

An Analysis of the H-2A Agricultural Guest Worker Program and Recommendations for Future Policy

Paulina M. Irigaray

DISSERTATION.COM



Boca Raton

*An Analysis of the H-2A Agricultural Guest Worker Program and
Recommendations for Future Policy*

Copyright © 2009 Paulina M. Irigaray

All rights reserved.

No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without written permission from the publisher.

Dissertation.com
Boca Raton, Florida
USA • 2011

ISBN-10: 1-59942-382-0
ISBN-13: 978-1-59942-382-1

Table of Contents

I. Abstract.....	4
II. History of Mexican Immigration to the United States	5
III. The Development of Immigration Restrictive Laws	12
IV. H-2A Agricultural Guest Worker Program: Definitional Details.....	19
a. Procedures for Acquiring H-2A Workers	21
b. Time Constraints and Other Restrictions.....	25
c. H-2A Worker Protections and Employer Requirements.....	27
d. Penalties, Sanctions, and Law Enforcement.....	28
V. An Analysis of the H-2A Program—Is the H-2A Program Truly Functional?	30
a. IRCA Drawbacks	31
b. Economic Considerations	37
c. Mechanization of Farm Labor.....	43
d. Exploitation: Lack of Rights and Protections.....	47
VI. Recommendations for Future Policy	58
a. Streamlining H-2A Worker Acquisition	59
b. Increased Flexibility.....	60
c. Law Enforcement Reform.....	61
d. Proper Legal Recourse and Elimination of Blacklists	64
e. Outreach	66
f. Technological Research.....	68
g. Track to Legalization	70

VII. Conclusion.....	74
VIII. Further Research	75
IX. Appendices	76
X. Works Cited	84

I. Abstract

The majority of the people who make up the United States' seasonal agricultural workforce are nonimmigrant Mexican citizens. Immigration policies such as the Immigration Reform and Control Act (IRCA) and the H-2A agricultural guest worker program were meant to encourage growers to employ legal labor workforces. A study of the laws and practices that eventually resulted in the H-2A program shows how and why the demographics are predominantly Mexican. In addition, such study is revealing as to why the US enacted the H-2A program—including definitional details of the program itself. However, does this program really work? This question has radically different answers. In theory, the program seems to be well designed; but, in practice, it does not function as intended because of its many shortcomings, loopholes, open-ended issues, and poor enforcement. I will analyze and demonstrate how these inadequacies perpetuate illegal immigration and exploitation of both legal and illegal seasonal agricultural farm workers. Lastly, I will offer a composite of recommendations for legislative reform of the H-2A program; as well as provide pertinent, resourceful questions for further research.

II. History of Mexican Immigration to the United States

The widespread Mexican demographic in the United States is the product of two mass “transborder” migrations; the first occurring between 1900 and 1930 and the second triggered by World War II, which some consider to still be active (Corwin and Cardoso 38). These exoduses were the direct result of “push and pull” factors from both nations involved. Mexico’s state of affairs was providing an initiative for its nationals to migrate to the United States and certain conditions in the United States created a pull or need for migrant labor workers, specifically Mexicans.

This section will investigate the causes and effects of the Mexican migration into the United States, what laws were enacted as a result of these migratory waves, and how understanding the historical context of this phenomenon ultimately provides the foundation for today’s immigration and exploitation issues.

At the very beginning of the twentieth century, Mexico was a country whose people were suffering; for the peasants, who are the majority of the population, Mexico’s future looked bleak. Between 1876 and 1911, the nation was under General Porfirio Díaz’s rule; during his command, he allowed foreign and Mexican land merchants to seize most of the pastoral land (Corwin and Cardoso 38). Consequently, the “peon class” or rural working class was left landless and essentially obligated to work on their land; thus, debt peonage became almost universal (Corwin and Cardoso 38).

This time in Mexico’s history is reminiscent of the medieval ages’ feudal system; a Mexican peon is like a serf who pays his debt to his lord by working his land for almost no compensation (Corwin and Cardoso 39). Moreover, if the patriarch of the peon family

has a debt and dies, that debt is then passed on to his eldest son; these factors of life in Mexico perpetuated the peon class' desire to be liberated from extreme poverty and this feudal-like system (Corwin and Cardoso 39).

“Perhaps the most important ‘push’ factor was simply abject poverty, commonly known in Mexico as *la miseria rural*. The condition of the semi-starvation may be seen in the relation between wages and food costs” (Corwin and Cardoso 39). *La miseria rural* provided the significant push or cause for Mexican peasants to start looking for a way out of poverty. The inequality they experienced was not only in wages and food costs, but also with regards to landownership; for instance, around 1910 only five percent of Mexican families owned the country's land (Corwin and Cardoso 39). Mexico, as a nation, was debilitating under General Diaz's rule. His inability to control poverty levels, the permissive feudal-like system, and extensive land shortages deprived and displaced the peasantry (Corwin and Cardoso 39). Migration to the United States became a viable solution to their miserable conditions of life.

However, General Diaz's regime was not the only cause for the early twentieth-century mass migration to the United States. The Mexican revolution was also a contributor to the first exodus of rural Mexicans. The revolution took place between 1910 and 1920; hence, it was not the primary cause of out-migration. As mentioned previously, migration began taking place in 1900; thus, the revolution is considered to be an incentive to migrate for those peasants reluctant to join revolutionary forces (Corwin and Cardoso). According to Arthur F. Corwin and Lawrence A. Cardoso, the revolution provided: “The most important impulse to rural migrations by uprooting and setting in motion thousands of panic-stricken families” (51). The catalytic nature of the revolution

thus refers to a few factors; for instance, anarchy put in motion the fleeing of landowners mostly because they were fearful of reprisals (Corwin and Cardoso 51). The abandonment of land by landowners trickled down to the peasantry, forcing more peons to be displaced and either join insurgents or flee to the countryside as revolutionary chieftains (Corwin and Cardoso 51). Moreover, because the peons were leaving or joining troops in the revolution, the lands and domestic animals were widely neglected which caused food production to drop drastically. Therefore, those Mexican families that were originally willing to deal with the wretched conditions of their country and way of life were then forced reconsider leaving; migrating became one of their only survival options. The combination of extreme poverty, the catalytic nature of the revolution, along with food and land shortages, created a new class—the migratory labor class.

The push created by Mexico's situations and circumstances was not the only force that allowed for the Mexican migration to be considered a mass migration. During the first two decades of the twentieth century, the United States was going through its own share of changes that in turn promoted a pull factor, a demand for Mexican labor. Corwin and Cardoso explain this concept with the following passage: "...The development of railroads, mining, and ranching, spurred by American and other foreign investors during the permissive Porfirian era, created a rising demand for migrant labor at high wages" (40). At the turn of the century, the technological advancements in transportation, the agribusiness, and other industries fueled a growing economy that lacked a significant domestic labor force. These conditions help answer why Mexicans fled north toward the United States, rather than to other Central American or Caribbean nations. Mexicans saw an opportunity in America's development and seized it in hopes

of prosperity.

Even though changes in economy, agribusiness, and technology stimulated the pull factor for Mexican migrant labor, war can be considered the greatest cause for increased labor demand in many businesses. In 1917 the United States entered World War I, and the political environment of the time was tense and untrusting of many nations. “With low-cost immigrant labor from Europe shutoff by the Immigration Act of 1917 and wartime conditions, and with millions of Americans in uniform, more American employers turned to Mexican labor” (Corwin and Cardoso 52). War not only depleted the number of men needed to keep the economy a well oiled machine, but it also prohibited entry to many foreign nationals who could have helped replenish the workforce.

The aforementioned Immigration Act of 1917 blocked European immigration and also placed general immigration restrictions on the Mexican border. However, the United States’ workforce was debilitated significantly enough that growers and employers solicited the Secretary of Labor to exempt Mexican contract workers from immigration prerequisites such as literacy tests and head tax (Corwin and Cardoso 52). The combination of Mexico’s neutrality with regards to World War I, its current state of revolutionary war, and its concentration of poverty-stricken people made Mexicans ideal contract workers for the rising US cyclic labor shortages. The Mexican supply of willing workers and the United States’ demand for labor was a well-choreographed phenomenon that “led directly to the so-called wetback invasion of the 1920s” (Corwin and Cardoso 52).

Between 1900 and the 1920s, the number of Mexicans in the United States grew exponentially, laying the foundation for future Mexican migrant generations and the implementation of immigration control, specifically, the establishment of the Border Patrol in 1924 (Corwin and Cardoso 52). The institution of the border patrol is the first indicator, in the history of the United States government, of a growing concern regarding the influx of Mexicans into the country. However: "...Undoubtedly, the Border Patrol, like other government institutions, was influenced by the political and economic climate of the times and was less than fully committed to enforcement of immigration laws on the Mexican border" (Fogel 11). Some sources even suggest that American growers would pressure the Secretary of Labor to order Border Patrol officers to purposely ease up on deportation of Mexicans around crop harvesting time (Kiser and Kiser 137). The Border Patrol was enacted with the intentions of controlling illegal immigration; yet, the laws were not always observed to their specifications, a concept that is not too far fetched from some issues seen today. Therefore, in the 1920s, the Patrol for the southern border fluctuated in its rigidity towards deportation to be in accordance with the country's current circumstances and needs. The 1930s, on the contrary, resuscitated the demand to keep illegal Mexicans out.

Clearly, the Great Depression of the 1930s changed American growers' and employers' view towards using Mexican migrant labor. Mexicans went from being seen as a necessary and desirable source of labor to being perceived as taking jobs away from Americans suffering from the United States' poor economic conditions (Fogel 12). As a result, the flow of Mexicans to the United States came to an abrupt halt for a little over a decade, between the 1930s and the 1940s (Corwin and Cardoso 52). Hence, the pull for

foreign labor had ceased and subsequently ended the first massive wave of Mexican immigrants into the United States.

The second exodus of Mexican immigrants to the United States began when the United States entered World War II; creating yet another, new pull factor for Mexicans to enter the United States. “The period from World War I to 1940 was a complete cycle in the major theme in U.S. utilization of illegal Mexican workers: they have been perceived as a mobile commodity, to be courted in periods of apparent labor shortages and shunted back to Mexico when the shortages disappeared” (Fogel 12). This passage illustrates how the push and pull factors discussed in this chapter can be seen as a cyclical pattern. World War I, agribusiness, and technological advancements created a demand for migrant workers; the Great Depression deterred any need for foreign labor; and at the United States’ entry into World War II, the country came full circle, calling on eager Mexican contract workers to ease the labor shortages that resulted from the war.

The government took many measures to combat the fears of labor shortage with the utilization of Mexicans, for instance: “...Recommended to the Immigration and Naturalization Service (INS) on May 12, 1943, that 3,000 Mexicans be used to augment the sugar beet labor force in California” (Kirstein 13). This time around the demand seemed to levitate towards agricultural jobs exclusively. Peter Kirstein offers the following as an explanation: “...Cause for reduction of the farm labor sector was the allurements of jobs in the defense industry.” More enticing and less arduous jobs for American citizens consequently led to shortages in the agribusiness sector of the economy. These events thus triggered demands for Mexican contract laborers, who more readily accepted backbreaking work for lesser compensation than that of a domestic farm

laborer (Kirstein iii). This essentially created another pull factor for fervent migrants waiting to cross the border.

As a result of these newly generated pull factors deriving from wartime conditions, the second massive wave of Mexicans entered the United States and were welcomed as war workers and allies (Corwin and Cardoso 54). Many of these migrant workers entered the US legally via the Bracero Program, becoming known as *braceros* (Corwin and Cardoso 53). This program was initially an emergency contract labor program between the United States and Mexico governments; it officially began in 1942 (Corwin and Cardoso 53). With regards to the development of the Bracero Program, Roosevelt stressed the military nature it; he saw the importation of Mexican contract workers as providing “strategic farm crops for the democratic cause” in World War II (Kirstein 15). The combination of the riddance of hostilities towards Mexicans, reports of high wages from the first wave of Mexican migrants, and the continuance of poor conditions in Mexico subsequently increased Mexicans’ desire to work in the United States (Corwin and Cardoso 54). Thus, “Economic penetration followed political intervention in shaping what eventually became the largest Spanish-oriented minority in the United States” (Portes 162).

Mexican migrant workers’ eagerness to work was such that many could not wait to go through the formalities the Bracero Program entailed; therefore, many risked bypassing the border on their own. “[The *bracero*] Soon learned that it was an easy matter to skip the contract or to return to the United States surreptitiously...by 1946 the bracero-control structure was literally swept aside by hordes of wetbacks.” (Corwin and Cardoso 54). Legal *braceros* were generally single men; some would legally send for

their relatives and legal immigration from Mexico began to rise steadily between the 1940s and 1950s (Corwin and Cardoso). On the other hand, migrant workers that would dodge the program were able to cross the border with their whole family and even continue expanding their family once in the United States; jolting illegal immigration to new numbers (Corwin and Cardoso 54). “A comparison of the number of wetback apprehensions with the number of *braceros* legally contracted during the period 1946-1954 suggests the dimensions of the control problem” (Corwin and Cardoso 54). Thus began the wave of “illegal” Mexican immigration into the United States, a wave that is still active today.

III. The Development of Immigration Restrictive Laws.

Mexican illegal immigration did not become a great concern for the United States until the end of the Korean War (Fogel 15). After the massive surge of illegal Mexican migrants the government realized it had a lack of “regulation” over the Bracero Program and over the border. “...(The) Commissioner of the INS...attributed the low levels of apprehensions after 1954 to a ‘securing’ of the border and stated an intention to control much more diligently the border...” (Fogel 16). Along with this “plan of attack” the government also expanded *bracero* contracting from 1955 to 1964; this was done in part to absorb some of the illegal population (Corwin and Cardoso 55). According to the article “Mexican Migrant Labor History” cited under PBS.org’s new series The Border, the 1960s brought an overflow of “illegal” agricultural workers and the invention of the mechanical cotton harvester reduced the practicality and appeal of the Bracero Program. The article also suggests that as a result of these events, harsh criticism of the program by United States politicians, and widespread humanitarian violations of *bracero* employers,

the Bracero Program was terminated in 1964. Thus, the push and pull forces once experienced between Mexico and the United States had ceased, on a political standpoint; however, the United States' dependence on Mexican labor and Mexicans' need for a way out of poverty had undoubtedly continued (Corwin and Cardoso 54).

The 1970s brought in a stronger era of animosity towards Mexican immigrants that is still seen today. The number of the foreign born documented population within the United States was on a steady increase. According to Jeanne Batalova in 1970 Mexicans were ranked fourth, in other words, they held a 7.9% share of all foreign-born people residing in the United States, refer to Appendix A for census numbers. The notion to "manage" Mexican immigration was thus intensified and new restrictive legislation was underway.

The newly heightened concern towards Mexicans had many negative repercussions; Americans soon began to feel repugnance towards them. This idea is clearly projected by examining the language used within the sources identified within the 1970s decade. It is noteworthy to observe that all of these sources utilized the term "wetback" or *mojado*. The term's roots and usage are explained in the following passage: "...[The term wetback] Is applied to those who enter the United States without legal permission. It comes from the fact that many came to the United States simply by wading across the Rio Grande, the river that forms the boundary between Texas and Mexico" (Ortega 187). This is one of the many excerpts found that detailed Americans' views on Mexican immigration; their attitudes were simply xenophobic. Americans saw immigration in general as a problem; the culture became ignorant and intolerant of immigrants. Some books published in this era even go as far as to say that Mexicans do

not find this term derogatory. The widespread use of these belittling slurs show how the American public saw Mexican immigration as specifically undesirable and foreign immigration, as a whole, as potentially harmful to our economy.

These abhorrent attitudes can be considered as the ramifications of agribusiness owners' exclusive use of Mexican laborers. Prior, as well as during the 1970s, American land owners: "...Always welcomed, *con un abrazo*, low-cost labor regardless of legal status, and there is not yet a law to castigate the employer of illegal aliens" (Corwin and Cardoso 61). The trend of hiring low-cost legal and/or illegal Mexicans to save money proliferated among most growers; promoting the notion that US farm workers are undesirable as well as leading to the emergence of many abusive behaviors towards Mexican migrant laborers. Even though exploitation was presumably existent since the first and second wave of Mexican immigrants; exploitation on American farms became prevalent during this era. Mexicans were vulnerable on many levels and there were no laws to oversee these labor transactions. Author of "The Plight of the Mexican Wetback", Joe C. Ortega, offers a specific case in point:

When his employees are apprehended, the employer usually denies he owes any back wages and pockets what the employee earned up to that time. He knows full well that the alien employee will be on his way to Mexico...and that he will have a hard time pursuing a claim for wages from there (189).

This example illustrates how growers' greed came before their sense of humanity. Furthermore, it establishes the foundation of how exploitation always existed and even evolved to stay current with the times.

However, the growers were not the only ones who saw an "opportunity;" Americans and Mexicans alike began to form labor agencies or became farm labor contractors where they would recruit Mexican peasants to work as contract laborers in the United States (Corwin and Cardoso 60). In essence, these agencies would draw in willing Mexicans, charge them a fee for their "service," and find them a job on an American farm (Ortega 190). This simple idea however was not always legal or licit; some agencies were more or less trafficking Mexican workers by stealing the fee and sending Mexicans into America covertly and illegally (Corwin and Cardoso 60). "Thus, alien smuggling, some of them carrying drug packets to pay their passage, has become a billion-dollar enterprise" (Corwin and Cardoso 60). These legal businesses conducting illegal behaviors ultimately stem from the cupidity of those who saw exploitation of innocent Mexican farm laborers, human beings, as an economic commodity (Kirstein 106).

The 1970s brought to light the rising number of foreign-born people residing within the United States, Americans' attitude towards immigrants, and the abusive nature towards migrant agricultural workers. "... A period of economic stagnation in the United States helped increase public concern about the economic and social consequences of the illegal flow" (Zolberg 322). By the 1980s, through the eyes of many Americans, immigration was officially a "problem;" which lends a very different connotation from it being considered an issue. This suggests that the public's attitude towards Mexicans

remained the same or worsened by the 1980s, mostly because of their growing presence in the American demographic. Furthermore, by that decade those Mexicans who came to the United States during the original mass waves of immigration have second and third generations born in the United States and are therefore citizens. Jeanne Batalova cites that Mexicans accounted for 15.6% of all foreign-born people residing in the United States in 1980; refer to Appendix A for a complete breakdown of Mexicans' presence among the foreign-born population. This percentage doubled from that of the decade preceding and offers a clue as to why Americans saw Mexicans as "invaders."

Lawmakers and politicians correspondingly began to realize that immigration was becoming the task at hand and that legislation was imperative. Therefore, Congress passed the Immigration Reform and Control Act of 1986 (IRCA). The act is defined on the United States Citizenship and Immigration Services website, under education and resources; the government agency provides the following glossarial citation:

Public Law 99-603 (Act of 11/6/86), which was passed in order to control and deter illegal immigration to the United States. Its major provisions stipulate legalization of undocumented aliens who had been continuously unlawfully present since 1982, legalization of certain agricultural workers, sanctions for employers who knowingly hire undocumented workers, and increased enforcement at U.S. borders.

The IRCA was enacted to slow immigration. American employers were to actively participate in this effort and adjust production as well as hiring practices. Employers

were also encouraged to utilize a smaller, more legal workforce as a way to eventually diverge future massive influxes of immigration (Taylor and Thilmany 350). Moreover, special provisions were incorporated in the IRCA with regards to agribusiness presumably because: “Farmers argued that they had become dependent on unauthorized immigrant workers because the U.S. government had not prohibited hiring such workers in the past” (Taylor and Thilmany 350). These new “special provisions” were a tactical measure created to ease employers’ transition by adding new classifications for seasonal agricultural workers and establishing provisions for the legalization of certain such workers (Levine, “Farm Labor Shortages” 3).

As a result, two classifications were set to permit some illegal aliens, specifically those working in the agribusiness, to have temporary legal status or amnesty. One such “new” status was called the Legal Temporary Resident (LTR). The Social Security Administration’s (SSA) Program Operations Manual System (POMS) website details what the term LTR signifies: “...A special agricultural worker who has applied for adjustment of status June 1, 1987 or later, or certain aliens on extended voluntary departure status who applied for adjustment of status in the 24-month period beginning December 22, 1987.” In addition to this classification, the IRCA specifies a second status classification for agricultural laborers called a Special Agricultural Worker (SAW). Under certain stipulations SAWs were granted amnesty and designated Legal Alien Permanent Residents (LAPR). This status is further explicated in the following passage also provided by the SSA’s POMS website:

An alien who resided in the U.S. and performed seasonal agricultural services in the U.S. for at least 90 days during

the 12-month period ending May 1, 1986. When these aliens are granted LTR status, they are considered LAPR's (for all purposes (including SSI), except under provisions of the immigration laws.

The IRCA was a complex act that held many new provisions, sanctions, registry dates and immigration status classifications. With regards to this thesis, it is important to note that the Act implemented sanctions on employers as an incentive to retain “legal” workers (Taylor and Thilmany 351). Additionally, it attempted to fill the new void of illegal farm laborers the Act itself would produce by creating new classifications as a way to make the United States’ vast usage of foreign agricultural workers become more legal (Levine, “Farm Labor Shortages” 3).

IV. H-2A Agricultural Guest Worker Program: Definitional Details

The IRCA was the solution United States government created as a way to control the flow of immigration. Contrary to the bill's simple goal, the components of this Act are highly involved and affect a medley of different immigrant groups who came to the United States for different reasons and with different goals. The IRCA tackles many of the issues surrounding several types of legal status' and visa classifications; adding new categories to grant and/or restrict those who enter the United States for temporary work.

With regards to the laws and statutes, a nonimmigrant is defined as being: "An alien in the United States for a specific purpose and for a temporary period of time" (Wasem and Collver 2). There are 70 nonimmigrant visa categories defined in the Immigration and Nationality Act (INA) of 1952; each category is assigned a letter that correlates with their section in the statute (Wasem and Collver 2). These categories can stipulate the person's status, purpose, length of stay, and other important information. For instance, an O-1 visa is reserved for persons who have extraordinary ability in sciences, arts, education, business, or athletics. Each category is meticulously detailed and developed for specific purposes.

The nonimmigrant H visa category was established while the Bracero Program was still in operation; both were definitive contributors to the crescendo of Mexican laborers in the United States. The United States' decades' long reliance on Mexican labor was, presumably, the primary reason why the government attempted to legislate a guest worker program and enable seasonal workers to work legally. Nonetheless, The United States' dependence on foreign labor is also related to American growers' strong

assertion to utilize foreign labor; ultimately, the government conceded in their favor (Simms 3). The government enacted the first many versions of the only legal temporary foreign agricultural worker program, the H-2 program (Wasem and Collver 2).

H-2 was initially authorized through the INA. It laid the foundation for the concept known as the temporary foreign worker program (Bruno 2). The H-2 program flourished; shortly after, the Bracero Program was eradicated in 1964 for its lack of provisos (Simms 2). The H-2 program was then the primary form of legislation with regards to importing nonimmigrant temporary workers for both agricultural and nonagricultural workers (Bruno 2). However, like the Bracero Program, the H-2 also included many undesirable features. For instance, a contract laborer's eligibility to be selected for the program depended on his or her contacts with certain officials of his or her government (Briggs 232).

The aforementioned IRCA of 1986 instituted many new provisos; one such provision was an amendment to the original INA, which engendered the dividing of the H-2 program (Bruno 2). The H nonimmigrant visa category for temporary workers was bifurcated into two subcategories: the H-2B, dealing with temporary nonagricultural work, and the other becoming what we know today as the H-2A agricultural guest worker program (Wasem and Collver 2). Philip Martin's article, "Guestworker Programs for the 21st Century," offers a simple definition of the H-2A program's intended purpose: "To add workers temporarily to the U.S. workforce without adding permanent residents to the population, and to do so in a manner that does not adversely affect U.S. workers."

The H-2A program, Section 218 of the INA, is mutually directed and administered by government agencies: The Employment and Training Administration

(ETA) of the Department of Labor (DOL), and the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) (Bruno 2). In addition, prospective H-2A workers also file nonimmigrant visas applications with the United States Department of State (DOS) consulate in the worker's country of origin (Wasem and Collver 2). In summary, the program and its subsequent laws involve several parties: three different government agencies, employers and/or agricultural associations, and potential nonimmigrant agricultural laborers.

a. Procedures for Acquiring H-2A Workers

The procedural steps to petition the USCIS for H-2A nonimmigrant visas begin with the employer who expects a labor shortage for seasonal or temporary work, such as harvesting crops. The law stipulates that foreign laborers should only be imported if there is a labor shortage in a region's agribusiness market. The H-2A program aims to ensure that domestic workers receive agricultural employment opportunities first. Thus, for an employer to acquire H-2A workers he or she must: first take the specified steps to recruit domestic workers, ensure that there is a labor shortage, then file an application requesting a temporary foreign agricultural labor certification by the ETA of the DOL, all before he or she can finally petition the USCIS of the DHS for H-2A laborer acquisition (Bruno 3).

An "employer" who files a request for this specific labor certification is defined as: any individual proprietorship, a corporation, a partnership, an association of agricultural producers who may also file as a sole employer, a joint employer with its members, or a joint employer acting as an agent of its members (Dept. of Labor: ETA).

Doleta.gov, the ETA of the DOL website, details what the H-2A labor certification essentially attests: that there is not a sufficient domestic labor force who are available, unemployed, capable, willing, and qualified to do the work; and that the employment of these foreign laborers will not adversely affect the wages or working conditions of domestic workers.

The Federation for American Immigration Reform (FAIR) website explains the first step of the labor certification process, confirming that there is a depleted domestic workforce by following the DOL's regulations. An employer must carry out "positive recruitment" efforts to acquire domestic workers by advertising jobs through general circulation print publications or on the radio (FAIR). They must also make jobs known by calling or sending letters to local farm labor organizations, domestic migrant workers and other potential workers as means to find domestic laborers (FAIR).

Additionally, FAIR delineates an interesting fact with respect to the "positive recruitment" measure. The ETA of the DOL has the authority, under federal regulation, to require which publications and radio stations are utilized; as well as the license to determine whether the advertisements should be in English or in another language (FAIR). Employers must also: "...Attempt to recruit domestic workers and must cooperate with DOL-funded state employment services agencies in local, intrastate, and interstate recruitment efforts" (Bruno 3). Furthermore, the employer must continue to recruit U.S. workers until the H-2A workers have departed from their country for the place of work in the US (Dept. of Labor: ETA). The ETA of the DOL also requires that the State Workforce Agency continue to refer to the employer qualified domestic workers who are seeking employment and who apply up to the first half of the contract period, the

employer must hire these domestic workers (Dept. of Labor: ETA). All of these efforts must be made to ensure the need for importing foreign labor.

In addition, the ETA of the DOL ensures the latter of the certification details as well—the employment of these foreign laborers will not adversely affect the wages or working conditions of domestic workers. FAIR states that an employer must offer the job at the higher of the federal minimum wage, the adverse effect wage rate (AEWR), or the prevailing wage. The federal minimum wage, according to the Department of Labor’s Employment Law Guide, Chapter: Temporary Agricultural Guest Workers (H-2A Visas), is \$6.55 per hour effective July 24, 2008 and \$7.25 per hour effective July 24, 2009. The United States Department of Agriculture (USDA) establishes the AEWER; it performs a quarterly survey of the wages of both field and livestock laborers throughout the United States (Whittaker 5). The AEWR is thus a weighted average of USDA’s findings and are calculated by region; the rate is thus set by state (Whittaker 5). Lastly the prevailing wage rate is calculated on an hourly or “piece” rate of pay (Dept. of Labor Employment Law Guide). These payment requirements intend to assure workers a fair wage rate with respect to the agribusiness labor market’s supply and demand of workers.

Once these positive recruitment efforts are completed and an employer still lacks a sufficient workforce, he or she may start filing for a labor certification; refer to Appendix B to view an ETA issued labor certification application. This application will only be accepted if it is in compliance with the special rules for consideration of applications detailed in Aliens and Nationality: 8 USCA §1188. For instance, there is a specific time frame for application submittal. A completed labor certification application must be filed and received at least forty-five days before the employer’s estimated date of