IMMIGRATION REFORM — PROVISIONS IN THE PROPOSED IMMIGRATION REFORM AND CONTROL ACT OF 1985 PERMITTING THE USE OF TEMPORARY FOREIGN WORKERS IN THE UNITED STATES — IMPORTING LABOR FROM MEXICO

"[T]he search for perfection leads nowhere. On this problem as on others the best is the enemy of the good."1

The United States Senate on September 19, 1985 passed legislation that would punish employers who hire illegal aliens but at the same time would increase the number of legal nonimmigrant workers available to farmers.2 Many United States farmers depend on illegal alien labor to produce crops.3 The Senate bill and its companion bill, introduced in the House of Representatives on July 25, 1985,4 both contain employer sanctions5 and amnesty provisions6 that would end that source of labor.7

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4 S. 1200, 99th Cong., 1st Sess. § 122, 131 CONG. REC. S11,753 (daily ed. Sept. 19, 1985) [hereinafter cited as Senate Version]. S. 1200 would impose civil fines of up to $10,000 for each violation, as well as criminal fines, on employers who engage in a pattern of hiring illegal aliens. Id. (Part C, 121) House Version, supra note 2, at 8-10. The bill would punish those who transport illegal aliens into the United States with fines and prison sentences of up to one year for first offenders and up to five years for repeated offenders. Id. at 35. S. 1200, 99th Cong., 1st Sess. § 122, 131 CONG. REC. S11,751 (daily ed. Sept. 19, 1985).

5 S. 1200 would legalize aliens who have been in the United States since before January 1, 1980. Legalization would begin three years after enactment, or sooner if a commission determined that employer sanctions and increased border patrols had curbed the flow of illegal aliens into the country. Senate Version, supra note 4 at S11,761 (Title II, 201). H.R. 3080 provides for legalization 180 days after enactment for aliens who have continuously resided in the United States since January 1, 1982. House Version, supra note 2, at 37-38.

6 See 43 CONG. Q., No. 38, at 1859 (Sept. 21, 1985).

If the legislators in joint conference agree to include employer sanctions and an amnesty provision in the compromise version of the bill, they must replace illegal workers with legal ones. Both the Senate and House bills, as introduced, would expand the existing H-2 temporary worker program and make it easier for farmers to follow H-2 procedural requirements. Both would also establish a three-year transitional labor program that would phase out the use of illegal labor. Additionally, the Senate bill would establish a separate program that would allow up to 350,000 nonimmigrants to enter the United States and work in perishable commodity industries.

Farmers argue that importation of inexpensive foreign workers keeps food prices down and allows the production of certain crops to remain in the United States. Moreover, they argue that United States workers generally scorn jobs for which illegal aliens are hired. Advocates of organized labor argue that "it makes no sense to bring additional workers to the United States when there are eight million unemployed [already here]."

I. LEGAL BACKGROUND

The United States has implemented guestworker programs in response to shortages of unskilled labor on two previous occasions. The first such program was contained in the Immigration Act of 1917 (1917 Act). Under the 1917 Act, farmers could contract for

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* 131 CONG. REC. S11,755 (daily ed. Sept. 19, 1985) (§ 122). See 43 CONG. Q., No. 38 at 1859 (Sept. 21, 1985). See infra notes 53-60 and accompanying text; see also infra notes 28 (H-2 workers are aliens admitted temporarily for specific temporary jobs) and 32-41 and accompanying text (H-2 procedural requirements discussed).
11 Infra note 49.
12 Infra note 64.
14 Hewlett, Coping with Illegal Immigrants, 60 FOR. AFFAIRS 358, 368 (1981-82). "[This temporary worker] program was a response to strong pressure from the large agricultural employers of the Southwest who wanted to maintain a cheap labor force." Id. The labor shortage resulted from newly tightened immigration standards and the flow of domestic manpower into the military. Alien workers were restricted to "agricultural pursuits, maintenance of way on railroads, or lignite coal mining." However, within these fields they were
alien workers who would be admitted for up to six months at a time. To prevent adverse effects on domestic workers, the provisions required employers to show that no United States workers were available for the jobs. The 1917 Act also required employers to pay the alien’s return fare to the port of entry so that workers would be more likely to return to their homelands at the end of the employment period. Unfortunately, this requirement encouraged employers purposefully to allow laborers to “desert” upon termination of employment. Additionally, some workers left their assigned jobs for more lucrative industrial jobs. In all, only one-half of the 76,000 temporary Mexican workers admitted under the 1917 Act ever returned to their homeland.

The second guestworker program was implemented in response to the general shortage of manpower during World War II. Known as the bracero program, this legislation was later revised by the Agricultural Act of 1949 (Act of 1949). The revision responded to concerns that the program had failed to protect domestic workers adequately. The Act of 1949 update authorized the Secretary of Labor to recruit and transport Mexican workers to the United States, provided: (1) that sufficient domestic workers were not available, despite reasonable efforts to attract them “at wages and standard hours of work comparable to those offered to foreign workers,” and (2) that the employment of aliens would not adversely affect the wages and working conditions of similarly em-

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16 H.R. Rep. No. 115, Part II, supra note 14. The term could be renewed for an additional six months. Id.

18 Id. Employers were also required to pay workers the prevailing wage and to abide by state or federal labor department standards regarding housing and sanitation. Id.

17 Workers left the farms on which they worked and remained in the United States illegally. Id. This effect was due in part to inadequate enforcement procedures. Id.

18 Hewlett, supra note 14. The program was terminated in 1922 because organized labor contended that it undermined the economic welfare of domestic workers. Id.


20 Id. During its first phase, 1942-47, the program was similar to the World War I program except that it admitted almost four times as many workers. The wartime legislation lapsed in 1947. Between 1948 and July 12, 1951, when the Act of 1949 was signed into law, temporary workers were admitted under the provisions of the 1917 Act. Id. at 21, 22.

21 Id. at 22. In March of 1951, President Truman’s Commission on Migratory Labor issued a report that revealed the adverse effects of the bracero program on domestic farm workers’ wages. It included the diagram below (see Appendix). Migratory Labor in American Agriculture, Report of the President's Commission on Migratory Labor (1951).
ployed domestic agricultural workers. In 1961, the bracero program was again revised. Under the revision, bracero wages were to be no lower than the amount established by the Secretary of Labor as the “adverse effect wage rate.” Despite these revisions, social welfare and labor groups heavily criticized the program, claiming that it decreased job opportunities for domestic farm workers. Congress responded to such criticism by terminating the program in 1964.

Similar European guestworker programs have sometimes developed into de facto immigration programs. They have so developed despite the fact that few of the immigrants involved initially intended a long stay abroad. Moreover, the permanence developed despite explicit policies in some of the host countries to avoid permanent immigration. As a result of the permanence of the migrations, these European programs proved ineffective to fill the long-term demands for labor. As the children of migrant workers were assimilated into the host country, they began to shun the menial

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23 R. Craig, The Bracero Program: Interest Groups and Foreign Policy 177 (1971). In addition, braceros, the workers admitted under the program of the same name, were permitted to remain in the United States for no more than six months (nine months in special circumstances). Occupational insurance benefits for braceros were also increased, and “detailed criteria were included to govern the removal of braceros involved in strikes or lockouts.” Id.
24 H.R. Rep. No. 115, Part II, supra note 14, at 23. In addition, a report issued in 1959 by a committee appointed by the Secretary of Labor criticized the program’s adverse effects on domestic farm laborers. Id. Cf. H.R. 722, 88th Cong., 1st Sess. (1963), reprinted in 1963 U.S. Code Cong. & Ad. News 1143, 1154 (indicates that United States farm wages rose during the years of the bracero program). The bracero program has since been criticized on the grounds that it depressed wage levels and led to the increased illegal immigration that occurred during the years following its conclusion. The program was said to have made guestworkers aware of the wide array of economic opportunities available in the United States. Hewlett, supra note 14, at 368-69. Richard Craig attributes the longevity of the bracero program, opposed by “superior forces representing the general interest,” to the coincidence of the interests of a foreign nation (Mexico) and a vocal domestic minority (farmers). Craig, supra note 23, at 203. According to Craig, the effect of the program was, ironically, to increase the wages of domestic workers. The increases responded to the higher wages given to temporary Mexican workers at the demand of the Mexican government when it signed the agreements authorizing the program. Id. at 200-02. See also Uglow, The Constituencies of the Immigration Bill, 12 Migration Today, No. 2, at 25 (1984).
26 Martin & Seghall, Illegal Immigration: The Guestworker Option, 28 Pub. Pol., No. 2, at 207, 220 (Spring 1980). “[T]he abstract policy of limited duration work permits fell victim to employer requests for extensions (to avoid recruitment and training costs), migrant desires to stay, and the simple humanitarian gesture of not uprooting migrants in order to import replacements simply because their work permits expired.” Id.
jobs once gladly accepted by their parents.27

Currently in the United States, approximately 40,000 temporary workers are admitted each year under the H-2 provision of the Immigration and Nationality Act of 1952 (INA).28 The Attorney General has final authority to decide who is to be admitted, but his decision is usually in accord with the recommendation of the Secretary of Labor.29 Moreover, the Secretary of Labor presently has the authority to issue regulations which govern the current H-2 program.30 Justice Department Immigration and Nationality Service regulations, however, require the Secretary of Labor either: (1) to certify that qualified domestic workers are not available and that the admission of the alien worker will not adversely affect similarly employed United States workers, or (2) to give notice that such certification cannot be made.31

An employer seeking to hire alien laborers under the H-2 program must comply with certain procedural requirements. Department of Labor (DOL) regulations require such employers to submit a request for certification eighty days in advance of the date of need. This provision allows time for a sixty-day recruitment period,32 during which the employer must actively participate with

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27 Thus, as the elder generation retired, new “temporary” migrants had to be brought into the country. *Id.* at 219.
32 Following the recruitment period, 20 days are allowed for the DOL to render its decision. 20 C.F.R. § 655.200. See Pedersen & Dahl, *Alien Farmworkers and United States Immigration and Naturalization Laws*, 4 AGRICULTURAL L.J. 222, 225 (Summer 1982) (the authors point out that farmers must predict their labor needs 80 days in advance under the
the DOL in the recruitment of domestic workers. Typically, the latter requirement is satisfied if the employer: (1) advertises the job in a newspaper or journal appropriate to the occupation, and (2) gives a job order, containing exactly the same offer as will be made to the alien worker, to the Employment Security Agency. Although the recruitment effort is nominally a national one, it is generally aimed, in fact, at those areas which historically provide workers for the occupation involved.

An employer's offer to hire an alien must also comply with various DOL regulations regarding transportation, housing, insurance, cost of meals, supplying of tools, term of employment, record keeping, payroll deductions, and guaranteed number of workdays. The wage offered must equal or exceed the "adverse effect wage rate" established by the Secretary of Labor to prevent foreign workers from underselling domestic ones. Furthermore, no H-2 workers may begin employment during a strike or labor dispute.

When a worker is admitted under the H-2 program, he is closely linked to his employer. The death of an H-2 worker's employer terminates the worker's visa and the alien must then submit a new
visa petition if he desires to begin working for someone else. Each petition is valid for no more than one year, although where the labor certification fails to specify a time period, an alien may extend his stay to three years if he can obtain a new labor certification each year. The current INA provisions make no distinction between agricultural and nonagricultural employment.

II. THE NEW LEGISLATION

The Senate passed immigration bills resembling the new 1985 legislation in each of the previous two sessions of Congress; however, neither of the previous Senate bills contained a separate guestworker program for the perishable commodity industry. In contrast, the House of Representatives passed a bill in 1984 similar to the 1985 Senate bill which did contain a separate guestworker program.

At the joint conference on the Immigration and Reform Act of 1984, members from both houses agreed to eliminate the separate guestworker program contained in the House bill. Disagreements over funding necessary to implement other provisions of the Act prevented passage, however. Additionally, each of the past four administrations has considered revisions of the present H-2 program, but only the Reagan administration has recommended the creation of a guestworker program distinct from the existing H-2 provisions.

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42 O'Neill Blocks Immigration Bill in House, 1983 Cong. Q. Almanac 287.

43 Telephone conversation with staff member of the Senate Subcommittee on Immigration and Refugee Policy, October 1984 [hereinafter cited as Subcommittee on Immigration].


45 The joint conferees, however, were unable to compromise on the issue of who was to pay the implementing costs of the bill. Thus, the legislation commonly known as the Simpson-Mazzoli bill was never passed. The N.Y. Times, Oct. 12, 1984, at A16, col. 2.

46 Semler, Temporary Foreign Labor: The Administration's "Guestworker" Proposal, 15 Clearinghouse Rev. 642-45 (Dec. 1981). The Reagan administration has recommended a pilot program to admit up to 50,000 workers for periods of nine to twelve months. The workers would be targeted to specific areas and categories of jobs and would be barred from
The 1985 Senate and House bills both contain provisions to increase the flow of legal nonimmigrant labor into the United States. Generally, such provisions aid United States farmers and harm domestic labor organizations. The greatest fear of the farmers was that they would have to pay more for labor if sanctions were imposed on employers who hire illegal aliens. Farmers express this fear in terms of increasing food prices and the loss of marginal industries to countries where cheap labor is available. They assert that if enough workers are not available during the harvest season, their crops will simply rot in the fields. Domestic

a category if a state level official certified that there was an adequate supply of United States workers in that category. Workers would be free to change employers but would have no access to welfare, food stamps, or unemployment compensation. Id. Both the Ford and Carter administrations recommended revisions of the existing H-2 program to improve it as a means of addressing temporary labor shortages without adversely affecting United States workers. S. Rep. No. 62, 98th Cong., 1st Sess. 23-26 (1983). Ashton Hart, president of the National Council of Agricultural Employers, argued in congressional hearings that 50,000 temporary workers would not meet agricultural needs. Vialet, supra note 7, at 119.

47 See infra notes 53-60 and accompanying text (discussing how the flow of legal alien labor would be increased).


49 Id.; IRIL, supra note 1, at 460. The National Council of Agricultural Employers stated that it is "very concerned . . . over the effect that employer sanctions may have upon the ability of this nation's farmers to produce food and fiber." Id. "[F]ailure to provide access to an adequate legal workforce would doubtless result in continued use of undocumented workers, which would undermine our overall objective of improved immigration control. Furthermore, failure to provide access to an adequate legal workforce could result in loss of production of some crops to other countries, reducing the nation's self-sufficiency in fresh fruit and vegetable food production and the positive contribution agriculture makes to our balance of payments." Id. at 1227-28 (statement of A. James Barnes, General Counsel, United States Department of Agriculture). See S. Weintraub & S. Ross, The Illegal Alien from Mexico 24 (1980). "[T]he supply of illegals 'may well be providing the margin of survival for entire sectors of the economy' like restaurants, other small businesses, and both small- and large-scale agriculture, that rely heavily on unskilled labor." Id. (quoting an editorial from the Wall St. J., June 18, 1976).

Better public policy might be to allow some of those industries relying on cheap labor for profit to cease to exist or to relocate in other countries. Those industries might then provide capital in the labor sending-countries that would enable them to buy United States goods. In addition, relocated industries in developing countries might increase the number of jobs available in those countries, thus slowing the flow of workers into developed countries. Id. See also Immigration to the United States: Hearings Before the Select Comm. on Population, House of Representatives, 95th Cong., 2d Sess. 58 (1978) (statements of David North and Rep. Scheuer) [hereinafter cited as Population Hearings]; Immigration Reform and Control Act of 1982: Hearings Before the Comm. on Post Office and Civil Service, House of Representatives, 97th Cong., 2d Sess. 65 (1982) [hereinafter cited as Census Hearings]; Gary Hector, The Non-Issue of Immigration, FORTUNE, July 23, 1984, at 92. "It is mostly marginal operators on the sleazy edge of business who depend for profit on the labor of illegal immigrants paid sweatshop wages." Id.

labor organizations, on the other hand, stress that an expanded H-2 program would both take jobs away from United States citizens and depress wages and working conditions of domestic employees.  

The new Senate and House bills both attempt to replace illegal workers with legal ones by expanding and revising the existing H-2 program. The current H-2 provisions allow an alien to come "temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country." The new legislation would limit the search for domestic workers to the time and place the workers were needed. The new language would make it easier for employers to obtain H-2 workers because employers could show that no suitable workers were available in the specific area more

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the Immigration and Nationality Act: Hearing Before the House Subcomm. on Labor Standards of the Comm. on Education and Labor, 98th Cong., 1st Sess. 14 (1983) [hereinafter cited as Labor Hearings]. Violet, supra note 7, at 119 (testimony of Ashton Hart). The argument that a temporary worker program will prevent crops from wasting in the field creates a compelling image. However, it is difficult to believe that farmers would continue to produce crops year after year knowing that there were insufficient workers to harvest them. Thus, relatively little food would be wasted in the long run. Moreover, the Senate program for perishable commodities allows foreign workers to plant and cultivate perishable commodities, not merely to harvest them. See infra note 75.

Judiciary Hearings, supra note 13, at 522. See generally North & Martin, Nonimmigrant Aliens in American Agriculture, Seasonal Agricultural Labor Markets in the United States 185, 186 (R. Emerson, ed. 1984) (discussing the macroeconomic effects of temporary worker programs); Hector, supra note 49, at 92 (quoting Vernon Briggs, a labor economist at Cornell University). "I don't believe there is any foreseeable shortage of unskilled workers in the U.S. If workers aren't available, then the wage rates may go up and others workers will come into the market." Id. U.S. Department of Labor, Special Review Staff, Review of the Rural Manpower Service, mimeographed (Washington, D.C., Apr. 1972), at 58-59, in Sosnick, supra note 35, at 400. A DOL study found that wages offered in areas where foreign workers are utilized were lower than the national average. Id. Some jobs may be created for United States citizens by the presence of a cheap labor force. Population Hearings, supra note 49, at 58-61.


A petition to import an alien as a temporary agricultural worker . . . may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification that —

(A) there are not sufficient eligible individuals who are able, willing, and qualified and who will be available at the time and place needed to perform the services involved in the petition, and

(B) the employment of the alien in such services will not adversely affect the wages and working conditions of the eligible individuals in the United States similarly employed.

easily than they could show that none were available in the entire United States. ⁴

Four other provisions would also make it easier for farmers to obtain H-2 workers. First, the legislation would give final authority for promulgating the regulations that would govern the H-2 program to the Attorney General. ⁵ The Attorney General regulations, as compared with the DOL regulations that currently govern the program, would likely be less biased toward labor interests. ⁶ Second, the new legislation would allow a foreign worker already in the country to remain in the country for brief periods to search for a new job, in the event that he completed the job that he initially had been admitted to perform. ⁷ Third, the new bills would reduce the period employers are required to wait for certification of foreign workers. ⁸ Finally, the 1985 legislation would allow employers to import foreign workers under various seventy-two-hour emergency provisions. ⁹ In some cases these emergency provisions would effectively eliminate the requirement that domestic farmworkers be recruited before foreign workers could be hired. ¹⁰

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⁴ A similar locality test is already set forth at 8 U.S.C. § 1182(a)(14), but that section is subject to the restrictions of § 1101(a)(15)(H)(ii).


⁶ Telephone conversation with staff member of the United States Department of Labor (November 1984) [hereinafter cited as Department of Labor].


⁸ The waiting period would be reduced from 80 to 65 days under the Senate bill. S. 1200, 99th Cong., 1st Sess. § 122, 131 CONG. REC. S11,755 (daily ed. Sept. 19, 1985). The House bill would reduce the waiting period to 60 days. H.R. 3080, 99th Cong., 1st Sess. § 301, at 68. Pugliese, Conversation, supra note 57.


¹⁰ Senate Subcommittee on Immigration, supra note 43. An employer would have been able to obtain certification for alien farmworkers within 72 hours if he could show that he had a need that could not be fulfilled by domestic workers and which could not have been foreseen in light of his historic needs. Id. Employers would also be able to request 72-hour certification in the event that recruited domestic workers did not show up on the date they were to begin work or if the workers proved unqualified for the job. Id. The Secretary of Labor would also have been required to provide an expedited procedure for review of a denial, which would guarantee employers an answer within 72 hours. Id. Finally, employers would have been able to appeal a denial by the Secretary of Labor to the Attorney General. Id. See also Higgins, The Immigration Reform and Control Act H.R. 1510, 12 MIGRATION
Opponents of the expansion of the H-2 program object to its potentially negative effect on domestic farm workers' wages and working conditions. They argue that guestworker programs are "subsidies for U.S. agribusiness at the expense of the country's farm workers." The underlying assumption of this objection is that there are citizens or permanent residents who would accept the jobs if the wages were high enough. However, farmers argue that not enough qualified domestic workers exist who want jobs as migrant stoop laborers despite the fair wages offered.

TODAY, No. 3 at 37 (discussing similar provisions in the 1984 Immigration Reform and Control Act). The 72-hour provisions could lead to less planning by farmers. See Id. (explaining that farmers would tend to forego efforts to plan ahead if they knew they could get the workers they needed by claiming an emergency situation).

61 Judiciary Hearings, supra note 13, at 514-15, 517-20 (discussion of United States labor market conditions between AFL-CIO President Lane Kirkland, and Senator Simpson); Vialet, supra note 7, at 123. "According to Cesar Chavez, the President of the United Farmworkers, AFL-CIO, any temporary worker program, including the existing H-2 program, delays and defeats organizing attempts and thereby harms all agricultural workers." Id. (statement of Stephanie Bower, United Farmworkers).

62 Vialet, supra note 7, at 124 (statement of Jesus Romo, Director, Farmworker Rights Organization). Pedersen & Dahl, supra note 32, at 240, 246. H-2 workers may be cheaper than domestic workers because employers do not have to pay social security, disability, income, and unemployment taxes on H-2 workers under current law. Id.

63 Vialet, supra note 7, at 124. Higher wages would attract rural minority youth and unemployed union workers, among others, into agriculture. See Id. (response of Ms. Bower to a question from Senator Simpson); 129 CONG. REC. S6799 (daily ed. May 17, 1983) (Memorandum from the AFL-CIO); Fauriol, U.S. Immigration Policy and the National Interest, 44 THE HUMANIST, No. 3, at 11 (May/June 1984). A 1979 San Diego County study found that 60% to 80% of illegal immigrants were holding jobs (7% to 8% in agricultural work) that United States workers would accept. “The Illinois Department of Labor had no trouble filling openings left after Immigration and Naturalization Service agents arrested 69 workers earning between $3.50 to $14.00 per hour.” Id.; see also Sosnick, supra note 35, at 394. “Americans have done and continue to do many forms of stoop labor. . . cleaning out sewers and cess pools, digging coal lying on one’s side. . . these and many others are unpleasant forms of work that are performed by men who seek such jobs. . . . It is unlikely that they prefer the work itself, but rather the rewards. . . there is a supply of urban labor that can be drawn into farm labor work. . . . The jobs themselves must be more [financially] rewarding.” Id. (citing Fred H. Schmidt, After the Bracero, mimeographed (Los Angeles: UCLA Institute of Industrial Relations, 1964), at 25, 27, 28, 127, 131). See generally id. at 215-16. Growers may overstate their need for workers, thus protecting themselves against a shortage of hands when the crop is ready to be harvested. Id.; see also North & Martin, supra note 51, at 168-93. The authors suggest that alien labor availability should be made contingent upon unemployment rates in the relevant work force, or alternatively, that there should be a variable tariff on alien workers based upon the rate of unemployment. Id.; Census Hearings, supra note 49, at 49. A list of 14 United States cities and the number of unemployed farm workers in each shows that United States workers are available. Id. (statement of Bert Corona, National Coalition of Latin American Trade Unionists, reading a memorandum prepared by Stephanie Bower, AFL-CIO).

64 Labor Hearings, supra note 50, at 22. “We have recruited thousands of domestic workers for our 200 jobs. However, U.S. workers have rarely worked more than a few days out of
dent of the bracero program points out that it is unfair to require farmers to accept certain domestic workers merely because the workers are unable to perform nonagricultural work satisfactorily.66

In light of these competing arguments, the drafters of the new legislation in both houses sought compromise. Thus, both bills contain provisions designed to protect the jobs of the domestic workers. User fees would increase the cost of hiring alien laborers.66 In addition, employers who do not give preference to United States workers would be excluded from the program for at least one year.67 Finally, monitoring and reporting requirements are designed to detect any adverse effects on domestic workers.68 Together, these provisions might reduce, though not eliminate, the displacement of domestic workers caused by the influx of large numbers of temporary workers.

In addition to expanding and revising the existing H-2 program, legislators hope to provide a sufficient number of workers to farmers through a three-year agricultural labor transitional program.69 During the first year of the program, an agricultural employer

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66 The argument is that domestic workers turn to stoop labor as a last resort. Thus usually only the least qualified workers accept such jobs. R. Hancock, The Role of the Bracero in the Economic and Cultural Dynamics of Mexico, at 128 (Hispanic American Studies, Stanford University, 1959).


could apply to the Attorney General for certification to hire up to 100 percent of "his nondomestic seasonal agricultural need." In the second and third years of the program, the Attorney General would reduce the number of work permits originally granted by one-third the amount of the first-year grant. Only aliens who are already present in the United States would be eligible for certification under the transitional program. As with the H-2 program, aliens would be authorized for admission only to the extent that they would not adversely affect domestic workers' opportunities.

The transitional program may be viewed as a compromise. On the one hand, it recognizes the need to provide more jobs for legal workers, both domestic and nonimmigrant. On the other hand, the program recognizes the need to allow employers and illegal workers sufficient time to adjust to the changes resulting from employer sanctions and the amnesty provision. Under the transitional program, legal workers would replace illegals gradually over a three-year period. The wages and working conditions of legal workers in the United States will likely improve as illegals are excluded from the labor market.

In addition to the revisions of the H-2 program and the transitional program, both contained in the legislation introduced in the House of Representatives, the Senate bill also contains a separate guestworker program that would admit up to 350,000 nonimmigrants at any one time to work in perishable commodity indus-

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70 Supra note 69.
71 Id.
72 Id.
73 Id.
74 See supra notes 51 and 63 and accompanying text. If the new legislation included a transitional program, employer sanctions, and an amnesty provision, without expanding the H-2 program and without adding a separate program for perishable commodity workers, domestic workers would be the primary beneficiaries of the improved working conditions and wages. Other possible results of such legislation would be: increased automation in United States industries, reducing the need for labor; relocation of industry abroad, where cheap labor is available; or the demise of industries dependent on cheap labor for profit. Id. See Protes and Kincaid, Alternative Outcomes on Reform, 22 Society, No. 4, 73, 75 (May-June 1985). Thus, the arguments in favor of legislation with no changes in guestworker provisions other than the addition of a transitional program would be: (1) improved conditions for United States workers; (2) increased efficiency of industry through automation; and (3) more intelligent allocation of domestic resources. The use of large numbers of alien workers in United States industries may be viewed as a distortion of the national economy. Employers reap the benefits of operating in the United States, the use of public services, without fully paying the costs associated with their business activities, that is, without providing jobs to domestic workers.
Each worker would be allowed to remain in the United States for up to nine months in any calendar year and could move freely between employers in a given region as needs change. The seasonal workers would be limited to “planting, cultural practices, production, cultivation, growing, and harvesting involving perishable commodities (as defined by the Secretary of Agriculture).” The Attorney General would establish standards for wages and working conditions to prevent the presence of the foreign workers from adversely affecting domestic workers’ wages and conditions. Employers would pay a sum equivalent to eleven percent of each employee's wages into a trust fund that would be used to administer the program. Workers would have twenty percent of their wages deducted and placed into the trust fund. Workers could reclaim those deductions after they had returned to their homeland, so long as they had complied with the terms and conditions of the program, including the obligation to be continuously employed or seeking employment. The program would automatically terminate after three years unless both houses pass a resolution in support of its continuance.

III. Conclusions

The generous temporary worker provisions in the Senate bill would provide farmers with sufficient numbers of legal foreign workers to replace illegal workers excluded by the provisions punishing employers who hire illegal aliens. The bill would increase the government’s control over the aliens who inevitably enter to work on United States farms. Additionally, it would generate new respect for United States immigration laws by legitimizing the use of foreign workers. Moreover, the legislation would eliminate the need for a farm labor black market since farmers could hire cheap labor legally.

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76 Supra note 75.
77 Id.
78 Id.
79 Id.
80 Id.
81 Id.
82 Fauriol, supra note 63, at 12.
83 Fauriol, supra note 63, at 6.
84 Portes & Kincaid, Alternative Outcomes of Reform, 22 Society, No. 4, 73, 75 (May-June, 1985).
The big winner under the Senate program is the United States farmer. He wins a permanent supply of experienced and inexpensive laborers. But he gains at the expense of domestic workers who will inevitably suffer some erosion of wages and working conditions as foreign competitors enter the labor market. Arguably, the importation of foreign workers will save industries and thus save domestic workers’ jobs as well. However, industries dependent on cheap labor as a source of profit do not always exploit resources wisely. Perhaps more jobs could be created by cutting off the source of cheap labor, thus forcing such inefficient industries to cease operations and encouraging more efficient industries to grow.

Moreover, experience with the bracero program suggests that a large guestworker program will not improve Mexico’s economy in the long run. Likewise, the individual nonimmigrant worker may not gain permanently from a program that raises his expectations without guaranteeing him work every year. Even when he is able to participate in the program, the guestworker is treated unfairly, is under-paid, and is removed from his family for extended periods. Finally, aliens may use an expanded H-2 program as a backdoor to permanent immigration and thus aggravate the problems associated with a large population of immigrants.

The above problems, which are generally associated with large

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85 The temporary workers admitted from abroad would likely be the same individuals previously crossing the border to work illegally before passage of the bill.
86 IRIL, supra note 1, at 529. See Fauriol, supra note 63, at 12. For every one million domestic workers displaced by illegal aliens (or presumably by temporary legal ones) the United States Treasury loses an estimated $7 billion per year in transfer payments. Id.
87 Bean & Sullivan, Confronting the Problem, 22 SOCIETY, No. 4, 67, 71 (May-June, 1985).
88 WEINTRAU & Ross, supra note 49, at 24; see also Census Hearings, supra note 49, at 65; Fauriol, supra note 63, at 6 (citing Garcia, Stopping Illegal Immigration at its Source, Christ. Sci. Mon., Nov. 8, 1982). The author suggests that the best method of controlling illegal immigration into the United States is to improve conditions in the sending countries. This alternative might create political stability in the sending countries and markets for United States goods and services in those countries. Id.
89 Although Mexico received over $100,000,000 per year in wages sent home by workers while the bracero program was in operation, Hancock, supra note 65, at 7, Mexico will likely not benefit from increased economic dependence on the United States. Id. at 76.
91 IRIL, supra note 1, at 1222.
92 Those problems include a permanent class of unskilled, unemployed workers and the growing use of ethnic power blocs in the United States. Fauriol, supra note 63, at 7. See generally R. Weist, MEXICAN FARM LABORERS IN CALIFORNIA: A STUDY OF INTRAGROUP SOCIAL RELATIONS (1977) (discussing conditions among Mexican workers in the United States).
temporary worker programs, should be avoided by limiting the ex-
ansion of the guestworker programs. The best immigration bill
that could emerge from the Ninety-Ninth Congress would seek to
provide farmers with a sufficient number of laborers and limit the
adverse effect of the admission of foreign workers into the United
States upon domestic workers' wages and working conditions.
These goals might be achieved by either: (1) expanding the agricul-
tural portion of the H-2 program and not including a separate pro-
gram for the perishable commodity industry, or (2) maintaining
the present H-2 program and adding the Senate's perishable com-
modity program.

Both alternatives recognize arguments of the farm employer and
the domestic worker. Alien workers would take jobs that domestic
workers prefer to avoid; that is, manual labor jobs on farms. Most
of the foreign workers admitted would not be competing directly
with urban minority workers, who are the most vulnerable to ad-
verse labor conditions.

By providing jobs for foreign workers, this legislation would im-
prove living conditions for hundreds of thousands of deserving in-
dividuals. To the extent that visiting workers save their wages,
they might invest in capital improvements in their homelands,
thereby improving living conditions. The money workers send
home to their families would stimulate the economies of the coun-
tries from which they emigrated. Visiting workers might also re-
turn to their homelands with new skills or agricultural techniques
that might also improve conditions there. Additionally, the pro-
gram would probably improve relations between the United States
and Mexico. Mexico needs jobs for its citizens, and the United
States might obtain improved access to Mexican oil reserves by

88 The House bill would employ this method.
84 Supra note 68.
86 Department of Labor, supra note 56.
89 See generally Hancock, supra note 65, at 122-24. The author argues that temporary
work abroad can make farm workers more self-reliant, give them access to long needed med-
ical attention, and make them more economically ambitious. But the latter, he points out,
might contribute to social unrest upon the workers' return to their homes. Id. See also 154
AMERICA 461 (June 8, 1985) (editorial quoting The Wall Street Journal without identifying
from which issue it takes the quotation).
87 Martin, The Economic Effects of Temporary Worker Migration, 13 MIGRATION TODAY,
21, 26 (May 1985).
88 Id. at 23.
89 Id.
supplying those jobs. Moreover, by providing a safety valve for Mexico's excess supply of workers and by creating a flow of income into that country, the Senate program would promote economic and political stability there.

The expanded H-2 provisions in the House or Senate bill, or the Senate perishable commodity program alone, combined with the existing H-2 nonagricultural provisions, would provide enough legal workers to satisfy the needs of United States employers. In 1984, both houses agreed to eliminate a separate program for the perishable commodity industry from the Immigration Reform and Control Act of 1984. The House should again resist the powerful farm lobby and reject a separate program for the perishable commodity industry on the grounds that it would be duplicative and excessive. The separate Senate program could then be omitted in Joint conference on the legislation.

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APPENDIX

CHANGES IN AVERAGE WAGES FOR COTTON PICKING
War and Post-War Employment of Mexican Contract Labor

Chart VII