106TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPT. 106–982
Part 1

AGRICULTURAL OPPORTUNITIES ACT

OCTOBER 17, 2000.—Ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4548]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4548) establishing a pilot program creating a system of registries of temporary agricultural workers to provide for a sufficient supply of such workers, to amend the Immigration and Nationality Act to streamline procedures for the temporary admission and extension of stay of nonimmigrant agricultural workers under the pilot program, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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89–006

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Agricultural Opportunities Act".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

SEC. 2. DEFINITIONS.

In this Act:

(1) ADVERSE EFFECT WAGE RATE.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term "adverse effect wage rate" means the rate of pay for an agricultural occupation that is 5 percent above the prevailing rate of pay for that agricultural occupation in an area of intended employment, if the prevailing rate of pay for the occupation is less than the prior year's average hourly earnings of field and livestock workers for the State (or region that includes the State), as determined by the Secretary of Agriculture, provided no adverse effect wage rate shall be more than the prior year's average hourly earnings of field and livestock workers for the State (or region that includes the State), as determined by the Secretary of Agriculture.

(B) EXCEPTION.—If the prevailing rate of pay for an activity is a piece rate, task rate, or group rate, and the average hourly earnings of an employer's workers employed in that activity, taken as a group, are less than the prior year's average hourly earnings of field and livestock workers in the State (or region that includes the State), as determined by the Secretary of Agriculture, the term "adverse effect wage rate" means the prevailing piece rate, task rate, or group rate for the activity plus such an amount as is necessary to increase the average hourly earnings of the employer's workers employed in the activity, taken as a group, by 5 percent, or to the prior's years average hourly earnings for field and livestock workers for the State (or region that includes the State) determined by the Secretary of Agriculture, whichever is less.

(2) AGRICULTURAL EMPLOYMENT.—The term "agricultural employment" means any service or activity that is considered to be agriculture under section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)) or agricultural labor under section 3121(g) of the Internal Revenue Code of 1986. For purposes of this paragraph, agricultural employment in the United States includes, but is not limited to, employment under section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act.

(3) ELIGIBLE.—The term "eligible" means, with respect to employment, an individual who is not an unauthorized alien (as defined in section 274A(h)(3) of the Immigration and Nationality Act (8 U.S.C. 1324a(h)(3)) with respect to that employment.

(4) EMPLOYER.—The term "employer" means any person or entity, including any farm labor contractor and any agricultural association, that employs workers.

(5) H–2C EMPLOYER.—The term "H–2C employer" means an employer who seeks to hire one or more nonimmigrant aliens described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act.

(6) H–2C WORKER.—The term "H–2C worker" means a nonimmigrant described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act.

(7) JOB OPPORTUNITY.—The term "job opportunity" means a specific period of employment provided by an employer to a worker in one or more agricultural activities.

(8) PREVAILING WAGE.—The term "prevailing wage" means with respect to an agricultural activity in an area of intended employment, the rate of wages that includes the 51st percentile of employees in that agricultural activity in the area of intended employment, expressed in terms of the prevailing method of pay for the agricultural activity in the area of intended employment.

(9) REGISTERED WORKER.—The term "registered worker" means an individual whose name appears in a registry.

(10) REGISTRY.—The term "registry" means an agricultural worker registry established under section 101(a).

(11) SECRETARY.—The term "Secretary" means the Secretary of Labor.

(12) UNITED STATES WORKER.—The term "United States worker" means any worker, whether a United States citizen or national, a lawfully admitted permanent resident alien, or any other alien who is authorized to work in the job opportunity within the United States other than an alien admitted pursuant to section 101(a)(15)(H)(ii)(c) or section 218A of the Immigration and Nationality Act, as in effect on the effective date of this Act.

TITLE I—AGRICULTURAL WORKER REGISTRIES

SEC. 101. AGRICULTURAL WORKER REGISTRIES.

(a) ESTABLISHMENT OF REGISTRIES.—

(1) IN GENERAL.—The Secretary shall establish and maintain a system of registries containing a current database of eligible United States workers who seek agricultural employment and the employment status of such workers—

(A) to ensure that eligible United States workers are informed about available agricultural job opportunities and have the right of first refusal for the agricultural jobs available through the registry; and

(B) to provide timely referral of such workers to agricultural job opportunities in the United States.

(2) GEOGRAPHIC COVERAGE.—

(A) SINGLE STATE.—Each registry established under paragraph (1) shall include the job opportunities in a single State, except that, in the case of New England States, 2 or more such States may be represented by a single registry in lieu of multiple registries.

(B) REQUESTS FOR INCLUSION.—Each State having any group of agricultural producers seeking to utilize the registry shall be represented by a registry, except that, in the case of a New England State, the State shall be represented by the registry covering the group of States of which the State is a part.

(3) COMPUTER DATABASE.—The Secretary may establish the registries as part of the computer databases known as "America's Job Bank" and "America's Talent Bank".

(4) RELATION TO PROCESS FOR IMPORTING H–2C WORKERS.—Notwithstanding section 218A of the Immigration and Nationality Act, no petition to import an alien as an H–2C worker may be approved by the Attorney General unless the H–2C employer—

(A) has applied to the Secretary to conduct a search of the registry of the State in which the job opportunities for which H–2C workers are sought are located; and

(B) has received a report or approved application described in section 203(a)(1).

(b) REGISTRATION.—

(1) IN GENERAL.—An eligible individual who seeks employment in agricultural work may apply to be included in the registry for the State in which the individual resides. Such application shall include—

(A) the name and address of the individual;

(B) the period or periods of time (including beginning and ending dates) during which the individual will be available for agricultural work;

(C) the registry or registries on which the individual desires to be included;

(D) the specific qualifications and work experience possessed by the applicant;

(E) the type or types of agricultural work the applicant is willing to perform;

(F) such other information as the applicant wishes to be taken into account in referring the applicant to agricultural job opportunities; and

(G) such other information as may be required by the Secretary.

(2) VALIDATION OF EMPLOYMENT AUTHORIZATION.—No person may be included on any registry unless the Secretary has requested and obtained from the Attorney General a certification that the person is authorized to be employed in the United States.

(3) EMPLOYMENT VERIFICATION SYSTEM.—The Attorney General shall establish a reliable automated employment eligibility verification system to ensure that an employer who hires an H–2C worker does not hire for employment in the United States an unauthorized alien (as defined in section 274A(h)(3) of the Immigration and Nationality Act).

(4) UNITED STATES WORKERS.—United States workers shall have preference in referral by the registry, and may be referred to any job opportunity nationwide for which they are qualified and make a commitment to be available at the time and place needed.

(5) USE OF REGISTRY.—Any United States agricultural employer may use the registry.

(6) DISCRETIONARY USE FOR NEW HIRES.—An agricultural employer may require prospective employees to register with a registry as a means of assuring that its workers are eligible to be employed in the United States.

(7) WORKERS REFERRED TO JOB OPPORTUNITIES.—The name of each registered worker who is referred and accepts employment with an employer shall be classified as inactive on each registry on which the worker is included during the period of employment involved in the job to which the worker was referred, unless the worker reports to the Secretary that the worker is no longer employed and is available for referral to another job opportunity. A registered worker classified as inactive shall not be referred.

(8) REMOVAL OF NAMES FROM A REGISTRY.—The Secretary shall remove from the appropriate registry the name of any registered worker who, on 3 separate occasions within a 3-month period, is referred to a job opportunity pursuant to this section, and who declines such referral or fails to report to work in a timely manner.

(9) VOLUNTARY REMOVAL.—A registered worker may request that the worker's name be removed from a registry.

(10) REMOVAL BY EXPIRATION.—The application of a registered worker shall expire, and the Secretary shall remove the name of such worker from the appropriate registry if the worker has not accepted a job opportunity pursuant to this section within the preceding 12-month period.

(11) REINSTATEMENT.—A worker whose name is removed from a registry pursuant to paragraph (8), (9), or (10) may apply to the Secretary for reinstatement to such registry at any time.

(c) CONFIDENTIALITY OF REGISTRIES.—The Secretary shall maintain the confidentiality of the registries established pursuant to this section, and the information in such registries shall not be used for any purposes other than those authorized in this Act.

(d) ADVERTISING OF REGISTRIES.—The Secretary shall widely disseminate, through advertising and other means, the existence of the registries for the purpose of encouraging eligible United States workers seeking agricultural job opportunities to register. The Secretary shall ensure that the information about the registry is made available to eligible workers through all appropriate means, including appropriate State agencies, groups representing farmworkers, and nongovernmental organizations, and shall ensure that the registry is accessible to growers and farmworkers.

TITLE II—H–2C PROGRAM

SEC. 201. EMPLOYER APPLICATIONS AND ASSURANCES.

(a) APPLICATIONS TO THE SECRETARY.—

(1) IN GENERAL.—Not later than 28 days prior to the date on which an H–2C employer desires to employ an H–2C worker in a temporary or seasonal agricultural job opportunity, the employer shall, before petitioning for the admission of such a worker, apply to the Secretary for the referral of a United States worker or nonimmigrant agricultural worker through a search of the appropriate registry, in accordance with section 202. Such application shall—

(A) describe the nature and location of the work to be performed;

(B) list the anticipated period (expected beginning and ending dates) for which workers will be needed;

(C) indicate the number of job opportunities in which the employer seeks to employ workers from the registry;

(D) describe the bona fide occupational qualifications that must be possessed by a worker to be employed in the job opportunity in question;

(E) describe the wages and other terms and conditions of employment the employer will offer, which shall not be less (and are not required to be more) than those required by this section;

(F) contain the assurances required by subsection (c);

(G) specify the foreign country or region thereof from which alien workers should be admitted in the case of a failure to refer United States workers under this Act; and

(H) be accompanied by the payment of a registry user fee determined under section 304(b)(1)(A) for each job opportunity indicated under subparagraph (C).

(2) APPLICATIONS BY ASSOCIATIONS ON BEHALF OF EMPLOYER MEMBERS.—

(A) IN GENERAL.—An agricultural association may file an application under paragraph (1) for registered workers on behalf of its employer members.

(B) EMPLOYERS.—An application under subparagraph (A) shall cover those employer members of the association that the association certifies in its application have agreed in writing to comply with the requirements of this Act.

(b) AMENDMENT OF APPLICATIONS.—Prior to receiving a referral of workers from a registry, an employer may amend an application under this subsection if the employer's need for workers changes. If an employer makes a material amendment to an application on a date which is later than 28 days prior to the date on which the workers on the amended application are sought to be employed, the Secretary may delay issuance of the report described in section 202(b) by the number of days by which the filing of the amended application is later than 28 days before the date on which the employer desires to employ workers.

(c) ASSURANCES.—The assurances referred to in subsection (a)(1)(F) are the following:

(1) ASSURANCE THAT THE JOB OPPORTUNITY IS NOT A RESULT OF A LABOR DISPUTE.—The employer shall assure that the job opportunity for which the employer requests a registered worker is not vacant because a worker is involved in a strike, lockout, or work stoppage in the course of a labor dispute involving the job opportunity at the place of employment.

(2) ASSURANCE THAT THE JOB OPPORTUNITY IS TEMPORARY OR SEASONAL.—

(A) REQUIRED ASSURANCE.—The employer shall assure that the job opportunity for which the employer requests a registered worker is temporary or seasonal.

(B) SEASONAL BASIS.—For purposes of this Act, labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year.

(C) TEMPORARY BASIS.—For purposes of this Act, a worker is employed on a temporary basis where the employment is intended not to exceed 10 months.

(3) ASSURANCE OF PROVISION OF REQUIRED WAGES AND BENEFITS.—The employer shall assure that the employer will provide the wages and benefits required by subsections (a), (b), and (c) of section 204 to all workers employed in job opportunities for which the employer has applied under subsection (a) and to all other workers in the same occupation at the place of employment, and in no case less than the greater of the hourly wage prescribed under section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)), or the applicable State minimum wage.

(4) ASSURANCE OF EMPLOYMENT.—The employer shall assure that the employer will not refuse to employ qualified individuals referred under section 202,

and will terminate qualified individuals employed pursuant to this Act only for lawful job-related reasons, including lack of work.

(5) ASSURANCE OF COMPLIANCE WITH LABOR LAWS.—

(A) IN GENERAL.—An employer who requests registered workers shall assure that, except as otherwise provided in this Act, the employer will comply with all applicable Federal, State, and local labor laws, including laws affecting migrant and seasonal agricultural workers, with respect to all United States workers and alien workers employed by the employer.

(B) LIMITATIONS.—The disclosure required under section 201(a) of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1821(a)) may be made at any time prior to the time the alien is issued a visa permitting entry into the United States.

(6) ASSURANCE OF ADVERTISING OF THE REGISTRY.—The employer shall assure that, from the day an application for workers is submitted under subsection (a), and continuing throughout the period of employment of any job opportunity for which the employer has applied for a worker from the registry, post in a conspicuous place a poster to be provided by the Secretary advertising the availability of the registry.

(7) ASSURANCE OF ADVERTISING OF JOB OPPORTUNITIES.—The employer shall assure that not later than 14 days after submitting an application to a registry for workers under subsection (a) the employer will advertise the availability of the job opportunities for which the employer is seeking workers from the registry in a publication in the local labor market that is likely to be patronized by potential farmworkers, if any, and refer interested workers to register with the registry.

(8) ASSURANCE OF CONTACTING FORMER WORKERS.—The employer shall assure that the employer has made reasonable efforts through the sending of a letter by United States Postal Service mail, or otherwise, to contact any eligible worker the employer employed during the previous season in the occupation at the place of intended employment for which the employer is applying for registered workers, and has made the availability of the employer's job opportunities in the occupation at the place of intended employment known to such previous worker, unless the worker was terminated from employment by the employer for a lawful job-related reason or abandoned the job before the worker completed the period of employment of the job opportunity for which the worker was hired.

(9) ASSURANCE OF PROVISION OF WORKERS COMPENSATION.—The employer shall assure that if the job opportunity is not covered by the State workers' compensation law, that the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

(10) ASSURANCE OF PAYMENT OF ALIEN EMPLOYMENT USER FEE.—The employer shall assure that if the employer receives a notice of insufficient workers under section 202(c), such employer shall promptly pay the alien employment user fee determined under section 304(b)(1)(B) for each job opportunity to be filled by an eligible alien as required under such section.

(d) WITHDRAWAL OF APPLICATIONS.—

(1) IN GENERAL.—An employer may withdraw an application under subsection (a), except that, if the employer is an agricultural association, the association may withdraw an application under subsection (a) with respect to one or more of its members. To withdraw an application, the employer shall notify the Secretary in writing, and the Secretary shall acknowledge in writing the receipt of such withdrawal notice. An employer who withdraws an application under subsection (a), or on whose behalf an application is withdrawn, is relieved of the obligations undertaken in the application.

(2) LIMITATION.—An application may not be withdrawn while any alien provided status under this Act pursuant to such application is employed by the employer.

(3) OBLIGATIONS UNDER OTHER STATUTES.—Any obligation incurred by an employer under any other law or regulation as a result of recruitment of United States workers under an offer of terms and conditions of employment required as a result of making an application under subsection (a) is unaffected by withdrawal of such application.

(e) REVIEW OF APPLICATION.—

(1) IN GENERAL.—Promptly upon receipt of an application by an employer under subsection (a), the Secretary shall review the application for compliance with the requirements of such subsection.

(2) APPROVAL OF APPLICATIONS.—If the Secretary determines that an application meets the requirements of subsection (a), and the employer is not ineligible to apply under paragraph (2), (3), or (4) of section 301(b), the Secretary shall, not later than 7 days after the receipt of such application, approve the application and so notify the employer.

(3) REJECTION OF APPLICATIONS.—If the Secretary determines that an application fails to meet 1 or more of the requirements of subsection (a), the Secretary, as expeditiously as possible, but in no case later than 7 days after the receipt of such application, shall—

(A) notify the employer of the rejection of the application and the reasons for such rejection, and provide the opportunity for the prompt resubmission of an amended application; and

(B) offer the applicant an opportunity to request an expedited administrative review or a de novo administrative hearing before an administrative law judge of the rejection of the application.

(4) REJECTION FOR PROGRAM VIOLATIONS.—The Secretary shall reject the application of an employer under this section if—

(A) the employer has been determined to be ineligible to employ workers under section 301(b); or

(B) the employer during the previous 2-year period employed H–2C workers or registered workers and the Secretary has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the assurances made with respect to the employment of United States workers or nonimmigrant workers.

No employer may have applications under this section rejected for more than 3 years for any violation described in this paragraph.

SEC. 202. SEARCH OF REGISTRY.

(a) SEARCH PROCESS AND REFERRAL TO THE EMPLOYER.—Upon the approval of an application under section 201(e), the Secretary shall promptly begin a search of the registry of the State (or States) in which the work is to be performed to identify registered United States workers with the qualifications requested by the employer. The Secretary shall contact such qualified registered workers and determine, in each instance, whether the worker is ready, willing, and able to accept the employer's job opportunity and will make the affirmative commitment to work for the employer at the time and place needed. The Secretary shall provide to each worker who commits to work for the employer the employer's name, address, telephone number, the location where the employer has requested that employees report for employment, and a statement disclosing the terms and conditions of employment.

(b) DEADLINE FOR COMPLETING SEARCH PROCESS; REFERRAL OF WORKERS.—As expeditiously as possible, but not later than 7 days before the date on which an employer desires work to begin, the Secretary shall complete the search under subsection (a) and shall transmit to the employer a report containing the name, address, and social security account number of each registered worker who has made the affirmative commitment described in subsection (a) to work for the employer on the date needed, together with sufficient information to enable the employer to establish contact with the worker. The identification of such registered workers in a report shall constitute a referral of workers under this section.

(c) ACCEPTANCE OF REFERRALS.—H–2C employers shall accept all qualified United States worker referrals who make a commitment to report to work at the time and place needed and to complete the full period of employment offered, on the registry of the State in which the intended employment is located, and the immediately contiguous States. An employer shall not be required to accept more referrals than the number of job opportunities for which the employer applied to the registry.

(d) NOTICE OF INSUFFICIENT WORKERS.—If the report provided to the employer under subsection (b) does not include referral of a sufficient number of registered workers to fill all of the employer's job opportunities in the occupation for which the employer applied under section 201(a), the Secretary shall indicate in the report the number of job opportunities for which registered workers could not be referred, and shall promptly transmit a copy of the report to the Attorney General and the Secretary of State, by electronic or other means ensuring next day delivery.

(e) USER FEE FOR CERTIFICATION TO EMPLOY ALIEN WORKERS.—With respect to each job opportunity for which a notice of insufficient workers is made, the Secretary shall require the payment of an alien employment user fee determined under section 304(b)(1)(B).

SEC. 203. ISSUANCE OF VISAS AND ADMISSION OF ALIENS.

(a) IN GENERAL.—

(1) NUMBER OF ADMISSIONS.—Subject to paragraph (2), the Secretary of State shall promptly issue visas to, and the Attorney General shall admit, as nonimmigrant aliens described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act a sufficient number of eligible aliens designated by the employer to fill the job opportunities of the employer—

(A) upon receipt of a copy of the report described in section 202(b);

(B) upon approval of an application (or copy of an application under subsection (b));

(C) upon receipt of the report required by subsection (c)(1)(B); or

(D) upon receipt of a report under subsection (d).

(2) PROCEDURES.—The admission of aliens under paragraph (1) shall be subject to the procedures of section 218A of the Immigration and Nationality Act.

(b) DIRECT APPLICATION UPON FAILURE TO ACT.—

(1) APPLICATION TO THE SECRETARY OF STATE.—If the employer has not received a referral of sufficient workers pursuant to section 202(b) or a report of insufficient workers pursuant to section 202(d), by the date that is 7 days before the date on which the work is anticipated to begin, the employer may submit an application for alien workers directly to the Secretary of State, with a copy of the application provided to the Attorney General, seeking the issuance of visas to and the admission of aliens for employment in the job opportunities for which the employer has not received referral of registered workers. Such an application shall include a copy of the employer's application under section 201(a), together with evidence of its timely submission. The Secretary of State may consult with the Secretary in carrying out this paragraph.

(2) EXPEDITED CONSIDERATION BY SECRETARY OF STATE.—The Secretary of State shall, as expeditiously as possible, but not later than 5 days after the employer files an application under paragraph (1), issue visas to, and the Attorney General shall admit, a sufficient number of eligible aliens designated by the employer to fill the job opportunities for which the employer has applied under that paragraph, if the employer has met the requirements of sections 201 and 202. The employer shall be subject to the alien employment user fee determined under section 304(b)(1)(B) with respect to each job opportunity for which the Secretary of State authorizes the issuance of a visa pursuant to paragraph (2).

(c) REDETERMINATION OF NEED.—

(1) REQUESTS FOR REDETERMINATION.—

(A) IN GENERAL.—An employer may file a request for a redetermination by the Secretary of the employer's need for workers if a worker referred from the registry—

(i) is not at the place of employment on the date of need shown on the application, or the date the work for which the worker is needed has begun, whichever is later;

(ii) is not ready, willing, able, or qualified to perform the work required; or

(iii) abandons the employment or is terminated for a lawful job-related reason.

(B) ADDITIONAL AUTHORIZATION OF ADMISSIONS.—The Secretary shall expeditiously, but in no case later than 72 hours after a redetermination is requested under subparagraph (A), submit a report to the Secretary of State and the Attorney General providing notice of a need for workers under this subsection, if the employer has met the requirements of sections 201 and 202 and the conditions described in subparagraph (A).

(2) JOB-RELATED REQUIREMENTS.—An employer shall not be required to initially employ a worker who fails to meet lawful job-related employment criteria, nor to continue the employment of a worker who fails to meet lawful, job-related standards of conduct and performance, including failure to meet minimum production standards after a 3-day break-in period.

(d) EMERGENCY APPLICATIONS.—Notwithstanding subsections (b) and (c), the Secretary may promptly transmit a report to the Attorney General and Secretary of State providing notice of a need for workers under this subsection for an employer—

(1) who has not employed aliens under this Act in the occupation in question in the prior year's agricultural season;

(2) who faces an unforeseen need for workers (as determined by the Secretary); and

(3) with respect to whom the Secretary cannot refer ready, willing, able and qualified workers from the registry who will commit to be at the employer's place of employment and ready for work within 72 hours or on the date the work for which the worker is needed has begun, whichever is later.

The employer shall be subject to the alien employment user fee determined under section 304(b)(1)(B) with respect to each job opportunity for which a notice of insufficient workers is made pursuant to this subsection.

(e) REGULATIONS.—The Secretary of State shall prescribe regulations to provide for the designation of aliens under this section.

SEC. 204. EMPLOYMENT REQUIREMENTS.

(a) REQUIRED WAGES.—

(1) IN GENERAL.—An employer applying under section 201(a) for workers shall offer to pay, and shall pay, all workers in the occupation or occupations for which the employer has applied for workers from the registry, not less (and is not required to pay more) than the greater of the prevailing wage in the occupation in the area of intended employment or the adverse effect wage rate. No worker shall be paid less than the greater of the hourly wage prescribed under section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)), or the applicable State minimum wage.

(2) PAYMENT OF PREVAILING WAGE DETERMINED BY A STATE EMPLOYMENT SECURITY AGENCY SUFFICIENT.—In complying with paragraph (1), an employer may request and obtain a prevailing wage determination from the State employment security agency. If the employer requests such a determination, and pays the wage required by paragraph (1) based upon such a determination, such payment shall be considered sufficient to meet the requirement of such paragraph.

(3) RELIANCE ON WAGE SURVEY.—In lieu of the procedure of paragraph (2), an employer may rely on other information, such as an employer-generated prevailing wage survey that the Secretary determines meets criteria specified by the Secretary in regulations.

(4) ALTERNATIVE METHODS OF PAYMENT PERMITTED.—

(A) IN GENERAL.—A prevailing wage may be expressed as an hourly wage, a piece rate, a task rate, or other incentive payment method, including a group rate. The requirement to pay at least the prevailing wage in the occupation and area of intended employment does not require an employer to pay by the method of pay in which the prevailing rate is expressed, except that, if the employer adopts a method of pay other than the prevailing rate, the burden of proof is on the employer to demonstrate that the employer's method of pay is designed to produce earnings equivalent to the earnings that would result from payment of the prevailing rate.

(B) COMPLIANCE WHEN PAYING AN INCENTIVE RATE.—In the case of an employer that pays a piece rate or task rate or uses any other incentive payment method, including a group rate, the employer shall be considered to be in compliance with any applicable hourly wage requirement if the average of the hourly earnings of the workers, taken as a group, in the activity for which a piece rate, task rate, or other incentive payment, including a group rate, is paid, for the pay period, is at least equal to the required hourly wage, except that no worker shall be paid less than the hourly wage prescribed under section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or the applicable State minimum wage.

(C) TASK RATE.—For purposes of this paragraph, the term "task rate" means an incentive payment method based on a unit of work performed such that the incentive rate varies with the level of effort required to perform individual units of work.

(D) GROUP RATE.—For purposes of this paragraph, the term "group rate" means an incentive payment method in which the payment is shared among a group of workers working together to perform the task.

(b) REQUIREMENT TO PROVIDE HOUSING.—An employer applying under section 201(a) for workers shall offer to provide, and shall provide, housing to all workers in the occupation or occupations for which the employer has applied for workers from the registry. Such housing shall be provided at no cost to the worker. The housing shall meet Federal, State, and local standards, including Federal standards for temporary labor housing. When it is the prevailing practice in the area and occupation of intended employment to provide family housing, family housing shall be provided to workers with families who request it.

(c) HOUSING ALLOWANCE AS ALTERNATIVE.—

(1) IN GENERAL.—In lieu of offering housing pursuant to subsection (b), the employer may provide a reasonable housing allowance during the 3-year period beginning on the effective date of this Act, if the requirement of paragraph (2) is satisfied or, in the case of a certification under such paragraph that is expired, the requirement of paragraph (3) is satisfied. Upon the request of a worker seeking assistance in locating housing, the employer shall make a good faith effort to assist the worker in identifying and locating housing in the area of in-

tended employment. An employer who offers a housing allowance to a worker, or assists a worker in locating housing which the worker occupies pursuant to this paragraph, shall not be deemed to be a housing provider under section 203 of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1823) solely by virtue of providing such housing allowance.

(2) CERTIFICATION.—The requirement of this paragraph is satisfied if the Governor of the State certifies to the Secretary that there is adequate housing available in an area of intended employment for migrant farmworkers, and nonimmigrant aliens described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act, who are seeking temporary housing while employed at farm work. Such certification shall expire after 3 years unless renewed by the Governor of the State.

(3) EFFECT OF CERTIFICATION.—Notwithstanding the expiration of a certification under paragraph (2) with respect to an area of intended employment, a housing allowance described in paragraph (1) may be offered for up to one year after the date of expiration.

(4) AMOUNT OF ALLOWANCE.—The amount of a housing allowance under this subsection shall be equal to the statewide average fair market rental for existing housing for nonmetropolitan counties for the State in which the employment occurs, as established by the Secretary of Housing and Urban Development pursuant to section 8(c) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)), based on a 2-bedroom dwelling unit and an assumption of 2 persons per bedroom.

(d) REIMBURSEMENT OF TRANSPORTATION.—

(1) TO PLACE OF EMPLOYMENT.—A worker who is referred to a job opportunity under section 202(a), or an alien employed pursuant to this Act, who completes 50 percent of the period of employment of the job opportunity for which the worker was hired, shall be reimbursed by the employer for the cost of the worker's transportation and subsistence from the worker's permanent place of residence (or place of last employment, if the worker traveled from such place) to the place of employment to which the worker was referred under section 202(a).

(2) FROM PLACE OF EMPLOYMENT.—A worker who is referred to a job opportunity under section 202(a), or an alien employed pursuant to this Act, who completes the period of employment for the job opportunity involved, shall be reimbursed by the employer for the cost of the worker's transportation and subsistence from the place of employment to the worker's place of residence, or to the place of next employment, if the worker has contracted with a subsequent employer who has not agreed to provide or pay for the worker's transportation and subsistence to such subsequent employer's place of employment.

(3) LIMITATION.—

(A) AMOUNT OF REIMBURSEMENT.—Except as provided in subparagraph (B), the amount of reimbursement provided under paragraph (1) or (2) to a worker or alien shall not exceed the lesser of—

(i) the actual cost to the worker or alien of the transportation and subsistence involved; or

(ii) the most economical and reasonable common carrier transportation charges and subsistence costs for the distance involved.

(B) DISTANCE TRAVELED.—No reimbursement under paragraph (1) or (2) shall be required if the distance traveled is 100 miles or less, or the worker is not residing in employer-provided housing or housing secured through a housing allowance as provided in subsection (b)(6).

(C) PLACE OF RECRUITMENT.—For the purpose of the reimbursement required under paragraph (1) or (2) to aliens admitted pursuant to this Act, the alien's place of residence shall be deemed to be the place where the alien was issued the visa authorizing admission to the United States or, if no visa was required, the place from which the alien departed the foreign country to travel to the United States.

(e) CONTINUING OBLIGATION TO EMPLOY UNITED STATES WORKERS.—

(1) IN GENERAL.—An employer that applies for registered workers under section 201(a) shall, as a condition for the approval of such application, continue to offer employment to qualified, eligible United States workers who are referred under section 202(b) after the employer receives the report described in section 202(b).

(2) LIMITATION.—An employer shall not be obligated to comply with paragraph (1)—

(A) after 50 percent of the anticipated period of employment shown on the employer's application under section 201(a) has elapsed;

(B) during any period in which the employer is employing no H–2C workers in the occupation for which the United States worker was referred; or

(C) during any period when the Secretary is conducting a search of a registry for workers in the occupation and area of intended employment to which the worker has been referred, or in other occupations in the area of intended employment for which the worker that has been referred is qualified and that offer substantially similar terms and conditions of employment.

(3) REFERRAL OF WORKERS DURING 50-PERCENT PERIOD.—The Secretary shall make all reasonable efforts to place a registered worker in an open job acceptable to the worker, including available jobs not listed on the registry, before referring such worker to an employer for a job opportunity already filled by, or committed to, an alien admitted pursuant to this Act.

(f) GUARANTEED NUMBER OF WORK DAYS.—An employer applying under section 201(a) for workers shall guarantee to offer to all workers in the occupation or occupations for which the employer has applied for workers from the registry at least ¾ of the work days of the total work period specified by the employer, including any extensions. If the employer offers any such worker fewer days, the employer shall pay the worker the amount which the worker would have earned had the worker, in fact, worked for the guaranteed number of days. The employer shall not be liable for payment under this subsection with respect to an alien who the Secretary has certified was displaced due to the employer's obligation under this Act to hire a United States worker.

SEC. 205. PROGRAM FOR THE ADMISSION OF TEMPORARY H–2C WORKERS.

(a) ESTABLISHMENT OF NEW NONIMMIGRANT CATEGORY FOR PILOT PROGRAM AGRICULTURAL WORKERS.—Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)) is amended—

(1) by striking "or (b)" and inserting "(b)"; and

(2) by adding at the end the following:

"or (c) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States pursuant to section 218A to perform such agricultural labor or services of a temporary or seasonal nature;".

(b) NO FAMILY MEMBERS PERMITTED.—Section 101(a)(15)(H) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)) is amended by striking "specified in this paragraph" and inserting "specified in this subparagraph (other than in clause (ii)(c))".

(c) ALTERNATIVE AGRICULTURAL TEMPORARY WORKER PROGRAM.—

(1) IN GENERAL.—The Immigration and Nationality Act is amended by inserting after section 218 the following:

"ALTERNATIVE AGRICULTURAL TEMPORARY WORKER PROGRAM

"SEC. 218A. (a) PROCEDURE FOR ADMISSION OF ALIENS WHO ARE OUTSIDE THE UNITED STATES.—

"(1) CRITERIA FOR ADMISSIBILITY.—

"(A) IN GENERAL.—An alien described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act shall be admissible under this section if the alien is designated pursuant to section 203 of the Agricultural Opportunities Act, otherwise admissible under this Act, and the alien is not ineligible under subparagraph (B) or (C).

"(B) DISQUALIFICATION.—An alien shall be ineligible for admission to the United States or being provided status under this section if the alien has, at any time during the past 5 years—

"(i) violated a material provision of this section, including the requirement to promptly depart the United States when the alien's authorized period of admission under this section has expired; or

"(ii) otherwise violated a term or condition of admission to the United States as a nonimmigrant, including overstaying the period of authorized admission as such a nonimmigrant.

"(C) FOREIGN RESIDENCE REQUIREMENT.—

"(i) IN GENERAL.—No alien admitted as a nonimmigrant under section 101(a)(15)(H)(ii)(c) or acquiring such status after admission shall be eligible to receive another nonimmigrant visa under such section until it is established that the alien—

"(I) departed the United States before the expiration of the alien's authorization to remain in the United States as such a nonimmigrant; and

"(II) has resided and been physically present in the country of the person's nationality or last residence for an aggregate of at least 2 months after the expiration of such authorization.

"(ii) APPEARANCE BEFORE CONSULAR OFFICER.—No alien admitted as a nonimmigrant under section 101(a)(15)(H)(ii)(c) or acquiring such status after admission shall be eligible to apply for another nonimmigrant visa under such section until the alien, at least 2 months after the expiration of the alien's authorization to remain in the United States as such a nonimmigrant—

"(I) appears before a consular officer in the country described in clause (i)(II);

"(II) verifies his or her identity by presenting to the consular officer the identification and employment eligibility document provided under subsection (a)(4); and

"(III) surrenders that document to the consular officer.

"(iii) ENTRY AND EXIT DATA SYSTEM.—After the Attorney General fully implements the integrated entry and exit data system under section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1221 note), no alien admitted as a nonimmigrant under section 101(a)(15)(H)(ii)(c) or acquiring such status after admission shall be eligible to receive another nonimmigrant visa under such section unless the data in such system establish that—

"(I) the requirement of clause (i)(I) has been satisfied;

"(II) at least 2 months have elapsed since the expiration of the alien's authorization to remain in the United States as such a nonimmigrant; and

"(III) during that 2-month period, the alien has not entered or attempted to enter the United States.

"(2) PERIOD OF ADMISSION.—The alien shall be admitted for the period requested by the employer not to exceed 10 months, or the ending date of the anticipated period of employment on the employer's application for registered workers, whichever is less.

"(3) ABANDONMENT OF EMPLOYMENT.—

"(A) IN GENERAL.—An alien admitted or provided status under this section who abandons the employment which was the basis for such admission or status shall be considered to have failed to maintain nonimmigrant status as an alien described in section 101(a)(15)(H)(ii)(c) and shall depart the United States or be subject to removal under section 237(a)(1)(C)(i).

"(B) REPORT BY EMPLOYER.—The employer (or association acting as agent for the employer) shall notify the Attorney General within 7 days of an alien admitted or provided status under this Act pursuant to an application to the Secretary under section 201 of the Agricultural Opportunities Act who prematurely abandons the alien's employment.

"(C) REMOVAL BY THE ATTORNEY GENERAL.—The Attorney General shall promptly remove from the United States aliens admitted pursuant to section 101(a)(15)(H)(ii)(c) who have failed to maintain nonimmigrant status or who have otherwise violated the terms of a visa issued under this title.

"(D) VOLUNTARY TERMINATION.—Notwithstanding the provisions of subparagraph (A), an alien may voluntarily terminate his or her employment if the alien promptly departs the United States upon termination of such employment.

"(E) REPLACEMENT OF ALIEN.—Upon presentation of the notice to the Attorney General required by subparagraph (B), the Secretary of State shall promptly issue a visa to, and the Attorney General shall admit, an eligible alien designated by the employer to replace an alien who abandons or prematurely terminates employment.

"(4) IDENTIFICATION DOCUMENT AND IDENTIFICATION SYSTEM.—

"(A) IN GENERAL.—Each alien admitted under this section shall, upon receipt of a visa, be given an identification and employment eligibility document to verify eligibility for employment in the United States and verify such person's proper identity.

"(B) REQUIREMENTS.—No identification and employment eligibility document may be issued and no identification system may be implemented which does not meet the following requirements:

"(i) The document and system shall be capable of reliably determining whether—

"(I) the individual with the identification and employment eligibility document whose eligibility is being verified is in fact eligible for employment,

"(II) the individual whose eligibility is being verified is claiming the identity of another person, and

"(III) the individual whose eligibility is being verified has been properly admitted under this section.

"(ii) The document shall be in the form that is resistant to counterfeiting and to tampering.

"(iii) The document shall incorporate, at a minimum, the features of the most technologically advanced identification documents issued under this Act on the date of the enactment of the Agricultural Opportunities Act that are designed—

"(I) to prevent counterfeiting;

"(II) to prevent tampering; and

"(III) to ensure that a person proffering the document as identification is the person to whom the document was issued.

"(iv) The document and system shall—

"(I) be compatible with other Immigration and Naturalization Service databases and other Federal Government databases for the purpose of excluding aliens from benefits for which they are not eligible and to determine whether the alien is illegally present in the United States, and

"(II) be compatible with law enforcement databases to determine if the alien has been convicted of criminal offenses.

"(b) EXTENSION OF STAY OF ALIENS IN THE UNITED STATES.—

"(1) EXTENSION OF STAY.—If an employer with respect to whom a report or application described in section 203(a)(1) of the Agricultural Opportunities Act has been submitted seeks to employ an alien who has acquired status under this section and who is lawfully present in the United States, the employer shall file with the Attorney General an application for an extension of the alien's stay or a change in the alien's authorized employment. The application shall be accompanied by a copy of the appropriate report or application described in section 203 of the Agricultural Opportunities Act.

"(2) LIMITATION ON FILING AN APPLICATION FOR EXTENSION OF STAY.—An application may not be filed to extend an alien's stay if the granting of the application would permit the alien's period of authorized admission as a nonimmigrant described in section 101(a)(15)(H)(ii)(c) to exceed 12 months.

"(3) WORK AUTHORIZATION UPON FILING AN APPLICATION FOR EXTENSION OF STAY.—An employer may begin employing an alien who is present in the United States who has acquired status under this Act on the day the employer files an application for extension of stay. For the purpose of this requirement, the term 'filing' means sending the application by certified mail via the United States Postal Service, return receipt requested, or delivered by guaranteed commercial delivery which will provide the employer with a documented acknowledgment of the date of sending and receipt of the application. The employer shall provide a copy of the employer's application to the alien, who shall keep the application with the alien's identification and employment eligibility document as evidence that the application has been filed and that the alien is authorized to work in the United States. Upon approval of an application for an extension of stay or change in the alien's authorized employment, the Attorney General shall provide a new or updated employment eligibility document to the alien indicating the new validity date, after which the alien is not required to retain a copy of the application.

"(4) LIMITATION ON EMPLOYMENT AUTHORIZATION OF ALIENS WITHOUT VALID IDENTIFICATION AND EMPLOYMENT ELIGIBILITY CARD.—An expired identification and employment eligibility document, together with a copy of an application for extension of stay or change in the alien's authorized employment that complies with the requirements of paragraph (1), shall constitute a valid work authorization document for a period of not more than 60 days from the date of application for the extension of stay, after which time only a currently valid identification and employment eligibility document shall be acceptable.

"(5) MAXIMUM PERIOD OF AUTHORIZED ADMISSION.—In the case of a nonimmigrant described in section 101(a)(15)(H)(ii)(c) who is granted an extension of stay under this subsection, the period of authorized admission as such a nonimmigrant may not exceed 12 months.".

(2) CLERICAL AMENDMENT.—The table of contents of the Immigration and Nationality Act is amended by inserting after the item relating to section 218 the following new item:

"Sec. 218A. Alternative agricultural temporary worker program.".

(d) RANGE PRODUCTION OF LIVESTOCK.—Nothing in this title shall preclude the Secretary and the Attorney General from continuing to apply special procedures to the employment, admission, and extension of aliens in the range production of livestock.

(e) VERIFICATION OF RETURN OF WORKERS TO COUNTRY OF ORIGIN.—The Attorney General shall establish a program to verify that H–2C workers are departing from the United States after the expiration of their authorized period of stay in the United States.

TITLE III—MISCELLANEOUS PROVISIONS

SEC. 301. ENHANCED WORKER PROTECTIONS AND LABOR STANDARDS ENFORCEMENT.

(a) ENFORCEMENT AUTHORITY.—

(1) INVESTIGATION OF COMPLAINTS.—

(A) AGGRIEVED PERSON OR THIRD-PARTY COMPLAINTS.—The Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting an employer's failure to meet a condition specified in section 201 or an employer's misrepresentation of material facts in an application under that section, or violation of the provisions described in subparagraph (B). Complaints may be filed by any aggrieved person or any organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, as the case may be. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

(B) EXPEDITED INVESTIGATION OF SERIOUS CHILD LABOR, WAGE, AND HOUSING VIOLATIONS.—The Secretary shall complete an investigation and issue a written determination as to whether or not a violation has been committed within 10 days of the receipt of a complaint pursuant to subparagraph (A) if there is reasonable cause to believe that any of the following serious violations have occurred:

(i) A violation of section 12(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 212(c)).

(ii) A failure to make a wage payment, except that complaints alleging that an amount less than the wages due has been paid shall be handled pursuant to subparagraph (A).

(iii) A failure to provide the housing allowance required under section 204(b)(6).

(iv) Providing housing pursuant to section 204(b)(1) that fails to comply with standards under section 204(b)(2) and which poses an immediate threat of serious bodily injury or death to workers.

(C) STATUTORY CONSTRUCTION.—Nothing in this Act limits the authority of the Secretary to conduct any compliance investigation under any other labor law, including any law affecting migrant and seasonal agricultural workers or, in the absence of a complaint under this paragraph, under this Act.

(2) WRITTEN NOTICE OF FINDING AND OPPORTUNITY FOR APPEAL.—After an investigation has been conducted, the Secretary shall issue a written determination as to whether or not any violation described in subsection (b) has been committed. The Secretary's determination shall be served on the complainant and the employer, and shall provide an opportunity for an appeal of the Secretary's decision to an administrative law judge, who may conduct a de novo hearing.

(3) ABILITY OF ALIEN WORKERS TO CHANGE EMPLOYERS.—

(A) IN GENERAL.—Pending the completion of an investigation pursuant to paragraph (1)(A), the Secretary may permit the transfer of an aggrieved person who has filed a complaint under such paragraph to an employer that—

(i) has been approved to employ workers under this Act; and

(ii) agrees to accept the person for employment.

(B) REPLACEMENT WORKER.—An aggrieved person may not be transferred under subparagraph (A) until such time as the employer from whom the person is to be transferred receives a requested replacement worker referred by a registry pursuant to section 202 of this Act or provided status under section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act.

(C) LIMITATION.—An employer from whom an aggrieved person has been transferred under this paragraph shall have no obligation to reim-

burse the person for the cost of transportation prior to the completion of the period of employment referred to in section 204(d).

(D) VOLUNTARY TRANSFER.—Notwithstanding this paragraph, an employer may voluntarily agree to transfer a worker to another employer that—

(i) has been approved to employ workers under this Act; and

(ii) agrees to accept the person for employment.

(b) REMEDIES.—

(1) BACK WAGES.—Upon a final determination that the employer has failed to pay wages as required under this section, the Secretary may assess payment of back wages due to any United States worker or alien described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act employed by the employer in the specific employment in question. The back wages shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker.

(2) FAILURE TO PAY WAGES.—Upon a final determination that the employer has failed to pay the wages required under this Act, the Secretary may assess a civil money penalty up to $1,000 for each person for whom the employer failed to pay the required wage, and may recommend to the Attorney General the disqualification of the employer from the employment of aliens described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act for a period of time determined by the Secretary not to exceed 1 year.

(3) OTHER VIOLATIONS.—If the Secretary, as a result of an investigation pursuant to a complaint, determines that an employer covered by an application under section 201(a) has—

(A) filed an application that misrepresents a material fact;

(B) failed to meet a condition specified in section 201; or

(C) committed a serious violation of subsection (a)(1)(B),

the Secretary may seek a cease and desist order and assess a civil money penalty not to exceed $1,000 for each violation and may recommend to the Attorney General the disqualification of the employer if the Secretary finds it to be a substantial misrepresentation or violation of the requirements for the employment of any United States workers or aliens described in section 101(a)(15)(ii)(c) of the Immigration and Nationality Act for a period of time determined by the Secretary not to exceed 1 year. In determining the amount of civil money penalty to be assessed or whether to recommend disqualification of the employer, the Secretary shall consider the seriousness of the violation, the good faith of the employer, the size of the business of the employer being charged, the history of previous violations by the employer, whether the employer obtained a financial gain from the violation, whether the violation was willful, and other relevant factors.

(4) EXPANDED PROGRAM DISQUALIFICATION.—

(A) 3 YEARS FOR SECOND VIOLATION.—Upon a second final determination that an employer has failed to pay the wages required under this Act, or a second final determination that the employer has committed another substantial violation under paragraph (3) in the same category of violations, with respect to the same alien, the Secretary shall report such determination to the Attorney General and the Attorney General shall disqualify the employer from the employment of aliens described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act for a period of 3 years.

(B) PERMANENT FOR THIRD VIOLATION.—Upon a third final determination that an employer has failed to pay the wages required under this section or committed other substantial violations under paragraph (3), the Secretary shall report such determination to the Attorney General, and the Attorney General shall disqualify the employer from any subsequent employment of aliens described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act.

(c) ROLE OF ASSOCIATIONS.—

(1) VIOLATION BY A MEMBER OF AN ASSOCIATION.—An employer on whose behalf an application is filed by an association acting as its agent is fully responsible for such application, and for complying with the terms and conditions of this Act, as though the employer had filed the application itself. If such an employer is determined to have violated a requirement of this section, the penalty for such violation shall be assessed against the employer who committed the violation and not against the association or other members of the association.

(2) VIOLATION BY AN ASSOCIATION ACTING AS AN EMPLOYER.—If an association filing an application on its own behalf as an employer is determined to have committed a violation under this subsection which results in disqualifica-

tion from the program under subsection (b), no individual member of such association may be the beneficiary of the services of an alien described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act in an occupation in which such alien was employed by the association during the period such disqualification is in effect, unless such member files an application as an individual employer or such application is filed on the employer's behalf by an association with which the employer has an agreement that the employer will comply with the requirements of this Act.

(d) STUDY OF AGRICULTURAL LABOR STANDARDS AND ENFORCEMENT.—

(1) COMMISSION ON HOUSING MIGRANT AGRICULTURAL WORKERS.—

(A) ESTABLISHMENT.—There is established the Commission on Housing Migrant Agricultural Workers (in this paragraph referred to as the "Commission").

(B) COMPOSITION.—The Commission shall consist of 12 members, as follows:

(i) Four representatives of agricultural employers and one representative of the Department of Agriculture, each appointed by the Secretary of Agriculture.

(ii) Four representatives of agricultural workers and one representative of the Department of Labor, each appointed by the Secretary.

(iii) One State or local official knowledgeable about farmworker housing and one representative of Housing and Urban Development, each appointed by the Secretary of Housing and Urban Development.

(C) FUNCTIONS.—The Commission shall conduct a study of the problem of in-season housing for migrant agricultural workers.

(D) INTERIM REPORTS.—The Commission may at any time submit interim reports to Congress describing the findings made up to that time with respect to the study conducted under subparagraph (C).

(E) FINAL REPORT.—Not later than 3 years after the date of enactment of this Act, the Commission shall submit a report to Congress setting forth the findings of the study conducted under subparagraph (C).

(F) TERMINATION DATE.—The Commission shall terminate upon filing its final report.

(2) STUDY OF RELATIONSHIP BETWEEN CHILD CARE AND CHILD LABOR.—The Secretaries of Labor, Agriculture, and Health and Human Services shall jointly conduct a study of the issues relating to child care of migrant agricultural workers. Such study shall address issues related to the adequacy of educational and day care services for migrant children and the relationship, if any, of child care needs and child labor violations in agriculture. An evaluation of migrant and seasonal Head Start programs (as defined in section 637(12) of the Head Start Act) as they relate to these issues shall be included as a part of the study.

(3) STUDY OF FIELD SANITATION.—The Secretary and the Secretary of Agriculture shall jointly conduct a study regarding current field sanitation standards in agriculture and evaluate alternative approaches and innovations that may further compliance with such standards.

(4) STUDY OF COORDINATED AND TARGETED LABOR STANDARDS ENFORCEMENT.—The Secretary, in consultation with the Secretary of Agriculture, shall conduct a study of the most persistent and serious labor standards violations in agriculture and evaluate the most effective means of coordinating enforcement efforts between Federal and State officials. The study shall place primary emphasis on the means by which Federal and State authorities, in consultation with representatives of workers and agricultural employers, may develop more effective methods of targeting resources at repeated and egregious violators of labor standards. The study also shall consider ways of facilitating expanded education among agricultural employers and workers regarding compliance with labor standards and evaluate means of broadening such education on a cooperative basis among employers and workers.

(5) REPORT.—Not later than 3 years after the date of enactment of this Act, with respect to each study required to be conducted under paragraphs (2) through (4), the Secretary or group of Secretaries required to conduct the study shall submit to Congress a report setting forth the findings of the study.

SEC. 302. COMMISSION.

The Attorney General is authorized and requested to establish a commission between the United States and each country not less than 10,000 nationals of which are nonimmigrant aliens described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(c)). Such commission shall provide a forum to the governments involved to discuss matters of mutual concern regarding

the program for the admission of aliens under section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act.

SEC. 303. REGULATIONS.

(a) REGULATIONS OF THE ATTORNEY GENERAL.—The Attorney General shall consult with the Secretary and the Secretary of Agriculture on all regulations to implement the duties of the Attorney General under this Act.

(b) REGULATIONS OF THE SECRETARY OF STATE.—The Secretary of State shall consult with the Attorney General, the Secretary, and the Secretary of Agriculture on all regulations to implement the duties of the Secretary of State under this Act.

(c) REGULATIONS OF THE SECRETARY OF LABOR.—The Secretary shall consult with the Secretary of Agriculture and shall obtain the approval of the Attorney General on all regulations to implement the duties of the Secretary under this Act.

(d) DEADLINE FOR ISSUANCE OF REGULATIONS.—All regulations to implement the duties of the Attorney General, the Secretary of State, and the Secretary shall take effect on the effective date of this Act.

SEC. 304. DETERMINATION AND USE OF USER FEES.

(a) SCHEDULE OF FEES.—The Secretary shall establish and periodically adjust a schedule for the registry user fee and the alien employment user fee imposed under this Act, and a collection process for such fees from employers participating in the programs provided under this Act. Such fees shall be the only fees chargeable to employers for services provided under this Act.

(b) DETERMINATION OF SCHEDULE.—

(1) IN GENERAL.—The schedule under subsection (a) shall reflect a fee rate based on the number of job opportunities indicated in an employer's application under section 201(a)(1)(C) and sufficient to provide for the reimbursement of the direct costs of providing the following services:

(A) REGISTRY USER FEE.—Services provided through the agricultural worker registries established under section 101(a), including registration, referral, and validation, but not including services that would otherwise be provided by the Secretary under related or similar programs if such registries had not been established.

(B) ALIEN EMPLOYMENT USER FEE.—Services related to an employer's authorization to employ eligible aliens pursuant to this Act, including the establishment and certification of eligible employers, the issuance of documentation, and the admission of eligible aliens.

(2) PROCEDURE.—

(A) IN GENERAL.—In establishing and adjusting such schedule, the Secretary shall comply with Federal cost accounting and fee setting standards.

(B) PUBLICATION AND COMMENT.—The Secretary shall publish in the Federal Register an initial fee schedule and associated collection process and the cost data or estimates upon which such fee schedule is based, and any subsequent amendments thereto, pursuant to which public comment will be sought and a final rule issued.

(c) USE OF PROCEEDS.—

(1) IN GENERAL.—All proceeds resulting from the payment of registry user fees and alien employment user fees shall be available without further appropriation and shall remain available without fiscal year limitation to reimburse the Secretaries of Labor, State, and Agriculture, and the Attorney General for the costs of carrying out section 218A of the Immigration and Nationality Act and the provisions of this Act.

(2) LIMITATION ON ENFORCEMENT COSTS.—In making a determination of reimbursable costs under paragraph (1), the Secretary shall provide that reimbursement of the costs of enforcement under section 301 shall not exceed 10 percent of the direct costs of the Secretary described in subparagraphs (A) and (B) of subsection (b)(1).

SEC. 305. FUNDING FOR STARTUP COSTS.

If additional funds are necessary to pay the startup costs of the agricultural worker registries established under section 101(a), such costs may be paid out of amounts available to Federal or State governmental entities under the Wagner-Peyser Act (29 U.S.C. 49 et seq.). Proceeds described in section 304(c) may be used to reimburse the use of such available amounts.

SEC. 306. REPORT TO CONGRESS.

(a) REQUIREMENT.—Not later than 4 years after the effective date under section 307, the Resources, Community and Economic Development Division, and the Health, Education and Human Services Division, of the Office of the Comptroller General of the United States shall jointly prepare and transmit to the Committee on the Judiciary and the Committee on Agriculture of the House of Representatives

and the Committee on the Judiciary and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report describing the results of a review of the implementation of and compliance with this Act. The report shall address—

(1) whether the program has ensured an adequate and timely supply of qualified, eligible workers at the time and place needed by employers;

(2) whether the program has ensured that aliens admitted under this program are employed only in authorized employment, and that they timely depart the United States when their authorized stay ends;

(3) whether the program has ensured that participating employers comply with the requirements of the program with respect to the employment of United States workers and aliens admitted under this program;

(4) whether the program has ensured that aliens admitted under this program are not displacing eligible, qualified United States workers or diminishing the wages and other terms and conditions of employment of eligible United States workers;

(5) to the extent practicable, compare the wages and other terms of employment of eligible United States workers and aliens employed under this program with the wages and other terms of employment of agricultural workers who are not authorized to work in the United States;

(6) whether the housing provisions of this program ensure that adequate housing is available to workers employed under this program who are required to be provided housing or a housing allowance;

(7) recommendations for improving the operation of the program for the benefit of participating employers, eligible United States workers, participating aliens, and governmental agencies involved in administering the program; and

(8) recommendations for the continuation or termination of the program under this Act.

(b) ADVISORY BOARD.—There shall be established an advisory board to be composed of—

(1) four representatives of agricultural employers to be appointed by the Secretary of Agriculture, including individuals who have experience with the H–2C program; and

(2) four representatives of agricultural workers to be appointed by the Secretary, including individuals who have experience with the H–2C program,

to provide advice to the Comptroller General in the preparation of the reports required under subsection (a).

SEC. 307. EFFECTIVE DATE.

(a) IN GENERAL.—This Act and the amendments made by this Act shall take effect on the date that is 1 year after the date of the enactment of this Act.

(b) REPORT.—Not later than 180 days after the date of the enactment of this Act, the Secretary shall prepare and submit to the appropriate committees of Congress a report that described the measures being taken and the progress made in implementing this Act.

SEC. 308. TERMINATION OF PROGRAM.

This Act, and the amendments made by this Act, shall cease to be effective on the date that is 3 years after the effective date under section 307(a).

PURPOSE AND SUMMARY

H.R. 4548, the "Agricultural Opportunities Act," introduced by Rep. Pombo of California, would create a 3-year pilot program for agricultural guest workers using a new "H–2C" visa.

BACKGROUND AND NEED FOR THE LEGISLATION

I. THE FRUIT, VEGETABLE, AND HORTICULTURAL SPECIALTY INDUSTRY AND LABOR FORCE

The branch of agriculture that relies most heavily on hired farmworkers, and hired immigrant farm workers, is that composed of fruit, vegetable, and horticultural specialty crops ("FVH"). What is distinctive about FVH crops? "Many farmers with several hundred acres of land raise crops which can be mechanically planted, tended and harvested, and need only one or two 'hired hands' to maintain their operations. In contrast, FVH-producing farmers are likely to

need hundreds of seasonal employees to accomplish the same tasks." [1] Many fruits and vegetables are still hand harvested and packed because they are so perishable and easily bruised. Most vegetables are predominantly hand harvested with certain exceptions such as tomatoes, carrots, corn, potatoes and spinach; most fruits are predominantly hand harvested with certain exceptions such as raspberries, dates, figs and cranberries.[2]

Because of these special requirements, the labor cost share of total production expenses is three times as large for FVH crops as for others.[3] Because they are so labor intensive, FVH farmers must rely on hired help. Thus, in midwestern farms, hired farmworkers account for only 8.5% of all farmworkers. In California, where much of the FVH industry is located, the figure is 57%.[4]

The need for this labor is not spread out evenly over the year. Most is required at harvest time. An extreme example is provided by cantaloupe cultivation in Imperial County, California. One acre requires 1 to 2 hours of labor per month in the off season, but 180 hours at peak harvest.[5] The Commission on Agricultural workers reported that:

> The labor force at a commercial FVH farm typically includes a small tier of year-round workers. On larger operations, this includes laborers, supervisors, and professional managers and marketers. This "core" labor force is supplemented by a larger group of regularly returning workers who, for a few weeks or months, performs a characteristic mix of crop tasks. . . . The majority of the work is usually done by a third group of workers, a tier of "peripheral," or temporarily hired workers who are relied upon to meet labor demand spikes, particularly during the harvest.[6]

FVH farmers rely on seasonal hiring that employs between 1 and 2 million workers annually.[7] What are the characteristics of the average seasonal agricultural worker? In 1994–95: 65% were Mexican-born, 69% were foreign-born, 18% were white-U.S. born, 10% were Hispanic-U.S. born, 2% were black-U.S. born, 81% were male, 67% were under 35.[8] Almost all the new entrants to this employment (approximately 200,000–300,000 each year) are immigrants—whether legal or illegal.[9] As many as two thirds of the three million legal Mexican immigrants over the 10 years from the mid-1980's to the mid-1990's have had at least one job in U.S. agriculture.[10]

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[1] Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers* 27 (1992) (hereinafter cited as "*Commission*").

[2] See Hamm, Oliveira, Zepp & Duffield, *Trends in Labor-Intensive Agriculture* in Immigration Reform and U.S. Agriculture 39, 43 (Martin et al. eds., 1995). An estimated 63% of vegetable production and 11% of fruit production is harvested mechanically. See *id.* at 51.

[3] See *id.* at 39.

[4] See *Commission* at 44.

[5] See *id.* at 46 n.9.

[6] *Id.* at 51.

[7] See Martin, *IRCA and Agriculture: Hopes, Fears, and Realities* (hereinafter cited as "*Hopes*"), in Immigration Reform and U.S. Agriculture 21, 37 n.4 (Martin et al. eds., 1995). Of course, other farmers—and ranchers—also make use of seasonal agricultural workers.

[8] See U.S. Department of Labor, Office of the Assistant Secretary for Policy, *A Profile of U.S. Farmworkers: Demographics, Household Composition, Income and Use of Services* 3 (1997).

[9] See *Hopes* at 22.

[10] See Martin & Taylor, *Guest Worker Programs and Policies* 4 (1995).

What are the wages of these workers? The average wage in 1998 for hired farmworkers was $6.18.[11] Seventeen percent of seasonal agricultural workers are paid by the piece, as are 46% of harvest workers.[12] Many of these workers will stitch together employment from a series of jobs, often following the harvests of different fruits and vegetables around the country.

How many illegal aliens are now in the fields? In 1998–99, 52% of seasonal agricultural workers admitted to being illegal, up from 7% in 1989.[13] James Holt, an economist and consultant to the National Council of Agricultural Employers, has testified that "[e]vidence based on INS enforcement actions and verification of Social Security cards by the Social Security Administration often results in 60 to 80 percent or more of workers' documents being determined to be invalid or not pertaining to the person who presented them."[14]

Is there presently a shortage of seasonal agricultural workers? James Holt has stated that:

> The combination of increased INS enforcement activity, the verification programs of the Social Security Administration, shortages of legal U.S. workers of unprecedented proportions and an unworkable program for the legal admission of alien workers are having serious negative consequences on the agricultural industry *and* the agricultural work force. Increased border enforcement, increased interior enforcement and increased SSA verification activity have led to reduction in labor availability and destabilization of the agricultural work force. These trends will continue. The increase in border enforcement personnel authorized by [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996] will not be complete until FY 2002. The SSA plans to continue lowering its threshold for rejection of employer tax returns due to name/number mismatches. These factors, coupled with the extraordinarily high levels of nonagricultural employment, have resulted in increasing frequency of farm labor shortages and crop losses and precipitated a problem which is rapidly reaching crisis proportions.[15]

The Department of Labor believes there is an oversupply of farm labor.[16] In a 1997 report, the General Accounting Office stated that "[t]here appears to be no national agricultural labor shortage now, although localized labor shortages may exist for individual crops and in specific geographical areas."[17] The GAO based its conclu-

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[11] See *H.R. 4548, the "Agricultural Opportunities Act": Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong., 2nd Sess. (June 15, 2000)(hereinafter cited as "*Hearing on H.R. 4548*") (statement of John Fraser, Deputy Wage and Hour Administrator, Employment Standards Administration, U.S. Department of Labor).

[12] See *Commission* at 97.

[13] See U.S. Department of Labor, Office of the Assistant Secretary for Policy, *Findings from the National Agricultural Workers Survey 1997–1998: A Demographic and Employment Profile of United States Farmworkers* (2000).

[14] *Hearing on H.R. 4548.*

[15] *Id.* (emphasis in original).

[16] *Id.* (statement of John Fraser).

[17] U.S. General Accounting Office, *H–2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers* 24 (Dec. 1997) (hereinafter cited as "*1997 GAO Report*"). See also *Temporary Agricultural Work Visa Programs: Hearing Before the Subcomm. on Immigration and Claims of the House Judiciary Comm.*, 105th Cong., 1st Sess. 35 (1997)(statement of Bruce Goldstein, Executive Director, Farmworker Justice Fund)(hereinafter cited as "*1997 Hearing*").

sion that major shortages will not develop on the theory that future INS enforcement efforts are unlikely to significantly reduce the number of illegal alien farmworkers.[18] Even if this prediction proves true, it is not good public policy to endorse a labor supply mechanism that relies on illegal labor. Such a reliance fosters contempt for the law. In addition, growers deserve a legal and predictable workforce for seasonal labor needs.

II. THE H–2A TEMPORARY AGRICULTURAL WORKER PROGRAM

The Immigration Reform and Control Act of 1986's "H–2A" temporary agricultural worker program took effect in June 1987. The program, a modification of the H–2 program implemented by the Immigration and Nationality Act of 1952, allows for aliens to come to perform agricultural labor or services of a temporary or seasonal nature.[19] The Attorney General can approve an employer's petition for an alien only after the employer has applied to the Secretary of Labor for a certification that:

> (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
>
> (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.[20]

A certification cannot be issued by the Secretary (1) during a strike or lockout, (2) if the employer has in the previous 2 year period substantially violated a material term or condition of a labor certification, (3) where the worker will not be covered under worker's compensation unless the employer has given assurances that it will provide adequate insurance, or (4) if the employer has not made positive recruitment efforts within a region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers, who, if recruited, would be willing to work (this is in addition to the circulation through the interstate employment service system of the employer's job offer).[21] The employer's job offer to U.S. workers shall offer no less than the same benefits, wages, and working conditions offered to H–2A workers.[22]

Among additional requirements, (1) charges for food cannot exceed $5.26 per day,[23] (2) free transportation must be provided between living quarters and worksites,[24] (3) the employer shall guarantee to offer H–2As work for at least three fourths of the workdays of the period the work contract is in effect,[25] (4) free housing

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[18] See *1997 GAO Report* at 30. Recently, the GAO reaffirmed this conclusion, based on the facts that, in 1999, only 7% of INS investigations of employers were directed at agricultural employers, and that INS was phasing out worksite investigations as an interior enforcement priority. *Hearing on H.R. 4548* (testimony of Cynthia Fagnoni, Director, Education, Workforce, and Income Security Issues, Health, Education, and Human Services Division, U.S. General Accounting Office).

[19] INA sec. 101(a)(15)(H)(ii).

[20] INA sec. 218(a)(1).

[21] INA sec. 218(b).

[22] 20 C.F.R. sec. 655.102(a).

[23] 20 C.F.R. sec. 655.102(b)(4).

[24] 20 C.F.R. sec. 655.102(b)(5)(iii).

[25] 20 C.F.R. sec. 655.102(b)(6)(i).

must be provided to the H–2As meeting applicable standards,[26] (5) wages, if paid by the hour, must be at least the adverse effect wage rate (the annual weighed average hourly wage rate for field and livestock workers for the region as determined by the Department of Agriculture), the prevailing hourly rate, or the minimum wage, whichever is highest,[27] and (6) wages, if paid at a piece rate, must be supplemented if necessary to equal at least what the worker would have to be paid if he were paid hourly and must also not be less than the prevailing piece rate.[28]

The Labor Department cannot require that applications be filed more than 60 days before the first date that the H–2As are needed.[29] Applications must be approved not later than 20 days before the date the aliens are needed if the employer has met the certification criteria and the employer "does not have, or has not been provided with referrals of, qualified eligible individuals who have indicated their availability to perform such labor or services. . . ."[30] Normally, an alien's stay can be for up to 1 year.[31]

Expedited procedures are provided for denials or revocations of certifications.[32] The Secretary of Labor can assess penalties and seek injunctive relief and specific performance of contractual obligations.[33]

Expectations were that applications would be made for 200,000 or more aliens each year.[34] In 1996, only 9,635 aliens were admitted under the program.[35] While utilization has increased somewhat since 1996 (the Department of Labor certified 41,827 workers in 1999, compared with 17,557 in 1996),[36] it has never reached expectations.

Why the low numbers? James Holt has testified that:

> The current H–2A temporary agricultural worker program is not working for three principal reasons. One is the structural problems built into the program. [The Department of Labor] ignored some of the most important of the H–2A streamlining provisions of the Immigration Reform and Control [Act. Second, t]he program is administered in a highly adversarial fashion. DOL regards H–2A applicants as potential, if not actual, lawbreakers and acts as though its mission is to keep employers out of the program rather than to help them use this program which Congress provided. The third reason the program is not working has to do with compliance enforcement and litigation. So-called farmworker advocates have for years strongly opposed the H–2A program. They have made both DOL and H–2A users targets for harassment and litigation. They have attempted to accomplish in the courts what they were unable to accomplish in Congress. Unfortunately the U.S. Depart-

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[26] INA sec. 218(c)(4).
[27] 20 C.F.R. secs. 655.100(b), .102(b)(9)(i), .107.
[28] 20 C.F.R. 655.102 (b)(9)(ii)(A).
[29] INA sec. 218(c)(1). The Department plans to modify its regulations to require only a 45 day period. *Hearing on H.R. 4548* (statement of John Fraser).
[30] INA sec. 218(c)(3).
[31] 20 C.F.R. sec. 655.100(c)(2)(iii).
[32] INA sec. 218(e).
[33] INA sec. 218(g)(2).
[34] See *Guestworker Programs and Policies* at 9.
[35] See Immigration and Naturalization Service, *1997 Statistical Yearbook of the Immigration and Naturalization Service* 120.
[36] See *Hearing on H.R. 4548* (statement of Cynthia Fagnoni).

> ment of Labor seems to have adopted the same attitude, and in some cases it appears that the two groups have been working together to try to intimidate employers into not using the program or abandoning it.[37]

The General Accounting Office has found that "a large number of Labor's certifications are issued too late to ensure that employers will be able to get workers by the specified date of need."[38] The Department of Labor "has acknowledged problems with the current H–2A program and is working administratively . . . to reengineer and streamline the program to better assure growers an adequate, predictable labor supply. . . ."[39]

III. H.R. 4548, THE "AGRICULTURAL OPPORTUNITIES ACT"

H.R. 4548 would create a 3-year pilot program for agricultural guest workers using a new "H–2C" visa, with no cap on the number of visas available annually. Each visa would be valid for up to 10 months, plus an additional 2-month extension if necessary.

The bill would create a central registry of American agricultural workers maintained by the Labor Department. When qualified American workers were not available from the registry, growers would be allowed to recruit and employ alien labor under the H–2C program. As James Holt notes:

> The registry mechanism offers significant improvements over the current labor certification system. One of the most important of these is timeliness. Currently, employers seeking H–2A workers are required to file a labor certification application a minimum of 45 days in advance of the date workers are needed. This is followed by the cumbersome procedures for processing job orders and recruiting U.S. workers. . . .
>
> The registry mechanism is based on searching a computerized data bank of workers who have already indicated their interest in agricultural employment.[40]

At least 28 days before workers are needed, a grower would have to apply for American workers from the registry before he could bring in H–2C workers. The grower's application would have to include assurances that the work is temporary or seasonal, that he will advertise locally for American workers and contact former workers, and that he is not using aliens as strikebreakers.

The Labor Department would then refer a sufficient number of qualified American workers from the registry by 7 days before the grower's date of need, or, if there is a shortfall, notify the Departments of Justice and State of the number of H–2C visas that must be issued to eligible aliens to make up the difference. If the Labor Department failed to process the application in time, the grower could apply directly to the State and Justice Departments for issuance of the necessary visas. The bill also provides expedited emergency procedures for obtaining H–2C workers if American workers referred from the registry are unwilling or unable to per-

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[37] *1997 Hearing* at 17.
[38] *1997 GAO Report* at 46.
[39] *Hearing on H.R. 4548* (statement of John Fraser).
[40] *Id.*

form the job, or if a grower encounters unexpected and urgent labor requirements.

The Attorney General would be required to establish a verification system to ensure that growers who hire H–2C workers do not also hire illegal aliens.

The bill would require growers to pay H–2C workers prevailing wages, provide them with housing or a housing allowance, and reimburse them for transportation costs. Each H–2C worker would be given a reliable identification document that is counterfeit-resistant, tamper-resistant, and compatible with Federal law enforcement databases. The Attorney General would be required to verify that H–2C workers depart from the United States after the expiration of their visas.

HEARINGS

The committee's Subcommittee on Immigration and Claims held 1 day of hearings on H.R. 4548 on June 15, 2000. Testimony was received from Rep. Pombo; Mr. John R. Fraser, U.S. Department of Labor; Ms. Cindy Fagnoni, U.S. General Accounting Office; Dr. James S. Holt, National Council of Agricultural Employers; Mr. Robert Dolibois, American Nursery and Landscape Association; Mr. Mark Krikorian, Center for Immigration Studies; Mr. Marcos Camacho, United Farmworkers Union; Ms. Michelle Williamson, Williamson Berry Farms; Mr. Dewey L. Hukill, Texas Farm Bureau; Mr. William Buchanan, American Council for Immigration Reform; and Ms. Cecilia Munoz, National Council of La Raza, with additional material submitted by five individuals and organizations.

COMMITTEE CONSIDERATION

On July 27, 2000, the Subcommittee on Immigration and Claims met in open session and ordered favorably reported the bill H.R. 4548, as amended, by a vote of seven to zero, a quorum being present. On September 19–20, 2000, the committee met in open session and ordered favorably reported the bill H.R. 4548 with amendment by a recorded vote of 16 to 11, a quorum being present.

VOTES OF THE COMMITTEE

One amendment was defeated by voice vote. The amendment, offered by Mr. Berman, would have placed an annual cap of 100,000 on the number of H–2C visas to be granted.

There were seven recorded votes during the committee's consideration of H.R. 4585, as follows:

1. Two amendments offered by Ms. Jackson Lee, en bloc, to make the registry of U.S. workers created by H.R. 4548 non-exclusive, so that growers could not rely on the registry as their sole source of U.S. workers. Defeated 12–17.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Sensenbrenner	X		
Mr. McCollum			
Mr. Gekas		X	

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham		X	
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner			
Mr. Hyde, Chairman		X	
Total	12	17	

2. Amendment offered by Ms. Jackson Lee to require growers to provide housing rather than a housing allowance for foreign workers. Adopted 14–13.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Sensenbrenner	X		
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly	X		
Mr. Canady		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Barr			
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham			
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner			
Mr. Hyde, Chairman	X		
Total	14	13	

3. Amendment offered by Ms. Jackson Lee to require growers to pay workers for 3/4 of the anticipated labor period even if less work is offered. Adopted 15–13.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Sensenbrenner	X		
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Barr			
Mr. Jenkins		X	
Mr. Hutchinson	X		
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan	X		
Mr. Graham		X	
Ms. Bono		X	
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Weiner			
Mr. Hyde, Chairman		X	
Total	15	13	

4. Amendment offered by Mr. Berman to require growers to pay higher "adverse effect wage rates" to workers. Defeated 13–17.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Barr			
Mr. Jenkins		X	
Mr. Hutchinson	X		
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham		X	
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough		X	
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner			
Mr. Hyde, Chairman		X	
Total	13	17	

5. Amendment offered by Mr. Gallegly to allow growers to provide a housing allowance (rather than housing) when the State Governor certifies that housing is available. Adopted 17–14.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum	X		
Mr. Gekas	X		

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Coble	X		
Mr. Smith (TX)	X		
Mr. Gallegly	X		
Mr. Canady	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Barr	X		
Mr. Jenkins	X		
Mr. Hutchinson	X		
Mr. Pease	X		
Mr. Cannon	X		
Mr. Rogan			
Mr. Graham	X		
Ms. Bono	X		
Mr. Bachus	X		
Mr. Scarborough	X		
Mr. Vitter	X		
Mr. Conyers		X	
Mr. Frank		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler		X	
Mr. Rothman		X	
Ms. Baldwin			
Mr. Weiner		X	
Mr. Hyde, Chairman		X	
Total	17	14	

6. Amendment offered by Mr. Barr to strike the provision placing the burden of proof on the U.S. government when denying an H–2C visa based on the applicant's previous unlawful presence in the U.S. Adopted 24–5.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum	X		
Mr. Gekas	X		
Mr. Coble	X		
Mr. Smith (TX)	X		
Mr. Gallegly	X		
Mr. Canady	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Barr	X		
Mr. Jenkins	X		
Mr. Hutchinson	X		
Mr. Pease		X	
Mr. Cannon	X		
Mr. Rogan			
Mr. Graham	X		
Ms. Bono	X		
Mr. Bachus	X		

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Mr. Scarborough	X		
Mr. Vitter	X		
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin			
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	24	5	

7. Vote on Final Passage. Adopted by a vote of 16–11.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum	X		
Mr. Gekas	X		
Mr. Coble	X		
Mr. Smith (TX)	X		
Mr. Gallegly	X		
Mr. Canady	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Barr	X		
Mr. Jenkins	X		
Mr. Hutchinson	X		
Mr. Pease	X		
Mr. Cannon	X		
Mr. Rogan			
Mr. Graham			
Ms. Bono	X		
Mr. Bachus			
Mr. Scarborough	X		
Mr. Vitter	X		
Mr. Conyers		X	
Mr. Frank		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman			
Ms. Baldwin			
Mr. Weiner			

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Mr. Hyde, Chairman		X	
Total	16	11	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R. 4548, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 27, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4548, the Agricultural Opportunities Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Carla Pedone, who can be reached at 226–2820.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers Jr.
Ranking Democratic Member

H.R. 4548—Agricultural Opportunities Act.

SUMMARY

H.R. 4548 would amend the Immigration and Nationality Act by creating a new temporary H–2C visa for nonimmigrant agricultural workers under a three-year pilot program. This new visa would be an alternative to the existing H–2A visa for those types of workers. The bill intends to increase the number of legal nonimmigrant farmworkers by streamlining the process for determining labor force needs and issuing visas.

The bill would specify procedures that employers must follow to make use of this new pool of workers. The Department of Labor (DOL) would be mandated to create and maintain a central registry of American agricultural workers, who would have to apply for inclusion. Employers with job opportunities would have to check with DOL's registry to determine whether American workers would be available, able, and willing to fill those jobs before they would be allowed to hire aliens under the H–2C program. The Department of Justice (DOJ) would have to ensure that all workers on the registry are authorized to be employed in the United States and that employers applying for H–2C visas did not hire undocumented aliens as well. Fees would be paid by employers to use the registry and to hire aliens. Those fees would offset the federal government's cost to administer the program. The bill would also require several studies.

CBO estimates that implementation of H.R. 4548 would reduce discretionary spending by $6 million over the 2001–2005 period. Outlays would increase by about $6 million to pay for the studies and the new registry, but that amount would be more than offset by estimated savings of about $12 million for administrative costs that would be shifted to direct spending.

CBO estimates that enactment of the bill would increase net direct spending by $2 million over the five-year period. Agency spending is estimated to increase by $124 million, but most of that spending would be offset by a net increase in receipts of $122 million. Because the bill would affect direct spending, pay-as-you-go procedures would apply.

H.R. 4548 contains no new intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act, and would impose no costs on state, local, or tribal governments.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 4548 is shown in Table 1. The costs of this legislation would fall within budget functions 150 (international affairs), 500 (education, training, employment, and social services), and 750 (administration of justice).

BASIS OF ESTIMATE

CBO assumes that H.R. 4548 will be enacted by early in October 2000, which would make it effective from October 2001 through early in October 2004. Authorized amounts are assumed to be appropriated by the beginning of the fiscal year.

Spending Subject to Appropriation

CBO estimates that enacting H.R. 4548 would decrease discretionary spending by about $6 million over the 2001–2005 period, because savings in administrative costs are expected to more than offset the cost of several mandated studies.

Costs of Studies and Commission. H.R. 4548 would direct several federal agencies and a newly established commission to conduct four studies, which would be conducted over a three-year period. In addition, the General Accounting Office would have to evaluate the program no later than four years after the date of enactment. Assuming a cost per study of about $500,000 plus an additional $750,000 per year to staff the commission, CBO estimates that these provisions would require appropriations of about $5 million over the 2001–2005 period. Outlays over the period would increase by the same amount.

Savings to Department of Labor from not Issuing H–2A Visas. Under current law, the Department of Labor spends about $4 million each year to reimburse state agencies for costs incurred in administering the H–2A visa program. Those costs are considered discretionary. CBO expects that if H.R. 4548 were enacted and fully implemented, employers would shift from H–2A visas to H–2C visas because the application process would be more streamlined and the total cost per immigrant worker might be lower. Under H.R. 4548, however, the administrative costs would be considered direct spending, to be financed by user fees. As a result, CBO estimates that budget authority for discretionary expenditures would decrease by $12 million over the course of the three-year pilot program.

TABLE 1. ESTIMATED BUDGETARY EFFECTS OF H.R. 4548

	By fiscal year, in millions of dollars				
	2001	2002	2003	2004	2005
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Cost of Mandated Studies and Commission					
Estimated Authorization Level	0	2	1	2	0
Estimated Outlays	0	*	2	3	*
Savings to Department of Labor from Not Issuing H–2A Visas					
Estimated Authorization Level	0	–2	–5	–5	0
Estimated Outlays	0	–2	–4	–5	*
Cost of Establishing Registry					
Estimated Authorization Level	1	0	0	0	0
Estimated Outlays	1	*	0	0	0
Total Proposed Change					
Estimated Authorization Level	1	0	–4	–3	0
Estimated Outlays	1	–2	–3	–2	*
CHANGES IN DIRECT SPENDING					
Proposed Changes in Spending					
Department of Labor					
Estimated Budget Authority	0	19	31	32	0
Estimated Outlays	0	17	30	32	3
Department of Justice					
Estimated Budget Authority	0	12	15	15	0
Estimated Outlays	0	11	15	15	1
Department of State					
Estimated Budget Authority	0	3	6	6	0
Estimated Outlays	0	3	6	6	0
Savings to Department of Justice and State from Not Issuing H–2A Visas					
Estimated Budget Authority	0	–3	–6	–6	0
Estimated Outlays	0	–3	–6	–6	0
Total Proposed Change					
Estimated Budget Authority	0	31	46	47	0
Estimated Outlays	0	28	44	47	5
Proposed Changes in Offsetting Receipts					
Fee Collections under H.R. 4548					
Estimated Budget Authority	0	–28	–56	–56	0
Estimated Outlays	0	–28	–56	–56	0
Loss of Fee Collections from H–2A visas					
Estimated Budget Authority	0	4	7	7	0
Estimated Outlays	0	4	7	7	0
Total Proposed Changes in Offsetting Receipts					
Estimated Budget Authority	0	–24	–49	–49	0
Estimated Outlays	0	–24	–49	–49	0
Total Changes in Direct Spending					
Estimated Budget Authority	0	7	–3	–2	0
Estimated Outlays	0	4	–5	–2	5
CHANGES IN REVENUES					
Civil Penalties	*	*	*	*	*

Note: Components may not add to totals because of rounding.
* = Less than $500,000 per year.

Cost of Establishing Registry. The bill would require DOL to create a registry of eligible American workers who seek agricultural employment. The registry would be set up as part of the already existing databases known as America's Job Bank and America's

Talent Bank. Therefore, CBO expects the initial set-up cost to be modest, around $1 million, to be spent mostly during fiscal year 2001.

Direct Spending and Revenues

H.R. 4548 would place new requirements on the Department of Labor and the Department of Justice and would increase the number of visas issued by the Department of State. CBO estimates that administrative costs associated with this pilot program would total around $139 million over the 2001–2005 period. Those costs would be covered by offsetting receipts from fees collected from employers.

CBO assumes that, once the new procedures were fully implemented, all current H–2A visas would be shifted to H–2C visas, thereby eliminating direct spending on H–2A visas by the Departments of Justice and State as well as the H–2A fees collected by those two departments and by the Department of Labor. (Under current law, H–2A fees collected by DOL go to the Treasury Department and are not used to offset costs incurred by DOL.) Taking into account the additional fees and offsetting savings, the net increase in direct spending would be $2 million over the five-year period.

In addition, DOL's activities to enforce labor standards and worker protection requirements could generate revenues in the form of civil penalties assessed on employers. However, CBO expects those penalties to be less than $500,000 per year.

Costs to the Department of Labor. H.R. 4548 would require that several new tasks be performed by DOL to implement the new visa program. CBO estimates that DOL would spend $82 million over the 2002–2005 period.

First, employers who wish to employ aliens under the new visa program would have to submit an application to DOL for workers from the registry. If DOL approves the application, it would search the registry, contact potential workers, and assemble a group of workers willing and able to fill the employer's needs. If there are not enough available American workers, DOL would notify DOJ to admit enough workers with H–2C visas to cover the shortfall. DOL would also notify the Department of State to issue the necessary visas. Moreover, DOL would have to set up a system to collect fees charged to employers to participate in the registry and visa program. In addition, DOL would have to create a program to investigate complaints related to the failure by employers to meet the requirements set by the bill regarding wages, transportation, and housing and to enforce remedies. CBO estimates that DOL would need a total of 100 additional full-time-equivalent employees to carry out these extra duties, at a total cost of $8 million to $9 million per year.

Second, DOL would need to reimburse state employment agencies for the costs associated with the increased number of visa certifications. Information from DOL officials indicates that total state administrative costs for the H–2A program in 1999 amounted to about $4 million. With 41,827 certified applicants, this implies an average cost of about $96 per applicant. CBO estimates that states' costs per H–2C visa would be roughly 50 percent higher, because it would involve starting a new program with new regulations.

Thus, accounting for inflation, the cost in 2002 would be an estimated $156 per H–2C visa.

The number of visas that would be issued under this program is difficult to predict. According to the Department of Labor, around 52 percent of the 1.8 million farmworkers—or 936,000 workers—employed in 1999 were undocumented aliens, while fewer than 42,000 alien workers had H–2A visas. On the one hand, there appears to be some support by employers for the H–2C program. On the other hand, however, hiring workers through the H–2C program would still be more expensive and cumbersome than hiring undocumented workers. For the purposes of this estimate, CBO has assumed that, in 2002, 70,000 workers would be issued H–2C visas. In 2003 and 2004, CBO assumes that 140,000 workers would participate in the program. These figures include workers that would otherwise enter with an H–2A visa. As a result, the total cost of certifying H–2C visas in 2002 would amount to about $11 million, increasing to $23 million by 2004, including adjustments for inflation. (Those costs would be partially offset by the projected elimination of discretionary spending for certifying H–2A visas.)

Costs to the Department of Justice. The requirements imposed on DOJ by H.R. 4548 would increase costs by an estimated $42 million over the 2002–2005 period. Those costs would be partially offset by a reduction in direct spending for H–2A visas of an estimated $11 million.

H.R. 4548 would direct the Immigration and Naturalization Service (INS) of DOJ to certify that all persons on the registry established by DOL are authorized to be employed in the United States. INS would also have to establish an automated system to verify that employers who hire H–2C workers do not hire unauthorized workers. Based on information from the INS about similar systems developed by the agency, CBO estimates that this provision would cost around $4 million in fiscal year 2002 and less than $500,000 per year thereafter. In addition, CBO estimates that the cost to DOJ of processing H–2C visas would be similar to the current cost of H–2A visas, about $110 per visa.

Costs to the State Department. Enactment of H.R. 4548 is estimated to result in the issuance of about 70,000 H–2C visas in 2002 and 140,000 per year in 2003 and 2004. According to the State Department, the cost would be $45 per visa. Therefore, the costs incurred by the State Department would amount to an estimated $16 million over the five-year period. Those costs would be partially offset by a reduction in spending for the H–2A visas of roughly $4 million over five years.

Offsetting Receipts

In order to cover the federal costs incurred by the various agencies, H.R. 4548 would mandate that employers be charged two fees where applicable. All employers applying for workers through the central registry would be charged a fee for each job that they try to fill. Employers wanting access to H–2C workers would be charged an additional fee per H–2C worker. DOL would have to establish a fee schedule that would be sufficient to cover the total federal direct spending.

CBO estimates that DOL would need to collect $140 million in fees to cover the outlays by the three federal departments. At the

same time, because H–2A fees would no longer be collected, federal receipts from that source would drop by an estimated $18 million. Thus, offsetting receipts would increase by $122 million over the five-year period.

Revenues

Under the bill, employers found to violate the various requirements imposed on them would be assessed a civil penalty of $1,000 per violation. CBO estimates that the total receipts from this provision would amount to less than $500,000 per year.

PAY-AS-YOU-GO CONSIDERATIONS

Section 252 of the Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. The net changes in outlays that are subject to pay-as-you-go procedures are shown in the following table.

By fiscal year, in millions of dollars

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Changes in outlays	0	0	4	–5	–2	5	0	0	0	0	0
Changes in receipts	0	0	0	0	0	0	0	0	0	0	0

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 4548 contains no new intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

ESTIMATE PREPARED BY:

Federal Costs: Carla Pedone (226–2820), Mark Grabowicz (226–2860)
Impact on State, Local, and Tribal Governments: Susan Tompkins (225–3220)
Impact on the Private Sector: Paige Piper/Bach (226–2940)

ESTIMATE APPROVED BY:

Robert A. Sunshine
Assistant Director for Budget Analysis

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article I, section 8, clause 4 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Sec. 1. Short Title; Table of Contents.

The short title for H.R. 4548 is the "Agricultural Opportunities Act."

Sec. 2. Definitions.

Section 2 lists the defined terms within H.R. 4548.

TITLE I—AGRICULTURAL WORKER REGISTRIES

Sec. 101. Agricultural Worker Registries.

Section 101 requires the Labor Department to establish a registry of United States farm workers for each State or region to ensure that U.S. workers are referred to available jobs before H–2C workers are hired. The registry will verify the citizenship or other immigration status of applicants so that illegal aliens are not inadvertently included, and the Attorney General will also establish a program to ensure that H–2C employers do not hire illegal aliens from other sources.

U.S. workers shall be removed from the registry if they so request or if they consistently decline or fail to report for employment referrals. Names on the registry shall be kept confidential and used only for agricultural employment.

TITLE II—H–2C PROGRAM

Sec. 201. Employer Applications and Assurances.

Section 201 requires growers to apply for workers at least 28 days before they are needed. Applications shall specify the number and qualifications of workers needed, anticipated period of employment, and wages and working conditions. Agricultural associations may also file applications for workers on behalf of employers. Each application shall be accompanied by a registry user fee.

A grower applying for workers shall certify that the jobs offered are temporary or seasonal, are not a result of a labor dispute, and shall be governed by applicable laws regarding hiring, wages, benefits, and working conditions. The grower shall also certify that it will advertise locally for U.S. workers and contact U.S. workers employed in past seasons.

The Labor Department shall approve or reject applications within 7 days. A grower's application shall be denied if the grower, within the previous 3 years, substantially violated its obligations under the H–2C program.

Sec. 202. Search of Registry.

Section 202 provides that upon approving a grower's application, the Labor Department shall contact U.S. workers on its registry and refer them to the grower by 7 days before the date they are needed. If there are not enough qualified and interested U.S. workers, the Labor Department shall notify the Justice and State Departments of the number of H–2C workers needed to make up the shortfall. The grower shall pay an alien employment user fee for each H–2C worker needed.

Sec. 203. Issuance of Visas and Admission of Aliens.

Section 203 provides that upon the Labor Department's notification, the State Department shall issue visas to, and the Immigration and Naturalization Service (INS) shall admit, enough H–2C workers to make up for the shortfall of U.S. workers. If the Labor Department fails to act in a timely manner, the grower may apply directly to the State and Justice Departments, who shall admit the necessary workers within 5 days.

If U.S. workers referred by the Labor Department fail to report for work, are unwilling or unable to do the work, or abandon their employment, a grower may apply for additional H–2C workers, and the Labor Department shall notify the State and Justice Departments of the need within 3 days. The Labor Department may also notify the State and Justice Departments of an emergency application made by a grower who faces an unforeseen need for workers.

Sec. 204. Employment Requirements.

Section 204 requires growers to pay H–2C workers the greater of the "prevailing wage" or the "adverse effect wage rate." The prevailing wage is the average wage rate of employees in an agricultural activity in the area of intended employment. The adverse effect wage rate is 5 percent above the prevailing rate, if the prevailing rate is less than the prior year's average hourly earnings of field and livestock workers for the State or region, provided that the adverse rate shall not be more than the prior year's average hourly earnings of field and livestock workers for the State or region. A prevailing wage may be expressed as an hourly wage, a piece rate, a task rate, or other incentive payment method, including a group rate.

A grower must provide housing for its workers, and the housing shall meet Federal, State, and local standards. Alternatively, a grower may provide a housing allowance if the State Governor certifies that there is housing available locally for farm workers, in which case a grower shall assist workers to find housing. The housing allowance shall be equal to the statewide average fair market rental for existing housing for non-metropolitan counties, as established by the Department of Housing and Urban Development.

A grower shall reimburse reasonable transportation and subsistence costs to the place of employment for a worker who completes 50 percent of the period of employment. A grower shall also reimburse reasonable transportation and subsistence costs from the place of employment for a worker who completes the period of employment, unless a subsequent employer is paying those costs. Reimbursement shall not be required for distances under 100 miles or for workers not using grower-provided housing or housing allowances.

A grower using H–2C workers shall continue to offer employment to U.S. workers until after 50 percent of the anticipated period of employment has elapsed, unless similar employment in the same area is available for U.S. workers. A grower shall also pay workers for at least three-quarters of the total work period specified by the employer, even if less work is offered, except to a foreign worker displaced by the grower's continuing obligation to hire a U.S. worker.

Sec. 205. Program for the Admission of Temporary H–2C Workers.

Section 205 provides that an otherwise admissible alien coming to the U.S. to perform temporary or seasonal agricultural labor is eligible for an H–2C visa if the alien has not, within the previous 5 years, violated H–2C visa requirements or other conditions of admission to the U.S. as a non-immigrant. The alien may not be accompanied by family members.

An alien may not receive a subsequent H–2C visa unless the alien departed the U.S. before the expiration of the previous visa, spent at least 2 months in his or her country of nationality or last residence, and verified the foregoing by appearing before a U.S. consular officer and surrendering his or her expired H–2C identification card. After the INS fully implements an entry-exit system as required by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, that system must also verify the alien's compliance with the foregoing requirements.

The duration of the H–2C visa shall be the lesser of the period requested by the employer or 10 months. Extensions of stay are available so long as the total visa duration does not exceed 12 months. The INS shall establish a program to ensure that H–2C workers do not overstay their visas.

An alien who abandons his or her employment shall be considered to have failed to maintain legal status as an H–2C visa holder. A grower shall notify the INS within 7 days of such abandonment, and the INS shall deport aliens who fail to maintain legal H–2C status. The INS shall issue additional H–2C visas to replace H–2C workers who abandon or prematurely terminate their employment.

Each H–2C worker shall be given a reliable, technologically advanced identification card that is counterfeit- and tamper-resistant. The card shall be compatible with INS and other Federal law enforcement databases containing the alien's immigration and criminal records, if any.

TITLE III—MISCELLANEOUS PROVISIONS

Sec. 301. Enhanced Worker Protections and Labor Standards.

Section 301 provides that the Labor Department shall adjudicate complaints regarding a grower's failure to meet its legal obligations under the H–2C program. The Department shall conduct expedited investigations and issue written determinations regarding serious child labor, wage, and housing violations. The Department's decisions shall be appealable to administrative law judges.

The Labor Department may permit the transfer of a worker who has filed a complaint against a grower to another grower, so long as a replacement worker is provided to the first grower, unless that requirement is waived by the first grower.

A grower who has failed to pay wages may be compelled by the Department to pay back wages, fined up to $1,000 per occurrence, and be barred from hiring H–2C workers for up to 1 year. Other violations of the H–2C program may be enjoined, fined up to $1,000 per occurrence, and result in up to a 1-year bar if the violation is substantial. A second failure to pay wages or other substantial violation shall be punished by a 3-year bar, and a third such violation by a permanent bar to hiring H–2C workers.

If an association of growers acting as an employer is barred from hiring H–2C workers, a grower-member of the association may not employ H–2C workers in occupations in which they were employed by the association, unless the grower applies for such workers on its own behalf or through another association.

Section 301 also provides for the conduct of a number of joint studies and reports. A new Commission on Housing Migrant Agri-

cultural Workers, composed of four growers' representatives, four workers' representatives, one representative each from the Departments of Labor, Agriculture, and Housing and Urban Development (HUD), and a State or local official appointed by HUD, shall study the issue of migrant farm workers housing and submit a report to Congress within 3 years. The Commission may also submit interim reports.

Also due to Congress within 3 years shall be a report on a joint study of migrant worker child care and child labor issues done by the Departments of Labor, Agriculture, and Health and Human Services; a report on a joint study of field sanitation standards done by the Labor and Agriculture Departments; and a report on a joint study of labor standards violations and enforcement done by the Labor and Agriculture Departments.

Sec. 302. Commission.

Section 302 authorizes the Attorney General to establish a commission between the United States and each country providing 10,000 or more H–2C workers to provide a forum to discuss matters of mutual concern.

Sec. 303. Regulations.

Section 303 requires interagency consultation regarding H–2C regulations promulgated by the Departments of Justice, State, and Labor. All such regulations shall take effect on the effective date of the Agricultural Opportunities Act.

Sec. 304. Determination and Use of User Fees.

Section 304 provides that the Labor Department shall set and collect registry user fees and alien employment user fees. The registry user fee shall be sufficient to reimburse the costs of registration, referral, and validation, and the alien employment user fee shall be sufficient to reimburse the costs of employing eligible aliens, including the establishment and certification of eligible employers, the issuance of documentation, and the admission of eligible aliens. Fees shall remain available to reimburse costs incurred by the Labor, State, Agriculture and Justice Departments, provided that reimbursement of enforcement costs shall not exceed 10 percent of the Labor Department's direct costs.

Sec. 305. Funding for Startup Costs.

Startup costs of the agricultural worker registries may be paid out of Federal or State funs available under the Wagner-Peyser Act (29 U.S.C. sec. 49 et seq.) establishing the United States Employment Service within the Department of Labor, and may be reimbursed from funds collected under Section 304.

Sec. 306. Report to Congress.

Within 4 years after enactment of the Agricultural Opportunities Act, the U.S. General Accounting Office (GAO) shall report to Congress regarding the implementation of and compliance with the act. The report shall address whether 1) the program has ensured that growers have an adequate supply of workers, 2) H–2C aliens work only in authorized employment and timely depart the U.S. when their visas expire, 3) growers comply with program requirements,

4) the H–2C program is not adversely affecting U.S. workers, and 5) adequate housing is available. The report shall compare wages and working conditions of U.S. and H–2C workers with those of unauthorized workers and, finally, make recommendations for improving and continuing or terminating the H–2C program. An advisory board of four growers' representatives and four workers' representatives shall advise GAO regarding the preparation of its report.

Sec. 307. Effective Date.

The Agricultural Opportunities Act shall take effect 1 year after enactment. Within 180 days after enactment, the Labor Department shall report to Congress regarding measures being taken and progress made in implementing the act.

Sec. 308. Termination of Program.

The Agricultural Opportunities Act shall cease to be effective 3 years after its effective date under Section 307.

AGENCY VIEWS

U.S. DEPARTMENT OF LABOR,
Washington, DC, July 27, 2000.

Hon. LAMAR S. SMITH, *Chairman,*
Subcommittee on Immigration and Claims,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN SMITH: This letter presents the views of the Administration on H.R. 4548, the "Agricultural Opportunities Act," which I understand your Subcommittee plans to mark up. This bill would establish a new three-year agricultural guestworker program as an alternative to the existing H-2A temporary nonimmigrant agricultural worker program under the Immigration and Nationality Act. The Administration strongly opposes enactment of H.R. 4548, and if the bill were presented to the President, I would recommend that he veto it.

The U.S. economy is experiencing a period of unprecedented prosperity with the longest economic expansion in our Nation's history. Unfortunately, farm workers are not sharing in this prosperity as their earnings and working conditions have been either stagnant or in decline. The conditions under which farm workers live and work are characterized by low wages, sub-poverty annual earnings, and significant periods of unemployment and under-employment. This all adds up to a labor force in significant economic distress. H.R. 4548 will not ameliorate these serious problems in the agricultural labor market, but rather—if enacted—could have the unintended consequence of making them worse.

The President has been and remains opposed to establishing a new agricultural guestworker program. This is based on serious concerns that legislation like H.R. 4548 would almost certainly increase illegal immigration, reduce work opportunities for U.S. citizens and other legal residents, and depress wages and work standards for American workers. The President's position is consistent with the conclusions of two Congressionally-created commissions—the bipartisan Commission on Immigration Reform, chaired by the

late Barbara Jordan, and the Commission on Agricultural Workers, which examined this issue in the early 1990s—as well as the more recent Binational Study on Migration, a joint study by highly respected scholars from both Mexico and the U.S. which issued its report in September 1997.

The Administration strongly opposes H.R. 4548 because it would shift costs and risks from employers to low-wage workers and/or the government. Specifically, this bill would:

- eliminate the current requirement that agricultural growers recruit workers and create a government run job registry—thereby reducing the growers' obligation to do positive recruitment.
- erode U.S. worker wages by capping the adverse effect wage rate at 105% of the locally prevailing wage.
- eliminate workers' guarantee of pay for at least three-quarters of the work hours/days offered in the employer's contract and allow workers to be terminated without pay at any time for "lack of work."
- provide an inadequate mechanism for housing foreign guest workers by allowing growers to provide a housing voucher in lieu of actual housing.

The Administration has acknowledged problems with the current H-2A agricultural guestworker program and is working administratively to reengineer and streamline the program to better assure growers an adequate, predictable labor supply while protecting U.S. farm workers. To this end, the Administration has requested $10 million to fund America's Agricultural Labor Network ("AgNet") that would benefit growers and workers by having an efficient additional means to match workers with employment opportunities. In addition, we have published regulations to reduce the length of time that employers must file an H-2A application from 60 to 45 days before the date when employees are needed; reduced the deadline for when employer-provided housing must be available for inspection before the date of need; and modified the requirement that certified H-2A employers provide notice of the exact date on which H-2A employees have departed for the place of employment. Also, we along with the Immigration and Naturalization Service have just issued a final regulation that completes an earlier proposal to delegate authority to adjudicate most H-2A petitions to DOL. This change significantly reduces the burden to growers when filing for H-2A workers by removing an entire step from the current process. Furthermore, we have made additional administrative changes to the H-2A program such as modifications to the positive recruitment requirement and intend to consistently meet the existing 30-day deadline to issue approved certifications for growers.

As the General Accounting Office (GAO) reported in December 1997 and most recently reiterated at a hearing before your Subcommittee on H.R. 4548, ample supplies of farm labor appear to be available in most areas, although there is some possibility of localized shortages relating to specific crops and geographic areas.

Based upon the findings of the GAO and bipartisan commissions, and the improvements which have been made and will continue to be made to the current H-2A program, the Administration is

strongly opposed to H.R. 4548. The Office of Management and Budget advises that there is no objection to the presentation of this letter from the standpoint of the Administration's program.

Sincerely,

ALEXIS M. HERMAN, *Secretary of Labor.*

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, DC, September 13, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter presents the Administration's views on H.R. 4548, the "Agricultural Opportunities Act," which I understand your Committee plans to mark up. The Administration shares the goals of assuring that our agricultural labor policy and any reform of the H–2A program both provides growers with a predictable and reliable labor supply, and assures adequate workplace protections for domestic and foreign farm workers. However, this bill would not meet these goals and therefore the Administration strongly opposes enactment of H.R. 4548. If the bill were presented to the President, his senior advisors would recommend that he veto it.

H.R. 4548 would establish a new three-year agricultural guest worker program as an alternative to the existing H–2A temporary nonimmigrant agricultural worker program under the Immigration and Nationality Act. Under this new program, costs and risks would be shifted from the growers to farm workers, who are among the poorest and most vulnerable workers in our society. Specifically, H.R. 4548 would:

- eliminate the current requirement that agricultural growers recruit workers and create a government run job registry—thereby reducing the growers' obligation to conduct positive recruitment;
- erode U.S. worker wages by lowering the required minimum wage and allowing this lower rate to be paid on *average* to a group of workers;
- eliminate workers' guarantee of pay for at least three-quarters of the work hours/days offered in the employer's contract and allow workers to be terminated without pay at any time for "lack of work;" and,
- provide an inadequate mechanism for housing foreign guest workers by allowing growers to give a housing voucher in lieu of actual housing.

In addition, this bill would likely increase illegal immigration, reduce work opportunities for U.S. citizens and other legal residents, and depress wages and work standards for American workers.

The President remains strongly opposed to legislation that would create a new agricultural guest worker program. This position is consistent with the conclusions of two congressionally-created commissions—the bipartisan Commission on Immigration Reform and the Commission on Agricultural Workers—as well as the more recent Binational Study on Migration, a joint study by highly re-

spected scholars from both Mexico and the U.S., which issued its report in September 1997.

The Administration has acknowledged problems with the current H–2A agricultural guest worker program and has been working administratively to reengineer and streamline the program to better assure growers an adequate, predictable labor supply while protecting U.S. farm workers. For example, the President's FY 2001 Budget requested $10 million to fund America's Agricultural Labor Network ("AgNet") an Internet-based, electronic tool that will facilitate the recruitment of agricultural workers by growers and the movement of agricultural workers to areas with employment needs. This request did not receive support in the House or Senate. In addition, the Departments of Labor and Justice have published regulations to streamline the application process for growers. This too has met resistance from the Congress. The current Conference agreement on the Labor, Health and Human Services, Education and Related Agencies Appropriations Bill, FY 2001, contains a rider blocking these regulations. Congress should work with us on these proposals to improve the current H–2A program.

Based on the findings of the bipartisan Commissions and the Administration's proposals to make the current H–2A program more responsive to growers without weakening workers' protections, we believe this bill is unnecessary and would likely worsen the current conditions in the agricultural labor market. Therefore, the Administration remains strongly opposed to H.R. 4548, and if the bill were presented to the President, his senior advisors would recommend that he veto it, as noted above.

Sincerely,

JACOB J. LEW, *Director.*

Identical Letter Sent to The Honorable John Conyers, Jr.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

IMMIGRATION AND NATIONALITY ACT

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TITLE I—GENERAL

DEFINITIONS

SECTION 101. (a) As used in this Act—
(1) * * *

* * * * * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
(A) * * *

* * * * * * *

(H) an alien (i)(b) subject to section 212(j)(2), who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 214(i)(1) or as a fashion model, who meets the requirements for the occupation specified in section 214(i)(2) or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1), or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 212(m)(1), and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 212(m)(2) for the facility (as defined in section 212(m)(6)) for which the alien will perform the services; or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of the Internal Revenue Code of 1954 and agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), of a temporary or seasonal nature, [or (b)] *(b)* having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; *or (c) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States pursuant to section 218A to perform such agricultural labor or services of a temporary or seasonal nature;* or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien [specified in

this paragraph] *specified in this subparagraph (other than in clause (ii)(c))* if accompanying him or following to join him;

* * * * * * *

TITLE II—IMMIGRATION

* * * * * * *

CHAPTER 2—QUALIFICATIONS FOR ADMISSION OF ALIENS; TRAVEL CONTROL OF CITIZENS AND ALIENS

* * * * * * *

ALTERNATIVE AGRICULTURAL TEMPORARY WORKER PROGRAM

SEC. 218A. (a) PROCEDURE FOR ADMISSION OF ALIENS WHO ARE OUTSIDE THE UNITED STATES.—

(1) CRITERIA FOR ADMISSIBILITY.—

(A) IN GENERAL.—An alien described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act shall be admissible under this section if the alien is designated pursuant to section 203 of the Agricultural Opportunities Act, otherwise admissible under this Act, and the alien is not ineligible under subparagraph (B) or (C).

(B) DISQUALIFICATION.—An alien shall be ineligible for admission to the United States or being provided status under this section if the alien has, at any time during the past 5 years—

(i) violated a material provision of this section, including the requirement to promptly depart the United States when the alien's authorized period of admission under this section has expired; or

(ii) otherwise violated a term or condition of admission to the United States as a nonimmigrant, including overstaying the period of authorized admission as such a nonimmigrant.

(C) FOREIGN RESIDENCE REQUIREMENT.—

(i) IN GENERAL.—No alien admitted as a nonimmigrant under section 101(a)(15)(H)(ii)(c) or acquiring such status after admission shall be eligible to receive another nonimmigrant visa under such section until it is established that the alien—

(I) departed the United States before the expiration of the alien's authorization to remain in the United States as such a nonimmigrant; and

(II) has resided and been physically present in the country of the person's nationality or last residence for an aggregate of at least 2 months after the expiration of such authorization.

(ii) APPEARANCE BEFORE CONSULAR OFFICER.—No alien admitted as a nonimmigrant under section 101(a)(15)(H)(ii)(c) or acquiring such status after admission shall be eligible to apply for another nonimmigrant visa under such section until the alien, at least 2 months after the expiration of the alien's authorization to remain in the United States as such a nonimmigrant—

(I) appears before a consular officer in the country described in clause (i)(II);

(II) verifies his or her identity by presenting to the consular officer the identification and employment eligibility document provided under subsection (a)(4); and

(III) surrenders that document to the consular officer.

(iii) ENTRY AND EXIT DATA SYSTEM.—After the Attorney General fully implements the integrated entry and exit data system under section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1221 note), no alien admitted as a nonimmigrant under section 101(a)(15)(H)(ii)(c) or acquiring such status after admission shall be eligible to receive another nonimmigrant visa under such section unless the data in such system establish that—

(I) the requirement of clause (i)(I) has been satisfied;

(II) at least 2 months have elapsed since the expiration of the alien's authorization to remain in the United States as such a nonimmigrant; and

(III) during that 2-month period, the alien has not entered or attempted to enter the United States.

(2) PERIOD OF ADMISSION.—The alien shall be admitted for the period requested by the employer not to exceed 10 months, or the ending date of the anticipated period of employment on the employer's application for registered workers, whichever is less.

(3) ABANDONMENT OF EMPLOYMENT.—

(A) IN GENERAL.—An alien admitted or provided status under this section who abandons the employment which was the basis for such admission or status shall be considered to have failed to maintain nonimmigrant status as an alien described in section 101(a)(15)(H)(ii)(c) and shall depart the United States or be subject to removal under section 237(a)(1)(C)(i).

(B) REPORT BY EMPLOYER.—The employer (or association acting as agent for the employer) shall notify the Attorney General within 7 days of an alien admitted or provided status under this Act pursuant to an application to the Secretary under section 201 of the Agricultural Opportunities Act who prematurely abandons the alien's employment.

(C) REMOVAL BY THE ATTORNEY GENERAL.—The Attorney General shall promptly remove from the United States aliens admitted pursuant to section 101(a)(15)(H)(ii)(c) who have failed to maintain nonimmigrant status or who have otherwise violated the terms of a visa issued under this title.

(D) VOLUNTARY TERMINATION.—Notwithstanding the provisions of subparagraph (A), an alien may voluntarily terminate his or her employment if the alien promptly departs the United States upon termination of such employment.

(E) REPLACEMENT OF ALIEN.—Upon presentation of the notice to the Attorney General required by subparagraph (B), the Secretary of State shall promptly issue a visa to, and the Attorney General shall admit, an eligible alien designated by the employer to replace an alien who abandons or prematurely terminates employment.

(4) IDENTIFICATION DOCUMENT AND IDENTIFICATION SYSTEM.—

(A) IN GENERAL.—Each alien admitted under this section shall, upon receipt of a visa, be given an identification and employment eligibility document to verify eligibility for employment in the United States and verify such person's proper identity.

(B) REQUIREMENTS.—No identification and employment eligibility document may be issued and no identification system may be implemented which does not meet the following requirements:

(i) The document and system shall be capable of reliably determining whether—

(I) the individual with the identification and employment eligibility document whose eligibility is being verified is in fact eligible for employment,

(II) the individual whose eligibility is being verified is claiming the identity of another person, and

(III) the individual whose eligibility is being verified has been properly admitted under this section.

(ii) The document shall be in the form that is resistant to counterfeiting and to tampering.

(iii) The document shall incorporate, at a minimum, the features of the most technologically advanced identification documents issued under this Act on the date of the enactment of the Agricultural Opportunities Act that are designed—

(I) to prevent counterfeiting;

(II) to prevent tampering; and

(III) to ensure that a person proffering the document as identification is the person to whom the document was issued.

(iv) The document and system shall—

(I) be compatible with other Immigration and Naturalization Service databases and other Federal Government databases for the purpose of excluding aliens from benefits for which they are not eligible and to determine whether the alien is illegally present in the United States, and

(II) be compatible with law enforcement databases to determine if the alien has been convicted of criminal offenses.

(b) EXTENSION OF STAY OF ALIENS IN THE UNITED STATES.—

(1) EXTENSION OF STAY.—If an employer with respect to whom a report or application described in section 203(a)(1) of the Agricultural Opportunities Act has been submitted seeks to employ an alien who has acquired status under this section and

who is lawfully present in the United States, the employer shall file with the Attorney General an application for an extension of the alien's stay or a change in the alien's authorized employment. The application shall be accompanied by a copy of the appropriate report or application described in section 203 of the Agricultural Opportunities Act.

(2) LIMITATION ON FILING AN APPLICATION FOR EXTENSION OF STAY.—An application may not be filed to extend an alien's stay if the granting of the application would permit the alien's period of authorized admission as a nonimmigrant described in section 101(a)(15)(H)(ii)(c) to exceed 12 months.

(3) WORK AUTHORIZATION UPON FILING AN APPLICATION FOR EXTENSION OF STAY.—An employer may begin employing an alien who is present in the United States who has acquired status under this Act on the day the employer files an application for extension of stay. For the purpose of this requirement, the term "filing" means sending the application by certified mail via the United States Postal Service, return receipt requested, or delivered by guaranteed commercial delivery which will provide the employer with a documented acknowledgment of the date of sending and receipt of the application. The employer shall provide a copy of the employer's application to the alien, who shall keep the application with the alien's identification and employment eligibility document as evidence that the application has been filed and that the alien is authorized to work in the United States. Upon approval of an application for an extension of stay or change in the alien's authorized employment, the Attorney General shall provide a new or updated employment eligibility document to the alien indicating the new validity date, after which the alien is not required to retain a copy of the application.

(4) LIMITATION ON EMPLOYMENT AUTHORIZATION OF ALIENS WITHOUT VALID IDENTIFICATION AND EMPLOYMENT ELIGIBILITY CARD.—An expired identification and employment eligibility document, together with a copy of an application for extension of stay or change in the alien's authorized employment that complies with the requirements of paragraph (1), shall constitute a valid work authorization document for a period of not more than 60 days from the date of application for the extension of stay, after which time only a currently valid identification and employment eligibility document shall be acceptable.

(5) MAXIMUM PERIOD OF AUTHORIZED ADMISSION.—In the case of a nonimmigrant described in section 101(a)(15)(H)(ii)(c) who is granted an extension of stay under this subsection, the period of authorized admission as such a nonimmigrant may not exceed 12 months.

* * * * * * *

DISSENTING VIEWS

We strongly dissent from H.R. 4548, the so-called "Agricultural Opportunities Act," which constitutes a dangerous step back to the days of the Bracero program when migrant farm workers were little more than indentured servants to agricultural employers. At a time when there is no evidence of a shortage of U.S. farm workers, the legislation would gut the minimal protections in the current H–2A program (designed to protect domestic and foreign workers), reduce wages, and result in a substantial increase in illegal immigration.

H.R. 4548 is opposed by the administration; in fact, the President's senior advisors are recommending that the President veto any legislation including H.R. 4548.[1] In addition, the bill is opposed by over 170 national, State and local groups with an interest in immigration, labor, civil rights, religious and environmental policy, including the AFL–CIO,[2] United Farm Workers,[3] National Council of La Raza,[4] American Bar Association,[5] Farmworker Justice Fund, U.S. Catholic Conference, Mexican American Legal Defense and Education Fund,[6] Asian Pacific American Labor Alliance, League of United Latin American Citizens, National Center for Farmworker Health, Service Employees International Union, Institute for Agriculture and Trade Policy, and United Methodist Church.[7]

H.R. 4548 proposes to restructure the farm labor market through the use of a new "guest worker" program that ultimately will replace the current H–2A program. Directly contrary to this proposal, the U.S. Commission on Immigration Reform, chaired by the late Barbara Jordan, concluded that a new agricultural guest worker program would be a "grievous mistake."[8] The Jordan Commission further wrote that:

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[1] Letter to Rep. John Conyers, Jr., from Jacob J. Lew, Director, Office of Management and Budget, Executive Office of the President (Sept. 13, 2000) (letter on file with the committee); Letter to Rep. Lamar Smith from Alexis M. Herman, Secretary, U.S. Dept. of Labor (July 27, 2000)(letter on file with the committee).

[2] Letter to Chairman Henry Hyde from Peggy Taylor, Director, AFL–CIO Department of Legislation (Sept. 11, 2000) (letter on file with the committee).

[3] Letter to Rep. John Conyers from Arturo Rodriguez, President, United Farm Workers of America (Sept. 18, 2000) (letter on file with the committee).

[4] Letter to House Judiciary Committee Member from Raul Yzaguirre, President and CEO, National Council of La Raza (Sept. 11, 2000) (letter on file with the committee).

[5] Letter to Chairman Henry Hyde from Robert D. Evans, Director, American Bar Assoc. Governmental Affairs Office (Sept. 11, 2000) (letter on file with the committee).

[6] Letter to Members of the U.S. House of Representatives from Bruce Goldstein, Co-Executive Director, Farmworker Justice Fund, Inc. (July 21, 2000) (letter on file with the committee).

[7] Letter to Speaker Dennis Hastert (Feb. 15, 2000) (letter from national, State and local organizations opposing a new temporary foreign agricultural worker program) (letter on file with the committee).

[8] U.S. Commission on Immigration Reform, *Legal Immigration: Setting Priorities*, p. 173 (1995); see also U.S. Commission on Immigration Reform, *Becoming an American: Immigration and Immigrant Policy*, pp. 94–95 (1997). The Commission on Agricultural Workers, in its final report in 1992, also recommended against a new guestworker 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.

> Even if labor shortages develop, the Commission would be cautious about recommendations for a guestworker program. Guestworker programs effectively expand rural poverty. Moreover, guestworker programs are predicated on limitations on the freedom of those who are invited to enter and work. Experience has shown that such limitations are incompatible with the values of democratic societies worldwide. For that very reason, "temporary" guest workers tend to become permanent residents, *de facto* or even *de jure*. We cannot ignore the inconsistency between the stated intent of guestworker programs and their actual consequences.[9]

In our view, H.R. 4548 creates a guest worker program that realizes the worst fears of the Jordan Commission. For these and the reasons set forth herein, we strongly reject the legislation.

Background and Description of the Current Guest Worker Program and H.R. 4548

United States agricultural employers, since the end of the Civil War, have repeatedly sought ways to hire foreign workers as a significant part of their seasonal workforce. The present legislative effort may be seen in that context. Between 1942 and 1964, many Mexican farm workers worked legally in the United States under the U.S.-Mexico agreement known as the Bracero program, a temporary foreign agricultural worker program that was established initially to meet World War II labor shortages. When this program peaked in the last half of the 1950's, it employed more than 400,000 workers a year. Many guest workers received less than the minimum wage, were housed in dilapidated shacks and were dismissed and shipped home if they spoke up for their rights. After employers deducted for food, housing and transportation, some braceros netted less than $100 for a season's work. The Bracero program was repealed in 1964, after an Edward R. Murrow documentary called "Harvest of Shame" exposed abuses by the growers, including unpaid wages, poor housing, and the physical toll of "stoop labor."

Since that time, the only legal temporary foreign agricultural worker program in the United States has been the permanent H–2/H–2A program.[10] The current H–2A program permits the admission of foreign agricultural workers to perform work that is temporary in nature, provided that U.S. workers are not available. It is administered by the Department of Labor's Employment and Training Administration ("DOL/ETA") and the Department of Justice's ("DOJ") Immigration and Naturalization Service ("INS"). The H–2A program requires an affirmative search for available U.S. workers and a determination that admitting foreign workers will

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[9] U.S. Commission on Immigration Reform, *Legal Immigration: Setting Priorities*, p. 173.

[10] The program began during World War II on the East Coast, was designated as an "H–2" program in 1952, and then as an "H–2A" program in the Immigration Reform and Control Act of 1986 (IRCA). Section 101(a)(15)(H)(ii)(A) of the Immigration and Nationality Act, 8 U.S.C § 1101(a)(15)(H)(ii)(A). The substantive terms appear primarily in section 218 of the INA, 8 U.S.C. § 1188. In 1986, IRCA contained a "special agricultural worker" (SAW) program, negotiated between agricultural worker and employer representatives, that granted legal immigration status to 1.1 million formerly undocumented workers who could prove that they had performed farm work.

not adversely affect the wages and working conditions of similarly-employed U.S. workers. To ensure that U.S. workers' wages and conditions are not undermined by the availability of foreign workers, and to avoid exploitation of the foreign guest workers, the H–2A program includes minimum standards regarding wages, housing, reimbursement of travel costs, and a minimum work guarantee for all workers—foreign and domestic.

H.R. 4548 establishes a new guest worker pilot program (known as H–2C),[11] and significantly alters worker protections applicable to foreign and domestic workers. H–2C eliminates positive recruitment and preference requirements relating to U.S. workers and instead allows employers to hire an unlimited number of foreign guest workers if they are unable to retain a sufficient number of domestic workers through a proposed new job registry.[12] The bill pares back on worker protections currently provided under the H–2A program. Among other things, H.R. 4548 creates a complex new wage formula that will result in lower wages than current law,[13] allows employers to in many cases substitute a housing allowance for actual housing,[14] and reduces employee travel reimbursement

[11] H.R. 4548 establishes a new nonimmigrant visa (H–2C) category for foreign agricultural workers under a three-year pilot program. H.R. 4548, § 205. To be eligible for the H–2C visa category, a person must be seeking a temporary position as a seasonal agricultural worker in the United States. *Id.* § 205(a). The foreign worker must demonstrate that he has a permanent residence abroad and that he has no intention of abandoning his foreign residence. *Id.* § 205(a).

[12] H.R. 4548 requires DOL to establish a computer database of registries (by State or region of United States) for U.S. workers who are available for temporary seasonal agricultural work. *Id.* § 101(b). Workers apply for inclusion in the registry of the State where they reside and then ask that their names be submitted to any additional States where they intend to seek employment. *Id.* § 101(a). DOL then verifies with DOJ that workers included in the registries are authorized to be employed in the United States. *Id.* § 101(b). Agricultural employers are able to apply to DOL for the referral of eligible U.S. workers. *Id.* § 201(a)(1). DOL then conducts a search of the appropriate registries to identify qualified U.S. workers and determines whether such U.S. workers are interested in the open position. *Id.* § 202(a). Within 21 days, DOL must notify the employer of any U.S. workers who are willing to accept the position. *Id.* § 202(b). No positive recruitment (i.e., the advertising of open positions or other effort to find workers) is required of the employer. Further, agricultural employers may refuse to hire qualified U.S. workers if the applicant fails to register with a job registry. *Id.* § 101(b)(6).

The bill removes certain protections for U.S. workers that exist in current law. In particular, in some cases employers who apply for registered workers do not need to offer employment to qualified U.S. workers if the worker applies before 50 percent of the anticipated period of employment has elapsed. *Id.* § 204(e)(2). Moreover, DOL is required to make "all reasonable efforts" to find an opening for a registered worker before making a referral to an employer that puts the employer in the position of hiring a U.S. worker for a position already filled by a foreign worker. *Id.* § 204(e)(3).

A U.S. employer is immediately eligible to hire foreign guest workers if DOL is unable to refer sufficient number of U.S. workers from the job registry. *Id.* § 203. In such cases, DOL submits a report to the employer and the State Department indicating the number of additional workers needed by the U.S. employer. In turn, the State Department issues H–2C visas to qualified foreign agricultural workers to fill the employers' remaining job opportunities. *Id.* § 203.

[13] H.R. 4548 proposes a complicated new wage requirement that substantially differs from current law. Employers are required to offer and pay the higher of the local "prevailing wage" for the particular job, or the "adverse effect wage rate" ("AEWR"). *Id.* § 204(a)(1). The employer cannot pay less than he Federal or State minimum wage. Under current law, the AEWR generally ensures that the wage being offered to guest workers is not lower than, and thus does not reduce, the prevailing wage rate for U.S. workers. The bill, however, redefines the term "adverse effect wage rate" to install an arbitrary methodology (at most, 5% above the local prevailing wage formula).

In determining the prevailing wage for a position, an employer may rely on an employer-generated prevailing wage survey. *Id.* § 204(a)(3). Additionally, the bill permits employers to pay the average of the hourly earnings of the workers, taken as a group. *Id.* § 204(a)(4)(B). Thus, an employer may pay individuals below the required wage rate as long as the group of workers on average earns the required rate. The bill does not guarantee any particular rate of pay to an individual worker.

[14] Employers are required to provide housing or a housing allowance to their agricultural. The housing shall be at no cost to the worker and must meet Federal, State and local standards, including Federal standards for temporary workers. *Id.* § 204(b). This housing requirement ex-

Continued

requirements.[15] Finally, the bill includes some modest enforcement requirements[16] and establishes several studies to consider the problems involved in housing migrant agricultural workers, issues related to the adequacy of education and day care for the children of migrant agricultural workers, the problem of field sanitation standards, and to evaluate the implementation of the pilot program.

I. THERE IS NO SHORTAGE OF AGRICULTURAL WORKERS

As a threshold matter, we would note that there is no shortage of domestic agricultural workers that would justify this drastic legislation. Indeed, the evidence points precisely to the opposite conclusion—there is a continuing glut of agricultural workers, who earn below poverty level wages while enduring inordinately difficult work under arduous working conditions. The conditions of agricultural workers in this country continue to be characterized as a "harvest of shame" forty years after that phrase was made famous by Edward R. Murrow's documentary.[17]

Recent and reliable information from the National Agricultural Workers Survey shows that the situation of farm workers has continued to decline: wages have stagnated, annual earnings remain beneath the poverty level, and farm workers face chronic unemployment. Consider the following:

- In 1997–98, most farm workers held only one farm job per year and were employed in agriculture for less than half a year.
- Even in July, when demand for farm labor peaks in many parts of the country, just over half of the total farm workforce held agricultural jobs.
- Since 1990–92, the average work year in agriculture has decreased from 26 to 24 weeks; while the number of weeks in nonagricultural employment has fallen from eight to five. Basically, another month of unemployment has been added to the farm worker misery index.

At the same time, despite a strong economy and record prosperity, farm worker wages have lost ground relative to those of workers in the private, nonfarm sector. Adjusted for inflation, the

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ists under current law. However, the bill has an additional provision which permits employers to provide workers with a housing allowance in lieu of housing. If the Governor of the State where the employment is located certifies that housing is available in the area of intended employment, the employer may provide workers with a housing allowance. *Id.* §204(c). The allowance must be "equal to the statewide average fair market rental for existing housing for nonmetropolitan counties for the States in which the employment occurs . . . based on a 2-bedroom dwelling unit and as assumption of 2 persons per bedroom." *Id.* §204(c)(4). "Nonmetropolitan counties" are established by the Housing and Urban Development Department. *Id.*

[15] A U.S. worker referred by a job registry or foreign guest worker, who travels more than 100 miles to the job, must be reimbursed by the employer for the cost of the worker's transportation from the worker's permanent place of residence or place of last employment. *Id.* §204(d). The worker is only entitled to reimbursement if he completes 50% of the job's period of employment. *Id.* In the case of the foreign worker, his place of residence is deemed to be the place where he departed the foreign country or where the visa was issued (i.e., the U.S.-Mexican border) rather than his actual place of residence. *Id.* §204(d)(3).

[16] The bill requires that an identification document and identification system be developed to verify the eligibility and identity of nonimmigrant agricultural workers admitted under this program. The bill also requires DOJ to develop a procedure to verify that H–2C workers depart from the United States when their authorized period of stay expires. The bill also establishes an administrative complaint mechanism that limits the type and scope of the Secretary's enforcement efforts.

[17] See "Napa Facing Harvest of Shame," S.F. Examiner (Sept. 26, 2000).

average real hourly wage of farm workers has dropped from $6.89 to $6.18. Consequently, farm workers have lost 11 percent of their purchasing power over the last decade.

In addition, a 1998 General Accounting Office study found that unemployment in twenty counties accounting for about half of the fruits, tree nuts and vegetables grown in the United States was so high that they either qualified for a Food Stamp waiver or were designated as a labor surplus area.

In California, the unemployment rates in eighteen agricultural counties continue to be nearly double the statewide average even during peak harvest months.[18] The California Rural Legal Assistant Foundation (CRLAF) has conducted surveys of farm workers in certain raisin and grape producing counties during harvests in the last 3 years. These surveys have consistently found that there are available farm workers who are not being recruited by employers. In fact, employers are doing a poor job of making their work opportunities known. Unfortunately, H.R. 4548 does not offer solutions to reducing farm worker unemployment and poverty; instead, it guarantees a perpetuation of these severe problems.

II. THE LEGISLATION WOULD HARM ALL WORKERS BY WEAKENING PROTECTIONS RELATING TO WAGES, HOUSING, AND TRAVEL REIMBURSEMENTS

H.R. 4548 would harm domestic and foreign migrant farm workers in a number of respects. Most significantly, it would reduce their wages, it would deny them fair and adequate housing, and it would cause them to bear increased travel expenses. We believe that, at a time when several hundred thousand farm workers already earn less than the poverty level, and face poor housing and working conditions, it is wholly inappropriate to reduce these critical worker protections.

Wages

In terms of wages, the legislation adopts a formula that permits employers to pay substantially less than under the H–2A program, and then creates loopholes to offer an even lower wage. Under the current H–2A program, employers must offer and pay U.S. and foreign workers the *highest* of three wage rates: (1) the State or Federal minimum hourly wage, (2) the local prevailing wage for the particular job, and (3) the adverse effect wage rate or "AEWR" (the "adverse effect" concept is based on the principal that foreign workers should not be permitted to depress the wage rates of U.S. workers—i.e., citizens and legal immigrants). H.R. 4548 weakens these core wage protections available under current law in several important and significant ways.

First, the bill alters the definition of "adverse effect" wage so that it equals the prevailing wage (or, in some limited circumstances, the prevailing wage plus 5%). Since the adverse effect wage is typically higher than local prevailing wages paid by H–2A employers, eliminating this standard will depress wages for agricultural workers generally.

[18] State of California, Employment Development Department, Report 400C, 1989–1999.

Second, H.R. 4548 permits employers to determine prevailing wages by relying on an employer-generated prevailing wage survey. In an industry known for its informal record keeping and "off the books" employment, it is questionable whether it is appropriate to allow the employers to conduct the surveys that determine the prevailing wage.[19]

Third, H.R. 4548 contains a large "loophole" that permits employers to show that their employees, *as a group, on average*, earned the same level of earnings that they would have earned if they had been paid the actual prevailing wage. Under current H–2A law, if the prevailing wage is $6.50 per hour, all workers must be offered the prevailing wage of $6.50 per hour or the AEWR, whichever is higher. By contrast, an H–2C employer could pay some workers less than $6.50 per hour, as long as the group of employees averaged at least $6.50 per hour. In other words, under the proposed H–2C system, many individual workers will not be entitled to the prevailing wage or its equivalent.

It is because of these concerns that the AFL–CIO has observed:

> With the disparity between pay requirements in current law and the proposed agricultural guestworker program, tens of thousands of farm workers would be very likely to experience pay cuts. For example, the AFL–CIO has estimated that in North Carolina alone, more than ten thousand farm workers—H–2A and similarly-employed U.S. workers—could experience a nearly 20 percent pay cut under the reduced minimum wage provisions of the proposed H–2C program.

Housing

During the days of the Bracero program, migrant workers slept in fields and ditches because no housing was available. Though housing guarantees were written into Bracero contracts, the requirements were poorly enforced and routinely circumvented.[20] If the committee-reported bill is enacted into law, we risk returning to these horrors and abuses.

This is because, under H.R. 4548, if the Governor certifies that adequate housing exists within the area of employment, the employer once again will not need to provide workers with housing. Instead, the employer can provide *either* housing or a housing allowance to the migrant farm workers.[21] Though the certification may assist in having employers provide housing where none exists, it remains possible that such a certification will be issued even though particular parts of an area have adequate housing while

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[19] H.R. 4548, § 204(a)(2).

[20] "As a result of official complacency and employer reluctance rural California was for many years spotted with rundown bracero camps. In the delta region of the San Joaquin temporary camps were set up among the mosquito-infested sloughs. Barns and stables were converted to human habitation. Former Wetback hideouts were fitted with plank bunks, a faucet and other standard equipment. Empty warehouses and abandoned garages were refurbished for a season." ERNESTO GALARZA, MERCHANTS OF LABOR—THE MEXICAN BRACERO STORY 194–95 (1964)

[21] H.R. 4548, 204(b)(2). Under current law, H–2A employers are required to provide housing without charge to those workers who are not reasonably able to return to their residence within the same day. If provided by the employer, the housing must comply fully with Federal standards issued by the Department of Labor for farm labor housing, as well as State housing standards. The Judiciary Committee adopted an amendment offered by Rep. Gallegly that permitted H–2C employers to provide a housing allowance only when the Governor of their State determined that farm worker housing is available.

other parts covered by the certification do not. Certainly, providing workers with a housing allowance when no housing exists is a hollow gesture. Moreover, assuming affordable housing does exist, few landlords will be willing to offer the short-term rentals needed by farm workers.

Of even greater concern is that the amount of the housing allowance required in H.R. 4548 often will be completely inadequate because it is based on a formula that yields less than the actual cost of housing in the areas where farm workers will be employed. The bill states that the allowance will be equal to the "statewide average fair market rental for existing housing for non-metropolitan counties for the State in which the employment occurs."[22] Several major agricultural production counties, such as Fresno County, California, are categorized by HUD as "metropolitan" even though they are largely rural. These "metropolitan" counties often have much higher rental costs than the non-metropolitan counties. As a result, housing allowances are based on rental costs in non-metropolitan counties even though much of the available housing is in the more expensive metropolitan counties. In practical terms, workers in such areas would receive about $4 per day toward housing, an unacceptably low amount.

Travel Expenses

Currently, the H–2A program requires employers to reimburse workers for their costs of transportation to the place of employment once they complete one-half the season, and to pay the workers' transportation to their homeland upon completion of the entire season. In addition, the H–2A regulations require employers to advance to U.S. workers the costs of transportation to the place of employment if such advances are made to foreign workers. These provisions offer financial assistance to workers who are traveling long distances to accept low-paying jobs, help ensure that temporary foreign workers will return home, and prevent employers from discriminating against U.S. workers and in favor of foreign workers regarding transportation benefits.

H.R. 4548 would require employers to reimburse costs of transportation to the place of employment after the first half of the season and payment of the costs of transportation home at the end of the season, but only for foreign workers and for U.S. workers who were referred through a job registry.[23] Those U.S. workers who obtained the job by applying directly to the employer or through other methods outside a job registry would not be entitled to the transportation benefit. Further, H.R. 4548 does not address the issue of transportation cost advances. Moreover, employers would be free to offer transportation benefits to foreign workers that are not offered to U.S. workers. Because many employers prefer to hire foreign workers, such discriminatory benefits are likely to be used to recruit foreign workers and avoid U.S. workers.

Other problems include the amount of the transportation cost payment. H.R. 4548 creates the fiction that the workers' "residence shall be deemed to be the place where the alien was issued the

[22] H.R. 4548, 204(b)(6)(D).
[23] *Id.* § 204(c)(1)–(2).

visa."[24] Because the workers in Mexico receive the H–2C visa at the U.S.-Mexican border, but can live very far from the border, they will be denied the actual costs of their transportation, making it more unlikely that they will return to Mexico. Illustrating the concerns with this provision, United Farm Workers has testified: "Under [H.R. 4548] a worker can be recruited in his home in southern Mexico, told to report to the U.S. consulate in Calexico to be issued his visa and then travel to the Imperial Valley, a journey of hundreds of miles and not receive any transportation reimbursement (the Imperial Valley is less than 100 miles from Calexico). Moreover, there is nothing in [H.R. 4548] that prevents the employer from actually charging the worker for this transportation."[25]

III. THE LEGISLATION WOULD HARM DOMESTIC WORKERS IN PARTICULAR BY ELIMINATING AFFIRMATIVE RECRUITMENT AND PREFERENCE RULES

The legislation also would do particular and marked harm to domestic agricultural workers. This is because it would eliminate critical safeguards for U.S. workers, such as affirmative recruitment and job preference rules, and undermine employee negotiating rights.

Elimination of Affirmative Recruitment

Guestworker programs are intended to fill labor shortages. Consequently, the current H–2A statute requires employers to engage in "positive recruitment" of U.S. workers. This requires that employers attempt to locate job applicants and hire them—and use the Federal-State Employment Service, before hiring foreign guest workers. H.R. 4548, however, would not require such recruitment inside the United States. Instead, the bill calls for the establishment of a new government bureaucracy, a Federal-State system of "job registries" devoted solely to the agricultural industry. This would allow all agricultural employers in the United States to hire foreign migrants if an insufficient number of U.S. workers are available in the job registry.

There are numerous problems with this approach. First and foremost, under the bill, all agricultural employers could reject qualified U.S. workers who applied for a job directly to the employer, or through a nonprofit group, a union, or a labor contractor. Moreover, the job registry could have as little as 14 days to recruit U.S. migrant workers before the employer would get access to guestworker visas. Yet, growers could recruit guestworkers for months.

This core concern was noted by the Department of Labor, when they testified that under H.R. 4548:

> for the first time, and in contrast to all other employment situations in the country—would shift the burden of finding workers from the employer to the government. Agricultural employers desiring to hire foreign guestworker would have no obligation to find U.S. workers on their own behalf

[24] *Id.* § 204(c)(3)(C).

[25] Hearing on H.R. 4548, the "Agricultural Opportunities Act," Before the Subcomm. on Immig. and Claims of the House Comm. on the Judiciary, 106th Cong., 2d. Sess. (June 15, 2000) (testimony of Marcos Camacho, General Counsel, United Farm Workers).

> except to apply to the government-operated registry, advertise (on behalf of the registry) in a local publication, and make "reasonable efforts" to contact workers employed in the previous season. Under H.R. 4548, the government would only have 14 days to find an employer's workers, may only search for such workers registered in the State where the work is to be performed, and must contact each potentially qualified worker to obtain a commitment to accept the offered job. Failure to overcome the obstacles to effectively operating an electronic job matching service in the agricultural labor market would allow the employer to obtain its workforce abroad.[26]

Second, the bill's intention to have farm workers referred to jobs through computer databases is impractical. Farm workers generally do not possess computers or access to the Internet, often are isolated from places where computers and modems are available, and usually do not have the knowledge, education or skills to utilize a computer-based job referral system even if they obtained access to a computer and the Internet.[27] As Rep. Howard Berman (D–CA) has noted, "the registry would work only if every domestic farm worker who desperately seeks these jobs had a laptop computer to receive messages about employers seeking workers in the very short turnaround time allotted for the registry referral."

In addition, assuming the resources were assigned to establish and maintain the job registries, it would take several years for the system to become operational. In the meantime, the failure of the job registries to send workers to these employers would trigger the obligation of the INS to deliver visas to the employers. The issuance of visas should be based on the failure of bona fide recruitment efforts, not on the failure to establish these new job registries.

Job Preferences

H.R. 4548 also weakens provisions in current law that guarantee that U.S. workers have an opportunity to fill jobs before they are 50% complete. Under the H–2A program, an employer must employ a U.S. worker if the worker applies for a position held by a guest worker before 50% of the total time period for the job has elapsed. The so-called "50% rule" is the primary method of ensuring that U.S. workers are given a job preference in the hiring process. In 1986, Congress ordered the Secretary of Labor to study this protection to determine whether the benefits of it outweighed the costs. After conducting a cost-benefit survey of the impact of the rule, the Bush administration retained the preference in the H–2A program. Unfortunately, H.R. 4548 does not include a similar provision.[28]

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[26] June 15, 2000 Hearing (testimony of John R. Fraser, Deputy Administrator, Wage and House Division, Employment Standards Admin, Dep't of Labor).

[27] We note that if a worker who is registered turns down 3 job referrals within a 3 month period, then the worker's name is removed from the registry. 101(b)(8). Thus, a worker who rejects two referrals because he is employed, and rejects a third referral because the wage rate is too low, will be removed from the list.

[28] Rep. Sheila Jackson Lee (D–TX) offered an amendment to include the 50% rule in H.R. 4548 to ensure that some U.S. worker protections are included in the new guest worker program. The amendment was defeated by the Majority by a vote of 17–12.

Indeed, H.R. 4548 contains provisions that are contrary to the 50% rule's job preference. For example, an employer "shall not be obligated" to offer a job to qualified, eligible U.S. workers who are referred by job registries if the registry is able to refer that qualified U.S. worker to other employers "that offer substantially similar terms and conditions of employment."[29] Similarly, the Secretary will be obligated to "make all reasonable efforts" to refer a U.S. farm worker to a job other than the H–2C employer's job if the employer has already "committed to" hiring a foreign worker.[30] Due to these "employer" protections, employers can establish recruitment networks in foreign countries to avoid hiring migrant workers from inside the United States.

General Impact on Employee Rights

Beyond weakening specific worker protections, as a general matter, it seems clear that by making it easier and less expensive for employers to retain large pools of migrant farm workers, this will further reduce the negotiating leverage, and wages and benefits available to U.S. workers. The bill does this first by increasing the supply of workers and reducing their wages. This puts American workers in an almost impossible position in terms of seeking to enhance their own wages and benefits.

Second, the bill makes it that much more difficult for workers to organize and negotiate collectively. This is because guest workers, and, as a result, U.S. workers, lack the bargaining power to improve wages and working conditions. During the Subcommittee on Immigration and Claims hearing on the bill, United Farm Workers explained that:

> The fundamental flaw in [guest worker] programs is that workers are not free to change employers and offer their labor in a free labor market. Without union representation, the best protection that most farm workers have from abusive working conditions is the right to walk away from a bad employer and find work elsewhere. Guest workers don't have that right. This is really the underlying issue here. In some ways, guest workers are in a worse position to protect their rights even than undocumented workers."[31]

Many guest workers fear that if they demand better wages or working conditions, they will be fired and deported, or that the employers will not request a visa for them in the following year. As workers with limited education, English-language capacity or job skills, their economic bargaining power is limited. This in turn has a negative impact on the bargaining power of their U.S. counterparts.

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[29] H.R. 4548, § 204(d)(2)(C).
[30] *Id.* § 204(d)(4).
[31] June 15, 2000 Hearing (testimony of Marcos Camacho, General Counsel, United Farm Workers).

IV. THE LEGISLATION WILL LEAD TO INCREASED ILLEGAL IMMIGRATION

Although proponents would argue that the legislation will encourage legal entry, it is far more likely that it will lead to a massive increase in illegal immigration as hundreds of thousands of persons choose to overstay their temporary visas. This was the case with the Bracero program. For example, historian Otey M. Scruggs observed in a study covering the years 1942 to 1947: "the Bracero program, instead of diverting the flow of [illegal aliens] into legal channels, as Mexican officials had hoped, actually stimulated unlawful emigration."

The Department of Labor agrees with this analysis, having testified:

> Experts and academics who study migration flows generally agree that guestworker programs establish migratory networks and paths that increase illegal immigration. Guestworkers tend to come and stay in the receiving country. The program resulting from H.R. 4548 would be no different. And it would make it easier for foreign agricultural workers admitted under the program to become illegal workers by overstaying in this country.[32]

We need not look any further than our country's own experience to conclude that illegal immigration results from guest worker programs.[33] The reasons why foreign guest workers do not return home are numerous. Some unauthorized immigrants do not wish to face the risk of returning home and having to cross the border again. Others would be barred for up to 10 years from reentering the country legally under an H–2C program because they currently have been in the United States unlawfully. Further, law enforcement makes little effort to identify farm workers here unlawfully and employers under the H–2C program would have no obligation to ensure that guest workers returned abroad upon completion of the work.[34] Though the working conditions of farm workers are poor by any standard, foreign workers often are eager to accept jobs in the United States in an effort to reach our country. Such an eagerness to live in the United States merely suggests the underlying truth that foreign agricultural will not return to their home country.

The modest enforcement provisions included in the bill will be of little use in stemming the flow of illegal immigration. Under current law, in addition to paying return transportation costs, H–2A employers must notify the government when their guest workers leave the grower to return to their country of origin. H.R. 4548, however, would put the employer under no obligation to ensure the workers it imported leave the U.S. upon completion of the work.

To address concerns regarding illegal immigration, Rep. Berman offered an amendment to cap the number of new guest workers at

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[32] *Id.* (Testimony of John M. Fraser, U.S. Department of Labor).

[33] According to some estimates, approximately 800,000 of the 1.6 million farm workers in the United States are undocumented workers.

[34] Indeed, the GAO concluded that INS enforcement efforts are not likely to significantly reduce the availability of agricultural labor. GAO–H–2A Guestworker Program, GAO/HEHS–98–20, Dec. 31, 1997 at 30; and GAO followup report in letter to Rep. Howard Berman, September 10, 1998, GAO/HEHS–98–236R, "Employer Experiences with H–2A."

100,000 per year. This resulted in a stunning admission by the subcommittee Chair that the actual expected flow of aliens could be one million persons per year:

> Rep. Smith: The pilot program without a numerical cap provides an opportunity to accurately gauge the United States' need for foreign agricultural labor, and I urge my colleagues to oppose this amendment. *The 100,000 cap in the amendment is not nearly enough to meet the demand which is estimated at closer to 1 million.*
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> * * *
>
> Rep. Berman: One of the arguments we have for immigration laws is that we want to protect American jobs. I thought that included farm workers, who are the lowest-paid workers in America today . . . ; let's have the cap.
>
> The chairman of the subcommittee [Smith] indicates that the cap is inadequate, that we may need up to a million new guest workers to come into the country to do agricultural work, notwithstanding the fact that there is no serious evidence that any substantial number of those new guest workers will return to the home country; notwithstanding that there is no evidence that the undocumented workers now in this country will leave and notwithstanding the fact that employer sanctions is a farce because of the presence of forged documents.
>
> So I'll conclude my comments with those and urge adoption of the amendment.

Rep. Berman's realistic and modest amendment unfortunately was defeated. Therefore, our concerns with the likelihood of illegal immigration resulting from the new H–2C guest worker program remain.

CONCLUSION

We are in favor of protecting the migrant farm workers who perform back-breaking work to harvest our Nation's crops and believe that foreign and domestic workers must be treated fairly and with dignity. We also recognize a need to address the concerns of agricultural employers and workers with the current program. A new guest worker program that threatens to return us to the horrors of the discredited Bracero program is not the answer. The program proposed in H.R. 4548 would increase vastly the number of undocumented workers in the United States, depress the wages of migrant workers, eliminate the employer-provided housing requirement and remove other worker protections that exist under current law. For these reasons, we must oppose H.R. 4548.

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