

FROM THE GROUND UP

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Focus on H-2A Guestworkers

Agencies Fail to Protect H-2A Workers

by Lori Elmer,
Legal Aid of North Carolina

Though the H-2A program provides immigrant farmworkers with a legal contract to work in the United States with some protections not afforded other workers, many of these guestworkers are not provided equal protection under the law. There are many instances in which government enforcement agencies have been derelict in their duties to protect these foreign guestworkers while in the U.S. Below are examples that have been noted in North Carolina.

When workers at L.C. Honeycutt's farm complained about pesticide violations, Honeycutt physically attacked Patricinio, one of the H-2A workers, in retaliation. While Mr. Honeycutt later pled guilty to criminal assault, his requests for foreign labor have continued to be fulfilled by the Federal Department of Labor (DOL). According to the DOL, loss of H-2A privileges occurs only if there is 'pattern and practice' of assault, and not a one-time physical attack.

Yet, in at least one instance, the U.S. DOL did not deny an employer's application for H-2A workers, even though DOL described the employer Evergreen Forestry Services' (EFS) as having "a woeful history of abuse" against workers. In 2002, fourteen EFS workers were killed in a van crash. Even though the U.S. DOL had acknowledged a 'pattern and practice' of poor behavior, they only issued vehicle safety violations, and continued to approve EFS's demands for H-2A workers.

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Guestworker History and H-2A Facts

compiled by Nadeen Bir, SAF

The Bracero Program, a guestworker program, was implemented in 1943 to deal with wartime labor shortages. At its peak between 1956 and 1959, roughly 450,000 Mexican farmworkers were brought to the U.S. yearly. The program ended in 1964. (*Federal News Service 1997 and the Farmworker Justice Fund*)

The H-2 program also began in 1943. Though not a government to government agreement like the Bracero Program, it contained similar statutory, regulatory and contractual labor protections for recruitment, wages, benefits, transportation, minimum-work guarantees, working and housing conditions. (*Farmworker Justice Fund*)

H-2 workers receive non-immigrant temporary visas to work for a specific period of time. H-2 workers are a captive workforce who have no freedom in changing employers and cannot advocate for themselves without facing the risk of losing their visas.

Revised in 1986, the H-2 program was divided into the H-2A agricultural program and the H-2B non-agricultural program. The number of workers issued H-2A visas doubled in the last six years to over 40,000 guestworkers. (*Farmworker Justice Fund*)

North Carolina is the single largest user of agricultural temporary foreign-born workers in the United States. From 1999 to 2003, approximately 10,000 Mexican H-2A workers have come to NC annually. (*North Carolina Justice and Community Development Center*)

According to the 2000 Department of Labor's National Agricultural Workers Survey, 25% of farmworkers are U.S. citizens, 24% are Legal Permanent Residents, and 52% are undocumented immigrants. Guestworker programs have been proposed as solutions to unlawful immigration.

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SAF is a 501(c)(3) non-profit organization whose mission is to bring students and farmworkers together to learn about each other's lives, share resources and skills, improve conditions for farmworkers, and build diverse coalitions working for social change.

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GOVERNMENT OF MEXICO ACCEPTS CASE ON H-2A GUESTWORKERS

by Bruce Goldstein, Farmworker Justice Fund, Inc.
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On February 11, 2003, the Farmworker Justice Fund (FJF) and Central Independiente de Obreros Agrícolas y Campesinos (CIOAC), an independent labor union in Mexico that represents farmworkers and small farmers, filed a request for action by the governments of the U.S., Mexico, and Canada under the "labor side agreement" of the North American Free Trade Agreement (NAFTA), which is formally known as the North American Agreement on Labor Cooperation (NAALC).

The request focuses on the treatment of Mexican citizens who are recruited to work as farmworkers in the state of North Carolina by several hundred agricultural employers and their recruiter, the North Carolina Growers' Association (NCGA). Mexican workers are recruited under a special visa program of the United States called the H-2A temporary foreign agricultural worker program. About 9,000 of these "H-2A workers" are now hired annually in North Carolina, more than are hired in any other state.

On September 5, 2003, the Mexican Government informed the Farmworker Justice Fund, Inc. and the U.S. Government that it had accepted the petition, would investigate, and prepare a report. Further proceedings are possible if violations by the U.S. Government are found. If initial consultations among the nations do not lead to satisfactory results, a nation can request a committee of experts to recommend changes and more extensive intervention is possible if an agreement cannot be reached to resolve the problems.

Under the NAALC, each nation has promised to cooperate to improve its treatment of workers and its enforcement of the labor laws. The submission challenges the unequal treatment of H-2A migrant workers under the U.S. labor laws and the failure of the U.S. government to enforce the labor laws with respect to the workers in North Carolina under the H-2A program.

The submission focuses on several problems, including the following:

- Exclusion of H-2A migrant workers from the federal labor law called the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA")
- Denial of right to join and organize labor unions and engage in collective bargaining
- Restricting workers' ability to receive visitors in employer-provided housing and on employer property
- 'Blacklisting': denying Mexican citizens access to H-2A jobs
- Government allows H-2A employers' manipulation of the length of season to avoid obligations to employees, including transportation cost reimbursements
- Denial of access to workers' compensation for work-related injuries and illnesses

Many of these problems were identified in a report by Human Rights Watch, "Unfair Advantage" (2001).

FJF and CIOAC are preparing additional materials to submit to the Mexican Government with the goal of persuading it to demand significant improvement in labor-law enforcement and changes in the H-2A program. Unfortunately, the NAALC procedures are weak and slow. Still, the NAALC is one tool that transnational farmworkers should use to improve their conditions.

Agencies Fail

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In another case, an employer, angry that an H-2A worker Juan had litigated a job injury, interrogated him at length in a strange building, taunted him and stopped giving him work. The North Carolina Industrial Commission (NCIC) - which arbitrates workers' compensation claims - was informed of the abuse, but failed to intervene. With no agency intervention, the employer interrogated the worker again and ordered him to sign a document. Though Juan cannot read, he was frightened and signed the "voluntary quit" document. He was then placed on a bus for Mexico. Only then did the NCIC issue an Order for the employer to stop harassing the worker, but declined to issue sanctions.

Enforcement agencies often fail to comprehend the intimidation faced by many H-2A workers. Many guestworkers will sign documents without fully understanding the consequences, continue to work with serious injuries, and are afraid to report cases of physical abuse by their employer, due to fear of the 'no return list.' Leoncio was placed on the 'blacklist' after he was injured on the job. Antonio was 'blacklisted' after he made a wage complaint. Unfortunately, there are thousands of H-2A workers who have been placed on a 'no-return list'. And while 'blacklisting' is criminal in North Carolina, the Attorney General's office has yet to enforce the anti-blacklisting statute against the politically powerful H-2A employers.

While H-2A farmworkers are only in the U.S. for a temporary period of time, they deserve to be treated equally and fairly under the law. Employers and enforcement agencies should treat these *guestworkers* with respect, and should not condone any abuse within the H-2A program.

A Road to Legalization for Farmworkers: Agricultural Job Opportunity, Benefits, and Security Act of 2003 (AgJOBS) S.1645/H.R.3142

This historical proposal could be the first major improvement in the immigration status of 500,000 or more H-2A guestworkers and undocumented farmworkers in nearly 20 years. These bi-partisan compromise bills introduced by Senators Larry Craig (R-ID) & Edward Kennedy (D-MA), and Representatives Chris Cannon (R-UT) & Howard Berman (D-CA) have come out of years of negotiations between the United Farm Workers of America, AFL-CIO (UFW) and growers.

These bills are an important **first-step** toward comprehensive immigration reform and address:

- * the failures of our current immigration laws,
- * the needs of the U.S. economy, and
- * protection of U.S. and immigrant workers in all industries.

AgJOBS is comprised of two major components: an earned adjustment program and revision of the H-2A guestworker program.

The two-step legalization or 'earned adjustment' program would allow farmworkers to adjust their immigration status. Farmworkers who have already worked at least 100 days in agriculture during a 12-month period within the 18-month period ending August 31, 2003 are required to obtain temporary immigrant status. To gain Legal Permanent Resident (LPR) Status, the farmworker is required to work at least 360 days in agriculture in a 6-year period, 240 days must be worked in the first three years after the law is enacted. The farmworker's family will be given temporary resident status but cannot work, and may adjust to LPR status when the farmworker does.

The revision of the H-2A program will have both negative and positive implications for workers. To benefit workers, important H-2A worker protections will be strengthened and put into the statute rather than in regulations; and for the first time ever, H-2A guestworkers will have the right to go to federal court to enforce their rights under the H-2A program. To benefit the employers, the proposed revisions will streamline the paperwork and speed up the process for employers to hire guestworkers, as well as freeze wages for three years while the adverse effect wage rate is researched.

At the end of 2003, prospects for the passage of the AgJOBS bill were good, with 81 House members and 50 Senators already supporting the legislation. Senate Majority Leader Bill Frist (R-TN) even promised to allocate time for debate on the Senate floor. But on Wednesday, January 7, 2004, President Bush announced his proposal for immigration reform, which was essentially a new temporary worker program. Though preliminary, it appears that Bush's proposal would provide some undocumented workers a three year work visa, yet unlike AgJOBS, the President's initiative fails to include an 'earned legalization' process. Though it is unlikely that Congress will act on the President's proposal this year, this could prevent AgJOBS from moving forward.

Though the AgJOBS bill does include an 'earned' legalization process, thus making legal permanent residency status dependent on future work requirements, and streamlines the already problematic H-2A program, in comparison to the President's proposal, AgJOBS would be a momentous step toward positive immigration reform, providing a road to legalization for undocumented and H-2A farmworkers.

Due to daily changes and updates regarding AgJOBS and the President's immigration proposal, please go to www.fwjjustice.org for more current information and action alerts.

See page 5 for information on how to support AgJOBS!

