless of queues and waiting lists in the immigration system.

AgJOBS satisfies grower demands by making the H-2A program more "employer-friendly." Instead of having the DOL certify their need for foreign workers, farmers would simply "attest" that they needed foreign workers. DOL would have to approve employer attestations if employers filed their job offers with DOL at least twenty-eight days before workers were needed. In other words, instead of the burden of finding U.S. workers falling on employers, as it does currently under the H-2A certification process, the burden of finding U.S. workers would shift to DOL, which would have to authorize the admission of H-2A workers if local workers were not available at least fourteen days before the farmer-set need date.

Most western growers do not offer housing to the seasonal workers they employ, which is one reason why they find it hard to obtain DOL certification to employ foreign workers under the H-2A program. Under AgJOBS, employers could provide workers with "a monetary housing allowance" if the state's governor certified that "sufficient housing" exists, such that workers could be expected to find their own housing.

The housing allowance would be equivalent to the "statewide average fair market rental for existing housing for metropolitan or nonmetropolitan counties," assuming two persons occupy one bedroom in a two-bedroom unit.³² This means that four workers would be expected to share a two-bedroom unit. Most of California's major farm counties are metro counties, and average rents for two-bedroom units range from \$600 to \$1000 per month, suggesting that housing allowances would be \$150 to \$250 per worker, per month.³³

Under the current H-2A program and under AgJOBS, employers would have to reimburse workers, who complete the season, for inbound and return transportation costs. Workers establish the length of the season when they apply to DOL, and they must guarantee to work for at least three quarters of the season that they specified. If AgJOBS is enacted, worker advocates could use federal, rather than state, courts to enforce foreign worker contracts. Farmers would have to pay foreign H-2A workers the higher of the federal or state minimum wage, the prevailing wage in the occupation and area of intended employment, or the Adverse Effect Wage Rate ("AEWR"), which is a DOL calculated wage for each state to avoid wage depression due to the presence of foreign workers.³⁴ U.S. citizens, legal immigrants, and unauthorized workers may be paid the federal or state minimum wage unless they are working alongside H-2A workers, in which case they must receive the same wages as H-2A workers.

III. HOW MANY WORKERS QUALIFY?

There is no cap on the number of unauthorized foreigners who could qualify for TRS under AgJOBS. It has been speculated, however, that

³² AgJOBS: Round 2, 9 RURAL MIGRATION NEWS 4 (Oct., 2003), at http://migration.ucdavis.edu/rmn/more.php?id=778_0_4_0 (last visited Jan. 11, 2005).

³³ U.S. DEP'T OF HOUSING & URBAN AFFAIRS, FAIR MARKET RENTS FOR SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM (1995) available at <http://www.huduser.org/datasets/fmr/fmrover.doc> (last visited Dec. 23, 2004).

³⁴ The AEWR is a minimum wage set to avoid having the presence of foreign workers depress the wages of U.S. farm workers, as might occur if wages did not rise because foreign workers were readily available. Since 1987, the AEWR has been the average hourly earnings of field and livestock workers in a state or region, as reported to USDA by farm employers four times a year. USDA asks farm employers to report to it the total earnings and total hours worked by nonsupervisory workers during a particular week. USDA then divides earnings by hours worked, and obtains the average hourly earnings figure that becomes the AEWR. In 2004, the AEWR was \$8.50 per hour in California, \$8.18 in Florida, \$8.06 in North Carolina, \$7.73 in Texas, and \$8.73 in Washington. U.S. DEP'T OF LABOR, EMPLOYMENT AND TRAINING DEPARTMENT, NEW H-2A ON-LINE APPLICATION PROCESSING SYSTEM, available at <http://atlas.doleta.gov/foreign/adverse.asp> (last visited Nov. 4, 2004).

500,000 unauthorized foreigners might qualify. One way to estimate the number of unauthorized workers who may qualify for temporary and, eventually, immigrant status under AgJOBS is to combine data from the National Agricultural Workers Survey ("NAWS") and the CPS. The percentage of unauthorized workers who could qualify varies depending on several factors, including type of employer (grower or contractor), commodity, and geography. Labor contractors employ higher percentages of unauthorized workers than growers who hire workers directly. The percentage of unauthorized workers is higher in seasonal fruit and vegetable jobs in the U.S. regions most recent to receive large numbers of immigrants: the South (except for Florida), Midwest, and Northeast.

Table 2 includes three estimates of the number of unauthorized farm workers who could qualify for TRS under AgJOBS. The first column, 58/20, estimates that there are nearly 1.2 million unauthorized foreign farm workers who may qualify because the NAWS found that fifty-eight percent of crop workers were unauthorized in 2001-02. The twenty percent unauthorized livestock workers are based upon my estimates of the most likely unauthorized shares of each labor force. The second column shows that if the unauthorized percentages were higher, if two-thirds of crop workers and one-third of livestock workers were unauthorized, there would be 1.4 million unauthorized U.S. farm workers, the likely upper limit. The third column provides the conservative estimate, showing that if fifty percent of crop workers and ten percent of livestock workers are unauthorized, there would be 1 million unauthorized farm workers who may qualify for TRS.

Table 2. Estimating Unauthorized Farm Workers

How many unauthorized workers?			
Percent unauthorized in crops/livestock	58/20	2/3-1/3	50/10
Hired workers	2,500,000	2,500,000	2,500,000
Crop workers	1,800,000	1,800,000	1,800,000
Percent unauthorized	58	67	50
Number unauthorized	1,044,000	1,200,600	900,000
Livestock workers	700,000	700,000	700,000
Percent unauthorized	20	33	10
Number unauthorized	140,000	233,100	70,000
Total unauthorized	1,184,000	1,433,700	970,000

Source: See text.

IRCA's SAW program limited eligibility to unauthorized foreigners who performed at least ninety days of farm work between May 1, 1985 and May 1, 1986.³⁵ This work requirement was based on CPS data showing that hired workers performed an average of one hundred days of farm work in the early 1980s.³⁶ The NAWS, which interviewed workers at work rather than at home, found that crop workers performed an average of twenty-four to thirty-one weeks of farm work per year in the 1990s, or 120 to 155 days, if they were employed for five-day weeks.³⁷ The NAWS also found that, when grouped by days of farm work during the previous year, legal immigrant workers performed the most days of farm work: 75 percent of legal workers did ninety or more days of farm work. In contrast, only half of unauthorized workers completed ninety or more days of farm work, suggesting that AgJOBS' 100-day work requirement may leave half of the unauthorized work force ineligible for temporary resident status (Table 3).

Table 3. Crop Workers: Number of Days Worked by Legal Status of Workers

Crop Workers: Days Worked by Legal Status				
Percentage of workers who did at least 60, 90, and 120 days of farm work over 12 months, 1993-98				
	60 days	90 days	120 days	Share of Workers 1997-98(%)
All Workers	68	56	47	100
US Citizens	59	47	39	22
1997-98	66	55	45	
Immigrants	84	75	67	24
1997-98	85	75	66	
Unauthorized	65	51	41	52
1997-98	64	50	37	

Source: NAWS Public Use Data, 1993-98³⁸

³⁵ U.S. COMM'N ON AGRIC. WORKERS, FINAL REPORT (Government Printing Office, 1992).

³⁶ LESLIE W. SMITH & ROBERT COLTRANE, HIRED FARMWORKERS: BACKGROUND AND TRENDS FOR THE EIGHTIES (U.S. Dep't. of Agric. Econ. Research Serv., Rural Development Report, 1981).

³⁷ U.S. DEP'T OF LABOR, OFFICE OF THE ASSISTANT SEC'Y FOR POLICY & OFFICE OF PROGRAM ECON., FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 1997-1998: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS, RESEARCH REPORT NO. 8 (2000).

³⁸ *Id.*

IV. OTHER PROPOSALS

In January 2004, President Bush unveiled a Fair and Secure Immigration Reform ("FSIR") proposal that would permit the 6 to 8 million unauthorized foreigners in the United States with jobs, perhaps two-thirds of the total of unauthorized foreigners, to become temporary legal residents. The Bush proposal is not limited to agriculture. As guest workers, the temporary legal residents would be free to travel in and out of the United States, to get social security numbers and driver's licenses, and to apply for immigrant visas.

President Bush has, for several years, advocated a program to "match willing foreign workers with willing U.S. employers when no American can be found to fill those jobs."³⁹ For unauthorized migrants already employed illegally in the United States, this plan would consider the no-available-American-worker requirement already fulfilled. The Bush plan has not been transformed into legislation. It could, however, work as follows: an employer acknowledges in a letter or affidavit the unauthorized worker's employment history. After paying a fee and undergoing a security check, the unauthorized worker then uses the employer letter or affidavit to become a registered guest worker for three years.

The Bush proposal offers no clear path from guest worker to legal immigrant status. Administration officials emphasized that "there is no linkage between participation in this program and a green card. . . one must go home upon conclusion of the program" and then apply for an immigrant visa, perhaps with the support of the U.S. employer.⁴⁰ Bush promised to propose an increase in the number of green cards or immigrant visas available for U.S. employers who cannot find U.S. workers. There still could be, however, long waits for employers seeking immigrant visas for needed foreign workers. For example, if five million unauthorized workers sought an additional 100,000 employment-based immigrant visas a year, it would take fifty years to convert all of them to immigrants.

If currently available unauthorized workers were not sufficient to fulfill employer demands, the Bush proposal would allow U.S. employers to recruit additional foreign workers. After advertising jobs for at least two weeks on a new internet labor exchange and justifying refusing to hire U.S. workers who respond, the employer could go

³⁹ *Bush: Legalization, AgJOBS*, 11 MIGRATION NEWS 1 (Jan. 2004), at http://migration.ucdavis.edu/mn/more.php?id=2967_0_2_0 (last visited Nov. 18, 2004).

⁴⁰ *Id.*

abroad and recruit guest workers who would receive three-year renewable visas like those issued to unauthorized workers in the United States. Guest workers from outside the United States, however, would not have to pay the registration fee of \$1000 to \$2000 charged to unauthorized workers in the United States. Furthermore, registered workers would have a new incentive to return home, according to Bush, because they would earn retirement credits in their home country's pension system for their contributions to U.S. Social Security.

Critics said that Bush's proposal was aimed at winning points with U.S. Hispanics with what he called "a more humane, safe, orderly and legal immigration policy."⁴¹ Furthermore, most U.S. employers welcomed the Bush plan for offering an easier way to obtain guest workers.⁴² Critics, however, seized on the fact that an immigrant visa may not become available within 3, or even 6 years, so that Bush's proposal "is more likely to ensure [the] departure [of unauthorized workers who register] than ensure their permanent residency."⁴³ In addition, there will be long waiting periods before immigration visas become available for unskilled workers sponsored by U.S. employers. Without a 245(i) program, which allows foreigners in the United States to pay a fee and adjust their status within the United States when their greencards become available, some of the workers returning to their countries of origin to get an immigrant visa may be barred from legal re-entry for ten years because they were in the United States illegally.

Democratic Presidential candidate John Kerry, stating that "[i]mmigration is central to our nation's history," supported legalization for unauthorized foreigners who have worked in the United States, paid taxes, and can pass a background check.⁴⁴ The major Democratic proposal in Congress, the Safe, Orderly, Legal Visas and Enforcement Act ("SOLVE"), would legalize unauthorized workers who have been in the United States for at least five years, worked for at least two years, and passed English, background, and medical checks. Those in the United States for less than five years could apply for "transitional status," which is effective for five years. They may thereafter apply for "earned immigrant status."⁴⁵

⁴¹ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Press Release, Kerry Presidential Campaign, Immigration Reform (Aug. 13, 2003), at http://www.johnkerry.com/pdf/pr_2004_0822e.pdf (last visited Dec. 23, 2004).

⁴⁵ Congress: *AgJOBS, Dream, Solve*, 11 MIGRATION NEWS 3 (July 2004), at

CONCLUSION: SOLUTION OR PROBLEM?

If AgJOBS is approved, there is likely to be renewed interest in the farm labor market, as QDEs legalize farm workers and the federal government establishes new procedures to track temporary residents' work and the presence of their family in the United States. However, while AgJOBS could legalize many currently unauthorized workers, it may not stabilize the farm work force because legalized workers most likely would leave farm work as soon as possible and would be replaced by newly arrived unauthorized workers, as occurred after the SAW legalization program. Alternatively, legalized workers could be replaced by guest workers who face new requirements and incentives to depart at the end of their work contracts, which would be a situation similar to the *Bracero* era in which farm workers were not a part of the community in which they worked.

A key issue in implementing AgJOBS will be verifying the work histories provided by applicants for temporary legal status. AgJOBS will require the creation of a database to record the days of farm work completed by temporary workers, the taxes they pay, and crimes they commit.⁴⁶ There was widespread fraud in the SAW program, however, with most applicants submitting one-sentence letters (affidavits), often from contractors, that read: "Jose Gonzalez picked tomatoes for 92 days in 1985-86."⁴⁷ Most applicants provided no proof of their claimed employment in the form of pay stubs, tax, or other records. Furthermore, the SAW program placed the burden on the U.S. government to disprove applicants' information, something the Immigration and Naturalization Service was unable to do in most cases even if, for example, the tomato picking season was less than ninety-two days. Recognizing the potential for fraud, AgJOBS would place the burden on the applicant to demonstrate by a preponderance of the evidence, that the claimed work was performed, which raises the possibility of farmers and worker advocates complaining if the government is too strict, and anti-immigration groups complaining if the government is too generous.

http://migration.ucdavis.edu/mn/more.php?id=3020_0_2_0 (last visited Nov. 18, 2004).

⁴⁶ If AgJOBS is enacted, a new system is to be established to give temporary workers credit for days they did not work in agriculture because of on-the-job injuries or if they were fired without "just cause."

⁴⁷ Philip L. Martin, *The SAW Legalization Program*, in *THE LEGALIZATION COUNTDOWN: A THIRD QUARTER ASSESSMENT* 115, 115-33 (Doris M. Meissner & Demetrious G. Papademetriou eds., 1988).

If AgJOBS is enacted, the farm work force would become even more complex in terms of the legal status of workers, because it would include U.S. citizens, legal immigrants, legal temporary residents earning their way to authorized immigrant status, legal temporary foreign workers, and unauthorized foreigners. This proliferation of legal statuses, and a history of agriculture's willingness to hire workers who present a variety of documents, may work against one of the central goals of AgJOBS: creating a legal farm work force. With or without AgJOBS, most farm workers are likely to be young men from rural Mexico, and future farm workers are likely to continue to be born and raised outside the United States.

Some things, however, may change as a result of AgJOBS. Controversies over the H-2A program may shift from federal government to state governments, as governors come under pressure from farm employers to certify that there is sufficient housing so that employers of legal guest workers may pay a housing allowance rather than provide housing.⁴⁸ Perhaps the most important impact of AgJOBS would be the signal that it sends to farmers, processors, and bankers about the future availability and cost of farm workers: a signal that workers will continue to be available roughly at current costs. In a worst case scenario, if unauthorized workers continue to arrive and find jobs, AgJOBS will improve the lives of some farm workers, but will fail in making fundamental changes in a farm labor market that depends on a continued influx of newcomers from abroad.

⁴⁸ Advocates undoubtedly would cite to statements about the lack of farm worker housing common in state applications for federal housing grants, as well as to farm employer group testimony that they cannot obtain workers via the H-2A program because they do not have acceptable housing.
