RESOLVED, That the American Bar Association supports: (1) efforts to improve wages, working conditions and housing for farmworkers; (2) enhanced enforcement of laws regulating the rights of farmworkers; and (3) according legal resident status to noncitizen farmworkers presently working in the United States.

FURTHER RESOLVED, that the ABA opposes any expansion of the existing H-2A nonimmigrant visa category for admitting temporary agricultural farmworkers to the United States either by changing the temporary labor certification process or by repealing or lowering existing H-2A requirements.
Summary

Notwithstanding America’s prosperity in the last decades of the twentieth century, agricultural workers remain one of the most disadvantaged groups of workers in the United States, working in hazardous conditions for low wages, living in substandard housing, and with very few protections. A majority of these farmworkers are recent legal immigrants; a substantial portion are unauthorized immigrants. Thousands of the farmworkers also are brought into the United States lawfully as temporary "guestworkers."

The status quo is unacceptable for all parties concerned. On the one hand U.S. growers should not have to either violate the law by hiring illegal workers or go through complicated and expensive legal processes to bring in foreign agricultural workers. On the other hand U.S. farmworkers deserve better pay, living and working conditions. Rather than allowing more temporary foreign farmworkers into the country, the United States should work to increase current farmworkers’ wages and improve working conditions and legalize the immigration status of farmworkers already working in this country.

Background/History

The treatment of foreign farmworkers in the United States has always been controversial. The "bracero" program, which operated between 1942 and 1964 and which permitted Mexicans to work temporarily in U.S. agriculture, resulted in civil rights and labor violations, as well as depressing wages in the Southwest. Between 1964 and 1986 the United States continued to allow entry to foreign agricultural workers under the H-2 program, which permitted the temporary admission of aliens to perform temporary labor where a shortage of domestic workers existed. Many agricultural employers found the H-2 program inadequate for their needs, however, and so relied on undocumented aliens.

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1 "Guestworkers" is not a legal term. It is used in this report to refer to nonimmigrant agricultural workers brought into the United States temporarily to help harvest perishable fruits, vegetables and horticultural items. Guestworkers are expected to return home after the seasonal harvest, and do not gain any permanent legal status by working in this country.


Knowledgeable estimates of the number of undocumented aliens working in U.S. agriculture in the early 1980's ranged from 300,000 to 1.2 million. The controversy over foreign agricultural workers was one reason why immigration reform legislation failed in 1982 and 1984, and why it almost derailed again in 1986. Growers contended that many U.S. workers did not want to work in seasonal agriculture or live in rural areas. If employer sanctions were to be instituted, growers wanted some assurance that they could obtain sufficient lawful workers so that their crops did not rot in the fields. Organized labor and advocates for farm workers disputed the growers' assertions, pointing to high unemployment rates among domestic farm workers. They charged that growers were seeking to preserve a cheap labor force that had few legal rights.

The Immigration Reform and Control Act of 1986 (IRCA) attempted to reconcile these competing claims by providing for the treatment of farmworkers in three ways. First, the 1986 law divided H-2 workers into two categories: temporary workers who perform agricultural labor or services (H-2A), and all other temporary non-professional workers (H-2B). Second, the new law allowed "special agricultural workers" (SAWs) to legalize their status if they could prove they worked ninety days in U.S. agriculture between May 1, 1985 and May 1, 1986. Third, IRCA allowed additional "replenishment agricultural workers" (RAWs) to enter the United States as temporary resident aliens between 1990 and 1993 if there was a shortage of farm workers during that time period. The ABA supported enactment of the IRCA legislation and its legalization programs.

Congress enacted IRCA in part to reduce the number of undocumented farm workers in the United States, curb illegal immigration and provide an adequate legal agricultural work force. But according to a 1992 report by the Commission on Agricultural Workers, "[s]ix years after IRCA was signed into law, the problems within the system of agricultural labor continue to exist. Since the mid-1980s, the living and working conditions of hired farmworkers have changed, but seldom improved." That statement remains true today, seven years later.

Despite IRCA, the number of undocumented farmworkers has not decreased. The U.S. General Accounting Office (GAO) estimates that about 600,000 farmworkers in the United States are not

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4 INA § 210A, 8 U.S.C. § 1161 (1986) (repealed in 1994). No replenishment agricultural workers were ever needed. The RAWs would have received temporary resident alien status, precursor to permanent resident status, not temporary guestworker status. Upon completion of three years of working at least ninety days in agriculture per year, the worker would have become a permanent resident alien. INA § 210A(a), (d), 8 U.S.C. § 1161(a), (d) (1986). See generally Immigration Law and Procedure, supra note 7, at § 53.02.
5 Adopted by the ABA House of Delegates in February, 1983.
6 CAW Report, supra note 3, at xix.
legally authorized to work. The total number of migrant and seasonal farmworkers performing crop work in the United States is estimated to be 1.6 million. Thus, undocumented farmworkers constitute about 40 percent of the overall farmworker population.

The H-2A Visa Category

For many years some agricultural employers have obtained legal foreign farm help through the H-2A visa category. Obtaining H-2A workers is a three-step process. First, agricultural employers who anticipate a shortage of domestic farmworkers request permission to hire nonimmigrant farmworkers from the Department of Labor (DOL). The employer must apply no later than 60 days prior to the date of need for labor. The DOL will approve the employer's application for certification if it finds that a labor shortage exists and that the wages and working conditions of similarly employed U.S. farmworkers will not be adversely affected by bringing in foreign farmworkers. If the DOL approves the temporary labor certification (which must occur 20 days before the date of need), the agricultural employer then files a petition with the Immigration and Naturalization Service (INS). Employers also must guarantee a minimum amount of work, provide housing, and reimburse workers for in-bound travel costs at the half-season point and pay workers' costs of going home upon completion of the season.

If the INS approves the petition, the approval is forwarded to a U.S. consulate (usually in Mexico) so that the State Department can issue visas to the foreign farmworkers. The Department of Agriculture plays an advisory role in the process by conducting wage surveys so that the DOL can determine the minimum wage rate agricultural employers must pay H-2A workers. The selected workers are given a "nonimmigrant" status under which they may only work for the one employer that secured their visa, and must leave the country once their H-2A status expires.

The number of H-2A visas issued annually has risen over the last several years. In fiscal year 1997, DOL certified over 23,000 H-2A job openings, a 28 percent increase over fiscal year 1996 levels. More than 27,000 H-2A workers entered the United States in 1998.

Legislative Efforts to Enlarge the H-2A Program

Agricultural employers complain that the H-2A program is too restrictive and cumbersome, even though 99 percent of applications by such employers are approved. Farmworker advocates...
allege that employers enjoy undue control over guestworkers, and complain that the H-2A job
terms and recruitment procedures are inadequate to attract and retain U.S. farmworkers. Growers
lobbied hard in 1998 to enact legislation to make it easier to import foreign farmworkers and to
lower the wages and benefits that must be offered to U.S. and H-2A foreign workers, in essence
to “deregulate” the program. The legislation passed the Senate 68-31 as part of H.R. 4276, the
Commerce, Justice and State Departments appropriations bill for fiscal year 1999. The H-2A
reform amendment was not included in the final enacted law, however, largely because the
Clinton administration opposed some of the Senate provisions. Similar legislation is certain to
be introduced again this year in Congress. The Senate immigration subcommittee has already
held hearings on this issue this year.

Legal and Policy Considerations

No Shortage of Farmworkers

Despite growers’ claims, there appears to be no overall shortage of farmworkers. A 1997 GAO
report found that “[a] sudden widespread farm labor shortage requiring the importation of large
number of foreign workers is unlikely to occur in the near future. There appears to be no national
agricultural labor shortage now, but localized labor shortages may exist for specific crops or
geographical areas.” The GAO reaffirmed this conclusion in a brief supplemental report in
1998.16

“The U.S. farm labor system is characterized by an oversupply of workers,” according to the
National Agricultural Workers Survey.17 At any point in the year at least 190,000, or 12 percent
of farmworkers in the United States are not working.18 The lack of an agricultural labor shortage
is also reflected by the fact that so few farmworkers work full-time. “Migrant workers (those
who travel for work) average only 29 weeks per year, 25 of them in farm work, yielding a
median income of $5,000 a year.”19

Unemployment statistics further support the view that no labor shortage exists. The GAO’s
analysis of the monthly and annual unemployment rates of 20 large agricultural counties—those
that contain large amounts of fruit, tree nut, and vegetable production in dollar value—found that
13 counties maintain annual double-digit unemployment rates, and 19 had rates above the
monthly unemployment rates double the national average.20 The State of California Employment

16 1997 GAO Report, supra note 11, at 5.
18 U.S. Department of Labor, Research Report No. 5, Migrant Farmworkers: Pursuing Security in an Unstable
19 Id.
20 Id. at 31.
Development Department similarly compared the average unemployment rates for California and 18 crop-producing counties in that state from 1987 through 1998. The unemployment rates in the crop-producing counties were consistently twice the rate of the state average. If there was a farmworker labor shortage, unemployment rates in these counties should be lower than they are.

Farmworkers’ Wages Have Declined, Not Risen

In most industries, employers facing a labor shortage increase wages to attract more workers. That has not happened in agriculture. According to the DOL’s National Agricultural Workers Survey, the average hourly wage rate for farmworkers between 1989 and 1995 fell 8.5 percent, to $6.06 an hour. The average hourly wage rate for farmworkers paid by the piece rate fell even more—16.9 percent, to $7.22 an hour. The New York Times reported in 1997 economists’ assessments that farmworkers’ real wages dropped by 20 percent over the last twenty years. Time magazine reported that California strawberry workers experienced a decline in real earnings from $9.10 per hour in 1985 to $6.00 per hour in 1995, while production increased by 40%.

A 1997 DOL report found that the median personal income for farmworkers remained stagnant between 1988 and 1995 at between $5,000 and $7,500. Almost three-quarters had personal incomes that did not exceed $10,000. Poverty rates among farmworkers had increased from about one-half in 1990 to over three-fifths of farmworker households in 1995.

Moreover, many farmworkers live in rural areas that offer relatively few social services, and often have to pay inflated prices to farm labor contractors or others for housing, health services, food and other necessities. This further erodes their already limited purchasing power.

23 California Rural Legal Assistance Foundation, The 1998 Central Valley Raisin Harvest: A Case Study of the Availability of Farm Workers During the Alleged Labor Shortage in the Four County Fresno Area (April 1999).
25 Id. at 97.
27 Margot Horblower, Picking a New Fight, Time, Nov. 25, 1996.
29 Id. at 25.
30 Martin & Taylor, Merchants of Labor: Farm Labor Contractors and Immigration Reform 5 (The Urban Institute May 1995).
Farmworkers Have Few Rights And Services

The Fair Labor Standards Act of 1938 (FLSA), which establishes minimum wage, child labor restrictions and overtime protection for most workers, contains special exemptions for agricultural employers. Farmworkers are not entitled to overtime pay after 40 hours of work, for example. Although farmworkers were added to the FLSA's minimum wage provisions in 1966, only larger farms are covered. Congress should amend the FLSA to provide the same coverage and rights to all farmworkers as are currently provided to other workers.

Agricultural employment remains one of the most hazardous occupations in the country. The combined category of agriculture, forestry and fishing ranks second only to mining as the industry with the highest rate of occupational fatalities in the United States. The working conditions farmworkers face also place them at high risk for non-fatal injuries, resulting from farm machinery, pesticides, poor field sanitation, unsafe transportation, the strenuous nature of the work, and substandard housing. Yet only twelve states, the District of Columbia, Puerto Rico, and the Virgin Islands require farmworkers to be covered by workers' compensation to the same extent as other workers. In thirteen states, coverage of farmworkers is not required by state law. The remaining jurisdictions provide varying degrees of coverage for farmworkers. This must be remedied.

In addition, agricultural employers rarely provide health insurance for their workers. There is also a critical lack of decent, affordable housing for migrant workers and their families. According to the Housing Assistance Council, "about 800,000 of the current workers lack adequate shelter." Farmworker housing often lacks flush toilets, electricity, and hot water. The housing shortage is so severe that in harvest-time visits to farming communities up and down both coasts over the year, workers were found packed 10 or 12 into trailers and sleeping in garages, tool sheds, caves, fields and parking lots."
These deficiencies are compounded by the fact that growers have increasingly turned to farm labor contractors (FLCs), also known as crewleaders, to recruit, hire and supervise the farmworkers. Growers then can deny that they directly employ farmworkers and can blame labor and immigration law violations on the FLCs.

Farmworkers face special problems if they attempt to organize and bargain collectively to improve their working conditions. Effective organizing is made more difficult by the fact that farmworkers are essentially powerless, both in objective terms and relative to the agricultural employers who oppose organizing. This powerlessness is compounded by the explicit exclusion of agricultural employees from legislation designed to afford U.S. workers this basic right.57 Farmworkers should be afforded the right to organize and bargain collectively. Increasing the number of temporary foreign workers admitted to the United States would make it even more difficult for existing farmworkers to organize, receive a minimum wage, or to collect worker's compensation if they are hurt.

**Lax Enforcement Fails to Protect Existing Farmworkers**

The DOL has been lax in enforcing the few rights farmworkers have, in part because Congress has failed to provide it with sufficient resources. In 1995, the DOL’s Wage and Hour Division conducted just 2,376 investigations under the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA).58 That is about half the number (4,769) conducted a decade earlier. Nevertheless, the Wage and Hour Division found violations in 1,337, or 63 percent, of those cases.59 Recently, the DOL surveyed California grape growers and concluded that 20 percent of the growers and over 50 percent of the farm labor contractors had violated the minimum wage.60

The decline in the DOL’s enforcement efforts is serious because private attorneys frequently will not accept farmworker cases due to the inability of the client or the case itself to pay a reasonable fee. Moreover, Congress has substantially restricted the resources and allowable types of representation by publicly funded legal services programs.

**Most Studies Oppose Expanding the Number of Foreign Farmworkers**

Most independent studies have concluded that we should not create new temporary foreign labor programs in the United States. For example, the U.S. Commission on Immigration Reform...

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58 29 U.S.C. 1800 et seq. MSAWPA regulates the use and licensing of farm labor contractors, requires disclosure of job terms to workers, sets transportation safety and housing standards, and allows farmworkers to bring actions in federal court to enforce their employment terms and other rights. MSAWPA specifically excludes H-2A guestworkers from coverage.


Historically, guestworker programs have depressed the wages and working conditions of U.S. workers. Of particular concern is competition with unskilled American workers, including recent immigrants who may have originally entered to perform the needed labor but who can be displaced by newly entering guestworkers. Foreign guestworkers often are more exploitable than lawful U.S. workers, particularly when an employer threatens deportation if the workers complain about wages or working conditions. The presence of large numbers of guestworkers in particular localities—such as rural counties with agricultural interests—presents substantial costs for housing, health care, social services, schooling, and basic infrastructure that are borne by the broader community and even by the federal government rather than by the employers who benefit from the inexpensive labor.11

The Commission stated its opposition "to implementation of a large-scale program for temporary admission of lesser-skilled and unskilled workers along the lines of the bracero program... [W]e affirm our belief that a new guestworker program would be a grievous mistake."12 One reason for this conclusion was that "guestworker programs are predicated on limitations on the freedom of those who are invited to enter and work. Experience has shown that such limitations are incompatible with the values of democratic societies worldwide."13

Similarly, the Commission on Agricultural Workers (CAW), established by Congress to study IRCA's effects on agriculture, recommended in 1992 that the industry reform its labor management practices rather than import more farmworkers.14

The CIR and CAW both found that guestworker programs fail to reduce unauthorized migration. To the contrary, the CIR's research showed that guestworker programs "tend to encourage and exacerbate illegal movements by setting up labor recruitment and family networks that persist long after the guestworker programs end."15 Moreover, guestworkers often remain permanently and illegally in the country.16

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12 Id. at 94-95.
13 Id. at 173.
14 CAW Report, supra note 3, at xxxi.
15 CIR Report, supra note 41, at 95.
16 Id.
One way to break this cycle of continuing unauthorized migration would be to regularize the immigration status of undocumented farmworkers already in the United States, and to give them the same rights as other U.S. workers. Current agricultural workers should be offered an opportunity to apply from within the United States to become conditional resident aliens. If they abide by all legal requirements of that status (which would entail freedom to select their employer, travel, etc.), and if they continue to work a certain number of days in agriculture for a certain number of years or are willing to accept employment from a national farmworker registry, they would then earn the right to become lawful permanent residents. This would assure agriculture of an experienced labor force, regularize the status of undocumented workers to reduce the underground economy, avoid imposing restricted guestworker status on workers, and minimize government intervention into day-to-day employment practices. It also has the advantage of being similar to the RAW program component of the 1986 immigration reform law.

There appears to be consensus that the status quo is unacceptable. Interest in a legalization mechanism is being seriously discussed among members of Congress, farmworker organizations and growers. Senator Diane Feinstein (D-CA) and Representative Howard Berman (D-CA) have publicly endorsed legalizing the agricultural work force and committed to work toward a bipartisan bill. Even Senator Gordon Smith (R-OR), co-sponsor of the legislation defeated in 1998, has expressed a willingness to consider this approach with them.

Religious and civil rights groups, think tanks and agricultural interests also are actively involved in the dialogue. Hispanic civil rights organizations, including the National Council of La Raza and the Mexican American Legal Defense and Educational Fund, consider resolving this issue to be a top priority. Dr. Demetrios Papademetriou, Co-Director of the International Migration Policy Program of the Carnegie Endowment for International Peace and a former official at the U.S. Department of Labor, supports regularizing the status of foreign farmworkers who have been working in U.S. fields along with other reforms. The National Council of Agricultural Employers has pledged its readiness to work with domestic farmworker, immigrant rights and church groups to find workable solutions that will produce a stable, legal work force and address the social and economic problems of those employed in seasonal farm work. Thus, the time appears ripe to engage this difficult issue.

Any such proposal should provide a waiver of relevant provisions of the INA that bar lawful entry to the United States of undocumented persons who resided unlawfully in the United States for more than 180 days. INA §212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B). The Senate adopted such a provision in 1998 as part of its H-2A reform bill. Any such proposal should also eliminate the 125 percent income requirement for sponsoring family members. INA § 213A, 8 U.S.C. § 1183a. Spouses and unmarried sons and daughters also should be accorded derivative status as provided for other employment-based immigrants. INA § 203(d), 8 U.S.C. § 1153(d).

See generally supra note 8.

Hearing before the Senate Judiciary Subcommittee on Immigration, May 12, 1999.

Dr. James S. Holt, Testimony before the Senate Judicial Subcommittee on Immigration on May 12, 1999, at 17.
Conclusion

Farmworkers are one of the most vulnerable and exploited groups of workers in the United States. The United States should work to increase current farmworkers' wages and improve working conditions of this predominantly immigrant population and enable those workers who are not legally authorized to work to obtain permanent immigrant status. Only then will we finally eliminate the harvest of shame that has plagued U.S. agriculture for over a hundred years.

Respectfully submitted,

Neal R. Sonnett
Chair
August 1999
1. Summary of Recommendation(s).

The recommendation supports: (1) efforts to improve working conditions for foreign and domestic farmworkers; (2) enhanced enforcement of existing laws regulating the rights of farmworkers; and (3) the legalization of unauthorized farmworkers currently in the United States. The recommendation also opposes expanding existing law to make it easier to admit temporary foreign farmworkers to the United States.

2. Approval by Submitting Entity.

The Coordinating Committee on Immigration approved this recommendation on May 24, 1999.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The ABA adopted policy in February, 1983, supporting the humane treatment and legalization of unlawful aliens living in the United States and enforcement of the labor laws. This recommendation is fully consistent with that position. The ABA also has consistently supported government-funded legal services for indigent agricultural workers, including H-2A workers.

5. What urgency exists that requires action at this meeting of the House?

There were efforts in the 105th Congress to ease current restrictions on hiring foreign farmworkers. Senate hearings have already been held in the 106th Congress and legislation is likely to be introduced soon. Action at this meeting of the House will allow the Association to be heard during the legislative session.


At the time of this submission, the recommendation does not support or oppose any specific legislation. But the recommendation is expected to address legislation to be introduced in the 106th Congress.

7. Cost to the Association.

None
   Not Applicable

9. Referrals.
   The chairs and staff of several ABA Sections and Divisions, Commissions,
   Standing Committees, Special Committees and Affiliated Organizations are being
   sent the report and asked if they wish to be listed as co-sponsors.

10. Contact Persons (Prior to the meeting)
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12. Contact Person Regarding Amendments to This Recommendation.
    There are no known proposed amendments at this time.