

FARMERS, GROWERS AND THE DEPARTMENT OF LABOR: THE INEQUALITY OF BALANCE IN THE TEMPORARY AGRICULTURAL WORKER PROGRAM

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Overview	100	A. The Shenandoah Valley: Pennsylvania, Virginia, Maryland, West Virginia	130
I. Introduction	101	B. Maryland	133
A. The Statutory and Regulatory Provisions	101	C. Hudson Valley, New York	137
B. Statement of Thesis	103	Conclusion	144
C. The Agricultural Labor Market	104		
D. Wage Depression and the Available Wage Data	106		
II. Evolution of the H-2 Program: 1964-1977 ..	107		
A. Background	107		
B. Congressional Direction and the Establishment of the Regulatory Framework	108		
C. The Department of Labor's Interpretation of the H-2 Program	110		
III. The Judicial Response in the 1970s	112		
IV. The Carter Revisions	116		
A. Background	116		
B. Proposed Revisions of the AEWR Regulations	117		
C. DOL's Final Rule on AEWR Regulations	117		
V. The Temporary Foreign Worker Program During the Reagan Revolution	119		
A. Piece Rate Provisions	119		
B. Redesigning the Adverse Effect Wage Rate	122		
1. The Judicial Response to the New AEWR Methodology	123		
2. The Debate: Was the Department of Labor's Policy "Reasoned"?	123		
3. Alternative Approaches	126		
VI. Case Studies	129		

OVERVIEW

The H-2A Temporary Foreign Worker Program allows U.S. farmers to hire immigrant labor on a seasonal basis if 1) a shortage of domestic farmworkers exists and 2) the employment of the immigrant labor will not "adversely affect" the wages and working conditions of U.S. workers "similarly employed." The program recognizes and attempts to accommodate growers' interests in obtaining foreign workers to meet their labor needs. Farmworkers may dispute whether that interest reflects a genuine labor shortage or simply a managerial, profit-driven preference for cheaper, more reliable, and more controllable workers. But the regulatory program and the statute enabling it presuppose a Congressional determination that at least *some* growers' interest in this regard is legitimate, otherwise the program would not exist. In short, the regulatory program by definition is premised on the existence of competing sets of interests.

However, this regulatory acknowledgment of growers' interests is subject to two limitations. First, governmental protection of growers from the vicissitudes of a competitive domestic labor market or from the risks inherent in producing a perishable product does not necessarily follow from the recognition of a legitimate grower need to obtain foreign workers in times of true labor shortages. Second, that an interest is a

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premise does not necessarily make it a *purpose* of the statutory mandate. As illuminating legislative history is scarce, one must look to the history of the regulations and their enforcement to discern what the scope of protection afforded to growers and the overriding purpose of the temporary foreign worker program have been. While Congress had struck a general, and rather imprecise, balance between competing grower and worker interests in the Immigration and Nationality Act of 1952 ("INA"), between 1964 and 1981 the Department of Labor ("DOL"), in developing and enforcing the regulations to implement the INA's guidelines, had construed its function to be the affirmative protection of only one set of the interests in that balance—farmworkers'.

A number of courts challenged DOL's focus on farmworker protections during the 1970s, but it was not until the Reagan Administration took office that DOL itself directly and comprehensively challenged this interpretation and ultimately discarded it. As designed and operated today, the H-2A program ostensibly balances growers' and farmworkers' conflicting interests to reach a "fair" resolution. Under this apparently reasonable guise, the program has come to function fundamentally as a mechanism to assist growers in obtaining foreign labor. Whereas the absolute number of certifications had been declining steadily throughout the 1960s and 1970s, that number has increased considerably during the 1980s; equally important, both the number of growers seeking H-2A certification and the diversity of crops and areas in which the foreign workers are found have risen notably in the last few years.

Does the employment of temporary foreign workers depress wages and other working conditions? This is a difficult question to answer, and it raises the issue of who should bear the cost of uncertainty. In the regulatory framework developed by DOL in the 1960s and 1970s, this cost fell primarily on the growers (although some courts were receptive to growers' petitions to overturn DOL decisions not to certify temporary foreign worker requests). In other words, growers bore the burden of demonstrating that adverse effect would not result from their employment of the foreign workers; if they failed to meet that burden, DOL would deny certification.

This cost allocation reflected two basic premises. First, throughout the 1960s and 1970s, DOL considered protection of farmworkers against adverse effect as its primary responsibility in administering the program—a responsibility it should not sacrifice to growers' business interests or market imperatives, however compelling they may have seemed. Second, until Reagan took office, DOL accepted as a given that the employment of foreign workers depressed—i.e. "adversely affected"—the wages and working conditions of domestic workers. Starting from these premises, the clear regulatory goal was to rectify past and dampen future adverse impact resulting from the importation of foreign workers.

With the inauguration of the Reagan Administration, however, the Department of Labor's position changed and growers' interests gained a new centrality.

With this change came a new allocation of the costs of uncertainty. The vast majority of the studies done suggest that, even if the extent of wage depression is uncertain, some degree of depression is far more likely than not. Yet uncertainty does exist, and inevitably will remain. For twenty years the Department of Labor had focussed its regulatory lens primarily on protecting the interests' of farmworkers. During the 1980s, the Department of Labor switched to a wide-angle lens to include the U.S. economy, labor markets, workers at large, and growers' interests within the scope of its regulatory gaze. As the additional interests were considered, the net impact of an infusion of foreign labor became increasingly difficult to ascertain. Thus, while the net impact on farmworkers who do not have the skills or resources to move into a different economic sector is certainly adverse, the impact on U.S. workers generally in a particular locality from an infusion of foreign farmworkers may be unclear. DOL used the uncertainty of adverse effect at the macro level not only to justify the cessation of any serious effort to prevent prospective wage depression, but to abandon a long history of augmenting minimum wage guarantees to compensate for past depression.

This article argues that the net result of the new policy orientation is that the regulatory wage and other minimum guarantees no longer provide a floor, below which farmworkers' earning power and working conditions cannot fall. Rather, these so-called protections create a ceiling, demands above which farmworkers are hard pressed to make if they hope to secure employment. These workers cannot afford to bear the cost of uncertainty and, with scant resources, should not bear the burden of performing the difficult, perhaps impossible, task of proving that the importation of foreign workers has or will upset the labor market to their detriment. That burden is far more appropriately placed, as it once was, on growers, who have more resources and access to pertinent wage and employment information, and are in a far superior position to minimize uncertainty and absorb its costs.

I. INTRODUCTION

A. THE STATUTORY AND REGULATORY PROVISIONS

The Immigration Reform and Control Act of 1986 (IRCA) authorizes the Attorney General of the United States to grant temporary visas to foreign agricultural workers (called "H-2A" workers, after the section of the statute governing their importation) in order to meet the labor demands of growers confronting a shortage of domestic workers. Before such a visa can be issued, the Secretary of Labor must certify that

- (1) There are not sufficient [U.S. workers] who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the [grower's] petition [for temporary foreign workers]; and
- (2) [T]he employment of the alien in such labor

or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.¹

Prior to IRCA, the temporary foreign worker certification program was administered under the Department of Labor ("DOL") regulations promulgated pursuant to IRCA's predecessor, the Immigration and Nationality Act of 1952 ("INA"). With the passage of IRCA, Congress elevated the language of the DOL regulations to statutory status.²

To obtain foreign labor certification, a grower must file an H-2A application and an Agricultural and Food Processing Clearance Order ("job order") with the Regional Administrator (RA) of the Department of Labor in charge of the area in which H-2A workers are sought and with the local office of the state employment service. The H-2A application must contain the wages, terms, and conditions of employment to be offered to the foreign workers. The job order also contains this information and is the form used by the employment service to recruit domestic workers on behalf of the grower. The employer must file both forms at least 60 calendar days prior to the beginning of the contract period for which foreign workers are sought, although emergency applications are permitted.

In order to prevent adverse effects to domestic farmworkers, the H-2A regulations require that in the job orders, the growers offer at least the so-called "adverse effect wage rate" (AEWR), which is the minimum wage DOL has determined must be paid to prevent the employment of foreign workers from depressing agricultural wages in the state. In addition, growers must offer terms and conditions of employment no less favorable than those prevailing in the area and make

certain other contractual guarantees and assurances.³ If the RA approves the job order, the grower can begin to recruit U.S. workers, and the state employment service will circulate the job offer throughout the "interstate clearance system." This system consists of Job Service offices located throughout the country operated by state employment agencies under the aegis of the U.S. Employment Service.⁴

If a sufficient number of qualified and available U.S. workers are not found, the employer has fulfilled its recruitment obligations and has not offered foreign workers higher wages or better working conditions than those offered to U.S. workers, and the RA determines that the employment of foreign workers at the wages and working conditions of employment offered will not adversely affect the wages and working conditions of similarly employed U.S. workers, the RA will grant certification for the number of foreign workers requested less the number of domestic workers successfully recruited. The RA must make a determination at least 20 calendar days prior to the beginning of the requested H-2A contract period.⁵

Farmworker advocates have criticized the two-month time frame allotted for the processing of H-2A applications and job orders as far too short for DOL to make reliable prevailing wage and practice findings, against which a grower's job order must be measured, and to recruit U.S. workers, particularly those residing outside the state and/or currently travelling in a migrant stream. Not only does such a short time frame inhibit adequate evaluation of U.S. worker availability and the H-2A workers' impact on the local farm labor market, but it renders virtually impossible meaningful judicial review of DOL's determinations under the program.⁶

1. 8 U.S.C. § 1186(a)(1)(1982 & Supp. IV 1986).

2. 8 U.S.C. § 101(a)(15)(H)(ii)(1952) of the INA authorized the Attorney General to approve visas for temporary foreign workers "if unemployed persons capable of performing" the needed labor "cannot be found in this country." Following this directive, the Attorney General promulgated regulations requiring employers seeking such temporary foreign workers to secure certification from the U.S. Department of Labor that (1) qualified domestic workers were not available and (2) the terms and conditions of employment offered to the foreign workers would not "adversely affect" the wages and working conditions of domestic workers "similarly employed." 8 C.F.R. § 214.2(h)(3)(A). The Department of Labor, in turn, adopted regulations to execute this mandate to protect U.S. workers from being displaced or adversely effected by the employment of foreign workers.

Under the pre-IRCA regulations the foreign workers were commonly referred to as "H-2 workers," after the section of the INA authorizing the program. I generally will refer to the temporary foreign worker program, and the foreign workers employed through it, in the years prior to IRCA as the "H-2 program" and "H-2 workers." "H-2A program" and "H-2A workers" generally refer to the program and workers after IRCA, but may refer to both the pre- and post-IRCA temporary foreign workers and program.

3. For example, if it is the prevailing practice in the area to pay workers on a weekly basis, H-2A growers must pay their workers at least that frequently. Growers must also guarantee work for three-fourths of the work days covered during the contract period, and must hire available and qualified U.S. workers through the first half of the contract period. For current contractual obliga-

tions and assurances, see 20 CFR § 655.102(b), 655.103 (4/1/90). The particular obligations and assurances required over the years will be discussed in detail below.

4. Actually, the job order is only circulated throughout the so-called supply states in which available farmworkers are likely to be found, as determined by the RA.

If the RA does not approve the order, s/he is required to notify the grower of the reasons for the denial within seven calendar days and afford him/her an opportunity to amend the order. Similarly, if the RA finds any deficiencies in the H-2A application, s/he is required to notify the grower within seven days so that the grower can amend that application.

5. 20 CFR §§ 655.101, 655.102(a), 655.104, 655.106(b)(1) (4/1/90).

6. Growers often have succeeded in obtaining a preliminary injunction ordering DOL to grant certification, asserting that they will suffer substantial crop loss if they are denied foreign labor. Judges, often with scant information and records before them, do not have the expertise to make the labor-market and worker-availability determinations necessary to evaluate a certification denial. Unable to determine with any certainty that U.S. workers are available, judges have been reluctant to ignore growers' dire appeals. Some judges also have viewed DOL's labor market expertise and administrative authority with remarkable disdain, reinforcing their proclivity to grant growers preliminary injunctive relief. Moreover, the merits of DOL's actions are seldom reached, since by the time the case is docketed for a hearing on the merits, the season usually has come and gone, and numerous cases have been dismissed as moot. See "Note: Overcoming Mootness in the H-2A Temporary Foreign Farmworker Program," 78 Georgetown L.J.

B. STATEMENT OF THESIS

DOL's execution of its responsibilities under the temporary foreign worker program have come under particularly harsh fire from farmworker advocates in recent years. The general thrust of the criticism is not new—that the AEWR and prevailing practice determinations have not prevented wage depression or the deterioration of other working conditions; that the recruitment efforts of U.S. workers required of growers and those made through the employment service have proven inadequate to locate the many unemployed, available, and qualified domestic workers these advocates insist do exist; and that circulation of H-2A growers' job orders through the Employment Service's interstate clearance system consistently has been a fruitless, pro forma exercise. Nonetheless, the intensity of these criticisms has escalated over the last decade as the Department of Labor's relationship to farmworkers and growers has changed.

The mid-to-late 1960s had witnessed a period of aggressive efforts on the part of the U.S. Secretary of Labor to limit growers' access to foreign workers; relations during those years between DOL and growers generally were strained.⁷ The 1980s, on the other hand, have witnessed consistent DOL approval of grower requests. Variation in the administration of the program also has resulted from different Regional Administrators approaching the certification process differently.⁸

Since Reagan's inauguration in 1981, DOL has effected a major overhaul of the H-2A regulatory program. The Department's opponents offer two basic critiques of the new (post-IRCA) H-2A regulations in particular. First, IRCA strikes a balance between the interests of employers and workers. By definition, the

statute recognizes a grower interest in securing sufficient workers at non-depressed agricultural wages; otherwise the H-2A program would not exist. But IRCA explicitly charges DOL with protecting the employment opportunities, wages, and working conditions of U.S. farmworkers.

DOL's duty is to carry out the statutory mandate that foreign workers not adversely affect the wages and working conditions of U.S. workers. This is an irreducible minimum which must be met, whatever balance point between worker and grower interests DOL may think is preferable.⁹

DOL, these critics charge, has begun to consider grower interests in striking its own balance, one which is fundamentally at odds with IRCA's clear statutory directive.

IRCA's legislative history is silent on precisely how Congress would define "adverse effect." But its adoption of the exact language of the H-2 regulations developed pursuant to the Immigration and Nationality Act of 1952, it is argued, clearly reflects general Congressional approval of the policies and standards applied by DOL for almost two decades prior to IRCA's passage. Those long-standing policies, in turn, reflected DOL's recognition of such an "irreducible minimum" necessary to prevent adverse effect, which growers' needs, however acute, could not override.

Second, farmworker advocates argue, DOL's failure to effectively administer and enforce the regulatory program has been particularly acute in recent years.¹⁰ In other words, while few farmworker advocates had contended that the administration of the H-2 program by the pre-Reagan Departments had been a panacea for workers in the field, at least the official policy motivating

197 (October 1989); H. Michael Semler, "Overview: The H-2 Program: Aliens in the Orchard," 1 Yale Law & Policy Review 187, 222-228 (Spring 1983). As the number of grower appeals dropped during the 1980s, however, this dynamic (certification denial followed by a lawsuit and preliminary injunctive relief) has disappeared from the judicial record.

7. See *infra* Section II.C.

8. Legal Services attorneys have found the RA currently responsible for the New Jersey, Pennsylvania, Maryland, Delaware, Virginia, and West Virginia region, for example, to be relatively cooperative and responsive to their complaints and requests. Farmworker attorneys have been received by the RA for the Southeastern states, on the other hand, with substantial hostility; from their perspective, that office clearly has identified itself with growers' interests. Similarly, the political proclivities and competence of state administrators and local officials vary widely across the country. Personal interviews with Florida Rural Legal Services' attorneys Greg Schell and Rob Williams; Migrant Legal Action Program attorney Shelley Davis; West Virginia Legal Services Plan attorney Garry Geffert; Farmworkers Justice Fund attorney Bruce Goldstein. In the case of the Southeastern Regional Administrator and his office, my own experience confirmed this view.

9. *H-2A Temporary Foreign Worker Program Litigation Manual* (Migrant Legal Action Program and Farmworker Justice Fund: Washington, DC) (1989), 9. See also *AFL-CIO v. McLaughlin*, 702 F.Supp. 307 (D.D.C. 1988) (District Court judge finding new regulations "do nothing to protect American workers and thus are not in accordance with the law.")

10. Data on this issue is not readily available—Freedom of Information Act Requests, which would produce thousands of pages

of documents at substantial cost, would be necessary. However, in a December 5, 1990 letter responding to former Secretary of Labor Elizabeth Dole's solicitation of comments on the Job Service, Florida Rural Legal Services (FRLS) detailed numerous cases in recent years in which growers found guilty of egregious violations of the regulations by the Department of Labor and/or a federal court nonetheless were granted certification by DOL. In the same letter, FRLS also detailed a number of instances in which DOL had fallen far short of fulfilling its oversight responsibilities for prevailing wage surveys and the interstate clearance and recruitment process. Conversations with eight attorneys who represent farmworkers in H-2A related cases confirm the impression that DOL's efforts to enforce the conditions imposed by the regulations on growers requesting foreign labor certification, as well as its operation of the interstate clearance system, plummeted with Reagan's inauguration. A GAO study of the recruitment of workers for H-2A tobacco growers in Virginia "showed that DOL's practices provide weak protections for U.S. workers," and its review of fifteen prevailing wage surveys led it to conclude that "some surveys included practices not generally considered technically sound." *The H-2A Program: Protections for U.S. Farmworkers*, GAO/PEMD-89-3 (U.S. General Accounting Office: October 1988), at 5, 35.

For additional confirmation of this interpretation see, "Note: Overcoming Mootness in the H-2A Temporary Foreign Worker Program," 78 Georgetown L.J. at 197 (Noting, for example, one seasoned farmworker attorney's observation that the "Department has recently approved nearly all grower requests for certification, and growers' resistance to the certification process has dwindled.")

the regulations had been one of protecting farmworkers; the Reagan-Bush DOL has gutted what minimal protection the regulatory program had afforded.

From the early 1960s through the Carter years, the basic policy orientation of the H-2A program had been for government to act as advocate and protector of the economically powerless and politically disenfranchised—in this case, farmworkers. Although largely silent during the Nixon Administration, the regulatory record during the Kennedy, Johnson, and Carter Administrations is replete with evidence that the Department of Labor had considered wage depression linked to foreign workers to be axiomatic; at least at the policy-making level, DOL consistently had asserted that the prevention of an inevitable, depressive effect was the regulatory program's fundamental and overriding concern. In short, there can be little doubt, at least on paper, of whose interests these DOL policymakers had intended the H-2A program to protect, and what forces they had intended to combat.¹¹

The reality, unsurprisingly, was not so heroic, and the fulfillment of the policy far from complete. DOL officials, scattered across the country, interpreted their roles and viewed the legitimacy of certification requests differently. The adequacy of resources and competence of staff also varied. At the operational level, many decisions adverse to the immediate interests of U.S. farmworkers were made.¹² But the inauguration of the Reagan Administration signaled a major ideological shift vis-a-vis public programs for the economically disadvantaged. From the perspective of farmworker advocates, policy as well as operational decisions sacrificing the interests of their clients increased in severity and frequency. As the Reagan DOL abandoned the government-as-protector role and adopted interest "balancing" as its *raison-d'être*, the temporary foreign worker program assumed a policy posture unaligned with farmworker interests.

This article focuses on the wage protections provided by the H-2A program and argues (1) that for many years DOL's official policy was to correct for past, as well as to prevent future, wage depression from the employment of foreign workers by U.S. growers; (2) that available evidence suggests that such depression has indeed occurred; but (3) that the Reagan and Bush Ad-

ministrations nonetheless have worked a major shift in the goals and execution of the temporary foreign worker program which is at odds with IRCA's statutory mandate and DOL's own history in administering the program, and which seriously undermines the farmworker interests the Department is charged with protecting. In developing this argument, the paper will follow the evolution of the regulatory program from its inception, survey the judicial response to the Department of Labor's administration of it, analyze the studies relied upon by DOL in its recent overhaul of the regulations, and finally present two case studies on wage depression in the Shenandoah Valley and in the Hudson Valley based on my own research.

C. THE AGRICULTURAL LABOR MARKET

The Immigrant Reform & Control Act gives the Department of Labor an impossible task. IRCA creates a mechanism for bringing foreign labor into the U.S. labor market and then charges DOL with preventing this influx from lowering U.S. wages. Elementary economic analysis explains that when the supply of a commodity (labor) increases, the equilibrium price it commands on the market (wages) falls. There is a fundamental contradiction in the H-2A program's allowing an infusion of foreign labor while requiring that this market dynamic be overcome through administrative gymnastics. Understanding the effect of this tension on U.S. workers requires knowledge of both the more general way in which labor markets function and the particular structure of the H-2A program.

Supply and demand operate in any market. The impact of additional workers on the equilibrium wage is exacerbated in the H-2A context for two reasons. First, the new foreign workers are willing to accept wages and working conditions inferior to those demanded by the "old" domestic workers. This is the case for both H-2A and undocumented foreign workers, as the wage these workers will accept is determined by the labor market in their home countries, which invariably suffer higher under-employment and unemployment rates and lower wages than the United States. Second, because under-employment and unemployment in the primary H-2A supply countries¹³ is quite high and because the DOL-approved wage invariably exceeds the rate attractive to the foreign workers, there are many more foreign work-

11. See *infra* Section II.

12. For a detailed discussion on the dysfunctionality of the Employment Service in administering a wide range of services to farmworkers (not just regarding the H-2 program) in the 1970s, see Goldfarb, *A Caste of Despair* (Iowa State University Press: Ames, Iowa) (1981), 60-113; *NAACP v. Brennan*, 360 F.Supp. 1006 (D.D.C. 1973) (Class action suit on behalf of migrant farmworkers against the Employment Service for a wide range of discriminatory and unlawful practices in administering farm labor services.) Goldfarb served as chair of the Special Review Committee, established pursuant to a consent order in the *NAACP v. Brennan* case in an effort to reach a settlement of that case. Final settlement of the case was reached in January 1980. Goldfarb at 109.

Also see, Letter from Florida Secretary of Labor Wallace E. Orr to U.S. Secretary of Labor Raymond Donovan (October 27, 1982), a frank assessment of the Job Service's failure in its recruit-

ment functions. In that letter the Florida Secretary noted: "Current experience with this system raises serious questions about its effectiveness. . . . The realities experienced by Florida crewleaders, migrant crew members, individuals and state and local employment office staff confirm the urgency of a complete review of the clearance process at the national level." The Secretary continued, "Quite frankly we feel that many of the 315 criteria orders received in Florida were issued on a pro forma basis and that a number of the 6,389 openings listed were not bona fide openings. . . . The Interstate Clearance System is cumbersome, and there are ways employers can use the system to insure that they qualify to obtain off-shore workers." The Secretary then detailed the ways in which his staff had experienced such behavior on the part of H-2 growers.

13. Most H-2A workers are recruited from Mexico and the Caribbean.

ers eager to fill H-2A jobs than there are positions available. The result is that H-2A employers in the United States have access to an essentially infinite labor supply available at the certified wage.

The number of foreign workers an employer can actually hire is, of course, limited by the number of certifications DOL approves. But growers are not required to offer domestic workers wages higher than the DOL-certified wage offered to H-2As. U.S. workers interested in a particular job, but demanding a higher wage, are not considered "available" for purposes of the regulations. Since any job openings unfilled by domestic workers as of 20 days before the beginning of the contract period constitute a labor shortage for which DOL will certify H-2A workers, the grower can meet its entire labor demand with workers to be paid at the certified wage. Once DOL approves a specific wage rate, the H-2A employer need not respond to unexpected, short-term, or other market pressures which otherwise would push the equilibrium agricultural wage up. The result of this system is that the adverse effect wage rate, rather than establishing a protective floor below which U.S. farm wages cannot fall, imposes a wage ceiling above which H-2A growers need not make offers in order to meet their demand for labor. This dynamic also applies to the other terms and conditions of employment governed by the H-2A regulations.

In analyzing the impact of foreign workers on the domestic labor market, it is critical to identify the particular sector of the labor market at issue. Workers in a given location will face different kinds of jobs, each requiring particular skills and each offering particular wages, benefits, and other conditions of employment. Each category of employment can be said to constitute a different sector of the labor market. Some sectors complement each other, so that the expansion of employment in one will bolster employment and wages in the other as well. For example, an influx of undocumented workers willing to accept dishwasher, food preparation and other kitchen jobs at below (then-prevailing) market wages might stimulate expansion in the area's restaurant industry generally, thereby increasing the demand for other workers to fill additional restaurant positions, such as waiters, bartenders, hosts, and chefs; this increased demand, in turn, would mean not only an expansion of employment opportunities in these complementary jobs, but increased wages to attract workers to them.

However, the influx of new workers willing to work as dishwashers may have a negative effect on people already employed as dishwashers. More generally, since workers *within* a particular sector will compete with each other for available jobs, an influx of new workers—especially those willing to work for a lower wage—will cause the wages of all workers in that sector to decline. This depressive impact will be tempered only to the extent that (1) the addition of the new workers causes the overall economy in the area (and to that extent the sec-

tor in question) to expand and (2) the old workers can move to jobs in a different sector of the labor market.

Enhanced economic activity and/or job mobility might compensate for the depressive effect an infusion of foreign workers otherwise would have within a particular sector of the labor market. This is a complicated issue, and economists have reached no definitive conclusions on the net impact of foreign workers either on domestic farmworkers who have sufficient skills and flexibility to move into alternative jobs or on domestic workers as a whole.

However, it is neither mobile workers nor domestic workers in general that the H-2A regulations are designed to protect. IRCA charges the Department of Labor specifically with protecting the wages and working conditions of domestic workers "similarly employed" to H-2A workers; the H-2 regulations prior to IRCA also specifically protected "similarly employed" U.S. workers. On its face, this language plainly suggests that the scope of DOL's inquiry into adverse effect is properly limited to that sector of the domestic labor market in which the H-2A workers are employed, and that differentiating between the impact of foreign workers on the wages and working conditions of domestic workers in distinct sectors of the labor market is critical to assessing DOL's success in running the temporary foreign worker program.

DOL's administration of the H-2 program from roughly 1952 to 1980 is consistent with this interpretation of its regulatory role.¹⁴ The issue of which sector(s) of the labor market DOL considers in assessing adverse effect began to gain importance toward the end of the Carter Administration and assumed a central position in the regulatory changes effected during the course of the Reagan and Bush Administrations.¹⁵

In assessing the sufficiency of both the adverse effect wage rate and the recruitment efforts required, it is also important to understand that the domestic farm labor market is national in scope. Most migrant farmworkers travel substantial distances from their "permanent" homes to a number of jobs during the course of a year. According to DOL, in 1977, nearly half of all migrant workers held farm jobs that were over 500 miles from their home base; roughly 20 percent held jobs in excess of 1500 miles from their home base.¹⁶ Moreover, contrary to conventional wisdom, the experience of farmworker attorneys and representatives today suggests that the bulk of migrant workers in any given area do not travel in the same "migrant stream," but in many different crossing, merging, and diverging streams.

It is migrant workers who constitute the segment of the agricultural work force most directly affected by H-2A workers. Migrant workers are concentrated in the seasonal, labor intensive fruit and vegetable crops where H-2A workers primarily are found, and they work more days per year performing farm labor than

14. See *infra* Section II & IV.

15. See *infra* Section V.B.

16. 46 Fed. Reg. 4568, 4571 (1/16/81).

nonmigrants, even if they constitute a numerically smaller group.¹⁷ Since many of the migrant workers in competition with the foreign workers travel extensively, to wherever work is available, the wage and working condition guarantees as well as the recruitment efforts should reflect the interstate nature of this labor market.¹⁸

D. WAGE DEPRESSION AND THE AVAILABLE WAGE DATA

Data from which one can measure wage depression is incomplete, and analyzing it is problematic. These problems are discussed below. Nonetheless, some data exists, and it provides tentative empirical support for the contention that the employment of H-2A workers has depressed domestic farm wages and enables us to gauge the extent of that depression. It is important to recognize the context of uncertainty in which decisive interpretations and analyses cannot be made. Nonetheless, the Department of Labor has a clear mandate: prevent adverse effect. The question facing DOL is, given the inevitability of some ambiguity and uncertainty surrounding wage depression and adverse effect, on which side should DOL err? A partial response to this question would be to require DOL to improve its data and survey techniques in order to reduce the uncertainty to a level acceptable to DOL implementation of its mandate; the New York wage surveys for the Hudson Valley during the 1970s and early 1980s, discussed below,¹⁹ offer one model for this kind of response. But for the present, and until such surveys are conducted, DOL's administration of the H-2A program must rely on analysis of existing data.

This article argues that IRCA implicitly strikes a balance between grower and farmworker interests, but that DOL's function in the regulatory structure is to protect farmworkers against adverse effect within that balance, not to strike a new balance. In addition, I argue that the balance struck by Congress in IRCA, and DOL's H-2A regulatory role pursuant to it, are consistent with the development and operation of the H-2 program under the Immigration and Nationality Act of 1952. In a context of uncertainty, DOL should err on the side of protecting workers and therefore should compensate for adverse effect where existing data suggest, even if somewhat tentatively, the existence of wage depression. From this perspective, even qualified con-

clusions based on available data help to evaluate whether or not DOL has satisfied its duty.

There are two approaches to measuring the extent of wage depression resulting from the H-2A program. First, one can make "snap-shot" comparisons between the wages offered for similar work by employers who utilize temporary foreign workers and those who do not. Second, one can compare changes over time in the prevailing wages and average earnings of domestic workers employed by H-2A growers to changes in other wage indices. Other such wage indices include the prevailing wages and average earnings of domestic workers employed in similar crops but working for employers who do not utilize foreign workers; the earnings of a larger pool of agricultural workers, including both H-2A and non-H-2A workers and crop areas, in which the proportion of H-2A to all workers will be diminished; and the earnings of non-agricultural workers.

Unfortunately, extensive data enabling sophisticated snap shot or growth comparisons does not exist. As the Congressional General Accounting Office has noted, most crop areas using H-2A or undocumented workers have been doing so for a long period, making it "hard to find strong contrasts of U.S. workers' wages with and without the influence of alien penetration."²⁰ New H-2A growers have been emerging in the last few years—but the time line for these growers is not long enough to provide the necessary "strong contrasts" to which the GAO referred. In addition, "Many other human-capital[...], contextual. . . [and other] labor cost factors" would have to be measured and accounted for.²¹ Thus, any conclusions drawn must be qualified by the limited nature of the data as well as the numerous exogenous and dependent variables that exist.

DOL collects and records farmworker data through two instruments: prevailing wages surveys and In-Season Farm Labor Reports. I turn first to the prevailing wage surveys. A basic data problem for making wage comparisons across time is that neither the state nor federal Labor Departments are required to maintain prevailing wage surveys and records for more than a few years, and most have not done so.²² In addition, prior to a new piece rate regulatory provision promulgated in 1987, discussed below,²³ which requires state employment agencies to survey any crop activity in which H-2A workers are or will be employed, DOL had required that states conduct a wage survey for particular crop activities only in certain specific circumstances.²⁴ The result

17. *Id.*

18. The regulations require the Employment Service to circulate the grower's job order in those states in which the Regional Administrator determines there is a good possibility that domestic workers can be successfully recruited. That RAs generally instruct the Employment Service to circulate the job order at least to several states in the region reflects a recognition on the part of DOL that the farm labor market is at least a regional one. 20 C.F.R. § 655.105 (a)(4/1/90).

19. See *infra* Section VI.C.

20. *The H-2A Program: Protections for U.S. Farmworkers*, GAO/PEMD-89-3 (U.S. General Accounting Office: October 1988), 62.

21. *Id.*

22. Apple growers throughout New England and in New York,

Maryland, Virginia, and West Virginia, for example, have employed H-2A workers for some or all of the years since the program's inception in 1952 up to the present time; many of these states have had such workers in every year. Maryland has one of the few labor departments which has retained prevailing wage surveys for more than two or three years. Most of New York's older surveys, discussed below, were obtained from Legal Services files.

23. See *infra* Section V.A.

24. DOL required prevailing wage surveys when (1) at least one hundred workers were employed during the previous season and were expected to be employed in the future, or (2) the "crop activity had an unusually complex wage structure or there [were] other factors" suggesting that a survey was necessary in order to arrive

is that prevailing wage surveys for many areas and crops in which H-2A workers are not employed simply do not exist, rendering impossible comparisons between wages in similar crop activities in areas in which H-2A workers are employed and those in which they are not.

While the reliability of prevailing wage surveys has been challenged repeatedly by farmworker advocates and questioned by agricultural economists, the surveys are superior to DOL's other source of agricultural wage data, the In-Season Farm Labor Reports. The In-Season Farm Labor Report is a monthly survey in which local Employment Service offices estimate the number of workers employed and the wage rates paid in various crop activities in their area. No particular procedure is followed in making these employment and wage determinations; rather, Employment Service field representatives estimate the figures, based on contacts they may have with local growers, crew leaders, and workers, as well as on their own knowledge of the area. Every farmworker advocate, labor economist, grower representative, and employee of the Florida and U.S. Labor Department whom I interviewed readily dismissed these reports as highly inaccurate and unreliable.

The U.S. Department of Agriculture's (U.S.D.A.) "Farm Labor Reports" offer another source of information on agricultural wages. This data also has several shortcomings for the purpose of calculating wage depression. First, the data published by U.S.D.A. is too aggregated to permit comparisons between wages paid in different crop activities in the same state or region, or between wages paid in the same crop activity in different states or regions. Second, the U.S.D.A. does not gather data on actual piece rates, the method by which most H-2A workers are paid; rather, it asks growers to report the number of workers paid by the piece (as well as by other methods), their total hours worked, and gross wages during the sample period; U.S.D.A. then publishes the average earnings of these workers. Third, U.S.D.A. periodically has altered its methodology and changed the aggregation or grouping of data it has gathered. For example, until 1981, average wages for all hired farmworkers were published for each state; after 1981, average wages were published on a regional basis, making comparisons across the two time periods difficult.

Philip Martin, a professor of agricultural economics at the University of California-Davis, has noted a number of other problems with the U.S.D.A. data. The surveys conducted prior to 1974 "relied on 'volunteers'

to report their farm employment and wages each month," leading to questionable reliability of the data obtained. In 1974, the USDA implemented a probability survey approach and conducted quarterly surveys, but budget cuts in the early 1980s resulted in limited data collection for several years; U.S.D.A. resumed the quarterly surveys in mid-1984. An additional problem "is the accuracy of total hours worked; Fair Labor Standards Act investigations show that hours worked, especially for piece rate workers, are often under-reported in employer records[,] further exacerbating the dilution of the weight of piece rate earnings in calculating the average field and livestock earnings and hence in the AEW.²⁵

Finally, two additional, non-data factors impede rigorous analysis of wage depression due specifically to foreign H-2A workers. First, numerous factors, in addition to the presence of H-2A workers affect farm wages: weather and crop conditions, different varieties of the same fruit, commuting distance, the price of the fruit on the market and the costs of inputs, to name a few. Consequently, it is hard to find two groups of workers who truly are similarly situated (or even largely so) except for the presence of H-2A workers. Other variables which might explain a given wage differential inevitably exist; economics is an inexact science, and apparent correlations are generally far from conclusive.

Second, the large presence of undocumented workers performing agricultural labor at sub-minimum, subsistence wages poses both a methodological problem for wage depression analysis—how to isolate the impact of H-2A workers on domestic workers' wages when the number of H-2A workers pales in comparison to the number of illegal workers—as well as a policy dilemma for the H-2A regulatory program—should the program protect U.S. workers from the adverse effect of all foreign workers, illegal as well as legal?

II. EVOLUTION OF THE H-2 PROGRAM: 1964-1977

A. BACKGROUND

Beginning with the Contract Labor Act of 1885, U.S. law generally barred the importation of unskilled temporary foreign workers ("contract workers") into the United States. Agricultural employers were given frequent exemptions, however,²⁶ and in the wake of World War II Congress enacted two pieces of legislation authorizing the creation of official contract worker pro-

at an objective, acceptable wage necessary for a grower to recruit workers through the inter and intrastate clearance systems. ETA Handbook No. 385, "Domestic Agricultural In-Season Wage Finding Process."

Like the U.S. DOL in approving interstate clearance orders accompanying H-2A certification applications, state agencies overseeing intra and interstate job clearance systems may accept a job order into the clearance system only if "[t]he wages and working conditions offered [on the job order] are not less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment[.]" 20 C.F.R. § 653.501(d)(4), (e)(4/1/90). Thus, it is not only when

temporary foreign workers are sought that prevailing wage surveys must be performed.

25. See Philip L. Martin, *Harvest of Confusion: Migrant Workers in U.S. Agriculture* (Westview Press: San Francisco, 1988), 38. Such under-reporting of hours, of course, also exaggerates the piece rate actually being paid.

26. To address the labor shortages experienced during World War II, for example, the War Manpower Division of the U.S. Department of Agriculture was given authority to import foreign workers, mostly from Mexico and the British West Indies. See Semler, *supra* note 6, at 190; W. Rassmussen, "A History of the Emergency Farm Labor Supply Program 1943-47," U.S.D.A. Monograph No. 13 (1951).

grams. The first, Public Law 78 passed in 1951, provided the formal legal foundation for the Bracero Program, under which as many as 500,000 Mexican workers were admitted to the United States each year, on a seasonal basis, to harvest fruit and vegetable crops.²⁷ The second, the Immigration and Nationality Act of 1952, created the legal foundation for the development of the H-2 program.²⁸ From their inception, both the Bracero and H-2 programs required that reasonable efforts be made to attract and secure U.S. workers, who would receive hiring preference over foreign workers, and that the employment of foreign workers would only be permitted if the wages and working conditions of U.S. workers would not be adversely affected.²⁹

Until 1964 the H-2 program, through which roughly 7,000 to 14,000 temporary West Indies, Bahamian and Canadian workers were imported annually, paled in comparison to the massive scope of the Bracero program, which oversaw the importation of as many as 500,000 Mexican farm laborers each year. The Bracero Program, however, came under widespread criticism for the severe exploitation of the Mexicans working under its auspices; consequently Congress, rather than renewing the program's enabling legislation, allowed it to expire in 1964.³⁰ It was at this point that the H-2 program, now the only vehicle for hiring foreign contract workers, began to develop in earnest.

The abolition of the Bracero Program and the ensuing policy battles that shaped the H-2 Program suggest an "original intent" to create a regulatory framework whose focus would be to safeguard the interests of U.S. farmworkers. Certainly, the INA H-2 provision as a whole recognized—indeed catered to—growers' interests in an adequate (and cheap) work force. However, having enabled growers to hire foreign workers, the regulatory apparatus that DOL developed

was designed to protect U.S. farmworkers from the type of abuse and adverse affect the Bracero Program had engendered and which any employment of exploitable foreign workers threatened.

B. CONGRESSIONAL DIRECTION AND THE ESTABLISHMENT OF THE REGULATORY FRAMEWORK

Following the INA's passage in 1952 and the Bracero Program's termination in 1964, Congress did little to clarify its broad, relatively vague, policy directive that temporary foreign workers be admitted only "if unemployed persons capable of performing such service or labor cannot be found in this country." The House Committee Report accompanying the 1952 bill emphasized that the restriction was designed to insure that foreign workers be admitted only to "alleviat[e] labor shortages" and only under conditions providing "strong safeguards for American labor." Following the INA's passage, the only very clear signal emitted by Congress was its decision to discontinue the widely-criticized Bracero Program.

In the early 1950s, the Department of Labor began to develop its policy on adverse effect and the standards to be applied, pursuant to its responsibilities under both Public Law 78 and the INA. In 1951, DOL officially incorporated the "adverse effect" terminology into its regulatory code. In 1956, and again in 1958, the Bureau of Employment Security issued an Employment Service Program Letter stating that DOL would find adverse effect where growers who employed Mexicans paid lower wages than those who did not. A 1960 Program Letter announced a policy and procedure for taking corrective action when wage surveys revealed wage differentials between user and non-user growers. In addition, in 1958, DOL established an absolute minimum 50¢ per hour wage for Mexican workers, and in the spring of 1962, it established statewide minimum rates.³¹

27. The Bracero Program began as a series of executive agreements between the United States and Mexican governments in response to the labor shortages experienced by U.S. growers during WWII; the first such agreement was concluded in July 1942. Similar to the temporary foreign worker programs of future years, the agreements provided that Mexican workers would not be used if U.S. workers were available and that their wages were to be at least as high as those prevailing in the area of intended employment. The Bracero Program continued through these informal bilateral agreements until 1951, when Congress passed Public Law 78, formalizing the procedure and the international agreements through which U.S. growers would continue to hire Mexican Braceros. Galarza, *Merchants of Labor: The Mexican Bracero Story*, 41-78 (1964).

The purpose of the law "was to assist 'in such production of agricultural commodities and products as the Secretary of Agriculture deems necessary, by supplying agricultural workers from . . . Mexico'" and it permitted foreign labor contracting "only on certification by the Secretary [of Labor] that domestic workers were not available, that their wages and working conditions would not be adversely affected by alien contract workers, and that employers had made reasonable efforts to attract domestic laborers." *Id.* at 72-73 (citations omitted). Following Public Law 78's enactment, the U.S. and Mexico established a Migrant Labor Agreement, updated periodically, which contained the minimum wages, conditions, and other employment guarantees required of Bracero employers.

Merchants of Labor provides an excellent account of the Bracero Program in general.

28. 8 U.S.C. § 101(a)(15)(H)(ii)(1952).

29. In the case of the Bracero Program, these criteria came directly from the statute, see *supra* note 27. In the case of the H-2 program they drew clear support from the INA. Section 101(a)(15)(H)(ii) of the INA authorized the admission of temporary foreign workers if qualified unemployed U.S. workers "cannot be found," and the House Report for this provision explained that foreign workers should be admitted only to "alleviat[e] labor shortages" under terms providing "strong safeguards for American labor." H.R. 1365, 82nd Cong., 2d Sess. 44, 50, *reprinted in* 2 U.S. Code Cong. & Ad. News 1653, 1698, 1705 (1951). But the specific H-2 standards were adopted through policy and regulatory statements, discussed immediately below.

On the history of the H-2 and Bracero programs generally, see *The West Indies (BWI) Temporary Alien Labor Program: 1943-1977*, Subcommittee on Immigration, Committee on the Judiciary, U.S. Senate, 95th Congress, 2d Session (U.S. Government Printing Office, 1978) (hereinafter, "*BWI Report*"); Semler, *supra* note 6; Rassmussen, *supra* note 26; R. Craig, *The Bracero Program* (1971), as cited in *H-2A Temporary Foreign Worker Program Litigation Manual*, *supra* note 9, at 10-12.

30. For a detailed description of the abuses of the Bracero workers, see Galarza, *Merchants of Labor* (1964).

31. Howard N. Dellon, "Foreign Agricultural Workers and the

Following the expiration of Public Law 78 in 1964, growers lobbied vigorously to maintain the Bracero Program, in all but name, through an immediate, rapid expansion of the H-2 program. Secretary of Labor Willard Wirtz, however, opposed the expansion, arguing that Congress, having terminated the Bracero program for the abuse rampant under its auspices, could not have intended that it be reincarnated under another statutory guise. Furthermore, Wirtz concluded, its decision not to renew the legislation indicated Congress' desire not only to terminate the large-scale importation of Mexican contract workers, but to reduce the country's dependence on all imported contract labor.³²

DOL had issued specific adverse effect wage determinations relatively infrequently in the early years of the Temporary Foreign Worker program. In general, the Department of Labor required only that growers pay temporary foreign workers the wage rate for the crop activity prevailing in the area. Adverse effect wage determinations, where either Bracero or H-2 workers were employed, had been made sporadically, on a crop-by-crop basis, whenever DOL had found (1) that Braceros had so infiltrated a crop that it was impossible to determine a prevailing domestic wage or (2) that there had been adverse effect. In 1962 this began to change, when Secretary Wirtz set statewide AEWRs for 24 states.³³ In December 1964, following the termination of the Bracero Program, DOL promulgated new regulations which imposed significantly higher minimum wage levels on employers seeking to hire foreign workers and institutionalized the statewide adverse effect wage as a pillar of DOL's regulatory policy.³⁴

In addition to strengthening the adverse effect determinations, the 1964 regulations codified several other requirements which were to provide the basic framework of the H-2 program for the next twenty years: Growers would be required (1) to exert reasonable efforts to recruit domestic workers throughout the contract period for which H-2 workers were sought; (2) to provide family housing "where feasible and necessary;" and (3) to provide reasonable round trip transportation costs between the place of recruitment and employment.³⁵

Wirtz did enjoy the Congressional support he asserted, although it was not as pervasive as he seemed to contend. Following the promulgation of the 1964 regulations, agricultural growers had lobbied for an amend-

ment to the INA which would transfer DOL's certification responsibility to the Secretary of Agriculture. Growers and their Congressional allies not only perceived the Secretary of Agriculture to be more sympathetic to their interests and more likely to approve their certification requests, but they also argued that he was in a better position to gauge and evaluate their needs.³⁶

Senate debate on the amendment focused largely on the question of whether or not Wirtz's program to minimize, if not eliminate, the employment of foreign agricultural labor accurately reflected the will of Congress. Led by Florida Senator Spessard Holland, the growers argued that Wirtz had "consistently misconstrued Congressional intent" in attempting to minimize the employment of foreign workers. Opponents of the amendment countered that the growers were trying to reverse Congress' decision to terminate the Bracero Program.³⁷ The amendment lost in the Senate—but only on the tie-breaking vote of Vice President Hubert Humphrey—providing "clear, although exceedingly narrow" Congressional support for Wirtz's policies.³⁸

In addition to the amendment proposing to transfer responsibility of the certification determinations to the Department of Agriculture, two other amendments to the INA were before Congress in 1965. Together, these amendments would have terminated the authorization provided by the INA to import seasonal foreign labor, thereby killing all legally-sanctioned contract labor programs. This proposal was defeated, indicating that Congress was not prepared to eliminate all foreign contract labor immediately.³⁹

But beyond rejecting all three amendments, Congress provided little guidance for DOL to follow in developing and administering the H-2 program. Congress did not provide any clear directives by way of specific statutory language or legislative history in 1952, and it did little to alleviate that deficiency over the years. Besides the Senate debate just described, the closest Congress seems to have come to articulating a policy directive for the program was in the House Judiciary Committee Report accompanying the 1965 amendments. That report elusively stated:

The committee has given much thought to the practice of importing foreign labor to work in agricultural endeavors. Inasmuch as the [Bracero

Prevention of Adverse Effect," 17 Labor Law Journal 739, 740-42 (December 1966).

32. See 29 Fed. Reg. 19101 (12/30/64) (Expiration of Public Law indicated "a Congressional intent to end reliance on Mexican Braceros for agricultural work in the United States.") See also *BWJ Report*, *supra* note 29, at 22-24.

Wirtz also cited President Kennedy to support his interpretation of DOL's policy mandate. Kennedy, recognizing the "clear and cumulative" adverse effect the Bracero program had had "on the wages and employment conditions of domestic workers," had agreed in 1961 to a three-year extension of the Bracero Program only "with the assurance that the Secretary of Labor will by every means at his disposal, use the authority vested in him . . . to prescribe the standards and make the determinations essential for the protection of the wages and working conditions of domestic agri-

cultural workers." U.S. Department of Labor, *Farm Labor Developments* (August 1966), p. 21; Dellon, 17 Labor Law Journal at 744.

33. *BWJ Report* at 21.

34. 29 Fed. Reg. at 19102 (12/30/64).

35. *Id.* at 19101-19102 (12/30/64).

36. *Temporary Worker Programs: Background and Issues*, Select Commission on Immigration and Refugee Policy, United States Senate, Committee on the Judiciary, U.S. Senate, Stock No. 052-05222-8 (U.S. Government Printing Office: Feb. 1980), p. 67 (Hereinafter, "*Temporary Worker Programs*").

37. 111 Cong. Rec. 23,512 (Remarks of Senator Holland, for the amendment), 23,515 (Senator Williams, opposed), 23,527-528 (Senator Bass, opposed) (1965), discussed in Semler at 196.

38. Semler, *supra* note 6, at 195-96.

39. *Id.* at 196.

Program] . . . has not been extended, it is the firm position of the committee that the provisions of the Immigration and Nationality Act, pertaining to temporary admission of laborers, shall not be abused. . .

... Likewise, the committee states that the exercise of discretion by the Attorney General in the temporary labor field will be scrutinized thoroughly.

The bill makes specific provision that *skilled or unskilled labor of a temporary or seasonal nature is not entitled to any preference.* . . .⁴⁰

Notably, the report made no mention of the truly controversial actor at the center of the debates, the Secretary of Labor, nor commented on his actions. In other words, the House Report gave virtually no helpful guidance at all. The Senate Report, even less instructive, noted only that:

The bill specifically provides that skilled or unskilled labor of a temporary or seasonal nature is not to be entitled to any preference under the selection system for the allocation of immigrant visas.⁴¹

In short, Congress did not provide clear policy guidelines in 1952, 1965, or in the years which followed, and the absence of any discernible directive from Congress during the vigorous debate that took place in the mid-1960s is notable. Thus, it was left to the Department of Labor to develop and refine the contours of the H-2 program, and to articulate in more detail the policy embodied by it.

C. THE DEPARTMENT OF LABOR'S INTERPRETATION OF THE H-2 PROGRAM

The Secretary of Labor had articulated a strong, clear policy direction in 1964, and developments over the next several years indicated that he intended to stay his course.⁴² Regulations promulgated in March 1967 (which neither followed nor sparked any Congressional action) enhanced the recruitment provisions, requiring an employer seeking H-2 certification to submit "a de-

tailed report of labor availability [and] recruitment efforts undertaken" and expanding the scope of the "reasonable efforts" required to recruit domestic workers.⁴³

The March 1967 regulations contained several other new provisions designed to strengthen the protection afforded farmworkers, and to diminish the benefits to growers of hiring H-2 workers: (1) H-2 employers would have to offer foreign workers, as well as domestic workers, the minimum wages and working conditions specified in the regulations;⁴⁴ (2) Growers would have to design piece rates to produce hourly earnings at least equivalent to the adverse effect rate established for the relevant state. (This represented an important protection for workers paid by the piece, who constituted the vast majority of seasonal farm laborers.); (3) Where workers were not covered by the state's workers compensation system, H-2 growers would have to provide alternative insurance for injuries and diseases arising out of and in the course of employment; (4) Employers would have to provide all tools, supplies and equipment needed to perform the job; (5) Permissible deductions from workers' wages were explicitly specified, and a cap placed on the amount deductible each week; (6) A ceiling was placed on meal charges; (7) Employers would be required to guarantee each worker employment for three-fourths of the working days offered in the contract; and (8) Employers would be required to keep "accurate and adequate" wage records.⁴⁵

The adjustments made to adverse effect wage rates provide a murky picture of the extent of DOL's determination, or perhaps its political ability, to persistently strengthen restrictive measures unpopular with growers. Until 1968, DOL periodically had calculated and recalculated adverse effect wage rates for states employing H-2 workers using various ad-hoc methodologies. By far the most progressive method, from farmworkers' perspective, was that selected by Wirtz in December 1964: to set the 1965 rates, which were calculated by increasing a given state's 1950 average agricultural wage by the 1950-1962 increase in manufacturing wages. New adverse effect rates were determined in 1967 by adjusting a state's 1965 figure by the 1963-1965 increase in the average national agricultural wage.⁴⁶

40. H. Rept. 745, 89th Cong., 1st Sess., 1965, 14-15 (emphasis added).

41. S. Rept. 748, 89th Cong., 1st Sess., 1965, 16.

42. The course Secretary Wirtz had laid out in the 1964 regulations survived its first legal challenge when, in the spring of 1965, Florida celery growers filed suit in federal district court, challenging DOL's regulatory authority. See *infra* Section III.

43. Such efforts were to include full use of workers who commute daily between their home and the place of employment, use of the interstate clearance system, full participation in special youth recruitment programs, and other measures which "which have produced or are expected to produce effective results." 32 Fed. Reg. 4570 (3/28/67).

44. The 1964 regulations specifically required that the various wage and working conditions guarantees be made to domestic workers. That foreign workers receive the same guarantees was indirectly implied through the adverse effect prohibition. The 1967 regulation made the requirement vis-a-vis foreign workers explicit.

45. 32 Fed. Reg. 4569-71 (3/28/67). The record-keeping time frame was increased to three years in June 1970. 35 Fed. Reg. 9016, 9017 (6/11/70).

DOL did make two modifications in the March 1967 regulations which, arguably, lowered the minimum housing and transportation guarantees required of all H-2 growers: (1) H-2 growers would continue to be required to provide free housing to workers, but *family* housing would be required where it was the prevailing practice in the area of intended employment to do so—as opposed to where it was "feasible and necessary," as the 1964 regulations had required; (2) Employers would have to continue to provide or pay for transportation between the place of recruitment and employment, but only for those workers who completed fifty percent of the season. 32 Fed. Reg. at 4570-71 (3/28/67). But the overwhelming thrust of the regulatory requirements was to strengthen the protection extended to farmworkers and to minimize the windfall growers received in employing foreign workers.

46. It seems likely that DOL's purpose in indexing the 1967 rates to the marginal change in the *national* farm wage was to dissi-

Beginning in 1968, Secretary Wirtz made a significant change in the methodology used to set the AEWR. First, he moved to adjust the adverse effect rates annually. Second, he invited comments on "what criteria or self-executing formula could be instituted" to set the subsequent rates.⁴⁷ The methodology adopted indexed each state's AEWR to the growth in the state's average agricultural wage for field and livestock workers in the previous two years.⁴⁸ DOL's institutionalization of an automatic, annual process for updating the adverse effect rates clearly enhanced the protections on the books for farmworkers, and reflected both an administrative recognition of chronic wage depression as a problem as well as an institutional commitment to remedial action. However, the methodological choice selected in 1968 was not nearly as strong, from farmworkers' perspective, as those used in 1965 or 1967, suggesting that there were limits beyond which DOL policymakers would not—or could not—go in running the program.

Wirtz had only barely succeeded in gutting the Bracero program and in defeating the growers' challenge to his jurisdiction over the H-2 program. He had continued to strengthen the adverse effect wage and other regulatory requirements to protect farmworkers and to make hiring H-2 workers less attractive. And he did terminate many existing uses of H-2 workers. For

example, after finding either adverse effect or domestic-worker availability, he refused to certify West Indian H-2s in the Midwest, Japanese workers in California, Canadian potatoes workers, shade tobacco pickers in New England, as well as the routine use of foreign vegetable, strawberry and citrus workers in Florida.⁴⁹ Indeed, during the first few years of the post-Bracero regime, employment of foreign contract workers dropped dramatically. Whereas 177,736 Mexicans had been imported under the Bracero program in 1964, that number was limited to 20,284 (admitted as H-2s) in 1965, and by 1968 had been reduced to zero. Meanwhile, the number of foreign contract workers admitted through the H-2 program fell from 22,286 in 1964 to 13,323 (the decade's low) in 1968.⁵⁰ Since growers' applications for H-2 workers had not declined, this dramatic reduction must be attributable at least in part to DOL's policy decision to strictly adhere to Wirtz's interpretation of the agency's statutory mandate as well as to strictly apply the regulations it had promulgated pursuant to it.⁵¹

By 1968, then, the basic apparatus to regulate the importation of foreign agricultural contract workers had been constructed. For almost ten years thereafter, DOL proposed no major changes in either the AEWR or other provisions of the regulations.⁵² The tenure of two Republican Administrations between 1968 and 1977

pate the wage depression in any particular state's farm labor market.

47. 33 Fed. Reg. 700 (1/19/68). Again, Wirtz's actions neither followed, nor were themselves followed by, Congressional action on the H-2 Program.

48. The method adopted was not described in the Federal Register until June 1976 (although it was adopted in 1968). See 41 Fed. Reg. 25017, 25018 (6/22/76).

The methodology is as follows: Assume $AEWR_2$ and $AEWR_3$ are the adverse rates in years 2 and 3, respectively, W is the percent increase in the agricultural wage from year 1 to year 2. $AEWR_3 = AEWR_2 \times W$. For example, the 1968 AEWRs were set by increasing the 1967 AEWR by the change in the average agricultural wage in each state from 1966 to 1967.

49. Semler at n. 50, 196.

50. Department of Labor, United States Employment Service, Division of Foreign Labor Certifications, 1989 *Annual Report: Labor Certifications for Temporary Foreign Agricultural Workers (H-2A Program)*, 17 (June 1990) (Hereinafter 1989 *Annual Labor Certification Report*).

The number of workers admitted through the H-2 program initially increased to 35,871 in 1965, from which height it fell to 13,323 in 1968, rose to 17,474 in 1970, and fell back to 12,526 in 1972. The initial and substantial rise in H-2 admissions in 1965 is almost certainly a result of the necessity to phase down (rather than immediately terminate) the Bracero growers' reliance on Mexican labor. If the number of Mexican admissions is subtracted from the total number of H-2 admissions, total H-2 admissions fell from 22,286 in 1964 to 15,587 in 1965. *Id.*

51. One political price of Wirtz's persistence in strengthening the regulations and scaling back utilization of the H-2 program had been leaving the two largest H-2 users—Florida sugar and East Coast apple growers—alone. It would not be surprising if Wirtz's persistence in this regard also had depleted his political capital to the extent that he was unable to adopt a more stringent adverse effect wage formula in 1968. Semler, *supra* note 6, at 196-97.

52. Regulations updating AEWRs and other charges (e.g. for meals and transportation) were published periodically. See, e.g., 32 Fed. Reg. 4569-71 (March 1967), 34 Fed. Reg. 17770 (11/4/

69), 35 Fed. Reg. 12393-4 (8/4/70), 36 Fed. Reg. 13140 (7/15/71), 37 Fed. Reg. 18725 (9/15/72), 38 Fed. Reg. 21920 (8/14/73), 39 Fed. Reg. 29918 (8/19/74).

In addition, there were two developments regarding the AEWRs during this time, but neither represented a substantive change or signaled a change in policy. First, until November 1969, DOL had published AEWRs only for those states where H-2s were employed. In 1969 Secretary of Labor George Shultz published AEWRs for each of the 48 contiguous states. 34 Fed. Reg. 17770 (11/4/69). The noteworthy point is that, in setting the AEWRs for the new states, DOL followed the same methodological path that had been followed in arriving at the AEWRs for the "old" states (i.e. those already employing H-2 workers)—i.e., DOL began with the higher of the state's and the nationwide average farm wage for 1950, increased that figure first by the 1950-1962 growth in the manufacturing wage, second by the growth in the national average agricultural wage from 1963-1965, and finally, following the standard methodology adopted in 1968, indexed it to the increase in the average state agricultural wage in the two previous years. Thus, the enhancement over the average agricultural wage yielded in most user states as a result of this method was applied to all states—not just those to those then employing H-2 workers.

Second, in 1974 USDA began to phase out surveying and calculating annual state average hourly farm wage rates, to which states' AEWRs were pegged. Instead, USDA began to survey and calculate quarterly rates, categorized by method of pay (per hour, by the piece, and cash only) and type of work performed (field and livestock, packinghouse, machine operators, etc.) This forced DOL to select a different data base to which AEWRs could be indexed in future years. DOL selected movements in the average national farm wage for Field and Livestock workers, as calculated by the USDA, which, it asserted, was the USDA category which most closely resembled the work for which growers sought H-2 workers. Whether or not field and livestock workers is the most appropriate USDA category is a disputed issue—one which has gained particular importance in recent years and is discussed below. But, because DOL only used the relative changes in the USDA-determined wage in adjusting the AEWRs from year to year—the *absolute* level of the average earnings measured by

may explain the absence of regulatory activity during these years or perhaps, once the details of the regulatory program had been hammered out to a significant degree, time was needed before a meaningful evaluation could be made. Or perhaps the H-2 revisions proposed in 1977 were part of the general overhaul of the U.S. Employment Service executed in response to a class action suit brought on behalf of migrant farmworkers, which had revealed a wide range of discriminatory and unlawful practices on the part of the U.S. Employment Service in administering farm labor services in general.⁵³ In any case, no major review of the regulations occurred until the end of the Ford Administration, when, in January 1977, just as the Carter Administration was assuming office, the Department of Labor proposed substantial revisions to the H-2 code. This development will be discussed after examining how federal courts handled cases brought under the H-2 regulations in the 1970s.

III. THE JUDICIAL RESPONSE IN THE 1970s

Decisions of the federal courts offer one of the few "official," if not scientific, records of the Department of Labor's administration of the H-2A program. The judicial record indicates that growers did not always have an easy time securing DOL's approval of foreign worker certification. The court decisions of the 1970s also provide some insight into the framing of the legal issues that have crystallized during the Reagan-Bush years.

The U.S. Department of Labor's Employment Service has never been noted for its effective or enthusiastic administration of farmworker services in general.⁵⁴ Nonetheless, during the 1970s, DOL seems to have administered the H-2 certification process fairly compe-

tently, in a manner consistent with the policy established early on by Secretary Wirtz. Certainly granting H-2 certification requests was not an automatic affair, although hard data on the absolute or relative numbers of denials and approvals is not readily available.⁵⁵ That the total number of jobs certified declined steadily during the 1970s (from 21,893 in 1971 to a low of 15,231 in 1976 when the number leveled off for a few years) provides evidence of this considered approach. The 1980s witnessed a reversal of this trend, with the number of H-2 jobs certified rising steadily throughout the decade—reaching a high of 26,607 in 1989.⁵⁶ The shared perception of farmworker advocates seems to be that, for the most part, DOL administered the program during the 1970s with the objective of keeping the number of foreign admissions to a minimum.⁵⁷

The federal courts gave the Department of Labor's administration of the H-2 program a lukewarm reception at best. While the courts upheld DOL's approval of certification requests in every reported challenge filed by farmworkers in the 1970s,⁵⁸ and while DOL had received some initial judicial support against challenges to its certification authority, the late '70s witnessed the beginning of a sharp decline in the deference that courts were willing to give to DOL's certification decisions.

DOL won a somewhat backhand victory against growers' first legal challenge to its regulatory authority in the spring of 1965. Pursuant to the new December 1964 regulations, DOL had granted Florida celery growers' initial certification application for H-2 workers. But when the growers requested an extension of the certification dates, DOL refused. The Court denied the growers' appeal on the grounds that the Attorney General, not the Secretary of Labor, had the authority to grant or deny the workers' admission.⁵⁹

USDA was irrelevant at this point—and the relative movement in the old versus new USDA wage rates were comparable, this change did not substantively affect the AEWs calculated by DOL. 41 Fed. Reg. 25017, 25018 (6/22/76) (proposed rule); 41 Fed. Reg. 35169 (8/20/76) (final rule).

Some farmworker advocates, it also should be noted, argued that the new USDA survey method resulted in lower average hourly earnings for most states. Again, because DOL utilized only the relative movement in the USDA wage, DOL's decision to index AEWs to changes in the average national wage for field and livestock workers did not result in lowering the absolute level of the AEWs, although it did result in a greater disparity between the AEW and the average wage as reported by USDA, an issue which also gained importance in future years, when the Reagan and Bush Administrations began to overhaul the H-2 program, and is also addressed later in this paper.

53. *NAACP v. Brennan*, discussed *supra* at note 12. On the implementation of the consent decree pursuant to the NAACP litigation, see Altman, "Implementing A Civil Rights Injunction: A Case Study of NAACP v. Brennan," 78 *Colum. L. Rev.* 739 (1978).

54. See Goldfarb, *supra* at note 12, at 60-113; *NAACP v. Brennan*, *supra* at note 12.

55. Freedom of Information Act Requests filed with DOL, which would produce thousands of pages of documents (if the documents have been maintained) at substantial cost, would be necessary and have not been done. It also is likely that the records no longer exist.

56. 1989 *Annual Labor Certification Report*, *supra* note 50, at 1.

57. See, e.g., Migrant Legal Action Program and Farmworker Justice Fund, *H-2A Temporary Foreign Worker Program Litigation Man-*

ual (Washington, DC: 1989), 19 ("The Carter Administration also went to great lengths to recruit U.S. workers for H-2 jobs and limit the use of the program.") On the perceived contrast between the Carter and Reagan years, see *supra* Section I.B.

58. See *Hernandez Flecha v. Quiros*, 567 F.2d 1154 (1st Cir. 1977) and *Galan v. Dunlop*, 411 F.Supp. 268 (D.D.C. 1975) (Upholding Secretary of Labor's certification that Puerto Rican farmworkers were not available for work within the meaning of the statute); *Williams v. Usery*, 531 F.2d 305 (5th Cir. 1976) (Upholding Secretary of Labor's refusal to determine a prevailing piece rate for sugar cane cutting and to require the employer to file his request for workers in advance of the date of need, thereby certifying a shortage of domestic workers without recruitment through the employment service being activated); *United Farmworkers v. Kleindeinst*, No. 72-1439 (S.D.Fla. 2/26/73), as cited in Semler at n. 19 (UFW union unsuccessfully challenged DOL's decision to certify Florida sugarcane cutters.)

The only case farmworkers appear to have won involved a suit filed in 1978 by the Secretary of Labor for the Commonwealth of Puerto Rico for a declaration that the actions of east coast apple growers violated the legal employment preference granted to domestic over foreign workers. The case the court heard, however, was not on the merits, but on whether Puerto Rico's Secretary had standing to sue. The Supreme Court held that he did. *Alfred L. Snapp & Son v. Puerto Rico*, 102 S.Ct. 3260 (1982), *aff'g*, 632 F.2d 365 (4th Cir. 1980), *rev'g*, 469 F.Supp. 928 (W.D.Va. 1979).

59. *Chase Glades Farms v. Wirtz*, Civil No. 65-86 (M.D. Fla., filed 5/5/65), as cited in *Temporary Worker Programs*, *supra* at n. 36, at 66-67.

Judicial affirmation of DOL's regulatory authority continued when, in 1974, the First Circuit reversed a New Hampshire District Court's decision ordering DOL to certify the H-2 application of Elton Orchards, one of a number of New England apple orchards which had submitted certification requests.⁶⁰ While granting certification to the other New England orchards, the Department of Labor had refused to certify Elton's request based on the availability of a group of Louisiana workers who had been referred to Elton through the interstate clearance system. Elton Orchards complained that the Louisiana workers were unskilled, and thought they should be apportioned between all the growers; DOL's refusal to deny only Elton Orchard's certification application was "arbitrary, capricious, invidiously discriminatory, and a deprivation of property without due process."⁶¹ The District Court agreed, concluding that the orchard was "entitled to its fair proportion of the foreign pickers," and ordered DOL to make an "aliquot proportion of the foreign pickers" available to it.⁶²

The Court of Appeals, however, ruled that the Department's actions were subject only to "rational basis" review and overturned the lower court's decision. The First Circuit acknowledged that Elton Orchards' business interest in hiring the experienced foreign crews may be significant, but its job order revealed no skill prerequisites, and the court found that Elton's preference for foreign workers "collides with the mandate of Congressional policy" and is therefore overridden by it:

To recognize a legal right to use alien workers upon a showing of business justification would be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed wherever possible.⁶³

This position was approved, verbatim, by the Fifth Circuit in *Florida Sugar Cane League, Inc. v. User*,⁶⁴ a case in which the Florida Sugar Cane League had filed suit challenging the AEWR set by DOL for Florida in 1976. Until 1974, the legal wage required of Florida sugar cane growers, who had been hiring roughly 9,000 to 10,000 H-2 workers from the West Indies for the previous 30 years, had been established by the Secretary of Agriculture pursuant to the Sugar Act. Since sugar cane growers were the only Florida employers at the time hiring H-2s and since DOL only published AEWRs for H-2

user states, DOL did not make annual AEWR determinations for Florida. However, the Sugar Act expired in 1974, leaving DOL with the responsibility to set an adverse effect wage rate applicable to the sugar growers. For the 1975-76 season (the first following the Sugar Act's expiration), DOL set the Florida AEWR at the level established by the Secretary of Agriculture under the Sugar Act for 1974. This rate significantly exceeded the rate DOL would have arrived at had it employed the USDA indexing formula used to calculate the AEWR in every other user state. The growers demanded that the USDA-indexing approach be used, arguing that to utilize another method was an abuse of discretion, beyond the Department's authority. The Fifth Circuit disagreed, finding the Secretary well within the bounds of his regulatory authority.⁶⁵

For the Department of Labor, *Elton Orchards* and *Florida Sugar Cane League* represented significant victories in bolstering its regulatory authority and its ability to limit expansion of the H-2 program, even in the face of compelling business interests. For domestic farmworkers, *Elton Orchards* represented strong judicial endorsement both of DOL's interpretation of its statutory mandate to give their wages, working conditions, and employment interests non-negotiable priority over growers' business interests and of its policy that the employment-preference and adverse-effect guarantees provided by the statute are absolute minimums, which neither DOL nor courts can waive, however desperate or compelling an employer's needs may seem.⁶⁶

Following *Elton Orchards* and *Florida Sugar Cane League*, however, judicial deference to DOL's administration of the H-2 program dropped. Michael Semler has argued that a number of courts showed "surprisingly little regard for the purpose of the H-2 program, DOL's labor market expertise, or even the normal limits of judicial review" in hearing such grower-initiated H-2 certification appeals.⁶⁷ Indeed, a few judges demonstrated remarkably open disdain for the agency.⁶⁸

At least three district courts overturned DOL decisions to deny certification to H-2 growers in the late 1970s. Two of these cases involved the question of whether or not H-2 growers would have to provide advanced transportation costs to domestic recruits.⁶⁹ In *Patterson Orchard v. Marshall* DOL had refused to approve Patterson's clearance order for interstate recruitment because it did not offer advanced transportation

60. *Elton Orchards, Inc. v. Brennen*, 508 F.2d 493 (1st Cir. 1974), rev'g Civil Action No. 74-276 (D.N.H. 1974).

61. *Id.* at 496.

62. *Elton Orchards*, Civil Action No. 74-276, at 5.

63. *Elton Orchards*, 508 F.2d at 500.

64. *Florida Sugar Cane League, Inc. v. User*, 531 F.2d 299 (5th Cir. 1976).

65. *Id.*

66. See also *Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 102 S.Ct. 3260, 3263, 73 L.Ed. 995 (1982) ("The obvious point of this somewhat complicated regulatory framework is to provide two assurances to United States workers. . . [that they] are given job preference over foreign workers. . . [and that] the working conditions of domestic employees are not to be adversely affected. . .") (emphasis added).

67. Semler, *supra* note 6, at 222.

68. A District Court judge in Colorado, for example, remarked that he had "already heard enough evidence . . . to know that what the regulations say and what the [DOL Secretary and Regional Administrator] claim the regulations say may be two entirely different matters." *Western Colorado Fruit Growers Ass'n v. Marshall*, 473 F.Supp. 693 (D. Colo. 1979).

69. This is a critical issue for migrant farmworkers, very few of whom are likely to have sufficient resources to pay their own transportation costs before receiving their first pay checks; farmworkers not attached to a crewleader (or wanting to leave the crewleader for any reason) have no other way of travelling to the next job.

costs. DOL determined that providing advanced transportation costs was the prevailing practice in Vermont, where the grower was located. Since Patterson had applied for H-2 certification, an interstate job clearance order offering at least the terms and conditions of employment prevailing in the region had to be circulated throughout the clearance system. Because the clearance order did not offer all such terms, DOL refused to accept it, thereby preventing Patterson's H-2 certification application from being processed. The Vermont district court found that DOL had abused its discretion "in rigidly interpreting the transportation provision with the harvest season rapidly approaching," and ordered DOL to accept Patterson's job clearance order.⁷⁰

In *Frederick County Fruit Growers' Association v. Marshall*, the second case involving the advance transportation issue, a number of apple growers' clearance orders had been rejected as not containing the minimum terms and conditions required of H-2 growers. The Virginia court found DOL's interpretation to be "inconsistent with the plain meaning of the regulation" and ordered that the job orders be accepted.⁷¹

A third case, in which the court reversed a certification denial, involved onion, melon, pepper, and cotton growers in Presidio Valley, Texas. These growers sought H-2 certification for the first time in 1977. Because they refused to offer domestic workers the minimum wage and housing required by the H-2 regulations, DOL did not certify that a shortage of U.S. labor existed. Nonetheless, INS, which had control of actually granting the visas, approved the growers' requests for temporary foreign workers. The Presidio Valley growers sought H-2 certification again in 1978. Again DOL found their offers deficient and refused to certify that a domestic labor shortage existed, and this time the INS denied the visas. The growers petitioned the district court, and received a preliminary injunction enjoining both DOL and INS from denying H-2 certification and visas.⁷² The agency's appeal was dismissed two years later as moot.⁷³

These cases show that DOL was certainly not controlled by growers' interests in its administration of the H-2 program.⁷⁴ Of course, these cases also do not reflect a consistently pro-farmworker H-2 operation, nor a uniformly anti-grower one, as the continued existence of 15,000 plus certifications annually attest. And, as Semler suggests, the cases do suggest an unusual judi-

cial disregard for the Department of Labor's sphere of discretion.

The cases also suggest the ease with which judges can identify and understand the seemingly urgent economic constraints of growers and the difficulty they have in recognizing the equally high interests of farmworkers at stake. The *Frederick County* court, for example, had emphasized the "irreparable harm" faced by the growers in the event DOL's denial of certification were not overturned.⁷⁵ Similarly, in *Patterson Orchard*, the District Court in Vermont placed its finding of an abuse of discretion in the context of the "rapidly approaching" harvest season and the injustice which would befall the growers given the late date of DOL's certification denial.⁷⁶

However, the financial impact of a labor shortage depends on a multitude of economic issues, and the problem with courts' automatic deference to the urgency and dire nature of growers' pleas is particularly problematic when, as is generally the case, "[r]ather than delving into these [economic] issues, the courts have accepted the employer's financial claims at face value."⁷⁷

In contrast to the ease with which judges seem to comprehend growers' pleas, the judiciary has been relatively unresponsive to the immediate and substantial harm caused farmworkers—loss of employment opportunities, depressed wages, and lowered working and living conditions—when H-2 certification denials are overturned.⁷⁸ The court seldom explicitly minimized, or indicated its indifference to, farmworkers' interests. Rather, farmworker interests are notably absent from many of the courts' decisions.⁷⁹

A relatively explicit example of one judge's perspective is found in the District Court opinion in *Alfred Snapp & Son*. In *Snapp*, the Commonwealth of Puerto Rico sought a declaration on behalf of 2,318 Puerto Rican workers that east coast apple growers were violating the Immigration and Nationality Act in recruiting and employing H-2 workers while rejecting Puerto Rican workers, who are considered domestic under the H-2 program. The issue presented to the court was whether the Commonwealth had standing to bring this challenge. Despite the denial of employment to over 2,000 potentially capable Puerto Rican workers, the court denied the Commonwealth standing to sue, finding that, "[i]n sheer numbers alone, it is clear that relatively few

70. *Patterson Orchard v. Marshall*, Civil Action No. 77-147, at 6 (D.Vt. 1977).

71. *Frederick Cty. Fruit Growers Ass'n v. Marshall*, 436 F.Supp. 218, 225 (W.D.Va. 1977).

72. *Presidio Valley Farmers' Ass'n v. Marshall*, No. EP-78-CA-95 (W.D. Tex. 5/26/78).

73. *Presidio Valley Farmers' Ass'n v. Marshall*, 617 F.2d 294 (5th Cir. 1980).

74. One additional case, which did not entail the court's decision on the growers' certification appeal but involved several counterclaims DOL had filed, also described a situation in which DOL refused to approve the job clearance orders of growers' applying for H-2 workers and to certify a labor shortage. *Western*

Colorado Fruit Growers Ass'n v. Marshall, 473 F.Supp. 693 (D. Colo. 1979).

75. *Frederick County*, 436 F.Supp. at 225.

76. *Patterson Orchard*, Civil Action No. 77-147, at 6. See also *Galan*, 411 F.Supp. at 271, 272 (citing the "immediate and irreparable injury" threatening growers and the "public interest" in avoiding lost crops and possible bankruptcy of growers); *Snapp & Son*, 469 F.Supp. at 929 (noting "the very real danger that certain . . . apples would overripen on the trees, thereby greatly diminishing their commercial value.")

77. Semler at 223.

78. *Id.*

79. See, e.g., *Frederick County*, *Patterson Orchard*, *Galan*, and *Hernandez Flecha*, *supra*.

residents of Puerto Rico were harmed directly.”⁸⁰

The courts’ lack of deference to DOL’s administration and enforcement efforts has been important in shaping the H-2 program. If the courts deferred to DOL’s market and regulatory expertise in administering the H-2 program, growers whose certification requests were denied would be forced to exert greater recruitment effort, offer the minimum terms DOL has required, and/or offer other improvements in wages and working conditions. Responsibility for the irreparable harm resulting from growers’ failure to obtain a sufficient work force would not fall on the Department of Labor but on the grower’s incompetence, poor business judgment, or simple inability to meet the competition. It is true that once the harvest season is underway, growers face a heavy time pressure to harvest their crops before they perish. But while growers may face unusual emergency situations in some years, as a general rule, there is nothing unexpected about the time pressures involved from year to year; moreover, most growers who employ H-2 workers do not do so to meet emergencies, but hire them every season. Many non-H-2 growers who do not employ H-2 workers face the same time and market pressures to obtain an adequate work force. This is simply one factor in the competitive market that growers face.

The Immigration and Nationality Act cannot be read to instruct, let alone to compel, the Department of Labor to save incompetent or uncompetitive growers; nor can IRCA be so read. Correspondingly, in the 1970s, DOL had interpreted its mandate to protect farmworkers from the depressive effects of importing foreign workers, not to protect growers from the market. Implicit in this position is the view that domestic farmworkers have little to gain where growers’ economic viability is saved by their ability to hire foreign workers; on the other hand, farmworkers do stand to benefit when a certification denial forces a grower to enhance recruitment efforts and/or improve working conditions to meet the minimum standards imposed by DOL before any foreign workers can be hired. In any event, throughout the 1960s and 1970s DOL did not consider its role to include protecting growers from the market or from errors in business judgment, such as in-

sufficient domestic recruitment efforts or failure to provide transportation advances.

A second important development rooted in the judicial decisions of the 1970s, which has persisted through the present, was the introduction of “balance” into the analytic framework used to evaluate H-2 certification determinations. Courts have relied on the concept of balance in decisions upholding DOL’s discretion and authority, as well as in those invalidating it.

Implicit in DOL’s policy in the 1960s and 1970s was the decision not to strike its own balance between the grower interests inherently acknowledged by the statute and the farmworker interests it affirmatively sought to protect. Some courts, however, took a different view of the balance struck by the statute and DOL’s role in enforcing it. In 1977 the Third Circuit suggested that the statutory purpose to “strike a balance between the two [competing] goals” of the regulatory program “to assure [employers] an adequate labor force on the one hand and to protect the jobs of citizens on the other” required DOL to weigh the former in its certification decisions.⁸¹ *Flecha Hernandez* affirmed this view, stating the purpose of the statute and regulations was “to provide a manageable scheme . . . that is fair to both sides.”⁸² Integral to this development, several courts have added the “public interest” in growers’ solvency and in preventing lost crops as a factor to be weighed in the balance sought. The District Court in *Frederick County* invoked a public consumer interest in the price of apples; the Court in *Galan* similarly raised the public interest in avoiding substantial crop loss and possible bankruptcy of the grower.⁸³

It is clear that some balance is inevitably struck, explicitly or implicitly, in DOL’s administration of the regulatory program. The courts are not wrong to point out that the statute does envision competing interests and finding a balance between them. However, DOL had understood this balance as forbidding the hiring of foreign workers when certain minimal standards were violated. In other words, DOL, through specific guidelines and criteria described in the H-2 regulations, placed an absolute “adverse effect” floor beneath farmworkers; below this floor, growers’ interests could not outweigh farmworkers’, no matter how devastating the market

80. *Snapp & Son*, 469 F.Supp. at 934. In holding that the Commonwealth of Puerto Rico did not have standing, the District Court applied a standard that “a state may bring suit to protect the public interest so long as that interest is not so vague and remote as to appear ethereal,” *id.* at 932, and noted that “the magnitude of the harm which is caused or threatened” must be considered. *Id.* at 933. To justify its standing, the Commonwealth had asserted “seriously high levels of unemployment” (18.5% of all Puerto Rican adults in the labor market, reaching 23% in rural areas, during the season at issue), lost tax revenues, and an interest in the proper application of federal laws mandating a preference for Puerto Rican over foreign workers, particularly in light of the high unemployment rate. *Id.* at 932. The District Court based its decision on the fact that the actual number of Puerto Rican workers affected by the growers’ actions was so small compared to the total Puerto Rican population of 2,712,033 as to render the harm suffered too small to justify granting standing to the Commonwealth. *Id.* at 934. It may be that the harm suffered by the

2,318 Puerto Rican workers not hired (as well as the potential harm to future workers who would be likely to suffer the same harm in subsequent years if the growers’ behavior was not stopped)—most critically their loss of employment—was insufficient to satisfy the standard for standing; but the Court *did not evaluate* the degree or relative significance of this harm. In contrast the Court of Appeals, to its credit, while “not pass[ing] on the merits” of the suit did recognize the “irreparable harm to future workers and to citizens in Puerto Rico” alleged and found it sufficient to grant standing. *Snapp*, 632 F.2d at 370, *aff’d*, 102 S.Ct. 3260.

81. *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977) (Invalidating Virgin Island statutes found to conflict with the Immigration and Nationality Act.)

82. *Flecha Hernandez*, 567 F.2d at 1156.

83. *Frederick County*, 436 F.Supp. at 225; *Galan v. Dunlop*, 411 F.Supp. at 272.

forces or compelling the business interests may have seemed. The courts in the aforementioned cases attempted to elevate the growers' interests and to preclude DOL from implementing its interpretation of the proper balance required.

IV. THE CARTER REVISIONS⁸⁴

A. BACKGROUND

In the late 1970s, the Department of Labor proposed new regulations for the H-2 program. The proposed revisions, which appeared in the Federal Register in January 1977, explained that "[i]n the long run, normal adjustments in wages and working conditions should bring sufficient United States workers to an occupation," and suggested a number of substantive revisions to the regulatory program. These revisions held out the possibility of reinvigorated administrative attempts to reduce the utilization of temporary foreign contract workers and to alleviate the H-2 program's deleterious impact on U.S. farmworkers. This promise, however, never materialized.

The changes proposed included the establishment of adverse effect *piece* rates; submission of recruitment plans designed to reduce repeat employer-applicants' dependence on foreign workers; denial of certification to any employer who had employed undocumented workers, violated an employment contract with any U.S. or foreign worker, or failed to comply with any applicable Federal, State or local employment-related laws during the previous year; mandatory hiring of domestic workers who became available through the first half of the H-2 contract period; free family housing; compensation for commuting time exceeding thirty minutes each way; an increase in the percentage of days for which employers must guarantee work; and offering terms and conditions of employment at least as favorable as those offered foreign workers in both the upcoming and previous seasons.⁸⁵

The final rule, published in March 1978, affirmed the policy tenor of the 1977 proposal. In the "Background" section to the final promulgation, for example, DOL explained that the employer bears the burden of proving "that the wages and/or working conditions . . .

offered will not adversely affect the wages and working conditions of similarly employed U.S. workers" and that the Department would deny certification whenever the employer had not met that burden.⁸⁶ And while the final rule declined to establish adverse effect *piece* rates, DOL did adopt an alternative piece rate provision requiring that piece rates keep pace with increases in the hourly adverse effect wage rate.⁸⁷ This provided critical protection against H-2 growers' circumventing AEWR increases through escalating productivity requirements in lieu of augmenting piece rates.

However, DOL did not adopt many of the other specific provisions proposed in 1977. In fact, DOL retained only two of the modifications: H-2 employers would have to hire domestic workers through the first half of the contract period and would have to offer domestic workers terms and conditions of employment at least as favorable as those offered to foreign workers in the previous and the upcoming seasons. Prior regulations only required parity between the terms and conditions of employment offered during the upcoming season and were silent on the question of how long H-2 growers had to keep positions open for domestic workers. It seems probable that most growers ceased hiring domestic workers as soon as certification was granted, or, at the latest, when the foreign workers had arrived.

In perhaps the most significant setback for farmworkers, DOL overhauled, and weakened, the affirmative recruitment provisions. Henceforth, the only specific independent effort required of H-2 growers would be to place two advertisements in local newspapers of general circulation. The primary H-2 recruitment effort required of growers would be to cooperate with the employment service system. Additionally, the new regulations required that employers make the "same kind and degree of efforts to secure U.S. workers" as to secure foreign workers and perform "other specific recruitment activities specified" by the Regional Administrator.⁸⁸ These provisions, it turned out, proved to have little impact on actual recruitment effort undertaken by H-2 growers.

As noted above, the national Employment Service system was under harsh fire from farmworker representatives and the federal court in *NAACP v. Brennan*.⁸⁹ And

84. The period I have labelled the "Carter Revisions" actually began with the end of the Ford Administration. This is basically for convenience, since much of the debate around these proposals and the changes ultimately adopted occurred during Carter's Administration. There is no indication that DOL's position on its H-2 regulatory role varied significantly between the Johnson, Nixon, Ford, and Carter Administrations; indeed, its enforcement activity throughout the 1970s suggests that the Department maintained essentially the same philosophy. Grouping the proposed changes initiated during the Ford Administration thus poses no analytic difficulties for the purposes of this paper.

85. 42 Fed. Reg. 4670-4673 (1/25/77).

86. In support of this position, the Department of Labor pointed to § 291 of the INA, which places the burden of proof on the person requesting a visa or other entry document that s/he is eligible to receive such visa or document. 43 Fed. Reg. 10306 (3/10/78). DOL's discussion of the burden of proof appeared not in the new regulation itself, but as part of the "Supplementary Information" published to explain the foundation and purpose of the

H-2 Program and the regulatory changes being adopted. As such, it is not part of DOL's "official" regulatory policy, but is more akin to a committee report accompanying a newly-enacted piece of legislation.

87. 43 Fed. Reg. at 10317 (§ 655.207(c)).

88. *Id.* at 10316.

89. *Supra* note 12. A 1971 farmworker complaint filed with the Department of Labor argued that the Farm Labor Service of DOL's U.S. Employment Service (replaced later by the Rural Manpower Administration), "though created to assist farmworkers in finding jobs . . . had become grower dominated, grower oriented, grower staffed, and totally perverted." Goldfarb, *A Caste of Despair*, at 63. The complaint detailed "countless specific abuses, indifferences, discourtesies and discriminations to which farm workers were subjected . . . all over the United States by the very officials who were paid to provide them with services," and alleged that Service employees routinely violated farmworkers' civil rights, referred them to jobs with deplorable conditions, and were more interested in gathering statistics to justify their jobs

while it is true that DOL was in the process of overhauling the Service in response to the class action litigation and its own in-house review, the potential for meaningful reform was far from certain at the time the final regulations were promulgated in 1978. The Department's apparent bad faith during *NAACP v. Brennan*, to give one small example, had prompted the District Court Judge overseeing the case to demand that DOL officials explain why he should not hold them in violation of the consent decree.⁹⁰ In this context, enhanced, indeed primary, reliance on the interstate clearance system to locate domestic farmworkers available to fill H-2 growers' labor demands was troubling indeed.

Finally, in an ominous precursor to the revamping of the regulatory apparatus in the 1980s, DOL itself began to incorporate the *Larson*, *Hernandez*, *Galan*, and *Frederick County* courts' articulation of the proper balance between employers' and workers' interests⁹¹ into the regulatory framework, explaining several of the deletions from, and changes to, the January 1977 proposal as an effort to strike this different balance.⁹² While this kind of balance was discussed in a number of judicial rulings, the March 1978 promulgation was the first time that DOL explicitly incorporated growers' interests into its H-2 regulatory purview.

B. PROPOSED REVISIONS OF THE AEWL REGULATIONS

In October 1979 the Department of Labor initiated proceedings to re-examine the methodology used to calculate annual changes in the adverse effect wage rates. In adopting a new methodology in January 1981, the Department of Labor reaffirmed its position "that the current AEWL methodology ha[d] not successfully achieved the purpose of preventing wage deflation of similarly employed U.S. workers." Rather, the current AEWLs were "substantially below prevailing wages and sometimes even below the Fair Labor Standards Act

minimum." In particular, DOL found that the AEWLs in states "using H-2 alien farmworkers [were] generally well below those not using such workers;" that "[r]elative growth rates in wages were also lower in States using H-2 alien farmworkers; and that "[p]iece rates in areas which heavily use H-2 alien farmworkers had remained unchanged for long periods and actually declined substantially in real terms." The problem was that the AEWLs "were based neither on prevailing wage levels nor on relevant labor markets," but were pegged to initial state base rates (set in 1968) that themselves had been depressed.⁹³

Of the five methodologies that DOL had considered adopting,⁹⁴ the formula selected was amongst those most favorable to farmworkers. That method would have established a single national AEWL based on the average hourly earnings of piece rate workers in the previous year.⁹⁵ DOL cited two primary reasons for adopting this method. First, tying the AEWL to earnings of piece-rate workers more accurately reflected the relevant labor market, since H-2 workers generally work in jobs which pay by the piece. Moreover, since piece rate workers consistently have earned more than hourly workers, DOL found that linking the wage floor to piece workers' earnings was "essential" to prevent wage depression. Second, the migrant farm labor market is national in scope. A national minimum AEWL both reflects the interstate fluidity of migrant workers and dilutes the wage depression occurring in particular H-2 user states and areas.⁹⁶

C. DOL'S FINAL RULE ON AEWL CALCULATIONS

DOL promulgated the final methodology on January 16, 1981, days before the Carter Administration left office. While unquestionably holding out significant wage improvements for farmworkers, the new regulations also reflected the gradual elevation of "balance"

than in serving farmworkers. *Id.* at 63-64. The complaint referred to a DOL in-house report which itself disclosed the "perversions of the foreign labor certification process," violations of Social Security, minimum wage, Crew Leader Registration, and immigration laws, as well as various sex and age discriminations. *Id.* at 64-66.

Finding DOL's response to its complaint unsatisfactory, farmworkers took their case to the District Court, which issued a memorandum opinion finding that rural employment agencies (affiliated with the U.S. Farm Labor Service) had discriminated against farmworkers on the basis of race, sex, age, and national origin; provided them with substandard facilities and services; processed improper job orders; referred workers to employers who violated minimum wage, child labor, Social Security, housing, and health laws; condoned illegal crew leaders; failed to assist in INS enforcement; and were generally unresponsive to farmworkers' complaints. *Id.* at 67-68. The litigation which ensued, until a settlement was finally reached in 1980, reveals that farmworkers did not perceive substantial improvement in the Service's record during the course of the decade. See generally *id.* chapter 5.

90. *Id.* at 109.

91. See *supra* Section III.

92. For example, DOL stated that requiring free family housing for all workers would be "costly to many employers" and concluded that in this instance "the costs outweigh the benefits." 43 Fed. Reg. at 10308. Requiring employers to hire U.S. workers

through the first half of the contract period, but only requiring that they actively recruit such workers until the H-2s have departed for the jobsite struck "a reasonable middle course." *Id.* at 10308-10309.

93. 46 Fed. Reg. 4568, 4569 (1/16/81) (final rule). See also, 45 Fed. Reg. 15914, 15915 (3/11/80) (proposed rule).

94. Five alternatives were suggested for study: (1) A single national AEWL based on the average hourly earnings of piece rate farmworkers and the relationship between increases in the earnings of piece rate and private, non-farm production workers; (2) National AEWLs by crop activity; (3) Statewide AEWLs, based on the federal minimum wage, adjusted by the greater of the annual percentage change in the national and state farm wage for field workers; (4) A single national AEWL set at 25% above the federal minimum wage; (5) The existing methodology, indexing each state's AEWL to increases in the average hourly earnings of field and livestock workers. 44 Fed. Reg. #201 (10/16/79) (regulations for AEWL methodology).

95. However, the Reagan administration moved to rescind the new regulations immediately after assuming office, so that the new methodology was never implemented. See *infra* Section V.

96. On the national labor market issue see *supra* Section I.C.; also see 46 Fed. Reg. at 4571, 4576 (1/16/81) and 45 Fed. Reg. at 15917 (3/11/80). On use of average piece-rate earnings, see 46 Fed. Reg. at 4578-79 (1/16/81) and 45 Fed. Reg. at 15917 (3/11/80).

into DOL's interpretation and implementation of its statutory mandate. DOL explained that its goal was to "provide a manageable scheme . . . that is fair to both sides" and "to balance the goals of supplying an adequate labor force and protecting the jobs of citizens."⁹⁷ A "compromise" paradigm for H-2 regulation and administration had begun to emerge.

With regard to agricultural wages, the final rule was a modified version of an even stronger proposed rule published the previous March 1980. That proposal would have attempted to project the average piece-rate earnings for the upcoming year by adjusting this figure by the average annual growth in private, non-farm production workers' earnings over the previous five years. In addition to correcting for the year-long time lag between the AEWR and the actual average earnings on which it was based, DOL explained that the proposed methodology

. . . recognizes the fact that earnings in the farm and nonfarm sectors are not independent of each other. That is, depending on the movement of relative wages, workers move from one sector to another. . . [A]bsent distortions that would be caused by the importation of foreign labor, DOL would expect a close statistical relationship (though not necessarily a one-to-one) between the earnings of farm and nonfarm workers.⁹⁸

However, again reflective of past judicial decisions and anticipating future administrative developments, DOL dropped this adjustment provision from the final rule. It also adopted a three-year time period to phase in the new AEWR formula. These modifications would render a formula which "would be easy to understand" and would "reduce substantially the cost impact" on growers.⁹⁹

DOL's concern with the financial impact on growers appears perfectly reasonable. It can even be argued, at least theoretically, that consideration of the impact on growers strengthens the overall protection afforded workers, since the existence of farmworkers' jobs pre-

supposes the agricultural industry's economic viability; however, the data on this question and the net impact of foreign workers remain open.¹⁰⁰ For the regulatory program, however, the critical question is what does a "compromise" or "balanced paradigm" mean for the protection of wages and working conditions for farmworkers "similarly employed" to H-2s, i.e. those in the narrow sector of the labor market in which the foreign workers are found? It seems fairly certain that these workers will be worse off if the regulations weigh the minimum wages and conditions to be required against their cost to H-2 growers.

This debate is similar to that surrounding any protective legislation or regulatory program. Minimum wage laws, health and safety codes, and environmental standards, for example, all cost money and therefore carry the potential to raise industry's costs and limit employment opportunities in the effected industries; setting such floors also bears potential costs to the public at large, in higher prices, for example, as the *Frederick County* court had argued would ensue if apple growers were denied H-2 workers. Nonetheless, minimum acceptable standards in these areas have been set—standards below which cost-benefit and efficiency analysis is not germane.

This paper has argued that, for almost three decades, the H-2 regulations and DOL's implementation of them evidenced an interpretation of "adverse effect" to create such an absolute minimum standard, which, by definition, cannot be compromised. What is "best" for workers may be debatable, indeed is hotly debated. But it seems equally clear that the language and action of compromise signaled a break with the past. This break was initiated by the courts, progressed hesitantly with the new Carter regulations (although farmworker advocates still considered these regulations to represent a significant net gain for migrant and seasonal farmworkers), and would become complete during the Reagan-Bush years.

97. 46 Fed. Reg. at 4569 (1/16/81) (citation omitted).

98. 45 Fed. Reg. at 15917 (3/11/80).

99. 46 Fed. Reg. at 4571 (1/16/81) (emphasis added). For example, had the final rule been in effect during 1980, the increase in labor costs for the crops employing the largest number of H-2 workers would have been negligible in that year: 0% for apples, citrus and sugar and less than 1% for tobacco. In contrast, DOL estimated that the proposed (March 1980) rule would have increased 1980 labor costs by 25.8% in tobacco, 16.2% in apples, and 19.6% in citrus. 46 Fed. Reg. at 4572 (1/16/81). Below is a table comparing the AEWRs calculated using the old, March 1980 proposed, and January 1981 final methodologies.

	Proposed Rule	Final Rule without Phase in	Final Rule with Phase in	Old Methodology*		
				Low	Mean	High
1980	\$4.51	\$4.07	\$3.67	\$3.18	\$3.44	\$3.79
1981	\$4.89	\$4.46	\$4.23	\$3.31	\$3.61	\$3.93
1982	\$5.32	\$4.89	\$4.80	\$3.35	\$3.67	\$3.98

Source: 46 Fed. Reg. at 4572, 45 Fed. Reg. at 30734 (5/9/80); 47 Fed. Reg. at 37980 (8/27/82), and calculations based on figures therein.

* As will be explained below, the Reagan Administration moved quickly to quash the January 1981 methodology, which consequently never took effect. The "Old Methodology" figures are the actual AEWRs used during the years in question, and represent the highest and lowest AEWR applicable in any user state; the sugar cane rate in Florida is excluded. In each year, the lowest AEWR was bounded by, i.e. equal to, the federal minimum wage.

100. For a discussion of the studies done on this question, see *infra* Section V.B.2.

V. THE TEMPORARY FOREIGN WORKER PROGRAM DURING THE REAGAN REVOLUTION

Farmworkers never realized the potential wage enhancements promised by the AEWR methodology which was promulgated by the Carter DOL. The new regulations were to have taken effect February 17, 1981; but the Reagan Administration moved quickly to quash them. On February 6, 1981, "in order to allow for a full and appropriate review" of the pending AEWR methodology (which had just emerged from the formal rule-making process), Reagan's Acting Secretary of Labor published a notice of deferral of the regulation.¹⁰¹ On June 23, 1981 the regulation was formally withdrawn¹⁰² "so that the subject of adverse effect wage rates may be included in the . . . broader review of [the] policies regarding immigration, refugees, and other issues dealing with the admission of aliens to the United States."¹⁰³

The presence of the new Administration was felt immediately, although it took until July 1989 for the Reagan H-2A regime to be fully implemented and institutionalized. For farmworkers, Reagan's inauguration heralded an administrative assault on their wages—already among the lowest in the United States—which proceeded primarily along two lines: (1) the piece rates which H-2 growers would be required to offer; (2) the methodology used to calculate the minimum hourly AEWRs.

A. PIECE RATE PROVISIONS

Before March 1978, in order to prevent depression of piece rates, DOL had required that piece rates be designed to yield (i.e. to enable workers to earn) at least the AEWR. That March, in response to workers' complaints that growers were increasing productivity requirements instead of augmenting piece rates to keep pace with the AEWR, the Carter DOL "clarified" its policy and strengthened the regulations to require, in addition to the design-to-yield provision, that

[i]n any year in which the applicable [AEWR] is increased, employers shall adjust their piece rates upward to avoid requiring a worker to increase his or her productivity over the previous year in order to earn an amount equal to what the worker would earn if the worker were paid at the [AEWR].¹⁰⁴

In September 1981 DOL, now under the Reagan Administration, issued General Administrative Letter 46-81 in which it "[re]clarified" the meaning of the March 1978 provision to require H-2 growers to in-

crease their piece rates only if workers' earnings at the prior year's rate would fall short of the current year's AEWR:

In any year in which the applicable wage rate increases to the point where the previous year's . . . piece rate will not enable an average worker[] . . . to earn the new applicable wage rate without requiring the worker to increase his/her productivity over the previous year . . . [a]n acceptable approach is for the employer to adjust the previous season's piece rate upward to a point where the employer's average worker in that activity will make hourly earnings equal to that season's [AEWR].¹⁰⁵

In other words, DOL would not require that piece rates keep pace with the AEWR unless and until the hourly earnings yielded fell to the actual level of the AEWR—an interpretation patently inconsistent with the plain language of the 1978 regulation, still in effect, as well as with the Department's 1978 explanation accompanying it.¹⁰⁶

The impact of the Reagan Department's suspect interpretation of the regulatory provision on productivity requirements and piece rates was clearly demonstrated in the West Virginia apple orchards. In 1979 these growers submitted certification applications basing their piece rates on an expected productivity rate (90 bushels per day) exceeding that in prior years' applications (80 bushels per day) by 12.5%. The Carter DOL refused to certify the applications until the growers amended them to contain piece rates enabling workers to earn the AEWR based on a productivity of 80 bushels per day. In 1980 and 1981 the growers' applications offered piece rates consistent with the 80 bushel per day figure and were approved by DOL. In 1982, however, the West Virginia growers not only offered a piece rate which represented a nominal decrease of one cent per bushel, but also required that workers increase their productivity in order to earn the AEWR. Moreover, DOL had not published AEWRs for 1982, so the AEWR used was that applicable for the 1981 season. The Reagan Department approved the growers' orders.¹⁰⁷

The Department of Labor justified its 1982 approval by pointing to DOL General Administrative Letter, GAL 46-81. However, farmworkers filed suit challenging DOL's decision and the judge hearing the case found that Letter (1) to represent an impermissible interpretation "directly contrary to the plain meaning" of the H-2 proportional piece rate provision, and (2)

101. 46 Fed. Reg. 11253 (2/6/81).

102. 46 Fed. Reg. 32437 (6/23/81).

103. 46 Fed. Reg. 32437 (6/23/81).

104. 43 Fed. Reg. at 10309-10, 10317 (3/10/78). This provision will be referred to as the piece rate proportionality provision.

105. General Administrative Letter No. 46-81, "Procedures for Reviewing and Processing Applications for Temporary Alien Certification in Agriculture and Logging" (U.S. Department of Labor:

September 11, 1981), Attachment 1, p. 5 (Hereinafter GAL 48-81).

106. The language of the 1978 provision is clear enough. But in the introductory notes to the 1978 regulation, DOL also explained that "in any year in which the adverse effect rate increases, employers must *redesign* their piece rates accordingly." 43 Fed. Reg. at 10310 (3/10/78) (emphasis added).

107. *NAACP v. Donovan*, 558 F.Supp. 218 (DDC 1982) (Hereinafter *NAACP I*).

"not authoritative" in any case because "for such agency action to have the force of law there must be advance notice and public participation." The court enjoined DOL from granting certification to any grower not offering a piece rate proportional to the AEWR at the "standard productivity rate of 80 bushels per day" established in 1977 (the judge considered the standard productivity rate to be that existing prior to the 1978 adoption of the piece rate-AEWR proportionality regulation.)¹⁰⁸

Meanwhile, in a related action, *Bragg v. Donovan*, migrant farmworkers in Maine, Vermont, and Florida filed suit to compel DOL to publish AEWRs for 1982.¹⁰⁹ The USDA had discontinued its quarterly survey, upon which the existing methodology pegging AEWRs to the change in average farm wages had depended, and DOL had taken no action to develop a new methodology. *Bragg* was settled with DOL agreeing to establish AEWRs for the four states implicated in the case.

But DOL did not establish new AEWRs for 1982 for any other H-2 user states. As a result, farmworkers filed a third suit, *NAACP II*, to force DOL to promulgate revised AEWRs for all states, in order to prevent their wages from being adversely affected.¹¹⁰ DOL contended that it had no obligation to promulgate annual AEWRs. The court disagreed, arguing that DOL had imposed this obligation on itself in the H-2 regulations, which provided that "the adverse effect rate for each year shall be computed by adjusting the prior year's adverse effect rate. . . ."¹¹¹ "In the past," the court also noted, "DOL itself has stressed the importance of yearly reassessment of the AEWR . . . [as] necessary 'to reflect changing labor market conditions,'"¹¹² and it ordered DOL to publish AEWRs annually until its "obligations are altered by promulgation of a valid rule."¹¹³

The Department of Labor, seemingly determined

to enable growers to keep piece rates down, responded to the *NAACP II* order in the summer of 1983 by formally amending the regulations to reflect the GAL 46-81 interpretation (which DOL continued to insist accurately stated the agency's original intent behind the piece rate proportionality provision).¹¹⁴ Nearly two years later, the D.C. Circuit invalidated the new regulation.¹¹⁵ The Court noted that DOL's stated policy continued to be to "avoid requiring [piece rate] workers to increase productivity to earn the minimum hourly wage," but that "the amended regulation allows an increase in productivity to substitute for an otherwise mandatory increase in the piece rate."¹¹⁶ The Court therefore held that, unless and until DOL demonstrated "by reasoned explanation" that it had considered this contradiction, the regulation could not stand.¹¹⁷

Two years later, DOL emerged with a new piece rate regulation, in which it proposed to disassociate piece rates from changes in the AEWRs altogether; DOL published the proposed and final regulation in June 1986 and April 1987, respectively. This new rule, which is now in effect, requires that H-2 growers pay piece rate workers the rate prevailing for the relevant crop in the area of intended employment, thus making the prevailing wage survey the central mechanism to prevent adverse effect for piece workers for the first time in the history of the temporary foreign worker program. Piece rates' only connection to the AEWR is contained in a new "build up" provision: If, during any pay period, a particular worker's piece earnings fell below the amount s/he would have earned at the AEWR (for the number of hours worked), the employer would be required to supplement the worker's earnings so that the AEWR was earned.¹¹⁸ In other words, each worker would be guaranteed the AEWR, but DOL would no longer require the earnings of those workers who picked faster than necessary to average the adverse effect rate

108. *Id.* at 222, 226.

109. *Bragg v. Donovan*, No. 82-2361 (D.D.C. filed August 20, 1982).

110. *NAACP v. Donovan*, 566 F.Supp. 1202 (D.D.C. 1983) (Hereinafter *NAACP II*).

111. *Id.* at 1206 (citation omitted, emphasis in opinion).

112. *Id.* at 1207 (citing 41 Fed. Reg. 25018).

113. *Id.* at 1210. In its promulgation of four 1982 AEWRs pursuant to the *Bragg* consent decree, DOL had set the rate for one of the states, West Virginia, significantly lower than the rate yielded by the AEWR formula then being used; DOL cited "equitable" considerations, as the 1982 West Virginia rate would have represented a 17.2% increase over the prior year—"substantially more than the other three named states." 48 Fed. Reg. 232, 234 (1/4/83). The court again ruled this a "substantial" and impermissible "departure from DOL's past practice of uniformly applying its AER methodology" without "providing a reasoned explanation for the change." *NAACP II* at 1205.

114. 48 Fed. Reg. 33684 (7/22/83) (proposed rule); 48 Fed. Reg. 40168 (9/2/83) (final rule).

115. *NAACP v. Donovan*, 765 F.2d 1178 (D.C. Cir. 1985) (Hereinafter *NAACP III*).

116. *Id.* at 1179, citing 48 Fed. Reg. at 40173 (emphasis in opinion).

117. *Id.* at 1185. In a repromulgation of its piece rate rule several weeks before the D.C. Circuit Court's *NAACP III* decision was issued, DOL "elaborated" its reasons behind the rule. While ac-

knowledging that "Generally, when foreign agricultural workers become dominant in an area, piece rates tend to become artificially static or depressed, while productivity standards increase," DOL explained that it was "not the intent of DOL to impose unreasonably high wage standards" on growers. *NAACP I* and *NAACP II*, it maintained, would have imposed unreasonable wages, because those decisions "would guarantee to workers earnings at levels above that determined by DOL as the adverse effect level. Employers who paid a higher than average piece rate in 1977 [the year prior to the March 1978 piece rate-AEWR linkage rule was adopted, which the NAACP court had determined was the appropriate base year], and whose workers received at that time, earnings far above the adverse effect level, would have been bound to maintain their workers at levels of earnings above the hourly AEWR required[.]" 50 Fed. Reg. 25705, 25707 (6/21/85). A degree of disingenuousness and deception is also evidenced in the June 1985 regulation. In support of its assertion that the court in *NAACP I* and *NAACP II* had interpreted the piece rate regulation incorrectly, DOL cited a Fifth Circuit opinion from 1976 which had found, "Nowhere is there a requirement that piece rates be in excess of the adverse effect minimum wage." 50 Fed. Reg. at 25708 (6/21/85), citing *Williams v. Uery*, 531 F.2d 305, 308 (5th Cir. 1976). The regulation in question in *NAACP III*, it will be recalled, was adopted in March 1978—two years after the *Williams* decision was issued.

118. 51 Fed. Reg. 20516 (6/5/86) (proposed rule).

to increase in proportion to increases in the AEW; the earnings of these workers could be eroded until the AEW was reached. Meanwhile, each year the slower workers requiring "build-up" pay generally could be terminated, as they would not be meeting the productivity standards prevailing in the area. In essence, growers could increase productivity requirements in lieu of increasing piece rates to meet the minimum AEW guarantee until the earnings of the bulk of workers would no longer exceed the AEW—precisely the result that DOL's 1981 General Administrative Letter would have effected and which the 1978 piece rate provision had been designed to avoid.

A practical problem for this new rule is the widespread underreporting of hours worked and quantities of fruits and vegetables picked, a problem which DOL itself has documented. Wage and hour violations aside, setting piece rates at the prevailing wage level is particularly problematic for workers in areas with a history of employing undocumented or H-2 foreign workers, where wages are most prone to depression. Each worker, assuming accurate record reporting, would be guaranteed the AEW, and at first glance the AEW would seem to offer the requisite minimum protection. But in the past the AEW had been pegged to *increases*—not the absolute level of—average earnings of agricultural workers. If average earnings stagnated due to the presence of foreign workers, then the AEW would have stagnated as well.

Just one month after publishing the proposed piece rule, DOL itself recognized that piece rates often are depressed. In rejecting the use of prevailing wage rates in setting AEWs, DOL explained:

The use of prevailing wage rates . . . [was] rejected as not being adequate to protect the wages of U.S. workers. *A major problem is that prevailing wage rates tend to remain static, adversely affected, over a long period in areas where H-2 workers are employed.*¹¹⁹

In its introductory comments to the new piece rate rule, DOL also had noted that it had

determined that similarly employed U.S. workers have been adversely affected by the employment of nonimmigrant aliens in agricultural employment. It has been determined further that employment of those aliens in a number of States at wages below specially computed adverse effect wage rates

would adversely affect the wages and working conditions of similarly employed U.S. workers.¹²⁰

It is hard to reconcile these findings and admissions with a decision to place primary reliance for wage protection on the very (i.e. prevailing) wages which themselves are depressed. Throughout the history of its involvement in the program, the Department of Labor consistently had issued regulations and established wage minimums "to compensate for past adverse wage effects."¹²¹ Reconciliation might be found in a decision to abandon compensating for past depression, which would amount to a fundamental change in policy. Indeed, although not yet publicly articulated, DOL was moving clearly toward a policy of preventing only prospective wage depression.

Farmworkers filed another suit challenging the new prevailing piece rate rule. Finding the action subject to a "reasoned explanation" standard of review, the District Court determined that the Department had not provided adequate explanation for "seemingly abandon[ing] those farmworkers who are paid through the piece rate and who exceed the AEW floor." The Court of Appeals, however, reversed.¹²²

DOL argued that the 1978 proportionality rule, as enforced by the *NAACP I* court, required grower-by-grower determination of productivity rates existing either in 1977 or in the first year a grower utilized the H-2 program thereafter. According to DOL, this produced a number of administrative difficulties, inequities to some growers (due to productivity differences, weather, and other factors "beyond the control of the employer"), and posed an obstacle for managerial initiatives to improve productivity.¹²³ Most importantly, however, DOL asserted that "although one effect of its prior regulation . . . ha[d] been to enhance piece rates for all workers each time the AEW was increased, this was not more than the incidental result of a policy to place a [wage] floor under piece-rate workers' earnings."¹²⁴ In other words, DOL asserted that it had never intended to require that piece rates increase unless workers' earnings fell below the AEW; "proportionate increase," it claimed, had only been intended to ensure a proportionate increase in piece rates when the hourly earnings produced equalled the minimum AEW.

DOL's stance clearly represented a break with past policy. Nonetheless, given the broad degree of discretion and deference granted administrative agencies, it is

119. 51 Fed. Reg. 24138, 24140 (7/2/86).

120. 52 Fed. Reg. at 11461.

121. *AFL-CIO v. Brock*, 835 F.2d 912, 914 (D.C. Cir. 1987) (emphasis deleted from original). See also, e.g., 50 Fed. Reg. 50311, 50312 (1985) (proposal to enhance AEW because "[c]ontinued reliance on the use of undocumented aliens has had a depressing effect on the wages of similarly employed United States workers") (emphasis added); 43 Fed. Reg. 10306, 10313 (3/10/78) ("The Administrator may determine that a wage rate higher than the prevailing wage rate is the adverse effect rate if the Administrator determines that the use of aliens has depressed the wages of similarly employed U.S. workers.") (emphasis added); 41 Fed. Reg. 25017, 25018 (6/22/76) (Secretary of Labor "has constructed . . .

[AEWRs] to reflect and rectify the adverse effect of the importation of foreign workers.") (emphasis added).

DOL's articulation of its policy to compensate for past wage depression had been responsive to growers' criticism that the indexing methodology utilized by DOL to adjust the AEWs annually imposed a minimum wage requirement on H-2 growers that was, on average, 20% higher than average agricultural wage in user states.

122. *AFL-CIO v. McLaughlin*, 702 F.Supp. 314 (D.D.C. 1988), rev'd, *AFL-CIO v. Dole*, 884 F.2d (D.C. Cir. 1989).

123. 52 Fed. Reg. 11460, 11465 (4/9/87); 51 Fed. Reg. 20516, 20519-20 (6/5/86) (proposed rule).

124. *AFL-CIO v. Dole*, 884 F.2d at 601.

unsurprising that the Court of Appeals reversed the District Court and accepted the Department's explanation as sufficiently reasoned. After seven years of litigation, DOL had implemented a new piece rate provision.

B. REDESIGNING THE ADVERSE EFFECT WAGE RATE

The methodology used to calculate the AEWs also underwent several metamorphoses before arriving at its current state. In 1981 the USDA discontinued the data series to which the AEW had been pegged since 1968. Consequently, DOL did not publish AEWs for 1982—leaving the 1981 rates to govern the minimum hourly guarantee H-2 employers could offer¹²⁵—until the court order in *NAACP II* was issued. Also in response to *NAACP II*, DOL adopted a temporary methodology which pegged changes in the AEW for each state to changes in average weekly wages for similarly employed workers covered by the state's unemployment insurance program. This formula, which essentially followed the 1968 methodology but used the unemployment data in place of the USDA data, was used for the 1983, 1984, and 1985 AEWs.¹²⁶ Growers filed four legal challenges to DOL's utilization of this methodology, and, although two district courts found for the growers, four courts of appeals upheld the Department's decision as well within the bounds of its discretionary authority.¹²⁷ Then in 1986, USDA having resumed its quarterly surveys, DOL returned to pegging increases in the AEWs to the USDA data; this time, however, the AEWs were indexed to the average farm earnings of field and livestock workers, not to the earnings of all hired farmworkers.¹²⁸

The resumption of the USDA formula proved to be short lived. In 1986 Congress passed the Immigration Reform and Control Act (IRCA), comprehensively amending the Immigration and Nationality Act of 1952. IRCA did not substantively alter the statutory mandate

behind the temporary foreign worker program, however, and there is no indication in the legislative history accompanying IRCA that Congress envisioned the program undergoing any changes; in essence, IRCA simply elevated to a statutory level the adverse-effect language used in the regulations originally promulgated by the Attorney General pursuant to the INA, and those the Department of Labor had in turn promulgated pursuant to the Attorney General's instructions.¹²⁹

Following IRCA, however, DOL issued comprehensive "new" regulations governing the H-2A program, pursuant now to 8 U.S.C. §§ 1101-1452, as amended, rather than to the Attorney General's instructions.¹³⁰ The new H-2A guidelines largely paralleled the then-existing H-2 regulations, although a few significant, and some minor, modifications were made. Most important for the purposes of this paper, DOL took the opportunity IRCA provided to issue yet another new AEW methodology. Published as an "interim final rule" in June 1987, the new rule established that subsequent AEWs would be set "at a level *equal to* the previous year's annual regional average hourly wage rates for field and livestock workers," rather than being indexed to the USDA wage.¹³¹

The new methodology effected a substantial reduction in the minimum adverse effect wage rate required of H-2A growers: With the exception of Florida, the 1987 AEW for each user state under the new H-2A proposed methodology would reduce the AEW as compared to the existing method by 16% to 24%.¹³² The AEWs for non-user states, which DOL proposed to publish even though they would have no practical impact until some growers in those states applied for H-2A certification, would not have differed significantly under the old and new methodologies, although a few would have been much greater under the old method. In Georgia, for example, where H-2A workers have just re-

125. 47 Fed. Reg. 37980 (8/27/82) (Continuing 1981 AEWs for 1982).

126. 48 Fed. Reg. 40168 (9/2/83); 50 Fed. Reg. 25705 (6/21/85); 50 Fed. Reg. 33121 (8/16/85).

127. *Florida Fruit and Vegetable Ass'n v. Brock*, 771 F.2d 1455 (11th Cir. 1985); *Shoreham Co-op Apple Producers v. Donovan*, 764 F.2d 135 (2d Cir. 1985); *Virginia Agr. Growers Ass'n v. Donovan*, 774 F.2d 89 (4th Cir. 1985), *rev'g* 597 F.Supp. 45 (W.D.Va. 1984); *Production Farm Management v. Brock*, 767 F.2d 1368 (9th Cir. 1985).

128. 51 Fed. Reg. 24138 (7/2/86). The average earnings of field and livestock workers are generally lower than those of all hired farmworkers. This became important later when DOL proposed to set the AEW at the absolute level of average field and livestock earnings. At this point, however, the change from one indexing base to the other did not significantly affect the AEWs because the *relative* growth in each of the two figures (to which the AEW is indexed) is approximately the same.

129. See *supra* Section I.A. On the characterization of the legislative history, see, e.g., 52 Fed. Reg. 20496, 20502 (6/1/87) ("The IRCA amendments . . . do not change the role and effect of DOL's policies to protect . . . similarly employed U.S. agricultural workers from . . . adverse effect."); *AFL-CIO v. Brock*, 835 F.2d 912, 918 (D.C. Cir. 1987) ("Congress made absolutely no alteration to the statutory mandate that underlies AEWs."); *id.* at 915 (Congress "has never paid any attention to the method or policy of calculating AEWs. It paid no attention in 1964, and it paid no attention in 1987. . . . The committee and floor discussion . . . confirms only

Congress' general intent to protect United States workers against adverse effects from imported labor.")

130. Some commentators have identified IRCA as the critical turning point in DOL's interpretation, implementation, and enforcement of the H-2A program. See, e.g., *Overcoming Mootness in the H-2A Temporary Foreign Farmworker Program*, Note, 78 GEORGETOWN L.J. 197, 203, 207 (1989). This paper suggests that the post-IRCA changes, at least vis-a-vis the H-2A program, were part and parcel of a general ideological and programmatic reorientation of the Reagan Revolution, of which IRCA itself was a part.

131. 52 Fed. Reg. at 20504 (emphasis added).

132. Under the existing methodology, two adverse effect rates were set for Florida—one for sugar cane workers and the other for all other crops. Sugar cane workers consistently netted significantly higher earnings than farmworkers in other crops, thus the sugar AEW was always significantly higher than the general Florida AEW. Under the new methodology, only one Florida rate, including the earnings of both sugar and other farmworkers, would be calculated. Relative to the general Florida AEW under the then-existing methodology, the single Florida rate under the new method would have increased by 5% in 1987. The enormous number of sugar cane workers, earning substantially more on average than other farmworkers, probably accounts for this increase. The new single AEW, however, would have been 18% lower than the rate for sugar cane workers under the existing methodology.

cently appeared for the first time, the 1987 AEW under the old methodology would have been 59% higher than that calculated using the proposed method.

1. *The Judicial Response to the New AEW Methodology*

Farmworkers predictably responded to the proposed H-2A regulations by filing suit in the D.C. District Court, which invalidated the regulations and granted the plaintiffs a preliminary injunction pending appellate review.¹³³ The Court of Appeals ultimately reversed the District Court, finding invalidation of the regulation inappropriate; the "district court," it believed, "mistakenly relied on the familiar notion that Congress is presumed to be aware of administrative interpretations of a statute or regulation when it adopts such language in a statute."¹³⁴ Nonetheless, the Court found that DOL's reversal of a twenty-year policy—a policy which resulted in minimum wage guarantees consistently above the average USDA agricultural wage and which had been based on a consistently asserted recognition that the presence of foreign workers continued to depress domestic agricultural wages—represented "a significant, highly redistributive, change in policy" for which the Department had failed to give reasoned explanation.¹³⁵

DOL submitted an expanded explanation to the District Court in April 1988 and, unsurprisingly, re-proposed the June 1987 methodology with an expanded explanation in October 1988.¹³⁶ In December the District Court rejected the April explanation as an impermissible "post-hoc rationalization," which, in any event, did not constitute a reasoned explanation for the policy reversal signaled by the new AEW methodology. The court therefore held that the June 1987 interim final rule was invalid and enjoined its implementation.¹³⁷

However, the District Court did not rule on the October 1988 proposed rule, and the Court of Appeals granted DOL an indefinite stay of the injunction, pending appeal.¹³⁸ DOL then adopted the October 1988 methodology (the repromulgation of the June 1987 method with an expanded explanation, and on which the District Court had not ruled) as a final rule in July

1989, thereby setting the AEWs at the absolute level of the average regional USDA wage for field and livestock workers. Farmworkers filed suit again. And again the District Court overturned the regulation, finding that "DOL ha[d] failed in the discharge of its responsibility to protect this nation's workers," that the AEW regulation was not rationally related to the administrative record before it and that DOL had abused its discretion in adopting it.¹³⁹ The District Court enjoined the Department from further utilizing the final regulation and reinstituted the AEW formula in effect prior to June 1987.¹⁴⁰ On appeal, the Court of Appeals found the choice of methodology to be "a policy decision taken within the bounds of a rather broad congressional delegation . . . oblig[ing] [the Department] to balance the goals of the statute—providing an adequate supply of labor and protecting the jobs of domestic workers."¹⁴¹

2. *The Debate: Was The Department of Labor's Policy "Reasoned"?*

In publishing the final rule, DOL explained that "the old methodology was not designed to enhance Statewide average hourly earnings from the USDA survey. . . . [T]hat the AEW averaged 20% above the average hourly earnings from the USDA survey in the fourteen 'traditional user States' [was] an *unintended* result" of past methodologies.¹⁴² Moreover, the Department added, "broad application of the old AEW methodology" had yielded "inexplicable and unjustifiable . . . anomalies," in that four states had AEWs below the applicable USDA average agricultural wage rate (at least three of which have "known concentrations of illegals") and others above it, including six with AEWs 70% or more above the applicable USDA rate (none of which "is noted for high concentrations of illegal aliens" and none of which have historically been H-2 user states).¹⁴³

But these allegedly "inconsistent" and "erratic" results are not inconsistent or erratic at all with the wage depression hypothesis; in fact, they support a continued

133. *AFL-CIO v. Brock*, 668 F.Supp. 31 (D.D.C. 1987).

134. *AFL-CIO v. Brock*, 835 F.2d 912, 916, n. 6 (D.C. Cir. 1987).

135. *Id.* at 918. DOL had relied on two explanations: (1) That IRCA created new circumstances justifying the change, because, DOL asserted, IRCA would result in the cessation of undocumented workers and therefore the "source for the alleged wage depression . . . will cease to exist." *Id.*, quoting DOL's Reply Brief. (2) That the old methodology caused anomalous disparities in AEWs from state to state and was difficult to calculate. *Id.*; 52 Fed. Reg. at 20504. The Court of Appeals, however, was "unable to discern the reasonableness" of the regulation "without further explanation." *AFL-CIO v. Brock*, 835 F.2d at 919.

136. 53 Fed. Reg. 43722 (10/28/88).

137. *AFL-CIO v. McLaughlin*, 702 F.Supp. 307 (D.D.C. 1988).

138. *AFL-CIO v. McLaughlin*, No. 89-5001 (D.C. Cir. 1989).

139. *AFL-CIO v. Dole*, 745 F.Supp. 18, 22 (D.D.C. 1990).

140. *Id.*, at 23.

141. *AFL-CIO v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991).

Consistent with the substantial deference courts ordinarily accord administrative agencies and in addition to the AEW and piece rate battles, DOL consistently has prevailed in challenges to its regulations and interpretations of them in the 1980s. See *Phillips*

v. Brock, 652 F.Supp. 1372 (D.Md. 1987) (DOL rationally interpreted regulation stating that "every job offer for U.S. workers" employed by an H-2 grower "will provide the worker with housing without charge" as not requiring free housing for local U.S. workers living within commuting distance of the work site); *Virginia Agr. Growers Ass'n v. U.S. Department of Labor*, 756 F.2d 1025 (4th Cir. 1985) ("50% rule," requiring that H-2 growers offer employment to qualified U.S. workers through 50% of the period of the H-2 contract, was not arbitrary and capricious), *rev'g VAGA v. Donovan*, 579 F.Supp. 768 (W.D.Va. 1984). For cases upholding DOL's discretion in the 1970s, see *supra* n. 58 and Section III. But see *Patterson Orchard, Frederick Cty. Fruit Growers Ass'n*, and *Presidio Valley*, discussed *supra* Section III, in which three district courts invalidated DOL's denial of growers' certification requests in the late 1970s. The only subsequent case in which a court's finding a DOL H-2A action invalid was not reversed is *Morrison v. U.S. Dept. of Labor*, 713 F.Supp. 664 (S.D.N.Y. 1989). In *Morrison*, however, DOL essentially conceded, on the record, that it had improperly enforced the regulation at issue.

142. 54 Fed. Reg. at 28040 (7/5/89) (emphasis added).

143. *Id.* at 28041. On the relationship between the AEW and the USDA average agricultural wage rate, see *supra* Section I.

finding of wage depression resulting from the presence of undocumented and H-2A workers. According to the wage depression hypothesis, agricultural wages in states without a significant foreign worker presence should not stagnate. Since the AEWRs for these, as all other, states are indexed to the USDA rate (they never had been set equal to the absolute level of the USDA average agricultural wage), the hypothesis would expect the AEWRs in non-user states also to rise at a non-depressed rate; thus, the fact that these AEWRs are above the average state agricultural wage is not inconsistent with wage depression linked to foreign workers.

Finally, DOL claimed its decision—to set the AEWR equal to the previous year's average hourly wage for field and livestock workers for each state—was “based directly on a current average agricultural wage that is not apparently depressed by the presence of foreign workers.”¹⁴⁴ This proposition defies common sense and elementary economic analysis; the introduction of any additional workers to a labor market necessarily will affect wages.¹⁴⁵ Nonetheless, DOL read “the data and literature as inconclusive on the issue of adverse effect or wage depression from the presence of illegal alien workers on the USDA data series”¹⁴⁶ and concluded that any “tendency for illegal alien workers to adversely affect wage rates . . . probably has been minor and localized.”¹⁴⁷

DOL's reading of the literature, however, is questionable.¹⁴⁸ The Department of Labor, for example, pointed to the 1986 Economic Report of the President which reported “mixed” results on the question of wage depression:

Some studies . . . have revealed evidence of adverse wage effects. . . . Several studies found a reduction in the wages of unskilled workers in areas with high concentrations of unskilled immigrant workers.

*Other studies, however, have shown that greater concentrations of aliens in labor markets are associated with higher earnings of native-born workers. Increased wages have been found both for broad groups of workers and also for native-born minority groups with whom immigrants might compete directly for jobs.*¹⁴⁹

In a similar vein, DOL cited a GAO report pre-

pared for the Senate Judiciary Subcommittee on Immigration and Refugee Policy, which, in DOL's words, “came to . . . [a] qualified and uncertain conclusion:”

Our major finding . . . is that illegal aliens do, in some cases, exert downward pressure on wages and working conditions with low-wage, low-skilled jobs in certain labor markets. The four case studies that supported this finding examined illegal aliens in competition for the same jobs with legal or native workers. . . .

In three other sectors and labor markets, the effects of illegal workers on legal or native workers' wages . . . could not be determined. The five case studies on these sectors or markets provided evidence that the increased supply of workers for some job categories, in some business and industry sectors . . . depressed wages for some native or legal workers but, at the same time, by stimulating business, also expanded employment opportunities and wages for other legal and native workers in complementary, usually skilled occupations. None of these studies, however, permitted an assessment of net affects. . . .¹⁵⁰

The primary point made by these two studies, as well as by others cited, is that the evidence suggests that wages of domestic workers in competition with—i.e. substitutes for—the undocumented workers are depressed, whereas wages of domestic workers in economically complementary occupations, who therefore are not in competition with the undocumented workers, may even rise, because job opportunities for these workers increase.¹⁵¹ It is the latter group of domestic workers whose wages generally are unaffected, or perhaps even bolstered. Furthermore, it is the overall effect which the studies emphasize cannot be conclusively determined. As the Urban Institute noted in its study, *The Fourth Wave: California's Newest Immigrants*: “In discussing the wage effects of immigration, a key distinction is the impact of immigrants on average wage levels in particular occupations and industries versus their impact on the wages of individuals within those occupations and industries.”¹⁵² This distinction is apparent in the excerpts above and others quoted by DOL,¹⁵³ although the Department's

144. 54 Fed. Reg. at 28039 (7/5/89).

145. See *supra* Section I.C.

146. 54 Fed. Reg. at 28043 (7/5/89).

147. *Id.* at 28041.

148. As the D.C. District Court had concluded, “the studies cited [by DOL] do not support a finding that wage depression no longer exists.” *AFL-CIO v. McLaughlin*, 702 F.Supp. 314 (D.D.C. 1988).

149. 54 Fed. Reg. at 28041-42 (7/5/89), citing 1986 Economic Report of the President 223 (Government Printing Office: 1986) (emphasis supplied by DOL).

150. 54 Fed. Reg. at 28042 (7/5/89), quoting *Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers* 1-2 (GAO/PEMD-88-13BR) (March 1988) (emphasis supplied by DOL).

151. Moreover, most of the studies focused on urban labor markets. It seems likely that the existence of alternative and complementary jobs will be greater in an urban versus a rural setting, since urban economies seem likely to have a greater diversity of industrial, service, retail and other industries and the interdependencies of these industries seems likely to be greater.

152. Muller, *The Fourth Wave: California's Newest Immigrants* 104 (The Urban Institute Press, Washington, DC: 1985). See also the GAO report, *Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers*, *supra*, at 42, which, while noting the limited scope of the case studies examined, concluded that the “detailed information from 9 case studies on 7 individual sectors or industries . . . offer strong[] evidence on wage effects . . . and highlight the importance of sectoral level analysis.” (emphasis added).

153. See 54 Fed. Reg. at 28042-44 (7/5/89).

reading of the studies clearly ignores it.¹⁵⁴ But the distinction is critical for purposes of the H-2A program. DOL's mandate, pursuant both to IRCA and the H-2 regulations preceding it, is not to protect the wages and working conditions of domestic workers in general; it is specifically to protect the wages and working conditions of U.S. workers *similarly employed*. Whatever uncertainty regarding the net impact on domestic workers may exist—and uncertainty clearly does exist—it is irrelevant for DOL's regulatory responsibilities, if the domestic farmworkers competing with the H-2A workers, who are unable or unwilling to obtain other nonagricultural employment, are harmed.

The other studies relied upon by DOL reinforce this point. For example, the passage of an Urban Institute study highlighted by DOL concluded that the influx of both legal and illegal Mexican immigrants "*somewhat depressed the wages of non-Hispanics working as laborers, but the impact on wages paid to non-Hispanics in semi-skilled occupations appears to be negligible.*"¹⁵⁵ What DOL did not emphasize is the Institute's conclusion that the presence of the

Mexicans and, in all likelihood, of other immigrant groups, reduced the average wages in manufacturing and some services . . . This reduction . . . primarily reflects the increasing share of Hispanics in the work force, since wages for this group are lower than for non-Hispanics in similar occupations.¹⁵⁶

Even more to the point, in explaining why the wages of non-Hispanic (in particular black) U.S. unskilled workers were only "somewhat depressed" and the impact on wages of such semi-skilled U.S. workers "appears to be negligible," the study stated: "The reason for this, at least in southern California," on which the study had focused, "is that there appears to be *relatively little direct competition between Mexican immigrants and native blacks for the same jobs.*"¹⁵⁷ "Unquestionably," however, "there has been some job competition between low-skill blacks . . . and immigrants . . . and some blacks (and others) who are unable to improve their occupational status or move to areas with less immigrant competition will find fewer job opportunities as a result of immigration."¹⁵⁸

Finally, "[a]n examination of historical data suggests that the wage gap between skilled and unskilled labor fluctuated in response . . . to waves of immigration to the United States," with unskilled keeping pace with skilled wages during periods of labor shortage, and

stagnating relative to skilled wages during periods of significant immigration, primarily of unskilled workers. In short, the Urban Institute study concluded without hesitation that "there is evidence of wage depression attributable to immigrants."¹⁵⁹

As noted, one of the reasons the overall impact of (legal and illegal) immigrants is uncertain is that wages in some occupations may rise with an influx of labor into complementary job sectors. If immigrants whose net impact is uncertain, or even positive, depress wages in the particular sector where they find jobs, then wage differentials between the unskilled workers in that sector and the skilled workers in complementary sectors should increase where the immigrants are found. Why? For the net impact to be negligible, an increase in wages in the complementary sector would be required to offset the wage depression in the immigrant sector. Conversely, an increase in the wage differential between the two sectors would support the existence of wage depression.

The Urban Institute found a "dramatic" decline in the wages of unskilled workers in the Los Angeles manufacturing sector relative to those of similar unskilled workers in the United States and other urban centers, whereas wages of skilled manufacturing workers in Los Angeles grew at about the national average. The study concluded,

There can be little doubt that the relative wage decline characterizing low-skill manufacturing jobs in Los Angeles is related to the presence of immigrant labor in large numbers, particularly Mexicans and Central Americans. *Because immigrant workers tend to be paid less than native workers in the same industry, a growing preponderance of immigrant workers lowers the average wage rate received by all workers in the industry.* . . .

We conclude that there is evidence of wage depression attributable to immigrants.¹⁶⁰

Thus, in areas where the determination of wage depression over time in particular job categories has not or cannot be performed, the Urban Institute study suggests that a meaningful barometer of adverse effect is not the net effect on the labor market as a whole, but rather the gap between wages in the sector(s) where immigrants are employed and those in which they are not, after controlling for relevant inter-sector variables.¹⁶¹

Finally, DOL highlighted the non-detectability of

154. For a brief discussion on the economic relationship of complementary versus substitute jobs, see Muller, *The Fourth Wave* at 93-95, 105-106.

155. 54 Fed. Reg. 28042 (7/5/89), quoting Muller at 123 (emphasis supplied by DOL).

156. *Id.*

157. *The Fourth Wave* at 101 (emphasis added). Again, this conclusion is not cited by DOL.

158. *Id.* at 102.

159. *Id.* at 112.

160. *Id.* at 110-12 (emphasis added).

161. DOL similarly misinterpreted the significance of the "mixed

and somewhat inconclusive" results of two other studies: (1) *Illegal Immigrants and Refugees—Their Economic Adaptation and Impact on Local U.S. Labor Markets: A Review of the Literature* (National Commission for Employment Policy: October 1986); and (2) *NBER Summary Report: Immigration, Trade, and the Labor Market* (National Bureau of Economic Research: January 1988). Both of these studies also discuss segmented versus fluid markets—i.e. whether domestic workers displaced by immigrants are able to move into other sectors of the economy—and complementary versus substitute labor dynamics. DOL discusses these studies in 54 Fed. Reg. at 28042 (7/5/89).

wage depression in the USDA data series.¹⁶² Indeed, both the GAO report and a study by Philip Martin, an agricultural economist who has worked extensively on foreign labor issues, do note that the USDA series may hide wage depression in particular farm labor markets.¹⁶³ DOL interprets this observation to mean that the current USDA average "is not apparently depressed by the presence of foreign workers."¹⁶⁴

But the lack of *detectability* is not dispositive on the question of the *existence* of wage depression. If agricultural wages in general have been depressed as a result of the employment of foreign workers, the particular impact of wage depression in specific crops and areas where foreign workers have been concentrated may not be noticeable at a more general level of aggregation. In other words, it may be simultaneously true that (1) wage depression is greatest in specific crops and areas where foreign workers are concentrated; (2) wages of agricultural wages in general are depressed due to the employment of foreign workers; but (3) the particular impact of the former depression on the latter is not reflected in average national agricultural wages.

More specifically, the detectability of depression in the wages of field and livestock workers (which is what DOL proposes to use as the AEW) is not dispositive on the question of whether or not wages of piece rate workers (who constitute the bulk of U.S. workers in competition with H-2 and other immigrant farmworkers) have been depressed. Piece rate workers traditionally have earned more than all field and livestock workers combined, although the gap is narrowing. If piece rates have been, and continue to be, depressed by foreign workers, setting the AEW equal to the USDA average wage for field and livestock workers may provide a floor below which the depressed earnings of piece rate workers cannot fall; but it does not prevent such slippage in piece rates until that floor is reached.¹⁶⁵ Thus, even if DOL were correct that the USDA average wage for field and livestock workers is not depressed by the presence of foreign workers (an assertion which is

debatable), this would support indexing the AEW to changes in that wage rate, as had been done prior to the post-IRCA regulations, not to setting the AEW at its absolute level, as the new regulations do.

An October 1988 GAO report on the H-2A program, not discussed by DOL, noted "that to the extent that general farm wages are also depressed—the penetration of undocumented and H-2A workers in the USDA sample is unknown—. . . general farm wages would be a less useful indicator of a nondepressed wage among seasonal workers."¹⁶⁶ Martin supports this suggestion: "[I]llegal aliens have been an integral part of some farm work forces for so long that extant data cannot portray farm labor markets in some commodities and areas which are not influenced by illegal aliens;" in other words, it may be impossible to detect how much wage depression has occurred "because the presence of illegal alien workers has *tainted existing wage data*."¹⁶⁷

3. *Alternative Approaches*

Concededly, the analytic issues discussed above render DOL's already difficult task of determining a non-depressed wage even more formidable. The solution, however, cannot be to ignore the fact of wage depression. If wage depression cannot be detected, DOL could look to the wage gap between various sectors where foreign workers are concentrated and a sector where they are not—for example, manufacturing wages or agricultural wages in a state relatively free of immigrant labor. Beginning with a base wage rate pre-dating the influx of immigrant labor to a particular state, the AEW could then be indexed to increases in the "untainted" wage.

Alternatively, DOL could determine, as a policy matter, what relationship between agricultural and, say, manufacturing wages would be acceptable. In addition to the earning power of agricultural versus manufacturing workers, DOL might consider other factors—such as the degree of international competition faced by the industry, the magnitude of labor costs as a percentage, on

162. See, e.g., 54 Fed. Reg. at 28043 ("Even if there may have been adverse effects on agricultural wages . . . they apparently have been so concentrated in specific crops, activities, and areas that such effects do not appear to be reflected to any significant degree in the USDA data series. . .").

163. *Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers*, *supra*, at 10 ("Our experience . . . suggested that wage depression is harder and harder to detect at levels of analysis beyond or above a highly localized and occupation-specific labor market."); Martin, *IRCA and the U.S. Farm Labor Market* (February 1988), p. 14 ("Farm wages should rise as IRCA eliminates illegal alien farmworkers, but it may be hard to observe such wage increases in regularly-published data [such as USDA's *Farm Labor*] because illegal alien workers are concentrated on a few farms growing a few commodities in a few states.").

164. 54 Fed. Reg. at 28039 (7/5/89).

165. Compounding this problem, DOL has selected the average earnings computed by USDA for field and livestock workers. This is the lowest rate DOL could have chosen—lower not only than piece workers' average hourly earnings, as estimated by USDA, but also lower than the average wage of all hired farmworkers combined as well as that of field workers alone.

166. *The H-2A Program: Protections for U.S. Farmworkers* 63 (GAO/

PEMD-89-3) (October 1988). This report also questioned the general appropriateness and potential effectiveness of the USDA field and livestock data to provide wage protection to U.S. workers employed similarly to H-2A workers. The primary doubts the GAO raised were the following: (1) The USDA survey may underrepresent seasonal and temporary workers (the only ones H-2As can directly replace) for two main reasons. First, the surveys are not performed at the peak seasonal employment periods. Second, the surveys exclude a large category of "agricultural service workers" because they are employed through a farm labor contractor (or "crew leader"), but many of whom perform seasonal labor of the type performed by H-2As. (2) The USDA estimates for field and livestock workers underestimates the wages of U.S. workers in the same occupations as H-2A workers to the extent that H-2A workers are employed in jobs paying by the piece (an observation also made uniformly by every attorney representing farmworkers and other advocates with whom I spoke), since piece rate workers earn substantially more than field and livestock workers in general. In short, the GAO found that DOL had failed to explain the relationship between the USDA wage and the wages of U.S. workers in jobs similar to H-2As. *Id.* at 58-59.

167. Martin, *IRCA and the U.S. Farm Labor Market* at 1-2.

average, of growers' total costs, and the overall economic viability of the industry and its importance to the economy at large—in determining the desired relationship. The point of either approach would be to link the AEWI determination to some independent wage base relatively free of the presence of foreign workers.

In comments submitted to DOL on the proposed AEWI methodology, West Virginia Legal Services compared manufacturing to USDA wage data. Citing the GAO *H-2A Program* report, Legal Services argued that such a comparison provides a proxy by which to measure general wage depression in agriculture. From the data submitted, reproduced below, Legal Services pointed out that agricultural wage rates in 33 of the 48

contiguous states increased more slowly than manufacturing rates between 1974 and 1987. The three states where agricultural wage rates increased most slowly relative to manufacturing wages (more than 40% less) have a long history of employing H-2 and undocumented workers. In twelve other states, including California and five H-2 user states, the USDA field and livestock wage fell between 20% and 40% relative to manufacturing wages. In another 13 states, including Florida and all but one of the remaining H-2 user states, the discrepancy ranged between 10% and 20%.¹⁶⁸

TABLE I
RATES OF CHANGE IN USDA AVERAGE FIELD AND LIVESTOCK WORKER WAGES
COMPARED TO RATES OF CHANGE IN MANUFACTURING WAGES
1974-1987

State	USDA Rate	% Change 1974-1987	Manuf. Rate	% Change 1974-1987	Diff. in % Changes
VA	1974: \$2.07 1987: \$4.17	101.45%	1974: \$ 3.65 1987: \$ 9.15	150.68%	-49.23%
NH	1974: \$2.02 1987: \$4.32	113.86%	1974: \$ 3.65 1987: \$ 9.30	154.79%	-40.93%
ID	1974: \$2.20 1987: \$3.95	79.55%	1974: \$ 4.41 1987: \$ 9.70	119.95%	-40.40%
ND	1974: \$2.41 1987: \$4.35	80.50%	1974: \$ 3.83 1987: \$ 8.43	120.10%	-39.60%
LA	1974: \$1.86 1987: \$3.91	110.22%	1974: \$ 4.40 1987: \$10.90	147.73%	-37.51%
ME	1974: \$2.02 1987: \$4.32	113.86%	1974: \$ 3.51 1987: \$ 8.77	149.86%	-36.00%
UT	1974: \$2.10 1987: \$4.29	104.29%	1974: \$ 4.19 1987: \$ 9.95	137.47%	-33.18%
VT	1974: \$2.02 1987: \$4.32	113.86%	1974: \$ 3.78 1987: \$ 9.12	141.27%	-27.41%
GA	1974: \$1.77 1987: \$3.88	119.21%	1974: \$ 3.50 1987: \$ 8.51	143.14%	-23.93%
TN	1974: \$1.78 1987: \$3.90	119.10%	1974: \$ 3.62 1987: \$ 8.78	142.54%	-23.44%
KS	1974: \$3.47*** 1987: \$4.35	25.36%	1974: \$ 6.71*** 1987: \$ 9.97	48.58%	-23.22%
CT	1974: \$2.02 1987: \$4.32	113.86%	1974: \$ 4.42 1987: \$10.46	136.65%	-22.79%
CA	1974: \$2.60 1987: \$5.41	108.08%	1974: \$ 4.76 1987: \$10.98	130.67%	-22.59%
AZ	1974: \$2.10 1987: \$4.30	104.76%	1974: \$ 4.40 1987: \$ 9.94	125.91%	-21.15%
MA	1974: \$2.02 1987: \$4.32	113.86%	1974: \$ 4.16 1987: \$ 9.77	134.86%	-21.00%
DE	1974: \$2.25 1987: \$4.83	114.67%	1974: \$ 4.62 1987: \$10.69	131.39%	-16.72%
FL	1974: \$2.42 1987: \$4.91	102.89%	1974: \$ 3.76 1987: \$ 8.16	117.02%	-14.13%
IA	1974: \$2.54* 1987: \$4.25	67.32%	1974: \$ 5.85* 1987: \$10.61	81.37%	-14.05%

168. Comments submitted by West Virginia Legal Services to

the U.S. Department of Labor regarding the Proposed Adverse Effect Wage Rate Methodology, 53 Fed. Reg. 43722 (10/28/88).

TABLE I (Continued)

<i>State</i>	<i>USDA Rate</i>	<i>% Change 1974-1987</i>	<i>Manuf. Rate</i>	<i>% Change 1974-1987</i>	<i>Diff. in % Changes</i>
NM	1974: \$1.72 1987: \$4.30	150.00%	1974: \$ 3.31 1987: \$ 8.74	164.05%	-14.05%
NE	1974: \$2.06 1987: \$4.35	111.17%	1974: \$ 4.15 1987: \$ 9.34	125.06%	-13.89%
OK	1974: \$1.87 1987: \$4.47	139.04%	1974: \$ 4.01 1987: \$10.14	152.87%	-13.83%
WA	1974: \$2.51 1987: \$5.26	109.56%	1974: \$ 5.24 1987: \$11.70	123.28%	-13.72%
CO	1974: \$2.66** 1987: \$4.29	61.28%	1974: \$ 5.80** 1987: \$10.11	74.31%	-13.03%
NY	1974: \$2.06 1987: \$4.32	109.71%	1974: \$ 4.53 1987: \$10.09	122.74%	-13.03%
RI	1974: \$2.02 1987: \$4.32	113.86%	1974: \$ 3.62 1987: \$ 8.19	126.24%	-12.38%
IL	1974: \$2.23 1987: \$4.60	106.28%	1974: \$ 4.97 1987: \$10.85	118.31%	-12.03%
MT	1974: \$1.98 1987: \$3.95	99.49%	1974: \$ 5.05 1987: \$10.61	110.10%	-10.61%
WV	1974: \$1.75 1987: \$3.90	122.86%	1974: \$ 4.53 1987: \$10.56	133.11%	-10.25%
MI	1974: \$2.32* 1987: \$4.22	81.90%	1974: \$ 6.81* 1987: \$12.97	90.46%	-8.56%
NC	1974: \$1.81 1987: \$4.17	130.39%	1974: \$ 3.28 1987: \$ 7.83	138.72%	-8.33%
AL	1974: \$1.70 1987: \$3.88	128.24%	1974: \$ 3.73 1987: \$ 8.76	134.85%	-6.61%
US	1974: \$2.09 1987: \$4.57	118.66%	1974: \$ 4.42 1987: \$ 9.91	124.21%	-5.55%
MO	1974: \$1.90 1987: \$4.25	123.68%	1974: \$ 4.39 1987: \$ 9.99	127.56%	-3.88%
NJ	1974: \$2.13 1987: \$4.83	126.76%	1974: \$ 4.57 1987: \$10.42	128.01%	-1.25%
KY	1974: \$1.68 1987: \$3.90	132.14%	1974: \$ 4.36 1987: \$10.04	130.28%	1.86%
WY	1974: \$1.81 1987: \$3.95	118.23%	1974: \$ 4.52 1987: \$ 9.78	116.37%	1.86%
TX	1974: \$2.23* 1987: \$4.47	100.45%	1974: \$ 4.98* 1987: \$ 9.85	97.79%	2.66%
OH	1974: \$1.97 1987: \$4.60	133.50%	1974: \$ 5.13 1987: \$11.73	128.65%	4.85%
IN	1974: \$2.04 1987: \$4.60	125.49%	1974: \$ 5.04 1987: \$11.06	119.44%	6.05%
SC	1974: \$1.53 1987: \$3.88	153.59%	1974: \$ 3.32 1987: \$ 8.10	143.98%	9.61%
MS	1974: \$1.57 1987: \$3.91	149.04%	1974: \$ 3.19 1987: \$ 7.59	137.93%	11.11%
PA	1974: \$2.07 1987: \$4.83	133.33%	1974: \$ 4.57 1987: \$ 9.98	118.38%	14.95%
WI	1974: \$1.79 1987: \$4.22	135.75%	1974: \$ 4.81 1987: \$10.55	119.33%	16.42%
MD	1974: \$2.05 1987: \$4.83	135.61%	1974: \$ 4.62 1987: \$10.08	118.18%	17.43%
SD	1974: \$1.84 1987: \$4.35	136.41%	1974: \$ 3.77 1987: \$ 7.94	110.61%	25.80%
OR	1974: \$2.16 1987: \$5.26	143.52%	1974: \$ 5.01 1987: \$10.55	110.58%	32.94%

TABLE I (Continued)

State	USDA Rate	% Change 1974-1987	Manuf. Rate	% Change 1974-1987	Diff. in % Changes
MN	1974: \$1.61 1987: \$4.22	162.11%	1974: \$ 4.67 1987: \$10.37	122.06%	40.05%
AR	1974: \$1.88 1987: \$3.91	107.98%	1974: \$ 7.10 1987: \$11.79	66.06%	41.92%
NV	1974: \$1.67 1987: \$4.29	156.89%	1974: \$ 4.89 1987: \$ 9.76	99.59%	57.30%

Notes:

- * Rates are from 1976, as that is the earliest manufacturing wage data available.
- ** Rates are from 1977, as that is the earliest manufacturing wage data available.
- *** Rates are from 1979, as that is the earliest manufacturing wage data available.

[Source: USDOL, BLS, Statistics Labstat Series Report of 11/21/88, Series # SAU 0100030000056 for state and area industrial employment, hours and earnings, manufacturing averages; Crop Reporting Board, ESS, USDA, Annual Average Wage Rates for Field and Livestock Workers Combined, by States, Standard Federal Regions and United States, 1974-1980; Farm Labor, Annual Average Wage Rates for Hired Workers, by States and Regions, 1987 (Feb. 1988)]

Of the H-2 user states, the table shows that only Texas and Maryland experienced agricultural wage growth exceeding that of the state's manufacturing wage. Legal Services suggested that the "Texas anomaly" resulted from the fact that Texas has been so inundated with undocumented workers crossing the border from Mexico that it is likely that manufacturing wages have also suffered in that state; growth in Texas manufacturing wages during the time period under consideration (1974-87) ranked 43rd compared to the other states.¹⁶⁹

Finally, West Virginia Legal Services addressed a second type of "anomaly": that applying the old methodology to some non-H-2 user states yielded AEWRs which exceeded the applicable USDA average farm wage rate. The fact that agricultural wages have kept pace with manufacturing wages in some cases, Legal Services attorneys argued, only provides "an indication of what would have happened in other states but for the presence of undocumented workers."¹⁷⁰ In other words, this phenomenon in non-user states is an unsurprising corollary of agricultural wage depression in user-states.

Despite the questionability of DOL's interpretation of the various studies and its lack of any firm data affirmatively supporting the absence of wage depression, the Court of Appeals found DOL's

interpretation reasonable. Reinforcing the new "balance" approach to DOL's administration of the program, the Court, as noted above, found the balance DOL had struck to be within its broad range of discretion and upheld the regulation.¹⁷¹

In the final part of this paper, the prevailing wages paid to piece rate workers in discrete crops and areas in which H-2 workers have been employed will be examined. Three case studies are presented. The first is based on wage data for apple pickers in the greater Shenandoah Valley area. The second compares wage data in Maryland for years in which H-2 workers were and were not employed by Maryland growers. The third examines data on apple pickers in Hudson Valley, New York.

VI. CASE STUDIES

As discussed above, any conclusions drawn from existing agricultural wage data are limited by the paucity and questionable reliability of the data that exists. The few studies which have been done, discussed above in relation to the new AEWR regulations, support the hypothesis that the importation of temporary foreign workers has depressed agricultural wages, and will continue to do so. In the following sections I will examine the apple harvests in three areas for evidence of wage depression: (1) The four states surrounding the Shen-

169. *Id.* at 3. West Virginia Legal Services also explained the "Texas anomaly" as resulting from USDA's post-1980 practice of combining Texas with Oklahoma and reporting a single rate for this "Southern Plains" region. In 1980, USDA published both separate wage findings for these two states as well as the regional finding. The Texas average was \$3.13 per hour; Oklahoma's was \$3.56. The combined average for the Southern Plains was \$3.20. The increase in average agricultural wages in Texas only narrowly exceeded that in manufacturing wages (2.66%); thus, the combined Southern Plain rate may have increased the agricultural wage used for Texas (i.e. the Southern Plains wage) sufficiently to tip the relationship between its farm and manufacturing wages. *Id.*

West Virginia Legal Services noted similar factors in explaining another seemingly anomalous state in the data, Oregon. And, while the Legal Services did not discuss Maryland, where agricultural wages grew 17% faster than manufacturing wages, USDA now reports a single rate for Northeast II, which includes Maryland, Delaware, New Jersey, and Pennsylvania. Of those states, only Maryland has a history of employing H-2 workers; and none of the states is noted for a concentration of undocumented workers, although undoubtedly some illegal foreign workers could be found in each. Thus, a similar dynamic to that at work in Texas may also have been present in Maryland. 170. *Id.* at 4.

171. *AFL-CIO v. Dole*, 923 F.2d 182.

andoah Valley—Pennsylvania, Virginia, Maryland, and West Virginia; (2) Maryland; (3) The Hudson Valley in New York. Much of the data analyzed is drawn from wage surveys and reports which the U.S. Department of Labor requires that states perform and, ultimately, are performed under DOL's direction; other data was compiled by the U.S. Department of Agriculture. To the extent that DOL's own data suggests wage depression, further doubt is cast upon the "reasoned basis" underlying its recent regulatory decisions.

A. THE SHENANDOAH VALLEY: PENNSYLVANIA, VIRGINIA, MARYLAND, WEST VIRGINIA

Apple growers operate in four states in the Shenandoah Valley—Maryland, Pennsylvania, Virginia, and West Virginia. The relative proximity of these growers to each other results in their facing relatively similar conditions in cultivating, harvesting, and marketing their produce. In addition, H-2A apple workers are not new to the Valley; apple growers in Virginia and West Virginia have hired temporary foreign workers at least since the 1960s. Pennsylvania apple growers, however, have never used H-2A workers, and Maryland growers did not employ H-2s before 1973, nor after 1986. Unfortunately, wage surveys for Pennsylvania were not performed for many years and records were not kept for many others. But for the years for which Pennsylvania records do exist, as well as for the years in which Maryland apple growers did not employ H-2A workers, comparisons between the wages in the H-2A and non-H-2A Shenandoah area states cast some light on the question of wage depression.

Virginia has performed wage surveys for apples in three distinct geographic regions: Winchester, Roanoke, and Marion-Galax. As shown in Table 1, the vast majority of H-2A apple workers in Virginia have been employed in only one of these areas—Winchester.

Winchester is the Virginia area which borders the Shenandoah Valley, making wage comparisons between it and Pennsylvania and Maryland growers, as well as between it and the Roanoke and Marion-Galax growers (whose orchards do not directly border the Valley), instructive. Again, it is unfortunate that a limited number of the Virginia and West Virginia surveys have been saved; but comparisons for recent years can be made.

Of course, as is inevitable, there are factors which tend to confound any such wage comparisons. First, farmworker advocates and agricultural economists alike repeatedly have attacked the reliability of many of DOL's wage surveys. They have questioned, for example, the sufficiency and random nature of the survey sample chosen, the impartiality and training of the survey interviewers, and the common practice of collecting information only from growers.¹⁷² In addition, the growers may face certain conditions peculiar to their state—state taxes, for example—which may affect their production costs and alter their demand curve for labor. Nonetheless, particularly in a context of limited wage data for H-2A crops and areas, the Shenandoah apple orchards offer relatively fertile ground for making meaningful comparisons between H-2A and non-H-2A wages.

The number of foreign and domestic apple pickers employed by Virginia growers in each of these areas for each survey year are shown in Table 1. During the years in question, the percent of the total workforce constituted by H-2A workers ranged from 26% to 51% in Winchester, from zero to 7% in Roanoke, and from zero to 16% in Marion-Galax. In both absolute numbers and as a percentage of all workers employed, the presence of H-2A workers in Winchester has far outweighed the number of H-2A workers in the Marion-Galax and Roanoke reporting areas.

TABLE 2
ESTIMATED NUMBER OF FOREIGN AND DOMESTIC WORKERS IN VIRGINIA APPLES¹⁷³

	<i>Winchester</i>			<i>Roanoke</i>			<i>Marion-Galax</i>		
	# of H-2As	% of total	Number of domestics	Number of H-2As	% of total	Number of Domestic	Number of H-2As	% of total	Number of Domestic
1986	710	51%	675	6	4%	146	3	2%	146
1987	475	35%	875	30	7%	425	30	16%	158
1988	301	26%	875	0	0%	275	12 #	7%	160
1989	*		515	*		175	0	0%	104

* Number not recorded on survey.

A handwritten note on the survey record suggests that perhaps no H-2A workers were employed in Marion-Galax in 1988.

Source: Prevailing Wage Surveys, ETA 232 for Virginia, Virginia Department of Employment Security.

As an initial matter in comparing the use and impact of foreign workers in the Shenandoah region, the

fact that *no* growers in Pennsylvania have ever sought H-2A pickers, and very few in Roanoke or Marion-Galax

172. The prevailing wage surveys do include a section for data collected through interviewing workers, but frequently these interviews either are not conducted or the information obtained through them is ignored in the prevailing wage determination.

173. Some of the same workers could be employed at different

times in more than one of the three areas listed. This possibility and the fact that these numbers are estimates may account for the disparity between these estimates and the number of certifications granted as reported in the U.S. DOL's *Annual Reports*, discussed below.

have done so, while growers in Winchester, West Virginia, and Maryland have hired significant numbers of such workers, coupled with the fact that farmworkers frequently travel across state lines to work, casts sub-

stantial doubt on the veracity of the alleged domestic labor shortage faced by the H-2A growers.¹⁷⁴

TABLE 3
COMBINED TOTAL NUMBER OF DOMESTIC AND FOREIGN APPLE WORKERS HIRED*

	Pennsylvania	Virginia	West Virginia	Maryland
1986	N.A.	1,888	1,325	365
1987	N.A.	1,993	1,415	314
1988	2,634	1,623	1,476	213
1989	1,566	2,071**	866	146

* As estimated by the various state labor departments.

** The In-Season Wage Report for Virginia did not specify the number of foreign workers hired in 1989. This figure is derived from the U.S. DOL's 1989 Annual Report: *Labor Certifications for Temporary Foreign Agricultural Workers (H-2A Program)*, which reports the number of foreign certifications (i.e. the maximum number of permissible hires). Thus, the figure in the table may be somewhat high (since growers need not fill all positions certified). However, this does not change the analysis.

N.A. Not Available.

Source: Domestic Agriculture In-Season Wage Reports.

Comparisons between the rates paid to apple pickers in Pennsylvania, Maryland, West Virginia, and Virginia suggest a strong connection between the wages paid to apple pickers and the presence of no, or very

few, H-2A workers. Tables 3 and 4 show the wages in each such area in the Shenandoah Valley for the years for which data exists.

TABLE 4
PREVAILING WAGES FOR APPLE PICKERS IN H-2A USER AND NON-USER AREAS CENTS PER BUSHEL*
1986-89

	Non-User Areas					User Areas	
	Adams PA	Franklin PA	West MD	Mar-Gal VA	Roanoke VA	Winchester VA	West Virginia
1989	52	48	50	50	52	41.6*	41.8
1988	44	41	55	50	50	40.9*	40
1987	NA	NA	50	50	55	40	40
1986	NA	NA	50**	50	55	39.8	40

* Where an end of season bonus (EOSB) is offered, it is included in the piece rate listed. An EOSB is a fixed sum, usually between two and five cents for apples, paid at the end of the season, for each bushel (or other unit) picked during the course of the season. Workers who quit or are fired before the season is over do not receive the bonus.

* The 1988 and 1989 Winchester surveys distinguished between picking apples for the fresh and processing markets. In 1989 these rates were 42.5¢ and 40.7¢, and in 1988, 41.8¢ and 40¢, per bushel. The percentage of workers picking for each market is not known. Accordingly, the figure in the table represents the simple average of the two rates in each of the two years.

** Western Maryland did have 94 out of 365 temporary foreign workers in 1986, but as is the case with Roanoke and Marion-Galax, this number is far fewer than the numbers in Winchester and West Virginia, and so it is listed as a non-user area in 1986; Maryland employed no H-2s in the subsequent years.

N.A. Not Available.

174. The most obvious explanation, that the labor needs of Pennsylvania growers are significantly smaller, is not borne out by the facts. As shown in Table 2, Pennsylvania growers hire a comparable or greater number of apple pickers than growers in the other three states. Nor can the difference in hiring patterns be explained by the presence of a much larger number of local workers in Pennsylvania. Out of the total 1,566 hires made by Penn-

sylvan apple growers in 1989, 1,403 (89%) were out-of-state workers. In 1988, only the survey for one of the two Pennsylvania counties broke down domestic workers into instate and interstate hires. In that county (Franklin), 551 out of 634 (87%) workers hired were from out-of-state. In 1988 and 1989, Winchester growers hired 775 and 439 interstate workers, respectively; West Virginia growers hired 850 and 490, respectively.

TABLE 5
PREVAILING WAGES FOR APPLE PICKERS IN H-2A USER AND NON-USER
AREAS CENTS PER BUSHEL*
1978-1981

	Non-User Areas Southeastern* Pennsylvania	User Areas	
		Maryland**	Winchester Virginia
1981	48	40	38
1980	45	37	36
1979	42	35	39
1978	42	29.6	32

* Note that the Southeastern crop reporting area of Pennsylvania is to the east of the Shenandoah Valley area, and thus may face crop and market conditions which differ to a somewhat greater extent from the other Shenandoah apple areas than Pennsylvania's Franklin and Adams counties. However, the rather large differential between the non-user versus user areas in the table suggests the likelihood that at least some of the difference in wage rates is attributable to the presence of H-2A workers.

** Maryland last used H-2A workers in 1986.

• Data for Winchester for these years comes from a memorandum, "Summary of Prevailing Wage Rates," written by attorney Edward J. Tuddenham, Migrant Legal Action Program, MLAP file 20.9.1 (October 19, 1988).

In 1989, piece rates per bushel in the non-user areas exceeded those in the user areas by a margin of 6.2¢ to 10.4¢, or by 15% to 25%; in 1988 the margin ranged from .1¢ to 15¢ per bushel, yielding wage differentials that were negligible as between non-user Franklin County and user Winchester up to a differential of 37.5% between West Virginia and the non-user areas of Western Maryland, Marion-Galax, and Roanoke. In 1987 and 1986, the per bushel rate in the non-user areas exceeded that in the user areas by at least 10¢, or 25%. The average piece rate in the non-user areas exceeded that in the user areas by 8.7¢ (21%) in 1989, and 7.5¢ (18%), 11.7¢ (29%), and 11.8¢ (30%) in 1988, 1987, and 1986, respectively. Comparisons between non-user Southeastern Pennsylvania and users Maryland and Winchester between 1978 and 1981 show similarly significant differences in the piece rates for apple pickers. Per bushel rates in Pennsylvania during those years exceeded those in Maryland by 8¢ to 12.4¢ (20% to 42%) and those in Winchester by 3¢ to 10¢ (8% to 31%).

Finally, comparing the differences between wage rates in user versus non-user areas in Virginia offers perhaps the strongest evidence of a positive correlation between H-2A workers and wage depression. A 1972 U.S. Department of Labor Rural Manpower Service Report compared wages paid by Winchester growers, who have been employing foreign workers since the early 1960s, and Roanoke growers, who, as noted above, it appears never employed H-2A workers until 1986, and then only in small numbers. Between 1964 and 1969, the Report found, the piece rate for picking apples in Winchester increased by 33%, from 15¢ to 20¢ per box, while in Roanoke the piece rate increased by 80%, from 15 to 27¢ per box—almost two and one-half times the wage increase in Winchester over the course of five

years;¹⁷⁵ in 1969 the Roanoke rate was 35% higher than that in neighboring Winchester. As can be seen in Table 3 above, this trend has persisted to the present time. In 1986 the piece rates in Roanoke and Marion-Galax (where relatively few H-2A workers were still to be found) were 15.2¢ and 10.2¢ per bushel (38.2% and 25.6%) higher than the rate in Winchester. By 1989 the gap had narrowed somewhat, but was still significant, with the piece rates per bushel for Marion-Galax and Roanoke measuring 8.4¢ (20%) and 10.4¢ (25%) higher than that in Winchester.

It should be noted that the correlation between the absence of H-2A workers and higher wages is not perfect. Significant wage differentials between the user and non-user areas do not exist for each such area in every year; the 1988 wage in non-user Franklin County, Pennsylvania, for example, is barely higher (.1¢ per bushel) than that in user Winchester. This may reflect that not all variables affecting the labor market are constant from area to area, or it may reflect some unexpected development experienced by a few large growers in one area. In the case of Adams and Franklin counties in Pennsylvania, data for only two years is available, making it difficult to analyze, for example, why the difference between the Franklin and Winchester wages in 1988 is negligible, or whether it might be anomalous. As discussed above, the force of conclusions one can draw from the data is limited. Nonetheless, the overall picture painted by the data in Tables 3 and 4 clearly does support the wage depression hypothesis.

It also is interesting to note that the piece rates offered in non-user areas evidence a much greater range than those in the user areas. In 1988, for example, the rates in the non-user Shenandoah regions ranged from 41¢ to 55¢ per bushel, while the rates in the two user areas were only .9¢ per bushel apart. While there is in-

175. U.S. Department of Labor, Manpower Administration, *Review of the Rural Manpower Service* (1972), 34.

One box equals approximately 1 and 1/8 bushels.

sufficient data upon which to reach any decisive conclusions, this pattern suggests that in user areas the wage offered by H-2A growers to H-2A workers (and to domestic workers in the employ of H-2A growers) comes to dominate the "equilibrium" wage. That is, the wage offered to all apple pickers in the area gravitates toward the H-2A wage, while in the non-user areas wages continue to be influenced by a variety of factors. In other words, in user areas the market as a medium of wage determination is displaced by a single wage rate—the prevailing wage, as determined by DOL. H-2A growers all typically offer the same wage, so that in crop reporting areas where they predominate, the prevailing wage will be the rate these growers pay. To be sure, DOL must certify this rate, but prospectively, it will be immune to market pressures that would push it up in a pure domestic setting. This is because growers can obtain as much foreign (exogenous) labor as they need at the certified rate; any domestic workers willing to work, but asking a higher wage, are considered unavailable for work and need not be hired.¹⁷⁶ In this way, the prevailing wage finding—which, to be consistent with the statutory and regulatory purpose of the temporary foreign worker program, should establish a wage floor to protect domestic workers—actually becomes a wage ceiling.¹⁷⁷ This theory would help to explain the diversity of piece rates within non-user areas as opposed to the more uniform and lower wages in the user areas. As discussed below, the prevailing wage surveys for apple pickers in New York's Hudson Valley offer additional, stronger evidence of the tendency for wages paid by H-2A growers to cluster below the rates offered by most non-user growers and to span a much narrower range than non-H-2A wages.

B. MARYLAND

The Maryland Department of Economic and Employment Development has retained prevailing wage surveys for Maryland's apple harvests since 1968. The surveys indicate that Maryland apple growers hired their first H-2 workers in 1973, and continued to employ such workers until 1987. The Maryland surveys offer the potential to measure the growth (or stagnation) of the prevailing apple wage against other wage indices. This section will compare the Maryland apple wage to the following wage indices: the average hourly wage paid to Maryland farmworkers during a given year, the average hourly wage paid to Maryland farmworkers in October of each year (the prevailing wage surveys are conducted annually in October), the average manufacturing wage

in Maryland in October, and the national average farm wage for all hired farmworkers during a given year and in October of each year.

The wage depression hypothesis to be tested is as follows: The presence of H-2A workers should have a smaller impact on the various wage indices than on Maryland apple wages either because the concentration of H-2A workers is diluted in a larger pool of labor surveyed (as is the case for the USDA surveys of all Maryland and all U.S. farmworkers) or because the number of H-2A workers in the relevant labor pool is zero and therefore any H-2A impact would be indirect and attenuated (as is the case for the manufacturing sector). If the presence of H-2 workers caused wage depression, we would expect two trends. First, we would expect that during the years in which Maryland orchards hired H-2 workers, growth in the apple wage should have stagnated relative to growth in the other wage indices. Second, we would expect that during the years before H-2 workers were hired, the Maryland apple wage would have fared better relative to the other wage indices than during the H-2 years.

Before probing the available data for evidence of wage stagnation and depression, a few preliminary notes are in order. It is worth reemphasizing that, while the wage comparisons below may provide evidence of wage depression in H-2A crops, no hard and fast conclusions are possible. The prevailing wage surveys seldom meet rigorous scientific standards or utilize sufficiently random sampling methods, diminishing their reliability. In addition, there simply are too many other variables which affect the wages in any particular segment of the labor market, and which cannot be held constant, to allow for a conclusive reading of the data. Moreover, as will be seen below, the correlation between temporary foreign agricultural workers and relative wage stagnation in Maryland is not without exceptions. And while logical, convincing explanations for these variances exist, they nonetheless underscore the lack of precision and certainty feasible in interpreting the data.

Turning to the question of wage depression in Maryland apples, two sets of wage comparisons will be made: 1) comparisons regarding the growth in the various wage indices between 1968 and 1973, before Maryland orchards began employing H-2 workers; 2) similar comparisons between 1974 and 1986, during which time Maryland orchards were employing H-2A workers.¹⁷⁸ The pertinent data is shown in Table 5. Tables 6 and 7 show the growth in the various wage rates dur-

176. Once DOL has certified a wage, a grower's labor shortage is, by definition, equal to the total number of workers needed less the number of domestic workers available and willing to work at the certified wage. See *supra* Section I.A.

177. For additional discussion on this see *supra* Section I.C. See also, *Flecha v. Quiros*, 567 F.2d 1154 (1st Cir. 1977). If wages are higher than the market equilibrium, there is nothing preventing growers from offering less, as would be expected in a free market.

178. It might seem more appropriate to divide the years into two groups from 1968-72 and 1973-86, since 1973 was the first year in which H-2s were hired. However, the USDA dramatically

changed its survey method in 1974. In that year, USDA implemented for the first time a probability survey method, and began conducting such surveys four times per year. Prior to 1974, the USDA had relied on agricultural employers' voluntary submission of wage, hour, and other employment information. As the USDA itself has noted, the comparability of the two sets of data is suspect. *Farm Labor*, U.S.D.A. (1/74). From this perspective, comparisons within each of the two periods (1968-73 and 1974-86) will be more meaningful than comparisons between the two periods.

In addition, there is a time lag between the time H-2 work-

ing the non-H-2 and H-2 periods, respectively. During the non-H-2 years (1968-73), the prevailing piece rate paid to apple pickers in Maryland increased in nominal terms by 25%. During the same time, the other farm and manufacturing wage indices each increased by between 36% to 56%—roughly $1\frac{1}{2}$ to $2\frac{1}{4}$ times as fast as the growth in the apple wage. The group of all farmworkers hired in Maryland during the month of October is perhaps the group of workers most similar to the apple pickers vis-a-vis the labor market; thus, the earnings of these workers may provide the best yardstick for measuring wage depression in apples. October earnings of hired Maryland farmworkers increased by 46% between 1968 and 1973—1.8 times as great as the increase in the apple wage.

Beginning in 1974, the prevailing apple wage stag-

nated, remaining constant in nominal terms until 1978, when it declined slightly by 1%. During the same period, from 1974 to 1978, the various other hourly-earnings indices each increased between 32% to 40%, a growth rate 32 to 40 times that in the prevailing apple wage and far greater than the $1\frac{1}{2}$ to $2\frac{1}{4}$ differential prior to 1973; the average October hourly earnings for all hired farmworkers in Maryland during this period increased by 34%. The prevailing apple wage began to rise after 1978, reaching a 1980 level 19% higher than that in 1974. Between 1974 and 1980, increases in the other hourly earnings figures ranged from 50% to 66%, yielding growth rates in the control indices $2\frac{1}{2}$ to $3\frac{1}{2}$ as fast as the nominal increase in the prevailing apple wage during these years.

TABLE 6
PREVAILING WAGE AND WAGE INDICES, SELECTED YEARS
(1969-1989)

	<i>Prevailing Wage for Md. Apples</i> ¢/bu	<i>Avg. Annual* Wage for Hired Farmworkers in Md.</i> \$/hr	<i>Avg. Oct.* Wage for All Hired Farm- workers in Md.</i> \$/hr	<i>Avg. Oct. Manufacturing Wage in Md.</i> \$/hr	<i>Avg. US Earnings for All Hired Farmworkers</i>	
					<i>Annual</i> \$/hr	<i>October</i> \$/hr
1968	20	1.37	1.40	3.04	1.44	1.41
1973	25	1.87	2.05	4.30	1.44	2.20
1974	30	2.20	2.23	4.77	2.00	2.57
1980	35.6	3.48	3.70	7.75	3.65	3.85
1986	50	N.A.	N.A.	9.86	4.70	4.83
1989	50	N.A.	N.A.	11.05	5.36	5.64

bu = standard U.S. bushel.

N.A. Not Available

* USDA ceased publishing Maryland figures in 1980. After 1980, USDA began publishing average wages on a regional basis. Data from Maryland began to be included in a region extending from Maine to West Virginia, although for a few years even the regional figures are not available.

Sources: Domestic In-Season Agricultural Wage Reports, Maryland Department of Employment Security; *Farm Labor*, USDA; *Employment and Earnings*, U.S. Department of Labor.

TABLE 7
GROWTH RATES IN WAGES OF MARYLAND APPLE PICKERS, AVERAGE HOURLY OCTOBER
AND ANNUAL EARNINGS OF ALL HIRED FARMWORKERS AND OCTOBER MANUFACTURING
WAGES IN MARYLAND

	<i>Apples</i>	<i>All Hired October</i>	<i>All Hired Annual</i>	<i>Manufacturing October</i>
<i>Pre-H-2</i>				
1968-73	25%	46%	36%	41%
<i>Post-H-2</i>				
1974-1978	-1%	34%	32%	40%
1978-1980	20%	23%	19%	16%
1980-1986	40%	NA	NA	27%

ers first enter the domestic labor market and when the depressive effect of their presence will be felt. That the market will need some time to adjust to a sudden change makes sense as an intuitive matter. More importantly, the operation of the regulatory program builds in a one-year time lag, as the wages required of an

H-2A grower in any particular year are determined by the prevailing wage finding in the previous year; thus it is not until 1974 that the effect of the foreign workers, first hired in 1973, will begin to be felt.

TABLE 8
GROWTH IN WAGE RATES OF MARYLAND APPLE PICKERS AND AVERAGE HOURLY OCTOBER
AND ANNUAL EARNINGS OF ALL HIRED FARMWORKERS IN THE UNITED STATES

	<i>Apples</i>	<i>All Hired Farmworkers October</i>	<i>All Hired Farmworkers Annual</i>
<i>Pre-H-2</i>			
1968-1973	25%	56%	39%
<i>Post-H-2</i>			
1974-1978	-1%	24%	35%
1978-1980	20%	21%	18%
1980-1986	40%	25%	29%

Three summary points can be noted thus far: (1) The prevailing wage paid to domestic apple pickers stagnated (and actually declined by 20% in real terms between 1973 and 1978) in the years immediately following the introduction of H-2 workers into Maryland's orchards; (2) In the first six years following that introduction, the prevailing piece rate paid to Maryland's domestic apple pickers grew substantially slower both than average hourly earnings of all farmworkers in Maryland and the United States at large as well as than those of manufacturing workers in Maryland; (3) While the prevailing apple rate also grew more slowly than the control indices prior to the introduction of H-2 apple workers in Maryland, that rate fared significantly better in comparison to the other indices during the pre- than the post-H-2 years.

Wages and average hourly earnings during the 1980-1986 period, however, paint a somewhat murkier picture. Reversing the earlier pattern, the growth in the prevailing nominal piece rate paid to Maryland's domestic apple pickers exceeded the growth in three of the five control indices. Between 1980 and 1986, the prevailing apple wage increased by 40%; the average October manufacturing wage in Maryland increased by 27%; the national average hourly earnings for all hired farmworkers and the national October average increased by 29% and 25%, respectively.

The relationship between the growth¹⁷⁹ of the prevailing wage and the average earnings of all hired Maryland farmworkers cannot be determined, as data on the latter have not been published.¹⁷⁹ This impedes analyzing the possible explanations for the reversal. For example, if the average wages of all Maryland farmworkers increased substantially more than the other control indices, it would seem safe to conclude that something unrelated to the Maryland apple harvest was pushing the apple wage up.

Nonetheless, the data does not necessarily defeat the wage depression hypothesis for Maryland's apple orchards. First, if real wages and earnings are examined, the 1980-1986 wage patterns seem less dramatic. As Table 8 shows, the prevailing apples wage remained practically constant in real terms, increasing by .4%, during the period in question. Between 1980 and 1986, real manufacturing wages in Maryland during October declined slightly, by 3.5% (from \$5.70 to \$5.45 per hour); average hourly earnings for all hired farmworkers in the United States also fell slightly by 3% (from \$2.68 to \$2.60 per hour), as did average hourly October earnings for all U.S. farmworkers, which fell by 2.5% (from \$2.68 to \$2.13 per hour).¹⁸⁰

TABLE 9
WAGES AND EARNINGS OF APPLE WORKERS IN MARYLAND IN REAL TERMS
(1977 Dollars)

	1980	1981	1982	1983	1984	1985	1986
Prevailing Wage (¢/bu)	27.2	26.6	25.1	27.4	26.2	28.1	27.6

Changes in the H-2 regulations also help to explain the rapid increase in nominal apple piece rates relative to the stagnation in earlier years. Prior to 1978, the H-2 regulations had required employers to set piece

rates to enable workers to earn the amount they would have earned had they been paid the AEWR. Farmworker advocates had argued that when the AEWRs increased, employers did not adjust their piece rates accordingly,

179. In 1980 the Department of Agriculture began publishing the *Farm Labor* report far less frequently and stopped publishing average farm earnings for each state altogether. Each report contained far less comprehensive agricultural wage and employment information; and USDA began aggregating that data which was collected and published on a regional, as opposed to a state-by-state, basis. The average earnings of Maryland

farmworkers are now lumped together with those of farmworkers from New England, the mid-Atlantic states, Virginia, and West Virginia.

180. Of course, measuring real wages versus nominal figures does not alter the relative changes in the various wage rates and indices; looking at real terms simply helps to add some perspective.

but simply increased productivity requirements in order to meet the AEWR-equivalence requirement. Indeed, the Maryland surveys reflect precisely this pattern: in the first four years after H-2 workers were introduced, the prevailing nominal piece rate did not change from its 1974 level of 30¢ per bushel. In March 1978 DOL, "recogniz[ing] the possibilities of abuses," adopted a rule requiring H-2 employers to increase piece rates in proportion to increases in the AEWR effective in their state.¹⁸¹

The new 1978 piece rate proportionality provision meant that the piece rate paid by H-2 orchards would have to increase at least in proportion to increases in the AEWR.¹⁸² Consistent with this requirement, in 1979 the nominal prevailing piece rate for Maryland apples did rise for the first time since 1974.¹⁸² In 1983, DOL began weakening the potential wage protection afforded by the rule, allowing employers to increase productivity requirements as long as the average domestic worker's hourly earnings had equalled or exceeded the prior year's AEWR.¹⁸³ The prevailing nominal wage did not change between 1983 and 1984, nor between 1985 and

1986 (the last year in which Maryland growers employed H-2 workers). The prevailing wage did increase by 11% between the 1984 and 1985 seasons, and this may weaken somewhat the evidentiary basis of the wage depression hypothesis. However, the mid-1980s was marked by considerable uncertainty as to what the regulations would require.¹⁸⁴ Changes in, and uncertainty regarding, the regulations may explain part of the prevailing piece rates' somewhat erratic pattern. In addition, while the availability of H-2 growers and the regulatory program do shelter H-2 growers from market pressures to increase wages, they cannot be completely immune from such pressures. Undoubtedly they must respond, however mutedly, to some labor market forces. For example, most H-2 growers employ both domestic and foreign workers, and it is possible that an expected supply of domestic labor may have dried up on short notice, forcing wages up, at least in the short term, to attract more U.S. workers. Table 9 compares the percent change in Maryland's AEWR and the prevailing apple wage from 1974 through 1990.

TABLE 10
CHANGES IN THE MARYLAND ADVERSE EFFECT WAGE RATE AND THE PREVAILING
WAGE IN MARYLAND APPLE ORCHARDS
1974 - 1990

	AEWR (\$/hr)	% Increase Over Prior Year	Prevailing Wage (¢/bu)	% Increase Over Prior Year
1974	2.27	—	30	—
1975	2.36	4 %	30	0 %
1976	2.27	-4 %	30	0 %
1977	2.43	7 %	30	0 %
1978	2.80	15 %	29.6	-1 %
1979	3.01	7.5 %	35	18 %
1980	3.23	7 %	35.6	2 %
1981	3.80	18 %	40	12 %
1982	3.80	0 %	40	0 %
1983	4.37	15 %	45	12.5 %
1984	4.54	4 %	45	0 %
1985	4.63	2 %	50	11 %
1986	4.60	-1 %	50	0 %
1987	4.92	7 %	50	0 %
1988	4.83	-2 %	55	10 %
1989	4.73	-2 %	50	-9 %
1990	4.89	3 %	55	10 %

181. 43 Fed. Reg. 10306, 10309 10317 (3/10/78). See also *supra*, Section V.A.

182. It is interesting to note that since 1968—the first year for which Maryland prevailing wage surveys are available—every Maryland apple grower surveyed, except an occasional handful who paid by the hour, had paid by the *bushel*. In 1978, the first year in which the new piece rate proportionality rule was in effect, the employers of the vast majority of domestic workers counted in the survey (100 out of 139) paid by the *box*. It is impossible to prove, but it seems highly probable that the growers who switched units were those who hired foreign workers. The survey shows that all of the growers who paid by the box paid the same rate (33¢); in addition the survey states that 96% of the foreign workers also received the prevailing wage, which equalled the 33¢

per box wage. As discussed above, H-2 apple growers in each wage area tend to offer the same wage. Moreover, as a general rule, those growers who hire the most foreign workers tend to be amongst the largest concerns, and hire the most domestic workers as well. Thus, it is reasonable to infer that the H-2 growers switched, en masse, to a per box rate. The question is, why? The per box rate paid, 33¢/box is equivalent to a per bushel rate of 29.6¢/bushel—.4¢ less than the prior four years' prevailing wage of 30¢/bushel. It seems plausible that the move to a per box rate was intended to circumvent the 1978 proportionality rule.

183. 48 Fed. Reg. 40168, 40175 (9/2/83). DOL had been trying to reverse the proportionality rule from the beginning of Reagan's Administration. See *supra* Section V.A.

184. See *supra* Section V.

C.. HUDSON VALLEY, NEW YORK

New York apple growers began importing temporary foreign workers no later than the early 1960s. At least since the early 1970s, the clear majority of apple growers in New York's Hudson Valley have employed such workers;¹⁸⁵ as a group, these growers also have employed more domestic workers each year than the growers who hire exclusively domestic labor. And since 1979, more than half of the apple pickers in any season have had H-2 status.¹⁸⁶ In short, it is fair to say that in this region, growers who employ H-2A workers dominate the labor market for apple pickers. If the presence of temporary foreign workers has a depressive wage impact, it should be discernable in the Hudson Valley area.

Tables 10 and 11 illustrate the general pattern of prevailing wage findings for picking Hudson Valley apples for the fresh market. Table 10 shows the prevailing nominal wage, which has increased gradually over the years in a step-like fashion, between 1971 and 1989.

TABLE 11
NOMINAL PREVAILING WAGE FOR FRESH-MARKET APPLES IN THE HUDSON VALLEY
1971-1989

	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980
Prevailing Wage (¢ per 1-1/8 bu)	30	30	35	35	35	35	38	38	40	43
	1981	1982	1983	1984	1985	1986	1987	1988	1989	
Prevailing Wage (¢ per 1-1/8 bu)	43	46	NA	NA	50	*	60	60	60	

* \$4.56/hour.

NA Not Available.

Source: Hudson Valley Prevailing Wage Surveys

TABLE 12
REAL PREVAILING WAGE (1974 DOLLARS) FOR FRESH-MARKET APPLES IN THE
HUDSON VALLEY

	1971	1974	Selected Years 1980	1985	1989
Prevailing Wage (¢ per 1-1/8 bu.)	36.6	35	25.7	22.9	23.8

Source: Hudson Valley Prevailing Wage Surveys

185. Surveys for the following seasons were available: 1977, 1979-1982, 1986, and 1989. Copies of Hudson Valley surveys conducted in seasons prior to 1977 and in 1983-1985, 1987, and 1990 were not available. Some information on the survey results for 1976, 1985, and 1987 is reported on the following year's survey report (i.e. the reports for 1977, 1986, and 1988).

186. During the decade between 1972 and 1982, the absolute number of foreign workers employed in picking Hudson Valley apples for the fresh market peaked at 1,618 in 1982, constituting 61% of the total workforce. The proportion of foreign workers peaked in 1981 with 1,388 foreign workers, constituting 66% of the total labor force. Similar data for the Hudson Valley is not available for 1983-1985, nor for 1987. Because of the way in which the data from these later surveys is broken down and recorded, it is not possible to be certain of the precise total number of domestic workers employed during the 1986, 1988, and 1989 seasons. However, one can derive a maximum total of domestic workers employed, thereby enabling a calculation of the minimum percent of the total workforce occupied by H-2As; for 1986, 1988,

Table 11 shows the real prevailing wage in selected years. Nothing different is learned from examining real versus nominal apple wages, and the analysis that follows looks only at the latter. The enormous erosion in Hudson Valley apple pickers' absolute earning power (as opposed to their earning power relative to other groups of agricultural or manufacturing workers) during the last twenty years, however, is more starkly demonstrated by looking at real wages; it is difficult to grasp intuitively the magnitude of the erosion by looking at the trend in nominal wages, which do rise. Real wages are shown simply to demonstrate the dramatic decline in these farmworkers' earning power. As can be seen, real piece rates paid for picking apples in the Hudson Valley had declined steadily for years, falling by 37% between 1971 and 1985, before recovering slightly to 65% of the 1971 level in 1989.

and 1989, the minimum percent of the total represented by foreign workers is 60%, 62%, and 51%, respectively.

On the number of user versus non-user orchards in the Hudson Valley, between 1977 and 1982 (excluding 1978), the proportion of user to non-user employers peaked in 1981 at 43 to 13, and reached its lowest, at 51 to 39, in 1977. By 1986, the number of user and non-user employers had evened out, but the size of the former, and the number of domestic workers employed by them, continued to exceed that of the latter. Again, exact numbers cannot be derived from the later surveys. The 1988 survey gives no indication of the number of U.S. workers employed on user versus non-user orchards, but the 1986 and 1989 surveys clearly support the assertion that H-2 orchards employ a greater number of domestic workers than non-user orchards; while not providing an exact breakdown, those survey reports do break down the user and non-user orchards into four categories, according to the number of domestic workers employed during the survey week (I: 60 or more; II: 30 to 59; III: 10 to 29; and IV: 1 to 9). The tables below will help to illustrate and clarify the information in this note.

Comparing the increase in the prevailing apple wage with the increase in the same five wage indices used in the Maryland analysis¹⁸⁷ supports the wage depression theory in the Hudson Valley. Table 12 shows the prevailing wage and the various wage indices for selected years between 1974 and 1989; Table 13 shows the percent growth in each wage, using 1974 as the base year. I have chosen 1974 rather than 1971, the first year for which the prevailing wage determination is known, as the base year because, as noted above, the USDA dra-

matically changed its survey method in that year.¹⁸⁸ As Table 13 shows, growth in the prevailing wage for Hudson Valley apples measured 13 to 37 percent less than the growth in each of the other wage indices between 1974 and 1980. This trend, relative to the indices for which there is data, continued through the 1980s, with growth in the nominal prevailing wage lagging substantially behind that in the New York manufacturing and national agricultural wages for all hired farmworkers.

TABLE 13
PREVAILING WAGE AND WAGE INDICES FOR SELECTED YEARS
1974-1989

	<i>Prevailing Wage for Hudson Val. Apples</i> ¢/1-1/8 bu	<i>Average Wage for All Hired* Farmworkers in New York</i>		<i>Avg. Earnings for Production Workers in N.Y.</i> \$/hr	<i>All Hired Farmworkers in the U.S.</i>	
		Annual \$/hr	October \$/hr		Annual \$/hr	October \$/hr
1974	35	2.24	2.61	2.57	2.29	2.57
1980	43	3.08	3.54	7.37	3.65	2.57
1985	50	N.A.	N.A.	9.73	4.42	4.56
1989	60	N.A.	N.A.	10.75	5.36	5.64

* USDA stopped publishing these figures in 1980.

NA Not Available.

Source: Hudson Valley Prevailing Wage Surveys

TABLE 14
GROWTH IN WAGES AND EARNINGS OVER 1974 LEVEL

	<i>Prevailing Wage for Hudson Val. Apples</i>	<i>Average Wage for All Hired Farmworkers in New York</i>		<i>Avg. Earnings for Production Workers in N.Y.</i>	<i>All Hired Farmworkers in the U.S.</i>	
		Annual	October		Annual	October
1974	—	—	—	—	—	—
1980	23%	38%	36%	58%	60%	50%
1985	43%	NA	NA	108%	93%	77%
1989	71%	NA	NA	130%	134%	119%

Source: Hudson Valley Prevailing Wage Surveys

The Hudson Valley surveys for the 1977-1982 seasons disaggregate the data for wages paid to domestic workers employed on "user farms" versus "non-user farms."¹⁸⁹ This provides an unusual opportunity to see whether the H-2 growers have paid wages comparable to those prevailing on the "pure domestic market" (consisting only of the domestic workers hired by non-user orchards) or whether these

growers' piece rates fall short of such a pure market wage, thereby pulling the overall domestic wage down.¹⁹⁰ These surveys thus suggest one model of the type of wage survey DOL could implement were it seriously to examine the question of wage depression and the H-2A program.

Table 14 shows three wage rates over the 1977-1982 period: (1) The prevailing piece rate found when

187. The five indices are (1) The average hourly earnings of all hired farmworkers in New York in October; (2) The average hourly earnings of all hired farmworkers in New York over the course of a year; (3) The average hourly earnings of production workers on manufacturing payrolls in New York during October; (4) The average hourly earnings of all hired farmworkers in the United States in October; (5) The annual average hourly earnings of all hired farmworkers in the United States.

188. See *supra*, note 178.

189. The wages paid by orchards employing only H-2A workers do not appear in the survey, which theoretically protects the

domestic wage by requiring user growers to offer the prevailing wage determined in a labor market of domestic workers only. However, this theory erroneously assumes that the wages an H-2A grower pays to domestic and foreign workers are independent.

190. Of course, there cannot be a truly "pure domestic labor market," immune from the impact of H-2 employers. Since, at any point, non-user growers' demand for domestic labor is fixed, user growers' importing foreign workers into the area necessarily increases the supply of domestic labor relative to the non-user demand, thereby lowering the equilibrium wage in the "pure" domestic labor market.

The Inequality of Balance

all domestic workers, employed on both user and non-user orchards, are surveyed; this is the prevailing rate which determines the minimum H-2A growers must offer both domestic and foreign workers in the following year. (2) The prevailing rate found when only non-user orchards are included in the survey; this is the "pure" domestic prevailing wage. (3) The prevailing rate paid to domestic workers on user orchards. Table 15 shows the number of domestic and foreign workers

employed on all orchards each year between 1972 and 1989. Table 16 shows the number and percentage of domestic workers employed on user versus non-user farms between 1977 and 1982. Table 17 illustrates the distribution of domestic workers receiving each of the various piece rates paid by user and non-user orchards each year between 1977 and 1982 (excluding 1978, as the survey for this year was unavailable).

TABLE 15
WAGES FOR PICKING APPLES FOR THE FRESH MARKET IN HUDSON VALLEY,
NEW YORK
(Cents per 1-1/8 bushel)†

<i>Survey Year</i>	<i>Prevailing Wage</i>	<i>Prevailing Rate on User Orchards</i>	<i>Prevailing Rate on Non-User Orchards</i>
1982	46¢	46¢	50¢
1981	43¢	43¢	48¢
1980	43¢	43¢	46¢
1979	40¢	40¢	45¢
1978*	38¢	38¢	42¢
1977	38¢	38¢	40¢
1976*	35¢	35¢	35¢

* As reported in surveys for the 1979 and 1977 harvests.

† One 1-1/8 bushel is equivalent to one Eastern Standard Box.

Source: Hudson Valley Prevailing Wage Surveys.

TABLE 16
NUMBER OF DOMESTIC AND FOREIGN WORKERS EMPLOYED ON ALL
HUDSON VALLEY ORCHARDS
1972-1989

	<i>Total Number H-2 Workers Employed</i>	<i>Total Number U.S. Workers Employed</i>	<i>Total Workforce</i>	<i>Foreign Workers as a Percent of Total Workforce</i>
1972	977	1,600	2,577	38
1973	1,237	1,250	2,487	50
1974	1,302	915	2,217	59
1975	1,249	1,890	3,139	40
1976	687	1,590	2,277	30
1977	1,158	1,919	3,077	38
1978	1,430	1,538	1,661	55
1979	1,538	1,279	2,817	55
1980	1,589	1,249	2,838	56
1981	1,388	711	2,099	66
1982	1,618	1,029	2,647	61
1983-85	NA	NA	NA	NA
1986*	1,252	822	2,074	60
1987	NA	NA	NA	NA
1988*	1,380	848	2,228	62
1989*	1,223	1,195	2,418	51

* The exact number of domestic workers cannot be determined from the survey data as reported in these years. The numbers listed here represent the maximum number of domestic workers, and thus may understate the percent of the total workforce which is foreign during these years.

Source: Hudson Valley Prevailing Wage Surveys.

TABLE 17
NUMBER OF DOMESTIC WORKERS EMPLOYED ON USER AND NON-USER ORCHARDS IN HUDSON VALLEY

	U.S. Workers on Non-User Farms		U.S. Workers on User Farms		Total U.S. Workers	
	Number	% of Total	Number	% of Total	Number	% of Total
1977	818	43	1,101	57	1,919	100
1979	528	41	751	59	1,279	100
1980	409	33	840	67	1,249	100
1981	252	35	459	65	711	100
1982	426	41	603	59	1,029	100

Source: Hudson Valley Prevailing Wage Surveys.

TABLE 18
DISTRIBUTION OF PIECE RATES FOR FRESH MARKET APPLES ON USER AND NON-USER ORCHARDS IN HUDSON VALLEY
1977-1982

1977						
Piece Rate (¢/1-1/8 bu)	Non-User Growers	User Growers	US Workers on Non-User Orchards	% of Total # Non-User US Wkrs.	US Workers on User Orchards	% of Total # User U.S. Workers
50	5	0	44	5	0	0
45	3	0	20	2	0	0
40 + 5 EOSB	3	0	111	13.5	0	0
40 + 3 EOSB	2	0	40	5	0	0
38 + 5 EOSB	0	1	0	0	29	3
40 + 2 EOSB	2	0	51	6	0	0
37 + 5 EOSB	1	0	4	.5	0	0
PNU 40	11	2	185	23	55	5
38 + 2 EOSB	0	1	0	0	23	2
35 + 5 EOSB	4	1	121	15	35	3
30 + 10 EOSB	1	0	30	4	0	0
38	3	46	84	10	959	87
35 + 3 EOSB	18	0	18	2	0	0
33 + 5 EOSB	1	0	30	4	0	0
35 + 2 EOSB	1	0	75	9	0	0
35	1	0	5	1	0	0
TOTALS	40	51	818	100	1,101	100
1979						
Piece Rate (¢/1-1/8 bu)	Non-User Growers	User Growers	US Workers on Non-User Orchards	% of Total # Non-User US Wkrs.	US Workers on User Orchards	% of Total # User U.S. Workers
60	1	0	10	2	0	0
50	8	0	96	18	0	0
45 + 5 EOSB	4	0	39	7	0	0
PNU 45	10	2	162	31	44	6
40 + 5 EOSB	6	4	97	18	120	16
42	1	0	9	2	0	0
40 + 2 EOSB	0	1	0	0	25	3
40	5	54	99	19	546	73
38	1	0	16	3	0	0
20 + 10 EOSB	0	1	0	0	16	2
TOTALS	36	62	528	100	751	100

EOSB: End of Season Bonus. For example, a wage equal to "35 + 5 EOSB" means that a worker receives a base wage of 35¢ at the time of picking and 5¢ at the end of the season (if s/he stays to the end) for each 1 1/8 bushel picked. The wage used for comparative purposes is the sum of the base wage and the EOSB. So the "35 + 5 EOSB" wage will be treated as 40¢ per 1 1/8 bushel, even though workers who do not remain until the end of the seasons will only receive the base wage of 35¢.

Bold face type indicates the prevailing wage for all domestic workers.

PNU indicates the prevailing wage paid on non-user orchards.

The Inequality of Balance

1980

<i>Piece Rate (¢/1-1/8 bu)</i>	<i>Non-User Growers</i>	<i>User Growers</i>	<i>US Workers on Non-User Orchards</i>	<i>% of Total # Non-User US Wkrs.</i>	<i>US Workers on User Orchards</i>	<i>% of Total # User U.S. Workers</i>
60	1	0	8	2	0	0
55	2	0	30	7	0	0
50 + 5 EOSB	1	0	23	6	0	0
40 + 15 EOSB	1	0	17	4	0	0
50	4	0	80	20	0	0
45 + 5 EOSB	1	1	16	4	44	5
43 + 5 EOSB	1	1	15	4	11	1
PNU 46	1	0	13	4	0	0
45	5	1	130	3	6	1
40 + 5 EOSB	3	0	40	10	0	0
43	1	47	23	6	779	93
40	1	0	14	3	0	0
TOTALS	22	50	409	100	840	100

1981

<i>Piece Rate (¢/1-1/8 bu)</i>	<i>Non-User Growers</i>	<i>User Growers</i>	<i>US Workers on Non-User Orchards</i>	<i>% of Total # Non-User US Wkrs.</i>	<i>US Workers on User Orchards</i>	<i>% of Total # User U.S. Workers</i>
70	1	0	6	2	0	0
60	2	0	26	10	0	0
50 + 10 EOSB	1	0	13	5	0	0
45 + 10 EOSB	3	0	53	21	0	0
PNU 48 + 3 EOSB	1	0	39	15	0	0
50	3	0	60	24	0	0
43 + 5 EOSB	0	1	0	0	14	3
45 + 2 EOSB	0	1	0	0	2	0
40 + 5 EOSB	1	0	23	23	0	0
43	1	41	32	32	443	97
TOTALS	13	43	252	100	459	100

1982

<i>Piece Rate (¢/1-1/8 bu)</i>	<i>Non-User Growers</i>	<i>User Growers</i>	<i>US Workers on Non-User Orchards</i>	<i>% of Total # Non-User US Wkrs.</i>	<i>US Workers on User Orchards</i>	<i>% of Total # User U.S. Workers</i>
60	5	0	53	12	0	0
55	2	0	23	5	0	0
50 + 5 EOSB	3	0	54	13	0	0
45 + 10 EOSB	1	0	26	6	0	0
46 + 5 EOSB	0	1	0	0	21	3
PNU 50	10	1	113	26	11	2
45 + 5 EOSB	2	0	44	10	0	0
48	0	1	0	0	42	7
45 + 3 EOSB	1	0	17	4	0	0
46	2	38	25	6	529	88
40 + 6 EOSB	1	0	12	3	0	0
45	1	0	13	3	0	0
40	2	0	46	11	0	0
TOTALS	30	41	426	100	603	100

Bold, face type indicates the prevailing wage for all domestic workers.

PNU indicates the prevailing wage paid on non-user orchards.

Source: Hudson Valley Prevailing Wage Surveys.

Several patterns emerge from these tables. First, between 1976 and 1982, user employers paid significantly lower wages than non-users in every year except 1976, during which the prevailing rate on user and non-user orchards was the same.¹⁹¹ From 1977 to 1982, the prevailing wage paid to domestic workers employed on non-user farms ranged from 5.3% to 12.5% more than that paid to domestic workers on user farms.¹⁹²

Second, the overwhelming majority of user growers pay the same rate to the overwhelming majority of domestic workers employed on those orchards; between 1977 and 1982, 87 to 95 percent of the user orchards paid the same rate. In addition, as can be seen in Table 17, the prevailing user rate consistently has been at or near the bottom of the wage range spanned by all apple growers surveyed in the area. The piece rates offered by non-user orchards, in contrast, span a larger range, and are much more evenly distributed throughout that range. In 1982, for example, 30 non-user growers paid eleven different piece rates, ranging from 40¢ to 60¢ per 1-1/8 bushel, to workers on their orchards; ten (33%) of these 30 non-user growers paid the modal rate (50¢ per 1-1/8 bushel) to 113 of the 426 (26%) domestic workers employed on all non-user orchards. In contrast, the 41 user growers paid only four different rates, ranging from 46¢ to 51¢ per 1-1/8 bushel (including, in some cases, an end-of-season bonus); 38 of these 41 (93%) user growers paid the modal user wage (46¢ per 1-1/8 bushel) to 529 of the 603 (84%) domestic workers employed on all user farms.

Finally, in every year during the 1977-1982 period, the prevailing wage paid to all domestic workers, employed on both user and non-user orchards, was the same as the prevailing rate paid when only those employed on user farms were considered, suggesting that the H-2A growers exert a dominating force in the Hudson Valley labor market for apple pickers.

The Hudson Valley surveys depict a clear picture: rather than providing a floor below which the wages paid workers cannot fall, the prevailing wage determination functions as a wage *ceiling*, which H-2A employers need not exceed in order to obtain a sufficient number of workers.¹⁹³ The wage that foreign workers will accept is determined by the labor market in their home countries, which inevitably suffer substantially higher underemployment and unemployment rates and a significantly lower market equilibrium wage than the United States; in other words, the minimum wage required of U.S. growers by U.S. law invariably exceeds the level sufficient to attract foreign workers. Because underemployment and unemployment are quite high in

the labor supply countries, U.S. employers of temporary foreign workers essentially face an infinite labor supply at the DOL-certified wage. Nor are the foreign workers likely to complain about wages and working conditions or to leave before the season's end, an occurrence which otherwise might force a grower to improve wages and working conditions, either to keep the foreigners from quitting or to locate additional domestic workers. U.S. workers unwilling to work at the certified rate are not considered "available" for purposes of foreign worker certification. Thus, an H-2 employer need not increase wages above the DOL-approved level in order to meet shortages of domestic labor; as s/he can obtain a sufficient number of foreign workers at that wage, there is no need for the H-2A employer to offer more.¹⁹⁴

Specific, direct evidence of precisely this wage-ceiling dynamic is found in the Hudson Valley survey for 1986. Official comments made on this survey explained that spring freezes and summer hail, coupled with early maturity and restriction on the use of Alar, resulted in a heavy demand for labor. Consequently, as basic supply and demand analysis would expect, the piece rate showed a substantial increase over 1985; the prevailing piece rate for fresh market standard apples, for example, increased by 25%, from 48¢ to 60¢ per Eastern Standard Box. However, only a limited number of smaller growers paid workers by the piece in 1986. At least since 1971 the vast majority (if not all) of the apple growers had paid workers by the piece. In 1986 most of the domestic workers employed on non-user farms were paid by the piece, and their wages did increase that season. However, the "majority of growers, *especially the larger ones that obtain certification for foreign labor*, paid workers at an hourly wage rate, rather than a piece rate this year."¹⁹⁵ Furthermore, almost all the domestic workers paid by the hour were paid the AEWR then in effect for New York—the minimum hourly wage permissible under the regulations for any growers seeking H-2 workers; indeed, only 8 of 319 domestic workers picking standard tree apples and 41 of 204 picking dwarf tree apples were paid an hourly rate above the AEWR. Had the H-2 growers paid by the piece, as they consistently had done in the past, they would have had to pay the heightened prevailing rate. But DOL certified two prevailing wage rates in 1986—the prevailing hourly and the prevailing piece rates. Because the H-2 growers employed far more of the hourly domestic workers than the non-user growers, the prevailing hourly wage was determined by the wages offered by H-2 growers themselves. And because DOL had certified that wage (rather than

191. Because the survey for 1976 is not available, it is difficult to determine the significance of this apparent exception, or what other factors, besides a lack of wage depression, may explain it.

192. The survey for 1989 similarly noted that the prevailing piece rate on non-user orchards ran 5¢ per 1-1/8 bushel higher than the prevailing rate on user orchards. But in general, the post-1982 surveys available unfortunately do not break the data between user and non-user orchards down as the earlier surveys did. As with the 1989 survey, several comments on the various reports were recorded which provide further evidentiary support

for wage depression and are discussed below, but the systematic analysis possible for the earlier surveys cannot be done for more recent years.

193. Of course, if the prevailing wage were to yield hourly earnings below the AEWR, H-2A growers must pay the latter, in which case it is the AEWR, not the prevailing wage determination, which operates as a wage ceiling.

194. See *supra* Sections I.A, I.C.

195. *Domestic Agricultural In-Season Wage Report*, #33-96-FH-02, Hudson Valley, 1986 Apple Crop (2/11/87) (emphasis added).

certifying only the prevailing piece rate paid to domestic workers on non-user orchards), the H-2 growers could meet any labor shortage experienced at the AEWR by requesting additional H-2 workers, rather than increasing wages.¹⁹⁶ Thus, while most non-user growers responded to the season's market pressures by paying a higher wage, the bulk of H-2 growers circumvented the hike in the market wage by offering the hourly AEWR.¹⁹⁷

It is highly unlikely that the AEWR itself reflected a higher wage resulting from the increased demand for labor in 1986. The 1977-1981 surveys report average hourly earnings of the surveyed domestic workers (all of whom were paid by the piece) which exceed the hourly adverse effect rate by 42 to 76 percent. These figures

are shown in Table 18. Average productivity or earnings figures for surveys after 1981 are not recorded, preventing similar comparisons for the years immediately preceding the 1986 shift to an hourly rate. However, it seems likely that the pattern of piece rate workers' average hourly earnings exceeding the AEWR would have persisted; as noted elsewhere in this paper, numerous farmworker advocates and observers have found this to be the case. Thus, not only did the H-2 growers circumvent the short-term rise in the 1986 market wage for domestic workers by shifting to an hourly rate, it is probable that they also reduced their labor costs, as well as the earnings their workers received, by a significant margin.

TABLE 19

AVERAGE HOURLY EARNINGS OF PIECE RATE WORKERS PICKING APPLES FOR THE FRESH MARKET IN THE HUDSON VALLEY COMPARED TO THE NEW YORK ADVERSE EFFECT WAGE RATE 1977-1981

	1977	1978	1979	1980	1981
Adverse Effect Wage Rate	2.70	2.82	3.06	3.18	3.48
Average Hourly Earnings of Domestic Piece-Rate Workers	4.76	N.A.	4.54	4.89	4.95
Average Hourly Earnings as a Percent of the AEWR	176%	N.A.	148%	157%	142%

N.A. Not Available

Sources: Hudson Valley Prevailing Wage Surveys; Federal Register

In contrast to the user grower, the non-H-2A employer must offer a wage sufficient to maintain a steady domestic workforce, and therefore must be responsive to varying crop conditions and adapt to changing market forces. Two of the Hudson Valley wage surveys noted, "There is some variation in piece rates based on apple varieties, size of trees and composition of the work force."¹⁹⁸ One added that the type of picking desired by the employer may effect the rate.¹⁹⁹ Another suggested that poor weather and crop conditions "may have had some effect on the increase in the rate paid to instate workers," and yet another that "[e]mployers not using H-2A workers paid somewhat higher piece rates to harvest their apples mainly due to the shortage of seasonal workers. Our finding ran \$.05 higher per 1 + 1/8 bu[shel] on non-user farms than on user farms."²⁰⁰ As noted above, the range of wages paid by different non-user growers was substantially wider than the range paid by user growers.

A non-user employer, who does not face an infinitely elastic labor supply at the certified wage, must offer higher rates for apples that are harder to pick or less densely packed on the trees, for work on orchards entailing greater commuting time, or for different types

of picking. But because DOL certifies a single piece rate at which H-2A growers can fill any labor "shortage" with foreign workers, they need not (although at times they may for incentive purposes) offer varying rates which reflect different crop or weather conditions or other economic developments.

In summary, the combination of the three wage patterns that emerge from the 1977-1982 Hudson Valley surveys and which are discussed above—i.e. the consistently lower level of the piece rates paid by H-2A growers, the concentration of those growers' rates at a single wage level at or near the bottom of the range paid by all growers, and the equality of the prevailing wage paid U.S. workers employed on user orchards and that paid domestic workers employed on all orchards—strongly suggests that, at least when H-2A growers account for the majority or a substantial portion of the demand for workers in a particular labor market, they are able to effectively control the wage they will pay. The Department of Labor's prevailing wage surveys do not provide an effective floor to lift wages from otherwise depressed levels, because the prevailing wage is not determined in a market free from the oligopsonistic influence of the H-2 growers.²⁰¹

196. Once DOL had certified a wage, a grower's labor shortage is, by definition, equal to the total number of workers needed less the number of domestic workers available and willing to work at the certified wage.

197. The AEWR, it should be recalled, is the minimum hourly

rate permitted by the H-2 regulations, unless a wage survey is performed and a prevailing wage yielding higher earnings is found.

198. Hudson Valley Wage Surveys for 1982 and 1980.

199. Hudson Valley Wage Survey for 1977.

200. Hudson Valley Wage Surveys for 1989 and 1988.

201. "Oligopsonistic" describes a market in which the number of

It would seem critical to protecting domestic wages against adverse effect that the prevailing wage be determined with reference to a labor market insulated to the greatest degree feasible from the influence of growers using foreign workers.²⁰² Instead, the surveys suggest that the H-2A apple growers in the Hudson Valley have come to dominate and control the very market against which their wage offers are tested. Far from protecting the domestic labor market from adverse effect, the H-2A program in essence has served to insulate H-2A growers from various market pressures that otherwise would push up the wages they would have to offer. This, in turn, inevitably increases the competitive pressure on, often smaller, non-H-2A orchards to lower their wages, thereby depressing wages throughout the agricultural labor market.

CONCLUSION

The H-2A temporary foreign worker program recognizes and attempts to accommodate growers' interests in obtaining foreign workers. Farmworkers dispute whether that interest reflects a genuine labor shortage or simply a managerial, profit-driven preference for cheaper, more reliable, and more controllable workers. But by virtue of their existence, the regulatory program and the statute enabling it presuppose a Congressional determination that at least some of the growers' interest in this regard is legitimate.

Thus, the regulatory program necessarily is premised on the existence of competing sets of interests. However, governmental protection of growers from the vicissitudes of a competitive domestic labor market and the risks inherent in producing a perishable product does not necessarily follow from the recognition of growers' needs to meet their demand for labor. Moreover, that an interest is a *premise* does not necessarily make it a *purpose* of the statutory mandate. Until 1981 DOL had construed its role in developing and enforcing the H-2 regulatory guidelines as counterbalancing the inevitably depressive effect that an influx of temporary

workers would have on wages and working conditions in a given area. Thus, the regulations were developed primarily with the protection of farmworkers' interests in mind. As designed and operated today, the H-2A program ostensibly gives equal weight to farmworkers' and growers' interests, balancing these conflicting interests to reach a "fair" resolution. Under this apparently reasonable guise, the program has come to function fundamentally as a mechanism to assist growers in obtaining foreign labor. Whereas the absolute number of certifications had been declining steadily throughout the 1960s and 1970s, that number increased considerably during the 1980s.

Does the employment of H-2A workers depress wages and other working conditions? This is a difficult question to answer. In the regulatory framework developed by DOL in the 1960s and 1970s, growers bore the burden of demonstrating that adverse effect would not result from their employing H-2 workers. With the inauguration of the Reagan Administration, however, DOL's position changed, and growers' interests gained a new centrality. With this change came a new allocation of the costs of uncertainty: If wage depression cannot be conclusively demonstrated, the minimum wage and working conditions imposed on H-2A growers will not be heightened to ensure against such possible depression. Rather than providing a protective floor, the H-2A regulations, following this approach, actually function as a ceiling on the wages and working conditions of farmworkers.

Has the Department of Labor inappropriately placed the burden of uncertainty on farmworkers? Proving adverse affect is a difficult, if not impossible, task. Farmworkers, with scant resources, are not in a position to meet this task. The burden is far more appropriately borne, as it once was, by growers, who have more resources and access to pertinent wage and employment information, and who are in a far superior position to minimize the uncertainty and absorb its costs.

buyers is sufficiently small that the normal free market assumption of competitive buying cannot be maintained. Such a market is called an oligopsony; it is the demand-side equivalent to an oligopoly. Henderson and Quandt, *Microeconomic Theory: A Mathematical Approach* (1986), 212.

202. It would be practically impossible, for example, to carve out a domestic labor market completely free from the impact of foreign workers, since the presence of those workers necessarily changes the relationship of the labor supply and demand in the non-user market.