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Analysis of Pombo H-2C Guestworker Proposal, H.R. 4548

The legislation introduced by Sen. Richard Pombo, H.R. 4548, to create a new "H-2C" temporary foreign agricultural worker program would be extremely harmful to farmworkers and contravenes numerous recommendations made over many years about ways to stabilize the agricultural labor force and improve conditions for migrant workers. The bill is similar to the Pombo-Chambliss amendment that was defeated on the House floor in July 1996 during the debate over immigration legislation. On June 15, 2000, the House immigration subcommittee will hold a hearing on H.R. 4548. This bill should be strenuously opposed.

Introduction: H-2A Temporary Foreign Agricultural Worker Program

Under current law, an agricultural employer who anticipates a labor shortage for seasonal jobs may apply for a labor certification from the Department of Labor. The employer must demonstrate that there is not an adequate number of qualified farmworkers at the place and time needed and that the wages and working conditions being offered would not "adversely affect" the wages and working conditions of similarly employed farmworkers. An "H-2A" labor certification entitles employers to obtain temporary visas for foreign workers who are tied to one employer and do not acquire immigration status.

The H-2A program, which began during World War II, and was revised in 1986, contains modest protections against displacement of U.S. workers, exploitation of vulnerable guestworkers, and depression in wage rates and working conditions caused by the hiring of undocumented workers and guestworkers. Many of these protections were developed under the old "bracero" program but were substantially revised by the Reagan Administration.

The H-2C Guestworker Program in H.R. 4548

The proposal in H.R. 4548 would establish a new agricultural guestworker or "H-2C" program. Rep. Pombo's bill should be rejected because it would remove or weaken major protections in longstanding guestworker programs and it would harm the agricultural labor market for generations into the future.

Avoiding Employment of U.S. Workers: The Pombo bill would allow a virtually unlimited flow into the country of exploitable temporary foreign workers whose visas would be controlled by employers.

- Under the current H-2A program's "50% rule job preference," employers must hire qualified U.S. workers who apply by the time one-half the season has elapsed. H-2A program employers must affirmatively recruit in the private marketplace (this is known as "positive recruitment") and use the federal-state Job Service to circulate job offers to areas where migrant workers may be located.
- No positive recruitment or Job Service circulation of job offers would be required by the Pombo bill. The new system of state job registries is designed to fail to refer U.S. workers to such employers and thereby justify the issuance of visas to exploitable guestworkers. Under this proposal, all agricultural employers could reject qualified U.S. workers who applied for a job directly to the employer, or through the a nonprofit group, a union, or a labor contractor. § 101(a)(6) Yet, employers could use labor contractors to hire foreign workers. Employers need only consider a U.S. worker's job application if it was submitted through a "job registry," a new government agency to be established in each state. The job registry could have as little as 14 days to recruit U.S. migrant workers before the employer would get access to guestworker visas. Yet, guestworkers could be recruited for months by growers.

No Housing Required: The current H-2A program requires employers to offer housing, and to provide it at no cost to the worker. The Pombo H-2C program would eliminate the housing obligation and authorize employers to provide below-market-rate housing allowances (at least for three years). Due to a severe housing shortage for farmworkers, and the inadequacy of their wages and the allowance, farmworkers will not be able to find housing or to finance its development and the burden will fall on farmworkers and local communities. See § 204(b)(6) and 204(d)(3).

No Minimum Work Promise: Under the H-2A program, employers who seek guestworkers have been required to offer the opportunity to work at least $\frac{3}{4}$ of the work-days in the stated period of employment, 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 H-2C program would lack any minimum work guarantee.

Wage Provisions Would Lower H-2A Wage Rates

- Farmworkers' wages have been declining in real terms for the last decade. This wage depression is caused partly by the presence of economically and politically weak guestworkers and undocumented workers (whose presence has increased to 52% of the labor force). To overcome the depression in wage rates and protect both U.S. and foreign workers, the H-2A employers must pay the highest of three minimum wages: (1) the federal or state minimum wage; (2) the local, job-specific "prevailing wage," as determined by the Department of Labor using state agency wage surveys; and (3) the H-2A "adverse effect wage rate or "AEWR." The formula for setting the AEWR was changed by the Reagan administration, lowering the rates by an average of 20%. The H-2A AEWR is now defined as the regional average hourly wage for field and livestock workers, as found in Department of Agriculture annual surveys. For example, Arizona's AEWR is now \$6.74, California \$7.04, Georgia \$6.72, North Carolina \$6.98 and Washington \$7.64. Often the AEWR is higher than the local prevailing wage and therefore many H-2A employers must pay the AEWR.

- The Pombo H-2C proposal (§ 2(1)) would redefine the term "adverse effect wage rate" (or "AEWR") to lower wage rates in most circumstances as compared with the H-2A program. The AEWR would be the local "prevailing wage" (under some circumstances plus five percent). The prevailing wage (plus five percent) is often significantly lower than the current AEWR (the regional hourly average wage). In addition, since the local prevailing wage is often an artificially low "piece rate," in many cases the only effective base wage rate will be the minimum wage under law at the federal (\$5.15 per hour) or state (in California \$5.75) level.
- Employers could increase productivity standards to overcome the effects of any potential increases in prevailing wage rates. Such "speed-ups" would no longer be regulated. The H-2A program has some (admittedly weak) protections.
- **No individual worker would be guaranteed the H-2C minimum required wage rate.** The bill allows employers a huge loophole to avoid paying the "adverse effect wage rate." The employer may offer an incentive wage system (piece rate, "group rate," "task rate") and merely demonstrate that its employees, "taken as a group," on average earn the local prevailing wage. If the group as a whole earns the minimum rate, then some workers, by definition, are earning below that minimum rate. The workers' only real wage floor is the federal or state minimum wage, from which some agricultural employers are still exempt. § 204(a)(4)(A)-(B)
- The employers would continue, as under the H-2A program, to be exempt from Social Security and unemployment taxes, depriving foreign workers of social security and creating incentives to use guestworkers rather than U.S. workers.
- As non-immigrant temporary visa holders, these H-2C workers would be ineligible for legal assistance from organizations funded by the federal Legal Services Corporation. There is a special exception that allows H-2A guestworkers to secure legal assistance regarding their employment contracts.

There are many other aspects of this lengthy bill that would reduce labor standards or offer protections that might seem helpful but turn out to be meaningless, but they are far too numerous to discuss in this brief paper.

There Is No Need For A New Temporary Foreign Worker Program

The U.S. Commission on Immigration Reform (Sept.1997) concluded **that a new guestworker program would be a "grievous mistake."** The U.S. General Accounting Office (Dec. 1997) and the Congressional Research Service (Dec. 1999) have issued reports that contradict the factual arguments made by the fruit and vegetable employers who are promoting these bills.

The CRS report states "Between 11% and 13% of these workers [hired farmworkers] were without jobs in the 1994-1998 period, **or at least twice the average unemployment rate in the nation.**" ("Farm Labor Shortages and Immigration Policy," p. 10. There is a surplus of agricultural labor. The GAO analyzed unemployment data in the 20 major agricultural-production counties in the United States and found that most have double-digit unemployment rates. Nor is there an impending shortage.

Employers have not sought to stabilize the labor market by improving wages and working conditions to attract and retain workers. Farmworkers' wages have declined in real terms during the last decade. The Department of Labor recently concluded that real **wages of farmworkers declined** from \$6.89 in 1989 to \$6.18 per hour (in 1998 dollars). In addition, farmworkers' wages went from being 54% of nonfarm workers' wage levels to 48% of nonfarm workers' wages during the same time period. DOL, National Agricultural Workers Survey, Report No. 8 (March 2000), pp. 34-35. **Poverty rates increased during that decade** so that three-fifths of farmworkers live below the poverty line. Further, the number of days of work per farmworker have dropped. Rampant violations of minimum and other labor protections persist, according to recent studies.

Labor-intensive agribusiness can afford to pay a living wage. Agricultural productivity has increased substantially. The value of production of fruits, vegetables and horticulture -- labor-intensive crops -- grew by 52% to \$15.1 billion between 1986 and 1995. Exports of these products, according to the USDA, grew from \$4.0 billion in FY 1988 to \$10.26 billion in FY 1999. Farmworkers did not share in that increase.

The GAO found that **the H-2A guestworker** program approves 99% of employers' applications, despite a labor surplus. Congress and the Department of Labor recently responded to grower complaints by speeding up the H-2A process through statutory and regulatory changes. The H-2A program has more than doubled in the last several years, spreading to new states and crops.

Growers claim that this type of legislation will reduce illegal migration, **but "guestworker" programs do not stop unlawful migration; they cause it.** Some guestworkers remain illegally in the country (since it's a safe legal way into the country) and employers open new migration streams in their never-ending search for new pools of low-wage labor in other nations.

American society does not benefit by importing "non-immigrant" workers who lack a meaningful opportunity to acquire the **democratic rights** or economic opportunities of immigrants and citizens. As long as agribusiness continues its backwards labor relations practices, there will be high turnover, resulting in more hiring of undocumented workers. If we need farm laborers, we should offer them temporary, and then permanent, resident alien status, "immigration status," and employers should improve their job terms to attract and retain them.

Conclusion

The proposed H-2C program in H.R. 4548 should be rejected. The proposal to create a new "adjustment" guestworker program (H.R. 4056, S. 1814, S. 1815) is equally objectionable.

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