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Mary Lee Hall

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Defending the Rights of H-2A Farmworkers

Cover Page Footnote

International Law; Commercial Law; Law

Defending the Rights of H-2A Farmworkers*

Mary Lee Hall**

My role here today is to provide a practitioner's perspective on agricultural guest-worker programs. I feel very honored to be included with the other distinguished speakers at this Symposium. I will focus my remarks on the U.S. temporary foreign agricultural worker, or H-2A,¹ program, and in particular, on the situation of the workers within that program. My colleagues at the Farmworker Unit of Legal Services of North Carolina and I represent many H-2A workers on employment-related matters each year. We are also engaged in ongoing litigation in which we represent U.S. citizens who were employed by H-2A employers but were not treated in accordance with the law. Many of my observations are also applicable to H-2B,² or temporary foreign non-agricultural, workers, and I could give another whole speech about the effects of these programs on U.S. workers in these occupations, but I will keep my points today focused on the H-2A workers.

The H-2A program for seasonal agricultural workers is commonly referred to as a guest-worker program. This innocuous-sounding term is misleading, intended to suggest they do not really live where they work. But as the political philosopher Michael Walzer points out in his book, *Spheres of Justice*:

* The following was given as the keynote speech at the North Carolina Journal of International Law and Commercial Regulation's Symposium, "Work, Migration & Identity," held January 26, 2002, at the University of North Carolina School of Law.

** Managing Attorney, Farmworker Unit, Legal Services of North Carolina. J.D., 1974, University of Florida; B.A., 1971, Florida Presbyterian College. I would like to thank Alice Tejada, Greg Schell, Lori Elmer, and Rob Williams for their help in framing and editing this speech initially, and Lisa Butler and Albert Lee for securing the documentation regarding the labor camp/POW camp connection, discussed *infra*, at notes 23–25 and accompanying text.

¹ Immigration and Nationality Act (INA) § 101(a)(15)(H)(ii)(a), 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2000).

² INA § 101(a)(15)(H)(ii)(b), 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2000).

In the usual sense of the word . . . guestworkers are not “guests” and they certainly are not tourists. They are workers, above all; and they come because they need work, not because they expect to enjoy the visit. They are not on vacation; they do not spend their days as they please.³

Professor Walzer was writing about the guest-worker programs of Western Europe’s most industrialized democracies. “Guest worker” is even more of a euphemism for the status and condition of workers under the H-2A program. Most of the programs of Western Europe or, to be more precise, the statutes underlying those programs, comply with the Convention Concerning Migration for Employment.⁴ One reason the United States is not a signatory to that treaty is because our H-2A program falls woefully short of international law.

Under the H-2A program, employers obtain permission from the U.S. Department of Labor to employ a specified number of “unnamed aliens.”⁵ The specific workers selected by the employer receive temporary nonimmigrant visas from the U.S. consulate in their home countries.⁶ H-2A visas are valid only for the length of the offer of employment and only while the worker remains employed by the employer who sought the visa.⁷ The workers serve at the employer’s pleasure. The individual workers also bear the costs of the program. They usually borrow money to pay for the visas and other documents they need, as well as for their transportation to the United States. For Mexican H-2A workers in North Carolina, those costs are about five hundred dollars.⁸ They pay up to twenty percent interest monthly on their loans from the local moneylender.⁹ The employer may terminate workers and get other H-2A workers to replace them, using the same certifications,

³ MICHAEL WALZER, SPHERES OF JUSTICE 58–59 (1983).

⁴ Convention Concerning Migration for Employment (ILO No. 97) (revised 1949), entered into force Jan. 22, 1952, in INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919–81 (1982), available at <http://ilolex.ilo.ch:1567/public/english/docs/convdisp.htm>.

⁵ 8 C.F.R. § 214.2(h)(5)(i)(C) (2001).

⁶ § 214.2(h)(5)(i)(B).

⁷ § 214.2(h)(5)(viii)(B).

⁸ Esther Schrader, *Fielding a Legal Team of Workers*, L.A. TIMES, Aug. 26, 1999, at A1.

⁹ *Id.*

although the new workers will pay their own visa fees, processing charges, and transportation.¹⁰ At the end of the contract, or earlier if the worker becomes ill or is discharged, H-2A workers must return to their home countries, usually at their own expense.¹¹ H-2A workers come without their families and live in communal housing with other H-2A workers, most often segregated from the community at large. All H-2A workers in North Carolina are men.

H-2A workers are not entitled to the social safety net that even the lowest paid U.S. workers can rely upon in times of need—unemployment compensation, social security disability or retirement, or food stamps.¹² H-2A workers' security concerns revolve around their opportunity to return on a similar visa in following years and earn more U.S. dollars. Their immediate economic needs overshadow concerns about broken promises, dangerous working conditions, or substandard housing conditions. As a practical matter, H-2A workers accept attenuated rights of free speech and free association as a condition of their employment. One worker described his status to a reporter as a soldier.¹³ Necessity compelled him to enlist for what he believed to be a necessary period of suffering in order to provide for his family.¹⁴

The only time H-2A workers freely express their feelings about their experiences is when they are no longer H-2A workers and have no need to be. Most current H-2A workers, even when they have been fired or so severely injured that they can no longer work, are reluctant to give up hope that somewhere a good boss will respect them and allow them to return and earn the needed income.

A number of years ago, I had a fascinating glimpse into the true feelings of H-2 workers about the system. At that time, I was working for Florida Rural Legal Services. I represented quite a few Jamaican citizens who had come to Florida originally as H-2

¹⁰ 8 C.F.R. § 214.2(h)(5)(ix).

¹¹ § 214.2(h)(5)(i)(B). Although the H-2A regulations require that employers pay return transportation for those workers who complete the contract, in our experience the majority of North Carolina workers pay their own return transportation.

¹² INA § 218(c), 8 U.S.C. § 1188(c) (2000).

¹³ Schrader, *supra* note 8, at A1.

¹⁴ *Id.*

workers to cut cane for the big sugar companies in south Florida. My clients left these jobs, or "jumped contract," married U.S. citizens, and found work picking citrus in the ridge area of central Florida where I worked. I handled their immigration cases and helped them get their green cards. We never talked about their experiences as H-2 workers, but I knew that they had originally come to the United States on H-2 visas.

In the fall of 1982, the sugar companies were required by the U.S. Department of Labor to go to the State of Mississippi to recruit because hundreds of workers there showed an interest in jobs in the cane fields. The unemployment rate in the Delta counties was about twenty percent and the hourly rates on the job orders for cane cutters looked good to the unemployed Mississippi laborers. About three hundred Mississippi workers came to Florida in early December of that year, but by mid-January, only a handful remained; all the others had been fired or encouraged to quit. Representative George Miller of California, the chairman of one of the subcommittees of the House Labor and Education Committee, decided to hold a hearing in Belle Glade, Florida, in the spring of 1983 to investigate why the Mississippians were unable to keep the jobs. After all, the main premise of the H-2 agricultural worker program is that the Department of Labor should only certify a petition for H-2 workers when sufficient U.S. workers are not able and available and when the wages and working conditions offered do not adversely affect similarly employed U.S. workers. A reporter for the *Los Angeles Times* scheduled to cover the hearings wanted to talk to some H-2 workers. In all of the cane camps, signs were posted warning workers not to talk to lawyers from Florida Rural Legal Services, and we had great difficulty even getting H-2 workers to accept a leaflet from us when they were away from the camps. We decided to see if any former cane cutters would be interested in meeting the reporter.

I called one of my former immigration clients, Albert Graham. He lived about an hour and a half from Belle Glade. I told him about the reporter wanting to talk to some cane cutters and explained that I could not even offer him his mileage to go to Belle Glade. The interview was to take place the night before the hearing, so Albert would probably not arrive home in time to go to work the next day. I told him it was completely his decision, and

that I certainly understood why he might not want to do this. Despite all this, Albert was interested and agreed to invite a friend of his, who was also a former cane cutter, over to his house on Saturday so I could explain the reporter's request to them in person.

When I arrived at Albert's house that Saturday, three other former cane cutters were there. Two of them were also former immigration clients. As I explained that the reporter wanted to hear about their experiences, they became very excited and began to relate not only to me, but also to each other, in graphic detail, how they were selected for their jobs. They pantomimed how their hands had been inspected for calluses to see if they were suitably-hardened laborers; one of them said that he was with a group that had to strip and pass by the company representatives for inspection in a scene eerily reminiscent of a slave market. They joked about how they thought they had cut cane in Jamaica but learned that it was a different matter in the cane fields of south Florida. They became quite passionate and animated, talking about the field supervisors, the production requirements, and the food provided. In a mix of bitterness and pride, they related to each other how they struck out for a new life in a new country. As I listened and watched them, I realized that even though they all had been away from the cane fields for at least five years, these experiences were still very alive for them.

These were all hard-working and relatively successful fellows with families. They picked fruit and were no strangers to hard physical labor. Albert's house was modest, but comfortable; they all had cars and supported their families adequately. They were classic examples of the immigrant success story. Yet, they remembered keenly the humiliations and privations of their experiences as H-2 workers. They were visibly and audibly resentful that they were treated as less than fully human.

I was not sure that these four fellows would actually show up in Belle Glade the following week. I thought, perhaps they had vented their frustration that day. But the following week, they arrived in Belle Glade before the reporter did. Not just Albert Graham and his three friends, but about thirty people came to talk to the reporter. Many were former H-2 workers, but some were their wives and children. One man was a current H-2 worker, and the brother to another in the group, whom they picked up at a labor

camp on their way. Their energy, passion, and sheer numbers overwhelmed both the reporter and me that night. No one could come away from that encounter believing that H-2A workers were actually happy with the system.

In the course of the last twelve years here in North Carolina, I have spoken with hundreds, maybe even thousands, of H-2A workers. Although many of them will defend their particular employer as a "good boss," none would prefer this system over one in which they could have employment authorization to work with whomever they please, rather than being tied to one employer. Many have volunteered to me, in candor, that if they could come to the United States to work legally without the program, they would never choose to be on a labor camp in rural North Carolina.

North Carolina leads the United States in numbers of H-2A workers.¹⁵ Last year, about twenty-five percent of the nation's total H-2A workers labored in North Carolina tobacco and vegetable farms, orchards, nurseries, and Christmas tree farms.¹⁶ Almost all of these workers, approximately 10,500, were obtained through the largest farm labor contractor in the United States, the North Carolina Growers Association (NCGA).¹⁷ Virtually all of North Carolina's H-2A workers are from Mexico.¹⁸ In fact, most of the H-2A workers across the country are from Mexico, which is a change from the situation before the early Nineties when the majority came from the Caribbean.¹⁹ Caribbean H-2A workers still work in the apple harvest in New England and Virginia and in

¹⁵ Ruth Ellen Wasem & Geoffrey K. Collver, *Immigration of Agricultural Guest Workers: Policy, Trends, and Legislative Issues*, RL30852 CRS, REPORT FOR CONGRESS, at CRS-7 (last updated Aug. 23, 2001) (on file with the North Carolina Journal of International Law and Commercial Regulation).

¹⁶ *Id.* at CRS-7, CRS-16.

¹⁷ *Id.* at CRS-7 (noting that North Carolina led the nation with 10,475 H-2A job certifications); see also Schrader, *supra* note 8, at A1 (stating that the North Carolina Growers Association is the "largest farm labor contractor in the country").

¹⁸ See Wasem & Collver, *supra* note 15, at CRS-5; see also Schrader, *supra* note 8, at A1 (focusing on Mexican H-2A workers).

¹⁹ "In the late 1980s, there were 4 times as many H-2A workers from the Caribbean as Mexico. By FY 1999, 96% of all H-2A visas issued by DOS went to workers from Mexico." Wasem & Collver, *supra* note 15, at CRS-5.

the cane harvest in Florida.²⁰

For a democratic society, the fundamental problem with a guest-worker program is that guest workers are not free and have no rights of membership in society. The problem is particularly acute for a democracy that proclaims itself a nation of immigrants. H-2A workers, all of whom are people of color, cannot hope to ever become members of our society under this program.

Lack of freedom, lack of membership, and a strong dose of compunction have always been elements of the H-2A program and its antecedents by design. The H-2A program grew out of a program begun during World War II to bring farmworkers from the Bahamas, the West Indies, and Mexico to harvest foodstuffs in support of the war effort.²¹ Cindy Hahamovitch very capably describes the activities of the War Food Administration in her 1997 book on East Coast farmworkers from the late Nineteenth century to 1945, *The Fruits of Their Labor*.²² One of the most telling moments in the history of this effort occurred when an undersecretary of the Department of the Interior proposed that workers be imported from the U.S. Territory of Puerto Rico to staff farms on the East Coast. He pointed out that Puerto Ricans are loyal U.S. citizens and that Puerto Rican agricultural workers suffered from widespread unemployment. It would have been a perfect match with the need for labor to produce food for the war effort. But his proposal was deemed to be unsuitable for the explicit reason that as U.S. citizens, Puerto Ricans would be free to leave the farm and seek other employment and, even worse, might decide to stay on the mainland, rather than returning to Puerto Rico.

Another source of labor used by the War Food Administration was German Prisoners of War (POWs).²³ In addition, Japanese-Americans could volunteer for the War Food Administration and

²⁰ Schrader, *supra* note 8, at A1. A greater percentage of that work is mechanized now.

²¹ *Id.* (noting that the H-2A program is “an offspring of the ‘Bracero’ program, which brought tens of thousands of Mexican laborers into the United States legally to ease labor shortages during World War II”); *see also* CINDY HAHAMOVITCH, *THE FRUITS OF THEIR LABOR* 200–01 (1997) (suggesting that the harvesting of foodstuffs during World War II helped shape agricultural policy for the next fifty years).

²² HAHAMOVITCH, *supra* note 21.

²³ *Id.*, at 178–79.

be allowed to leave the internment camps.²⁴ Thus, from the beginning, there was a strong preference for a captive workforce.²⁵ The importation of temporary foreign agricultural workers was not something that occurred suddenly in response to wartime labor shortages. Rather, it was the result of much longer-standing forces: government-supported changes in agricultural economies that gave rise to a need for migratory labor; agribusiness demands for an oversupply of docile migratory workers; racial politics that excluded agriculture's predominately non-white manual laborers from the social programs of the New Deal and sought to maintain the status quo of rural society, especially in the South; and the co-optation of progressive elements that sought to improve the lot of farm laborers through regulation.

After the War, the importation of Mexican workers was formalized into the Bracero program, which was quite large and used extensively in the western United States.²⁶ In the eastern United States, the importation of Caribbean workers was institutionalized when the H-2A program was created in the early 1950s. The history of the H-2A program cannot be viewed in isolation from the larger history of agricultural labor, which includes significant government action, as well as deliberate inaction. Almost all of the government decisions were made at the behest of agricultural employers, who viewed laborers as another necessary raw material in production, like seeds or fertilizer, a fungible and expendable commodity.

When I say that H-2A workers are not free, the lack of

²⁴ *Id.* at 186.

²⁵ The connection between POWs and migrant farmworkers continued for many years. An infamous migrant labor camp on the eastern shore of Maryland, the "Westover" camp, was originally built to house POWs. Forty years later, it became the source of prolonged litigation over its substandard conditions. See Molly Moore, *Va. Weighs Migrant Worker's Plight*, WASH. POST, Aug. 29, 1985, at A1 (discussing the transformation of the Westover camp from a World War II POW camp into a migrant worker camp). "Spuds," another labor camp, named for the area's primary agricultural product, still in use outside of Palatka, Florida, was also used as a POW camp. See Southeastern Archaeological Research, Inc., *A Cultural Resource Assessment Survey of the Potential Historic District Between State Road 207 and Old 207, St. John's County, Florida*, 1999 (on file with the North Carolina Journal of International Law and Commercial Regulation).

²⁶ For an excellent source of information on the Bracero Program, see generally ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* (1964).

freedom has several different aspects:

- They cannot change employers.²⁷
- They cannot bargain over their terms and conditions of employment.²⁸
- Their remedies are limited and less than those afforded other workers.²⁹
- They are subject to deportation and banishment from the program if they complain or are even suspected of complaining.³⁰

The first two problems, the inability to change employers and the inability to bargain over the terms and conditions of employment, are obvious and written into the system.³¹ The limited remedies are a subtler problem.

The H-2A program has an extensive set of regulations, many of which originated with the Bracero program.³² The regulations were ostensibly written to protect U.S. workers and there is some case law allowing U.S. workers to use those regulations and the Wagner-Peyser Act as a basis of a private right of action.³³ H-2A workers have no such right. They are dependent on the U.S. Department of Labor's Employment and Training Administration (ETA) interpreting the regulations in a way that does not harm the H-2A workers.³⁴ The ETA over the years has usually exercised its discretion in the service of agricultural employers, not the U.S. workers, and certainly not the H-2A workers.³⁵

²⁷ Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J., 575, 595 (2001).

²⁸ *Id.* at 592-93.

²⁹ *Id.* at 598-613.

³⁰ *Id.* at 597.

³¹ See generally *id.* at 591-97 (discussing the H-2A program).

³² See Cecelia Danger, *The H-2A Non-Immigrant Visa Program: Weakening Its Provisions Would be a Step Backward for America's Farmworkers*, 31 U. MIAMI INTER-AM. L. REV. 419, 422 (2000).

³³ See *Vega v. Nourse Farms, Inc.*, 62 F. Supp. 2d 334 (D. Mass. 1999).

³⁴ See Andrew Scott Kosegi, *The H-2A Program: How the Weight of Agricultural Employer Subsidies is Breaking the Backs of Domestic Migrant Farm Workers*, 35 IND. L. REV. 269, 282 (2001).

³⁵ See Holley, *supra* note 27, at 598-604 (discussing the Department of Labor's complaint system).

For example, in the early 1980s, my colleague in West Virginia, Garry Geffert, brought a lawsuit against the Secretary of Labor on behalf of U.S. workers who picked apples for H-2A employers, challenging the ETA's failure to follow its own regulations with regard to piece rates.³⁶ H-2A employers may pay a piece rate (in apples, a flat rate for each bin of apples picked), but the worker's piece rate earnings must still equal the Adverse Effect Wage Rate (AEWR).³⁷ Essentially, the regulation required the ETA to adjust the piece rates upward when the AEWR increased.³⁸ The ETA had declined to make these increases, so production requirements for the workers effectively increased, as growers weeded out workers they had to pay by the hour.³⁹ When the plaintiffs won, the ETA simply changed the regulation to relieve the ETA of any duty to adjust the piece rates for increases in the AEWR.⁴⁰ The ETA also took this tack with several other cases claiming it abused its discretion in not following its own regulations.

More recently, the ETA approved language in North Carolina contracts that purported to waive workers' rights under North Carolina tenancy law in labor camp housing.⁴¹ North Carolina law provides that an employee in employer-owned housing is in a

³⁶ *Feller v. Brock*, 802 F.2d 722, 724–26 (4th Cir. 1986) (discussing the lengths to which this issue was litigated in federal courts in the District of Columbia in *NAACP v. Donovan*, 566 F. Supp. 1202 (D.C. Cir. 1983) and *NAACP v. Donovan*, 737 F.2d 67 (D.C. Cir. 1984)).

³⁷ 20 C.F.R. § 655.202(b)(9)(ii) (2002). The Adverse Effect Wage Rate is a special hourly wage rate that applies to H-2A employers. § 655.207(b). AEWRs were instituted during the Bracero era to try to offset the depressing effect that large numbers of braceros had on wage rates. The AEWR for each state is set by a methodology using a statistical survey of farm wages. § 655.207(b).

³⁸ § 655.2.2(b)(9)(ii).

³⁹ See *NAACP v. Donovan*, 558 F. Supp. 218, 219–24 (D. D.C. 1982) (describing the practical effects of increasing production requirements and reducing the earnings of workers).

⁴⁰ See *Feller*, 802 F.2d at 725 (discussing how the regulation was changed so as to avoid an appeal of the injunction granted in *NAACP v. Donovan*, 566 F. Supp. 1202 (1983), which prohibited the Department of Labor from certifying a grower who failed to adjust his piece rate).

⁴¹ See Lela Klein, *Labor Camps Deny Visitors to Migrant Farm Workers: This Restriction May Violate Migrants' First Amendment and Basic Human Rights*, GREENSBORO NEWS & REC., Feb. 24, 2000, at A11. See generally Content of Job Offers Rule, 20 C.F.R. § 655.102(b)(1)(i)–(iv) (2002).

landlord/tenant relationship with the employer and has certain rights as a tenant, the most basic being the covenant of quiet enjoyment.⁴² Although there is absolutely no conflict in North Carolina law regarding this, the ETA was exceedingly reluctant to actually follow state law when we challenged this provision on behalf of some clients. The ETA steadfastly clung to some of the NCGA's contract language regarding noise in labor camps, apparently under the notion that quiet enjoyment is to be interpreted literally!

The other arm of the U.S. Department of Labor, the Wage and Hour Division, is supposed to enforce contracts the ETA approves,⁴³ but its administrative complaint procedure is very limited.⁴⁴ In our experience here in North Carolina, however, the inadequate resources of the Wage and Hour Division to investigate worker complaints is as much a problem as the severe limitations on the actual complaint procedure.

Realistically, neither statutory nor regulatory protections for H-2A workers matter unless the workers have effective private remedies and are able to freely and readily utilize them. Neither of those conditions exists for H-2A workers.

First, H-2A workers actually have fewer and less effective legal remedies than other migrant farmworkers. The basic statute that we use to seek redress for our other farmworker clients is the federal Migrant and Seasonal Agricultural Worker Protection Act.⁴⁵ This Act gives a worker a private right of action in federal court if, among other things, an agricultural employer does not accurately disclose the terms and conditions of employment at the time of recruitment, houses the worker in housing which does not meet the federal and state standards, fails to pay wages when due, does not keep proper payroll records, or fails to provide an

⁴² See *Tucker v. Park Yarn Mill Co.*, 140 S.E. 744 (N.C. 1927).

⁴³ See Employment Standards Administration Wage Hour Division Mission Statement, at <http://www.dol.gov/dol/esa/public/aboutesa/mission/mission.htm> (last visited Apr. 17, 2002) (on file with North Carolina Journal of International Law and Commercial Regulation).

⁴⁴ Mike Holley, from Texas Rural Legal Aid, has described the limitations of the Department's administrative complaint procedure very capably in a recent law review article. See Holley, *supra* note 27.

⁴⁵ Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (1994).

itemized wage statement.⁴⁶ It provides for actual or statutory damages,⁴⁷ but this statute, by its terms, excludes H-2A workers.⁴⁸ This is due to the political power of the sugar lobby at the time of the bill's passage, when the Florida sugar industry was the largest employer of H-2A workers. This exclusion is actually a violation of the United States' treaty obligations under the North American Agreement on Labor Cooperation, the labor side-agreement to the North American Free Trade Agreement.⁴⁹

H-2A workers are, therefore, basically left with whatever remedies they have under state law. Suffice it to say that most H-2A workers are employed in rural counties where judges and potential jurors can identify far more readily with employers than with H-2A workers. Under no circumstances is an H-2A worker going to be able to get a jury of his peers.

The availability of a trial assumes that the court will exercise jurisdiction over the claim. Recently, in the case of *Reyes-Gaona v. N.C. Growers Association*, the Fourth Circuit held that a Mexican citizen seeking an H-2A job has no recourse under the Age Discrimination in Employment Act.⁵⁰ Luis Reyes-Gaona went to the recruiter/agent for the NCGA in his home state of Michoacan, Mexico to apply to become an H-2A employee.⁵¹ The recruiter bluntly informed him that the NCGA would not accept any workers over the age of forty unless they had previously worked for the NCGA.⁵² The Fourth Circuit, in a ruling contrary to generally-accepted principles of extraterritoriality,⁵³ held that since the discrimination took place in Mexico, the Act did not apply to the plaintiff.⁵⁴

⁴⁶ § 1854.

⁴⁷ *Id.*

⁴⁸ § 1803.

⁴⁹ North American Agreement on Labor Cooperation, Nov. 1, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 (entered into force Nov. 1, 1993).

⁵⁰ *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861 (4th Cir. 2001). For a full discussion of this case, see Ruhe C. Wadud, *Note: Allowing Employers to Discriminate in the Hiring Process Under the Age Discrimination in Employment Act: The Case of Reyes-Gaona*, 27 N.C. J. INT'L LAW & COM. REG. 335 (2001).

⁵¹ *Reyes-Gaona*, 250 F.3d at 863.

⁵² *Id.*

⁵³ See Wadud, *supra* note 50, at 342-52.

⁵⁴ *Reyes-Gaona*, 250 F.3d at 864-67.

Reyes-Gaona seems to create a consequence-free zone in which employers of foreign nationals can engage in various illegal employment practices with impunity. An effect of the policy we frequently see is increased timidity on the part of older H-2A workers. For example, last summer I represented a relatively young H-2A worker who had suffered an injury on the farm, and whose father was employed by the same farmer. Initially, both father and son had concerns that if the injured son pursued his workers compensation claim, the farmer might not request the father again the next year.

A worrisome implication of *Reyes-Gaona* is that retaliations will occur in Mexico when an H-2A worker discovers he cannot return the following year. But the ultimate effect of such a holding is injury to similarly employed U.S. workers. If an H-2A employer can restrict its hiring to young strong males, then women and older men will be pushed out of the workforce of the United States.

The single most important failure of the H-2A program to operate as anything other than a legalized form of peonage, however, is that H-2A workers quite reasonably fear that they will be deported and blacklisted if they complain. The NCGA routine is intended to reinforce that fear. The NCGA maintains a blacklist. Workers are either “preferred” and requested to return to work for a given employer or their names are placed on the “no return” list. Any one grower in the Association determines whether an individual worker can come back to North Carolina and work for any of the almost one thousand growers in the NCGA the following year.

The NCGA reminds its H-2A workers each year quite explicitly that they are powerless. The workers are brought on chartered buses to a large warehouse on the outskirts of the small town of Vass. Inside the warehouse, half of the space is walled off, with a faux stucco facade, supposedly resembling Spanish colonial architecture. Behind the facade are the comfortable air-conditioned offices of the NCGA. In front of the façade, the warehouse has no heat or air-conditioning, no chairs, and no water fountains. Portable toilets are outside.

The walls are adorned with a large banner, which reads “Legal Services Wants to Destroy the H-2A Program,” and an electronic scrolling marquee which also spews out an anti-legal services

message in Spanish. A member of the NCGA staff comes out on a balcony on the hacienda facade and speaks to workers standing below. A standard part of this "orientation" is to warn the workers that Legal Services is the enemy of the H-2A program and wants U.S. citizens to have their jobs. In 1999, the NCGA made a concerted effort to deprive their workers of our booklet, "Your Labor Rights as a H-2A Worker," which we have someone in Texas distribute to the workers as they walk across the bridge at the border. The NCGA required workers to dig into their luggage, retrieve our booklets, pass by trash bins, and toss their copies of the booklet in the trash. They still encourage workers to discard the books periodically.

Many, probably most, of the workers do not believe the NCGA's line that Legal Services is their enemy. Unfortunately, the workers go into debt to come to the United States and they know from the start that the NCGA will not be happy if they have anything to do with the only group of lawyers readily available to assist them. So most H-2A workers hesitate to assert their rights or seek outside help or information, even under the most egregious circumstances. Several clients contacted us after they were refused medical treatment for on-the-job injuries and continued working with broken bones for several months, limping along as best they could, until they could work no longer. I cannot begin to tell you the number of times we have visited a labor camp at the request of the camp residents who are being sprayed with pesticides in the field, only to have them decide that it is too risky to make a confidential OSHA complaint. When they can no longer tolerate the conditions, most H-2A workers will "vote with their feet" and leave silently rather than complain. The saddest part of our work is seeing the obvious pain of workers who are ashamed at being too afraid to stand up and defend their rights.

Over the last five or six years, agribusiness has mounted, almost annually, an effort in Congress to "reform" the H-2A law. They complain that there is too much "red tape" with the program, despite a ninety-nine percent approval rate for H-2A applications, and numerous studies showing that farmworkers (ones who are U.S. citizens or aliens with INS employment authorization) suffer unemployment rates of roughly twice the national average.⁵⁵

⁵⁵ Press Release, Bruce Goldstein, Farmworker Justice Fund, Inc., Analysis of

The proponents of the “reform” envision a new agricultural guest-worker program with as many as 500,000 workers,⁵⁶ a lower minimum wage, and an elimination of the requirement to provide housing. While the merchants of labor like the NCGA support lowered wages, their interests actually diverge from the large agribusiness concerns in the West. The Western growers have been willing to entertain a farmworker-earned legalization plan that would allow all undocumented and H-2A farmworkers in the United States as of a certain date to apply for legalization based on a certain number of days worked in agriculture in a previous calendar period. For the merchants of labor, legalization is anathema. In the fall of 2000, a deal was struck between agribusiness and the United Farm Workers that would have provided for a farmworker-earned legalization program beginning in 2001.⁵⁷ The deal was killed by Senator Phil Gramm of Texas, who would only support an expanded guest-worker program and not any plan that included legalization.⁵⁸ Senator Gramm declared that legalization would only take place “over [his] dead body.”⁵⁹ Since he has declined to run for re-election, there is some hope that a bill encompassing legalization can pass without such a drastic condition precedent.

At present, there are two bills pending.⁶⁰ The agribusiness bill is the Cannon/Miller bill, which would abolish the Adverse Effect Wage Rate and use a lower “prevailing wage.”⁶¹ The employer could conduct his own prevailing wage survey, rather than the state employment service, and the prevailing wage could be a piece rate, with the only guaranteed hourly wage being the

Pombo H-2C Guestworker Proposal, H.R. 4548 (Sept. 21, 2000) (on file with the North Carolina Journal of International Law & Commercial Regulation).

⁵⁶ This is a number almost ten times the size of the current program and just under half the total number of migrant farmworkers estimated to work in the United States.

⁵⁷ See Farmworker Justice Fund, Inc., *Legislative Updates*, at <http://www.fwjjustice.org/legislat.htm> (last visited Apr. 17, 2002) (on file with the North Carolina Journal of International Law and Commercial Regulation).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ The number of bills is technically four because there are companion House/Senate bills for the two alternatives.

⁶¹ Wage Equity Act of 2001, H.R. 2457, 107th Cong. § 2(b) (2001); Wage Equity Act of 2001, S. 1442, 107th Cong. § 2(b) (2001).

minimum wage, if the employer was covered.⁶² The Cannon/Miller bill does not include any legalization measure.⁶³

The worker bill is the Kennedy/Berman bill, which provides for earned legalization.⁶⁴ This bill gives the growers a more streamlined H-2A application process, more like the H-1B attestation process, and they can use a monetary housing allowance under certain circumstances.⁶⁵ While the bill's earned legalization offers hope to current undocumented workers and to current H-2A workers, it does not address most of the underlying flaws in the H-2A program. It would end the exemption from coverage under the Migrant and Seasonal Agricultural Protection Act, affording H-2A workers a useful private right of action. Another feature is payment to a trust fund of the amount of employer taxes (FICA and FUTA) saved by employing H-2A workers.⁶⁶ The trust fund would be used to administer the H-2A program more efficiently and to establish agricultural labor-management committees under the Federal Mediation and Conciliation Service.⁶⁷ Thus, the bills present very different visions of agricultural labor/management relations and have very different implications for immigration policy.

I am always struck when a group of non-H-2A farmworkers discusses the situation of H-2A workers; at least one always says that H-2A workers are "like slaves," even if that person is him or herself undocumented. The other workers in the group always readily agree with this assessment. Non-H-2A migrant farmworkers who have interacted with H-2A workers probably grasp the dynamics of the system more readily than anyone else.

In 1944, Justice Jackson stated succinctly the dilemma the H-2A program poses for any attempt to improve the treatment of migrant agricultural workers in this country when he wrote for the

⁶² H.R. 2457 § 2(a); S. 1442 § 2(a).

⁶³ H.R. 2457; S. 1442.

⁶⁴ H-2A Reform and Agricultural Worker Adjustment Act of 2001, H.R. 2736, 107th Cong. § 101(a)-(c) (2001); H-2A Reform and Agricultural Worker Adjustment Act of 2001, S. 1313, 107th Cong. § 101(a)-(c) (2001).

⁶⁵ H.R. 2736 § 201(a); S. 1313 § 201(a).

⁶⁶ H.R. 2736 § 301; S. 1313 § 301.

⁶⁷ H.R. 2736 § 303; S. 1313 § 303.

majority in *Pollock v. Williams*.⁶⁸ In that case, the Supreme Court struck down as unconstitutional Florida's last attempt to criminally punish workers who failed to work after receiving an advance.⁶⁹ Statutes of the sort at issue in *Pollock* were used repeatedly, primarily in Southern states, to compel tenant farmers and hired laborers to work off debts or supposed debts. Although most of the victims were African-American, Justice Jackson's decision also outlined how a similar statute had been used to keep immigrant workers at hard labor in the pine forests of Maine.⁷⁰ Justice Jackson captured some observations I have heard other farmworkers make about their fellow H-2A workers, and I will close with his words:

[I]n general, the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.⁷¹

⁶⁸ *Pollock v. Williams*, 322 U.S. 4 (1944).

⁶⁹ *Id.* at 25.

⁷⁰ *Id.* at 18–20.

⁷¹ *Id.* at 18.

