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**The Inherent Tension  
Between Design and Practice in the  
H-2A Guestworker Visa Program**

*by Elinor R. Jordan*  
*Michigan State University*

**Occasional Paper No. 74**  
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# **The Inherent Tension Between Design and Practice in the H-2A Guestworker Visa Program**

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## **Abstract**

When formulating farm and immigration policy for the nation, it is vital that lawmakers consider the long-term consequences of the programs they put into place. The H-2A visa program has served to bring numerous temporary workers to the United States to work in agriculture—but at what cost? This article chronicles the experiences of many farmworker advocates regarding a pattern of exclusion of U.S. workers by employers, who seemingly prefer H-2A workers. The article further argues that, particularly in states like Michigan, where a large percentage of seasonal farmworkers travel with their families, overutilization of the H-2A program could undercut efforts to improve labor conditions and strengthen the fabric of farm communities.

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# The Inherent Tension Between Design and Practice in the H-2A Guestworker Visa Program

## I. Introduction

When we think about agriculture in the United States, it is nice to picture a simplistic, pastoral scene of orchards laden with delicious fruits and vegetables. But there is actually very little that is simple about it. The policy that goes into food is riddled with contradiction. This report presents these contradictions as they play out in the visa program for international agricultural workers, known as the H-2A guestworker program.<sup>1</sup> Built on the shaky historical foundations of the *Bracero* Program,<sup>2</sup> section H-2A was meant to keep wages in the agricultural sector from being artificially low due to the availability of undocumented workers who were willing to work for lower wages. Taking into account the complex environment in which the H-2A program and the people within it are operating, this report asserts that the United States Department of Labor (DOL) does not adequately protect the purported fundamentals of the program: goals that would prioritize the protection of U.S. workers and their jobs. As a result, conditions for farmworkers all over the United States are adversely affected. More specifically, this report explores the growing trend of growers utilizing the H-2A program, and what that could mean for the balance of agriculture, particularly in Michigan.

## II. Background

Despite constant urbanization, agriculture continues to be an important part of the U.S. economy. Over two million seasonal workers are required each year in order to hand-harvest various crops that cannot be picked by a machine (Rothenberg, 1998). Although the harvesting process is increasingly mechanized, human labor remains necessary to make decisions—such as whether certain fruits or vegetables are ripe

enough to pick—or to carefully pick and prune the plants. This is highly tactile work that only a person can do well. In Michigan, where agriculture is the second largest industry and contributes \$63.7 billion to the state’s economy, over 45,000 seasonal workers are required to maintain an “adequate” workforce (W. H. Wood, letter to T. Dowd, DOL Employment and Training Administration, April 2008).

### A. Living and Working Conditions for Migrant Farmworkers

Significantly, migrant farmworkers are “our nation’s poorest and most disadvantaged class of laborers” (Rothenberg, 1998, p. xvii). The real wages they are paid have dropped by roughly 25 percent since the early 1980s. To make matters worse, farmworkers are excluded from many of the New Deal measures that protect workers in other industries, such as overtime pay and collective bargaining (Holley, 2001, p. 588). Because of the migratory nature of their work, many farmworker families rarely have the opportunity to settle down, leaving them isolated and disengaged from their communities. This isolation is compounded by the fact that most migrant farmworkers are from different cultural and linguistic backgrounds than the residents of surrounding communities.

Despite such isolation from the rest of society, the migrant farmworker community is known for quick word-of-mouth communication amongst fellow workers. Each state and each region of the country has a unique reputation among farmworkers. For example, Michigan stands out among other receiving states on the migrant stream in that it receives a large number of families. In Michigan, 76.5 percent of migrants and 84.3 percent of seasonal workers are accompanied by non-working family members (Larson, 2006). Many of these families have come to the same location and worked on the same farm for generations. These longer-term relationships differ from migration patterns on the coasts and can foster increased engagement in the seasonal community and more favorable employment relationships (Rothenberg, 1998).

Those farmworkers who are undocumented are the most likely to be threatened, abused, or cheated out of their wages, because they are

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<sup>1</sup> These visas are named H-2A visas after section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act.

<sup>2</sup> The term *bracero* is roughly derived from the Spanish word for arm, “*brazo*,” and means farmhand (Bosworth, 2005).

least likely to speak up for themselves. Documented workers are better able to resist abusive and unfair employer tactics. Thus, one way to ensure at least the minimum worker protections for farmworkers is to strive for a workforce that is entirely or primarily documented and legally working in the United States.<sup>3</sup> In those cases when U.S. citizens, legal permanent residents, or other persons with work authorization (hereinafter referred to collectively as “U.S. workers”) are unavailable to fill agricultural jobs, the H-2A visa program is intended to provide an option for employers to bring in foreign workers.

### **B. History of Guestworker Programs**

In 1942, the Roosevelt administration initiated a Mexican guestworker program in order to avoid labor shortages during World War II. The program, which was part of a treaty with Mexico and consisted of several U.S. policies, was referred to as a whole as the Bracero Program. It peaked at 400,000 Mexican workers (Bosworth, 2005). In order to avoid the displacement of U.S. farmworkers by braceros, the program included several safeguards. First, the employer was to offer domestic workers the same work at the same terms. Second, DOL had to certify that the employer could not get domestic workers for the job before hiring braceros. Finally, the employer had to get DOL approval that the wage being paid to braceros was the “prevailing wage.” Unfortunately, these lofty goals did not generally play out in practice. This was due largely to the fact that statisticians did not come up with a prevailing wage rate, which resulted in depressed wages (Holley, 2001, p. 584).

In turn, braceros became “essentially, part of a captive workforce ... dependent on staying with the employers who sponsored their visas” (Bosworth, 2005, p. 1099). The braceros were subject to severe mistreatment during their employment in the United States. They were carried in cattle cars from Mexico to their work sites and treated like animals. Braceros had no option of returning to Mexico empty-handed

after having borrowed at least a month’s salary in order to come to work in the U.S. One former bracero put it: “as a bracero, you knew you couldn’t complain” (Rothenberg, 1998, p. 37).

Because of the conditions described above, braceros came to be considered more dependable workers by agricultural employers as a whole (Holley, 2001). However, when the cultural pendulum swung against immigration in the 1950s, the government limited the number of braceros allowed into the country. In 1965, public outcry mounted regarding the conditions for braceros, and the program was shut down altogether. But the Bracero Program had encouraged growers to incorporate artificially low wages and poor working conditions into their business model. Thus, “the formal end of the Bracero Program did not eliminate the immigration model that it had created” (Bosworth, 2005, pp. 1101–1102). In fact, many growers continued hiring Mexican and Central American workers after the Bracero Program had been terminated. This led to an increase in undocumented immigration, since bracero visas were no longer available, necessitating a wide amnesty program in 1986, which gave legal status to 1.2 million farmworkers. However, most workers who gained amnesty at that time were no longer young enough to do arduous agricultural work (Holley, 2001). These conditions precipitated the rise of the H-2A visa program.

### **III. Availability of Farm Labor**

Both the media and farm lobbying groups often refer to a labor shortage in the United States that threatens to “leave fruits and vegetables rotting in the fields” (Martin, 2007, p. 1). Leaders in the agricultural industry lobby have stated that, “while farmers are engaged in a continual search to employ domestic labor, that labor is simply not a ‘viable’ alternative” (Ohio Farm Bureau and Ohio Produce Growers and Marketers Association, letter to T. Dowd, DOL Employment and Training Administration, April 14, 2008). However, an investigation by the Center for Immigration Studies found that this conclusion was not founded. In fact, fruit and

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<sup>3</sup> A more profound analysis of the ongoing immigration debate in the United States is beyond the scope of this paper.

vegetable production has risen in recent years, with consumption remaining relatively constant (Martin, 2007).<sup>4</sup>

Claims of a labor shortage seem particularly dubious in a state like Michigan, which is experiencing its highest rates of unemployment in decades. In June 2009, Michigan's unemployment rate was at 15.2 percent (Michigan Department of Labor and Economic Growth, 2009). Furthermore, a 2006 enumeration study put the number of migrant farmworkers in the state at approximately 45,800 (Larson, 2006). That was when the unemployment rate in Michigan was at 6.9 percent (U.S. Bureau of Labor Statistics, 2006). The Michigan Farm Bureau estimates that Michigan farms need about 45,000 workers each year (W. H. Wood, letter to T. Dowd, DOL Employment and Training Administration, April 2008).

Granted, it is possible that some crops have a more significant labor shortage than others. For example, "unemployed domestic workers have expressed ... that they would not want to pick citrus because citrus work is too dangerous and too hard and not worth the pay" (S. Mercado-Spencer, personal interview with author, August 3, 2009). Specific research conducted on a region-by-region, season-by-season basis would be required to speak definitively about the adequacy of labor in the agricultural industry. On the other hand, experience in the coal mining and fishing industries would indicate that hard, dangerous jobs can still be filled by U.S. workers, provided that the pay is sufficient. Based on the history discussed above, it would seem that the Bracero Program created an unsustainable system within the industry: it led agricultural employers to become accustomed to paying below market value for labor. Artificially low wages adversely affect U.S. workers and guestworkers alike.

#### IV. The H-2 Guestworker Program by Design

In 1952, the Immigration and Nationality Act was enacted, creating the H-2 visa program to provide for foreign labor in the event of a labor shortage (Bosworth, 2005). Because it was enacted during the existence of the Bracero Program, the H-2 visa system excluded Mexican workers and was used primarily to bring in Caribbean workers to the East coast in small numbers (Guernsey, 2007). In addition to granting amnesty to some farmworkers through the Special Agricultural Worker provision, the Immigration Reform and Control Act of 1986 established the H-2A program for agricultural workers and the H-2B program for non-agricultural low-skilled workers (Bosworth, 2005).<sup>5</sup>

The H-2A agricultural visa program is currently administered by the DOL and the Department of Justice (Bosworth, 2005). Growers who would like to employ foreign workers can apply to the DOL through the Office of Foreign Labor Certification (OFLC). The program's goals and guidelines mirror those originally laid out for braceros. In order to ensure that the program protects the jobs and wages of U.S. workers, the OFLC reviews applications to determine that there is a certifiable labor shortage—i.e. that there is not an adequate supply of labor in the country "able, willing, and qualified" to perform the work (Immigration and Nationality Act [INA], 2005c). For example, one element of that determination is whether the pay that is offered is the highest of the prevailing wage rate, the Adverse Effect Wage Rate (AEWR), or the federal or state minimum wage (INA, 2005e). The AEWR is the minimum wage which must be offered and paid to U.S. and foreign workers by employers of H-2A visa holders; it is a number that is arrived at through government-provided wage statistics (Office of Foreign Labor Certification, 2009). For the pro-

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<sup>4</sup> This rhetoric has also found its way into political debate. In a 2006 speech before the AFL-CIO, Sen. John McCain offered anyone in the crowd a job picking lettuce in Arizona, saying "you can't do it, my friends" (McCain, 2006).

<sup>5</sup> A more detailed discussion of the H-2B program is outside the scope of this paper, although research in preparation for this paper would indicate that many of the issues faced by H-2A workers are shared by H-2B workers, and that H-2B workers are often misclassified, as they are doing agricultural work. (See, e.g., *Riojas v. Chao*, 2007)

tection of similarly situated agricultural workers, the statute also guarantees housing according to the prevailing practices of the area, workers' compensation insurance, inexpensive meals or an appropriate kitchen for preparing meals, travel costs, that the worker will be paid for at least three-fourths of the contract time, and that the employer is not seeking H-2A workers because of a strike (INA, 2005d). These are the minimum requirements for the OFLC to review an application for H-2A workers.

Given these requirements, it would seem that any profit-minded grower would prefer to recruit U.S. workers, rather than pay foreign workers the same wage and provide for the transportation and administrative fees involved in the H-2A program. In theory, this imposed preference should benefit the farm labor force as a whole, since U.S. citizens are more likely to demand acceptable wages and working conditions. It could also help keep unemployment low, as unskilled laborers who could not find work elsewhere would be able to seek employment in agriculture. Unfortunately, the preferential goal has proven to be little more than just that: a goal that sounds good in theory. The policy laid out in the H-2A statute is inherently contradictory because it attempts to prioritize both the rights of domestic laborers and the needs of a farm labor market that has been kept artificially flexible by braceros and undocumented immigration. In the OFLC certification procedure, the interests of U.S. workers "often give way to those of the agricultural industry" (Guernsey, 2007, p. 291).

## V. The H-2A Program in Practice

### A. Growers' Growing Preference for H-2A Workers

It is impossible to discuss the functioning of the H-2A program without making one thing clear: there is ample evidence that most growers would prefer to hire foreign guestworkers over U.S. workers. The growers' lobby has made clear that its constituents seek a dependable, flexible, adaptable, and responsive workforce (Colorado Farm Bureau, letter to T. Dowd, DOL Employment and Training Administration, April 2008). One rationale given for this preference, a Catch-22 of sorts, is that growers find them-

selves "unknowingly" hiring undocumented workers. When presented with a would-be employee, a grower must follow Form I-9 procedures, which involve asking for documentation, such as a social security card, identification, etc. If this documentation appears valid on its face, the grower must accept it in order to be in compliance with anti-discrimination laws. Thus, a grower may end up hiring a person with false documentation that looks real. Growers have expressed concerns that if some of their workers are undocumented, immigration raids could liquidate their workforce overnight. Therefore, they prefer hiring through the H-2A process (W. H. Wood, letter to T. Dowd, DOL Employment and Training Administration, April 2008).

There are several additional reasons why growers allegedly prefer H-2A workers. The three main reasons are that through the H-2A process an employer can be more specific about what type of worker is preferred, the employer can retain employees through changing seasons, and an H-2A workforce is more dependable and flexible for the grower than a workforce made up of U.S. workers. When hiring H-2A workers, an employer may discriminate based on age, sex, and familial status (Reyes-Gaona v. North Carolina Growers' Association, 2001). Thus, the employer can get a pool of young male workers whose only focus is on work. The employer can house and feed them together, and therefore save money when compared with housing married workers and their families (J. Wedemeyer, personal interview with author, August 10, 2009). As one grower put it:

[t]he [migrants] we have now, they come and work. They do not have kids to pick up from school or take to the doctor. They do not have child support issues. They do not ask to leave early for this and that. They do not call in sick. If you say to them, today we need to work ten hours, they do not say anything. The problems with American workers are endless (United Farm Workers v. Chao, 2009).

Other U.S. industries must cope with employees that "have lives" or export production elsewhere. Farm labor cannot be shipped abroad. But H-2A visas provide a set of workers with very differ-

ent dynamics, creating an uneven playing field for U.S. workers (M. L. Hall, personal interview with author, August 13, 2009).

Retention is an important factor to farm labor employers because the seasons have a tendency to vacillate, and when that happens, a U.S. worker may leave a specific farm to go work where a harvest is booming at that time. Growers state that “the work is arduous, episodic, [and] taxing. ... Within the U.S. economy the pay—while increasing—is relatively low” (Colorado Farm Bureau, letter to T. Dowd, DOL Employment and Training Administration, April 2008). In addition, H-2A workers may come back year after year once the grower has found a group that works well. Turnover is costly in any business, and farm labor employers, like any other group of employers, prefer to have a constant labor force (M. L. Hall, personal interview with author, August 13, 2009). While other industries have dealt with turnover through wage and benefit increases, the H-2A program seems to be one method through which growers are addressing this ever-present issue.

A dependable workforce is not an unreasonable thing to be desired by a grower. Unfortunately, it appears that, much like during the bracero period, “‘dependable’ [is] merely a euphemism for ‘vulnerable,’” that is, workers who do not have the wherewithal to complain (Holley, 2001, p. 585). Like most migrant farmworkers, H-2A workers face cultural and language barriers with their surrounding communities. However, these barriers are exacerbated because the workers actually come from outside the country and are often completely unfamiliar with their surroundings. Thus, H-2A workers are unlikely to seek redress for their work-related problems (A. Vaughn, personal interview with author, August 13, 2009).

More important, an H-2A worker cannot “vote with his feet” by leaving the employer who sponsored his visa and go work for someone else (S. Mercado-Spencer, personal interview with author, August 3, 2009). According to J. Wedemeyer (personal interview with author, August 10, 2009), those who violate their status in this way must return to their country of origin, and they face a five-year bar on their eligibility to work through the H-2A

program. Furthermore, there is intense and well-founded fear among H-2A workers of being reported as slow or ineffective. Growers can enter comments about a worker into a database; these stay with the worker’s file for years to come. This report is referred to as the “poisoned pen,” and the information appears when a worker tries to get a new visa the next year. Such negative comments could be detrimental to their application. Finally, H-2A workers are less likely to collect workers’ compensation funds if they are injured. When employers contest a worker’s claim—if the workers complain at all—the claim is likely to outlast the worker’s visa, and continuing to pursue the claim from Mexico involves complex translation of medical documentation and other cumbersome processes. Thus, H-2A workers wind up effectively incapable of collecting funds for their injuries.

It is evident that the growers’ lobby increasingly prefers the H-2A model. This has been demonstrated recently in two primary ways. First, the number of H-2A workers that were admitted is on the rise; in fact, it nearly doubled between 2007 and 2008. In 2007, 87,316 H-2A workers were admitted, while in 2008 the number was 173,103 (Bureau of National Affairs, 2008). Second, the Farm Bureau mobilized to express this preference by submitting several strongly worded letters to the DOL during its open comments period on the H-2A program. In that process, growers asked for one thing above all: flexibility. To improve the H-2A program, growers sought flexible start dates so that growers don’t have to have workers outside of harvest dates, that growers not be required to provide housing to family members of U.S. workers unless it is the prevailing practice of the grower, and that DOL limit the grounds for grower debarment for abusing the program (W. H. Wood, letter to T. Dowd, DOL Employment and Training Administration, April 2008). The H-2A program is currently quite small, but as it grows its ability to change the face of farm labor in the United States becomes more significant.

## **B. The Experience of U.S. Workers Seeking Would-Be H-2A Jobs**

The law mandates that an employer who seeks foreign guestworkers may only receive



those workers if there is a certifiable labor shortage. Therefore, the statute requires that growers make reasonable assurances that U.S. workers, if found, will be offered at least the same opportunities, wages, benefits, and working conditions as those offered to H-2A workers (INA, 2005a). However, once an employer has made the efforts required to apply for H-2A workers in the first place, receiving those workers becomes their priority, which is in conflict with the statutory mandate that they give domestic workers a fair shot. As a result, the experience of U.S. workers who seek to fill jobs on farms that seek foreign guestworkers provides further evidence of employer preference for foreign workers. This factor has been persistent throughout the evolution of the H-2 and H-2A programs. In fact, a single farmworker advocate was involved in several cases and over one hundred administrative hearings during the 1980s in which U.S. workers were unlawfully denied apple-picking jobs in the mid-Atlantic region (G. Schell, personal interview with author, August 10, 2009).

A sample of cases reflects past experiences and the creative ways in which U.S. workers were dissuaded from seeking positions. In Ackerman v. Mount Lewis Orchards (1982), a Regional Administrator of the U.S. DOL's Employment and Training Services awarded restitution in the amount of \$1,262.40 for wages that should have been paid to a worker who applied, then was given the runaround by an employer who later employed guestworkers. In 1983, a group of U.S. workers of Haitian descent arrived seeking work on a Virginia farm. They were told that they had to work separately from each other and live scattered, far away from one another. They did not accept the employment under those unwelcoming circumstances (Bohlen, 1983). Later, in the case of Bernett v. Hepburn Orchards (1987), a grower was found to be using a ladder test in which applicants had to lift and move a ladder on their own, despite the fact that, in practice, the workers helped one another do this. Most U.S. worker applicants failed the ladder test, while foreign workers tended to pass.

More recently, some U.S. workers have been explicitly told that an employer does not need workers because they “have workers

coming from Mexico” (M. L. Hall, personal interview with author, August 13, 2009). Sometimes, rather than being so specific, employers will simply put obstacles in front of prospective employees. Other workers face discrimination on two different levels; some are dissuaded from applying or going forward with the application process from the outset, while others are fired after being exposed to disparate working conditions from foreign workers. For example, U.S. workers may be told that the work is “too hard,” that the other workers speak Spanish and “they will not know what is going on,” or that the employer has “run out” of applications and they should come back another day (A. Vaughn, personal interview with author, August 13, 2009).

Many advocates indicate that U.S. workers have had difficult encounters with employers. That is, workers are dissuaded from continuing in the application process by employers who repeatedly give them different information about the job, or simply tell them that the employer will be in touch if a job opportunity arises (J. Wedemeyer, personal interview with author, August 10, 2009). One farmworker advocate has had cases where applicants were told, for example, “that ‘there’s no work tomorrow, come back on Friday,’ then on Friday ‘I don’t think I’ll have any work for you until next Wednesday’ or ‘I don’t have any work here, but if you’ll go over to my brother’s farm [forty-five miles away], he’ll have some work for you” (M. L. Hall, personal interview with author, August 13, 2009). For migrant farmworkers who are generally living from paycheck-to-paycheck and cannot afford to continue returning, these tactics effectively stop them from pursuing work at that farm.

The case of Riojas v. Chao (2007) detailed a large number of workers who were exposed to similar treatment. In Riojas, state workforce agencies referred about 720 U.S. workers for H-2A jobs, but “almost all of them were rejected outright or received the ‘runaround.’ The few U.S. workers who were hired suffered abusive treatment and received lower pay and fewer benefits than the H-2A workers.” One farmworker, Bladamir G., and his family, who are involved in the Riojas case, approached a farmer in Texas seeking work, calling the company on

five separate occasions to follow up on the job. On each occasion they were told to wait for a return call. Then the family was told that the job's terms had changed—it would be outdoors picking onions and watermelons and part of the job would be far away from their home where they would have to find their own place to live. They still wanted the job but they were told to call back in three months. Finally, they were told that the family was not going to be hired (Riojas v. Chao, 2007).

When workers are not put off by such ploys, some employers use more abrasive tactics to dissuade them from seeking jobs. One woman's experience is particularly illustrative. When Sabrina Steele sought work at Pope's Plant Farm in Tennessee, she was told that, if hired, she would be expected to work "as many as eighty hours per week." On the contrary, the clearance order for Pope's farms intended for U.S. worker recruitment stated that workers would be expected to work forty hours per week. Steele was also informed that she would be the only "American, English-speaking employee besides the office workers" and that "she would be greatly outnumbered by men" (Steele v. Pope's Plant Farm, 2008). Further, Steele alleged that Pope advised her to consult with her husband before taking the job (Lawinski, 2009).

Many other cases of discrimination like that experienced by Steele have been brought before the Job Service Complaint system of the DOL or through the courts. In the past ten years, at least sixteen such claims have been made through one or both of these mechanisms. These claims are based on rejection of U.S. workers, workers who experienced the tactics described above, and discrimination. All of them describe a recruitment process gone awry (J. Wedemeyer, personal interview with author, August 10, 2009). Importantly, many U.S. workers are unaware of their rights or are so consumed with looking for work that they are not able to register their experiences of discrimination. Thus, the number of claims indicates that there have probably been many more U.S. workers who have had similar experiences but simply have not made a formal complaint about them.

When employers do hire U.S. workers, those workers are often subject to disparate treatment

when compared with their H-2A counterparts, or they are fired shortly after starting for not adhering to a previously undisclosed standard. In one case, workers were being paid a piece rate based on the amount of blueberries they picked each day. However, the guestworkers were allowed to go through the field first while the U.S. workers were forced to pick in fields that had already been picked once (Juana M., personal communication with author, July 2009). Employers have been known to fire workers for "not keeping up with the Mexicans" or for minor infractions which are described as "insubordination" (A. Vaughn, personal interview with author, August 13, 2009).

In Perez-Farias v. Global Horizons, Inc. (2008), two groups of plaintiffs filed claims against a recruitment agency. The first group had been denied employment through discriminatory practices, such as not providing necessary disclosures about the job in Spanish and failure to inform the applicants that there would be transportation to and from work. The second class was either (1) fired based on production standards that they were not advised they would need to adhere to, and of which they were not informed in advance, or (2) forced to leave their work because of inappropriate layoffs and inadequate pay. The court found that the recruitment agency had racially discriminated against the U.S. workers, most of whom were Latino, in favor of Thai H-2A workers.

### **C. The Role of the Department of Labor**

The U.S. DOL Office of Foreign Labor Certification (OFLC) is charged with ensuring that the recruitment process is adhered to in favor of U.S. workers (INA, 2005a&b). According to the regulations, after going through the process described in section IV above, the application must not be certified unless a mandatory recruitment process has taken place. Recruitment is supposed to be undertaken in conjunction with the State Workforce Agency (SWA) (INA, 2005a&f). Remarkably, despite the many complaints, both formal and informal, the DOL approves the importation of 99 percent of the workers requested (Holley, 2001). In testimony before the U.S. House of Representatives, Attorney Javier Riojas stated that:

[e]ach year from 2005–07, the Texas Workforce Commission sent numerous warnings to DOL that the employers were discriminating against U.S. referrals. Finally, in 2007, the DOL required one of the three employers to submit an H-2A application, which the agency approved [for a limited number of workers], despite multiple unlawful rejections of U.S. workers (personal interview with T. S. Labor, May 6, 2008).

Guernsey (2007) reported on the DOL’s administration of the H-2A program, stating “the manner in which the DOL administers the H-2A program does not comply with the program’s statute and regulations.” Guernsey discussed two common themes of questionable determinations by the OFLC regarding adverse effects on the wages and working conditions of U.S. workers. First, the OFLC often fails to adequately assess prevailing wages by overlooking growers’ failure to include piece rate in their applications, and by not acquiring accurate prevailing wage numbers from the SWAs. Second, the OFLC has allowed for a distortion of prevailing working conditions by permitting applications that require a certain production standard in order to be paid the wage promised (Guernsey, 2007). These common shortcomings undercut the OFLC’s ability to uphold the purported goal of the H-2A regulations: to protect U.S. workers from adverse effects.

Some advocates also point out that the cumbersome process at SWAs may also discourage U.S. workers from the application process. S. Mercado-Spencer of Florida Rural Legal Services described a trip to the SWA during which she and her client spent almost two hours filling out the paperwork required to apply for a clearance order job (personal interview with author, August 3, 2009). At first, the attendant at the SWA said that her client would need to come back the next day because she did not have time to fill out the application. It was only after Mercado-Spencer revealed that she was an attorney that the attendant got them the required documents (personal interview with author, August 3, 2009).

#### **D. The Result: The H-2A Program Does Not Accomplish Its Primary Goal**

In sum, there is evidence that employers are discouraging U.S. workers from taking or keeping jobs, and the agency that is supposed to uphold the preference for U.S. workers is failing to effectively do so. As a result of this combination, U.S. workers in agriculture are increasingly being replaced by foreign **guestworkers**. The AEW, meant to be the very minimum that can be offered for jobs that are in the foreign labor recruitment process, winds up being the high end of pay in practice, and most workers are unable to get or keep jobs at that rate. Attorney M. L. Hall of North Carolina Legal Aid states that this is “the dynamic by which what is theoretically supposed to be a floor becomes the ceiling” (personal interview with author, August 13, 2009). Ironically, just as the H2A program’s requirements mirrored those of the Bracero Program, its effect on the status of U.S. farmworkers could also mirror that program’s. If foreign guestworkers, who tend not to enforce their rights, become the norm in American agriculture, worker abuses could increase without control, and both domestic and foreign workers could suffer.

#### **VI. Michigan at a Crossroads**

In his seminal work on migrant farmworkers in the United States, *With These Hands*, D. Rothenberg (1998) shares an interview with K. Dawson, a cucumber grower from Hartford, Michigan. There, Dawson discusses her and her husband Steve’s relationship with a migrant farmworker family named Avila, which has worked on their farm for over twelve years. Dawson notes:

“They usually come about the first of April and stay with us ... until the end of October, when they go back to their home in Texas. They’re a family that has always worked together. The mother and father are our age and they’ve been married the same number of years. They’re just like us except they have more children. ... The Avilas’ main concern is their family and it shows in their children ... [the Avilas’

son] would be the closest thing Steve has to a son.” (Rothenberg, 1998, p. 65)

This narrative represents a pattern that studies have also demonstrated: for decades, Michigan has been a receiving state for migrant farmworker families, the overwhelming majority of whom are legally present and working in the United States (Carroll, 2009).<sup>6</sup> These families are different from the groups of single men—who are more likely to be undocumented—that form the migrant farm labor force in many other states, particularly on the coasts. Because many families are legally present, they are more likely to seek quality working conditions and become more involved in the fabric of their temporary communities. In addition, many different service providers, such as health care providers, local schools, and statewide agencies, provide support to migrant families. Although there are still many obstacles to worker rights and parity between farmworkers and workers in other Michigan industries, this difference in worker identity makes for a more humane environment on Michigan farms. Beyond that, there is an intangible value to preserving family unity that cannot be ignored.

Notably, only 313 foreign workers were brought to Michigan through the H-2A program in 2008 (W. H. Wood, letter to T. Dowd, DOL Employment and Training Administration, April 2008). However, it is a fair assessment that if the H-2A program were to increase drastically in Michigan, the state stands to disturb the current balance of a family-friendly and relatively well protected workforce. A case in point is the state of North Carolina. For almost two decades, it has been the state with the most H-2A workers. Advocates such as M. L. Hall from Legal Aid of North Carolina have found that as foreign guest-worker populations have increased, conditions for workers as a whole have remained stagnant.

Moreover, the shift came at the same time that many farmworkers who received amnesty under the 1986 Immigration Reform and Control Act were becoming legal permanent residents. Advocates speculate that the increase in guestworkers “hastened the exit of these workers from agriculture” (M. L. Hall, personal interview with author, August 13, 2009). Michigan is at a crossroads: it could choose the path of increased H-2A workers and run the risk of recreating the unsustainable legacy of the Bracero Program. Alternatively, it could trod a different path and strengthen its tradition of being a state that is friendly to both families and labor.

## VII. Conclusion

Farmworkers are one of the most marginalized groups in the United States. The abuse of the Bracero Program helped to introduce unsustainably cheap labor to the U.S. agricultural market, and the industry has not been able to break free of the artificially low labor costs that resulted. However, starting in the 1960s, increased regulation and a stronger role for farmworker advocates began to improve the situation for America’s farmworkers. The H-2A program was enacted with the express purpose of protecting the rights of U.S. workers. Unfortunately, the evidence of preference for foreign guestworkers and agency attempts to weaken H-2A regulations represent a counter-current that is eroding the little progress that has been made. Foreign guestworkers brought in through the H-2A program are more likely to accept substandard labor practices; one major reason is because they are tied to one employer. States like Michigan, with a history of attracting good workers through positive efforts to protect workers and their families, have the most to lose should foreign guestworkers become the norm. The H-2A regulations, if properly enforced, can be beneficial to the labor experiences of both domestic and foreign workers. In order to protect the values that Americans and their politicians purport to hold dear, the U.S. Department of Labor should pursue active enforcement of the Foreign Labor Certification process and the gathering of Adverse Effect Wage Rates.

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<sup>6</sup> On the national level, two in five married farm workers live away from their families while they engage in farm work. Half of male farm workers live in situations that are made up exclusively of people unrelated to themselves, while only one in ten women farm workers live solely with unrelated persons (U.S. Department of Labor, 1997).

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