

LABOR, FARMS, AND IMMIGRATION:

ALIEN LIFE ON THE FARM

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## I. INTRODUCTION

Americans are bombarded with statistics about illegal immigration and undocumented workers. We are told of the horrific deaths of those trying to cross the border to have their chance at a better life, their chance to realize the American dream. On the other side we are told that the millions of illegal immigrants are drawing from the public and giving nothing back. What should the American public believe? It is hard to determine what to believe, or which side to choose, and yet it is impossible to ignore the impact undocumented workers have on our society and in particular our agricultural system. It is impossible to deny that our fruits and vegetables, grown in the United States, were undoubtedly picked by alien hands.

The Department of Labor has estimated that of the 1.6 million workers in agriculture more than half of them are undocumented workers.<sup>1</sup> Other groups estimate that the numbers may be higher, around seventy-five percent.<sup>2</sup> The Pew Hispanic Center approximates that there were twelve million illegal immigrants in the United States in March 2006.<sup>3</sup> The Department of Homeland Security approximates that in 2005 there were 10.5 million illegal immigrants in the United States.<sup>4</sup> Each year the number of illegal immigrants rises by about 500,000.<sup>5</sup> Further “it remains almost impossible to accurately track the population of illegals using data from the census, which doesn’t ask people their legal status.”<sup>6</sup> Most undocumented workers are transient

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<sup>1</sup> Linda Levnie, Farm Labor Shortages and Immigration Policy, Congressional Research Service, January 30, 2009 at Summary.

<sup>2</sup> *Id.*

<sup>3</sup> Andorra Bruno, Immigration: Policy Considerations Related to Guest Worker Programs, Congressional Research Service, January 17, 2008, at 6.

<sup>4</sup> *Id.*

<sup>5</sup> Sara R. Halle, Note, Proposing a Long-Term Solution to a Three-Part American Mess: U.S. Agriculture, Illegal Labor, and Harvest Mechanization, 12 Drake J. Agric. L. 359 at 360 (Summer 2007).

<sup>6</sup> Nathan Thornburgh, Undocumented and Undeterred, Time Magazine, April 20, 2009 at page 36.

and seek to be invisible for fear of being found and deported which makes it even harder to determine how many are in the country.<sup>7</sup> The many different statistical numbers and the efforts of the workers to remain hidden, demonstrates how difficult it is to determine exactly how many illegal immigrants are in the United States at any given time.<sup>8</sup>

It is also difficult to establish how necessary undocumented workers are to the agricultural economy. Guest worker programs are used to provide additional labor when there is a shortage. However determining whether there is a shortage of labor in a given area can be problematic. After all, one must determine from which viewpoint the question of shortage of a labor supply will be decided. If seen from the employer, there is a shortage of labor if there are not enough workers for the wage that he wants to pay. From the government's viewpoint, there may be plenty of workers available for the work; they simply demand that the employers pay more.<sup>9</sup> Any future guest worker reform program will need to incorporate how domestic labor shortages will be decided.

Problems are created with the guest worker programs because they create a group of legally disabled individuals who are marginalized from society and yet compete in the job market with citizens who enjoy more protections.<sup>10</sup> Employers often would rather hire an undocumented worker, who they can pay less with worse conditions than have to pay higher wages to citizens who can also sue employers for poor work conditions. Employers argue that

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<sup>7</sup> Alice J. Baker, Article, Agricultural Guest worker Programs in the United States, 10 Tex. Hisp. J.L. & Pol'y 79 at 93 (Fall 2004).

<sup>8</sup> Arthur N. Read, Article, Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform, 16 Temp. Pol. & Civ. Rts. L. Rev. 423 at 424 (Spring 2007).

<sup>9</sup> Levine, *supra*, at 4.

<sup>10</sup> Read, *supra*, at 427.

because farming is arduous, seasonal, underpaid, and reliant on hand labor, domestic workers do not want to participate, instead employer must use alien workers who are the only ones willing to take the job.<sup>11</sup> “Agricultural workers in the United States suffer from chronically low wages, poor working conditions, and high unemployment,” while earning approximately fifty cents to the dollar when compared with private sector workers.<sup>12</sup> Wages can be so low for farm workers that even during peak season roughly half of them are below the federal poverty guidelines.<sup>13</sup>

There is no question that the guest worker system is broken, both in terms of protecting the foreign workers from the employers who rely on paying very low wages and in providing job security for domestic workers.<sup>14</sup> Alien workers in the United States face a frightening existence. Many have spent small fortunes to get to the United States, often crossing deserts without water, and always with the fear of being left behind or caught. Once in the United States they find that they have little to no rights, and they fear anything that is governmental because of the chance of deportation. If the few rights that they have are violated they may find that they barred from the courthouse because they are illegal immigrants, which only encourages others to take advantage of them. They fear becoming organized because that may draw attention, which can lead them to being blacklisted or even deported.<sup>15</sup>

## **II. HISTORY OF GUEST WORKER PROGRAMS**

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<sup>11</sup> Levine, *supra*, at summary.

<sup>12</sup> Baker, *supra*, at 95.

<sup>13</sup> *Id.*

<sup>14</sup> Bill Ong Hing, Symposium, Immigrants Rights & Critical Perspectives on Immigration Reform., February 10, 2007: Article The Case for Amnesty, 3 Stan. J.C.R. & C.L. 233 at 264 (August 2007).

<sup>15</sup> *Id.* at 267.

To understand the goals and rationale of current guest worker legislation it is important to explore and understand the United States' dependency upon foreign laborers, created from years of reliance on a legally disabled work force. United States history begins with a dependency on alien workers to supplement the working population. For example slaves were brought in from Africa before and during the colonial period and up to the Civil War.<sup>16</sup> Slaves were used to provide the needed labor for plantations and other unattractive jobs, because at the time growers could not find another source of usable labor. Following the Civil War, workers were brought in from Mexico and Southeast Asia for undesirable, dangerous, and low paying jobs including building railroads, mining, and working on farms.<sup>17</sup>

The first real national program dealing with immigration and guest workers came from the Immigration and Nationality Act of 1917.<sup>18</sup> This act allowed for certain classes of workers to enter the United States for temporary employment in mainly agriculture or manual labor.<sup>19</sup> Between 1917 and 1921, under the Immigration and Nationality Act of 1917, around 73,000 temporary workers from Latin American entered the United States.<sup>20</sup> The intent was for the workers to return to their home countries after World War I ended, however enforcement was careless and many workers stayed in the country.<sup>21</sup> These undocumented workers who remained in the United States were technically unemployable because they were illegal, however, "the Border Patrol had an informal practice of waiting until the end of the growing

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<sup>16</sup> Emily B. White, Comment, Howe We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program, 28 Berkeley J. Emp. & Lab. L. 269 at 273 (2007).

<sup>17</sup> Baker, *supra* at 82, *see also* Halle, *supra* at 362.

<sup>18</sup> White, *supra* at 273.

<sup>19</sup> *Id.*

<sup>20</sup> Baker, *supra* at 82, *see also* Halle, *supra* at 362.

<sup>21</sup> Baker, *supra* at 83.

season in order to raid farms so as not to disrupt the regions' agricultural production."<sup>22</sup> This lax enforcement gave undocumented workers readily obtainable employment in agriculture even though it was against the law. The state of the illegal immigrant labor force following World War I, serves as an example, of the agricultural sector using legally disabled workers because they were cheaper and expendable. The Immigration and Nationality Act of 1917, remains significant because it represented the first time that the United States began to regulate Guest Workers. The program however, should be learned from because of its failure to provide adequate protections to the workers. The aftermath of the act demonstrates the continued reliance that growers have on disenfranchised foreign individuals to do hazardous unpleasant work for low wages.

**a. The Bracero Program**

The next major guest work program following the Immigration and Nationality Act of 1917 was the Emergency Farm Labor Program, known as the Bracero Program that was started as a series of treaties between the United States and Mexico in 1942.<sup>23</sup> The original purpose of the Bracero Program was to augment the labor population that was diminishing during World War II.<sup>24</sup> Congress considered the need to bring in additional labor as necessary for national defense.<sup>25</sup> The Bracero Program was intended to be beneficial to both countries, by giving the United States needed laborers and helping the suffering Mexican economy through temporary workers sending their earned wages home to their relatives in Mexico.<sup>26</sup> Under the program

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<sup>22</sup> Baker, *supra* at 83, *see also* Halle, *supra* at 362.

<sup>23</sup> White, *supra* at 273, *see also* Baker *supra* at 84.

<sup>24</sup> Halle, *supra* at 363.

<sup>25</sup> Baker, *supra* at 84.

<sup>26</sup> White, *supra*, at 273.

roughly 450 thousand workers came into the United States each year between 1956 and 1959, the peak years of the Bracero Program, to work for agricultural industries.<sup>27</sup> Although the act was intended to provide labor during WWII, the act continued after the end of the war and in 1947 the program became a private matter between employer and workers instead of being the original government-to-government program.<sup>28</sup>

As will become common in the procedures of Guest Worker programs that followed it, the Bracero Program required the Secretary of Labor to certify that there was in fact a shortage of domestic workers and foreign workers were needed.<sup>29</sup> This included showing that using guest workers would not negatively affect domestic laborers.<sup>30</sup> In addition growers must have attempted to find workers in the domestic population before they are able to apply for immigrant workers.<sup>31</sup>

The Bracero Program was the first guest worker program that contained significant provisions to protect the workers, including free housing, transportation, and fair wages.<sup>32</sup> These provisions however did not keep cruel injustices from happening to guest workers, in fact “the Bracero program has been widely condemned as a failed experiment because of the severe injustices suffered by the 4.6 million workers who participated in the program from 1942 until

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<sup>27</sup> William M. Ross, Note, The Road to H-2A and Beyond: An Analysis of Migrant Worker Legislation in Agribusiness, 5 Drake J. Agric. L. 267 at 270 (Spring 2000).

<sup>28</sup> Baker, *supra*, at 84.

<sup>29</sup> Halle, *supra*, at 363.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> White, *supra*, at 274.

1964.”<sup>33</sup> The provisions that were put into place to protect the workers were largely unsuccessful because the workers were unable to bring grievances if they were injured. The exploitation of the workers worsened when the program went from being a program between two governments to a program between the grower and the immigrant worker, because the change decreased governmental oversight of the program.<sup>34</sup> Illegal immigration grew during the Bracero Program, especially when employers realized that they could use illegal immigrants as workers and avoid the complex regulations and procedures established in the Bracero Program.<sup>35</sup> The Bracero Program finally ended in 1964 when President John F. Kennedy allowed it to expire.<sup>36</sup>

#### **b. The H-2 Program**

In 1952, during part of the Bracero Program the H-2 program was passed and during its initial years was primarily used for Caribbean and Canadian workers for sugar cane, tobacco, apples, potatoes and other crops because most Latin American workers were still covered by the Bracero Program.<sup>37</sup> Similar to the Bracero Program, the H-2 program was created to provide for temporary workers in agriculture if workers could not be found in the United States.<sup>38</sup> Akin to the guest worker programs that came before it and after it, the H-2 program required that the Secretary of Labor certify that foreign labor was needed because the domestic labor supply was

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<sup>33</sup> White, *supra*, at 274 (citing Jim Abrams, Guest Worker Programs Have Flawed Past, Associated Press, Mar. 25, 2006).

<sup>34</sup> Baker, *supra*, at 84.

<sup>35</sup> *Id.*

<sup>36</sup> White, *supra*, at 275. *See also* Baker, *supra* at 85.

<sup>37</sup> Baker, *supra*, at 86.

<sup>38</sup> Baker, *supra*, at 85.

not sufficient.<sup>39</sup> Further, the Secretary of Labor needed to attest that wages for domestic workers would not be negatively affected by bringing in foreign workers.<sup>40</sup> Workers were given some protections under the H-2 program including housing and a minimum wage that was set by the government.<sup>41</sup> However, the H-2 program “was not widely used because of its ‘regulatory complexity and history of litigation instigated by legal aid...and the U.S. Department of Labor.’”<sup>42</sup>

### **c. The Immigration Reform and Control Act**

Because of the complexity and failures of the H-2 program, The Immigration Reform and Control Act (IRCA) was passed in 1986.<sup>43</sup> The goal of the IRCA was to remove the incentive for illegal immigration by punishing employers who hired undocumented workers, thereby decreasing the number of jobs available for illegal immigrants because fewer employers would be willing to hire an individual who was not documented.<sup>44</sup> This was the first time that employers faced sanctions or jail for knowingly employing illegal immigrants.<sup>45</sup>

The IRCA’s attempt to decrease the amount of illegal immigration ended up not working as illegal immigrants continued to enter the country and work in agriculture.<sup>46</sup> While, the IRCA is noteworthy for being the first program that punished employers for hiring illegal immigrants,

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<sup>39</sup> Baker, *supra*, at 86.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Ross, *supra*, at 276 (quoting *Guest Worker Hearings*, *supra* note 24, at 171 (statement of Russell L. Williams on behalf of agricultural producers)).

<sup>43</sup> Baker, *supra*, at 86.

<sup>44</sup> Ross, *supra*, at 275.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 276

it also represents a failure because of the affirmative defense to sanctions provided by the law to employers. Under the IRCA, as long as “the employer relied on good faith on false documentation provided by the worker” then the employer could not be sanctioned.<sup>47</sup> It became impossible for the IRCA to use penalties on the employers as a way to end the incentive of illegal immigration, when the affirmative defense within the IRCA, supplied employers a way out.

Further, the IRCA gave amnesty to some undocumented workers, through two specific legalization programs for agricultural workers, the Replenishment Agricultural Worker (RAW) program and the Special Agricultural Worker (SAW) program.<sup>48</sup> The SAW program included workers who had at least ninety days of experience with perishable crops. Congress wanted the SAW workers to help stabilize the labor supply for the heavy demands from farms.<sup>49</sup> Of the workers in the SAW program, two-thirds stated that they intended to continue working in agriculture until they were no longer able to physically.<sup>50</sup> However, Congress’s motive backfired when within eighteen months of the IRCA being passed, around 1.3 million workers had applied for amnesty under this provision and the majority of those workers then found jobs outside of the agricultural sector.<sup>51</sup> Under the IRCA’s earned legalization programs, around 2.7 million individuals have earned legal permanent residency.<sup>52</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> Levine, *supra*, at 2

<sup>49</sup> Ross, *supra*, at 275

<sup>50</sup> Levine, *supra*, at 2.

<sup>51</sup> Baker, *supra* at 87.

<sup>52</sup> Bruno, *supra*, at 19.

In 2007, the average age of an SAW worker was approximately 47, meaning that those workers are coming to the point where they may no longer physically be able to do the work.<sup>53</sup> The usefulness of the SAW program in stabilizing the workforce has become even less constructive as those legalized immigrants who have stayed in the agricultural industry have started to age out of the working population.<sup>54</sup> Beyond the legal workers getting older, many unauthorized immigrants have begun to take the SAW workers' jobs because employers can pay them less, provide them with fewer protections, and know that they cannot seek legal remedies in court.<sup>55</sup>

#### **d. The H-2A Program**

The IRCA also broke the H-2 program into two subsections, the H-2A, dealing with agricultural workers, and the H-2B, regarding non-agricultural workers.<sup>56</sup> Each year under the H-2A program approximately 15,000 to 20,000 workers are brought into the United States.<sup>57</sup> The H-2A was created in an attempt to provide employers with a simplified way to bring in alien workers to provide the required labor that domestic workers are unable to provide.<sup>58</sup> The idea of the H-2A program is to only use guest workers to meet with seasonal labor needs, and after the completion of the season, or when domestic labor supply is enough to satisfy the needs of the industry, the guest workers would return home.<sup>59</sup> The program “seeks to provide growers with a

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<sup>53</sup> Levine, *supra*, at 3.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Baker, *supra*, at 87.

<sup>57</sup> Ross, *supra*, at 278.

<sup>58</sup> Ross, *supra*, at 276.

<sup>59</sup> Read, *supra*, at 442.

ready supply of crop workers, to protect domestic workers from displacement by foreigners and depressed wages and working conditions, and to protect foreign workers from exploitation.”<sup>60</sup>

The process for an employer to hire workers through the H-2A program requires the employer to first file an application stating the number of workers and dates of employment, with the Department of Labor.<sup>61</sup> The Department of Labor then reviews the application and if it meets the standards, the Secretary of Labor will give will the employer a temporary alien agricultural labor certification.<sup>62</sup> This certification gives the employer the ability to file a petition with the Directorate of Border and Transportation Security so that workers can be brought into the United States.<sup>63</sup> The Department of Labor can however, deny the employer’s application if it finds that there are enough domestic workers to supply the employer.<sup>64</sup> The application will also be denied if the Department of Labor finds that the employer did not attempt to recruit domestic workers.<sup>65</sup> Or if the employer cannot keep the basic worker protections as established in the H-2A program.<sup>66</sup>

One of the obvious problems with this system is that the Department of Labor may not process the employer’s applications in a timely manner and the employer may not get the workers that he needs when he needs them, which can become a significant issue when dealing

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<sup>60</sup> Baker, *supra*, at 88.

<sup>61</sup> Baker, *supra*, at 91.

<sup>62</sup> Baker, *supra*, at 92.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

with perishable agricultural products.<sup>67</sup> On the other side, if the employer is mistaken as to the exact date that he will need the additional employees, some undocumented workers may be brought in and find that for the first few weeks they have no work and no income.<sup>68</sup>

The H-2A Program also contains protections for the alien workers. For example, minimum wages are used to protect the workers and keep employers from creating extremely low wages by importing workers who are willing to work for even less.<sup>69</sup> The H-2A program requires that the employer pay the worker either the prevailing hourly wage rate, the federal/state minimum wage or the annual weighted average hourly wage rate (AEWR) for field and livestock workers in the region, whichever of the three is the highest.<sup>70</sup> Employers are also required to guarantee a minimum number of working hours, free housing, either three meals a day or kitchen facilities to prepare meals, transportation to the place of employment, and if the worker completes his contract the employer must provide the worker with transportation home.<sup>71</sup> The program also prohibits an employer from retaliating in anyway against a worker who complains about their employer or employment conditions.<sup>72</sup>

### **III. AFFECT OF GUEST WORKER PROGRAMS ON THE WORKFORCE**

The H-2A program creates problems in our society because the labor force that is brought in has limited civil rights and when their few rights are violated they have limited means of

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<sup>67</sup> Ross, *supra*, at 277.

<sup>68</sup> *Id.*

<sup>69</sup> Baker, *supra*, at 89.

<sup>70</sup> *Id.*

<sup>71</sup> Baker, *supra*, at 90.

<sup>72</sup> Baker, *supra*, at 91.

redress.<sup>73</sup> An alien worker's ability to stay in the country is dependent on his employer and on him keeping his job. Even if the conditions of employment are appalling, an alien worker may not be able to change employers without risking deportation or being black listed.<sup>74</sup> Guest workers can only enter the United States with the sponsorship of an employer, which in turn only elevates the employer, giving him the opportunity to exploit workers and blacklist those who do not comply with the employer's conditions.<sup>75</sup> Due to the large control that the H-2A program gives employers over their workers, the workers become "a form of compulsory servitude."<sup>76</sup>

The creation of these second-class workers affects the labor system as a whole as well as domestic workers. "Workers around the country are witnessing the transformation of formerly well-paying, permanent jobs into temporary jobs with little or no benefits, which employers are staffing with vulnerable foreign workers who have no real enforceable rights through the guest worker programs."<sup>77</sup> Since employers are able to have such control over their workers, the employers are able to decrease wages dramatically because they are not faced with competition for obtaining workers.<sup>78</sup>

One important way to fix the problems created by current guest worker programs is to give the workers portable visas, meaning that they would have the ability to change employers without being deported.<sup>79</sup> It is also important to increase enforcement of labor laws in

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<sup>73</sup> Read, *supra*, at 430.

<sup>74</sup> *Id.*

<sup>75</sup> Read, *supra*, at 431.

<sup>76</sup> *Id.*

<sup>77</sup> Read, *supra*, at 442.

<sup>78</sup> Baker, *supra*, at 81.

<sup>79</sup> Read, *supra*, at 443.

agriculture because lax enforcement has been permitting undocumented workers to be employed in the agricultural industry.<sup>80</sup>

Undocumented workers affect the rest of the work force due to the low wages that employers can pay them. By paying these workers very low wages, it draws the wage rate for farm workers, in general, down. Guest worker statutes use minimum wage provisions to try to counter act the effect of the low wages. In the H-2A program, the employer must pay the highest of the prevailing wage rate, the state or national minimum wage rate, or the AEW. <sup>81</sup> The AEW, set by the Department of Labor each year, is determined based on region, and must be paid to both foreign and domestic workers, thereby not depressing the wages earned by domestic workers.<sup>82</sup>

Employers state that they do not want to hire undocumented workers because of the chance of sanctions.<sup>83</sup> They, however, believe that the large presence of illegal immigrants in the United States shows that the demand for labor is there and they are forced to use it for lack of a better option.<sup>84</sup> This in turn affects the legal workers because they now have to compete with unauthorized workers, who, except for the risk of sanctions, are less expensive and require less paperwork. The presence of illegal workers is one of the main reasons that wages for agricultural workers are low and employment conditions are often deplorable.<sup>85</sup>

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<sup>80</sup> Baker, *supra*, at 81.

<sup>81</sup> Lauren Gilbert, Article, Fields of Hope, Fields of Despair: Legisprudential and Historic Perspective on the AgJOBS Bill of 2003. 42 Harv. J. on Legis. 417 at 436 (Summer 2005).

<sup>82</sup> *Id.*

<sup>83</sup> Levine, *supra*, at 3.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 4.

#### IV. THE AGJOBS ACT

The need for some sort of reform of our Guest Worker Programs is obvious, from the complicated procedural system set up in the H-2A program, to the violations of the program that create a sub class of workers, and even to the millions of illegal immigrants present in the United States, something needs to be done.<sup>86</sup> The Agricultural Job Opportunity, Benefits, and Security (AgJOBS) Act, in all of its forms, was one of the most thought out and promising responses to the need for restructuring.<sup>87</sup>

The AgJOBS bill was the creation from major compromises between major growers' associations, such as the American Farm Bureau Federation and the National Council of Agricultural Employers, and major worker advocate groups, such as the United Farmworkers of America.<sup>88</sup> The bill came from years of hard work and it considered the input from over 400 different agriculturally related associations.<sup>89</sup> Negotiations for the AgJOBS bill started in 1999, when a group of growers hired an advocate of migrant workers, Rick Swartz, to create a proposal to negotiate a new program for guest workers.<sup>90</sup> After the proposal was created, in October of 2000, the Berman Compromise was formed between representatives of farm workers and representatives from growers' associations.<sup>91</sup> The Berman Compromise was built off of a reform of the H-2A visa program and an earned legalization program for undocumented workers

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<sup>86</sup> Gilbert, *supra*, at 439.

<sup>87</sup> *Id.*

<sup>88</sup> Gilbert, *supra* at 419.

<sup>89</sup> *Id.*

<sup>90</sup> Gilbert, *supra* at 439.

<sup>91</sup> Gilbert, *supra* at 440.

currently in the United States.<sup>92</sup> The 150 page proposal that resulted from the Berman Compromise was introduced in Congress, during the last few days of the Clinton Administration.<sup>93</sup> After the 2000 elections, farm worker advocates considered the new bill to be an impossibility, until the employers' representatives expressed interest in continuing forward with the bill.<sup>94</sup> The continued interest from the employers served as a symbol of the need to reform guest workers programs. The continued support, also revitalized the bill to the point where the bill was pushed forward until Senator Phil Gramm (R-Tex.) threatened a filibuster, which the supporters would not be able to overcome.<sup>95</sup> The threatened filibuster successfully killed the first AgJOBS bill.<sup>96</sup> Since 2000, the AgJOBS bill has been reincarnated several times, in many different forms, including the AgJOBS Bill of 2003, 2005, and 2007. Some of these versions have been successfully incorporated into other acts, for example some amendments on CIRA.<sup>97</sup> Overall, the problems with guest worker programs still remain, although, the AgJOBS bill could possibly provide some solutions for the future.

**a. AgJOBS Bill of 2003**

The AgJOBS bill of 2000 was revived with the AgJOBS bill of 2003 as Senate Bill 1645 and House Bill 3142.<sup>98</sup> This bill was very similar to the AgJOBS bill of 2000, with the system

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<sup>92</sup> Gilbert, *supra* at 440.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Gilbert, *supra* at 441.

<sup>96</sup> Gilbert, *supra* at 441.

<sup>97</sup> Read, *supra*, at 432

<sup>98</sup> Gilbert, *supra* at 442 and 446.

for earned legalization and the additional protections for workers.<sup>99</sup> The bill would have simplified the H-2A program, making it easier for employers to hire temporary alien workers.<sup>100</sup> Further, the bill would have provided farm workers with an opportunity to earn permanent residency status over the course of several years, while still protecting them from exploitation while they were still alien seasonal workers.<sup>101</sup>

The program for earned citizenship would create a new status for agricultural workers “who could show that they have performed at least 575 hours or 100 work days of agricultural employment in the United States during any 12 consecutive months between February 28, 2002 and August 31, 2003.”<sup>102</sup> If the worker could show that he had the required work experience he would be granted temporary residency. Individuals with temporary residency status would be given the same rights as individuals admitted for permanent residence, and their temporary resident status could only be withdrawn if the individual was found to be deportable.<sup>103</sup>

The AgJOBS bill of 2003 provided for additional needed protections for workers in hopes to address the issues created in previous guest worker programs. Included in the protections were procedures to give workers the ability to seek redress from employers who did not follow the act.<sup>104</sup> For the first time the worker was given the right to arbitrate if he was fired without just cause.<sup>105</sup> There was also a provision to keep families together, where the principal

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<sup>99</sup> Gilbert, *supra* at 442.

<sup>100</sup> Gilbert, *supra* at 418, 419.

<sup>101</sup> *Id.*

<sup>102</sup> Gilbert, *supra* at 442.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

applicant's spouse and child will be provided residency.<sup>106</sup> The bill also provided that the AEW R would be changed and instead indexed "by the annual percentage change in the consumer price index for urban areas."<sup>107</sup> Growers wanted to end the use of the AEW R, however, they instead compromised on holding it at the present rate for three years, until it could be reindexed.<sup>108</sup> Most importantly the bill gave workers a right of action so that they could bring violations of the bill in federal court.<sup>109</sup> This provision gave needed power to the workers who previously did not have the ability to seek redress when their employers broke the law.

The H-2A Program was also reformed in the AgJOBS bill of 2003 including requiring the Department of Labor to grant or deny the employers' petition for foreign workers within seven days, in an attempt to make the procedure less complicated.<sup>110</sup> Further, a process for expedited adjudication of H-2A petitions was created, in which approved petitions would be quickly and directly set to where an H-2A worker applies for admission, such as the appropriate consulate.<sup>111</sup> Also, current H-2A workers would be allowed to participate in the program and past H-2A workers who have stayed in the United States past their visas would be eligible to participate in the new version of the H-2A.<sup>112</sup> A compromise with the employers was reached and the bill included language for cases when a worker abandoned his job, allowing the employer to replace the worker quickly with a new H-2A worker while the old worker loses his status and would be

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<sup>106</sup> Gilbert, *supra* at 443.

<sup>107</sup> Gilbert, *supra* at 444.

<sup>108</sup> Hing, *supra*, at 254.

<sup>109</sup> Gilbert, *supra* at 445.

<sup>110</sup> Gilbert, *supra* at 444.

<sup>111</sup> Gilbert, *supra* at 444.

<sup>112</sup> Gilbert, *supra* at 446.

required to leave the United States.<sup>113</sup> The employers argued that this provision was necessary to keep workers from leaving their employment by using the threat of deportation.<sup>114</sup>

When the AgJOBS bill of 2003 and was first introduced it had 2 co-sponsors in the House and 21 co-sponsors in the Senate.<sup>115</sup> By December the bill had attracted 79 more co-sponsors in the House and 28 more co-sponsors in the Senate.<sup>116</sup> At the same time Secretary of Homeland Security Tom Ridge “stated that ‘I think there’s a growing consensus that, sooner rather than later, we need to deal with the reality that these men, women, and families are here, many contributing...to their community, paying taxes, paying into Social Security. We have to legalize their status.’”<sup>117</sup> Secretary’s Ridge’s comments, along with the increased support, were seen as a good sign that the AgJOBS bill would pass.

In July of 2004, the AgJOBS bill had bipartisan support of 62 Senator co-sponsors, which meant that unlike its predecessor, it would be able to withstand a filibuster.<sup>118</sup> Senators were worried that the AgJOBS bill would die if it were referred to the Immigration Subcommittee, which was chaired by a Republican Senator close to the Bush administration.<sup>119</sup> Instead, Senator Craig, the chief sponsor of the bill, was going to add the AgJOBS bill as an amendment to the Class Action bill, which was already before the Senate.<sup>120</sup> Senator Craig’s plan, however, failed

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<sup>113</sup> Gilbert, *supra* at 445.

<sup>114</sup> *Id.*

<sup>115</sup> Gilbert, *supra* at 446.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (quoting Jane Daugherty et al., *Support Grows for Immigrant Amnesty*, PALM BEACH POST, Dec. 14 2003, at A1).

<sup>118</sup> Gilbert, *supra* 418 and 448.

<sup>119</sup> *Id.* at 419.

<sup>120</sup> *Id.* at 418.

when Senate Majority Leader Frist (R-Tenn.) stated that only relevant amendments would be allowed to attach to the Class Action bill.<sup>121</sup> This action killed the AgJOBS bill of 2003 and was seen as influenced by pressures from the Bush Administration, who wanted credit for any major immigration reform to be attributed to President Bush.<sup>122</sup> “For the second time in four years, an attempt to bring AgJOBS to a vote before the full Senate, where it appeared to enjoy wide support, seemed to have failed more because of procedure than because of substance.”<sup>123</sup> Supporters of the AgJOBS bill of 2003 blame its failure on the bill’s confliction with the Bush administration’s plans for immigration reform and the need to court Hispanic votes for the upcoming election.<sup>124</sup>

#### **b. AgJOBS Bill of 2005**

In April of 2005 the AgJOBS bill of 2005, another reincarnation of the AgJOBS bill of 2000 had 46 co-sponsors in the Senate.<sup>125</sup> It was the intention to add this bill to the supplemental emergency spending bill as an amendment, but the bill still lacked enough votes to prevent a filibuster.<sup>126</sup> In essence this bill was the same as the AgJOBS bill of 2003.

The AgJOBS bill of 2005 worked to reform the existing the H-2A program to encourage employers to use the system by making the procedures more user friendly. One of the major reforms is an expedited certification process that places a greater burden on the federal government then on the grower. As with the AgJOBS bill of 2003, the AEWB would be frozen

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<sup>121</sup> *Id.* at 420.

<sup>122</sup> *Id.* at 449.

<sup>123</sup> *Id.* at 450.

<sup>124</sup> *Id.* at 481.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

for 3 years, so as to give time to investigate how useful the AEWWR was in setting appropriate wages for farm workers. Freezing the AEWWR was the result of a compromise with employers who believe that the AEWWR are an inaccurate way to calculate proper wages. The AgJOBS bill protected workers by providing them with the ability to seek redress through either mediation or federal court, while employers could still protect themselves from frivolous claims in state court.

The AgJOBS Bill of 2005 contained an earned legalization program to incorporate undocumented workers who are already working the United States. The worker must have worked at least 100 days in the 18 months before the bill was introduced in order to qualify for the legalization program. By limiting earned legalization to only workers who are already in the country, the bill does not promote new illegal immigration. Further, this legalization program would help to create a stable labor force for agriculture by requiring the workers to continue working in agriculture for the next 3 to 6 years before they can complete the program. If a worker in the earned legalization program, leaves the agricultural field before their three to six years is over, they would be subject to deportation.

### **c. AgJOBS Bill of 2007**

The AgJOBS Bill of 2007 was introduced as S. 340, S.237, and H.R. 371 and part of S. 1639.<sup>127</sup> This bill provided a test program of earned legalization using a new work visa called blue cards. Immigrants could be granted blue cards if they could show that they have worked in agriculture during 2005 and 2006 for 863 hours or 150 workdays.<sup>128</sup> In an attempt to stabilize the workforce, once the worker is give his blue card he must continue to work in agriculture for three to five years, after which he will become a citizen. Only 1.5 million blue cards would be

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<sup>127</sup> Bruno, *supra*, at 112. (S. 1639, sponsored by Senator Edward Kennedy (D-MA) contained parts of the AgJOBS act but was also known as the DREAM Act of 2007, the Unaccompanied Alien Child Protection Act of 2007, and other similar names).

<sup>128</sup> *Id.* at 12.

issued for the five years following enactment of the bill.<sup>129</sup> This bill would also protect workers by allowing them to seek redress if their employer fires them without just cause.

The AgJOBS Bill of 2007 also contained provisions to protect current domestic workers who are working for an employer who is applying for H-2A workers. If the job is covered by a union contract, before the employer can file an H-2A application, he must notify the union and the representatives of his employees that he is filing the application.<sup>130</sup> For jobs that are not covered by a collective bargaining agreement, there are additional assurances that the employer must comply to, including ensuring benefits, working conditions, and wages.<sup>131</sup> Further, the employer must take steps to find domestic workers before he applies for H-2A workers.<sup>132</sup> Once the employer has submitted a complete and accurate application the Department of Labor must decide certification within seven days.<sup>133</sup>

Worker protection provisions were balanced with employer concerns in creating the AgJOBS bill. For example, the requirement that employers provide housing for their employees is no longer required under the AgJOBS bill if the governor of the state confirms that sufficient housing is available.<sup>134</sup>

### ***1. S. 1639***

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<sup>129</sup> *Id.* at 13

<sup>130</sup> *Id.* at 9.

<sup>131</sup> *Id.* at 12

<sup>132</sup> *Id.* at 9

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

S. 1639 was introduced in the Senate on June 18, 2007 and was reported by the Committee the following day.<sup>135</sup> On June 28, 2007 the bill failed a cloture motion, which thereby killed the bill without any consideration.<sup>136</sup> This bill incorporated many different aspects of reforming immigration, along with parts of the AgJOBS bill that have failed in the past, as well as additional restructuring ideas for many different aspects of guest worker programs, not only in agriculture. For example, S. 1639 created the Z-A nonimmigrant visas that can be given to foreign workers who have performed at least 150 work days or 863 hours of work in agriculture over a twenty-four month period that ended on December 31, 2006. Only 1.5 million Z-A visas would be allowed to be issued, however dependent visas for spouse and dependent children would not be limited.<sup>137</sup>

A proposed new visa named Y Temporary Worker visa would also be established by S. 1639, where workers coming to the United States for the sole reason of performing non-skilled temporary labor could file an application with the Department of Labor and employers in the United States could hire them.<sup>138</sup> Of course, before an employer can hire Y visa workers, the employer must certify with the Department of Labor that there is a shortage of domestic labor.<sup>139</sup> Before being granted a certification of a shortage of domestic laborers, the employer must also show that he had made attempts to find workers within the United States.<sup>140</sup> Y visa workers

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<sup>135</sup> <http://www.govtrack.us/congress/bill.xpd?bill=s110-1639>

<sup>136</sup> <http://www.govtrack.us/congress/bill.xpd?bill=s110-1639>

<sup>137</sup> Bruno, *supra*, at 10.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

would be allowed to stay in the United States for 10 months.<sup>141</sup> Afterwards they would have to leave the United States for two months before they could obtain a Y visa again.<sup>142</sup>

## V. OPPOSITION TO THE AGJOBS ACT

Those who oppose the AgJOBS act are concerned that by giving the immigrant workers the chance to gain citizenship, those workers will then leave the agricultural workforce and move on to higher paying jobs therefore defeating the purpose of the bill.<sup>143</sup> This is supported by some of the programs that were created in 1986, where amnesty was given to immigrants in hopes that it would create a stable agricultural workforce, when instead the immigrants left the agricultural sector and found higher paying jobs once they became legal.<sup>144</sup>

Others argue that the only purpose of the AgJOBS act is to create an amnesty program, this included President Bush who stated that he had opposed the AgJOBS program because it was an amnesty program and not a guest worker program.<sup>145</sup> These opposition groups suggest that any new guest worker programs must only apply to immigrants not already in the country, because if amnesty were given to any undocumented worker already in the United States the illegal immigration problem would only be aggravated.<sup>146</sup> Any guest worker program that allows current undocumented workers to participate is often seen as rewarding those or break the

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<sup>141</sup> *Id.* at 11.

<sup>142</sup> *Id.*

<sup>143</sup> Stacy McCland, Article, Immigration Reform and Agriculture: what we really want, what we really need, and what will happen if they Leave?, 10 *Barry L. Rev.* 63 at 69 (Spring 2008).

<sup>144</sup> *Id.*

<sup>145</sup> Gilbert, *supra* at 451.

<sup>146</sup> James Jay Carafano, The AgJOBS Act: Immigration Amnesty Revived, The Heritage Foundation, WebMemo – The Heritage Foundation, No. 1626 September 19, 2007.

law and ultimately encouraging others to do the same, especially if there is a chance to become a permanent legal resident through the program.<sup>147</sup>

Some opposition groups suggest that the AgJOBS Act will actual discourage some immigrants from joining the program because of the requirement to become a citizen after acquiring a blue card and working in agriculture for three to five years.<sup>148</sup> These groups state that many temporary alien workers are not seeking permanent legal status.<sup>149</sup> Further, the opposition disagrees with the bill on the need for employers to show just cause before terminating an employee. They allege that domestic workers who work on an at will basis do not have this protection.<sup>150</sup> It would be wrong, the opposition argues, to give immigrants a right that domestic workers may not even have.<sup>151</sup> Additionally, by creating this legal remedy for guest workers, the judicial system would become clogged with guest workers seeking redress and in the end giving workers the right to a legal remedy would be a discouragement for growers to hire blue card workers.<sup>152</sup> Those against the AgJOBS bill also argue that if wages are raised for farm workers that will affect the agricultural market and make the cost of food more expense.<sup>153</sup>

## **VI. LESSONS LEARNED FROM THE AGJOBS BILLS**

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<sup>147</sup> Bruno, *supra*, at 18Congressional Research Service – Immigration: Policy Considerations Related to Guest Worker Programs by Andorra Bruno, January 17, 2008, page 18..

<sup>148</sup> Carafano, *supra*.

<sup>149</sup> *Id.* .

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Levine, *supra*, at 3.

All of the AgJOBS bills have had great potential to pass and become law. They had great support from both sides of the agricultural labor situation and yet for the most part they all failed. Some blame their failure on coming in opposition to the planned immigration reforms of the presidential administration. Others blame the failure on anti-immigrant factions that rallied together and labeled the bill as amnesty legislation.

For whatever reasons the bills failed, they still have much to teach us. Especially how two sides of a problem can work together to reach a solution. The employers and the workers are both fighting for different things, but when they both realize that there is a significant problem with the guest worker programs in this country, they come together and negotiate to reach an agreement. The AgJOBS bills symbolize that talking and negotiating can create solutions.

It also symbolizes that there really is a problem with the current state of guest worker programs, when both sides come together, to find a resolution. The AgJOBS act is a symbol that it can be done, the guest worker program can be reformed and solutions to the guest worker problems can be found. It will take time and energy from all sides of the discussion to create change, but it can happen. More importantly the AgJOBS bills show us that in order for the reform to take place we need all the sides of the discussion to help. Other pieces of legislation in other areas of society should recognize the compromises and negotiations that go into solving a problem. Similar to the AgJOBS bills, solutions to big problems do not happen over night, they require years of discussion and negotiations between every side of the problem and even then procedure and politics can still get in the way. But with ever reincarnation of the AgJOBS bill we are reminded that we must continue to try.

## VII. THE FUTURE OF GUEST WORKER PROGRAMS

In today's economic difficulties it is challenging to say what will happen with guest worker programs or immigration as a whole. As Vice President Joe Biden once said to Latin American leaders it is "difficult to tell a constituency while unemployment is rising, they're losing their jobs and their homes, that what we should do is in fact legalize [undocumented workers] and stop all deportation."<sup>154</sup> Vice President Biden is not the only governmental leader having trouble speaking on immigration; Congress is also not dealing with the issue.<sup>155</sup> Instead the decisions facing illegal immigrants in today's economic crisis comes down to the individual decisions of the illegal immigrants themselves.<sup>156</sup> These immigrants are not only facing unemployment issues, but they know that if they leave the United States they may never be able to return.<sup>157</sup> In fact "for those who are in the U.S., the twin pressures—increased enforcement and a worsening economy—have actually made it harder for them to return home."<sup>158</sup> The increased enforcement has made it harder to get back into the country, which means that smugglers are charging illegal immigrants more which in turns leads to fewer people being willing to leave because they feel that they need to stay just to pay off the debt acquired to get to the United States.<sup>159</sup> In fact one example shows that one immigrant will need over two years to

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<sup>154</sup> Thornburg, *supra*, at 34.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 36.

<sup>159</sup> *Id.*

just break even on his debt to the coyote and he has a better chance of making that money in the United States than back home.<sup>160</sup>

On the other side of the immigration debate are the unemployed citizens that view immigrants as unfair competition. “And there are plenty of signs that as joblessness grows, so to could populist outrage against undocumented workers and their families.”<sup>161</sup> Local and state governments have been responding to the fears of these citizens and are using legislation to express these fears. For example, Georgia’s legislature passed a bill that requiring that the written driver’s license test be given only in English.<sup>162</sup> These laws then trigger fear that racism is on the rise, among immigrants, which in turn can create real and deep racial tension in towns and cities.

It is also important to recognize that many illegal immigrants are important to the communities that they live in, whether it is through owning homes and making mortgage payments on that home, or even just buying groceries at the local grocery store.<sup>163</sup> What it comes down to is that if an illegal immigrant returns home, it isn’t solely about his job becoming available to domestic workers it is about the bank who controlled his mortgage seeing a loss in revenues and the Safeway where he bought his groceries would lose a customer as well as the

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at p. 32 (using the example of Glenn Beck a Fox News host who has “suppurating monologues about dark forces allied against real Americans” to demonstrate that there are “escalated tensions facing illegal immigrants”).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 36

hardware store where he bought spark plugs for his car.<sup>164</sup> Illegal immigrants have become an integral part of the economy in many areas.<sup>165</sup>

Many also see undocumented workers as vital to economy recovery because business may be getting back on their feet, but they are “not going to hire permanent workers until they’re sure the recession is over.”<sup>166</sup> During economic crisis, cheap labor becomes even more important and the effect of deporting 10 million illegal immigrants and their contributions to society would be devastating.<sup>167</sup> “Illegal America is simply too big to fail.”<sup>168</sup>

With the United States in its current economic crisis, when considering what may come of the guest worker programs, it may be wise to look at the state of immigration during the Great Depression. In the 1930s, many workers returned to Mexico because they were unable to find jobs during the Great Depression.<sup>169</sup> Employers argued that during this time they experienced labor shortages, but statistics from this era show that there was actually a labor surplus of 263 workers for every 100 farm jobs.<sup>170</sup>

Many supporters of the AgJOBS bill are not discouraged about the bill failing in Congress, they simply view it as not yet their time, but they know that their time will come.<sup>171</sup> Each time the AgJOBS bill dies, the creators and the sponsors of the bill learn a little more and

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<sup>164</sup> *Id.* at 36.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Halle, *supra*, at 362.

<sup>170</sup> *Id.*

<sup>171</sup> Gilbert, *supra*, at 481.

rethink the bill a little more and reorganize so that each bill that is reintroduced in Congress can be seen as an even better version of the bill than the one before it.<sup>172</sup> The AgJOBS bill has so much potential for success because so many different factions, even groups that are normally opposed to one another, support it. If future reforms of the guest worker programs are going to happen it is going to take the work of groups from across the table.<sup>173</sup> Reforms also take time, “it is clear that just as it took the U.S. a century to get into this predicament, it will likely require another century to rectify the situation.”<sup>174</sup>

The AgJOBS bills represent one of the best opportunities that the United States has to reform the guest worker programs. This bill, while still having opposition, is endorsed by both growers and worker advocates. It is a piece of legislation that was produce with bipartisan support, and now that Congress is out from under the thumb of the Bush administration, it may stand a chance to at least be heard in Congress.

The future of guest worker programs is unclear. The whole country realizes that reform is needed, however what shape that reform will take is uncertain. The reform may limit temporary workers by nationality, as was considered by the Bush Administration in 2001.<sup>175</sup> The reform may contain an earned legalization component with unrealistic work requirements.<sup>176</sup> Or the reform may be a great compromise between employers and workers, that provides protections to the workers and easy certification for the employers while also ensuring that the

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<sup>172</sup> *Id.* at 482.

<sup>173</sup> *Id.*

<sup>174</sup> Halle, *supra*, at 361.

<sup>175</sup> Bruno, *supra*, at 18.

<sup>176</sup> *Id.* at 20.

domestic work force is not adversely affected. Perhaps the next great guest worker reform will be the next reincarnation of the AgJOBS act.