The guest worker program is designed to respond to labor shortages by bringing workers to the U.S. on a short-term basis, but instead allows the mistreatment of workers, adversely effects the wages and working conditions of domestic workers, promotes an illegal class of immigrants, and creates tensions between the U.S. and Mexico. There has been much proposed legislation aimed at fixing the guest worker program, most of it falling into one of three categories of reform. The first includes legislation that would grant amnesty to all illegal immigrants who are currently in the U.S. The second category includes reform that would modify the current guest worker program, addressing the various abuses. The third area of reform would create a hybrid of the first two, and would be a revised and expanded program offering a chance for earned legalization.

This paper proposes that the hybrid model is the reform necessary for remedying the guest worker program’s many ailments. The problem with the current program as well as with past guest worker programs is that they focused solely on the needs of the employers. In order for program reform to be effective, it must focus not only on the needs of the employers in filling
labor shortages, but also on the needs of the employees and on those of the U.S. and Mexico in instituting and maintaining the program.

This article will explore the reform necessary to realize a guest worker program that incorporates the needs of all involved parties. It will first give an introduction to the proposed hybrid model as well as to the current climate and attitudes towards the program in the U.S. and Mexico. Next, it will look briefly at the history of the guest worker program along with the current H-2A visa which all guest workers must apply for. In the third section, the paper will look to legislation that has been proposed to deal with the problems outlined in section two. Finally, the paper will offer a suggested reform model, incorporating much of the legislation that has already been introduced in Congress. Hopefully, the proposed reform will not only meet the needs of the Mexican workers, the U.S. workers, the employers, and the two countries, but it will also lend to improvement of the program, the Immigration and Naturalization System (INS), and the immigration system as a whole.

I. INTRODUCTION

Illegal immigration into the United States across the U.S.-Mexico border, and the mistreatment of Mexican immigrants who are in the U.S. legally, primarily as part of the guest worker program, are problems that must be addressed through cooperation between the U.S. and Mexico as well as through legislative reform in the U.S. The 2000 Census estimated the number of illegal Mexican immigrants in the U.S. at 3-4 million and yet the borders are still flooded with those trying to enter both legally and illegally, often risking death. It is not only the illegal border crossings that give cause for concern since immigrants that are already in the U.S., legally and illegally, are often treated as indentured servants, denied the protection of U.S. labor laws, and offered no hope for legalization. In describing the plight of Mexican immigrants in the U.S., Senator Phil Gramm emphasized this point by stating that “millions of Mexican citizens go to work every day in America in violation of our immigration law and outside the protection of our labor law.”
In early September 2001, Mexico’s President Vicente Fox met with President George W. Bush and other officials in the U.S. to discuss immigration reform. While the tragic events of September 11\textsuperscript{th} have delayed the talks, they remain a high priority for both nations and will be revisited in the near future. Meanwhile, Mexican nationals are hoping for reform that will improve the regulation of their transit into the U.S. labor market\textsuperscript{[5]} and millions of undocumented immigrants are hoping for reform that will lend them protection under U.S. laws and give them a chance for legalization of their status. Additionally, employers, economists, and legislatures are waiting to see how businesses, the economy, and the infrastructure of the INS will be affected by the anticipated reform.

In February of 2001, Presidents Bush and Fox established a “high-level migration working group” led by U.S. Secretary of State Colin L. Powell, Attorney General John Ashcroft, Mexican Foreign Minister Jorge G. Castaneda and Mexican Interior Secretary Santiago Creel.\textsuperscript{[6]} The goal of the working group is to create “an orderly framework for migration that ensures humane treatment and legal security, and dignifies labor conditions.”\textsuperscript{[7]} Their hope is that the high-level discussions will help address the web of immigration issues that have plagued relations between the two nations.\textsuperscript{[8]} This working group is essential for effective reform because it creates an environment of cooperation and partnership rather than of opposition.

The working group is currently dealing with three major proposals aimed at “fixing” the immigration problems with Mexico.\textsuperscript{[9]} The first proposal supports legalization or amnesty for those illegal workers who are already in the U.S. This would allow those that came to the U.S. illegally or who stayed in the U.S. after their visas expired to be granted an “exemption” and stay as legal immigrants. This reform is supported by Representative Luis V. Gutierrez of Illinois, who introduced it in the U.S. Employee, Family Unity and Legalization Act in the House in February of 2001.\textsuperscript{[10]} This legislation would grant temporary legal status to Mexican workers who were in the U.S. before February 2000 and full status to workers here before February 1996.\textsuperscript{[11]} The legalization date would then roll forward to eventually encompass all Mexican workers who are in the U.S. illegally.\textsuperscript{[12]}
The second proposal focuses on the expansion and modification of the current guest worker program, encompassed by the H-2A visa. This reform would be aimed not only at future workers but also at those who are already here. Undocumented workers already in the U.S. would have six months to apply for a guest worker permit which would automatically be granted. After six months, enforcement of employer sanction laws and penalties would be increased. This reform is supported by Senator Phil Gramm of Texas as well as by various other Republicans.

The third proposed reform focuses on a hybrid of the first two approaches: a combination of a revised and expanded guest worker program as well as incorporation of legalization. Florida Senator Bob Graham introduced this approach in AgJOBS, a combination program where unauthorized workers who can prove that they have worked in the U.S. will receive temporary work permits and will eventually receive immigration visas if they continue to work in agriculture for several years.

The best hope for a solution lies is the hybrid approach, focused on admitting workers under a revised version of the H-2A visa as well as offering a chance for earned legalization to undocumented workers currently bringing labor and money to the U.S. economy. This combination program will focus on the needs of employers seeking temporary labor, as well as on those of the workers and countries that are part of the program. It is essential that all three sets of needs be considered in order to achieve a balanced program that will decrease illegal immigration and worker abuse.

The current guest worker program shares the same problem that plagued previous guest worker programs: a primary focus on employers’ needs for cheap labor. In times of labor shortage, legislative reform and relaxation of INS regulations made it easier for employers to fill jobs with workers willing to work at or below the minimum wage and under poor working conditions. While it is important for our economy and our businesses to consider the needs of employers, social and labor protections are essential for immigrants doing our work. The guest worker program must be modified and expanded in order to afford Mexican workers the rights
and protections of U.S. laws. It should give guest workers visa privileges such as health insurance, access to courts, and the right to join a union. The modified program will need to provide an enforcement mechanism for protecting workers’ basic human rights as well as their rights as employees. The program will need to ensure that labor conditions and wages are regulated and maintained.

The modified program must also focus on workers’ needs by providing a path to legalization rather than continuing to take advantage of Mexican labor without providing any hope for eventual immigrant status. Although immigrant status cannot be granted to all that request it, the current situation, with no path to legalization, exploits the workers and perpetuates the existence of an abused labor class that that takes jobs from U.S. workers.

An effective guest worker program will also focus on the needs of the United States and Mexico by encouraging workers to eventually return home, therefore decreasing the number of permanent illegal workers in the U.S. while sending capital and
skills to Mexico. Modifications such as the creation of an IRA-type fund, paid out upon return to Mexico, will encourage workers to return while at the same time stimulating the Mexican economy. Such modifications would help to create a program where, in the words of Senator Gramm, “Mexican citizens can work legally, acquire skills, accumulate wealth, and then go home to help build up their own economy.”

The modified system will also look to the needs of the U.S. by continuing to provide labor during shortages but will look first to the domestic labor supply and will therefore not adversely affect the wages and working conditions of the relevant industries. It will provide a reliable, legal source of workers for labor-intensive industries that cannot meet their demand for workers through domestic labor alone. As the baby-boomer generation moves towards retirement there will be an increased demand for guest workers; however, employers must first look to U.S. workers to fill the jobs.

Although the immediate solution, especially in the wake of September 11th, seems to be to cut down on immigration and create tighter controls, we must be wary of this approach and insist on instituting an effective guest worker program coupled with earned legalization. While it is important to balance the need for guest workers against national security concerns, guest workers are necessary: they pick our crops when others won’t. It is also crucial to remember that the U.S. was founded as an open-society and literally built by immigrant workers. While national security is of paramount importance, it is also vital that the U.S. continues to be a country offering liberty and the chance for a new beginning.

II. THE GUEST WORKER IN THE U.S.

A. History of the H-2A Visa

The U.S. has historically taken actions to obtain a cheap labor force from foreign countries, most often from Mexico and most often in agriculture where domestic workers are not able to fill the jobs. Since the end of slavery “agricultural workers have tended to be foreign-
born and nonwhite, \textsuperscript{28} and of the three to four million unauthorized Mexicans in the U.S., one million are employed in agriculture.\textsuperscript{29} 

The Immigration Act of 1917 made the first steps towards a guest worker program when it waived specific immigration requirements for temporary workers.\textsuperscript{30} Between 1942 and 1964 approximately 4.6 million Mexican workers were admitted to the U.S. as Braceros to fill agricultural jobs.\textsuperscript{31} The Bracero contract was negotiated between the U.S. and Mexico and allowed workers to enter the U.S. without meeting literacy requirements and had contract labor provisions similar to those of the current H-2A program.\textsuperscript{32}

The Bracero program was allowed to expire in 1963 in response to large opposition from labor unions and civil rights groups.\textsuperscript{33} In fact, the Bracero Program was such a failure that a national class-action lawsuit was filed in Federal court on behalf of Braceros seeking lost wages.\textsuperscript{34} One of the terms of the program was that a 10% deduction would be made from each paycheck, forwarded to a U.S. bank, and paid out upon the Bracero’s return to Mexico. Estimates say that between $14 and $36 million was withheld between 1942 and 1949.\textsuperscript{35} This 10% deduction was included in the Bracero Agreement at the insistence of the Mexican government.\textsuperscript{36} Apparently the funds were sent to Mexico,\textsuperscript{37} unfortunately these wages were never paid to the workers and lawyers have filed several class action lawsuits seeking as much as $500 billion for the lost wages, interest, and punitive damages.\textsuperscript{38}

In 1952, Congress created the H-2 visa as a part of the Immigration and Nationality Act.\textsuperscript{39} This visa applied to non-agricultural and agricultural workers as well as to all foreign workers, regardless of citizenship. This program also developed numerous abuses similar to those seen in the Bracero Program. The Immigration Act of 1965 addressed these abuses.\textsuperscript{40}

In 1986, the H-2 visa was split into two parts: the H-2A visa, which is described in detail below and applies to agricultural workers, and the H-2B visa, which applies to nonagricultural workers.\textsuperscript{41} The Immigration Reform and Control Act (IRCA) created the H-2A visa\textsuperscript{42} in order to meet the needs of growers who were not getting enough domestic workers;\textsuperscript{43} however, it did not aim to protect migrant workers.

\textbf{B. The H-2A Visa & its Requirements}

From 1990 to 1996 the INS admitted an average of 13,412.2 H-2A workers annually.\textsuperscript{44} The use of H-2A workers in agriculture is on the rise as approximately 30,000 immigrants were admitted under the visa in 1998.\textsuperscript{45} The H-2A Program allows employers to
apply for nonimmigrant alien workers to perform seasonal or temporary work when domestic workers are not available. While there is an annual cap of 66,000 H-2B visas, there is no cap for H-2A visas, allowing employers to meet any size labor demand.\[46\]

The major purpose of the program is to supply the needed labor force while protecting the wages and jobs of U.S. workers. In order for employers to qualify for the program the Department of Labor (DOL) must grant a temporary labor certificate.\[47\] In order for the DOL to grant the certificate the employer must show two things. First, that there are not enough “able, willing, and qualified” U.S. workers available at the time and location needed.\[48\] Second, that hiring guest workers will not “adversely affect the wages and working conditions of…similarly employed U.S. workers.”\[49\] “The H-2A Temporary Agricultural Worker Program permits agricultural employers who can demonstrate a labor shortage to import foreign workers on a temporary basis under terms and conditions that will ideally result in no adverse effect to U.S. workers similarly situated.”\[50\]

Employers who qualify for the program are generally agricultural employers including individual proprietorships, associations of agricultural producers, partnerships, and corporations.\[51\] These qualified employers must file applications with the DOL and various other state agencies at least 60 days before the workers are needed. The DOL must approve or deny the application 20 days before the start date.\[52\]

Another requirement for qualification in the program is that employers must engage in positive advertising and recruiting of U.S. workers.\[53\] This ensures that guest worker labor is not being used where American workers are available to fill jobs. Any U.S. workers that apply for the job before 50% of the work is complete must be hired.\[54\]

A state’s employment service is also involved in finding U.S. workers. The service receives a copy of all applications filed in the state and must immediately begin recruiting U.S. workers.\[55\] Most referrals for workers come from state agencies.\[56\]

Once an application is authorized it becomes the responsibility of the employer to file a visa petition with the INS.\[57\] If granted, an H-2A visa is generally valid for a maximum of one year.\[58\] Extensions are possible for three consecutive years; afterwards workers must leave the country for at least a six-month period before resuming H-2A status.\[59\]

Once qualified for the program, employers must provide wages equivalent to that which would be paid to U.S. workers. Wages must be the higher of either the Adverse Effect Wage Rate (AEWR) or the applicable prevailing minimum wage.\[60\] The AEWR is determined by the Department of Agriculture by considering the prior year’s average hourly rate.\[61\]
Employers must also provide free and approved housing, furnish three meals a day or facilities for meal preparation, reimburse workers for transportation to the job once 50% of the work has been completed, pay return transportation once the work is complete, provide workers’ compensation for all employees, and must guarantee that the worker be permitted to work for at least ¾ of the contract time. The Employment Standards Administration (ESA) of the Department of Labor is responsible for enforcing all of these terms and conditions of employment.

C. The Major Problems With the Current Program

Despite the evolution of the program over the past 100 years, it is still not without flaws as the push for reform or abandonment of the program continues. Despite the H-2A visa program and the other immigration measures outlined above, undocumented immigrants continue to be a huge problem. The booming 1990’s attracted a large number of illegal immigrants who now feel that they have no reason to fill out paperwork which will put an expiration date on their time in the U.S., and alert the INS to their presence. Proponents for abandoning the program argue that coming to the U.S. illegally is simply too attractive and no amount of immigration reform will make the alternatives better.

Many argue that despite provisions protecting U.S. jobs and working conditions, the program does not sufficiently protect U.S. workers. They argue that the Department of Labor does not strictly enforce the requirements that employers recruit U.S. workers first and that they follow the wage calculations outlined by the DOL. This lack of enforcement results in immigrants taking positions that could be filled by U.S. workers, and lowers wages that U.S. workers receive throughout agriculture. Since employers are able to circumvent the program requirements, it is being used as a means to hire cheap labor at any time even when no labor shortages exist, rather than as a means to deal with labor shortages.

Others argue that despite provisions for workers compensation, housing, etc., abuse and mistreatment of the workers continues, and is in fact enhanced by the program. The program creates an exploitable labor class consisting of workers who are denied protections and privileges guaranteed to citizens. It is in effect, creating a second class of citizens. This is unfortunately consistent with the history of guest worker programs which have aimed to add workers to the labor force without adding permanent residents to the population.
Economic supply and demand analysis questions the wisdom of importing labor in order to prevent usage increases.\[^{[69]}\] Many argue that importing labor creates a distortion effect which widens the supply and demand gap by increasing the supply without changing the demand.\[^{[70]}\]

Despite these numerous stumbling blocks, the guest worker program must be revised instead of abandoned and focus on the employers, workers, and the leaders of our nations that are looking for an expansion and revision of our immigrant relations. Whatever the complaint and from whichever group, the list of problems with the guest worker program appear to be endless.

### III. CURRENTLY PROPOSED LEGISLATION

**A. AgJOBS**

In July of 1998, the Senate approved the Agricultural Job Opportunity Benefits and Security Act, also called the AgJOBS program, which was proposed by Senator Bob Graham.\[^{[71]}\] However, the bill did not survive conference negotiations and a second version of AgJOBS was introduced in October of 1999.\[^{[72]}\] The House did not act on the second version of the bill and AgJOBS still remains on the Congressional agenda.\[^{[73]}\]

Both versions of the bill proposed various program reform including modifying existing requirements for employer-paid housing and wage determinations and extending H-2A visa holders the protections of all U.S. labor laws, including the Migrant and Seasonal Agricultural Worker Protection Act.\[^{[74]}\]

Unique to the second version of the bill is the provision for quasi-legalization of immigrant status. This version would allow unauthorized workers who could prove that they did at least 150 days of farm work in the year previous to the bill’s introduction, to apply for new, probationary non-immigrant status.\[^{[75]}\] These workers could then become U.S. immigrants by performing at least 180 days of farm work, each year, for five of the next seven years.\[^{[76]}\]

**B. Phil Gramm’s Proposal**

Texas Senator Phil Gramm wants to see legislation which would increase the number of guest workers.\[^{[77]}\] However, his legislation will not allow for blanket amnesty or legalization of any kind. Gramm’s proposal would offer one-year work contracts to new workers from Mexico as well as to those already in the U.S. illegally.\[^{[78]}\] Those workers already in the U.S. would be given a one-time opportunity to enroll in the program.\[^{[79]}\] The work contracts would be
renewable under certain circumstances and the number of guest workers allowed in the U.S. would be adjusted annually in response to changes in the U.S. economy, primarily based on unemployment rates calculated by counties.\textsuperscript{80}

Other reform, such as coverage of workers under U.S. law, would lead to what Senator Gramm feels is a necessary program that “would allow vital U.S. industries to put food on our tables and roofs over our heads at a cost that working American families can afford to pay.”\textsuperscript{81} He also proposes to divert the 15.3\% of wages that are withheld as social security taxes to a fund in order to provide emergency medical care for workers.\textsuperscript{82}

C. The Berman Compromise

On August 2, 2001, the Berman Compromise was introduced in the Senate by Massachusetts Senator Edward Kennedy and in the House by California Representative Howard Berman as the “H-2A Reform and Agricultural Worker Adjustment Act.”\textsuperscript{83} Senator Bob Graham agreed to the compromise that was brokered by Representative Berman and endorsed by the United Farm Workers and the National Council of Agricultural Employers.\textsuperscript{84} The bill is still on the Congressional Agenda and its latest major action was on January 24, 2002 when it was referred to the House Subcommittee.\textsuperscript{85}

The compromise calls for legalization for unauthorized farm workers to be followed by earned immigration. Unauthorized workers that could show that they performed at least 100 days in farm work during one of the two seasons before passage of the law would be granted temporary resident alien status.\textsuperscript{86} From there, the workers could earn immigrant status by working at least 360 days over the following six years, 240 of which would need to be performed in the first three years.\textsuperscript{87}

In terms of reforming the current program, the bill calls for less bureaucracy when applying for workers, coverage of workers under the Migrant and Seasonal Agricultural Worker Protection Act\textsuperscript{88}, and the right to join and organize labor unions to all workers.\textsuperscript{89} Additionally, the bill would freeze the AEWR for at least three years.\textsuperscript{90}
D. TheCraig/Cannon Proposals

Although not identical legislation, the bills introduced by Idaho Senator Larry Craig and Utah Representative Chris Cannon are similar enough that both opponents and proponents group them together. Both bills address the agricultural guest worker program and both are strongly opposed by groups representing the interests of migrant farm workers.

The Craig Bill was introduced in July of 2001 at the request of agricultural employers and in an attempt to modify the Berman compromise. The bill would lower wages, weaken labor protections, and create so many restrictions on qualifying for legalization that most workers would never become legal immigrants.

The Cannon Bill focuses on wage issues and proposes eliminating the AEWR, allowing employers to pay low wages for foreign workers. The legislation would also create loopholes that would allow employers to avoid even the new low minimum wage rates.

IV. PROPOSED REFORM

A. Framework of Criteria For Analyzing Proposed Changes

In order to effectively propose and analyze reform, there must be a framework of criteria against which the reform can be evaluated. In other words, the reform must consider the viewpoints of each interested party, workers, employers, and the U.S. and Mexico.

U.S. workers will want to know how the reform will affect their wages and the quality of their jobs. They will want to see reform that protects them first and that only allows the program to come into play when there is a real shortage of labor. They will also want to see reform that prevents or at least decreases illegal immigration so that their working conditions and wages do not deteriorate.

Employers will want to know how they will be affected in terms of increased costs and restrictions. They will want to know how much it will cost them to hire guest workers and how strictly they will be regulated by the INS, the DOL, and other agencies involved in the
process. Employers are concerned that if the bureaucracy is restrictive it might be more hassle than it is worth.

U.S. citizens will want to know how the program will affect the economy, specifically, who will bear any increased costs of administering the guest worker program and of providing benefits to guest workers. Also, U.S. citizens will want to know what the impact on the economy as a whole will be if all guest workers are all “legalized” and the shadow economy consisting of formerly illegal workers disappears.

Besides being concerned about how the program will affect the economy, U.S. citizens will also want to know how the program will change immigration, both legal and illegal, as well as what measures will be taken to prevent another Bracero-style failure. They will want to know if the incentives and disincentives for employer and employee compliance with the program are strong enough to cause guest workers to eventually return to Mexico.

Also very important and rarely considered in past programs is how the program will affect guest workers. Important considerations include whether or not the benefits and legal protections afforded to guest workers will be enough to prevent their continued treatment as indentured servants, and whether workers will get a chance to earn legal immigrant status rather than continuing to pour labor into the U.S. only to be eventually asked to leave.

It is within these three main frameworks of criteria that the reform will be evaluated. The proposed reform will also take into account past successes and failures in the hopes of achieving a legislative proposal that will not repeat past failures and will instead lead to a program that is beneficial to all those involved.

**B. Proposals for New Legislation**

**Protecting Domestic Workers**

An employer who hires guest workers must be able to show that there were no able, willing, and qualified U.S. workers available to fill the jobs at the time the guest workers were hired.\[95\] This requirement should not be eased as is proposed in the Berman legislation\[96\] because it is crucial in preventing employers from circumventing the entire program in order to hire cheap labor despite the availability of qualified domestic workers,
thereby encouraging illegal immigration and worsening the work conditions and wages of the domestic workers.

The DOL should strictly monitor compliance by employers in their hiring and advertising practices. Any employer found to not be in compliance should be suspended from the program for the following season. In order for the DOL to ensure that U.S. workers are being hired when they are available, unemployment calculations must be made by region and should be done annually as proposed by Senator Gramm. This will allow the DOL to permit hiring only when there are labor shortages and to pinpoint those employers who are hiring guest workers outside of the shortages.

Another way to ensure that domestic workers are being hired when they are available is by increasing the lead-time required for filing certification applications from 60 to 80 days. Since agricultural employers know their planting and harvesting schedules well in advance and are able to estimate their needs up to 80 days before workers are needed, the increased time will not negatively affect the employers and will give a longer time for interstate recruiters to actively seek U.S. workers. This extra time will create a buffer zone for times when the DOL is behind in reviewing applications and releasing information to recruiters. It will also allow time for a meaningful test of the market to ensure that labor certifications are granted only when there are actual labor shortages.

**Employer Compliance**

The key to employer compliance is the control of illegal immigration. Employers can avoid wage, housing, and other requirements of the program if they hire workers who are undocumented and outside of the program. However, as the number of undocumented workers available for hire decreases, it will become harder for employers to hire outside of the program. It is therefore crucial that control of illegal immigration run hand-in-hand with the modification of the guest worker program thereby stopping growth of the migration “black market.”

Unfortunately, incentives cannot be offered to employers without the risk of discriminating against U.S. workers. Guest workers and domestic workers must receive the same wages and benefits and the cost to the employer of hiring both must be equal. By equalizing the costs, it is possible to ensure that employers will only look to the guest worker program in times of labor shortage, because there will be no benefits to hiring guest workers over
domestic workers. Responding to labor shortages is the goal of the program, not increasing our shadow economy and decreasing agricultural wages. This goal of responding to labor shortages will be met by equalizing the wages and costs for both domestic and guest workers.

Employers found violating any of the program requirements should be suspended from the program for the following season. However, if the violation is found before the start of the job and no guest workers will be adversely affected, the employer should be suspended from the immediate season. After three suspensions the employer should be banned from participating in the program and therefore from hiring any guest workers. The Employment Standards Administration (ESA) is, and should continue to be, responsible for enforcing contract provisions and assessing civil and monetary penalties for unpaid wages.

Gross violations, including worker abuse, discrimination against workers that join unions, denial of workers compensation, etc. should result in immediate expulsion from the program. “Gross” violations will be determined by the DOL according to guidelines promulgated by various agencies including the INS and the Department of Agriculture.

**Fees for Workers**

The theory behind charging employers a fee for every guest worker they hire is that this will help to close the demand-supply gap. Without foreign workers, economists predict that wages for U.S. workers would rise, those rising wages would in turn decrease the demand for labor and the supply of workers would increase. By charging employers a fee for foreign workers, the demand-supply gap could be reduced over time. The fee would also help to equalize the domestic and guest worker as outlined above.

However, a large fee would result in several negative consequences. If an employer is charged a $1,000 fee for each worker employed, as is done with the H-1B visa, they will simply look to the undocumented workers. This will encourage illegal immigration and completely undermine the guest worker program. Another drawback to imposing a large fee is that the bureaucracy and enforcement requirements are already felt to be much too cumbersome and costly. If the costs of implementing the program are too high, employers will find ways around those costs and hire illegal workers. According to a recent Chicago-Tribune article, “the U.S. already has something akin to a guest worker system, but its
requirements and red tape are so burdensome that both employers and immigrants just ignore it.”

While closing the demand-supply gap and equalizing domestic and guest workers in terms of their costs are both crucial to the success of the program, they cannot be solved by the imposition of a large fee. Instead, employers should be charged a minimal processing fee for each worker.

**Worker Wages**

The current program requires that guest worker wages be the higher of either the AEWR[109] or the applicable prevailing minimum wage rate in the state, although neither may be lower than the Federal minimum wage.[110] Employers are also required to guarantee that the worker will be employed for at least ¾ of the contract period. This is called the ¾ wage guarantee and prevents the employer from firing the worker without pay if the workload decreases.[111]

The Berman Compromise legislation proposes that the AEWR freeze for at least three years.[112] Freezing the AEWR will create a disparity between the wages of domestic and guest workers and will not only make it harder for domestic workers to compete but will lead to more abuse of the guest workers. As discussed elsewhere in this article in the section dealing with incentives for employer compliance, everything must be equal between guest workers and U.S. workers or else the guest worker program will reach beyond providing labor in times of shortages and will instead continue to create a shadow economy of underpaid workers.

The Craig proposal includes provisions for lowering the wage rates[113] while the Cannon proposal advocates for eliminating the AEWR altogether.[114] These proposals are flawed in the same way that Senator Graham’s proposal for freezing the AEWR is. In order to end exploitation of guest workers and ensure that domestic workers are used, the wage rates must be maintained as is suggested in the Berman legislation.[115] In response to employer complaints that the H-2A wages are too high, the Berman legislation proposes that a study be prepared by a special commission and by the General Accounting Office.[116]

**Housing Allowance**

The current program requires that all employers provide “free, inspected, and approved housing to all workers who are not able to return to their residences the same day.”[117] This requirement prevents employers who do not have adequate housing from participating in the
program. As proposed in the Berman Compromise, new legislation should include a housing allowance as an alternative. Those employers that wish to offer this alternative housing allowance must be certified by the Governor of the state in order to show that there is adequate housing available for migrant farm workers in the desired area. This will allow employers who do not have adequate housing to join the program.

Unlike the Berman legislation, the housing allowance or “stipend” should be available regardless of whether or not the employer has adequate housing available for the workers. If equal in value to the cost of providing housing, the stipend will add no additional cost to the employer while providing the workers with alternatives to living under the employer’s roof. This freedom of choice will allow workers to select accommodations that best suit them and their families.

**IRA-Type Fund**

As was seen in the Bracero program, a portion of the workers’ wages should be set aside and used to fund an IRA-type account. The proceeds of this fund would be available to the worker if and when they returned to Mexico. In order to avoid another Bracero-style disaster, the U.S. and Mexico will need to strictly monitor the funds. It will be up to the Mexican government to make decisions concerning interest rates, investment type, and financial institutions.

Although the wages will not be available to the worker until they have given up their guest worker permit and their chance to participate in the program, as suggested in the Gramm proposal, the money will be available for emergency health care for the worker. This will allow the worker to pay for the health care costs that might otherwise have made him indebted to his employer for the costs of illnesses.

An employer that is illegally employing an immigrant does not currently have to pay for payroll taxes such as Social Security (FICA) and Federal Unemployment (FUTA). This creates a demand for illegal labor and leaves domestic workers competing for jobs by taking lower wages. The taxes are also of no benefit to the immigrant worker if he is being employed legally. Theses taxes should instead be paid into a separate, non-IRA fund. These funds would be used to decrease the high costs of administering and monitoring the program, contribute to labor management, and pay for costs of worker compensation. This will help to equalize the pay
for guest workers and domestic workers while using the funds in a way that is useful to the worker.

Legal Protection

Although the Craig Bill proposes dropping coverage under AWPA, it is crucial that H-2A guest workers continue to be covered by the statute. AWPA provides the worker with a right to file a lawsuit in federal court to enforce the “working arrangement,” between the employee and the guest worker. The AWPA also contains disclosure requirements, transportation and housing standards, and other protections crucial to guest workers. This statute is critical in ensuring that the abuse and mistreatment of guest workers does not continue.

Since current H-2A legislation includes coverage under AWPA and mistreatment of workers still exist, the problem must be related to the extent of coverage under other laws as well as to guest worker access to courts. Currently farm workers are excluded from the National Labor Relations Act which prevents employers, recruiters, or labor contractors from discriminating against workers who join or organize labor unions. The Berman legislation proposes that the AWPA be amended to grant farm workers, including guest workers, the right to join or organize labor unions free from the fear of retaliation. This right would be enforceable by the DOL through the usual AWPA remedies and should be included in any new H-2A legislation.

Most courts have allowed employers of guest workers to contract out of wage requirements and compliance with statutes such as the Fair Housing Act. The law requires that every worker be provided with a copy of their job contract or job clearance order. The contract or order must include the start and end dates of the contract period, all significant conditions of employment, hours per day and days per week that the worker is expected to work, the crops to be worked, the rate of pay for each job, any tools required with the cost to the employer, and notification that workers compensation insurance will be provided in accordance with state law. However, these requirements do not prevent employers from contracting around provisions meant to protect the worker.

New guest worker legislation should not allow contracting around requirements set by the very legislation creating the program. Courts should be statutorily barred from upholding employer decisions to contract around program requirements and any employer found to be doing so should be suspended from the program for a season. Multiple violations will ban the employer from the program altogether.
Legislation should ensure that no workers are excluded from landlord tenant laws or any other state laws. In the past, some states have excluded workers from landlord tenant laws, and have gone as far as allowing employers to prevent guest workers from having guests in their homes “after hours.” The guest worker program legislation should encompass landlord tenant laws and other relevant state laws.

Access to Courts

Agriculture workers are typically represented in court by farm worker services which are funded by the Legal Services Corporation (LSC). The ineffectiveness of this situation is illustrated by the fact that in North Carolina, no guest worker has ever filed a complaint with a government agency. The only complaints that have been filed have been by farm worker advocates or church groups. Not only are guest workers reluctant to file, but courts historically find against them.

In order to encourage workers to use the judicial system to protect their rights, legislation should include a citizen-suit provision to allow advocates such as labor unions and not-for-profit organizations to bring suit on behalf of reluctant workers. In theory, the provisions outlining legal protections will allow courts to rule more frequently for the worker although it will be important for advocates to monitor the findings to ensure that justice is being served.

Legalization Provisions: “Earning Immigrant Status”

Generally, Mexican workers come to the U.S. for seasonal work, not in the hopes of becoming permanent citizens, but in order to earn wages that they can send back to their families in Mexico. However, some workers come to the U.S. to stay or find that once here, they cannot return to Mexico for various reasons. For those workers, it is necessary to offer a system which allows them to earn their legalization.

It is also necessary to bear in mind that when denied legal entrance 150,000 Mexicans find a way across the U.S. borders each year, entering the U.S. economy as illegal immigrants. Cutting down on guest worker recruitment can lead to an increase in legal and illegal immigration because workers are dependent on their earnings from their jobs to sustain themselves and their families and usually will not allow their lack of legal status to keep them from entering into the U.S. workforce.
The earned legalization system will allow unauthorized workers (or those entering the U.S. as guest workers) to receive temporary work and residence permits that could eventually be converted to green cards or immigrants visas assuming the worker completes a certain amount of farm work over a specified time frame.

An earned legalization component of a guest worker program would require that the “no intent to immigrate” provision of the current H-2A visa be dropped. The current program requires that guest workers have a residence in a foreign country that they have no intent of abandoning. Generally, an applicant for a visa that requires a showing of no intent to immigrate will be denied a visa in the event that any other visa was received or even applied for. If the "no intent to immigrate" provision is dropped and a path to earned legalization is provided, a worker will be able to apply for the H-2A visa even if they have shown an intent to immigrate in the past. However, INS officials should take the “intent” into account to try to ensure that the guest worker program is not used solely as a front for those trying to immigrate to the U.S.

The AgJOBS Legislation proposes that a worker perform at least 180 days of work per year for five of seven years. This framework for legalization would apply to those workers who are already in the U.S. with the start date being the date the legislation passes. It would also apply to those who participate in the guest worker program in the future, with the start date being the issue date of the visa. The Berman compromise proposes similar reform with legalization for unauthorized farm workers followed by earned immigrant status.

The Craig proposal is much stricter on legalization. It requires the worker to complete 50 days of farm work a year during four of six years, which is a total of 600 days (compared to Berman of 360 days). It would also require the temporary resident alien to leave the U.S. for at least two months a year. Many feel that the requirements are “so onerous that few workers would ever prove their eligibility.”

The earned legalization reform should be modeled after the Berman compromise by requiring workers to complete 360 days of farm work over the next six years, (with 240 during the first three years) in order to earn immigrant status. Guest workers should be offered a path to immigration status instead of continuing a perpetual path of indentured servitude.
Those Who are Already Here

Amnesty should not be offered to currently undocumented workers. The reforms proposed in this article would allow guest workers that are currently in the U.S. illegally to join the guest worker program without penalties for the laws they have already broken. These workers would be able to “earn” their legal status. Workers in every industry and in every visa setting should be required to go through the immigration process like everyone else and should not be handed a “free pass” to legal immigrant status. The main flaw of the Berman Compromise is that it offers amnesty to undocumented workers who register within a certain time period.\textsuperscript{138} Amnesty should not be an option for illegal immigrants.

Workers who are already in the U.S., either legally or illegally, should have the option of joining the guest worker program and eventually earning their legalization. For those who are here illegally, if they can prove that they have worked for at least 90 days in U.S. agriculture, they should qualify for the program. However, none of their previous work should be counted towards their earned legalization.

Bilateral Agreements between the U.S. and Mexico

Under the current H-2A program, U.S. employers are given complete discretion as to where and how they recruit their workers.\textsuperscript{139} This allows them to select the “best” workers and nurtures a system where bribes lead to jobs. By involving Mexico with the guest worker program through bilateral agreements, the two countries can regulate and facilitate recruitment, remittances,\textsuperscript{140} IRA-funds from wages, and the return of workers to Mexico.

V. CONCLUSION

Combining reform of the guest worker program with a system for earned legalization will create an effective program that will seek to meet the needs of not only the employers but also the farm workers and the U.S. and Mexico. There are currently a number of bills pending which propose reform of the guest worker program. Some of these bills focus too strongly on the needs of the employer while not providing adequate protection for guest workers. Other legislation is too permissive, granting amnesty to illegal workers currently in the U.S. without considering the impact this will have on the U.S. economy, the labor market, and the immigration system. The ideal solution for the problems posed by the current guest worker program is to adopt a hybrid of
the two models. This hybrid would contain provisions for protecting domestic workers, ensuring employer compliance, charging minimal fees for workers, equalizing the wages of domestic and guest workers, providing a housing allowance, creating an IRA-type fund from a portion of the workers’ wages, extending legal protection to workers and ensuring their access to the courts, giving workers a chance for earned legalization, and laying the foundation for bilateral agreements between the U.S. and Mexico. This hybrid model will strike a balance between the needs of employers, workers, and the countries involved.


[2] As of 2001, there were 8.6 million Mexican born people in the U.S. *Id.*

[3] Thousands of people have been killed while trying to illegally cross the border since the mid-90s. See the Central America/Mexico “Report” http://www.rtfcam.org/report/volume_21/No_2/article_5.htm This article argues that the increase in deaths from illegal border crossing attempts can be attributed to the Border Patrol policy of deterrence which began in 1996.


[5] Fox is pushing the U.S. to open the border to move workers as it has goods and services under the North Atlantic Free Trade Agreement (NAFTA). See Thompson, *supra* note 1, discussing talks between Fox and Bush.


[8] *Id.*


[12] *Id.*

[13] Proposals are aimed at a modified guest worker program for unskilled farm and non-farm workers (see the distinction in the H-2A section below). However, this paper will focus only on the H-2A visa for farm workers and the agriculture industry.


[15] *Id.*


[17] *Id.*


[19] This paper focuses on the relationship between the U.S. and Mexico because it is primarily Mexican workers that apply for H-2A visas and that work in our agriculture industry. It is important to note that while this paper will focus on immigration reform between the United States and Mexico, workers have been recruited from countries such as the Philippines, China and Japan to harvest American crops.

[20] See section below on the history of the guest worker program, specifically the Bracero program.

This paper focuses on the agricultural industry, the traditional target of the guest worker program and regulated by the H-2A visa; however, the program should encompass any industry which needs seasonal workers. The effectiveness of this program depends upon the simultaneous control of illegal immigration so that there is not an illegal supply of cheap labor and employers will look only to U.S. workers and guest workers to fill their jobs.

We will also need to see efforts to ensure efficient monitoring and INS regulations as well as tighter controls on granted visas of any kind.

When crops spoil, the effects are felt throughout the nation’s food supply chain. However, some argue that a decline in the number of guest workers will not result in the spoilage of crops but instead the mechanization of harvests. In other words, the crops will get picked.


Rural Migration News, supra note 7.

Act of Feb. 5, 1917, ch. 29, §3, 39 Stat. 874, 877-78

Philip Martin, There is Nothing More Permanent Than Temporary Foreign Workers, BACKGROUNDER, April 2001.


Philip Martin, supra note 27.


Id.

http://www.crlaf.org/bracerosuit.htm

Rural Migration News, supra note 7. Mexico also formed a national commission to investigate the missing funds.

Id.

8 U.S.C. §1101

Jackson, supra, note 28.

H-2 Temporary Alien Labor to Meet Temporary Needs and Seasonal Workers, CALIFORNIA LEGAL CENTER. http://www.bijanassil.com/visas/htbvisa.htm


There are currently five types of guest workers programs in the U.S.: the H-1B, H-2 (including the H-2A and the H-2B), H-3, L-1, and O-1. Each of the programs are targeted at different employer needs.

Jackson, supra, note 28.

Id.

California Legal Center, supra note 41.

The Immigration and Naturalization Service is a division of the Department of Labor.

20 C.F.R. §665.90(b)(1)(A)

Id. §665.90(b)(1)(B)


Id.

Id.

Id.

Id.

Id.

Certifications of workers is governed by 20 C.F.R. p 665 subpart B (2001)


Id.

Jackson, supra note 28.
Id.
Id.
Id.
Id.
Id.
Id.
Id.

Id.
Jackson, supra note 28.
Id.
Id.
Id.
Id.
Id.
Id.

Id.
Jackson, supra note 28.
Id.
Id.
Id.
Id.
Id.
Id.

Id.
Jackson, supra note 28.
Id.
Id.
Id.
Id.
Id.
Id.

Id.

The effect of importing labor to skew the supply and demand is a topic worthy of exploration as it can have huge repercussive effects on the economy.

To provide for the adjustment of status of certain foreign agricultural workers, to amend the Immigration and Nationality Act to reform the H-2A worker program under that Act, and for other purposes, S. 1313, 107th Congress (2001).

Rural Migration News, supra note 7.

H.R. 2457, companion bill to S. 1161, supra note 91.

Id.

To amend the Immigration and Nationality Act to streamline procedures, S. 1161, 107th Congress (2001).

Id.

Id.

29 U.S.C. §1801. The law is the principle federal employment law for farm workers.


S. 1313, supra note 83.

To amend the Immigration and Nationality Act to streamline procedures, S. 1161, 107th Congress (2001).

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.
Most legislation remains silent on the matter of closing the demand-supply gap in the farm labor market. The large fee is plausible for a program like the H-1B visa because it deals with the high-tech industry where alternative labor sources are usually not abundant.

The Employment Policy Foundation estimates that the private sector spends $565 million annually on securing employees through guest worker programs. See The risks of a guest worker plan, CHICAGO TRIBUNE, August 8, 2001. The AEWR is determined by looking at the prior year’s average hourly rate. See 20 C.F.R. §665.90.

See section above on the H-2A visa.


S.1313, supra note 83.

S. 1161, supra note 91.

Id.

S. 1313, supra note 83.

Id. This study will be able to confirm whether or not there is a disparity in the cost to the employer between hiring a domestic worker and hiring a guest worker. If there is a disparity, the wages should not be changed but instead other costs to the employer should be reduced.


S. 1313, supra note 83.

Of course the success of this stipend depends on available housing within a short distance of the employer since transportation to and from can add considerable cost.

Graham, supra, note 21.

The Berman Compromise also supports continued coverage under AWPA. See S. 1313, supra note 83.

See the section on Access to the Courts below for more on the issue.


Jackson, supra note 28.


See Sugar Cane Growers Cooperative of Florida v. Pinnock, 735 So. 2d 530, 531 (Fla. Dist. Ct. App. 1999) holding that the employer could contract around the $4 wage guarantee requirement of the H-2A visa.

Leah Beth Ward, Desperate Harvest: N.C. Growers’ Trade in Foreign Farm Workers Draws Scrutiny, CHARLOTTE OBSERVER, October 31, 1999.

Jackson, supra note 28.

Id.

Jackson, supra note 28.

Thompson, supra note 1.

Martin, supra note 31.


AgJOBS, supra note 16.

See section above on proposed legislation.

S. 1161, supra note 91.


See S.1313, supra note 83.


Remittances from Mexican workers (between 6 and 8 billion per year) is Mexico’s third largest source of foreign revenue, behind oil and tourism. See Thompson, supra note 1.