NLWJC - Kagan

DPC - Box 033 - Folder 007

Immigration - H2A Workers [3]

1. Specific exclusion of packing
2. Specific - min wage laws continue to apply
3. Growers must make g.f. effort to help them find housing (along w/ voucher) (no attestation)

   DiFi: most growers would do; not very happy about it.
4. Enforcement - expedited review of "flagrant" complaints --

   e.g., about child labor (Becerra: real reason we have this problem - wages too low)
   housing
   wage payment
   → investigate by 10 days

   JF: Very few complaints in ag. We do very quickly if ever get one
   Wyden: Entertain any other suggestions
   JF: Current bill seems to limit to complaint-based!
   Wyden: Not our intent - agree on policy
5. ERs must reimburse inbound and outbound - for domestic workers as well

   Berman - why rewriting 50% rule, which is lynchpin protection for US workers.
   INS: employer verif. pilot in 5 states - very limited success in ag sector.
6. Clarity that H2A wkrs are free to leave, shift to another ER - when initiates petition
7. Clarity - no visa unless petition in order

8. Phase in the program · illegal
cap: based on annual wkr survey.
10% 1st yr. 20% 2nd 40% 4th 70% last yr
from that point forward: disagreement on whether should be cap.

9. Advisory Bd to GAO. ½ lbr; ½ ag

↓

10. Reports to Cong - yr 3 + 5 re program

10. Effective date extended to 1 yr (from 6 mos)
Diff: we want registry to work 1st
2-3 yrs - to make sure it works

11. ? Create a "window" for returning foreign wkrs.
change: ~~abolishes~~ changes the opportunity for reentry

12. Legalization provisions - prob. will be taken out of bill

13. Entry - exit via system - to validate exit of H2A wkr - at consulate

Wyden: Not worked out 3/4 guarantee.
USDA suggestion: oblig ceases if EE is placed somewhere else in equiv job (50 C distance)

Repatriate previous gene.

Registry - still relieves ER of responsibility to recruit.

Wyden: listen to other ideas to allow growers to work in legal environment

DiFi: doesn't want to legalize current whilst just do good registry - work on this.

Immig - H2A

Nonimmigrant Agricultural Worker (H-2A) Program
Reform Discussions

September 15, 1998

Proposed Agenda

- Purpose of Discussions

- Process for Dialogue (attachment)

  ⇒ Timetable

  ⇒ Communications with Constituencies

- Guiding Principles (attachment)

- Principal Issues:

  ⇒ Worker recruitment – Registry

  ⇒ Terms and Conditions of Employment

    - ♦ Wage requirements (Adverse Effect Wage Rate, or "AEWR")
    - ♦ Housing requirements
    - ♦ Transportation reimbursement
    - ♦ Three-quarter (3/4) guarantee

  ⇒ Repatriation incentives

Bi-Partisan Working Group on the H-2A Program: Proposed Process

9/15/98

Background: For a number of years, there have been significant issues raised by both farm worker and grower communities regarding the current H-2A program and use of foreign guest workers in agriculture. In order to address these concerns, we need a forum for constructive dialog and, if possible, the establishment of guiding principles which may lead to a new consensus for addressing these issues. Secretary Herman proposed to Senator Coverdell the establishment of a bi-partisan group of Members of Congress and the Administration for this purpose and for examining various policy options related to the H-2A program to determine where consensus for change could be achieved.

Proposed Process:

- The objectives of the initial staff level discussions are to develop proposals on:

  -Purpose and a process for the working group
  -Principles to guide the discussion
  -Issue/problem areas that need to be addressed
  -Time frame and schedule for the working group

- An initial principals' meeting would be arranged to approve and/or modify the above proposals developed by the staff, and to provide direction to the staff on next steps for the working group.

- Subsequent staff sessions will focus on individual issue/problem areas and will include discussion of how workers and growers are affected by current policies; an examination of proposals that may be available to address those problems; consideration as to how various groups are affected by alternatives; and a discussion of where there may be the potential for consensus among the groups' participants.

- Principals' meetings will be held as appropriate to discuss and to seek consensus on specific issues where potential consensus exists. The staff will outline alternatives that have been considered in reaching consensus, and the impact of making those changes on both growers and farm workers.

- A final report will be prepared by the staff working group for consideration by the principals, identifying issues that had been examined by the group, alternatives considered and their impact on growers and workers; areas ripe for consensus and/or barriers to seeking consensus among the working group members.

Framework for H-2A Reform Discussions
September 15, 1998

Guiding Principles

The Administration's guiding principles for reform of the H-2A program intend to assure that our national policy achieves greater stability in the agricultural workforce in a way that agricultural producers and farm workers both benefit. Growers must have a more predictable and reliable legal labor supply, while adequate workplace protections are afforded domestic and foreign farm workers – who are among the poorest and most vulnerable in our society.

The Administration's guiding principles in reforming the H-2A program are designed to create a system:

1. Where the procedures for using the program are simple and the least burdensome for growers;

2. Which stabilizes the agricultural workforce so as to enable agricultural employers to recruit an adequate legal labor supply in a predictable and timely manner, and reduce competition with legal U.S. farm workers by illegal aliens;

3. That provides a clear and meaningful first preference for employment of U.S. farm workers, and a means for mitigating against the development of a structural dependency on foreign workers in a crop or area;

4. Which avoids the transfer of costs and risks from businesses to low-wage workers;

5. That encourages longer periods of employment – and, thus, higher annual earnings – for legal U.S. farm workers; and,

6. Which assures decent wages and working conditions for domestic and foreign farm workers, and that normal market forces work to improve wages, benefits and working conditions.

Further, reforms to the H-2A temporary nonimmigrant agricultural guest worker program must **not**:

- Increase illegal immigration to the United States;
- Reduce job opportunities for legal U.S. farm workers;
- Depress wages and work standards for American farm workers.

Immig - H2A

Julie A. Fernandes
09/10/98 06:21:45 PM

Record Type: Record

To: Maria Echaveste/WHO/EOP, Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP, Janet Murguia/WHO/EOP

cc: Marjorie Tarmey/WHO/EOP, Laura Emmett/WHO/EOP, Shannon Mason/OPD/EOP, Mindy E. Myers/WHO/EOP

Subject: H2A -- more update

According to Earl G. at DOL, he has scheduled the first bi-partisan working group meeting for Tuesday at 4:30pm.

Also, David Blair (Wyden's staffer) told Earl that one possible substitute for their current bill is to develop a program by which undocumented farmworkers found to be working in the U.S. are automatically converted to H2A workers (and thus receive housing, AEWR, etc.), rather than be deported. Seems not much of an incentive to play by the rules (including the rule that requires domestic recruitment prior to accessing the H2A program).

julie

Immig-H-2A

MEMORANDUM FOR ELENA KAGAN AND SALLY KATZEN

FROM: JULIE FERNANDES AND CECILIA ROUSE

SUBJECT: ASSESSMENT OF H-2A "IDEAS INVENTORY"

DATE: September 11, 1998

Attached is our assessment of the positions of USDA and DOL regarding the proposals put forth in DOL's "ideas inventory." The shaded boxes indicate important proposals for which there is agency disagreement and thus should be discussed at today's meeting. We have also attached a list of the current program requirements that includes definitions of the most important terms.

In order to better understand the agencies' positions, it is useful to understand the underlying policy tensions. Growers see themselves as having a choice between three categories of workers: legal U.S. workers, illegal workers, and H-2A workers. Which category they draw from is almost exclusively determined by total cost. For example, if the total cost of hiring a U.S. worker (including wages, taxes, housing, etc.) is higher than the total cost of hiring an H-2A worker, the grower will hire the H-2A worker. Therefore, the total compensation offered by the H-2A program becomes the effective total compensation ceiling for U.S. workers. In addition, the presence of large numbers of illegal farmworkers distorts the labor market such that the growers' response to an inability to find sufficient legal U.S. workers is to hire illegal workers, rather than increase wages or improve working conditions. Thus, though we may want to require fair wages and working conditions in the H-2A program, if the cost of using the program is too high, the growers will hire undocumented workers.

USDA's goal is to provide a steady, reliable source of farmworkers for U.S. growers. USDA believes that the domestic labor force can never completely satisfy the labor needs of agriculture, particularly during peak times, and therefore there will always be a need for temporary foreign agricultural workers. In a world in which the INS is increasingly cracking down on the employment of undocumented workers, the USDA (and the growers) would prefer that the foreign workers that they employ be authorized to work. Their goal is thus to set a wage (or total compensation) floor that is low enough that growers will readily use the H-2A program (rather than hire undocumented workers), but that is high enough to continue to attract existing U.S. farmworkers. However, they believe that an H-2A program that would set the wage (or total compensation) floor high enough to attract many more U.S. workers would drive growers into the illegal labor market.

DOL is concerned that a low wage (or total compensation) floor becomes a low ceiling for U.S. workers and therefore hurts these already impoverished workers. They are not as convinced that the domestic labor force could never satisfy growers needs at a reasonable wage; rather, they argue that agricultural wages have been kept artificially low because of the large presence of undocumented workers. Labor believes that if agricultural wages were allowed to rise, additional

U.S. workers would be willing to work in agriculture. They also assert that we can do a better job of facilitating matches between workers and employers that would give domestic farm workers more stable employment and growers access to a steady supply of workers.

As you read through the following list of proposals, you will notice that in many areas (e.g., wages, housing, transportation) the issue is whether the proposal increases the total cost to the employer or shifts those costs to the government or the farmworker. USDA generally opposes reforms that would increase grower costs. The Labor Department generally opposes reforms that transfer costs to the government or the farmworker, and favors reforms that aim at improving labor conditions or wages for U.S. and foreign farmworkers. Because the focus is on total costs (with wages and housing being the most significant areas of concern) we cannot decide on individual reform components in isolation.

Requirements (and Definitions) under the Current H-2A Program

- **Recruitment**: The agricultural employer must engage in independent positive (i.e., active) recruitment of U.S. workers, including newspaper and radio advertising in areas of expected labor supply. Such recruitment must be at least equivalent to that conducted by non-H-2A agricultural employers to secure U.S. workers.

- **Wages**: Employers must pay H-2A workers the "**adverse effect wage rate**" (**AEWR**), the applicable prevailing wage rate, or the statutory minimum wage rate, whichever is higher. The AEWRs are the minimum wage rates which the DOL has determined must be offered and paid to U.S. and H-2A workers, and they are established for each state. The region- or state-wide AEWR for all agricultural employment for which H-2A certification is being sought, is equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the USDA.[1] The AEWRs are designed to prevent the employment of these nonimmigrant alien workers from adversely affecting the wages of similarly employed U.S. agricultural workers.

- **Housing**: The employer must provide free and approved housing to all workers, both foreign and domestic, who are not able to return to their residences the same day.

- **Meals**: The employer must provide either three meals a day to each worker or furnish free and convenient cooking/kitchen facilities. If meals are provided, then the employer may charge each worker a certain amount per day for these meals.

- **Transportation**: The employer is responsible for the following types of transportation for workers: 1) After a worker has completed fifty percent of the work contract period, the employer must reimburse the worker for the cost of transportation and subsistence from the place of recruitment to the place of work; 2) The employer must provide free transportation between any required housing site and the work site for any worker who is eligible for such housing; 3) Upon completion of the work contract, the employer must pay return transportation to the worker's prior residence or transportation to the next job.

- **Workers' Compensation Insurance**: The employer must provide Workers' Compensation or equivalent insurance for all workers, both foreign and domestic.

- **Three-fourths Guarantee**: The employer must guarantee to offer each worker employment for at least three-fourths of the workdays in the work contract and any extensions. In applying this guarantee and determining any additional wages due, the following facts must be established: 1) The beginning and ending dates of employment; 2) The number of workdays between the established beginning and ending dates of the

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[1]Some 1998 AEWRs: California, $6.87; Florida, $6.77; Georgia, $6.30; Hawaii, $8.83; Kentucky, $5.92; and Ohio, $7.18.

guarantee period; and 3)The hours of worktime for the guarantee. The guarantee is then established by computing seventy-five percent of the established total hours of work time in the contract period. Note that the employer may not count any hours offered on such days in which the worker refused or failed to work.

- **Fifty Percent Rule**: The employer must employ any qualified U.S. worker who applies for an available job until fifty percent of the contract period has elapsed.

- **Tools and Supplies**: The employer must furnish at no cost to the worker all necessary tools and supplies, unless it is common practice for the worker to provide certain items.

- **Labor Dispute**: The employer must ensure that the available job for which the employer is requesting H-2A certification is not vacant due to a strike or lockout.

- **Certification Fee**: A fee will be charged to an employer granted temporary alien agricultural labor certification. The fee is $100, plus $10 for each available job certified, up to a maximum fee of $1,000 for each certification granted.

- **Farm Labor Contractors (Crewleaders)**: A farm labor contractor is an organization or entity that either supervises, recruits, transports, houses, or solicits farm labor other than the owner of the work site. Bona fide registered farm labor contractors may be eligible to apply for and receive H-2A certification, although they generally deal with domestic laborers. Farm labor contractors would be required, as employers, to provide all the minimum benefits specified by the H-2A regulations, including the three-fourths guarantee and the fifty percent rule.

Reform Proposal	WH	USDA	DOL
Worker Recruitment			
Require "positive recruitment" of U.S. farmworkers by growers only in areas where DOL finds that there are a significant number of qualified workers willing to make themselves available for employment at the time and place needed.	Y	okay	DOL implemented this administrative change.
Count as "available" for employment only those U.S. workers who are identified by name, address, and SSN	Y	okay	DOL implemented this administrative change.
Post employers' H-2A job orders on America's job bank	Y	USDA would not oppose.	DOL proposal; requires job order simplification.
Strengthen the MSPA program of registering farm labor contractors to require bonding; allow H-2A employers to require bonding as a condition of employing a farm labor contractor.	Y	DOL and USDA agree to support this.	
Allow H-2A growers to include a bonding requirement for FLCs they employ.	Y	DOL and USDA agree to support this (essentially the same as the previous proposal).	
Eliminate the requirement that farm labor contractors must be used by H-2A growers if the use is the prevailing practice in the area.	N	USDA generally wants more flexibility for growers, however they are unlikely to strongly oppose DOL's opposition.	DOL strongly opposes because the goal is for the H-2A program to track prevailing practices in areas of labor protection.
Provide an exception from current program requirement to use FLCs for any FLC who has a demonstrated history of employing illegal workers or other serious labor abuses.	Y	USDA agrees.	DOL regulatory initiative.
Require use of FLCs as recruitment mechanism whenever use is "common" or "normal" (not prevailing) in an area.	N	USDA will likely oppose because grower regulations should involve the highest standard.	DOL generally supports prevailing practice. This is not likely an issue about which DOL will take a strong position.
Require payment of competitive rates for FLC services.			

Employment Eligibility Verification			
DOL work with Congress and other affected agencies to develop a reliable means of verifying individual's authorization to work as they are hired.	Y	USDA would likely agree because of their goal to decrease growers' dependence on undocumented workers as long as growers had increased access to H-2A workers.	DOL agrees.
Create a national employment eligibility verification system so that employers can check on the legal status of domestic workers who are hired during the H-2A process.	Y	INS currently has a pilot program to do just that which we support and has encouraged growers to participate in the pilot.	
Require growers using the H-2A program to use INS pilot employment eligibility verification system.	Y	USDA would likely agree as part of an overall package.	DOL would likely agree.
Growers only responsible for recruiting and hiring farm workers in the U.S. through the DOL-administered Registries (and contacting former employees). Registries are responsible -- and have only 14 days -- to locate, contact, verify employment eligibility, and refer U.S. workers to growers seeking foreign farm workers; failure to refer timely or to refer sufficient workers allows direct application for workers to Secy of State.	N	USDA likely supports this provision because it reduces the burden on employers.	DOL hates this provision because it leaves the burden of recruitment entirely to the Federal government.
Secy of State authorizes additional H-2A workers if Registry-referred workers fail to report; are "not ready, willing, able, or qualified" to do the work; or, abandon or are terminated from employment.	N	USDA likely supports this provision because it provides growers with quick access to H-2A workers if they have cannot recruit U.S. workers through the registry.	DOL would likely hate this provision because, again, it centralizes all recruitment through the Registry and absolves growers of any additional recruitment before applying for H-2A workers.
Pilot test new Registry of available U.S. farm workers; growers share responsibility for positive recruitment of U.S. farm workers.	Y	USDA would likely support a pilot of a mechanism to facilitate the hiring of U.S. workers for growers.	DOL supports a pilot of such a registry (as long as growers continue to share part of the responsibility for recruitment).

Require employers' "positive recruitment" to include: providing an 800 contact telephone number and accepting "collect" calls from worker job applicants; contacting other potential employers to link a series of job opportunities; and developing a long-term recruitment plan to reduce dependence on foreign guestworkers.	N	USDA would likely oppose such positive recruitment measures because it increases the costs to employers.	DOL would likely support these measures, but are unlikely to require that they be part of a final package.
H-2A workers covered by the MSPA, but disclosure only required at time of visa issuance.	N	USDA likely supports this measure.	DOL supports having H-2A workers covered by MSPA but likely believes that the workers should be informed of their rights when recruited rather than at the time of visa issuance (which could be after the worker has incurred significant costs).
DOL rulemaking regarding possible consolidation of agricultural job orders in the Interstate Clearance System.	Y	USDA agrees.	DOL agrees
Productivity Standards			
H-2A employers allowed to set minimum production standards after a "3-day break-in period."	?		
Employer-established productivity standards and quality requirements should be permitted only if they are the prevailing practice among non-H-2A employers, are bona fide, objective, justifiable, fully disclosed and implemented on a fair and equitable basis.		USDA generally opposes any additional regulations or restrictions on growers and would therefore likely oppose this idea.	DOL would likely support this idea as it is aimed at protecting U.S. workers.
Experience (and related) Requirements			
H-2A employers should be allowed to specify "agricultural experience" as a condition for hiring U.S. farm workers.		USDA would likely support because it ultimately gives the growers more flexibility in who they hire.	DOL would likely oppose arguing that it gives growers too much discretion for jobs that generally do not require substantial experience.

Disallow job qualifications, experience and reference requirements unless they are the prevailing practice among non-H-2A employers and are otherwise job-related and bona fide.		USDA would likely oppose for the same reasons that they would support specifying "agricultural experience."	DOL would likely support for the same reasons they would oppose specifying "agricultural experience."
Allow H-2A workers to move from one certified H-2A employer to another, with the final employer responsible for return transportation costs.	Y		According to DOL, this is current law.
Prohibit H-2A job orders that consolidate seasons and different crops.		USDA would likely oppose because consolidation would potentially decrease costs to growers by allowing them to group together and reduce the number of individual applications.	DOL would likely support because it protects U.S. farm workers by requiring growers to submit individual applications.
Prohibit use of the H-2A program in designated labor surplus areas.	N	USDA may not disagree in theory but would likely be concerned that the designation of a labor surplus areas would not necessarily reflect the short-term labor needs of particular growers with particular crops.	DOL would support this in theory, however it would likely have concerns about how areas are designated.
Wages and Costs			
Revise H-2A regulations regarding the 3/4 guarantee to remove incentives to growers to overestimate the contract period.	Y	Agrees.	Agrees.
Consider applying the 3/4 guarantee incrementally during the contract period.	N	Oppose.	Opposes.

Eliminate the 3/4 guarantee	N	Doesn't like the 3/4 guarantee b/c wants growers not to have to pay workers if their crop is disappointing (less work in fact than they anticipated). However, they understand that this is a more generous rule than under the MSPA (the statute that governs non-H2A farmworkers) and thus agrees that this reform is no good.	Opposes the elimination of the 3/4 guarantee (b/c protects farmworkers by ensuring that the work that they are promised in the contract is provided, thus allowing them to make fairer judgments when choosing between jobs). However, not sure that 3/4 is a magic number.
Modify the 3/4 guarantee to allow H-2A growers to limit the contract period to "duration of crop activity" and terminate the contract period offered due to changes in market conditions.	N	Agree that effectively eliminates the 3/4 guarantee.	Agree that effectively eliminates the 3/4 guarantee.
Eliminate AEWR and instead require payment of 105% of prevailing wage for crop in the area.		Yes. They are in favor of eliminating the AEWR b/c it provides a wage higher than the prevailing wage for some H2A workers. USDA does not agree that the prevailing wage is depressed by the presence of illegals in the workforce, but does not object to a small sweetener to the prevailing wage to replace the AEWR (like the 105% proposed by Wyden).	No. The AEWR is calculated to compensate for the presence of illegals that depress the prevailing wage rate. It calculates the required wage as the state-wide average of all non-managerial farmworkers, thus dispersing the impact of illegals. If the wage is calculated based on 105% of prevailing, it will still be a depressed wage in those industries or areas where the presence of illegals is large. However, DOL agrees that the AEWR is a bit of an odd way to calculate, and that there is no magic to it. They want some way to calculate the wage that compensates both for the presence of illegals (wage depression) and for the fact that growers do not pay H2A workers FICA/FUDA (approx. 8%). AEWR may not be magic, but 105% of prevailing does not even get the wage = to that of non-H2A workers.

Eliminate AEWR and require payment of the prevailing wage for the crop in the area.		USDA likes this option. They want the H2A wages to be the same as the prevailing wage in the crop and area. They dispute that wages are depressed b/c of the presence of illegals. In addition, they maintain that if the program requires a higher wage than what is being paid locally, the growers will not use the H2A program and will access the undocumented workforce.	Labor hates this idea, for the reasons above. The wage paid to H2A workers should be a fair wage -- defined as one that compensates for the wage depression caused by the presence of illegals. Labor believes that growers should have to go to the U.S. market first, offer a fair wage and good conditions, and if not successful, access an H2A market that compels them to pay a fair wage under good conditions.
Only require payment of federal minimum wage (not AEWR) as a "training wage" for inexperienced workers during a training period (in the K).		Another way to undercut the AEWR that USDA likes.	Another way to undercut the AEWR that Labor hates.
Require increases in piece rates to reflect increases in the AEWR.	Y?	USDA would likely not like. This would raise the total wage cost.	Labor would like. Most farmworkers are paid by the piece, so a conversion of the piece rate to the AEWR is consistent with their desire to keep or strengthen the AEWR.
Prohibit H-2A employers from increasing productivity requirements to offset increases in the AEWR.	Y	USDA would likely not like b/c this would raise the total wage cost and require farmers to set productivity levels early in the season and not allow conditions to change expectations.	Labor would like this. It discourages the farmers from changing productivity levels in ways designed to keep the wage low.
Change AEWR methodology to set at 90th percentile of local market wage or 80th percentile of regional market wage.	?	They are generally opposed to any change that would increase the overall wage cost. However, they may be open to setting the wage at some modest percentage higher than the local prevailing wage. Thus, though these numbers are high, there may be room to work there.	Labor is generally in favor of calculations that result in a higher wage, though they see no magic in the AEWR. The conflict with USDA would be over how high to set the percentile.
Apply AEWR to sheepherders.	?	Opposed. Sheepherders are different.	They want more for the sheepherders.

Disallow any wage deductions by H-2A employers that reduce earnings below the highest required wage.		USDA would favor changes along these lines. They want to consider total cost of employing an H2A worker and compare that to total cost of hiring a non-H2A worker (legal or illegal).	Oppose. Though Labor is open to discussions that take into account total cost to growers to use the program, they do not want the farmworker wages to be too low.
Prohibit H-2A employers from fixing uniform wage rates across large areas -- states or regions.	?		
Reforms to the 50% rule as recommended by OIG.	Y	USDA agrees.	Labor agrees.
Modify existing 50% rule to only require hiring of local workers (that reside within commuting distance) but extend this obligation to the entire period of the contract.	N	Oppose. Blocks out of state U.S. crews from work.	Oppose. same reason.
Eliminate 50% rule except for workers referred through the registries *unless* there are other substantially similar job opportunities in the area.	Y	Would agree to apply the 50% rule only where equivalent jobs are not available in the area. This is currently the rule where the association in the employer. Also agrees that the 50% rule is good for U.S. workers.	Agrees.
H-2A workers should be covered under the State Unemployment Insurance System	Y	This could increase grower cost, but unlikely that they would oppose this.	Likely favor, though there is a question of whether this would only apply where U.S. farmworkers are covered under state law.
H-2A employers expressly authorized to pay hourly wage, piece rate, task rate, or "other incentive payment method, including a group rate," irrespective of the prevailing [illegible] payment method.	N	USDA might like this b/c it gives flexibility to growers.	Labor will hate this, b/c they have asserted that the task rate is too variable to be susceptible to a prevailing wage determination. There are also likely problems with the "group rate."
H-2A employers are in compliance with the wage requirements if "the average of the hourly earnings of the workers, taken as a group," equals the required hourly [illegible] wage.	N	USDA may like this, but fairness concerns weigh against it.	Labor will not like this b/c it allow the growers to pay some workers less than the required hourly wage.
Prohibit payment by "task rate" or other variable rate method of payment.	Y	May not like b/c like grower choice.	Would likely favor. Have spoken out against the task rate.
Protect earnings level when employers convert from a piece rate to an hourly rate.	Y	USDA likely would not oppose, b/c it only holds the rate the same.	Protecting wage rates would seem a good thing to Labor.

For employers converting from hourly rate to piece rate, set piece rate to assure earnings at least 30% above AEWR.		This is another way to sweeten the wage that USDA will likely oppose.	This is another way to sweeten the wage that DOL will like, but it is -- in a way -- difficult to defend (unless you assume that growers are setting piece rates at levels well below the AEWR conversion).
H-2A workers apply for transportation reimbursement to the government (rather than the employer).		This is a shift of cost from the grower to the government. USDA will like this.	Labor does not like, for the same reason. However, as long as the cost to the grower remains the same for a U.S. worker (working under fair wages and good conditions) and an H2A worker, DOL will not fight if some overall costs are picked up by the government (as long as the cost is not coming out of their budget!).
H-2A workers may apply to the employer for transportation reimbursement, but employer not obligated to provide such reimbursement.	N	USDA may like this, b/c lowers cost for the grower. However, growers are used to paying transportation costs in this program. This cost as just part of the overall cost and thus would go into the overall cost calculation (which, according to USDA, determines whether a grower will participate or hire illegals).	DOL will oppose. They want H2A workers to have transportation paid for. However, as noted, they may be amenable to a system that has the government assume some of this cost.
H-2A workers not eligible for transportation reimbursement if distance traveled is less than 100 miles.	?	This is part of the cost calculation. USDA may think that this is a small step in the right direction.	Labor would likely oppose as eroding the transportation guarantee. Not likely a big issue for either side.
Pilot program for transportation advances for U.S. farmworkers.	Y	USDA would likely be open to this.	DOL would also likely be open to this (a *small* pilot).
Require H-2A employers to provide travel advances to U.S. farmworkers.			
Charge fee (=FICA/FUDA taxes) to finance certain program activities (housing, admin. costs, transportation).	Y	USDA is in favor. The question is how high is the fee.	Labor is not opposed to a fee that would fund certain activities. The question is how high is the fee (more than FICA/FUDA?)

Impose user fees that reflect the cost of the H-2A program.		First, we are not sure how to calculate this cost (particularly, the cost of housing). Even if we could, USDA would be concerned that it would be too high (and thus cost prohibitive for growers to use). They are open, though, to a modest user fee.	As noted, Labor is also open to a user fee. However, it is not clear that they would want to push for a fee that was a total reimbursement (making it cost neutral for the government). That would surely make it too expensive for growers to use.
Allow H-2A workers to opt out of the employer-provided meal plans.		Unclear how they would react to this.	Labor would likely think this is o.k., b/c under the current system the cost of meals is deducted from the farmworker wages. However, there is some concern about making sure that workers don't opt out and then not have adequate food for the harvest.
Require first time H-2A employers to maintain wages and working conditions previously offered.		USDA would oppose this as restricting grower flexibility.	Labor would likely favor, but it could be hard to administer.
Housing			
Apply local or state (rather than federal) housing standards to housing provided by H-2A growers.		USDA would likely favor (local laws could give more flexibility) , but it is just a race to the bottom. They could be convinced that federal standards should apply in a federal program.	Labor would likely oppose. Would want federal standards to apply in this federal program. Also, would assume that federal standards are stricter.
H-2A employers permitted to charge workers up to fair market value for the cost of maintenance and utilities provided.		USDA likes as a way to reduce cost.	Labor hates as a way to erode wages.
H-2A employers can charge workers reasonable amounts (up to $25 per week) for the cost of maintenance, utilities, repair and clean up of housing provided.		Same	Same
H-2A employers can charge a security deposit (up to $50) "to protect against gross negligence or willful destruction of property."		USDA likes as a way to share some costs with farmworkers and make them responsible for taking care of grower-provided housing.	Labor in general would not like, but likely some compromise could be struck on this one.

H-2A employers may require reimbursement (wage deduction) from responsible worker of reasonable cost of repairing damage to housing provided that is "not the result of normal wear and tear."	Y	According to DOL and USDA, this is current law.	
Reduced user fee to H-2A growers providing housing.		This is just another way to think about total cost to growers. If we have a user fee, we have to think about what we want it to pay for.	
H-2A employers may provide a "minimum housing allowance" in lieu of housing, unless (no earlier than 8 years after enactment) a state Governor certifies that there is not adequate farm worker housing available.		USDA would like as a cheaper way to meet the housing requirement.	Labor hates this. First, there is a shortage of affordable housing generally (which is particularly acute in rural areas). Second, it is unreasonable to expect a migrant worker from another country to be able to rent any housing on his own with a federal voucher.
H-2A employers may provide a "minimum housing allowance" in lieu of housing, but must also arrange for decent housing at the allowance level.		USDA would like this as affording choice to the grower on how to comply with the housing requirement.	This is better than above, but does not address the fact of great shortages of decent, affordable housing in rural areas. Under this system, what happens if housing is not available?
Require growers to provide free housing to all U.S. farm workers (including local workers).		USDA would not like this additional cost burden on the growers.	Labor would like as an ideal, but unrealistic to add this additional burden on growers (unless heavily subsidized by the federal government).
Require H-2A growers to make their housing available for U.S. workers who arrive early.		Can't see the objection to this one.	Labor likely is in favor.
Enforcement			
Extend to Wage & Hour the authority to debar violating employers who commit serious labor standards or H-2A program violations.	Y	USDA and DOL agreed to this during our earlier process. Will be part of upcoming rulemaking.	
Issue final H-2A regulations.	Y	DOL has agreed to this.	

Narrow DOL enforcement to only allow investigations only pursuant to a complaint.	N	USDA may like this, but not sure. It would be difficult for them to argue in favor of less enforcement, when there is so little already.	DOL would hate this. They need **more** not less enforcement money and tools.
Institute a 12-mo. statute of limitations on complaints		USDA likely would favor.	DOL may think this is o.k.
Provide a "reasonable cause" threshold for investigations.		USDA would likely favor.	DOL may want to reserve the right to do random inspections.
Limit penalties to certain types of violations.		Unclear what this recommendation means.	
Institute a three-year and permanent debarment period for repeat violations.		USDA would likely favor.	DOL would likely favor, unless this is substantially less than current law.
Require hiring of former H-2A workers (where allowed) to offset disincentives to complain about labor violations.		USDA would oppose. This too greatly limits grower flexibility in hiring.	Not sure if DOL would see this as an effective tool to offset disincentives to complain about labor violations.
Require disclosure of terms and conditions of employment to be given to workers in their native language in plain language.		Can't imagine opposition, unless it costs a lot.	Labor would likely favor.
More timely initiation and completion of DOL enforcement actions.		We are all in favor of timeliness.	
Immigration Management			
H2A worker ineligible for continued participation in the program if, during the prior 5 years, the worker violates the terms of admission to the U.S.		USDA would not likely have an opposition to this in theory.	DOL would not likely have an opposition to this in theory.
H2A workers admitted to the U.S. have 14 days after termination of employment contract to search for other legal work in the U.S.	Y	USDA would not likely have an objection.	DOL would not likely have an objection.
H2A workers admitted must be issued fraud-resistant identification/work authorization documents.	Y	USDA would not likely have an objection.	DOL would not likely have an objection.

An employer may file for extension of stay to employ an H2A worker already in the country and may legally employ such a worker from the date application is made.		USDA would likely support this idea because it provides growers with easy and quick access to H-2A workers.	DOL would likely oppose this idea because it would allow growers to get around the recruitment requirement.
AG study whether H2A workers timely depart the U.S. after period of authorized employment.	Y		
Legalization for H2A workers who complete at least 6 years, 3 months employment in the U.S. under the H2A program for 4 consecutive years and in compliance with program requirements.	N	USDA would not likely oppose this idea. However, it does not advance their goals because they believe that growers need a ready supply of foreign workers to meet short-term labor needs. Once legalized these foreign farmer workers would likely move into other sectors of the labor market.	DOL is opposed because it a) it gives the employers additional leverage over the workers by empowering them to hold the promise of a greencard out to the foreign worker and b) it undercuts our immigration policy.
Require withholding of percentage of H2A workers wages, deposited in accounts reclaimable within limited time period in home country, as incentive to repatriate.	N	USDA supports incentives to repatriate and if they believed that if this would work they would support it.	DOL would likely oppose this because 1) there is no guarantee that the workers would actually receive these wages and 2) there is no evidence that this amount of money would be an incentive to repatriate.
User fee offsetting FICA/FUDA advantage used as repatriation incentive	N	Same position as above.	Same position as above.
Require entry-exit control system for all H2A workers.	Y	If this were possible, USDA and DOL would support it. However, at this time INS is unable to operate an effective exit and entry control system on the land borders.	
Other issues			
Expand scope of the H2A program to include agricultural -- meat/poultry -- processing employment.			

Secretary authorized to establish cap on number of H2A visas issued pursuant to application from "independent contractors, agricultural associations and such similar entities."	Y	USDA would likely support this as long as it was a high cap.	DOL supports this provision since 80% of all H-2A applications are from independent contractors or agricultural associations.
Comprehensive report by AG and Secretaries of Labor and Agriculture.	Y		
All H2A employers non-wage practices and benefits should be subject to prevailing practice standards.		USDA will want more flexibility for growers.	DOL would likely favor tieing all practices and benefits to prevailing practice standards.
Assure that U.S. and H2A workers are truly allowed to choose their employer			
Cap the number of visas available under the H2A program.		See above.	See above.
Administrative Processes			
Consolidate DOL certification and INS petition approval into one process administered by DOL	Y		
Consolidate responsibility within DOL in Wage & Hour for post-application examination and enforcement of employer compliance with H2A program requirements.	Y		
Government -- not employer -- responsible for reimbursing transportation costs of eligible workers.	Y		
Require employers' H2A labor certification applications to be submitted 45 (rather than 60) days before the employer "date of need."	Y		
Reduce lead time for employer applications to 30 (rather than 60) days before "date of need."	Y		

Consistently meet 7 day deadline -- after initial receipt of employer's labor certification application -- to give written notification to the employer of deficiencies precluding adjudication of the application.	Y		
Consistently meet existing 20 day deadline -- prior to employer's date of need -- to issue approved certifications	Y		
After consolidation of certification and petition adjudication process in DOL, change the law to set deadline for DOL approval of employers' application to 7 days before date of need.	Y		
Reduce the deadline for employer-provided housing to be available for inspection to 15 (rather than 30) days before the date of need.	Y		
Change the current labor certification to one based on employers' attestations to comply with program requirements.	?	Unsure how this changes employer obligations.	

Immig-H2A

September 18, 1998

MEMORANDUM FOR ELENA KAGAN AND SALLY KATZEN

FROM: JULIE FERNANDES and CECILIA ROUSE

RE: AMENDED WYDEN-GRAHAM AGRICULTURAL GUESTWORKERS BILL

As you know, Senators Wyden and Graham have put forward a series of changes to their bill to reform the H-2A agricultural guestworker program. On Friday morning, you will be meeting with staff of Senators Ron Wyden (D-OR), Bob Graham (D-FL), Edward Kennedy (D-MA), and Dianne Feinstein (D-CA), and Representatives Howard Berman (D-CA), Sanford Bishop (D-GA), and Xavier Becerra (D-CA), to discuss where we are.

Though their new proposal does move in our direction in a couple of areas (e.g., it restores the requirement that growers reimburse workers for transportation; eliminates the provision that would have required reducing workers wages by 20% as an incentive to repatriate; adds a requirement that growers make a "good faith" effort to assist workers in utilizing the housing voucher), fundamental substantive objections remain. The following is a list of the most significant problems with the new Wyden-Graham proposal.

1. The bill would eliminate the current requirement that growers must conduct private market recruitment for workers, substituting a simple requirement to check a new and untested government-run "job registry".

The core of the Wyden-Graham bill remains the creation of a new "job registry" administered by the government. Under their bill, growers would need only to check this registry before employing H-2A workers. Thus, all responsibility for the recruitment of domestic farmworkers would shift to a new, untried, process for which the government and low-wage workers are entirely responsible. In addition, although this registry would take years to create and implement effectively, employers could begin to hire H-2A workers within 6 months of the enactment of the bill.

At last week's meeting, there was some discussion about extending the start date for the use of the registry from six months to one year after the enactment of the bill. However, even if this change is made, it would not address the fundamental problems with the proposed registry: (1) that use of the registry would relieve the growers of any obligation to do positive recruitment; and (2) that the bill would require wholesale reliance on a method of recruitment that has not been shown to be effective.

2. The bill would erode U.S. worker wages.

The wage provisions of the Wyden-Graham bill have not changed. Under the current program, growers who employ H-2A workers are required to pay all their farmworkers the higher of the prevailing wage (equal to the average local wage for the crop) or an "adverse effect wage rate" (AEWR) (equal to the average statewide wage). The use of the AEWR reflects the fact that foreign workers (both undocumented and H-2A guestworkers) can sometimes dominate a local labor market and depress the local prevailing wage: in such a case, using a statewide calculation (the AEWR) may be more appropriate. The Wyden-Graham bill caps the AEWR at 105% of the local prevailing wage. We continue to believe that this cap is not set high enough to compensate for the depression of wages in areas where there is a heavy reliance on foreign workers.

In addition, the current proposal from Sens. Wyden and Graham bill does not include the much-discussed "user fee" (equal to 8½ percent of the H-2A worker's wage). Without this fee, the wage cost of hiring a U.S. workers remains 8 ½ percent higher than hiring an H-2A worker.

3. The bill does not provide an adequate mechanism for housing foreign guestworkers.

Though the proposal continues to replace the requirement that growers provide housing with a requirement that the growers provide workers with a housing voucher, it now includes a requirement that growers make a "good faith" effort to locate housing for the worker. Though this minimal assistance obligation is an improvement, the fundamental obligation that the grower assure that workers are adequately housed would be eliminated.

As was outlined previously, there are many areas (particularly in the West) where there simply is not an adequate supply of rural housing to meet the needs of farmworkers. This proposal does not address that. Moreover, even with the "good faith" assistance by growers, it remains unrealistic to expect low-wage foreign migrant farmworkers to be able to secure housing using a federal voucher. Thus, many workers will likely end up without housing, or will overcrowd any available rental housing.

4. The bill would eliminate the requirement that growers guarantee part of the work offered to recruit U.S. and foreign workers.

This proposal continues to eliminate the requirement that growers guarantee 3/4 of the work offered to recruit U.S. and foreign farmworkers. Under current law, H-2A workers must be paid for at least 75% of the work contract period for which they were recruited, except when there is an "act of God." This "three-fourths guarantee" gives migrant workers some indication of their potential earnings and discourages employers from over-recruiting to secure a labor surplus and drive down wages. Though Wyden's staff discussed trying to include a modified version of this requirement in their bill, their most recent proposal does not restore this protection. The elimination of the 3/4 guarantee would encourage growers to lure workers from hundreds or thousands of miles away with the promise of potentially high earnings without any

obligation to fulfill any part of that promise. The change also could encourage growers to recruit more workers than they actually need to hedge against uncertainties.

September 18, 1998

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At last week's meeting, there was some discussion about extending the start date for the use of the registry from six months to one year after the enactment of the bill. However, even if this change is made, it would not address the fundamental problems with the proposed registry: (1) that use of the registry would relieve the growers of any obligation to do positive recruitment; and (2) that the bill would require wholesale reliance on a method of recruitment that has not been shown to be effective.

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In addition, the current proposal from Sens. Wyden and Graham does not include the much-discussed "user fee" (equal to 8½ percent of the H-2A worker's wage). Without this fee, the wage cost of hiring a U.S. workers remains 8 ½ percent higher than hiring an H-2A worker.

3. The bill does not provide an adequate mechanism for housing foreign guestworkers.

Though the proposal continues to replace the requirement that growers provide housing with a requirement that the growers provide workers with a housing voucher, it now includes a requirement that growers make a "good faith" effort to locate housing for the worker. Though this minimal assistance obligation is an improvement, the fundamental obligation that the grower assure that workers are adequately housed would be eliminated. Also, though the Wyden-Graham proposal permits States to certify that there is inadequate housing for farmworkers (within one year of enactment of the bill), there is no requirement that States make an assessment of their rural housing stock and no incentive for them to do so. Further, even if such a certification is made by a State, the growers may still provide vouchers instead of housing for up to four additional years.

There are many areas (particularly in the West) where there simply is not an adequate supply of rural housing to meet the needs of farmworkers. This proposal does not address that. Rather, it gives a grower a minimum of five years after enactment of the bill to continue to use vouchers, regardless of the availability of adequate housing. Moreover, even with the "good faith" assistance by growers, it remains unrealistic to expect low-wage foreign migrant farmworkers to be able to secure housing using a federal voucher. Thus, many workers will likely end up without housing, or will overcrowd any available rental housing.

4. The bill would eliminate the requirement that growers guarantee part of the work offered to recruit U.S. and foreign workers.

This proposal continues to eliminate the requirement that growers guarantee 3/4 of the work offered to recruit U.S. and foreign farmworkers. Under current law, H-2A workers must be

paid for at least 75% of the work contract period for which they were recruited, except when there is an "act of God." This "three-fourths guarantee" gives migrant workers some indication of their potential earnings and discourages employers from over-recruiting to secure a labor surplus and drive down wages. Though Wyden's staff discussed trying to include a modified version of this requirement in their bill, their most recent proposal does not restore this protection. The elimination of the 3/4 guarantee would encourage growers to lure workers from hundreds or thousands of miles away with the promise of potentially high earnings without any obligation to fulfill any part of that promise. The change also could encourage growers to recruit more workers than they actually need to hedge against uncertainties.

The Wyden-Graham proposal would require H-2A workers to be covered under the Migrant and Seasonal Worker Protection Act (MSPA). Under MSPA, U.S. migrant farmworkers appear to enjoy a guarantee of 100% of the work contract period for which they were recruited. There is some internal dispute as to whether Wyden's proposal to cover H-2A workers under MSPA would mean that H-2A workers would enjoy a 100% work guarantee. No one on either Sen. Wyden's or Sen. Graham's staff has claimed that this change would provide such a guarantee.

Immig - H2A

Julie A. Fernandes
09/10/98 06:13:01 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Janet Murguia/WHO/EOP, Sally Katzen/OPD/EOP

cc: Laura Emmett/WHO/EOP, Mindy E. Myers/WHO/EOP, Shannon Mason/OPD/EOP
Subject: H2A -- update

The attached gives the latest on DOL's work to set up the bi-partisan working group on H2A reform. According to Earl G. at Labor, they will have set up the first meeting by 6:30pm this afternoon.

julie

---------- Forwarded by Julie A. Fernandes/OPD/EOP on 09/10/98 06:31 PM ----------

Julie A. Fernandes
09/09/98 05:37:06 PM

Record Type: Record

To: Maria Echaveste/WHO/EOP

cc: Marjorie Tarmey/WHO/EOP
Subject: H2A -- update

Maria,
On July 30, Secretary Herman wrote Senator Coverdell indicating her commitment to establish a bi-partisan working group to examine H2A issues. In the letter, the Secretary indicated that if these efforts lead to a consensus on how best to address H2A reform issues, she would give "serious consideration " to the proposals. In August, DOL had discussions with Senator Coverdell's legislative director outlining the Administration's plans for proceeding with the bi-partisan working group. Senator Coverdell indicated that he wanted to respond to the Secretary's letter in writing, with suggestions of how to move forward.

Soon after sending the Coverdell letter, DOL made contact with Senators Wyden, Graham, Kennedy, Abraham, G. Smith and Feinstein and Representatives L. Smith, Bishop, Becerra, Watt, and Berman re: the establishment of this working group and their participation in it. However, Senator Coverdell's office has been reluctant to set a date for this first meeting (again indicating that the Senator wanted to respond to the Secretary with process suggestions). Because the committment to establish this working group was to Senator Coverdell, his participation is key. DOL's last contact with Coverdell's staff was yesterday (Tuesday Sept. 8th). During that meeting, they again pressed for a committment to meet next week. Coverdell's staffer is scheduled to call DOL back on Thursday (the 10th).

Our plan for the first meeting of this bi-partisan group is to focus on process issues, principles for reform, and the framework for considering policy options. Subsequent meetings will address the substantive issues.

Last week, we (DPC, NEC and OMB) held two meetings with Labor and USDA in an attempt to go through policy options for H2A reform and determine pros, cons and recommendations. Though we have made good progress in understanding the issues, we have not made much progress toward reaching consensus between the agencies. We have another inter-agency meeting (this time, including INS) scheduled for Friday, September 11th at 11am. We hope to be able to make WH staff-level recommendations about what reform should look like sometime in the next week to 10 days, and then proceed with a Deputies and Principals meeting as soon as we can.

julie

Immig-H2A

Julie A. Fernandes
09/10/98 06:11:10 PM

Record Type: Record

To: Laura Emmett/WHO/EOP, Mindy E. Myers/WHO/EOP, Shannon Mason/OPD/EOP

cc:
Subject: H2A -- Critique of Wyden bill

oops. I just sent this to Elena, Sally and Janet and forgot the cc.

julie

---------- Forwarded by Julie A. Fernandes/OPD/EOP on 09/10/98 06:30 PM ----------

Julie A. Fernandes
09/10/98 06:09:49 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP, Janet Murguia/WHO/EOP

cc:
Subject: H2A -- Critique of Wyden bill

Attached is a quick critique of the Wyden/Graham bill.

julie


WYDEN.

Problems with the Wyden/Graham Guestworker Bill

The overall concern with the Graham/Wyden guestworker bill is that it shifts costs and risks from employers to the workers and the government.

1. **Reduces farmworkers' wages and earnings**

   Farmworkers are among the poorest and most vulnerable in our society. Average annual earnings for a farmworker family are only about $6,500 and farmworkers are employed on average only about 23 weeks per year. The Wyden/Graham bill will lower wages and annual earnings of U.S. farmworkers:

   a. Eliminates current requirement that the lowest wage paid be based on the "adverse effect wage rate" (AEWR) -- i.e., the average statewide agricultural wage rate. This way of calculating the wage was designed to compensate for the presence of illegal workers by relying on a state-wide average, rather than a local prevailing wage (thus, dissipating the effect of the presence of illegals).

   b. Allows growers to charge farmworkers for the cost of maintenance, utilities, and repairs for grower-provided housing. This change would simply transfer some of the costs of housing to the low-wage workers. This would, in effect, lower the worker's actual earnings.

2. **Growers would no longer have to guarantee any part of the work offered to recruit U.S. and foreign workers.**

   Under current law, workers recruited must be paid for at least 75% of the work contract period for which they were recruited. The Wyden/Graham bill will eliminate this requirement:

   a. Under the MSPA, migrant farmworkers are guaranteed 100% of the work contract period for which they were recruited.

   b. This will encourage growers to lure workers from hundreds or thousands of miles away with the promise of potentially high earnings without any obligation to fulfill any part of that promise.

   c. This may also encourage growers to recruit more workers than they actually need to hedge against uncertainties.

3. **Growers would no longer have any domestic worker recruitment obligation except through the proposed Registry.**

Under current law, if the grower is seeking to employ H2A workers, he much first recruit legal U.S. farmworkers for these jobs. The responsibility for this recruitment is shared between the prospective employer and the U.S. Employment Service. These recruitment requirements are widely acknowledged to be highly ineffective, but the Wyden/Graham bill will make them even less so by only relying on the proposed "Registry":

a. Growers seeking to employ H2A workers would have no obligation to attempt to recruit legal U.S. farmworkers except through the proposed Registry. Thus, all responsibility for the recruitment of domestic farmworkers would shift to a new, untried, process for which the government and impoverished, low-skilled workers are entirely responsible. This proposed approach allows growers to concentrate all their worker recruitment efforts abroad, abandoning domestic worker recruitment to a new federal bureaucracy.

b. The bill would allow the new registry only 14 days in which to try to locate and contact legal U.S. farmworkers to ascertain their availability and interest in accepting a grower's offer of employment and get these workers in touch with the prospective employer. This time period is drastically too short. Most U.S. farmworkers will be extremely difficult to locate and contact in short period of time due to the migratory and rural nature of their work.

c. As a result, efforts to recruit legal U.S. farmworkers for these jobs will almost certainly be even less effective than at present and the use of foreign farmworkers will steadily increase.

4. Does not provide adequate mechanism for housing foreign guestworkers

Current law requires growers who employ H2A workers to provide housing for them. The Wyden/Graham bill allows growers to provide a payment voucher in lieu of housing unless the State certifies that adequate housing is not available in the area.

Under the Wyden bill the grower employing H2A workers would have no obligation to assure that housing is actually available and could be obtained with the voucher. Thus, many workers will likely end up without housing or be encouraged to overcrowd any available rental housing.

Immig - H2A

THE WHITE HOUSE

WASHINGTON

September 14, 1998

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: ELENA KAGAN
SALLY KATZEN

RE: WYDEN-GRAHAM AGRICULTURAL GUESTWORKERS BILL

You are meeting with Senators Ron Wyden (D-OR) and Bob Graham (D-FL) on Tuesday afternoon to discuss their amendment to the Commerce, Justice, State (CJS) Appropriations bill, which would make significant changes to the current H-2A agricultural guestworker program. Sens. Wyden and Graham will ask you to support their legislation or to negotiate with them to arrive at a substitute version. We believe you should reject this approach, and instead urge Wyden and Graham to play a leading role in a broad bipartisan working group we have set up to discuss changes to the H-2A program. We make this recommendation because (1) Wyden's and Graham's amendment has numerous substantive problems; (2) the amendment is opposed by many Democrats, as well as by Hispanic groups and the unions; and (3) the amendment stands little chance of going anywhere unless we support or negotiate off it.

Agricultural "guestworkers" are admitted on H-2A visas for temporary jobs. Under the current program, in order to hire H-2A workers, an employer must demonstrate to the Department of Labor (DOL) that (a) there are not sufficient U.S. workers able, willing, qualified, and available to perform the services; and (b) there will be no adverse effect on the wages and working conditions of similarly-employed U.S. workers. There are currently about 20,000 farmworkers in the H-2A program, out of a total of 1.6 million farmworkers (600,000 of whom are illegal immigrants).

In response to concerns expressed by growers that the H-2A program needs to be streamlined, the Department of Labor and the Justice Department (which handles the immigration aspects of the program) developed a set of regulatory reforms that we hope will go into effect by the end of January. Though some grower advocates were pleased with these reforms, they have continued to press for a legislative package that would fundamentally alter the way the program is operated.

On July 22, 1998, Senators Wyden, Graham and Gordon Smith (R-OR) introduced their bill to overhaul the H-2A guestworker program as an amendment to the Senate CJS Appropriations bill. Secretary Herman wrote a letter strongly opposing the amendment because it would erode protections for U.S. workers and shift costs and risks from employers to workers

and/or the government. We set forth our detailed objections to the bill in an attachment to this memo.

The bill passed the Senate by a vote of 68 to 31. Since then, however, it has lost support among Senate Democrats, principally because labor and Hispanic groups have made clear their vehement opposition. The National Council of La Raza (NCLR) and the Mexican-American Legal Defense and Education Fund (MALDEF) have said that preventing the enactment of this bill is one of their chief civil rights objectives during this session of Congress. In addition, the United Farm Workers of America (AFL-CIO) has made clear its strong opposition, and John Sweeney reiterated this opposition to John Podesta yesterday.

Further, the Wyden-Graham amendment has little support in the House -- from either Republicans or Democrats. Liberal Democrats in the House (and especially the Hispanic Caucus) oppose the bill because it would erode farmworker protections. At the same time, House Judiciary Immigration Subcommittee Chairman Lamar Smith and other Republican members of the House Judiciary Committee strongly oppose adding the measure to the CJS bill because it could lead to expanded immigration of low-wage farmworkers.

To respond to the criticisms of the H-2A program in a thoughtful manner (rather than through a hasty and flawed last-minute amendment to an appropriations bill), we have put together a broad bipartisan working group. The goal of that group, which will meet for the first time tomorrow afternoon, is to examine various policy proposals for H-2A reform and determine whether and where consensus can be reached. We would aim to develop and present a reform package to the Congress next year. Sens. Wyden and Graham, of course, would like action sooner.

Because of our serious substantive, procedural, and political concerns regarding the Wyden-Graham bill, we recommend that we continue strongly opposing the bill, including making it clear that we are prepared to veto it. In addition, in light of our commitment to address H-2A reform through a broad bipartisan process on the Hill over the course of the next few months, we do not recommend commencing any direct negotiations with Sens. Wyden and Graham about the specifics of their bill. Instead, we should urge Sens. Wyden and Graham to play an active role in our bipartisan working group.

If you believe it absolutely necessary to give Sens. Wyden and Graham something now, we could agree to report language in the appropriations bill directing the Department of Labor to develop a pilot "job registry program." This pilot would be a much narrower version of a proposal made in the Wyden-Graham bill: it would create a system for trying to match growers to farmworkers efficiently, but would not (as in their bill) eliminate the obligation of growers to try to recruit U.S. workers. This pilot project is a good idea, and Senator Kennedy supports it. John Sweeney, however, yesterday indicated his strong opposition to even this pilot program.

Substantive Objections to the Wyden-Graham Bill

- The bill would eliminate the current requirement that growers must conduct private market recruitment for workers, substituting a simple requirement to check a new and untested government-run "job registry"

  At the core of the Wyden-Graham bill is the creation of a new "job registry" administered by the government. Under their bill, growers would need only to check this registry before employing H-2A workers. Thus, all responsibility for the recruitment of domestic farmworkers would shift to a new, untried, process for which the government and low-wage workers are entirely responsible. In addition, although this registry would take years to create and implement effectively, employers could begin to hire H-2A workers within 6 months of the enactment of the bill.

- The bill would erode U.S. worker wages

  Under the current program, growers who employ H-2A workers are required to pay all their farmworkers the higher of the prevailing wage (equal to the average local wage for the crop) or an "adverse effect wage rate" (AEWR) (equal to the average statewide wage). The use of the AEWR reflects the fact that foreign workers (both undocumented and H-2A guestworkers) can sometimes dominate a local labor market and depress the local prevailing wage: in such a case, using a statewide calculation (the AEWR) may be more appropriate. The Wyden-Graham bill caps the AEWR at 105% of the local prevailing wage. Our assessment is that this cap is not set high enough to compensate for the depression of wages in areas where there is a heavy reliance on foreign workers.

- The bill does not provide an adequate mechanism for housing foreign guestworkers

  Current law requires growers who employ H-2A workers to provide them with free housing. The Wyden-Graham bill allows growers to provide a payment voucher in lieu of housing. Under this approach, the grower employing H-2A workers would have no obligation to assure that housing is actually available and could be obtained with the voucher.

  We have two concerns with this provision. First, there are many areas (particularly in the West) where there simply is not an adequate supply of rural housing to meet the needs of farmworkers. Second, even if there is some housing available in the area, it is unrealistic to expect low-wage foreign migrant farmworkers to be able to secure housing on their own using a federal voucher. Thus, many workers will likely end up without housing, or will overcrowd any available rental housing.

- The bill would eliminate the requirement that growers guarantee part of the work offered to recruit U.S. and foreign workers.

3/4 mk

Under current law, H-2A workers must be paid for at least 75% of the work contract period for which they were recruited, except when there is an "act of God." This "three-fourths guarantee" gives migrant workers some indication of their potential earnings and discourages employers from over-recruiting to secure a labor surplus and drive down wages. The Wyden-Graham bill would eliminate this work guarantee. This change would encourage growers to lure workers from hundreds or thousands of miles away with the promise of potentially high earnings without any obligation to fulfill any part of that promise. The change also could encourage growers to recruit more workers than they actually need to hedge against uncertainties.

- The bill would permit growers to withhold worker wages as an incentive to repatriate

The Wyden-Graham bill would permit employers to withhold 20% of the worker's wages until the worker returns to his home country. According to the Department of Labor, the federal government does not, in any other circumstance, sanction the withholding of wages as an incentive toward future behavior. In addition, it is unclear whether many of these workers would be able to recover this money from their home countries. Finally, there is little evidence that these amounts would serve as a disincentive for workers who intend to stay in the U.S.

Immig - H2A

Julie A. Fernandes
09/14/98 09:16:07 AM

Record Type: Record

To: Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP

cc: Laura Emmett/WHO/EOP, Shannon Mason/OPD/EOP, Cecilia E. Rouse/OPD/EOP
Subject: H-2A -- background paper for Deputy's meeting

Elena/Sally,
Attached is a background memo for the H-2A Deputy's meeting this afternoon. It outlines the six main issues re: H-2A reform. We would also like to send a abridged version of this document (without the recommended administration positions) to those who are attending the meeting this afternoon. Please advise. Thanks.

julie & ceci

DEPUTY.

MEMORANDUM FOR ELENA KAGAN and SALLY KATZEN

FROM: JULIE FERNANDES
CECILIA ROUSE

RE: WYDEN-GRAHAM AGRICULTURAL GUESTWORKERS BILL

DATE: September 14, 1998

Background

Agricultural "guestworkers" are admitted on H-2A visas for temporary jobs. Under the current program, in order to hire H-2A workers, an employer must demonstrate to the DOL that (a) there are not sufficient U.S. workers able, willing, qualified and available to perform the services; and (b) there will be no adverse effect on the wages and working conditions of similarly-employed U.S. workers. Employers also are required to pay workers an "adverse effect wage rate" (AEWR), determined by the average wage paid to non-managerial agricultural workers in the state; provide free housing to workers outside the commuting area; reimburse workers' inbound transportation if they complete half the contract, outbound also if they complete the contract; guarantee 3/4 of the hours of the contract; and hire any qualified U.S. worker who applies during the first half of the work contract. There is no cap on the number of H-2A visas granted. Out of the 1.6 million farmworkers in the United States, approximately 600,000 are unauthorized to work, and approximately 20,000 are in the H-2A program.

In June 1995, in response to efforts in Congress to pass legislation that would create a new guestworker program (without the worker protections present in the existing program) and agreeing with the recommendation of the Commission on Immigration Reform, the President stated his opposition to a "new guestworker program." However, he also stated that if the crackdown on illegal immigration contributes to labor shortages, he would direct the Departments of Labor and Agriculture to work cooperatively to improve and enhance the existing H-2A program.

Grower advocates argue that they continue to experience difficulties in finding domestic farmworkers and that the H-2A program is slow, cumbersome, and expensive. However, a recent (December 1997) GAO study concluded that agribusiness does not now and will not soon face an agricultural labor shortage. The GAO's finding of a labor surplus echoes the conclusions of the U.S. Commission on Agricultural Workers (1992), and the U.S. Commission on Immigration Reform reports (1995 and 1997). While the GAO report suggested that there could develop localized labor shortages, it noted the widespread belief that employers should respond to the market place by increasing wages, improving recruitment and modernizing their labor practices. Further, the GAO report cited a study which concluded that substantial wage increases

would have little effect on consumer produce prices or international competitiveness. Many growers blame the INS's recent crackdown on undocumented farmworkers for the shortages of domestic farmworkers and their need to rely on a dysfunctional H-2A program.

On March 12th of this year, the House Judiciary Subcommittee on Immigration approved legislation, sponsored by Rep. Robert Smith (R-OR), that provides for a new pilot guestworker program that erodes existing worker protections. In a letter to Chairman Lamar Smith, Secretary Herman stated that if this legislation were presented to the President, she would recommend a veto. This bill was voted out of the subcommittee on a voice vote, but has not been taken to the full House Judiciary Committee.

Soon after this bill was introduced, we initiated a process with the Departments of Labor and Agriculture to determine what kinds of regulatory and/or administrative reforms we could put into place before the next growing season. We developed a set of regulatory reforms that respond to the growers' concern that the program needs to be streamlined (i.e., improved processes; reduced paperwork and delay). The Department of Labor and the Justice Department (which handles the immigration aspects of the program) have developed a package of proposed rulemaking changes that we hope will go in effect by the end of January. However, though some grower advocates were pleased with the set of administrative reforms, they continue to press for a legislative package that would fundamentally alter the way the program is operated.

On July 22, 1998, Senators Ron Wyden, Bob Graham and Gordon Smith (R-OR) introduced an amendment to the CJS appropriations bill that would make significant changes to the current H-2A program. On that same day, the Secretary of Labor sent a letter to Senator Wyden stating her strong opposition to his amendment which creates a new guestworker program that erodes labor protections for migrant farmworkers. The overall concern with the Wyden-Graham bill is that it shifts costs and risks from employers to workers and/or the government.

Issues Regarding H-2A Reform

Issue #1
Use of the Adverse Effect Wage Rate
Whether we would consider eliminating the adverse effect wage rate and replacing it with an enhanced prevailing wage rate.

Current Law:

Under the current program, growers who employ H-2A workers are required to pay their workers the higher of the prevailing wage (determined by the average wage for the crop in the local area), the federal, state or local minimum wage or an "adverse effect wage rate" (AEWR) (equal to the average statewide agricultural wage rate). Because foreign workers can sometimes dominate a local labor market, this wage depression is often reflected in the local prevailing wage. The

AEWR partially corrects for this depressive effect by measuring farmworker wages on a statewide basis -- thus dissipating the impact of foreign workers on the wage.

Wyden-Graham Bill:

Under the Wyden-Graham bill, the worker is required to be paid either the prevailing wage or the AEWR (capped at 105% of the prevailing wage).

Recommended Administration Position:

The Departments of Labor and Agriculture agree that our goal is to find a way to calculate the wage that both takes into account the depression of wages in areas where there is heavy reliance on illegal and H-2A workers and that isn't so high as to drive employers to hire undocumented workers. Thus, we have agreed to explore proposals to replace the AEWR with some form of an enhanced prevailing wage, so long as the enhancement is adequate. Our preliminary assessment is that 105% of prevailing wage would be an *inadequate* enhancement. Then what ?

Though we may conclude that a move away from the AEWR could more accurately reflect proper wages in certain sectors, we will likely face significant backlash from the Hispanic and farmworker communities if the new formula results in lower wages in any sector.

Issue #2
Employer Recruitment -- Use of Proposed Registry
Whether we support the creation of a registry system for matching growers to farmworkers that totally replaces an employer's obligation to conduct positive recruitment.

Current Law:

Under current law, if the grower is seeking to employ H-2A workers, he must affirmatively recruit in the private marketplace (know as "positive recruitment") and use the federal-state Job Service to circulate job offers to areas where migrant workers may be located. Thus, the responsibility for farmworker recruitment is shared between the prospective employer and the U.S. Employment Service.

Wyden-Graham Bill:

Under the Wyden-Graham bill, growers seeking to employ H-2A workers would have no obligation to attempt to recruit legal U.S. farmworkers except through a newly-created "job registry." Thus, all responsibility for the recruitment of domestic farmworkers would shift to a new, untried, process for which the government and low-wage workers are entirely responsible. This registry would take years to create, but H-2A workers could be hired within 6 months of the enactment of the bill. Further, because growers would no longer have an obligation to recruit domestically, they would be free to concentrate their worker recruitment efforts abroad.

Recommended Administration Position:

There is general agreement between USDA and DOL that total reliance on a registry (undeveloped; untested) would be unacceptable -- growers must retain some of the responsibility for finding U.S. workers. However, despite these concerns, it may be worthwhile to develop a pilot program to test whether a registry of the kind described in the bill could be an effective tool to assist growers in locating U.S. farmworkers. We could also consider the development of a method of ensuring that those domestic workers whose names are included in the registry are authorized to work (as in the Wyden bill). ?

Issue #3
Housing
Whether H-2A employers should continue to have an obligation to provide housing to their workers. Also, whether this obligation is met by the issuance of housing vouchers.

Current Law:

Current law requires growers who employ H-2A workers to provide them with free housing.

Wyden-Graham Bill:

The Wyden-Graham bill allows growers to provide a payment voucher (equal to 1/4 of the Fair Market Rate in the applicable county for a two bedroom apartment) in lieu of housing, unless the State certifies that adequate housing is not available in the area. Under this approach, the grower employing H-2A workers would have no obligation to assure that housing is actually available and could be obtained with the voucher.

Recommended Administration Position:

The DOL's chief concern is that the cost of housing not be transferred from the grower to the worker. They also believe that it should remain the grower's responsibility to ensure that housing is available for the workers. USDA remains of the view that the provision of a housing voucher or an increased wage (to reflect the cost of housing) should satisfy the grower's obligation, even if there is no housing available for these workers.

First, there are many areas (particularly in the West) where there simply is not an adequate supply of rural housing to meet the needs of these workers. Second, even if there is some housing available in the area, it is unrealistic to expect low-wage foreign migrant farmworkers to be able to secure housing on their own using a federal voucher. Thus, reliance on a voucher system will leave many workers either without housing or overcrowding any available rental housing.

We recommend not eroding the existing requirement that growers who use the H-2A program

provide their workers with housing. However, we may want to consider whether the federal government could do more to assist growers in creating housing for their farmworkers. Currently, the Department of Agriculture administers a migrant farmworker housing program that we could scale up. Also, it may be possible to find ways to encourage states to use their CDBG or HOME funds to target the creation of farmworker housing. Finally, it may be possible to waive some housing regulations if the H-2A worker were housed in established housing (i.e., a hotel, government housing, etc.). These options would be designed to assist the growers with fulfilling *their* obligation to provide adequate housing for their workers -- not as a shift in responsibility from the growers to the government.

not sure about this

Issue #4
The 3/4 Guarantee
Whether we support the continued use of the 3/4 guarantee.

Current Law:

Under current law, workers must be paid for at least 75% of the work contract period for which they were recruited, except when there is an "act of God." This "three-fourths guarantee" gives migrant workers some indication of their potential earnings and discourages employers from over-recruiting to secure a labor surplus and drive down wages. Under the MSPA (which applies to U.S. migrant farmworkers, but not H-2A workers), workers enjoy a 100% guarantee.

Wyden-Graham Bill:

The Wyden-Graham bill would eliminate this work guarantee for H-2A workers. This change will encourage growers to lure workers from hundreds or thousands of miles away with the promise of potentially high earnings without any obligation to fulfill any part of that promise. This may also encourage growers to recruit more workers than they actually need to hedge against uncertainties.

Recommended Administration Position:

There is agreement within the Administration that the H-2A program should generally track the worker protections included in the Migrant and Seasonal Worker Protection Act (MSPA). As noted, under the MSPA, migrant farmworkers are guaranteed 100% of the work contract period for which they were recruited. Thus, the 3/4 guarantee for H-2A workers is more flexible (and thus better for growers) than the 100% guarantee mandated for those who employ only U.S. workers.

It would seem inconsistent for us to endorse a standard substantially less for the H-2A program than that required under the MSPA. When asked why the growers could live with the 100% guarantee under MSPA, but not the 75% guarantee under the H-2A program, we were told by USDA that it is because the MSPA guarantee is never enforced, and the H-2A guarantee is.

Issue #5
Repatriation Incentive
Whether we support wage-withholding as an incentive for H-2A workers to repatriate.

Current Law:

Under current law, there is no mechanism for ensuring that H-2A workers return to their home country.

Wyden-Graham Bill:

Permits employers to withhold 20% of a worker's wages, to be reclaimed upon the worker's return to his home country.

Recommended Administration Position:

In general, there is agreement within the Administration that we should try to develop an effective way to ensure that guestworkers return to their home country after the termination of the contract. However, this wage deduction is a bad idea that would likely prove ineffective.

First, this would be the first time that the federal government authorized the withholding of worker wages as an incentive toward future behavior. Second, it is unclear whether many of these workers would be able to recover this money from the accounts in their home countries. In addition, there is no evidence that these amounts would serve as a disincentive for employees who intend to stay in the U.S. ??

According to Sen. Wyden, this provision is not important to the growers, but is key to the viability of his legislation in the Congress. Some members of Congress are concerned that a new guestworker program will lead to an increase in foreign workers in the U.S. and thus an increase in those that do not return to their home country. However, as noted, there is very little reason to believe that a worker who wants to overstay his visa will be deterred by this withholding. Thus, it only would serve to inconvenience (and possibly, disadvantage) those workers who want to work here and return home.

Issue #6
Transportation Reimbursement
Whether employers should continue to be required to provide reimbursement to workers for inbound transportation if they complete 50% of the contract, and for outbound transportation if they complete 100% of the contract.

Current Law:

Under current law, the employer must reimburse the H-2A worker for inbound transportation costs if the worker completes 50% of the contract and for outbound transportation costs if the worker completes 100% of the contract.

Wyden-Graham Bill:

Under the Wyden-Graham proposal, workers may receive such reimbursement from their employer, but the employer is under no obligation to pay. This change would simply shift the cost of transportation to and from the job from the grower to the worker.

Recommended Administration Position:

There is general agreement within the Administration that growers should be responsible for the transportation costs of their H-2A workers. Therefore, we strongly oppose allowing growers to have discretion in reimbursement. However, we could consider giving the grower options on how to reimburse the worker for transportation costs. For example, the grower could have a choice between providing the transportation outright, advancing the cost of transportation to the worker, reimbursing the worker for the transportation, or paying the worker a much higher wage (such as 120% of the prevailing wage) with the intent that the wage "bonus" would be sufficient to cover transportation costs. In addition, there is likely agreement that DOL could develop a pilot program to provide transportation advances for U.S. farmworkers.

Immi 1-H2A

Julie A. Fernandes
09/14/98 01:00:36 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP, Cecilia E. Rouse/OPD/EOP

cc: Shannon Mason/OPD/EOP, Laura Emmett/WHO/EOP
Subject: Update for this afternoon's meeting -- NEW INFO

Labor has double checked. USDA was correct. Under MSPA, the employer is obliged to provide the weeks of employment specified in the offer of employment (at the specified wage), unless there is an "act of God." MSPA also provides a private right of action to enforce the employment contract.

The one hindrance to enforcement is that MSPA, unlike the H2A program, does not require that the period of employment offered be precise (thus, could offer "at least 6 weeks of work, but possibly 8"). However, there is a possibility to challenge an employment contract in some cases as false and misleading.

julie

---------- Forwarded by Julie A. Fernandes/OPD/EOP on 09/14/98 01:14 PM ----------

Julie A. Fernandes
09/14/98 12:44:27 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP

cc: Laura Emmett/WHO/EOP, Shannon Mason/OPD/EOP, Cecilia E. Rouse/OPD/EOP
Subject: Update for this afternoon's meeting

Elena/Sally:
Contrary to what we were told by the USDA, John Fraser at the DOL says that he is not sure that the MSPA requires the payment of 100% of the contract wage. Labor was at the meeting when USDA asserted this (and we all discussed it), but they now question whether this is a statutory requirement. John is checking on this.

What is clearly true is that a U.S. worker who has a work contract that is broken (b/c promised 8 wks of work, but provided with only 5 wks) could bring an action against the employer for breach. This option is less possible for migrant workers.

julie

Immig - H2A

September 14, 1998

H-2A Discussion Document

The purpose of today's meeting is to determine general Administration guidelines for H-2A reform.

Background

Agricultural "guestworkers" are admitted on H-2A visas for temporary jobs. Under the current program, in order hire H-2A workers, an employer must demonstrate to the DOL that (a) there are not sufficient U.S. workers able, willing, qualified and available to perform the services; and (b) there will be no adverse effect on the wages and working conditions of similarly-employed U.S. workers. Employers also are required to pay workers an "adverse effect wage rate" (AEWR), determined by the average wage paid to non-managerial agricultural workers in the state; provide free housing to workers outside the commuting area; reimburse workers' inbound transportation if they complete half the contract, outbound also if they complete the contract; guarantee 3/4 of the hours of the contract; and hire any qualified U.S. worker who applies during the first half of the work contract. There is no cap on the number of H-2A visas granted. Out of the 1.6 million farmworkers in the United States, approximately 600,000 are unauthorized to work, and approximately 20,000 are in the H-2A program.

In June 1995, in response to efforts in Congress to pass legislation that would create a new guestworker program (without the worker protections present in the existing program) and agreeing with the recommendation of the Commission on Immigration Reform, the President stated his opposition to a "new guestworker program." However, he also stated that if the crackdown on illegal immigration contributes to labor shortages, he would direct the Departments of Labor and Agriculture to work cooperatively to improve and enhance the existing H-2A program.

Grower advocates argue that they continue to experience difficulties in finding domestic farmworkers and that the H-2A program is slow, cumbersome, and expensive. However, a recent (December 1997) GAO study concluded that agribusiness does not now and will not soon face an agricultural labor shortage. The GAO's finding of a labor surplus echoes the conclusions of the U.S. Commission on Agricultural Workers (1992), and the U.S. Commission on Immigration Reform reports (1995 and 1997). While the GAO report suggested that there could develop localized labor shortages, it noted the widespread belief that employers should respond to the market place by increasing wages, improving recruitment and modernizing their labor practices. Further, the GAO report cited a study which concluded that substantial wage increases would have little effect on consumer produce prices or international competitiveness. Many growers blame the INS's recent crackdown on undocumented farmworkers for the shortages of domestic farmworkers and their need to rely on a dysfunctional H-2A program.

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Herman stated that if this legislation were presented to the President, she would recommend a veto. This bill was voted out of the subcommittee on a voice vote, but has not been taken to the full House Judiciary Committee.

Soon after this bill was introduced, we initiated a process with the Departments of Labor and Agriculture to determine what kinds of regulatory and/or administrative reforms we could put into place before the next growing season. We developed a set of regulatory reforms that respond to the growers' concern that the program needs to be streamlined (i.e., improved processes; reduced paperwork and delay). The Department of Labor and the Justice Department (which handles the immigration aspects of the program) have developed a package of proposed rulemaking changes that we hope will go in effect by the end of January. However, though some grower advocates were pleased with the set of administrative reforms, they continue to press for a legislative package that would fundamentally alter the way the program is operated.

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Issues Regarding H-2A Reform

Issue #1
Use of the Adverse Effect Wage Rate
Whether we would consider eliminating the adverse effect wage rate and replacing it with an enhanced prevailing wage rate.

Current Law:

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Wyden-Graham Bill:

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Housing
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Immig - H2A

Maria Echaveste 09/10/98 01:34:52 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Marjorie Tarmey/WHO/EOP
Subject: H2A -- update

fyi

---------- Forwarded by Maria Echaveste/WHO/EOP on 09/10/98 01:34 PM ----------

Julie A. Fernandes
09/09/98 05:37:06 PM

Record Type: Record

To: Maria Echaveste/WHO/EOP

cc: Marjorie Tarmey/WHO/EOP
Subject: H2A -- update

Maria,
On July 30, Secretary Herman wrote Senator Coverdell indicating her commitment to establish a bi-partisan working group to examine H2A issues. In the letter, the Secretary indicated that if these efforts lead to a consensus on how best to address H2A reform issues, she would give "serious consideration " to the proposals. In August, DOL had discussions with Senator Coverdell's legislative director outlining the Administration's plans for proceeding with the bi-partisan working group. Senator Coverdell indicated that he wanted to respond to the Secretary's letter in writing, with suggestions of how to move forward.

Soon after sending the Coverdell letter, DOL made contact with Senators Wyden, Graham, Kennedy, Abraham, G. Smith and Feinstein and Representatives L. Smith, Bishop, Becerra, Watt, and Berman re: the establishment of this working group and their participation in it. However, Senator Coverdell's office has been reluctant to set a date for this first meeting (again indicating that the Senator wanted to respond to the Secretary with process suggestions). Because the committment to establish this working group was to Senator Coverdell, his participation is key. DOL's last contact with Coverdell's staff was yesterday (Tuesday Sept. 8th). During that meeting, they again pressed for a committment to meet next week. Coverdell's staffer is scheduled to call DOL back on Thursday (the 10th).

Our plan for the first meeting of this bi-partisan group is to focus on process issues, principles for reform, and the framework for considering policy options. Subsequent meetings will address the substantive issues.

Last week, we (DPC, NEC and OMB) held two meetings with Labor and USDA in an attempt to go through policy options for H2A reform and determine pros, cons and recommendations. Though we have made good progress in understanding the issues, we have not made much progress toward reaching consensus between the agencies. We have another inter-agency meeting (this

time, including INS) scheduled for Friday, September 11th at 11am. We hope to be able to make WH staff-level recommendations about what reform should look like sometime in the next week to 10 days, and then proceed with a Deputies and Principals meeting as soon as we can.

julie

Immig - H2A

shouldn't

Fairness
Need a
little more
$

Parties
Time — Approps
Pilots

Constituency groups

Internal process —
Pilots — more details
Leg proposals
on task < actively support / can discuss
off task

Mtgs next wk
Calls on process after Thurs —
Substance

Calls to: P Steele
Minyon — constituencies

allowable state uses
allowable fed uses

real $'s but flexibility op.
like to hold off you
Shouldn't talk to outsiders

Didn't discuss
state uses

Potential issues

more $
farmers
FDA safeguards
New entrant

States OK w/ prioritization