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CIRA and the H-2C: Reviewing the Potential for Future Comprehensive Immigration
Reform

A Thesis submitted in partial satisfaction of the requirements for the degree Master of
Arts

in

Latin American Studies (International Migration)

by

Brian W. Hawkins

Committee in charge:

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Professor David Fitzgerald
Professor Gordon Hanson

2010

The Thesis of Brian W. Hawkins is approved and it is acceptable in quality and form
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University of California, San Diego

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ABSTRACT OF THE THESIS

CIRA and the H-2C: Reviewing the Potential for Future Comprehensive Immigration Reform

by

Brian W. Hawkins

Master of Arts in Latin American Studies (International Migration)

University of California, San Diego 2010

Professor Wayne Cornelius, Chair

This thesis critically analyzes the H-2C temporary worker program (TWP) that was part of the 2006, Senate-approved Comprehensive Immigration Reform Act. Employer opinions and lessons from past U.S. TWPs are presented, resulting in recommendations for changing H-2C's design in order to maximize its potential as a core component of future immigration reform in the United States. The paper finds that small businesses, which comprise the majority of the businesses in the United States, and are among the heaviest users of foreign labor, consider the 2006 H-2C program to be unaffordable. Policy makers must redesign H-2C to be affordable for small businesses while still offering an effective system for protecting domestic worker interests. The paper concludes that the best means to achieve both program affordability for small businesses and effectual domestic worker protections is likely a user-friendly, electronic program process.

I.

INTRODUCTION & METHODOLOGY

Illegal immigration is a highly salient issue for the United States. An estimated 500,000 undocumented migrants enter the country illegally on a yearly basis (U.S. Government Accountability Office 2006). The latest estimate of the number of undocumented immigrants living and working in the United States as of March 2009 is 11.9 million, the majority of which are low-skilled laborers employed in the service and agricultural sectors (Pew Hispanic Center 2009). Employers in these sectors of the U.S. economy, either incapable or unwilling to acquire the workers they need through legal means, have turned to the reservoir of undocumented migrant labor to keep their businesses afloat and their products competitive. Knowing there are jobs waiting for them in the United States, many labor migrants are resorting to clandestine entry and residence in the U.S. since current immigration policy allows for little legal ingress. Many of these labor migrants die while crossing the U.S.-Mexico border due to unforgiving desert environments and poor preparation for the journey.

The portion of U.S. immigration policy which is intended to address the supply of, and demand for, low-skilled, foreign labor does not currently meet the economic realities that drive the illegal migratory flow. Furthermore, U.S. measures to police the U.S.-Mexico border and deter illegal entry are not functioning. This has led some researchers to posit the “gap hypothesis,” in which immigration policy intents and outcomes differ markedly (Cornelius et al. 2004). This “gap” between policy intent

and outcome was used to justify the Bush administration call for comprehensive immigration reform in 2006.

The focus of this paper is the Senate-approved Comprehensive Immigration Reform Act of 2006 (CIRA, S. 2611.ES). CIRA encompassed a vast array of initiatives aimed at refugees, labor migrants of all skill levels, new technologies in worksite and border enforcement, proceedings for residency, increases in interior and border enforcement personnel, and so on. Regarding illegal immigration, the proposal was divided into two parts, one dealing with the undocumented already in the United States, and the other addressing future flows of labor migrants to the U.S. Of central importance to this project is this “future flows” component of CIRA, specifically, the H-2C visa proposal. The H-2C visa proposal was a new temporary worker program (TWP) designed to address the continuous influx of illegal, low-skilled foreign labor into the country through a high visa cap ceiling, a pathway to permanent, legal residency, and a certain level of free agency in the U.S. labor market, among other measures.

U.S. TWPs have a highly controversial legacy. Harkening back to the Bracero Program of contract labor importation (1942 – 1964), debate continues to this day as to whether TWPs are an effective means of satisfying the exigencies of the U.S. labor market while still offering market protection for American-born workers. Pro-immigrant groups tend to argue that low-skilled migrant workers, legal or otherwise, form the economic backbone of the United States, but insist that migrants who are admitted on temporary visas should have the opportunity to obtain legal, permanent residency. Anti-immigrant groups argue that illegal workers are a drain on the U.S.

economy, depress wages for native workers and steal domestic jobs, not to mention that they are law-breakers and disrespectful of national sovereignty. Furthermore, they contend that immigrant workers, whether temporary or permanent, are unnecessary additions to the U.S. labor force. At the very least, all parties seem to agree on the need for immigration reform.

Since CIRA gained the approval of the U.S. Senate and had much popular support, it is likely that its elements will be reconsidered in any future Congressional debate on reform. Given the legacy of past and current U.S. TWPs, it is crucial that the H-2C program balance the weight of differing and often conflictive political and economic interests in order to be considered as a template for the future. The United States cannot afford to execute another ill designed TWP that fails to meet policy goals. Existing U.S. TWPs have suffered and continue to suffer from a host of inefficiencies and human rights violations that mar their political viability and become a financial burden on the private industries that use them. One can therefore not overstate the importance of an effective approach to controlling and legalizing the continued arrival of low-skilled labor migrants to the United States.

The goal of this paper is to analyze the policy design of H-2C and the related components of CIRA in an effort to maximize their potential for successful future implementation. Does the design of H-2C, as it was approved by the Senate, manage to address the problems experienced in other past and present U.S. TWPs? Do employers, whom the program would regulate, find its design to be not only financially viable but more attractive than options currently available? If not, what changes need to be made so that old mistakes are not repeated and employers willingly

participate in the program before turning to potentially illegal alternatives? By answering these questions, the H-2C program can be reconsidered as a potential key element of future comprehensive immigration reform.

Methodology

This project employs a two-tiered research approach. First, the history and outcomes of three particular U.S. TWPs – the Bracero Program, the H-2A agricultural workers program, and the H-2B service sector program – are reviewed to see if the lessons discernible from these programs have been incorporated into the design of H-2C. These three programs are chosen for analysis and comparison for two reasons. First, the majority of undocumented migrants are employed in the secondary labor sector, and the U.S. TWPs designed for primary sector workers are of less value for comparative analysis, such as the H-1B visa for highly skilled foreign professionals. Second, a significant portion of H-2C's design in CIRA mirrors that of the H-2A and H-2B programs, which are legislatively rooted in the precedents set by the Bracero Program.

The second approach involves unstructured interviews with 15 employers in the agricultural and service sectors in San Diego, CA, San Francisco, CA, and Tucson, AZ. These firms included restaurants, hotels, landscaping, equine services, agribusiness and other industries. The interviews were performed on the business site and included discussions on business employment characteristics and services provided, the employer's use of foreign versus domestic labor, the employer's knowledge of current guest worker programs, and the employer's knowledge of the

2006 comprehensive reform proposal and the specifics of H-2C. Some of the employers interviewed are current users of the H-2B program, and in the review of that program their voices are used in conjunction with published literature.

Each interview ended with the employer giving recommendations for changing H-2C's design. A sheet detailing the most important aspects of H-2C for both workers and employers provided to each interviewee to assure a common understanding of the program. Each interview was audiotaped and employers were advised to refrain from using personal names and references in their discussions. Employers were never explicitly asked if they knowingly hired illegal workers, but they were asked to elaborate on the usage of foreign versus domestic labor. They were guaranteed confidentiality of any information given. Pseudonyms are used in this paper to protect identities and certain business names have also been changed or withheld entirely.

Due to time constraints, no interviews were conducted with workers, native or foreign-born, for this project. However, much of CIRA's legislation and H-2C itself focuses on controlling the employer, whose behavior is central to the economic process that perpetuates the migratory labor flow into the United States. It should also be noted that while a significant portion of CIRA's proposals address the question of legalizing unauthorized workers, this subject was not addressed in this project. The legalization debate is one of such complexity that it alone could serve as the topic for a separate project of similar size and scale.

It should be noted that the small number of interviews conducted in this project means a small set of employer voices are used to support generalized arguments. The limitations of such generalizations are fully recognized in this paper. The

generalizations in this paper do not incapacitate the conclusions provided, but one should recognize the methodological margins of these conclusions.

Several terms are used in this paper to refer to the different types of actors in the TWP game. The terms domestic worker and native worker refer specifically to the low-skilled, U.S.-born workers often found in secondary-sector U.S. jobs. The terms foreign worker or migrant worker refer to similarly employed, low-skilled workers, born outside the United States. None of these terms is used to reference highly skilled workers in the context of this paper, unless otherwise specified. The term employer exclusively refers to secondary-sector business managers, whether business owners or employees, who are directly responsible for the hiring process for their company.

Finally, for the purposes of this paper, the terms primary sector and secondary-sector industries each refer to a specific set of industries that together compose the whole of the U.S. economic landscape. Generally, primary sector industries are those that require highly skilled or educated professional employees. Such industries include finance, insurance, scientific and technical services, health care, education, administrative support and management of companies and enterprises. Secondary-sector industries, conversely, are defined here as those industries that require a low skilled labor force where higher education and professional achievements are not requisites for employees. These industries include forestry, fishing, agriculture, construction, landscaping, transportation, warehousing, accommodation and food services.

II.

DOMESTIC VS. FOREIGN LABOR

The debate over the need for a new U.S. TWP such as H-2C, and the arguments surrounding its design, could be concluded immediately by replacing foreign workers with domestic workers in secondary-sector U.S. jobs. If employers nationwide made exclusive use of domestic labor, the need for a TWP of the size and scale of H-2C would be rendered obsolete. It is important to address this issue before discussing the lessons from past and present U.S. TWPs and the design of the future.

The foremost argument against a new TWP is that foreign laborers take jobs from domestic workers, and if employers raised their wages to a level attractive to domestic workers, employers would find an ample supply of available and willing labor (Seminara 2010). Some say the usage of foreign labor is therefore depressing low-skilled wage rates across the nation and distorting the U.S. economy (Martin 2000). Each employer interviewed was explicitly asked to respond to these arguments. They were asked to what extent their business specifically, and their industry at large, depend on foreign labor, and what prevents them from finding and using more domestic workers. They were asked why they do not raise wages to attract more domestic workers, and to place their answers in and out of the context of the current economic climate.

A brief look at a farm in San Diego County illuminates some of the basic experiences that many secondary-sector employers have with native workers.

Luwanna Hallstrom is the manager of one of San Diego County's largest

farming operations and employers of farmworkers, Harry Singh and Sons, Inc.. This firm is the largest single producer of vine ripened tomatoes in the United States. It is also the only user of the H-2A temporary agricultural worker program in San Diego County. It is located on Camp Pendleton, a military base north of Oceanside, CA, and operates entirely on military land.

In 2006, Hallstrom testified before Congress on behalf of her business, the Agriculture Coalition for Immigration Reform (ACIR) and the National Council of Agricultural Employers (NCAE) on her experiences with the H-2A program. Hallstrom stated that domestic workers, although available on demand, are not willing or generally qualified to do the work necessary. Domestic farmhands, she says, tend to remain on the job for at most a few weeks, most simply vacating farm premises without notice. She also states that though her company receive a large number of applications from domestic workers, very few, if any, will show up for work.

The H-2A program does not take jobs away from American workers. We are required to recruit U.S. workers, and we may end up with hundreds of calls, several interviews and a few hires, of which many don't show up to work, oftentimes, maybe one or two days, at best... In 1998, Senator Feinstein encouraged California growers to work with the State Welfare and Employment Development Offices to recruit U.S. workers for farm jobs. And after extensive advertising, there were 137,000 able-bodied candidates that were identified, but only 503 of those applied for work, and only three actually showed up.

A San Diego immigration lawyer who has experience assisting employers with the H-2A process corroborated Hallstrom's statement of the unreliability of native workers. Domestic workers, he said, "would show up for work at seven in the morning, and by noon they were gone. They would just leave. If they stayed for a week, it was a miracle... You cannot rely on those people. They come in the morning,

and by lunch, you may lose half your workforce.” The lawyer says this remains the case even during the current economic downturn. Although the number of applications his clients receive from domestic workers has risen recently, very few result in dependable workers for county farmers.

A similar experience was recounted by Jack, the manager of the San Diego branch of a nation-wide landscaping company. His business employs approximately 75 workers, at least 65 of whom are foreign-born. He says that “domestic workers, in this current labor market, will come in and work, but will only stay here until other things open up. This is not their preference. At a gardener level, it is pretty difficult to keep them... They are looking for something temporary to put food on the table, but when other things open up, they are usually the first ones to go.”

It is clear that some domestic workers may be willing to perform the kinds of jobs described above, but the more common pattern is for them to stay a matter of weeks, at most. In the experience of employers interviewed for this project, most domestic workers who take such jobs consider them to be only temporary. Employers say such workers often enter the job site with no intention of remaining to become a reliable and experienced employee. Three factors may explain this attitude; a culturally grounded stigma against service sector jobs with little opportunity for socioeconomic advancement, low wage rates, and difficult working conditions.

Three restaurateurs in Tucson, Arizona independently spoke of a cultural resistance to working low-skilled jobs in their industry, dating at least from the mid 1980s. Erica, for example, is a professional chef and professor of culinary arts at a community college in Tucson, AZ. She is also a ranking official of the Southern

Arizona Chef's Association and has worked in restaurants across the country for over thirty years. She recalled:

The restaurants I worked in previous to 1987, even in Tucson, there was not a predominance of foreign-born individuals in the kitchen. After the '80s, when I worked at the country club in Green Valley, my Spanish speaking had to go up about three notches. A large proportion of individuals in the more menial jobs particularly were of a Hispanic background. Since 2000, one of my close friends who is a chef at the Skyline Club has told me that his kitchen is now predominantly foreign-born. He's seen a huge upswing [of foreign-born labor] in the country club where he's been working for 30 years.

When asked to explain this increase in foreign workers in the restaurants she knows, Erica pointed towards the unwillingness of an educated generation starting approximately in the 1980s:

The best workers that I had when I was the chef during the late 1980s at [restaurant name withheld] turned out to be illegal... They were the ones that really needed and wanted a job, and they were the ones that performed to the best of their ability. It's not that Americans were lazy, but there was a generation not too long ago that all fancied themselves as above any kind of menial work. It's a cultural thing. They all thought they were entrepreneurs. Just like the phenomena today with the culinary schools. They pay \$50,000 to \$60,000 dollars to go to culinary school and they all expect to come out as a chef, not as a line cook who is getting paid close to minimum wage. That is not what they anticipated. They are not all going to be chefs. This disillusionment leads to an attitude problem on the jobsite.

Michael, the owner of one of Tucson's most successful and longest-operating Italian restaurants, confirmed Erica's experience. He runs a labor force of over 60 individuals. Approximately 20% of his workforce is foreign-born, almost all of whom are employed as bussers, dishwashers or line cooks.

It used to be younger kids did the work, and now they don't. I've been doing this since 1972, and all of our dishwashers and bussers used to be young [American] kids, all of them. Then, starting in the mid to late '80s, kids became less and less interested in working full time. These kids being 16 to 18. I feel it's because parents think it's better

the kids spend their time on school and other activities instead of working, and if they do work, it's a couple days here or there, and they have to leave for summers or whatever. They say 'We want our kids to work, but we have to take off for the summer or we have soccer in the winter' or something. You don't want to have anyone that just takes off for a couple weeks. You can't rely on that. I now feel I am dependent on [foreign workers]. I've tried to find [native workers], and there are some, but they are often the children of the immigrants anyway. Other than that, it's almost impossible to replace a [foreign worker].

Michael was asked to elaborate on why this was so. He again pointed to a combination of availability and culture. "[Foreign workers] want to make money," he says, "and they're not proud about how they make it. They're not into titles, they just say 'you point me to it, and you pay me well, and I'll do it'... For every one [domestic worker with this attitude] there's five immigrants."

David is the owner of one of Tucson's most successful new Italian restaurants, and he has over 30 years of experience in the industry. His small restaurant employs 15 workers, a third of whom are foreign-born.

The difference between the '60s and '70s versus now is back then all my employees in the restaurant business were kids going to school. High school or college. They were all smart, hard-working, driven people. Well nowadays everybody wants their kids to concentrate on school so they don't learn how to work. Now we get [uneducated domestic workers] in restaurants that don't want to work. We don't have a [native] workforce for this industry anymore. Then [foreign workers] came here, and they couldn't get professional jobs here, but these were jobs were better than the ones at home, and they worked hard at it. It gave us a workforce to pull from that was loyal, very punctual and reliable. I just hired a guy named Jorge, who is legal, but he's foreign, and he can outwork any three [domestic workers]. And he does it with a smile because he appreciates the job... Being a small business owner, I can't afford a big payroll of unreliable people. I have to have a very efficient workforce.

A San Diego Farm Bureau (SDFB) official, as well as two ornamental plant growers who were separately interviewed in northern San Diego County, spoke of a

cultural issue in the agricultural sector. Americans, they said, simply “do not raise their children to become farmworkers.” Seasonal farm work is seen as a “dead-end” job, with no means for upward mobility, socioeconomic advancement, or year-round employment. They say this remains the case despite the current national economic climate with high unemployment rates. The SDFB official further contended that not even foreign-born, immigrant farmworkers are raising their U.S.-born children with the expectation to perform agricultural work. The official places the estimated percentage of foreign-born labor on San Diego County farms at 90%, 50% or more of whom may be working illegally. This percentage has remained more or less stable, the official said, for the past several decades in the county. If foreign farmworkers were teaching their children to be farmworkers as well, he observed, that percentage would have decreased noticeably over the years, as immigrant children with U.S. citizenship replaced their parents in the fields.

In sum, the view of these employers is that the United States began a cultural shift in the mid-1980s that placed education as a priority over working secondary-sector jobs during the teenage years. These employers now unanimously see the young American workforce which used to populate their business to be unwilling, and consequently unavailable or unreliable, for the lower-level job to be filled. It is inaccurate to say that these employers view all Americans as incapable or inherently lazy. Rather, they see native-born workers as unmotivated, particularly the young who used to comprise much of the industry workforce. The foreign-born worker, conversely, has made himself readily available for the job, while providing what employers view as an outstanding work ethic. As a result, these Arizona restaurateurs

and California agricultural employers are witness to and participants in a steady increase of foreign-born labor on the job site.

The possibility remains, however, that a significant rise in wages for these secondary-sector jobs might ameliorate the cultural stigma attached to these jobs and increase the motivation of native workers. The SDFB official was asked to respond to the idea of raising wages to attract and keep more native workers. He stated that while such an approach may work for larger-scale businesses, an increase in wages is something the generally small-scale operations of San Diego County cannot afford without an increase in product prices to consumers. Given the current state of the economy, this is something County farmers are especially reluctant to do, as many consumers are in search of the cheapest product prices available. As it stands, the average hourly wage rate for farmhands in San Diego County is \$12, which the SDFB official claims is already relatively high compared to other counties within the state and stands well above the current state minimum wage rate of \$8 an hour.

When asked about raising wages to attract more native workers, Erica, in Tucson, also responded that it would be possible, but with consequences;

The restaurant industry has already been hit with a hike in minimum wage, which is just, but to raise it up to the expectations of the American worker would make the cost of the food in a restaurant prohibitively expensive. You can't fork out the money without getting the money in to pay. Depending on the size of the restaurant and the demands on benefit packages and so forth that are required of the employer, well, it's money in and money out... The American public, especially at a time like this, is looking for bargains. But in the [wage hike] process, the American public has to start paying more for dinner.

Erica observed that in a healthier economic environment, where customers are willing to pay more for their restaurant meals, significant wage increases may be more viable.

However, she believes that such a level of economic turnaround will not occur for several more years, and, therefore, believes that wage increases, at least in the short term, are not a viable option for employers in her industry.

Jack, the landscaping company manager, responded similarly. “We operate in a price-driven market,” he says. “We would have to completely restructure our contracts. We could not adhere to the prices we currently have with our clients. And that would be difficult... Everybody in the industry would have to do it.” Jack pointed out that if only a handful of landscapers in California, for example, were to raise their wages to levels attractive to domestic workers and follow it up with a raise in prices for consumers, they would quickly be run out of business due to the loss of a competitive pricing edge. In other words, Jack believes that no single landscaper will be willing to raise his wages unless all landscapers in the region do the same. This would require a “complete restructuring” of the industry.

Yet whether or not a business can afford an increase in employee wages without suffering an increase in prices for consumers, and consequently a loss of their customer base and profit margin, may actually vary from business to business. In an article prepared for an anti-immigration advocacy group, David Seminara (2010) points out several case studies of large-scale hotels or hotel chains that rank among the most prolific users of the H-2B program. Each of these hotels, he shows, are also some of the most expensive hotels in their respective regions. The Biltmore Estate Inn in Asheville, N.C., for example, imported 157 temporary workers in 2008 that were paid between \$6.28 and \$8.50 per hour. The Biltmore is the largest privately owned estate in America, with 250 rooms. Room rates start at \$619 per night, and the best

suites start at \$4,000 per night. Seminara argues that the savings such businesses gain through the use of foreign labor are not transferred directly to the consumer. The Biltmore is charging the consumer top dollar for their services, despite any cheaper foreign labor they employ. A business that is not transferring these savings, he argues, has no justification for refusing to increase wages to levels acceptable by domestics. These businesses are taking advantage of the H-2B program and the availability of foreign laborers to avoid using domestic labor at an increased wage level, he concludes.

Undoubtedly, there are certain employers who make use of foreign labor – legal or otherwise – who are perfectly capable of employing domestic workers at an increased wage rate. There are other employers, however, particularly the owners of small businesses, who truly rely on foreign labor for their low-skilled positions and cannot afford a wage increase.

A prime example of one such business is a deli and catering company in Fremont, CA owned by Mason. Mason has worked in the culinary industry for 26 years, and is the sole owner of his small northern California business. He runs a staff of only five employees, two of whom are foreign-born. Both of his foreign-born employees work in the kitchen with him, as a preparatory cook and line cook. Throughout his 26 years in business, only two to three kitchen staff have been native-born. Ninety-five percent of his business comes from catering, and he usually resorts to outside employment agencies to supply him with the needed labor to cater larger events that his small staff alone cannot handle. He notes that

there are two different sets of rules for big business and small business. To have a structure that's progressive that offers benefits

and upward mobility and so forth to your workforce from the back of the house to front... the key is what your income and your bottom line is. You need to have that revenue. If you don't have that revenue, you could be the most idealistic person in the world and still get shot down. Most 'mom and pops' don't have that revenue. 'Mom and pops' are still struggling to survive, and about 80% of restaurants are 'mom and pops' nationwide.

A brief look at the characteristics of businesses nationwide supports Mason's statement that a high percentage of businesses are 'mom and pops,' or, more specifically, small businesses with less than 20 employees. In 2006, the number of firms in the United States with less than 20 employees made up 89% of all firms in the country (U.S. Small Business Administration 2006). Interestingly, the U.S. Small Business Administration's (U.S. SBA) definition of a small business is a business with 500 or fewer employees. Those with 20 or fewer are actually designated 'very small businesses'. If one employs the U.S. SBA definition of a small business and counts the firms with 500 or less, the total percentage of small businesses in the United States in 2006 jumps to approximately 99%.

Mason states that he used to own three separate deli operations, but has scaled back to just one location over the past decade. As it currently stands, his business is "barely surviving." There is no question that, in Mason's case, raising wages for the sake of attracting more domestic workers is not an option, irrespective of national economic conditions. He says his business just doesn't generate enough revenue. He believes, while admitting there are always exceptions to the rule, that the same would apply to many of the "mom and pop" operations throughout the country.

U.S. SBA statistics once again provide support for Mason's views. According to the SBA, very small businesses of less than 20 employees pay 67% more for tax

compliance than their larger counterparts. They also spend four and a half times more per employee on environmental regulations, such as sanitation, than their larger counterparts. When all federal regulations are considered, very small businesses spend an average of 45% more per employee than larger businesses. These greater expenses for very small businesses, combined with the small revenue flow that a business of only 20 or less employees in a secondary-sector industry generates, results in far more modest profit margins, and, ultimately, a decreased ability to raise wages without raising prices for consumers.

In short, there are businesses which could afford significant increases in wage rates without threatening the life of the company and those that cannot. Seminara provides excellent examples of large businesses that are most likely capable of such a change, while Mason's case illustrates a small business that cannot. The SBA statistics support Mason's claims of "mom and pops" forming the majority of businesses in the United States that enjoy far smaller profit margins than larger firms. The generalized argument that businesses nationwide could be relieved of any need to use of foreign labor through offering domestic workers more attractive wage rates is not universally applicable.

It should be noted that there are some employers, both large and small, who are already paying particularly well for their positions and continue to have difficulty finding reliable and available domestic workers. In these cases, the wage rate is actually trumped by other factors, such as working conditions and schedule requirements. A prime example of this comes from Victoria, an H-2B employer in San Diego in the equine industry.

Victoria's business specializes in training horses and riders, as well as horse grooming and preparation for horse shows and special events. All of her H-2B workers perform grooming services, a labor-intensive job that requires a highly flexible schedule during the horse show season and exceptional training and experience. The grooms are responsible for cleaning and maintaining stables, as well as for the detailed care of the horses themselves at the company ranch or on the road. Victoria was quick to note in her interview that many of the horses their grooms care for are valued at \$400,000. The owners of these horses, she says, view their horses like children, and refuse to leave their "children" under the care of someone who is either inexperienced or unwilling to perform the kinds of tasks necessary to properly maintain the expensive animal's health.

Victoria's H-2B grooms make anywhere from \$3,000 to \$3,500 a month, well above the prevailing wage requirements the Department of Labor sets for her every year.¹ Despite this, all of Victoria's domestic workers are either trainers or customer service personnel, and none are grooms. Victoria says her domestic workers simply refuse to take up the groom position when offered. Each of these domestic workers has the qualifications necessary to do groom work, with some of them even holding four-year degrees in animal husbandry. They are also readily available year-round, and would make ideal grooms in Victoria's eyes. Victoria believes the labor demands of the groom position are the primary cause in preventing her domestic workers from accepting the offer. Grooming "is dirty work," she says, "and they just don't want to do it," despite an increase in earnings.

¹ The various aspects of the H-2B program, such as prevailing wage requirements, will be covered in greater detail in the following chapter.

Michael, the aforementioned owner of one of the most successful Italian restaurants in Tucson, AZ, also states he pays relatively well for his dishwashers but cannot find domestic workers to do the job.

I pay my dishwashers \$9 to \$10.50 an hour, which I think is very good money for a dishwashing job. The state minimum wage is \$7.25. When it was five-something, I used to pay \$8.50 to \$9 an hour, up to \$10, because they work hard. I'm telling you, there are a lot of line cooks in town that don't get that. [Domestics] don't want to dishwash. No one wants to dishwash.

When asked if he might raise his dishwasher wages even further, he responded "People are always saying, 'Pay more, pay more,' but up to what point? Why would anybody want to be a trained chef who paid thousands of dollars to go to school if they're making the same as a dishwasher? There wouldn't be any incentive anymore. I think that's called socialism."

Thus there are instances in which employers are already offering relatively high wage rates for certain jobs that domestics still largely refuse, given the nature and difficulty of the work. As a result, more than willing foreign workers take the jobs. Victoria's grooms already make some of the best earnings in her company, and Michael believes paying his dishwashers any more would distort incentives for more skilled workers. Such employers argue that it is unreasonable to ask them to pay more for a job which is already relatively well paid.

Conclusion

The overwhelming presence of foreign workers in the secondary-sector jobs described here can be attributed mostly to the unwillingness of domestic labor to take such jobs. The restaurateurs interviewed cited a cultural stigma, starting somewhere

in the 1980s, which dissuades many native workers from taking secondary-sector jobs. These employers believe that the youth of today, who once populated their labor forces, operate within an entirely different set of cultural standards that places education and socioeconomic advancement as priorities over working what are viewed as “dead-end jobs.”

Luwanna Hallstrom, two San Diego nursery growers and the SDFB official all claim a similar cultural resistance to agricultural work. They each believe that U.S. families are not raising their youth to become farmhands. In fact, the SDFB official pointed out, not even immigrant farmhands are raising their U.S. born children to become farmworkers. The domestic workers who do rarely accept a farmhand job tend to stay for a matter of weeks at most, some leaving in the middle of their shifts without prior notice. Both Hallstrom and a San Diego immigration attorney provide ample examples of such occurrences, and they tend to see domestic workers as simply unreliable.

It may be possible to increase the reliability and availability of native workers, and, perhaps, lessen the cultural resistance to these jobs by increasing wage rates to levels attractive to most domestics. However, many employers claim that a raise in wages inherently requires a raise in prices for their consumers, which threatens the life of the business by forcing a loss of competitive edge in a price-driven market. Mason’s Fremont, CA catering business is one example. Yet there are other cases in which businesses have revenue levels high enough to raise their low-skilled job wages without compelling an increase in prices for consumers and suffering a loss of

business. Many of these larger businesses are already charging top dollar for their services, and are not transferring the savings on labor directly to the consumer.

That some business can afford an increase in wages while others cannot means this solution cannot be universally applied to U.S. businesses that use significant numbers of foreign-born workers. Some of these businesses, if forced into increasing wages just for the sake of being able to find a reliable, purely domestic workforce, would most likely be shut down. Ideally, the H-2C program would apply standards which are universally applicable, so as to make the program as simple and widely applicable as possible. A forced increase in wages that only targets particular businesses would make the H-2C program unacceptably complex and hotly contested by those who might suffer.

Furthermore, the only realistic way to bring about step-level, national wage rate increases for low-skilled jobs is to mandate them by state or federal law. One cannot expect many, if any, profit-oriented businesses in a capitalist society to voluntarily increase their low-skilled wage rates for the sake of attracting domestic workers. It would, therefore, be necessary to have a significant amount of state or federal government muscle behind the wage shift, which would signal an entirely new level of government intervention in private business. This would run contrary to basic free market principles. The political risks of championing such a measure would be prohibitively high to many legislators.

Finally, the question still remains on what U.S. employers might do in the complete absence of imported secondary-sector labor. A 1998 study revealed that employers who had experimented with alternatives to employing foreign workers tried

mechanization, subcontracting, hiring more part-time workers, outsourcing, and hiring women or elderly. However, most of the firms in this study reported that these experiments did not effectively reduce their demand on foreign labor. The study concluded that most of these firms seemed “solidly locked into the transnational labor market” (Cornelius and Kuwahara 1998).

One could hypothesize that in the absence of imported labor, some firms would restructure their businesses along the lines described above, and do so successfully. Others, however, may not enjoy such success, and would likely have to downsize. Others yet still may find themselves with no choice but to shut down the business entirely. It can be posited that the small businesses of the United States, who are the most numerous and the most dependent on foreign labor, would suffer the most under such circumstances as the firms least capable of raising wages and undergoing major production restructuring.

In short, foreign workers take the jobs that a mostly unwilling domestic population leaves behind, and a forced raise in wage rates to increase the presence of domestic workers in secondary-sector jobs is neither universally applicable nor politically viable. An increase in wage rates is, therefore, not a complete or workable solution to the United States’ illegal immigration problem. In fact, an increase in wages in secondary-sector jobs might actually result in increased levels of immigration, as exclusionary migrant networks may give first notice and opportunity to the relatives or friends of migrant workers (Waldinger and Lichter, 2003, Cornelius 1998). In the absence of an available imported labor force, many of the United States’

small business would likely be faced with either a complete restructuring or a shut-down of business.

The best solution may lie in the specifics of a new TWP. If properly balanced within the constraints of the U.S. political environment, a new TWP could both provide a legal means for the foreign-born to work in the United States without suffering the consequences of a clandestine lifestyle, and effectively protect willing domestic workers from losing jobs by overly profit-minded business owners. Before the details of a new program as H-2C can be considered, the lessons available from past and present U.S. TWPs must be reviewed.

III.

PAST & PRESENT U.S. TEMPORARY WORKER PROGRAMS

This chapter will focus more on the nuts and bolts of policy design than the larger historical and political processes responsible for the creation of the three preexisting U.S. TWPs. The goal here is less a historical review of these TWPs and more a discussion of their architecture and particular outcomes, with the exception of the Bracero Program. The Bracero Program will be reviewed first, followed by the currently operating H-2A and H-2B programs.

Of particular importance to this discussion is considering for whom each program was designed. Given the previous discussion, one must consider if the program was designed with both small and large-scale employers in mind, as well as both domestic and foreign workers. Given that these TWPs were created in the context of often conflicting political interests, it is important to note which interest group or groups benefited most from each TWP's design. Were large-scale businesses favored over small ones? Were foreign workers favored over domestics in these industries? Whose interests are missing from the policy design? As will be shown, each TWP does not, in one respect or another, collectively satisfy the interests of the three central parties; the employer, the domestic worker, and the foreign worker.

The Bracero Program

The Spanish term *bracero* comes from the word *brazo*, meaning 'arm'. *Bracero* may be then taken to mean a "strong arm," or in this particular case, a

laborer whose experience and physical capacity was seen as ideal for the working conditions found on U.S. farms in the mid 20th century. The Bracero Program lasted for 22 years, officially from 1942 to 1964, and was specifically designed to supply U.S. farmers and farm owners with the labor they claimed to need during the beginnings of U.S. involvement in World War II up until the 1960s (Craig 1971).

Mexican labor was actually present on U.S. farms well before the official beginnings of the Bracero Program in 1942, but in comparatively small numbers. Records indicate that Mexican laborers regularly crossed the (then) open border to work on southern California and Texas farms as early as the first decades of the 20th century (Garcia y Griego 1981). As the Great Depression hit in the 1930s and the Dust Bowl hampered much of southwestern U.S. agricultural production, Mexican labor trickled to a miniscule stream. But as World War II increased in intensity and the U.S. joined the fight, much of the available domestic labor went either to war or to factories involved in wartime production (Craig 1971). The classic argument of farm owners, that native labor was either not in sufficient supply or not willing to work, suddenly became a very present reality. Farmers had argued before the 1940s that they suffered consistent labor shortages, but their cries were never fully heeded until World War II caused an irrefutable domestic labor shortage.

In 1942, the United States and Mexico drew up an international labor accord authorizing the mass importation of workers onto U.S. farms. Four broad principles were established during the 1942 talks that would guide the Bracero Program throughout its 22-year history. First, the U.S. military would never draft Mexicans nor request them to perform military service of any kind. Though this may seem a

peculiar stipulation now, the reasoning becomes self-evident when considered in the context of World War II. Both the United States and Mexico participated in World War II as allies, and Mexico did not want the U.S. drafting her nationals and sending them to combat under a U.S. banner. Second, Mexican nationals would suffer no discriminatory acts of any kind while in the United States, on or off the worksite. Third, the U.S. employer would cover transportation, repatriation and labor expenses. Fourth and finally, the use of Mexican labor would not displace domestic workers or depress domestic wage rates (Craig 1971). The enforcement of these last three principles, however, lagged throughout the program's history (Galarza 1964).

It is critical to note here that the "employer" in the 1942 accord was not actually the individual farmer, but rather the U.S. government. The U.S. and Mexican governments performed roles as representatives for their respective nationals, and wrote contracts for Braceros as two distinct negotiating entities engaging in an agreement. Actual U.S. farm employers would then subcontract Braceros for their farms from the U.S. government, after the U.S. government had secured them from recruitment centers located throughout Mexico with the assistance of Mexican officials (Craig 1971).

To fulfill these essential guidelines, Braceros were guaranteed prevailing wage rates, a minimum of $\frac{3}{4}$ employment for the contract period, and housing conditions equal to those offered to domestics at the time. The wage rates were determined regionally, but a federal minimum standard was set at no less than 30 cents an hour. Braceros were guaranteed \$3.00 a day for the remaining $\frac{1}{4}$ contract period in the case of unemployment. The guarantee of equal housing showed the naiveté of the Mexican

government towards U.S. agricultural policy at the time, however; the United States offered no housing or working condition guarantees to its own agricultural workforce in the 1940s, effectively rendering this guarantee irrelevant (Craig 1971).

Between 1942 and 1947, 200,000 Braceros entered the United States under the accord, earning over 200 million in U.S. dollars. The program was extended beyond 1945 and the end of World War II to continue the supply of surplus agricultural goods to countries involved in reconstruction once the war ended and to ease the demographic impact of a surge in U.S. population following the war (Galarza 1964; Garcia y Griego 1981). Though labor union efforts decried the extension of the program just another effort by farm owners to procure cheap labor for as long as possible, their lack of organization and position as political underdogs prevented them from having any real impact on terminating the program at the end of the 1940s (Craig 1971).

The program continued beyond the 1940s and evolved to become particularly favorable for U.S. farmers during the ‘interim’ period of 1948 to 1951, illustrating the political weight that big farm lobbyists and organizations enjoyed (Craig 1971). As a consequence, one of the most noted outcomes of the Bracero Program – a drastic increase in Mexican immigration levels, irrespective of any labor programs or other legal routes available – began to emerge. The roots of mass immigration from Mexico to the United States were sown through the Braceros who chose to settle, albeit illegally, in the United States. They formed the foundation for the migrant networks which provided the pathways for other migrants from Mexico to settle (Martin 2000).

With the 2,000 some miles of international border essentially unpatrolled by either government and the tide of migrants increasing uncontrollably, officials viewed at least ‘some’ legal immigration program as preferable to ‘none’ (Craig 1971). Thus a series of new accords were reached from 1948 to 1951 that were highly susceptible to the demands of U.S. big farm lobbyists, creating labor accords that differed from the World War II accord in several key aspects.

First, the U.S. government was removed as the “employer” of Bracero workers, leaving farmers and Braceros themselves to formulate contracts with the sideline assistance of U.S. and Mexican government officials. These meant that the contracts had no U.S. governmental backing or guarantee, and, consequently even less enforceability than previously experienced. Furthermore, the federal minimum wage rate was removed from contractual arrangements, leaving Braceros highly susceptible to wage infractions. Though the Department of Labor (DOL) at least required employers to obtain certification for foreign labor contracting, the tests performed to determine need in the employer’s area of operation were extremely questionable. These tests ultimately resulted in legislative ‘window dressing’ that had no real impact on preventing employers from using foreign labor even in the possible presence of a surplus of willing and available domestic labor (Craig 1971).

Perhaps only two provisos of the 1948-1951 accords did not favor U.S. growers. First, those growers who had been caught using undocumented workers were barred from using the program. Second, and more importantly, growers using the program were required to create a \$25 bond with the U.S. government that would be used to ensure the Bracero’s cost-free repatriation upon contract termination.

Employers complained that too many Bracero's already abandoned their contracts well before their end, and they would never see their bond monies returned as a consequence for each Bracero that jumped ship. The proviso remained however, despite farmer claims of financial burden (Ibid).

During this period the imported Mexican national came to be anathema to organized U.S. labor (Garcia y Griego 1981). Labor unions continued their disorganized and piecemeal efforts at halting the program altogether, or at least providing more protections for domestic workers, but to no avail. To make matters worse for U.S. unions, the Korean War had surfaced and come to full swing by 1951. Farmers found themselves again with the same reasoning for importing Mexican labor they enjoyed during World War II, and the Bracero Program entered a new era of formalization and extended institution (Craig 1971).

This new era was not to be the grower-favored times of the preceding period, however. Mexican officials and pundits made it clear to U.S. officials that significant numbers of growers were not respecting the provisions of previous accords, and that if the United States wanted any laborers at all, more protective provisions and enforcement were required. With the passage of Public Law 78 (PL 78), the Secretary of Labor was empowered to perform a variety of tasks which would place much of the program under greater bureaucratic control. Of the most important, the Secretary was empowered to recruit illegal workers who had been in the country for at least five years, to place them into a legal tract of employment, to assist Braceros in negotiating their contracts with employers, and to guarantee employer adherence to contract provisions relating to wages or transportation (Garcia y Griego 1981).

Furthermore, Braceros would not be made available to employers unless the Secretary determined that 1) sufficient, able, willing and qualified domestic workers were not available to work, 2) employment of Braceros did not adversely affect working conditions and wages of domestics employed in similar tasks, and 3) reasonable efforts had been made by employers to attract domestics for employment at wages and standard work hours comparable to those offered Braceros (Garcia y Griego 1981). This included newspaper advertisements and other common means of job advertising at the time. Despite these provisions, organized labor maintained that mechanisms for ensuring a true lack of domestic labor were absent, that the statute did not assure that either employer or employee would meet provisions of the contract, and that it did not contain meaningful penalties for employers circumventing the program by using undocumented workers (Craig 1971).

By 1952, the program had stabilized and become an outstanding feature of the U.S. agricultural system. It is important to note that, although only a small percentage of the total U.S. farms employed Braceros, they dominated the work forces for southwestern states on farms harvesting certain crops, particularly lettuce and cotton (Craig 1971). The features of the program remained relatively stable from 1952 until 1959 along the lines of those described, with 2.5 million workers employed between 1954 and 1959, earning, at conservative estimates, over 200 million in U.S. dollars (Galarza 1964).

The demise of the program from 1960 to 1964 was due in large part to a two-fold process. First, many farmers began to mechanize their operations and use less manual labor. Second, and of most interest to this discussion, the administrative

design of the program was changed such that employers no longer found it advantageous to participate. New Department of Labor regulations concerning housing, wages and transportation made the program a great deal more costly for employers. The basis for these new regulations came from a group of consultants formed by Secretary of Labor James P. Mitchell, who were charged with analyzing fundamental aspects of the Bracero Program and making recommendations based on their findings (Craig 1971).

The consultant committee concluded that the program had failed in four key respects. First, despite any such efforts, adverse wage affects had occurred in particular cases. Second, Braceros were being used increasingly in skilled and semi-skilled jobs year-round where domestics ought to be employed. Third, much of the shortage of domestic workers was the result of imported laborers being offered better working conditions than domestics. Fourth, employers had largely never put forth bona fide efforts to recruit domestic laborers (Ibid).

The committee then made four particular recommendations, none of which pleased grower interests. The consultants first recommended that Braceros be confined to unskilled, non-mechanical jobs where temporary labor shortages genuinely existed as determined by the Department of Labor. Second, the Secretary was to be given greater powers in establishing prevailing wage rates and a standardized system of determining that wage. Third, the Secretary was to be granted greater enforcement capabilities ensuring employers were offering competitive opportunities for domestic workers. Fourth and finally, a tripartite group consisting of workers, employers (or their representatives), and the general public be established to advise the Secretary on

the state of the program (Ibid). These recommendations sparked an enduring and heated debate in Congress, which led to yet another reformation of the program that would last from 1962 until the program's final end in 1964.

Among the key features of the final reformations were that Braceros could no longer stay in the United States beyond a nine month period, transforming them, at least legislatively, into true temporary workers, and the Secretary of Labor now had full control over determining and setting the prevailing wage rate, which served as a minimum for Bracero earnings. Furthermore, employers once had to simply obey prevailing wages for their area of employment, but now had to pay wages according to the statewide averages, meaning if one part of the state could afford better pay rates for its workers, the other part would have to follow along, regardless of its own relative economic standing. Finally, stipulations were added which detailed processes for preventing Bracero contracting during, or involvement in, domestic strikes or lockouts, as well as an increase in insurance and housing quality offered to Mexican workers (Ibid).

The combination of mounting organization and political weight of organized labor, an increase in farm mechanization, greater costs for employers wishing to use the program, and real increases in enforcement of policies signaled the end of the program for employers (Ibid). At its end, the Bracero Program had set an incredible number of precedents for the TWPs to follow, namely the H-2s. Furthermore, it had a series of lasting impacts on the U.S. immigration debate that continue today.

To begin, the foremost impact of the program was a significant rise in illegal immigration rates following its termination. In fact, one of the pro-Bracero arguments

in Congress during the early 1960s was that an end to the program would inherently signal a new era of mass undocumented migration, as the program had fostered such a strong network of labor migrants and employers throughout the southwest that the entire flow could not simply be turned on and off like a tap (Garcia y Griego 1981). Pundits argued that an end to the program would rather be the beginning of a new epoch of mass illegal immigration, which is exactly what occurred, and what continues today.

It is important to note here, however, that the program itself cannot be wholly blamed for the exponential increases in illegal U.S. immigration from Mexico over the past half century. It is quite likely that U.S. growers of the mid 20th century would have found, one way or another, the labor they needed to make their industries profitable. The true impetus of the Mexican migratory flow has, therefore, not been the presence or absence of a large-scale worker program, but rather the disparity of economic conditions between two contiguous first and third world nations. The illegality of the migratory flow may be attributed to the lack of policies offering legal routes into and out of the United States, but the source of the migratory flow itself has existed outside of the realm of U.S. immigration policy.

A second, though nonetheless important, impact of the program was to demonstrate the absolute necessity of enforcement for the policies that guide TWPs. Though the policy that governed the Bracero Program gradually increased in favor of domestic workers and the Bracero himself, the lack of enforcement throughout the program's history meant that much of this well-meaning policy amounted to no more than 'writing on paper' (Craig 1971). It was not until the late period of the program,

in the mid 1960s, that any visible enforcement was realized, and, by then, the program was well on its way out. If the Bracero Program has taught us anything, it is that law, if unenforced, will amount to suggestion. As a consequence, the abuses and misconduct of many employers throughout the Bracero Program have been well documented (see Galarza 1964).

The Bracero Program was, thus, a TWP designed almost entirely in the interests of the large-scale U.S. farmer. Agribusiness lobbyists used their congressional weight to muscle much of the program to favor U.S. farmer interests. Eventually, as U.S. domestic labor organized and gained their own congressional lobbying power, the program was reformed to offer greater domestic worker protections and a vast increase in bureaucratic complexity, contributing to its disuse by employers. However, at no point did the program effectively implement the interests of the Bracero himself. At most, foreign worker protections were written into the law, but rarely enforced.

In the end, the contributions of the Bracero Program to the illegal immigration debate, current U.S. TWP design, and the consideration of H-2C for the future are several fold. It becomes immediately clear that the major themes in the contemporary immigration debate have their roots in the Bracero Program. These include U.S. labor market protectionism, human rights issues for migrant workers, the inability to control the migratory flow crossing the border, and the economic impacts, positive or negative, of so many foreign-born workers in the United states.

The Bracero Program also created a host of legal precedents that are readily apparent in the H-2 programs that follow in its steps. These include employer

obligations to pay prevailing wage rates determined by the DOL, to make genuine efforts towards recruiting domestic workers before employing foreign laborers, to provide transportation and housing costs as needed, and to ensure that the employment of foreign laborers does not displace domestic workers nor adversely affect working conditions or wage levels. These are all guidelines readily visible in the H-2A and B programs, which the following discussion will show.

In the end, the Bracero Program offers three particular lessons for implementation in H-2C's design, each of which concerns the interests of the migrant worker. First, the well documented abuses of Braceros on and off the farm are a travesty that cannot be repeated. Migrant workers must be given some means of realistic legal protection in the case of employer abuse. If U.S. political leaders wish to portray the United States as a leader in human rights issues, imported foreign workers must be treated accordingly.

Second is that "there is nothing more permanent than temporary workers" (Martin 2000). Any future U.S. TWP needs to recognize that the great majority of temporary workers in the past chose to settle, and often sent for families to join them. The Bracero Program is noted for forging the foundations of the migrant networks that channel migrants into the country on a daily basis. This is not a phenomenon exclusive to the Bracero Program. The post-World War II, German *Gastarbeiter* TWP saw the importation of millions of guest workers into Germany, the majority Turkish. Many of the visiting Turks decided to settle permanently, called for their families, and created the migrant chains which would propel a continuous influx of Turks throughout the century (Cornelius et al., 2004). Thus H-2C would do well to

allow for the legal, permanent residence of migrant workers who choose to stay after meeting certain conditions, or find a means of effectively removing them, en masse, from the country.

Third and finally, the Bracero Program shows that enforcement is critical to the success of a TWP's laws. The designers of the Bracero Program may have had good intentions during the program's later phases as they introduced a body of law to protect both domestic and foreign workers. However the lack of enforcement throughout the period rendered these laws mere proposals. If H-2C is to realize each of its important goals, it must be rigorously and uniformly enforced at the federal and state levels.

The H-2A program

As the Bracero Program ended, the H-2 program took its place as a much smaller-scale TWP primarily aimed at providing East Coast industries with the labor they demanded (Martin 2000). With the passage of the Immigration Reforms and Control Act (IRCA) of 1986, the H-2 program was split into two parts: H-2A and H-2B. H-2A is designated specifically for seasonal foreign laborers employed in the agricultural sector, and is thus inappropriate for highly skilled professionals (H-1B) or employers seeking low-skilled seasonal workers in the service sector (H-2B) (Vasic 2009). It has undergone a series of changes in recent times, first under the Bush Administration in January 2009, and then once again under the Obama Administration in early 2010. The Bush Administration changes were largely focused on streamlining the program to expedite the application process for employers, to the detriment of

certain domestic worker protections. The Obama Administration essentially reversed the Bush era changes and returned the H-2A program to its pre-Bush state.

Currently, the H-2A process begins by an employer filing for foreign labor certification through the Department of Labor (DOL). The DOL first determines the prevailing wage rate that the employer must offer for the available position. The wage rate is calculated through a set of statistical means by the Bureau of Labor Statistics and other agencies. This is a measure the DOL takes to prevent wage depression in a given region through the certified use of foreign labor, a lesson taken from the Bracero era. Once the wage rate is determined, the employer is required to place job advertisements in conspicuous places, such as the classified sections of local newspapers, offering the job to domestic workers at the DOL mandated wage rate. The employer is then asked to maintain documentation proving that they either a) received no applications from domestic workers, or b) received applications from domestic workers, but found no one qualified or willing. This documentation is provided to DOL throughout the application process, until DOL confirms that there is a genuine need for foreign laborers to fill the position.

After obtaining foreign labor certification, the employer then petitions for a certain number of H-2A workers through U.S. Customs and Immigration Services (USCIS). The workers are given notice of the job availability either through informal migrant networks (Waldinger and Lichter, 2003, Cornelius 1998), “middleman” labor supply agencies, or Internet sites specializing in U.S. visa jobs (Seminara 2010), among others. They apply for the work visa through a local U.S. consulate, and have their application reviewed by USCIS. If the applicant passes a USCIS background

check, they are approved for temporary agricultural work in the United States. The workers then travel to a port of entry where the employer pays for their transportation from the port of entry to the jobsite. The employer is responsible for providing housing for their contracted H-2A workers, paying them a minimum of a prevailing wage rate set by the DOL, and providing a minimum of $\frac{3}{4}$ of the work hours offered in the job advertisement, just as in the later phases of the Bracero Program. H-2A workers are only allowed to work a maximum of 10 months out of a given year during peak seasonal harvests, and then required to return to their country of origin. There is no annual visa cap for the H-2A program, meaning employers across the nation can petition for as many H-2A workers as they please, pending DOL foreign labor certification and USCIS approval of the workers.

The impact of the Bracero Program on H-2A's design is evident. The housing, transportation, prevailing wage and labor certification requirements all have their roots in the Bracero era. The description of the H-2A process given here, however, is truly no more than an outline. The H-2A process for employers, in reality, is extremely complex, such that those who use the program consistently hire lawyers to guide them through the process. The H-2A program is even more complex and costly than the Bracero Program, providing the greatest difference between the Bracero Program and H-2A's current design.

Another look at the farming environment in San Diego County begins to illustrate how the complexity and costs of the program could discourage many employers from taking advantage of it. There are approximately 5,000 farms within the county, only a few of which operate on a large, industrial or corporate scale.

Rather, San Diego farms are typically small-scale operations, hosting a total of 10,000 to 12,000 workers spread over 64,000 irrigated acres. Furthermore, the combination of topography, historically expensive land and the costs of importing water from the Colorado River has resulted in the cultivation of high value specialty crops, namely ornamental plants, avocados, strawberries and tomatoes.² High yield, “commodity” crops such as corn and rice are instead found further north and east in areas like the Imperial Valley. The typical San Diego County farm is, thus, a small-scale, family-owned operation that specializes in high-value crops and employs a small labor force.

While San Diego County is one of the country’s leading agricultural regions, Harry Singh and Sons is the only farm of the 5,000 in the County that currently makes use of the H-2A program. Thus, there is plenty of room for county participation in the program to grow. The SDFB official interviewed for this project stated that the housing requirement is foremost in preventing more San Diego farmers from participating.

If you are going to be in the H-2A program, you have to be a landlord. H-2A requires that you provide housing, which means you build housing, you maintain housing, you manage housing; you are a landlord. That’s a very different line of work from being a farmer... If you don’t have [the housing] on your property, you have to lease a trailer park or apartment building. Those units are in your name as the farmer, and that’s a huge roadblock.

Renting out an entire apartment complex or building housing from the ground up on farm property is something the small-scale farms in San Diego simply cannot afford. The profits of such small-scale farming are marginal and the SDFB official

² San Diego County is the foremost producer of ornamental plants and avocados in the entire United States.

highlighted this out as the primary issue deterring more San Diego farmers from even trying the H-2A program.

The transportation requirement further discourages county farms from participating. The SDFB official considered this as a secondary issue of lesser importance than the housing requirement, but viewed it as problematic as well. The transportation requirement is simply another cost added onto the already unaffordable housing requirement, and combined, they make for an impossible financial obligation for San Diego's small farms. Perhaps with only a transportation requirement more San Diego farms could find the program more feasible, but the SDFB official says the combination of housing and transportation for workers amounts to a fiscal impracticality.

Furthermore, the prevailing wage tends to fall above what some of the county farming operations can manage without having to raise prices for consumers, though it should be noted that not all farmers in the county would face this issue. Given the differences in farm size and revenue throughout the county, certain farms might be capable of paying higher wages while others are not. Generally speaking, the larger the farming operation, the SDFB official says, the closer it becomes to being able to afford the requirements of the H-2A program. Thus it would likely only be the smaller of the already small county farming operations that experience this problem. As it stands, Harry Singh and Sons, the sole user of the H-2A program in the county, also happens to be one of the county's largest farming operations.

In her 2006 congressional testimony, Luawanna Hallstrom of Harry Singh and Sons corroborates much of what the SDFB official stated.³ After the World Trade Center attacks on September 11th, 2001, over 75% of Hallstrom's workforce was fired or deported due to extensive documentation checks on all individuals operating within Camp Pendleton. As a result, her company turned to the H-2A program in order to survive.

Hallstrom speaks of the inefficient structure of the H-2A application process that she claims prevents her company obtaining sufficient labor when needed. Crop harvesting is an industry that requires a flexible labor force that can be accessed on demand, lest the crops spoil while workers are being recruited during often unpredictable harvest peaks. The H-2A program, she says, consistently fails to get her the labor necessary at the time necessary, due to the lengthy, complex and bureaucratically dense application process. By the time DOL hands her the foreign labor certification and USCIS provides her workers, she says, much of the crop has spoiled, resulting in massive financial losses for the company.

Hallstrom continues in her testimony to highlight the litigation-prone nature of the program. Hostility towards the program by those who oppose TWPs, coupled with overly complex and burdensome regulatory requirements, have combined to make the few users of the program litigation magnets. As a result, Hallstrom has fallen in line with the widespread practice of hiring teams of lawyers to navigate the complicated waters of the H-2A process. Despite this effort, her company has still suffered lawsuits and court actions at great costs. She ends her testimony arguing that most

³ Unfortunately Hallstrom was not available for a personal interview during the research for this paper; her Congressional testimony provides the information used here.

agricultural employers simply cannot afford these kinds of costs and interferences with their farming operations. A great majority of agricultural operations are therefore effectively excluded from participating in the program.⁴ As a result, she says, over 75% of the national agricultural labor force remains undocumented, with the H-2A program only accounting for a miniscule 3% of the total labor force.

An alternative Hallstrom does not mention, however, is to fully mechanize the farming process. The SDFB official noted, however, that ornamental plants, avocados, strawberries and high-value tomatoes cannot be harvested by purely mechanical means. Such crops require a human hand for collection. Furthermore, the hills and slopes on which San Diego farmers typically operate prevent the use of large farming equipment, while other large-scale farms in other areas might enjoy wide acres of flat land suitable for such machinery. Mechanization, therefore, is not an option for at least San Diego County.

To summarize, San Diego County farmers and, according to Hallstrom, many other farmers nationwide find themselves caught between the rock and hard place of an unaffordable guest worker program and an unwilling native labor force. Using the program requires employers to go through a lengthy and litigation-prone bureaucratic process of such complexity that those who use the program consistently hire lawyers to guide them through successfully. These legal fees combine with the housing, transportation, and prevailing wage requirements to make the program completely unaffordable for small farm operations in San Diego County and others nationwide.

Thus, much like the Bracero Program, H-2A has been designed with large-scale farming operations in mind. The interests of the small-scale farmer, like those in

⁴ It is important to note here that Hallstrom is speaking of the entire nation, not just San Diego County.

San Diego County, are almost entirely absent because the program does not recognize the constraints under which these farms operate. It is critical to realize, though, that small-scale farmers feel they cannot afford the program largely because the interests of both domestic and foreign workers have been given far greater weight since the end of the Bracero Program in the mid 1960s. The increase in bureaucratic complexity and costs of the program stem from the implementation of domestic and foreign worker protections, such as forced advertising for native workers and providing housing and transportation for foreigners.

What is needed, both Hallstrom and the SDFB official state, is a complete reform of the H-2A program that effectively recognizes the interests of all parties involved; the large and small-scale farmer, the foreign worker, and the domestic worker. The official says almost all San Diego County farmers, as well as several key legislators, firmly support the Agricultural Job Opportunities, Benefits and Security Act (AgJOBS) that was part of CIRA and other proposals. AgJOBS enjoys a wide base of bipartisan support, and was negotiated primarily between United Farm Workers and several large agribusiness representatives over a period of several years.

First and foremost, the SDFB official reported, AgJOBS would modify the housing requirement and allow employers to give workers a “housing allowance” if the state governor certifies there is enough qualified and available worker housing in the region. This would amount to workers receiving a certain dollar amount an hour above their standard wage rate specifically allotted for paying rent, and relieving employers of housing operation “landlord” responsibilities. The official believes this would effectively lift the burdens of the housing requirement from farmers currently

using the program, and make the program much more financially viable, and consequently attractive, to the smaller farmers outside of the program's reach.

AgJOBS would also keep the Adverse Effect Wage Rate (AEWR) provisions currently in place, but freeze them at their 2008 levels for a period of three years. This may allow those smaller county farmers to pay the wage rates required by the program, alleviating the third issue the SDFB official listed as problematic. The transportation requirement would remain intact, however, and be strengthened by requiring employers to comply with the transportation safety standards set forth for U.S. workers under the Migrant and Seasonal Agricultural Worker Protection Act of 1983. However, given that the costs of transportation are fairly minimal relative to the costs of housing for H-2A workers, the SDFB official believed this would not become an issue for small farmers.

AgJOBS would also provide H-2A workers with a pathway to permanent legal residency. For those already in the country illegally, workers could apply for a temporary resident card, known as a "blue card", through their employer or an appropriate government organization as their first step to residency. They would be required to pay a fine and an application fee, prove they have worked in the United States for a set period of time previous to the passage of the legislation, and not have a criminal record. Upon successfully obtaining a blue card, workers could then be eligible for a 'green card', or permanent residency.

AgJOBS would also grant H-2A workers the right to file a federal lawsuit to enforce their wages, housing benefits, transportation cost reimbursements, minimum-work guarantee, and the other terms of the written H-2A job offer. This would allow

temporary guest workers in the United States an unprecedented level of access to the U.S. legal system in defense of their contractual rights, something they certainly did not enjoy during the Bracero Program. The SDFB official contended that the great majority of San Diego farmers fully support the increase in worker rights included in AgJOBS and find the proposal to be an acceptable balance between worker privileges and employer responsibilities.

The AgJOBS proposal would thus remove many of the major obstacles employers face who in using the H-2A program. It enjoys a wide, bipartisan base of political support, and is the product of years of discussion between all interested parties. It also provides a critical lesson for the design of H-2C; if a TWP is to be nationally supported, it must strive to address the essential needs of all involved parties, and do so within the political constraints that influence legislative decisions.

H-2A suggests two specific lessons for H-2C's consideration. First, a TWP should not be designed in such a way that only larger businesses find themselves capable of participating. The affordability of a program as critical to the nation as H-2C should not be the primary factor in the decision to participate. Second, controlling participation costs inherently means designing the program with smaller businesses in mind, or more specifically, businesses with small revenues such as the majority of San Diego County's farms. The Bracero Program was influenced by, and largely designed for, large agribusiness corporations, and the H-2A program is a reflection of that fact. If H-2C wishes to address the continuous influx of low-skilled, undocumented workers into the United States, it must be able to accommodate small businesses nationwide.

In some ways, the H-2C proposal is to the H-2B program what the pending AgJOBS proposal is to H-2A: a program replacement or ‘makeover’ that recognizes the political and economic realities preventing the program from becoming truly effective. The H-2B program, however, contains its own set of complexities and issues, and is a consequently a challenge of a significantly different nature.

The H-2B program

The design of the H-2B program is very similar to the H-2A program, while different in several key aspects. The H-2B program also appears to be the template upon which H-2C was designed. To begin, H-2B workers are restricted from agricultural work; most are employed in hotels, restaurants, landscaping and other service sector industries. H-2B workers are seasonal workers, much like H-2A workers, and are contracted during seasonal increases in business for a maximum of 10 months, such as the summer season when much of the hotel industry experiences an increase in clientele (Vasic 2009).

The H-2B application process mirrors that of the H-2A. Employers begin by filing for foreign labor certification with the DOL. The DOL determines a wage rate, either prevailing or through using the AEWR, and asks the employer to place advertisements for domestic workers in appropriate places at or above the set wage. Employers must keep documentation of where and when they advertised in case of a DOL audit. If no domestic workers are found for the position, the employer notifies the DOL and provides evidence as necessary to prove the absence of qualified and

willing native workers. DOL then issues temporary foreign labor certification to the employer.

Once the employer receives labor certification, a petition is sent to USCIS for a specific number of workers. Potential workers are notified through a variety of means and apply at their U.S. local consulate for an available H-2B visa. USCIS performs a background check on the worker and issues the visa. The worker travels to a port of entry, where the employer pays for their transportation to the worksite. Workers are allowed to work a maximum of 10 months in a given year before having to return to their country of origin.

There are two principal differences between the H-2B and H-2A programs. First, H-2B workers are not offered paid housing with the position. They are entirely responsible for finding their own lodging during employment, although in certain cases employers will offer housing. If an employer offers housing, the housing does not receive any mandatory DOL inspection. Second, the H-2B program is capped at 66,000 visas per fiscal year, divided into two groups (33,000 visas in the first half of the year, and the remaining 33,000 in the second). The H-2A program is not limited in the number of visas it can award on an annual basis (Vasic 2009).

There are several H-2B employers in San Diego County, and interviews with them illustrate a host of problems from an employer perspective with the program. These include the seasonal nature of the program, the annual visa cap, and program costs. Perhaps the foremost employer complaint is the seasonal time limit on workers. Many of the industries in need of H-2B workers do not operate on an entirely seasonal basis.

A San Diego immigration lawyer gave an overview of the employer experience with the seasonal restrictions of the H-2B program.

You have to pretend there's a season. That's what they all do... If you're in the construction business, and you need the workers to finish your house, you may need them in the summer, you may need them in the winter, who knows? You need them all the time. The whole H-2B is just a game. You have to create the seasons. You have to try to manipulate the system by breaking it down into different seasons, and you shouldn't have to.

In effect, many employers find themselves applying for H-2B certification at differing times throughout a given year, in an effort to supply their businesses with the year-round labor they actually need. Other businesses, the lawyer reported, either manage the requirement through restructuring their business or simply avoid the program entirely.

Susan, the HR manager of a San Diego equestrian services company, gives a specific example of how a business struggles with the seasonal restriction of H-2B. There are a total of 23 workers at her business, four of whom are H-2B employees. Six are domestic workers, and the rest are foreign-born workers with dual citizenship. Susan has employed the same four H-2B workers for the past eight years, and each specializes in grooming services.

The horse show season begins in January and ends in late November each year. This leaves only one to two months of "off-season" work, where horses are not being groomed and trained for competition. In 2009, Susan's H-2B workers were forced to leave the county in October due to program time limits, and missed approximately one month of the actual seasonal workload. Susan had prepared in advance to have her workers return on time for the start of the next season in January 2010, and was told

by the DOL that she had been approved and could expect the return of her workers by late December 2009. Yet, for reasons Susan does not understand, the DOL delayed her application process, despite regular usage for eight years, and her H-2B workers only managed to return by February 2010. Thus, while Susan was paying for 10-month seasonal workers, she was only given workers for a total of seven, and the lack of needed labor at the end of last year's season and the beginning of this year's cost her business significantly.

Susan says if she could obtain more permanent workers, she would. Her business, in her own words, is not really a seasonal business. Grooms are still needed even when the show season is at rest. However, she continues to have difficulty finding qualified and willing American-born grooms who would be available year-round. There are several foreign-born workers she could employ in San Diego who have both the skill set and the will for grooming, but they rarely turn out to be legally authorized to work in the United States. She is currently considering abandoning the H-2B program entirely because of the seasonal requirements and the associated costs, even though doing so could mean a significant restructuring and downsizing of her business.

Jack, the aforementioned manager of the San Diego branch of a nation-wide landscaping company, also rarely employs H-2B workers because of the seasonal requirement. Of Jack's 75 workers, only five to ten a year are obtained through the H-2B program. San Diego provides a consistent climate that keeps the landscaping industry hard at work throughout the year. In other places where his national company operates, like Texas, the climate changes enough such that landscapers do less work

during the cold winter months. At most, there is a moderate increase in business during the spring and summer seasons in San Diego, when the small number of H-2B workers whom Jack employs are used. Were the program not only less costly, but more importantly not seasonal, Jack says his local branch would likely make much greater use of it.

Following seasonality on the list of problems employers experience with the H-2B program is the low annual visa cap. Congressional testimony from employers in 2008 focuses entirely on the visa cap issue. In 2005, Congress allowed a temporary relaxation in the visa cap. From 2005 to 2007, workers who had used the program in the previous three years could reapply and be accepted without counting towards the total visa cap. Thus from 2005 to 2007 the total number of H-2B workers annually employed reached into the hundreds of thousands (U.S. Congressional Hearing, 2008). This exception expired in 2007 without renewal, however, and several proposals have been introduced in Congress to reinstate the visa allowance. There has been no action on these proposals thus far.

Third on the list of complaints about H-2B are the costs of the program associated with its complexity. Jessica is the national HR director for the same nationwide landscaping company with a branch in San Diego under Jack's management. Jessica says the company has been using the program continuously for several years and spoke in detail of her experiences with the costs of the certification process. She reported that responses from native workers have increased significantly this year with the economy's slide. Jessica received over 100 domestic worker applications this year in response to the job advertisements DOL requires. This number considerably

exceeds previous years during her time with the company. Despite this significant increase, Jessica said, only 13 of the approximately 100 applicants both showed up for the interview and were found qualified for the job. The landscaping company requires that applicants pass a drug test and can lift at least 50 pounds, which only 13 of the native applicants that came to interview could do. Of the 13 the company found qualified, only five accepted the job and showed up for work on the first day. Of those five domestic workers, four quit within one month of work. The remaining one domestic worker managed to stay on the job for a total of six months, until he was fired for drinking alcohol during his lunch break.

As mentioned, the H-2B program requires that employers maintain documentation proving that no qualified or willing native workers were available for the position before DOL awards foreign labor certification. With the recent increase in native applicants, Jessica said her company spent several thousand dollars in 2010 on maintaining and mailing documentation alone. She must make certified copies of each domestic application she receives at five to six dollars each, and send them through priority mail to DOL's national processing center in Chicago at approximately \$25 each, as well as pay processing fees for each document filed. Jessica asserted that while the requirement to advertise and protect job opportunities for domestic workers is understandable, it does not reflect the reality of her industry. Her nationwide landscaping company employs over 300 workers, she says, approximately 98% of whom are foreign-born. In her words, the thousands of dollars her company annually spends on futile efforts to recruit domestic workers have amounted to nothing more than a significant financial drain.

Further complicating the issue is that DOL requires the job advertisement to be placed several months in advance to the actual date of need. The landscaping company's seasonal peaks often start in February nationwide, and DOL requires that the job advertisement thus be placed as early as October. Jessica says this results in most native applicants refusing the job offer due to the immediate need of work, or simply finding other work before the landscaping job ever begins. She also feels that most respondents to the required advertisements are likely those using government unemployment services, which require that beneficiaries prove they are actively seeking work in order to continue receiving state support.

In sum, while Jessica may find the advertisement requirement morally understandable, it fails to address the reality of the labor market in her view. The requirements of the certification process ultimately cost her business thousands of dollars on an annual basis. The demand to place job advertisements several months in advance of the date of actual need also results in many potential domestic workers refusing the job offer since they are in need of immediate work. Jessica also believes most of those domestic workers who do respond to the advertisements are merely complying with unemployment benefit rules, and are not sincere job hunters. This series of issues means that her business is losing large sums of money each time it complies with H-2B requirements.

Complaints from a worker perspective on the H-2B program are an entirely different story, however. Several studies have labeled the H-2B program as “indentured servitude” (Griffith 2007; Bauer 2008; Farmworker Justice 2009). A critical component of both H-2 programs is that workers cannot change jobs without

the permission of the original petitioning employer. Should workers quit or abandon their contracts, employers are bound to send a report to USCIS, and workers will lose their visa status and be made ineligible for the program in the future. Worker advocacy groups claim this gives the employer the power to use the job as a bludgeon with which to control the worker and force them into inhuman working conditions (Bauer 2008; Farmworker Justice 2009).

The same studies also show that many workers pay labor contractors and other middlemen large sums of money just to have the chance to become an H-2B worker. In extreme cases, workers end up in debt to the middlemen that connect them with H-2B jobs in the United States, and spend most of their time working to pay off the debts that allowed to work the job in the first place (Bauer 2008). In the original Bracero Program, from 1942 to 1947, the U.S. and Mexican governments acted as the effective middlemen between employers and workers, providing government guarantees towards contract compliance. With the H-2B program, the middlemen are often independent third-party contractors, who provide the service as a profit-making business (Griffith 2007). Furthermore, these “body shops”, as they are sometimes called, have a tendency to petition for large numbers of H-2B workers every year, and sell them out to employers who did not get their applications approved due to the annual visa cap being reached. These “body shops” are thus taking advantage of the visa cap system by soaking up as many workers as they can, then selling them off to the highest H-2B bidder at prices often well above what DOL and USCIS normally charge an applicant (Seminara 2010).

With respect to domestic workers, Seminara provides several examples of H-2B issues. First, certain H-2B users are petitioning for foreign workers for jobs that are not only highly skilled but also well-paying. These are jobs that a qualified domestic worker would likely gladly perform, given the wage rate and working conditions of the job. An example cited by Seminara comes from the Aspen Ski Company in Aspen, CO. In 2008, the Aspen Ski Company won DOL certification for 184 H-2B ‘ski instructors’ for three-season jobs from October 1, 2008, to April 30, 2009. The company paid their ski instructors between \$28.55 and \$34.45 per hour. This was a well-paying job that did not include any ‘dirty work’ such as cleaning horse stalls. It is difficult to believe there were no Americans in the Aspen area willing, qualified and available for these jobs.

But were American workers aware of these opportunities? The advertisements that DOL requires can be made minimally visible to someone looking through the local newspaper. Seminara points out several instances of specific H-2B advertisements that appear more like legal notices, and in fact they are often written and published by immigration attorneys. Seminara concludes that many of the ads “are specifically designed to attract as little attention as possible.” With this perhaps purposefully inefficient advertising method being used, it is not surprising that a domestic worker may never hear of opportunities like the Aspen Ski Company.

In short, the H-2B program suffers a host of issues from employer, foreign worker, and domestic worker perspectives. From the employer perspective, the seasonal limitations of the program, the annual visa cap, and the costs associated with program complexity are the leading complaints. From a temporary worker’s

perspective, the lack of rights and advantages taken by both employers and middle men, or “body shops”, have made the H-2B experience akin to indentured servitude. From a domestic worker perspective, certain employers are purposefully avoiding the use of domestic labor for jobs that are not only highly skilled but well paying and non-seasonal. Domestics are given little notice of these jobs through the inefficient advertising system DOL currently has in place.

None of the three central parties involved – employers, domestic workers and foreign workers – find the current H-2B program to be functionally well designed. This amplifies the lesson from the H-2A program, that an effective TWP must be a careful balancing act of the needs, often conflicting, of all interested parties.

Conclusion

The Bracero, H-2A and H-2B programs each have important implications for the H-2C alternative. These lessons can be usefully summarized as follows. In short, H-2C must:

- Be thoroughly enforced, with visible, on-the-ground results nationwide.
- Provide a pathway to legal, permanent residency for those migrant workers who wish to stay.
- Control program participation costs so that businesses with smaller revenues may find it financially feasible to participate.
- Provide some measure of free labor market agency to temporary workers.
- Have a higher visa cap ceiling that recognizes the real numbers of undocumented workers entering the country annually.

- Recognize the non-seasonal nature of many businesses that rely on foreign labor.
- Provide a more effective means of protecting domestic worker interests, primarily through a revised advertising system.

The need for real enforcement and a pathway to residency for workers both stem from the Bracero experience. The lack of enforcement of Bracero policies resulted in a significant level of program abuses, both towards foreign and domestic workers. Foreign workers were often subjected to harsh treatment and withheld pay, for example, while domestic workers suffered from an inefficient set of labor market protections that, although well intentioned, amounted to little in reality. Furthermore, the Bracero and *Gastarbeiter* programs each demonstrated that many foreign workers will opt to stay in the host country and lead a clandestine life utilizing the social and economic connections they forged while a guest worker. Neither of these programs recognized that one cannot simply import a laborer without importing the human being as well. Without an assured pathway to residency, a new, large-scale TWP risks expanding the undocumented population.

Qualitative evidence from an analysis of the San Diego agricultural community illustrates why a program like H-2A must control program costs in order to maximize employer participation. Housing costs, on top of transportation costs, lawyer fees and litigation against employers who struggle with a needlessly complex program amounts to financial burdens that the small-scale farms of San Diego County cannot afford. According to Luawanna Hallstrom, this phenomenon of program unaffordability is not

unique to San Diego County, and explains why the H-2A program accounts for a miniscule amount of the foreign-born workers found on farms nationwide.

The need for some level of labor market mobility for H-2C workers, an increased visa cap, a non-seasonal program, and a more effective means of advertising for domestic workers becomes evident from the H-2B program experience. First, the documented cases of H-2B worker abuse make the need for freedom of movement for the H-2C worker of utmost necessity. Employers cannot be allowed to the link between worker visa status and job status as a tool for worker manipulation. Allowing workers to quit their jobs in the face of unsatisfactory working conditions without losing visa status would provide a quick and efficient remedy to this problem. The H-2B visa cap of 66,000 is also woefully inadequate for a labor force that numbers in the millions, while the number of undocumented laborers entering the country every year numbers in the hundreds of thousands. Furthermore, many businesses who make use of the H-2B program are not truly seasonal businesses, and those who would like to use the program find themselves excluded from it because of their undeniably non-seasonal nature. If the H-2C program is to encompass these businesses, it needs to offer a program structure that allows for year-round worker employment. Finally, in the interest of offering better domestic worker protection, policy makers would be wise to consider amplifying H-2C's advertisement process beyond that of H-2B. Currently, H-2B advertisements are difficult to locate and consequently do not reach a broad domestic audience. This has allowed for certain jobs to go to foreign workers where qualified and willing domestic workers were likely available.

Perhaps most importantly, the H-2C program must address each of these seven issues while still maintaining a balance of employers and workers in both large and small businesses. The Bracero, H-2A, and to a certain extent H-2B programs were designed with large-scale businesses in mind. This demonstrates a lack of recognition for one of the most important players in the TWP game: the small American business. The extent to which the 2006 Senate-approved version of H-2C addresses these diverse interests, including those of small businesses, will be reviewed in the following chapter.

IV.

THE H-2C PROGRAM

Both employer interviews and a review of past and present U.S. TWPs have suggested a wealth of TWP and broader immigration policy issues that the H-2C program will need to address in order to close the gap between current policy outcomes and immigration control goals. Fortunately, as will be shown, the Senate-approved H-2C program of 2006 addresses the great majority of these issues. However, as employer interviews illustrate, certain aspects of the program raise a new set of issues that require reconsideration if H-2C is to become the template for a future TWP.

Program Design

To begin, agricultural or seasonal employers were restricted from using the H-2C program. The program was intended solely for employers with year-round foreign labor needs that are outside the agricultural sector. The most likely users would be restaurants, manufacturers, cleaning companies, and certain landscapers. If the DOL determined that an employer's need was truly seasonal, that employer would have to use the H-2A or H-2B program to obtain foreign workers.

The H-2C application process and many of the employer obligations are identical to H-2B. As in H-2B, an H-2C employer must first file for foreign labor certification with the DOL. The DOL responds with a minimum prevailing wage rate that the employer must include in the mandatory advertisements to attempt to

recruit native workers. Similar to the 2009 Bush reforms of H-2A and H-2B, the Senate-approved proposal allows for employers to simply attest to the lack of available or qualified domestic workers for the job after advertising, but requires that employers hold documentary evidence for at least one year in case of DOL audit. The intent of using attestation and audit in the place of providing documented evidence throughout the course of foreign labor certification was to expedite the certification process, albeit at the potential sacrifice of some domestic worker protections. Given that the Obama Administration reversed this aspect of the 2009 Bush H-2A and H-2B reforms, it is likely that, when reconsidered, the next version of H-2C will do the same. Once certification is approved, employers then file with USCIS for a specific number of workers at the wage rate originally advertised. The H-2C program offers a flexible visa cap starting at 200,000 workers per year. In their original proposal, Senators advocating comprehensive immigration reform offered a visa cap of 400,000 per year, but this number was negotiated down to 200,000 before the bill was approved by the Senate. The bill called for the visa cap to be revised annually based on market behavior and the speed at which the visas are used, meaning the annual visa allowance could either rise or fall significantly. CIRA called for the creation of a Temporary Worker Task Force, featuring Congressionally appointed experts in economics, demographics, and labor markets, to measure the impact of temporary workers on the states and recommend annual changes in the visa cap limits. Thus, employers could expect a visa cap reaching in the millions, or, pending the decision of the Task Force, a cap in the thousands, changing annually. This is one of the most significant differences between the H-2B and H-2C programs.

It should be noted that CIRA did not remove labor brokers from the H-2C contracting process. It did, however, restrict “body shops” from charging H-2C workers for job opportunities and labor contracting services. Furthermore, these middlemen are required to provide a full detailed list of job descriptions to workers, including what the broker, the employer and the worker each get out of the arrangement. False advertisements or non-compliance with advertisement details are punishable offenses.

Once USCIS approves the requested number of workers and the workers are authorized, the workers are responsible for transporting themselves to a border checkpoint. The employer is then responsible for paying the worker’s transportation costs from the checkpoint to the job site. As in the H-2B program, employers are not required to provide housing. They are required to provide worker’s insurance, however, should state law not already provide for worker compensation.

H-2C features several other notable employer requirements. First, employers are required to post a notice within the job site that clearly states the employer is petitioning for H-2C workers. This would inform current employees of the impending H-2C application. Second, employers are prohibited from receiving foreign labor certification and H-2C workers during a strike. Third, if an employer fires a domestic worker within 90 days previous to or after receiving H-2C certification, the employer cannot use an H-2C worker to fill the vacant position. This is to prevent employers from purposefully dismissing domestic workers with the intent to immediately replace them with H-2C employees.

The employer is also required to use the E-Verify employment verification system. E-Verify is an Internet-based, no-cost program that compares Social Security information from an employee's Employment Eligibility Verification Form (I-9) to data from federal records. If the information on the I-9 form matches the government database, the employee is eligible to work in the United States. If there is a mismatch, E-Verify alerts the employer and the employee is allowed to work while he or she resolves the problem. If the problem is not resolvable, the employee is ordered to come to an interview with the Department of Homeland Security (DHS) and may be placed into custody. The program is operated by DHS in partnership with the Social Security Administration. Currently, some states such as Arizona have already made usage of the E-Verify program mandatory. Other states, such as California, have no participation requirement. Any H-2C employer, however, would be forced to use the program on all of their current employees, domestic and non-domestic.

Finally, though not written into CIRA or the H-2C program itself, the employer would likely have to hire a lawyer to navigate the H-2C process. This can be safely assumed for two reasons. First, the H-2C program's striking similarity to H-2B means that it would likely be as bureaucratically dense as the H-2B program currently is. Given that both H-2A and B employers consistently use immigration lawyers, it is highly probable that an H-2C employer would need to do the same. Second, included in CIRA, though not technically part of the H-2B program, is a massive increase in the number of worksite visits from Immigration and Customs Enforcement (ICE) personnel.

Under a clause involving increases in interior and border enforcement, CIRA called for an annual minimum increase of 2,200 ICE agents during the five years following the passage of the bill. The minimum of number of new agents per year would be raised (or kept at the minimum) depending upon available funding. Thus, one could expect a minimum increase of 11,000 interior enforcement personnel, possibly rising to a level of 20,000 to 30,000 over the five year period. Furthermore, CIRA mandated that a minimum of 25% of the new agent's work hours devoted to worksite enforcement. The employer, in other words, could expect to see more of the ICE on the jobsite.

There is no doubt then that an employer would want a lawyer to make sure that each detail of the H-2C program is being properly handled. ICE agents would be responsible for making sure that employers are falling clearly in line with program regulations, operating without mistakes, and not engaging in any form of program circumvention in their use of foreign labor. One might recall the litigation-prone nature of the H-2A program, as described by Hallstrom in her 2006 H-2A testimony before Congress. Any employer misstep in the H-2C process would constitute reason for the ICE to impose fines and even criminal sanctions. It is, therefore, in the best interest of the employer to have an expert on board, namely an immigration lawyer, to serve as both guide and shield from the complexities and potential consequences of program use.

Much of the program's cost for employers arises from program complexity and the consequential need for lawyers. It should be noted that no specific application fees for employers are written into CIRA or the H-2C portion. This was perhaps done so

that the DOL and its corresponding bureaus could decide on application fees themselves. One could expect the application fees for H-2C to approximate those for H-2B, given the degree of similarity in both programs. Given that application fees do not surface as a principal source of cost for H-2B employers, one can expect any H-2C application fees to be negligible when compared with lawyer fees. Lawyer fees and litigation would likely remain the biggest expenses for program users. As it stands, the only application fee written into the H-2C program is a \$500 fee to be paid by the worker directly to the U.S. government.

When viewed from a foreign worker's perspective, the H-2C program becomes an entirely different creature. From an employer perspective the program largely emulates current H-2B legislation, with the important exceptions of being restricted to non-seasonal businesses and featuring a greatly increased and flexible annual visa cap. For foreign laborers, however, the program is like none seen in U.S. immigration policy history.

First and foremost, H-2C workers are provided with an assured pathway to legal permanent residency. The H-2C work visa lasts for a three year period, and can be renewed for an another three year period, totaling six years of authorized H-2C work within the United States. The relatively lengthy stay of an H-2C worker corresponds with the non-seasonal purposes of the program. After the six year period is over, the worker is required to leave the country. However, after completing one year of work, an H-2C worker may be sponsored by his or her employer for a permanent residency visa. After four years of work, which necessarily includes a successful visa extension petition, the worker may apply for residency alone, without

the sponsorship or support of an employer. The requirements for obtaining permanent residency mirror those currently in place.

Second, the signed legislation specifically states that “an H-2C nonimmigrant shall not be denied any right or any remedy under Federal, State, or local labor or employment law that would be applicable to a United States worker employed in a similar position with the employer because of the alien's status as a nonimmigrant worker.” This inherently recognizes the right to unionize where possible, the right to bring litigation against workplace offenders, and the right to bring family members temporarily into the United States as H-4 dependents. Perhaps most importantly, this clause gives H-2C workers the right to a certain amount of labor market mobility.

H-2C’s design includes an unprecedented measure that allows a 60-day “grace period” to an H-2C worker who is either fired or quits their U.S. job. If an employer finds an H-2C worker’s efforts unsatisfactory, if the worker finds employment conditions unacceptable, or if the worker finds a better paying H-2C job, he or she has a full 60-days to be hired again as an H-2C worker before losing visa status and having to leave the country. It is important to note that an H-2C worker may only switch jobs between other H-2C positions. Should a worker be fired or quit, the employer is required to inform the DOL within three days. The H-2C worker is therefore not given complete access to the U.S. labor market. H-2C workers would nevertheless have a degree of free agency not provided by any previous U.S. TWP.

The H-2C Program in Comparative Perspective

It is immediately apparent that the Senate-approved H-2C program addresses several of the essential problems described above that have blighted U.S. TWPs. First, H-2C recognizes the need for a pathway to residency for those workers who may wish to stay in the country. This effectively addresses one of the major consequences of the German *Gastarbeiter* and U.S. Bracero Programs. Without this feature, the H-2C program would likely result in an increase in the undocumented population, as those workers who choose to stay to continue work would resort to clandestine employment.

Second, the H-2C program recognized the magnitude of the employer demand for low-skilled labor migrants in the United States. Though a 200,000 starting visa cap may still seem inadequate, it is a significant improvement over the H-2B program's woefully inadequate 66,000 seasonal visas per year. The flexibility of the visa cap is key to addressing the real needs of the U.S. labor market. Without this flexibility, the H-2C visa ceiling would be unable to make any significant dent on current and future undocumented migrant flows.

Third, the program deals efficiently with the non-seasonal nature of many of the businesses that rely on foreign labor. It provides workers who are available for three consecutive years in a row, 365 days a year. This is precisely the kind of legal worker that Susan, for example, the equine services manager in San Diego, says she needs but cannot seem to find locally. Her struggles with the seasonality of the H-2B program and the lack of willing and qualified domestic workers for groom positions would be effectively solved by participating in the non-seasonal H-2C program.

Fourth, CIRA recognizes one of the major lessons from the Bracero era; that a TWP must be aggressively enforced if its principles and requirements are to be

honored by program participants. The increase of thousands of ICE agents per year is a strong step in this direction. It is impossible to say, however, if this level of enforcement increase would suffice, or if it would amount to enforcement “overkill”, without empirical testing. At the very least, it addresses one of the fundamental problems of the Bracero Program.

Finally, the H-2C program recognized the documented abuses of the H-2B program and provided workers with a method to leave an unsatisfactory job without losing their visa status. The 60-day “grace period” effectively prevents exploitative employers from using the job and its connected visa status as a cudgel with which to control their employees. Such employers would no longer be able to threaten their workers with deportation should the workers not comply with every demand. Notably, CIRA does not include a set of definitions as to what constitutes an unsatisfactory job nor how long workers would have to stay at the first given H-2C position, if at all. It also does not address if higher pay at another H-2C position would constitute a legal reason to change jobs. As it stands, given that a temporary worker enjoys all rights given to a similarly employed domestic worker, one can interpret the “grace period” proposal to mean that an H-2C worker could leave his or her position at will, as long as he or she finds another certified H-2C position within 60-days.

However, the Senate-approved H-2C program fails to address two critical issues raised by current H-2 programs. First is that many employers find the complexity and associated costs of the H-2A and H-2B programs unfeasible. These are typically businesses with smaller revenues. Because the H-2C program mandates

an application process and a set of employer obligations nearly identical to the H-2A and H-2B programs, it can be safely assumed that the costs of participating in the program will also be similar. If the H-2C program is to maximize nationwide employer participation, its costs must be reduced so that smaller businesses that depend on foreign labor may participate equally with larger businesses. Controlling costs inherently means lessening program complexity and increasing ease of use, so that hiring expensive immigration attorneys, for example, is no longer an implicit requirement. By copying much of the design of the current H-2 programs, H-2C fails to lessen program complexity and consequently lessen the costs of participation. This would reduce employer participation and lessen the program's impact on undocumented migration.

Second, the method for advertising for native workers before receiving foreign labor certification in the H-2B program is ineffective, and the H-2C program employs precisely the same methodology. As Seminara (2010) points out, many of these ads appear less like legitimate job offers and more like legal notices that are crammed into the obscure corners of local classifieds. Employers are not required, for example, to use Internet-based advertising, which is arguably the leading means by which a domestic worker finds jobs today. Furthermore, the requirement that H-2B employers must place advertisements several months in advance of the date of need results in most domestic workers finding other job opportunities before the advertised H-2B position ever begins. If the designers of the H-2C program wish to settle much of the debate over whether foreign workers take jobs from domestic workers, the advertising

system should be revisited and transformed into a truly effective informational mechanism for the U.S. domestic labor force.

Employer Responses

Interviews with employers support the above points on the positives and negatives of the H-2C program, but they also flag key program issues that the analysis of past and present U.S. TWPs does not reveal. There are three specific issues that each employer independently emphasized when discussing employer obligations and worker rights under the H-2C program.

First, several employers said that they could not afford to hire the extra staff necessary or a lawyer to assist with a program of this nature. That this issue arises in both the analysis of past and present TWPs and in employer's comments about H-2C places it at the forefront of the necessary changes in H-2C's design. A series of interviews with nursery growers, restaurateurs, and landscapers clearly illustrate the need for a low-cost, and consequently simple, worker program.

Eric is the owner of a small-scale mushroom nursery in San Diego. His company used to employ around 20 employees but has recently downsized and become part of a larger-scale nursery conglomerate. Currently, his firm employs only five people. Upon reviewing the projected costs for participation in the H-2C program, he immediately stated his company could not meet the expense of a lawyer or a new set of human resources (HR) personnel to handle the program's process. "If you're a larger business," he says, "maybe a couple hundred people, then you've got enough mass behind you and you've got a full blown personnel department... We all

wear multiple hats here. We don't even have an HR department. We couldn't afford a lawyer and new HR people or anyone else just to handle this kind of thing."

Eric, and every other interviewee, was informed of the average costs of using an immigration lawyer in San Diego County. The immigration lawyer from downtown San Diego gave an average of \$500 per H-2A or H-2B worker that is requested. This charge may or may not include the standard application fees DOL requires. One of the H-2B employers interviewed in northern San Diego County says her northern county firm pays around \$900 per worker. However, the downtown San Diego lawyer says most immigration lawyers or firms will offer a discount if employers buy "in bulk".

Several other employers corroborated Eric's reaction when presented with these potential legal and application fee expenses. Elizabeth, the Southern Arizona Chef's Association representative and long time restaurateur, said:

Small businesses are not going to be able to afford this. That's unfortunate. I don't think [the government is] looking at the whole picture of affordability. It's like the big boys can handle whatever you dish out to them on the basis of something like this. But the little employer, they are the ones who are going to get penalized the worst because they can't afford to follow the rules. It should be easier than that. You shouldn't need a lawyer. You don't want to make it difficult. You want to make it seamless. You want to make it fair and equal to all employers.

That smaller businesses would be the most likely to suffer under such requirements is a common theme in employer responses on this subject. David, the small Italian restaurateur from Tucson, AZ and Mason, the catering business owner in Fremont, CA, had parallel statements.

Right now we are trying to recuperate our start up costs, about \$65,000, so we are in quite a hole. But even then, that seems like the

government making something complicated again. You shouldn't need a lawyer. It should be as simple as a guy having a work visa, you register, you get him on, pay a small fee, and you're in business. A little place like mine, that you would have to pay that kind of money to hire a guy that you're going to pay a wage to... I don't know. I can understand a big company that's going to hire 2,000 farmworkers, but for a guy like me that needs one dishwasher or one busser, that's ridiculous... You're talking too much for maybe one or two guys.

In Mason's words:

Our business exists on a really, really, small margin. I don't have an HR department, but I would probably have to hire a lawyer? I'm not liking that aspect of things at all. Again, it's a small business. I want to be in a small business. I don't want to be in a big business. This program would force me to be a big business. I don't want that. When you are self-employed, there are some realities... I'd just as soon not be in the business anymore. That's the problem with D.C.; it's too complex. Simplify it.

An interview with an official from the California Landscapers and Contractors Association (CLCA) provided a different perspective on the issue of program costs. The CLCA is an umbrella organization of thousands of landscaping and contract businesses throughout California. It provides numerous services to its members, including policy advocacy. The CLCA official believes that his organization's members would simply find one way or another to survive.

I'd hope that trade associations might help out here. Contractors might band together to find ways to keep those costs down. But you got to do what you have to do. You're not in business if you don't have workers... It would be better as a simpler process that a landscaper could handle themselves. Those fees and those hoops that our members have to jump through now is the primary reason why our members haven't taken advantage of the [H-2B] program.

Interestingly, none of the H-2B employers interviewed for this project claimed the potential costs to be an issue. The cost structure of the H-2C program mirrors that of the H-2B, and given these H-2B employers are already capable of handling the

costs of the H-2B program, they found no such issue with the design of H-2C. It should be noted, however, that none of the H-2B employers were owners of a small business in terms of worker count, or a business with small revenue. The equine service providers discussed here, for example, have workforces of only 20 or so people. However, their industry generates enough revenue to cover the costs of participation in programs as H-2B or C.

Thus the H-2C program, as it was designed, strikes the employers interviewed in this project as prohibitively expensive for businesses with small revenues. This is the same problem that many of the small-scale San Diego farms experience with the H-2A program. The CLCA official also claimed that program costs are the primary factor preventing more of his organization's members from using H-2B. However, all of the H-2B employers interviewed for this project find the program costs to be acceptable, since they are large-scale or high-revenue businesses.

There is little question that service sector small businesses are among the heaviest users of foreign-born labor. A 1996 study that compared the usage of foreign labor in San Diego to Hamamatsu, Japan identified a series of characteristics that typified the immigrant-dependent business. Among these were a) small size, with a median number of 30 employees, b) low profitability, with 36% of the firms breaking even or losing money, c) heavier reliance undocumented workers, and d) more likely to recruit workers through social networks. On average, the owners of these immigrant-dependent firms claimed that an average \$3.10 per hour raise in current wage rates would be necessary to successfully attract domestic workers (Cornelius 1998).

The U.S. Small Business Administration and U.S. Census Bureau showed in 2006 and 2007 that foreign-born workers are overwhelmingly employed in low-wage industries and secondary-sector jobs. Approximately 75% of all foreign-born workers in the United States, including naturalized citizens and non-naturalized citizens, are employed in the secondary-sector industries represented in this paper. Businesses with fewer than 20 employees comprise about 80% of all businesses involved in secondary-sector industries, where approximately 75% of the low-skilled, non-citizen workers are employed. In other words, small businesses dominate the secondary-sector landscape of the U.S. economy and are among the heaviest users of foreign labor (U.S. Small Business Administration 2006; Newburger and Gryn 2009)

Jack, the manager of a San Diego branch of a nationwide landscaping company, says that larger business tend to not make use of illegal labor because they are far easier targets for government enforcement. “[Small businesses] can hide under the radar,” he says, “and some don’t even have Yellow Pages advertisements.” He says he would like to see government agents focus on smaller businesses (rather than large ones like his own) because, in his experience, that is where most undocumented workers are to be found. Unfortunately, he believes, U.S. enforcement personnel target the larger corporations because “they are easier to find.”

Given that small businesses form the vast percentage of all businesses in the country, are the majority of all businesses involved in secondary-sector industries, and are also among the heaviest users of foreign labor, according to the quantitative and qualitative evidence provided here, it is especially troubling that small businesses would find the H-2C program financially impossible. It is precisely these businesses

that the H-2C program needs to target, given that they lie at the heart of the low-skilled migratory labor flow into the United States. Controlling program participation costs must become a top priority of policy makers if the H-2C program is to be viable for small businesses and consequently able to effectively address the continued arrival of undocumented migrant workers into the country.

There is a second issue that arises from employer interviews, which both H-2B and non H-2B employers agree is a serious problem in H-2C's design. This problem stems from the 60-day "grace period" that would allow an H-2C worker to switch jobs at will without losing visa status. Employer responses to this section of the program are ambiguous, and show the tension between program costs for employers and necessary rights for workers.

Michael summarized the point well in his comments:

What if you get them in and they take off on you? I guess that's a chance you have to take, but at least if you could somehow get another person cheaper, or on a discount or waive some of these fees, in case someone left you for whatever reason... [Workers] should have some restriction. If they find a better paying job, just because another guy is paying them a quarter more, even though I usually pay very high... that could be an issue. Then again, workers should have a right. It would definitely help if the program was cheaper or easier... This seems a little too open. Maybe if they had to work for a full year before being allowed another job, or a discount or something.

That an H-2C worker could leave the job site at will after an employer invests the time and money in recruiting and training is alarming to employers across the board. It should be noted that H-2C workers could only transfer to other certified H-2C jobs, and would not enjoy complete access to the U.S. labor market. There are no specifications in the Senate-approved version of CIRA that restrict the means by which an H-2C worker may leave the position. This, combined with the statute that

foreign workers have all rights enjoyed by similarly employed domestic workers, suggests an exceptional amount of worker freedom.

In Mason's words:

There's some validity to both sides of this coin. The workers have to be protected from being taken advantage of. But they need to find a way to offer some relief to both sides here. The worker needs to be confident that if he finds himself in a situation where he is being taken advantage of, he can move. On the other hand, the employer should have some protection too. Some sort of a guarantee or minimum work period. There is vulnerability [for employers] there.

Eric, the manager of a small San Diego nursery, also sees the necessity for the "grace period" as a form of worker protection, but is concerned about workers taking advantage of the system.

It's a reasonable thing for the employee, because you wouldn't want him under indentured service, but from the employer end, it's a Catch-22. Why would you go through all this effort and the guy could just find another job the next day and be gone? You got to put up valuable time and money... If you invested in the training for them, and all the paperwork, he should have to have a justifiable reason for leaving.

When asked if minimizing or eliminating program costs would alleviate the tension between this particular worker right and corresponding set of employer obligations, employers responded with a resounding "yes". First, minimizing or eliminating program costs would effectively make the H-2C worker no different from a native worker in the employer's eyes. Second, minimizing or eliminating costs would allow those smaller revenue businesses to readily participate in the program.

For example, in her interview Elizabeth commented on the evident tension between worker rights and employer obligations.

That's a hard one. There are ways of taking advantage of that system. On the other hand, if it's a situation where [the worker] is being abused, and it can be documented, then it would be fair. It would have

to be documented to be fair... If the program were cost free [for employers], this wouldn't be an issue.

Employers also suggested several other options that would address this problem. These included restricting the worker's movement for at least one year, keeping him or her tied to the original job. This would help to dissuade workers from "springboarding," in which an employee uses one job to enter the country while waiting for another opportunity to become available. Policy makers might also allow for some sort of discount or refund to employers who have H-2C workers that change jobs quickly, as the employer seeks out new H-2C workers. A final option would be to only allow workers to leave jobs only under a defined set of circumstances, and be required to show documented evidence of these circumstances in order to gain job mobility.

A third and final issue concerns the increase in domestic worksite enforcement. Many employers see little need for such an increase if an easy to use and relatively cheap legal means of obtaining workers is provided. Some see the increase as nothing more than a political game to meet certain constituent demands. Others see it as a move towards a veritable police state. Each employer was informed of the specific numerical increases in inspectors and the fact that such increases would likely result in more ICE audits of the worksite.

Elizabeth harbors a particularly strong response to this aspect of CIRA's legislation:

We shouldn't feel like we're living with the *Gestapo*. If you have E-Verify and a workable program, why more visits? The health department is an example. The sanitation inspectors come twice a year. Well, they have such a stress on their system to check every single business twice a year that they have to maintain quite a force of

inspectors. In some years, it's nearly impossible to do that. So it's an idealistic concept on the part of the government. From my perspective, to think that this would be cost-effective in tax dollars, number one, and number two that it would be a comfortable resolution to this... I don't think it is, I don't think it's comfortable at all. What's the difference between a sanitation spot check and more ICE visits? More ICE visits means you're going to get hounded... It means more [government] jobs, but you're going to feel like you're living in a police state. I think you can create more jobs that are more fulfilling to the future of the country.

Michael, on the other hand, feels indifferent towards the enforcement increase, and his statement effectively represents many other employer responses. His indifference is rooted in the availability of a workable program that he can use to obtain the labor he needs.

If I can get [workers] legally, it's no problem for me. [An enforcement increase] is really only for people who pay sub-minimum wages, who don't give benefits, who don't live up to worker's comp, who pay cash under the table. The majority of us, in my opinion, don't mind paying well or in full. We're not hiring [foreign workers] to save money, we are hiring them for hard work. That's all we want. You could have [an ICE agent] stationed at my back door, and I wouldn't care, as long as I can get workers legally.

The CLCA official echoes Michael's stance on the irrelevance of an increase in worksite enforcement, if coupled with an effective program that employers will want to use. He also provides a suggestion as to where the increase in ICE agents would be best placed:

If we're doing everything the way we are supposed to be doing... If you've got border enforcement and a much better system for verifying the legal status of workers, it seems like there'd be no need, or less need [for enforcement]. I would argue that it doesn't make sense to target H-2C participants; it would make sense to target those who aren't [in the H-2C program].

The broad employer response to this issue, then, is that the worksite enforcement increase would be largely irrelevant in the face of a well designed

program, and is either an ineffective use of tax payer money, or a movement towards a police state. Most employers feel immigration enforcement personnel would be better placed elsewhere, such as along the border itself. At the very least, they feel that those not participating in the H-2 programs would be best targeted, since those in the programs have no incentive to continue hiring unauthorized workers.

Conclusion

The H-2C program is largely a copy of the H-2B program in terms of employer obligations. The program costs, application processes, and program requirements, such as paid transportation, are the mirror image of H-2B. H-2C begins to differ radically, however, when considered from the viewpoint of the foreign worker. H-2C affords the imported worker an unprecedented level of rights and access to U.S. residency and the labor market. It is also designed to be the largest low-skilled, legal foreign labor importation program since the Bracero Program half a decade earlier.

An analysis of past and present low-skilled U.S. TWPs shows that the H-2C program, and the related aspects of CIRA, manage to address many of the problems that have blighted previous U.S. TWPs. However, by copying much of the H-2B program, H-2C imports two of the H-2B program's foremost problems. First is the complex, and consequently, costly nature of H-2B's application process; second is the inefficient advertisement system that is intended to attract domestic workers to the position before an employer is awarded foreign labor certification.

That H-2C seems financially impossible for small businesses only magnifies the conclusion on program costs from the preceding TWP analysis. Non-H-2B

employers repeatedly identify this as the principal program defect in their interviews. They would much rather see an easy-to-use, and consequently less costly, TWP that permits businesses with smaller revenues to participate on an equal basis with larger firms. The need for a user-friendly and inexpensive program is further underlined by the fact that small businesses are, in the aggregate, the principal users of foreign labor.

Employers also highlighted other issues in H-2C's design. First, the 60-day "grace period" for workers becomes a problem when coupled with the time and money expenses built into the program. Employers do not feel comfortable investing so many resources to hire a worker who may leave at will. Second, many employers see the accompanying increase in ICE worksite enforcement personnel as moot in the face of an effective worker program. The Bracero Program clearly shows that enforcement of a program's rules is absolutely necessary, but it is currently impossible to tell if the enforcement formula in CIRA would result in a waste of tax payer money as some employers believe. What is needed is empirical testing.

In sum, the 2006 H-2C program was, overall, well-designed. It managed to address several of the major issues concerning other U.S. TWPs, with the exception of two: program participation costs and an inefficient domestic worker advertising system. Furthermore, all of the employers interviewed for this project actually find the H-2C program, when taken as a whole, to be an attractive alternative. They would readily participate pending amendments to address their three major areas of concern: program costs, the logistics of the 60-day worker "grace period", and the consequences of an exponential increase in worksite enforcement. This includes H-2B users, who say they would readily switch programs should H-2C become available.

Employers are very much in favor, for example, of the increase in worker rights, particularly the pathway to legal permanent residency and the three year length of stay. The remaining key issues that policy makers must address can be summarized as follows:

- Make the program viable for small businesses by increasing its ease of use and in turn lessening the cost of participation.
- Provide some measure of protection to the employer against abuse of the 60-day worker “grace period”.
- Revise the advertising system adopted from H-2B so that the job ads efficiently reach a large domestic worker population.
- Consider that employers find increased interior enforcement unnecessary as long as a workable TWP is in place when creating the formula for worksite enforcement.

There have been some significant changes in the national immigration policy debate since the H-2C program was unveiled in 2006. The issues raised by H-2C’s design must now be placed in that evolving debate before final recommendations for addressing each issue can be made.

V.

CURRENT U.S. IMMIGRATION CONTROL STRATEGY: IMPLICATIONS FOR TWP DESIGN

The United States currently employs a border enforcement focused strategy of immigration control. This is exemplified by the Secure Border Initiative Project (SBInet, also known as the Virtual Fence Project) started in 2005 and the Secure Fence Act passed by Congress in 2006. No significant changes have been made to either of the H-2 TWPs. The legalization of millions of undocumented workers already in the United States remains in contentious debate. Interestingly, the increase in border security initiatives were part of CIRA, as well as the corresponding House proposal (H.R. 4437: the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005). These border enforcement initiatives are the most significant measures to have survived the 2006 immigration reform movement.

The SBInet project has a total projected expense of \$6.7 billion, with \$1.1 billion spent through March 2010. It calls for 1,800 technologically advanced towers to be built along the U.S.-Mexico border, featuring advanced radar systems, video surveillance cameras, and ground sensors to detect movement and sound. New vehicle barriers are also to be constructed, and the Border Patrol is to employ small, unmanned aerial surveillance vehicles. Currently, funding for the project has been frozen, with only a 23 mile segment near Tucson, AZ having been completed. It is unlikely that the entire 2,000 mile border will be virtually fenced in the foreseeable future.

The Secure Fence Act of 2006 called for 670 miles of new physical fencing across the southern border. To date, more than 600 miles have been constructed, covering approximately 31% of the total mileage across the border. The fencing includes pedestrian blockades as well as vehicle barriers. The estimated construction cost for each mile of pedestrian fencing ranges from \$3.9 to \$16 million per mile.

The question then becomes whether this increase in border enforcement has resulted in a decrease in illegal crossings along the U.S.-Mexico border. The thrust of the argument behind the “enforcement first” approach is that the U.S. cannot implement major reforms such as a new, large-scale TWP or a legalization program without first securing its borders. In light of the recent escalation in drug-related violence in the northern Mexican border, this approach has found a considerable degree of political support.

But field research has found that the border enforcement-centered approach is failing to achieve its goals. Since 2005, UCSD’s Mexican Migration Field Research Program (MMFRP) has annually studied three separate Mexican migrant sending communities in Oaxaca, the Yucatan, and Jalisco, as well as their U.S. satellite communities. The MMFRP has devoted special attention to how the border enforcement build-up has affected migration behavior.

The six MMFRP field studies conducted from 2005 to 2010 show that the increase in border security has not deterred Mexican migrants from coming to the United States. Instead, tougher border enforcement has resulted in a series of unintended consequences. These include an increase in the use of professional people-smugglers and steep rises in smugglers’ fees, an increase in migrant deaths as they

begin to cross in ever more dangerous parts of the southern U.S. desert. The increase in security has resulted in a “cage effect” whereby migrants are now more likely to stay in the United States rather than return home, and the emergence of a new set of border-crossing methods that do not involve trekking the deserts on foot. In fact, since 2005, more than 90% of MMFRP interviewees who attempted to migrate to the United States were successful in entering. This includes those who were apprehended once or more on the same trip to the border. The fact that this pattern has remained steady throughout the last six years of stronger border enforcement illustrates the inefficiency of this approach.

Yet, evidence shows a steady decrease in Border Patrol apprehensions since 2006, suggesting a decline in migratory flows (Bowers 2007). MMFRP research also shows a steady decrease in the intent to migrate since 2006. Some politicians have used this evidence to claim the success of the border enforcement strategy. MMFRP research, however, shows that over 70% of migrants use loans from U.S.-based family members to pay for being smuggled across. As the U.S. economy slides, fewer families have found it possible to cover increasingly expensive smuggler fees. Thus, the severe U.S. recession may have had far more effect on the decision to migrate than the cost or difficulty of the border crossing itself.

Consistent with this analysis is a recent rise in border apprehensions in Arizona, showing a reversal of the downward trend of migration rates over the past few years (Associated Press 2010). This change corresponds perfectly with the recent increase in job availability across the United States as the Obama Administration’s stimulus plan begins to have impact on the U.S. labor market. Thus, as job availability

began dropping in the mid-2000s, migration flows dropped correspondingly, and the Border Patrol reported a decline in apprehensions. However, as the U.S. economy once again starts to recover, migration flows already have rebounded.

Current U.S. immigration control strategy is suffering from a significant gap between policy goals and outcomes. The “enforcement only” strategy has not managed to stem the influx of undocumented migrants into the country. MMFRP research clearly shows that migrants are simply finding other ways to get in, and the United States is experiencing a host of unintended policy consequences. Furthermore, the “enforcement only” approach does not address the millions of undocumented migrants already in the country. Increases in ICE worksite raids and deportations will not yield a cost-effective solution to undocumented immigration. Thus, comprehensive immigration reform is still much needed. Such reform must balance enforcement with legal pathways for migrant workers already here and yet to come.

To this end, Democratic Senators Charles Schumer, Harry Reid, Robert Menendez, Diane Feinstein, and Patrick Leahy announced the Real Enforcement with Practical Answers for Immigration Reform (REPAIR) proposal in April 2010. The REPAIR proposal is, in many ways, a recycling of CIRA and features many identical measures. For example, the REPAIR proposal continues the border enforcement strategy currently in place, and calls for greater increases in interior enforcement. It also maintains the current H-2A and H-2B programs, and incorporates the AgJOBS component of CIRA. The H-2B program is modified under REPAIR, however, and provides the first of a series of important changes from CIRA with regards to low-skill labor importation.

Under REPAIR, H-2B employers would be required to conduct more rigorous recruiting efforts before receiving foreign labor certification. It also reintroduces the use of State Workforce Agencies (SWAs) to handle the advertisement process for employers. Furthermore, employers would be required to pay above the prevailing wage rate for their region. If the prevailing wage rate is the minimum wage, for example, employers would be required to pay 133% of the minimum wage. Should the national unemployment rate be at or below 8%, the annual visa cap would be removed for returning workers, as it was from 2005 to 2007. If unemployment is greater than 8%, a returning worker may still be exempted from the cap if the metropolitan statistical area where the labor is to be performed is below 6%.

The H-2C program is included in REPAIR as it was in CIRA. In fact, there is only one major change that REPAIR makes to the 2006 H-2C proposal. It revises the 60-day “grace period” that allows workers some measure of labor market mobility. Under REPAIR, workers would be obligated to remain at their first H-2C job for a minimum of one year before being granted job mobility. This change resolves one of the most salient concerns in employer interviews about the 2006 H-2C design; the possibility of worker ‘springboarding’ and quickly losing an H-2C worker who requires substantial investment to obtain.

Finally, one of the key components of REPAIR is a new Biometric Enrollment, Locally-stored Information, and Electronic Verification of Employment (BELIEVE) System. The BELIEVE system would make use of a machine-readable, biometric Social Security card expressly used to prove an employee’s legal working status in the country. Senators are quick to point out that the biometric cards, mandatory for all workers in the United States, domestic and foreign, will not be used in any way as a form of national

identification or legal status. The cards are to be used solely for work authorization purposes, and should not be considered as some kind of national identity card. Citizens would still need driver's licenses, passports, birth certificates and the like, for example, to prove citizenship.

Prospective employees would present their card to employers, who swipe the cards through a card-reader to confirm the cardholder's identity and work authorization. The cardholder's work authorization would be verified by matching a digital encryption key contained within the card to a digital encryption key contained within the work authorization database being searched. If an employer does not have a card reader, he or she can go to designated government locations, such as post offices, to check the employee's work authorization status against BELIEVE system databases. As such, the system is intended to completely replace the E-Verify program currently in place, and would be mandatory for all employers to use after a set period of time upon REPAIR's enactment. The card would also eventually serve as the sole acceptable document to be produced by an employee to an employer for employment verification purposes. There would be strict employer penalties for failure to participate in the BELIEVE system after being notified of a requirement to do so by the Secretary of Homeland Security or after the BELIEVE system had been fully implemented nationwide.

In sum, the REPAIR bill represents the foremost comprehensive immigration reform proposal to date. It would supply the current enforcement-focused strategy with the other critical components needed for truly comprehensive and effective reform. It mirrors much of the 2006 CIRA proposal, makes necessary changes to H-2A and B, and would resolve one of the major concerns of interviewees on the design of H-2C. It would also establish a nationwide electronic employment verification system that would overhaul the government's ability to regulate legal employment in the country.

Final Recommendations

The REPAIR proposal, though the most complete comprehensive immigration reform plan to date, does not address three of the four final key issues that employers highlight in discussing future TWP design. The one salient issue that REPAIR does address is the implementation of a one year requirement for workers, effectively preventing the possibility of job ‘springboarding’. However, the level of enforcement, the reformation of the advertisement system for recruiting domestic workers, and, most importantly, program costs, still call for attention.

The level of enforcement, to begin, is perhaps the least troublesome of the three remaining issues. The increase in interior enforcement in REPAIR mirrors that of CIRA. Employers highlight in interviews that the increase in interior enforcement in CIRA would be rendered nearly unnecessary if employers nationwide were given a workable TWP for all business levels. Some employers also feel that the increase would result in an unneeded police state, which has the potential for popular and political backlash. For these reasons, employers state that taxpayer money would perhaps be better spent elsewhere, or that, at least, the new ICE personnel would be best placed on the border or investigating those businesses with foreign laborers who are not participating in TWPs.

Yet lessons from the Bracero era cannot be ignored. The need for enforcement of national legislation is irrefutable. The matter is less whether enforcement at all is necessary, and more what level of enforcement is needed. Realistically, determining the right level of enforcement that effectively regulates foreign labor usage within the country while not wastefully spending tax dollars or creating a veritable police state

will take empirical experimentation. This means live testing of enforcement levels over an extended period of time, and making those enforcement levels adjustable, just as the H-2C visa cap is made flexible on an annual basis. In short, given that enforcement is an absolute necessity and finding the right balance of enforcement levels requires some level of live experimentation, the only remaining option is to simply try and see. This puts the enforcement question on hold for the time being, pending the results of experiment.

The REPAIR proposal makes significant advancements towards mending the broken advertising system in the H-2B program. Requiring advanced recruiting efforts on the part of employers and reintroducing SWAs to handle the domestic advertisement process will go far in maximizing the domestic audience reached. However, it is critical that SWAs make use of a modern method of advertising for jobs; the internet. Most H-2B advertisements, as Seminara points out, are relegated to the obscure corners of newspapers and, as such, are ineffective advertising mechanisms. They do not stand out and call attention to a reader. Beyond this, online searches are becoming increasingly popular as a principal method native workers use for job hunting (Hansen 2002). Should SWAs not take advantage of this popular new medium for connecting workers with job opportunities, a great portion of the domestic populace will be missed.

Alongside an optimized advertisement strategy, mandatorily increasing the wage rate employers must advertise will do well to attract more domestic workers. The REPAIR proposal already outlines formulas demanding that employers pay wage standards that exceed prevailing wage rates in order to participate in the H-2B

program. The increase in wage rates for H-2B jobs, combined with a more efficient advertising system, should certainly result in an increase in domestic responses to H-2B job advertisements, and, consequently, a greater level of domestic worker protection.

The REPAIR proposal, as of yet not fully detailed, does not mention if the revised advertising system and increase in wage rates for H-2B jobs would be transplanted into the H-2C program. Given the depth of similarities that already exist between the two programs, however, one can assume policy designers will make the transfer. However, increasing required advertising efforts and minimum wage rates for H-2C jobs will unquestionably result in an increase in program complexity and costs. This runs contrary to the most essential and final recommendation of this project.

Of all the issues highlighted by employers, the complex and costly nature of the H-2C program, inherited from its parent H-2B program, takes front stage as the most critical. The intent of the H-2C program is to effectively turn the illegal, low-skilled migratory flow into the United States into a controlled, legal flow of foreign labor. Small businesses are both the most numerous in the United States and among the foremost users of low-skilled foreign labor. They form the beating heart of the undocumented worker population in the country, as well as the backbone of the U.S. economy. They should, therefore, be the primary target of the H-2C program.

However, small businesses are also the least capable of raising wages without risking raising prices for consumers and a potential loss of business. They are also the least capable of hiring immigration lawyers or dedicated HR personnel to handle

complex TWPs. Mirroring the process of the H-2B program, increasing the complexity of advertising requirements, and mandating higher than prevailing wages for imported workers unquestionably results in a costly program that small businesses, the target group of the H-2C program, are unlikely to be able to afford.

The end result is a contradictory set of requirements that the H-2C program must meet. The program must, at once, increase the effectiveness of attracting domestic workers to secondary-sector jobs to provide real domestic labor protections the H-2B program does not. Yet, it must, at the same, time manage program costs so that the average small business employer may participate on a national scale. It is a paradox of requirements that pull the H-2C program in seemingly opposite directions.

The solution may lie in a combination of technology and a decrease in fines for employer missteps during the H-2C application process. If the H-2C program can be handled through a simplified and purely electronic application process in such a way that lawyers, at the least, are not a necessity for program participation, the program will become far more viable for small business. Making the application process electronic will decrease the heavy paperwork that lawyers are often hired to handle. This simplified 'e-process,' when combined with a lessened level of fines and litigation for those employers who make application mistakes, would likely allow for even small businesses to afford the mandatory increase in pay rates that REPAIR proposes for the H-2B program.

The goal for policy makers, then, is an electronic, easy to use, and consequently fairly inexpensive program that does not implicitly require hiring new personnel or lawyers, that leaves enhanced advertising efforts to SWAs, and that does

not threaten employers with heavy fines or litigation for simple missteps. Such an electronic system could easily be based on, or incorporated into, the BELIEVE system outlined in REPAIR. The only non-electronic components of the program may be résumés or other documentation that are used to prove the absence of willing and qualified native workers during the certification process.

Certainly, the recommendation here is a broad outline lacking in specific details of how this electronic process may work and exactly which sections of the program need to be simplified for maximizing ease of use and minimizing costs. The overriding goal for policy makers, however, should be to simplify the H-2C program and make it less costly to participate. If program participation costs remain the principal factor in the employer's decision to participate, the H-2C program will likely suffer from the same lack of use among small businesses as the H-2A and H-2B programs. Policymakers must remember that small businesses are at the core of the low-skilled, undocumented migratory flow. Recognizing the economic constraints in which these businesses operate is essential to the success of a future U.S. TWP.

However, the design of a new U.S. TWP will be subject to an arena of political interests that greatly impact its final design. Though this paper argues for a series of technical design features that may serve to minimize the gap between TWP policy goals and outcomes, one must realize that policy design will first answer to political demands. As the Bracero Program shows, these political interests rarely brandish an equal amount of power, meaning some constituents will have a greater power to influence policy design over others. Furthermore, constituent interests seldom parallel one another, and, more often than not, are in direct conflict. While an ideal TWP

would equally balance the interests of all parties involved, a perfect symmetry of diverse party interests in TWP policy design is unlikely.

Examples of this are numerous throughout U.S. TWP history. For example, the Immigration Reform and Control Act (IRCA) of 1986 featured not only a legalization program, but an increase in interior enforcement similar to that of CIRA. However, while the legalization program was realized, the increase in enforcement was not. This was due to the pull of political compromise. The H-2C program of 2006 was also subject to significant political compromise, as the original 400,000 visa cap, which came very close to addressing the real numbers of unauthorized workers annually crossing the border, was negotiated down to 200,000 per year, and made flexible. In fact, due to the weight of differing political interests, the largest changes to U.S immigration control from the 2006 movement were increased border and interior enforcement levels.

Thus, while a series of policy-specific measures have been outlined here that may serve to maximize the efficacy of a new U.S. TWP aimed at legalizing the flow of undocumented labor into the country, a “silver bullet” policy design that universally solves imported labor issues from all perspectives is unlikely in light of differing political interests and levels of policy influence. This does not render the essential recommendations of this paper obsolete, but instead highlights that these essential recommendations must pass through a gauntlet of diverse interests and political power structures before becoming realities.

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