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THE WEST INDIES (BWI) TEMPORARY ALIEN LABOR PROGRAM: 1943–1977

A STUDY

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CONTENTS

FOREWORD

The subject of this report is the BWI temporary foreign worker program which dates back to World War II and, since 1952, has operated under the authority of the Immigration and Nationality Act. "BWI" refers to the British West Indies, although by now some of the offshore islands from which the workers come—notably Jamaica—have gained their independence.

If legislation is enacted which curtails the employment of illegal aliens, the time may well come when it will be necessary for the United States to look toward a lawful source of temporary workers in greater numbers than have been authorized in recent years. In that eventuality, the experience of the BWI program cannot be ignored and it offers a possible model for new programs.

While the temporary employment of foreign workers remains highly controversial, it is likely to become less so if we are successful in eliminating the current clandestine alien worker supply. It is not improbable that in our highly complex and industrialized society there will always be certain kinds of jobs which, for whatever reasons, will not attract U.S. workers in sufficient numbers. An example discussed in this report is migratory farm labor. The choice increasingly appears to be whether we prefer to have these and other jobs filled by illegal aliens, as is presently the case, or by temporary workers legally admitted to the United States under an organized and carefully controlled program. The history of a successful program of this type is traced in this study.

As a final comment, it is worth noting that contrary to what is sometimes asserted, the termination of the Mexican bracero program by Congress in 1964 carried no mandate to phase out temporary alien agricultural labor. The proof of this can be found not only in the legislative history but in the continuing vitality of the BWI program and the retention of the H–2 provisions for over a quarter of a century in the Immigration and Nationality Act.

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The West Indies (BWI) Temporary Alien Labor Program: 1943–1977

I. INTRODUCTION: THE BWI PROGRAM

The BWI program is a temporary alien labor program which operates under the legislative authority of the Immigration and Nationality Act of 1952, as amended.[1] Agricultural workers from the Caribbean islands—formerly the British West Indies (BWI)—are admitted temporarily as nonimmigrant ("H–2") workers "to perform . . . temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country."

As with other "H–2" nonimmigrant workers, the final authority for the admission of BWI workers rests with the Attorney General, who has delegated his authority to the Immigration and Naturalization Service (INS), within the U.S. Department of Justice. Controls on the BWI workers are administered by the INS office in West Palm Beach, Fla.[2] INS regulations require that employers or employer associations petitioning for the entry of H–2 workers must include with their applications a certification from the Labor Department "stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed."[3]

The Labor Department has issued detailed regulations outlining the steps necessary to obtain certification for temporary foreign workers. These include the requirement that an interstate job order for U.S. workers at specified wage rates and conditions be placed with the local office of the State employment service not less than 60 days before the expected date of need. An attempt is made to fill the order first locally, then through the statewide and interstate resources of the Federal-State employment service system. Additionally, employers must provide evidence of their independent efforts to recruit workers. The Labor Department regulations were in the process of revision during 1977,[4] and were published in final form on March 10, 1978.[5]

The governments of the offshore islands from which the BWI workers come have traditionally taken an active interest in the program since its inception during World War II. Currently, the islands involved in the program include Jamaica, St. Lucia, St. Vincent, Dominica, and Barbados. While there are no longer government-to-government agreements, as there were during the war, the BWI program operates under a tripartite agreement between the U.S. employer

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[1] Act of June 27, 1952, Public Law 82–414, 66 Stat. 163. The provisions governing the entry of H–2 workers are sec. 101(a)(15)(H)(ii) and sec. 214 (c).

[2] INS Operating Instructions 214.2(h)(2)(v).

[3] 8 CFR 214.2(h)(3)(i) (Jan. 1977).

[4] Proposed rules published 42 Fed. Reg. 4670 (Jan. 25, 1977). For a discussion of differences between the proposed and final regulations, see 43 Fed. Reg. 10306–10311 (1978).

[5] 20 CFR 655, 43 Fed. Reg. 10312–10318 (1978). See Appendix.

or, as is more frequently the case, employer association, the worker's government, and the worker.

The British West Indies Central Labour Organisation (BWICLO) represents the governments of the participating islands, serving a liaison function and generally attending to the problems of the workers, auditing employer payrolls, and negotiating with employers regarding the terms and conditions of the workers' service. The main office of the BWICLO is in Washington, headed by Mr. Harold F. Edwards. There are also offices in the sugar cane area in Florida, and temporary offices in other areas as needed. Like other H–2 workers, BWI workers are exempt from Social Security payments, as are their employers. BWI workers are subject to the U.S. income tax.

Over the years, the BWI workers have worked in a wide variety of areas and crops, including shade tobacco in Connecticut, truck farming in New Jersey, cherry picking in Wisconsin, sweet corn in Idaho, tomatoes in Indiana, asparagus in Illinois, and peas in California—to give a partial list. A number of these crops have since been mechanized and/or the BWI workers have been replaced by domestic workers. In 1977, they were employed in sugar cane in Florida, and apple picking up the East Coast. Despite the reduction in the crops and areas, the number of BWI workers admitted annually has been in the general vicinity of 12,000 since 1960, ranging from 9,000 to 15,000. Since the termination of the Mexican Bracero program in 1964, BWI workers have regularly accounted for the largest single group of temporary agricultural workers.

The following is a history of the development of the BWI program since its origins in 1943. The emphasis throughout is on Congressional response to the program, as reflected in both oversight and legislative activities.

II. 1943–47: THE WORLD WAR II PERIOD

Both the Mexican bracero program and the BWI program [1] originated in response to the labor shortage which arose during World War II. While the paths of the two temporary alien labor programs diverged widely after 1947, they followed a similar pattern in the period 1942–47, during which the BWI program may generally be viewed as a supplement to the much larger Mexican program.

The labor shortages of World War II abruptly followed the labor surpluses of the depression of the 1930s. As late as 1940, Secretary of Agriculture Henry Wallace testified before a Senate subcommittee that 1.6 million fewer farm workers were needed than 10 years previously, and that the number of farm workers far exceeded the number who could expect to make a decent living from agriculture.[2]

Between 1940 and 1942, large numbers of rural farmworkers either entered the armed forces or left the farms for the higher wages of the growing defense industry. There were increasing complaints of shortages particularly in agricultural areas around defense plants. However, according to a contemporary history, "Many of the reports of shortages in specific areas were based, not so much on the inadequacy of a supply sufficient to maintain full production, as on inability to continue the

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[1] Unless otherwise noted, "BWI program" encompasses workers from both the British West Indies and the Bahamas, although for contracting purposes they were handled separately.

[2] Wayne D. Rasmussen, "A History of the Emergency Farm Labor Supply Program, 1943–1947." Washington, U.S. Department of Agriculture, Agriculture Monograph No. 13, Sept. 1951, p. 14. (Henceforth cited as Rasmussen (1951).)

peacetime methods of employment, with underemployment, unemployment, and low wages." [3] The domestic farm labor supply was generally considered adequate by Government officials prior to the entry of the United States into World War II in December 1941. Requests for supplementary Mexican laborers during 1941 from groups in Arizona, Texas, New Mexico, and California were all denied, the latter at the request of the Governor of California.[4]

This situation changed in 1942. The complex sequence of events leading to the admission of the first foreign workers, and setting the pattern for subsequent admissions, is outlined as follows in a contemporary account:

> On May 22, 1942, the Chairman of the War Manpower Commission advised the Secretary of State of a certification by the United States Employment Service for the immediate need of 6,000 Mexican agricultural workers. The matter of authorizing the admission of these workers to the United States was presented to this Service by the Department of State. That Department, in turn, was requested to present the question of such importation to the Government of Mexico. During the negotiations that followed an agreement, which became effective August 4, 1942, was entered into between the two governments regarding the importation of native citizens of Mexico to work in the United States. On September 11, 1942, authority was granted by the Attorney General for the temporary admission under the 9th Proviso to Section 3 of the Immigration Act of 1917, of such Mexican agricultural workers as applied for temporary admission under the terms of the agreement, notwithstanding their inadmissibility as alien contract laborers, with the understanding that no such person would be permitted to enter under the authority granted until the United States Employment Service had certified to the need for the importation, indicating the approximate length of time their services would be needed in this country.[5]

Pursuant to this agreement, the first Mexican workers entered at El Paso, Tex., on September 27, 1942 for employment in the sugar beet harvest at Stockton, Calif. This was the beginning of the Mexican Bracero program, which continued under various legal authorities until December 31, 1964.

Bahamians entered in 1943, followed shortly by Jamaicans, constituting the origin of the BWI program which continues in operation today, 35 years later. Bahamian workers were admitted pursuant to an intergovernmental agreement signed March 16, 1943; Jamaicans entered pursuant to an intergovernmental agreement signed April 2, 1943. Other groups entering from the British West Indies pursuant to intergovernmental agreements during the war period included natives of Barbados and British Honduras.[6] Of these groups, the Jamaicans accounted for the largest numbers of foreign workers entering during the war period, second only to the Mexicans.

The BWI workers had certain advantages over the Mexicans as a supplementary labor supply for the East Coast. Most spoke English, and Spanish was far less widely spoken in the East than it was in the Southwest. They also had the advantage of proximity, being closer to the Eastern seaboard than Mexico. The manpower shortage resulting from the transfer of much of the domestic work force to the military and to defense industries had been exacerbated by the gasoline and tire shortages, which curtailed the travel of foreign as well as domestic

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[3] Ibid.
[4] Ibid., p. 200.
[5] Robert H. Robinson, "The Importation of Alien Laborers," Immigration and Naturalization Service Monthly Review, vol. IV, Apr. 1947, p. 130.
[6] See Rasmussen (1951), pp. 233–277, for a detailed account of the agreements and experiences with workers from these areas.

workers. Finally, quoting from Rasmussen, "even if the barriers of transportation and language had not existed there still was the fact that Mexico limited the number of workers that could be made available and there were too few to meet the demands of the Southwest." [7]

The Bahamas and the British West Indies were experiencing high unemployment, due in part to the wartime curtailment of shipping and tourism, and not only were well disposed to U.S. requests for supplementary workers but, at least in the case of Jamaica, were well organized to accommodate them. The beginnings of Jamaica's participation in the World War II program are described as follows from a Jamaican point of view:

> The involvement of the United States in the war created the need for manpower for agriculture and munition works over and above the level which the United States labour market could meet. Accordingly, the United States Government turned first to nearby Jamaica (1942) and later (1944) to other Caribbean territories for her supply. The riots in Jamaica and elsewhere in the Caribbean caused by high levels of unemployment and general distress had been quelled only a few years earlier (1938–1939). A Centre had been created in Kingston (1938) for the registration of the unemployed and a Labour Department with branches in certain parts of the island had been established. When the request for contract workers came in 1942, therefore, the institutional framework necessary for recruitment and processing as well as for negotiating at least a modicum of protective measures had already existed and had had some experience in dealing with the processing of workers for employment. The institutional framework was strengthened in 1943 by the passage of the Employment of Workers Law which prohibited the recruitment of groups of workers by private individuals for work overseas under contract unless the recruiter was specifically licensed in that regard by a Licensing Authority created by the Law.[8]

The major differences between the BWI program during the initial five-year emergency war period and subsequently was that the United States Government was directly involved during the war both through intergovernmental agreements and Federal legislation. Quoting from the 1951 Report of the President's Commission on Migratory Labor, "In effect, the Government was the labor contractor." [9] Beginning in 1943, the Government also had the legal authority to recruit and transport the foreign workers. A brief discussion of the international agreements with the countries involved is followed below by a summary of the legislative authority for the emergency wartime foreign labor programs.

International Agreements

The various formal and informal international agreements which formed a significant part of the basis for the importation of alien workers during the war period provided, with variations that:

> (1) such laborers would be exempt from selective service; (2) such laborers would be exempt from certain requirements of our immigration laws, such as literacy requirements and payment of head tax or other admission charges; (3) such laborers would be guaranteed round-trip transportation; (4) hours of work and wages would be equal to those of domestic labor in the United States; and (5) the foreign government would determine the number and types of laborers who could leave that country without adversely affecting its economy.[10]

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[7] Ibid., p. 233.
[8] Organization of American States, Regional Seminar on the Establishment of Migration Services in Labor Ministries for Seasonal Migrant Workers, "National Migration Policies of Supplying Countries," Oct. 1970, pp. 1–2.
[9] "Migratory Labor in American Agriculture," Mar. 1951, p. 41.
[10] Senate Report No. 1515, 81st Cong., 2d Sess. (1950), p. 579.

The first and most detailed of these agreements was the formal diplomatic accord with Mexico in mid-1942.[11] The detailed Mexican-U.S. agreement was the result, in part, of the sensitivity of the Mexican Government due to the large-scale deportation of Mexican nationals from the United States during the depression of the 1930s. This led to the enactment of legislation by the Mexican Government prescribing the conditions under which its citizens could accept foreign employment. The 1942 agreement reflected these conditions as well as the desire of the U.S. Government to protect its own workers from adverse effects due to the importation of foreign labor.

The agreements with the Bahamian Government and with the British West Indies, in which the Government of Great Britain maintained a direct interest, generally took the form of memoranda of understanding drawn up by representatives of the governments involved, rather than the formal diplomatic exchange of notes which governed the Mexican program. As indicated above, the March 1943 agreement with the Bahamas was followed in April 1943 by an agreement with Jamaica and subsequently by agreements with Barbados and British Honduras. While there were minor differences in the agreements with the different islands, and modifications prior to their expiration in 1947, according to a Labor Department report, "for the most part the basic items remained intact throughout the period." These basic provisions have been summarized as follows:

(1) Costs of transportation from the point of recruitment to the United States and the return trip home, were to be borne by the U.S. Government. The employer would pay the costs to the worksite and back. (The first agreement with the Bahamian Government called for it to pay the costs of transporting its citizens to the U.S. port of entry. Because of difficulty in procuring transportation, this was never carried out, and was modified by supplemental agreements.)

(2) Workers were to be paid the prevailing wage received by U.S. workers in the same activity, but not to be less than 30 cents per hour. Employment was guaranteed for three-fourths of the contract period; a subsistence allowance was to be paid if the work guarantee was not fulfilled.

(3) The first agreements called for the workers to be employed only in agricultural jobs. Later understandings allowed Jamaican workers to be employed in any type of work which furthered the war effort. Similar agreements for the use of Barbadian and British Honduran workers in nonagricultural work were in force in 1944 and 1945, respectively. They were transferred to agriculture when they were no longer needed in industrial work.

(4) Employment of the foreign workers was not to displace domestic workers, or reduce the rates of pay of domestic workers.

(5) The imported laborer was to be exempted from the draft, and to be protected from discriminatory acts.

(6) Housing and medical care were to be equal to that received by the local workers, or of quality approved by the Government, and to be without cost to the agricultural workers.

(7) Amounts which were to be deducted from the workers' wages were established, the money to be sent back to their homes for family support and savings to be claimed by the workers upon return. Other unauthorized deductions were prohibited. The amounts deducted varied as the programs developed during the war period.[12]

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[11] The International Agreement of August 4, 1942, as modified by the International Agreement of April 26, 1943, formed the basis for the Mexican program during the war period, although there were further amendments and modifications. See U.S. Department of Labor, "The Admission of Aliens into the United States for Temporary Employment," in Study of Population and Immigration Problems, Special Series No. 11 House Judiciary Committee, Subcommittee No. 1 (G.P.O. 1963), pp. 28-31. (Henceforth cited as Labor Department report, House Judiciary hearings (1963).)

[12] Labor Department report, House Judiciary hearings (196 3), p. 106.

In addition to the intergovernmental agreements, detailed work contracts were also executed between the BWI workers and the U.S. employers, rather than with the U.S. Government, as was the case with the Mexican workers. However, the effect was the same, since the Government was ultimately responsible for the compliance of the employers with the terms of the BWI agreements.[13] The work contracts were subordinate in importance to the intergovermental contracts, and worker-employer relationship was not analogous to that existing today between the H–2 worker and his U.S. employer. Among other things, the international agreements provided explicitly for the transfer of workers from one employer to another.[14] In 1944, for instance, with regard to Jamaican workers:

> The British Government suggested that the transfer of workers from one employer to another without the consent of the workers was inconsistent with the [International] Recruiting Conventions [of 1936 and 1939, not agreed to by the U.S.]. The [U.S.] Office of Labor replied that the workers had only one contract, the Work Agreement with the United States Government and this Agreement was never transferred. It was often necessary to move workers employed in harvesting perishable crops frequently and quickly and to obtain the consent of the worker would be impracticable and would serve no useful purpose.[15]

The intergovernmental agreements governing the wartime BWI program were not renewed beyond the termination on December 31, 1947 of the special legislation, discussed below, under which the programs operated. The more formal U.S.-Mexican agreement was continued beyond this date at the insistence of the Mexican Government.

Legislative Authority

Temporary farm workers were first admitted pursuant to the ninth proviso to section 3 of the Immigration Act of 1917,[16] which authorized a waiver of exclusion to inadmissible aliens—in this case, contract laborers—seeking temporary admission. In September 1942, the Attorney General authorized such a waiver for Mexican agricultural workers applying for temporary admission under the terms of the U.S.-Mexican agreement. A certification from the U.S. Employment Service that local workers were unavailable was required as a condition of entry. The ninth proviso was also the authority used in the admission of the first Bahamian and Jamaican workers in 1943, under conditions similar to those imposed in the case of the Mexican workers.

On April 29, 1943, the 78th Congress enacted Public Law 45, authorizing the U.S. Government to temporarily admit "native-born residents of North America, South America, and Central America, and the islands adjacent thereto, desiring to perform agricultural labor in the United States."[17] Public Law 45 was the first of a series of acts referred to as the farm labor supply appropriations acts which, together with the international agreements, formed the basis for the emergency labor supply program operated under direct governmental supervision from April 30, 1943 until December 31, 1947. The various formal and informal intergovernmental agreements were recognized, either directly or indirectly, by the special legislation.

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[13] Ibid., p. 107:
[14] See, for instance, "Memorandum of Understanding Between the War Manpower Commission and the Governor of Jamaica". Ibid., p. 117 (#10).
[15] Rasmussen (1951), p. 268.
[16] Act of Feb. 5, 1917, 39 Stat. 874, 878.

Public Law 45 provided the authority and funds for the recruitment, transportation, and placement of agricultural workers, specifying that no funds made available for these purposes:

* * * shall be used directly or indirectly to fix, regulate, or impose minimum wages or housing standards, to regulate hours of work, or to impose or enforce collective-bargaining requirements or union membership, with respect to any agricultural labor, except with respect to workers imported into the United States from a foreign country and then only to the extent required to comply with agreements with the government of such foreign country; *Provided*, That nothing herein contained shall prevent the expenditure of such funds in connection with the negotiation of agreements with employers of agricultural workers which may provide that prevailing wage rates shall be paid for particular crops and areas involved and that shelter shall be provided for such workers.[18]

It also exempted foreign workers admitted under its authority from a variety of provisions of the Immigration Act of 1917, including the head tax and other fees, the literacy requirement, the prohibition against the admission of contract laborers, and the requirement of a bond from the employer.

The Act of February 14, 1944, Public Law 229,[19] reenacted and extended the provisions of Public Law 45, authorizing the admission of temporary workers for agricultural employment, including employment in the processing of agricultural products. The program continued in the Department of Agriculture, where it was administered by the newly formed War Food Administration. Prior to 1943, and after 1947, responsibility for farm placement was housed in the U.S. Employment Service, and not the Agriculture Department.

In addition to Public Law 45 and Public Law 229, both of the 78th Congress, the series of acts referred to as the farm labor supply appropriations acts included subsequent legislation extending the authority and funding for the program until December 31, 1947. These were Public Law 529 (December 22, 1944; 58 Stat. 853), also of the 78th Congress; Public Law 269 (December 28, 1945; 59 Stat. 632), Public Law 521 (July 23, 1946; 60 Stat. 600), and Public Law 707 (August 9, 1946; 60 Stat. 969), all of the 79th Congress; and Public Law 40 (April 28, 1947; 61 Stat. 55) and Public Law 76 (May 26. 1947; 61 Stat. 109), of the 80th Congress.

Title II of Public Law 229 (February 14, 1944) contained a separate authority and appropriation for the temporary migration of workers from foreign countries in the Western Hemisphere, specifically "pursuant to agreements between the United States and such foreign countries", for employment in the United States "with industries and services essential to the preservation, marketing or distribution of agricultural products, including the timber and lumber industries."[20] This title was administered by the War Manpower Commission, within the Executive Office of the President. The authority and funding for this program were broadened and extended through June 30, 1944 by Public Law 373 (June 28, 1944; 58 Stat. 547) of the 78th Congress, which provided for the employment of the workers with "industries and services essential to the war." The program was further extended by Public Law 124 (July 3, 1945; 59 Stat. 361). The War Manpower Commission was dismantled shortly after

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[17] 57 Stat. 70, 73.
[18] 57 Stat. 70, 72.
[19] 58 Stat. 11.
[20] 58 Stat. 11, 17.

the end of the war, and the workers were either repatriated or, in the case of a number of Jamaicans, transferred back to the jurisdiction of the War Food Administration.

Employment Experience of BWI/Bahamian Workers, 1943–47

Summarizing the wartime use of temporary foreign labor, the Immigration and Naturalization Service stated that, "During the war there were three programs for importation of laborers, that is, railroad track workers, laborers in industries essential to the war effort, and agricultural laborers." [21] The railroad track worker program was limited to Mexicans. The BWI/Bahamian workers were used most extensively in the agricultural program administered by the War Food Administration, although some BWI workers were also employed in war-related industries in the program administered by the War Manpower Commission. For instance, as of December 31, 1944, almost 5,000 Jamaicans had been transferred from the agricultural program to war industry employment.[22]

According to a Labor Department assessment of the impact of the BWI/Bahamian workers, "while their total numbers were not large, the qualitative importance . . . was significant, particularly in agriculture along the eastern seaboard." [23] In mid-1945, approximately 24,000 BWI and Bahamian workers were employed in the United States in agriculture. Approximately two-thirds were employed in 11 States along the east coast, led by Florida. The total number of BWI workers involved in non-agricultural work in mid-1945 was 16,346, or about three-quarters of the number in agricultural work at the same time. The Bahamians did not participate in the non-agricultural program. Foundries, food processing, and lumber—in that order—accounted for more than half of the industrial jobs.[24]

III. 1948–51: POST-WAR TRANSITION

The expiration of the emergency wartime legislation at the end of 1947 marked the end of the direct participation of the U.S. Government in the recruitment and transportation of BWI and Bahamian workers. The Mexican program, in contrast, continued to be regulated by international agreements until its termination on December 31, 1964.

In the case of the BWI and Bahamians, the intergovernmental agreements of the war period were replaced by agreements between the workers, their U.S. employers, and representatives of the BWI and Bahamian governments. In these tripartite agreements, according to a Labor Department description of the post-war period, the representatives of the Bahamian and BWI governments "assumed the role played by the [U.S.] War Food Administration with respect to recruiting, transportation, and contract-enforcement activities."[1]

Until 1951, the governments of Jamaica, Barbados, and the Leeward Islands contracted directly with the U.S. employers, with Great Britain taking an active interest, and the British West Indies Central Labour Organisation (BWICLO) serving a general liaison function.

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21 Annual Report, INS, 1947, p. 14.
22 Rasmussen (1951), p. 263.
23 Labor Department report, House Judiciary hearings (1963), p. 109.
24 Ibid., p. 110.
1 Labor Department report, House Judiciary hearings (1963), p. 111.

In 1951, the Regional Labour Board was created to officially represent the participating territories, which were increased to include the Windward Islands, Trinidad, British Guiana, and British Honduras. Although there have been significant changes since then, including the granting of independence to many of the territories, the Regional Labour Board still meets annually to negotiate the terms of the Work Agreement and the Group Insurance Policy, etc., with U.S. farmers belonging to the West Indies Employers Association; and the BWICLO continues its liaison functions.[2] The Bahamian Government continued to maintain separate representation until its withdrawal from the program.

With the lapse of the emergency legislation on December 31, 1947, the ninth proviso of section 3 of the Immigration Act of 1917, providing a waiver of exclusion of inadmissible aliens, including contract laborers, again became the authority for the temporary admission of the BWI/Bahamian workers, and remained so until the enactment of Public Law 414 in 1952. According to an INS account, the immigration status of about 20,000 BWI workers was changed by means of an administrative order effective January 1, 1948 to temporary farm laborers, and bonds were required to be posted by their contractors.[3]

During the period 1948–51, the importation of workers from Mexico proceeded under a frequently revised International Agreement. In contrast to the war period, the U.S. employer paid all transportation and recruitment expenses and, until 1951, the U.S. employer, rather than the U.S. Government, was the contractor. During this period, Mexican temporary workers were admitted under the ninth proviso, as were other temporary workers, and clearance from the U.S. Employment Service was required.

The role of the Department of Agriculture in the administration of the foreign farm labor program ceased with the end of 1947. Farm placement functions, including the certification of the need for temporary foreign workers, reverted to the U.S. Employment Service. Legislation was enacted in mid-1948 by the 80th Congress [4] authorizing Federal assistance in the recruitment of foreign farm labor within the Western Hemisphere, focusing on Mexico, but including the offshore islands. The legislation was justified on the basis of "the limited supply of domestic labor for agricultural employment in certain areas," and the reported serious disorganization of private employer efforts to recruit foreign workers, particularly from Mexico.[5] Funds appropriated under the Act were not used and were subsequently transferred to the Public Health Service.[6] Public Law 893 expired on June 30, 1949.

On October 10, 1949, legislation was enacted explicitly making funds appropriated for the Federal Security Agency's Bureau of Employment Security (including the U.S. Employment Service) "available for cooperation with the United States Immigration and Naturalization Service and the Secretary of State in negotiating and carrying out agreements relating to the employment of foreign agricultural workers, subject to the immigration laws and when necessary to supplement the

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[2] U.S. Senate Select Committee on Small Business, "Agricultural Labor Certification Programs and Small Business," Hearings, 95th Cong., 1st sess., 1977, pp. 71–72.

[3] "Supplemental Labor Programs," I and N Reporter, July 1961, p. 2.

[4] Public Law 893, Act of July 3, 1948; 62 Stat. 1238.

[5] H. Rept. No. 2379, 80th Cong., 2d sess., June 16, 1948 [to accompany S. 2767], 2 U.S. Code Cong. & Admin. News, 1948, p. 2314.

[6] Labor Department report, House Judiciary hearings (1963), p. 34.

domestic labor force."[7] According to a subsequent Labor Department report, this legislation was basically superfluous because "the Bureau of Employment Security's basic grant of authority under the Wagner-Peyser Act [of 1933] provided a sufficient legal basis to permit assisting in the recruitment of Mexican workers,"[8] and, by extension, other foreign workers, including those from the British West Indies.

The general role of the U.S. Employment Service in performing its dual functions of recruiting foreign workers and protecting domestic workers from adverse competition was summed up as follows in a 1949 communication from the Federal Security Agency opposing proposed legislation which would have transferred the foreign labor certification function to the Agriculture Department:

> Under the present arrangement the United States Employment Service, which has the responsibility for maintaining a farm-placement service, makes the certifications of the unavailability of domestic labor to the Commissioner of Immigration and Naturalization. The availability or nonavailability of domestic labor is ascertained by a clearance system carried out through the facilities of the approximately 1,800 local public-employment offices operated pursuant to the provisions of the Wagner-Peyser Act. * * *
>
> In determining the available supply of domestic labor, with the integration of the Farm Placement Service into the United States Employment Service, it can draw on the registers of unemployed industrial workers and students, many thousands of whom work on farms on a seasonal basis. * * *
>
> If domestic labor is to be protected, it is imperative that any program for the importation of foreign workers be completely coordinated with the public employment service program.[9]

Report of the President's Commission on Migratory Labor

A report issued on March 1951 by the President's Commission on Migratory Labor, appointed by President Harry Truman, was critical of the post-war administration of the alien contract labor program. Specifically, the Commission criticized the administration of the Mexican segment of the program in terms of the failure of the responsible Government agencies to adequately protect domestic farm labor. Its conclusions in this regard were based largely on an examination of wage rates in the occupation (cotton picking) and States (California during the war; Texas, New Mexico, and Arkansas after the war) most heavily impacted by Mexican workers. They found that "changes in wages in the principal areas of employment and the principal crop of employment have been inverse to the numbers of contract Mexicans."[10] The Commission generally concluded that "alien labor has depressed farm wages and, therefore, has been detrimental to domestic labor."[11]

The Commission's criticism of the BWI/Bahamian program during the post-war period focused not on its adverse impact on domestic labor, but on the lack of "official vigilance for the protection of living and working standards of alien farm laborers."[12] Quoting further:

> For the Jamaicans and Bahamians, whose governments did not insist on intergovernmental agreements after those of World War II terminated, we have given

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[7] Public Law 343; 63 Stat. 738, 741.
[8] Labor Department report, House Judiciary hearings (1963), p. 34.
[9] U.S. Senate Committee on the Judiciary, "Admission of Foreign Agricultural Workers," Hearings on S. 272, 81st Cong., 1st sess., July 12, 1949, Washington, U.S. Govt. Print. Off., 1951, pp. 7–8. (Cited as Senate Judiciary 1949 hearings.)
[10] U.S. President's Commission on Migratory Labor, Migratory Labor in American Agriculture, Washington, 1951, p. 58.
[11] Ibid., p. 59.
[12] Ibid., p. 64.

no official scrutiny to the terms of the work contracts or to their enforcement. In these instances, our authorities have permitted the entry of contract alien labor on whatever terms these foreign governments were able to secure in negotiation with private employers of the United States.[13]

As an example of the differences in the conditions governing the entry of Mexican and BWI workers, the Commission noted, "The sharp contrast between the Mexican and British West Indian deduction allowances is that the Mexican contract prohibits the withholding of forced savings out of which the deportation costs of the alien may be recovered if he leaves his contract or otherwise become deportable." [14] Considerable deductions for this purpose were permitted from the BWI workers' pay, and the bonds required for BWI workers were also significantly higher than those required for Mexicans. In the opinion of the Commission, the greater "vulnerability of the British West Indian workers to financial discipline" was a reason why the British West Indians deserted from their contracts much less frequently than the Mexicans.[15]

The first of the recommendations by the President's Commission on Migratory Labor on the subject of alien contract labor pertained to the desirability of equal treatment of the different sending countries based on intergovernmental agreements, as follows:

We recommend that:

(1) Foreign labor importation and contracting be under the terms of intergovernmental agreements which clearly state the conditions and standards of employment under which the foreign workers are to be employed. These should be substantially the same for all countries. No employer, employer's representative or association of employers, or labor contractor should be permitted to contract directly with foreign workers for employment in the United States. This is not intended to preclude employer participation in the selection of qualified workers when all other requirements of legal importation are fulfilled.[16]

IV. 1951–52: PUBLIC LAW 78 AND PUBLIC LAW 414

Preliminary Legislative Efforts and Recommendations

In July 1949, the Senate Judiciary Subcommittee on Immigration held a hearing on S. 272, permanent legislation outside the Immigration Act of 1917 which would in effect have perpetuated the legislative authority under which the emergency farm labor program operated during the war period. The bill would have transferred labor certification authority to the Secretary of Agriculture, and would have exempted temporary agricultural workers from the Western Hemisphere and adjacent islands from a number of provisions of the Immigration Act of 1917.

According to the testimony, the bill had been prompted not by difficulties with the labor certification process—the impetus for related legislation offered, also unsuccessfully, in 1965—but because of "the conflict between the farmers and the Immigration and Naturalization Service" regarding the regulations governing the importation of Mexican workers.[1] The situation was aggravated by difficulties in renegotiating the International Agreement with Mexico.

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[13] Ibid., p. 65.
[14] Ibid., p. 48.
[15] Ibid.
[16] Ibid., p. 66.
[1] Senate Judiciary 1949 hearings, p. 2.

The bill was opposed by the Justice Department, which argued that "legislation of this type should be temporary rather than permanent and * * * should conform fundamentally with the established immigration policy of this country." [2] It was also opposed by the Federal Security Agency, on the grounds that, "if domestic labor is to be protected, it is imperative that any program for the importation of foreign workers be completely coordinated with the public employment service program." [3] Although the State Department also opposed the bill, it noted that "there may be some need for clarification of the statutory authority under which foreign workers are admitted temporarily for employment in the United States agricultural activities." [4]

In 1950, the Senate Judiciary Special Subcommittee to Investigate Immigration and Naturalization considered temporary agricultural workers in its comprehensive report entitled, "The Immigration and Naturalization Systems of the United States." The subcommittee found "that the agricultural labor supply in the United States, particularly in the Southwestern States, requires supplementation," and made the following recommendation:

> * * * provisions should be made in permanent legislation which would permit the admission of temporary agricultural labor in a nonimmigrant classification when like labor cannot be found in this country. The determination of the necessity for the importation of such labor in any particular instance should be made by the Commissioner of Immigration and Naturalization upon application by the interested employer before the importation and after a full investigation of the facts and consultation with appropriate agencies.[5]

This recommendation was essentially enacted into law in the Immigration and Nationality Act of 1952—and remains in effect today—with the very important omission of the Mexican agricultural labor program. Beginning in 1951, the Mexican program was authorized by separate legislation, Public Law 78, until its expiration on December 31, 1964.

Enactment of Public Law 78 [6]

Public Law 78, authorizing the Mexican worker program, was enacted in 1951 largely in response to the domestic farm manpower shortage resulting from the Korean war. An amendment to the Agricultural Act of 1949, it evolved from legislation (S. 984, 82d Cong.) originally introduced by Senator Allen J. Ellender (Democrat of Louisiana) which, he indicated, "authorized the Government to carry out its part of the agreement reached on the importation of farm agricultural workers at Mexico City in February [1951]." [7] Both Senator Ellender, the Chairman of the Senate Committee on Agriculture and Forestry, and Congressman W. R. Poage (Democrat of Texas), the Vice Chairman of the House Committee on Agriculture and sponsor of the related House bill, had been members of the U.S. delegation to Mexico City.

As enacted, Public Law 78 was restricted in its application to "agricultural workers from the Republic of Mexico." However, as originally introduced, the bill applied to "agricultural workers within

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[2] Ibid., p. 5.
[3] Ibid., pp. 708.
[4] Ibid., p. 8.
[5] S. Rept. No. 1515, 81st Cong., 2d sess., 1950, p. 586.
[6] Act of July 12, 1951 ; 65 Stat. 119.
[7] U.S. Senate Committee on Agriculture and Forestry, "Farm Labor Program," hearings, 82d Cong., 1st sess., 1951, p. 8.

the Western Hemisphere." The request was made by employers of BWI and Bahamian workers that the legislation be specifically modified to exclude the BWI program, on the grounds that the existing arrangements were satisfactory to all concerned. Senator Spessard Holland (Democrat of Florida) testified:

> So far as the agricultural interests of Florida are concerned, they much prefer not to have any subsidy from the Government in this connection, not to have the Department of Labor serve as an official agency for recruiting offshore laborers. They much prefer to continue their present course of dealings, under which they pay the transportation costs themselves, and deposit bonds guaranteeing the return of the laborers who are in for a season and who are then sent back to the Bahamas or to Jamaica, as the case may be. They are quite willing to have continued the present set-up which they have found eminently satisfactory.[8]

Senator Ellender readily accepted amendatory language excluding the BWI program,[9] and the bill as introduced on the House side (H.R. 3048, 82d Cong.) initially limited applicability to "agricultural workers from foreign countries on the mainland of the Western Hemisphere." Congressman Poage commented:

> There was one principle which everyone who has visited a country courthouse recognizes, and that is, "do not argue with the court when it is ruling with you." It seems that the West Indies Government is ruling with us. Why in the world should we then take it upon ourselves to argue with a situation that is working out perfectly satisfactorily today.
>
> It was for that reason that we left the West Indies out. We could not see any reason in the world to disturb a satisfactory situation.[10]

The exclusion of the BWI program was strongly opposed only by the Department of State, primarily on the grounds that it would leave the United States open to possible charges of discriminatory treatment of certain groups of alien workers, and "may be detrimental to this Government's broader foreign-policy interests." They also noted that exclusion of the British West Indies from the bill would "impede this Government in any efforts which may prove necessary to facilitate this program in the future." [11] However, the State Department representative also indicated that "we are not implying that the Department of State is recommending that any changes be made in the existing operations of the West Indian program." [12]

As enacted on July 12, 1951, Public Law 78 established the basic framework under which the Mexican bracero program operated until the mid 1960's, as refined by subsequent amendments and international agreements. Public Law 78 authorized the Secretary of Labor to take certain steps to recruit and transport Mexican workers, pursuant to international agreements, subject to the following restrictions:

> SEC. 503. No workers recruited under this title shall be available for employment in any areas unless the Secretary of Labor has determined and certified that (1) sufficient domestic workers who are able, willing, and qualified are not available at the time and place needed to perform the work for which such workers are to be employed, (2) the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly

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[8] Ibid., p. 16.
[9] Ibid.
[10] U.S. House of Representatives Committee on Agriculture, "Farm Labor," Hearings, 82d Cong., 1s sess., 1951, p. 32.
[11] Ibid., p. 68.
[12] Ibid., p. 73.

employed, and (3) reasonable efforts have been made to attract domestic workers for such employment at wages and standard hours of work comparable to those offered to foreign workers.

Among other things, the legislation, in combination with the revised 1951 International Agreement which followed it, provided that the U.S. Government establish and operate reception centers at or near the Mexican border; provide transportation, subsistence, and medical care from the Mexican recruiting centers to the U.S. reception centers; and guarantee performance by employers in matters relating to transportation and wages, including all forms of remuneration.

U.S. employers were required to pay the prevailing wages in the area, and to guarantee the workers employment for three-fourths of the contract period. Additionally, they were required to provide the workers with free housing and adequate meals at a reasonable cost, and they were responsible for the round-trip cost of transportation to the U.S. Government-operated reception centers. They were also required to reimburse the Government for essential expenses of the program, including penalties for workers not returned to the reception centers.

During the course of the debate on Public Law 78, the Labor Department argued that domestic workers should be provided with the same benefits as those provided foreign workers, including free transportation, housing, and basic medical benefits. Congressman Poage argued against this position, as follows:

> It seems to me that this very provision is one of the greatest safeguards that you can provide for American labor. If it, in fact, costs the employer more to bring in foreign labor, then no matter what kind of laws you write he is not going bring in foreign labor, as long as American labor is available.[13]

The exact extent of the cost differential is not clear. For instance, under the terms of Public Law 78, U.S. employers were not required to post bonds, and the workers—limited to adult males—were also exempt from both social security and income tax withholding provisions.

Public Law 414, the Immigration and Nationality Act of 1952 [14]

All other temporary workers, including those entering under the BWI program, have been admitted under the terms of Public Law 414, the Immigration and Nationality Act of 1952, since it went into effect on December 24, 1952. Temporary alien workers, referred to as H–2 workers, are included in one of the categories of nonimmigrants defined under section 101(a)(15)(H), as follows:

> (H) An alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country.

The H–2 temporary labor provision is administered by the Attorney General in consultation with "appropriate agencies of Government," under section 214(c), as follows:

> The question of importing any alien as a nonimmigrant under section 101(a)(15)(H) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon

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[13] Ibid., p. 16.
[14] Act of June 27, 1952; 66 Stat. 163; 8 U.S.C. 1101 et seq.

petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

According to the House report on the 1952 Act, the purpose of the section 101(a)(15)(H) temporary worker provision and section 214(c), which provides for its administration by the Attorney General, was to "grant the Attorney General sufficient authority to admit temporarily certain alien workers, industrial, agricultural, or otherwise, for the purpose of alleviating labor shortages as they exist or may develop in certain branches of American productive enterprises, particularly in periods of intensified production." [15]

Regulations published by the Justice Department's Immigration and Naturalization Service require Labor Department certification of the unavailability of domestic workers as a prerequisite for admitting H–2 workers, thus following the pattern established during the initial period of the temporary foreign labor programs, and after 1947. However, Labor Department certifications in the case of H–2 workers are advisory only, and may be overridden by the Justice Department, which has final authority. The H–2 provisions differed in this respect from those governing the bracero program, under which the role of the Labor Department was considerably more extensive. This difference was explained as follows by a Labor Department representative during 1963 hearings:

> In all foreign-labor programs we have the responsibility for certification as to need and as to the conditions of employment. In other words, we certify that the conditions of employment of the temporary entrants will not adversely affect domestic workers similarly employed.
>
> In the Mexican program, we also have responsibility for carrying out the international agreement and the standard work contract. What this means is that we have the compliance responsibility. . . .
>
> In the other foreign-labor programs, our only responsibility is the certification as to the need for the workers, and that they will not adversely affect the domestics. Responsibility for the enforcement of that contract then falls within the purview of the Immigration and Naturalization Service.[16]

V. THE BWI PROGRAM DURING THE BRACERO PERIOD

1953–60: Bracero Program Expansion

The use of alien contract labor was more extensive in the period immediately following the enactment of the separate legislative authorities for the bracero and BWI programs than during the World War II. According to a University of California study,

> * * * the 1954 contract labor program was approximately three times its wartime emergency average and exceeded the wartime peak year by 120 percent. . . . In national proportions, alien contract farm labor was approximately 2 percent of all hired farm labor in wartime but had risen to approximately 6 percent in 1954.[1]

During the remainder of the decade, the BWI program was increasingly eclipsed by the expansion of the bracero program. Statistics on the admission of Mexicans, British West Indians, Bahamians, and other foreign agricultural workers during the period 1942–64 are shown

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[15] H. Rept. No. 1365, 82d Cong., 2d sess., 1952, pp. 44–45.
[16] House Judiciary hearings (1963), p. 2.
[1] Varden Fuller, "Labor Relations in Agriculture," Institute of Industrial Relations, University of California, Berkeley, 1955, pp. 44–45.

in Table 1. BWI admission figures are not an entirely accurate indication of the number employed during a given year, because during this period many were admitted for periods of up to three years. Nonetheless, they are dwarfed by the Mexican figures, which rose steadily after the enactment of Public Law 78 until a peak of 445,197 in 1956, and remained over 400,000 until 1959, when they began to decline steadily.

TABLE 1.—FOREIGN WORKERS ADMITTED FOR TEMPORARY EMPLOYMENT IN U.S. AGRICULTURE, BY YEAR AND NATIONALITY[1]

Year	Total	Mexicans	British West Indians	Bahamians	Canadians	Others
1942[2]	4,203	4,203			(3)	
1943	65,624	52,098	8,828	4,698	(3)	
1944	84,419	62,170	16,574	3,048	1,414	[4] 1,213
1945	73,422	49,454	17,291	2,100	4,055	[4] 522
1946	51,347	32,043	11,081	2,690	5,533	
1947	30,775	19,632	1,017	2,705	7,421	
1948[5]	44,916	35,345	2,421	1,250	5,900	
1949	112,765	107,000	1,715	1,050	3,000	
1950	76,525	67,500	4,425	1,800	2,800	
1951	203,640	192,000	6,540	2,500	2,600	
1952	210,210	197,100	4,410	3,500	5,200	
1953	215,321	201,380	4,802	2,939	6,200	
1954	320,737	309,033	2,159	2,545	7,000	
1955	411,966	398,650	3,651	2,965	6,700	
1956	459,350	445,197	4,369	3,194	6,700	[6] 390
1957	452,205	436,049	5,707	2,464	7,300	[6] 685
1958	447,513	432,857	5,204	2,237	6,900	[6] 315
1959	455,420	437,643	6,622	2,150	8,600	[6] 405
1960	334,729	315,846	8,150	1,670	8,200	[6] 863
1961	310,375	291,420	8,875	1,440	8,600	[6] 40
1962	217,010	194,978	11,729	1,199	8,700	[6] 404
1963	209,218	186,865	11,856	1,074	8,500	[6] 923
1964	200,022	177,736	[7] 14,361	(7)	7,900	25

[1] This does not include small number of Basques and other workers.
[2] Data for 1942–47 were obtained from USDA reports.
[3] Not available.
[4] Newfoundlanders transported.
[5] Data for 1948–61 were compiled by Bureau of Employment Security, U.S. Department of Labor.
[6] Includes 390 Japanese in 1956; 652 Japanese and 33 Filipinos in 1957; 315 Japanese in 1958; 400 Japanese and 5 Filipinos in 1959; Japanese only in 1960 and 1961; 279 Japanese and 125 Filipinos in 1962; Japanese only in 1963–64.
[7] Bahamians included with British West Indians.

Source: "The Migratory Farm Labor Problem in the United States," 87th Cong., 2d sess., S. Rept. No. 1225, Washington, p. 10, 1962; and "Farm Labor Market Developments," Bureau of Employment Security, U.S. Department of Labor, January 1964 and January 1965. U.S. Department of Agriculture. Termination of the Bracero Program, Agricultural Economic Report No. 77, Washington, June 1965, p. 5.

Public Law 78 was extended three times during this period: for two years in 1953 without amendment; for 3½ years in 1955 with only minor amendments; and for 2 years in 1958.[2] International agreements were renegotiated with Mexico throughout this period with more or less difficulty. In 1954, for instance, there was a heated dispute between the United States and Mexico regarding Mexico's contention that the prevailing wage determination by the Labor Department was too low. This was also the period of Operation Wetback; more than one million apprehensions of illegal aliens were made in 1954, and most of the apprehended aliens were sent back to Mexico.

The few discussions of the BWI/Bahamian program during this period were generally favorable, as indicated by the following examples. During consideration of the extension of the bracero program

[2] See Labor Department report, House Judiciary hearings (1963), pp. 36–41, for a summary of amendments and revisions in the international agreements.

in 1953, Senator Holland pointed out to Mr. Robert Goodwin, the Director of the Labor Department's Bureau of Employment Security, that, in contrast to the Mexican program, under the BWI program:

> The Government has not been put to any large expense, does not have to exercise this supervision to the degree that prevails with reference to the Mexican labor, and it has been more satisfactory both to the ones employed and the employers, has it not, than has been the case with reference to the areas employing the Mexican labor and the Mexican laborers themselves?[3]

Mr. Goodwin concurred, but indicated that Mexico would not agree to a similar simplified arrangement, or to an elimination of the international agreement. He noted further that, "We had some very undesirable developments prior to this program in terms of Mexico refusing to permit them to come in, or refusing to allow employers to recruit in Mexico until certain payments were made, that sort of thing."[4]

A series of House Judiciary Committee reports commented briefly on the BWI program. In late 1954, a special subcommittee of the House Committee on the Judiciary examined the British West Indies program as part of an overall consideration of the H–2 temporary worker program. They concluded:

> * * * That the program of recruiting agricultural laborers in the British West Indies progresses satisfactorily, and it is beneficial to both American employers and the laborers. It also greatly contributes to the improvement of the economic situation of the British islands, due to the fact that the laborers send home a substantial proportion of their earnings in dollar currency.[5]

This was in marked contrast to their recommendation elsewhere in the same report regarding the use of temporary alien workers from the British Virgin Islands on the Virgin Islands of the United States: "it is believed that a truly effective solution of the whole problem might be achieved through a locally applicable British-American agreement, patterned upon the Mexican-American agreement presently in effect."[6]

In a subsequent report in 1957, Subcommittee No. 1 of the House Judiciary Committee reiterated its earlier finding "that the importation of agricultural workers from the British West Indies is beneficial for agricultural interests in the United States." Quoting further:

> There are now approximately 8,000 British West Indies workers in this country employed in Connecticut, Florida, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, New York, and Wisconsin. The British West Indies program provides employers in the United States with the needed workers at the time when their services are required and the program does not affect adversely similar categories of domestic workers. No complaints from labor unions have been registered. The number of abscondees among the British West Indies workers has been found to be very low and on an annual basis it rarely exceeds 300 "missing" workers some of whom are being apprehended. Around 100 annually are being forced to depart from the United States pursuant to the breach of contract.
>
> The British West Indies program has been found to operate satisfactorily in all other respects and has the additional merit of being beneficial to the economy of the British West Indies, a neighbor of the United States.[7]

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[3] U.S. Senate Committee on Agriculture and Forestry, "Extension of the Mexican Farm Labor Program, Hearings, 83d Cong., 1st sess., 1953, p. 28.
[4] Ibid., p. 29.
[5] H. Rept. No. 1570, 84th Cong., 1st sess., 1955, p. 137.
[6] Ibid., p. 131.
[7] H. Rept. No. 780, 85th Cong., 1st sess., 1957, p. 2.

Finally, in a 1958 report entitled," Immigration Problems on the Southeastern Sea Border," a special subcommittee of the House Committee on the Judiciary noted its earlier positive findings regarding the BWI program, but sounded a note of warning in the context of rising industrial unemployment:

> However, this special subcommittee deems it necessary to stress that the rise of unemployment in the United States might quite likely result in the reversing of the trend of recent years, which trend was marked by the movement from farm to nonfarm employment. In the event that such reversal materializes, the supply of domestic farm labor will increase in proportion to the apparently diminishing employment opportunities in the industry. Even if such reversal of the trend of the past should be but temporary—as it is hoped—it will necessitate the curtailment of the importation of all foreign labor, including the British West Indian farmworkers.
>
> It is recommended that the Immigration and Naturalization Service remain in close contact with the United States Employment Service for the purpose of immediate adjustments of the size of the foreign farm labor force in strict conformity with the changing supply of domestic farm labor.[8]

In May 1959, Secretary of Labor James P. Mitchell reportedly issued regulations which guaranteed BWI contract laborers certain minimum standards of free housing and transportation.[9] These standards were adopted in the 1960 BWI contract, as indicated in a May 1960 press release by the Department of Labor reporting that Assistant Secretary of Labor Newell Brown met with and congratulated the British West Indies Employers Committee on their cooperation in meeting the Department's request for contract revisions. The press release is of particular interest as an indication of similarities and differences between the BWI and bracero programs before and after 1960. Quoting:

> * * * the new [BWI] contract brings it into essential conformity with contracts of the other major foreign worker programs. The principal changes cited by Brown are that (a) employers henceforth will pay the major portion of the workers' cost of transportation between jobs in this country, and (b) workers will be guaranteed employment for at least three-quarters of the normal hours of work during the contract period. Other changes in the contract represent mainly a formal recognition of what were already the normal practice. They include provision of free housing for the workers, and assurance that food would be provided at cost.[10]

Mr. Brown "emphasized the Department's satisfaction that employers have agreed to meet the minimum standards prescribed for the much larger Mexican program," and indicated that in some respects it was well ahead of the Mexican program, particularly regarding accident insurance.[11]

The Assistant Secretary of Labor indicated that at that time the BWI workers constituted approximately 6,500 of the 450,000 foreign agricultural workers admitted each year. However, despite their relatively small numbers, he noted that the BWI workers had "a significant impact on the farm labor market in Florida, and some of the States in the north-central and middle-Atlantic regions." [12]

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[8] H. Rept. No. 1368, 85th Cong., 2d sess., 1958, p. 5.
[9] "Mexican, Foreign Worker Programs," Congress and the Nation: 1945–1964, Washington, Congressional Quarterly Service, p. 765.
[10] U.S. House of Representatives Committee on Education and Labor, "Migratory Labor," Hearings, 87th Cong., 1st sess., 1961, p. 135. (Cited as House Education and Labor hearings (1961).)
[11] Ibid.
[12] Ibid.

1960–64. Phasedown of the Bracero Program

By the end of the 1950s, the bracero program was coming under increasing attack by labor and welfare groups, including a four-member consultants' group appointed by Secretary of Labor James P. Mitchell.[13] It was argued that the braceros were adversely affecting the wages and working conditions of domestic workers, particularly in certain areas and occupations. This position was presented by Secretary of Labor Arthur J. Goldberg who noted that in "bracero-dominated areas," of which they had identified 80, the prevailing wage standards offered no protection to domestic workers since the prevailing wage was in fact set by the braceros themselves. Quoting Secretary Goldberg:

> And what happens there is that the wage level, which we have been able to fix since the standard was adopted, has remained stationary for 10 years at a time when throughout the country the domestic farm-labor rate has been increasing. And there is no domestic labor really available at the wages which prevail there.
>
> I think the increase in the wages of domestic farm labor since 1946, if I remember correctly, has been 46 percent throughout the country—46 percent wage increases.
>
> Yet in these areas, the wage has remained stationary.[14]

Secretary Goldberg indicated that the Kennedy Administration was not advocating termination of the bracero program. However, they were seeking several substantive and controversial amendments. One of them—the statutory limitation of braceros to temporary or seasonal agricultural work, excluding the operating of machines and certain processing functions—was adopted. However, an amendment requiring that the wages offered braceros be based on 90 percent of the statewide or national average, in order to afford protection to "bracero-dominated areas", was dropped in conference. As noted below, a related measure was adopted administratively the following year. The 1961 legislation extended Public Law 78 through December 31, 1963 and contained the last substantive amendments made to this legislation.

During the course of the 1961 Senate hearings on the bracero program, Senator Eugene McCarthy (Democract of Minnesota), a critic of the program, observed that "in the House report and the hearings thus far in the Senate there is no reference made to the importation of Jamaican workers." [15] In response to Senator McCarthy's question as to whether the Jamaican program was based on a private agreement with a foreign government, Secretary Goldberg replied:

> Yes; except that I must say that the Jamaican Government which does supervise the program from their end has seen to it that the standards are much in excess of what the Mexican labor standards are. Their wage rates are much higher, and we have not had as a consequence the reaction to the Jamaican program that we have had to the Mexican program. And this proves, I think, the essential point of these amendments we have, that if the wage rate is a proper wage rate—it is a question of economics—there will be braceros used, but much of the strong feeling and impact will be eliminated, and it will really be a supplementary program, because the wage rates being paid the Jamaican workers who come in—and their number is very small in comparison with the number of Americans—apparently has not prejudiced the position of the domestic worker to the degree that the Mexican program has.

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[13] U.S. Senate Committee on Agriculture and Forestry, "Extension of Mexican Farm Labor Program," Hearings, 87th Cong., 1st sess., 1961, pp. 267–284.
[14] Ibid., p. 230.
[15] Ibid., p. 235.

Senator McCarthy. Certainly there has not been unfair competition under the standards that prevail with the domestic worker.

Secretary Goldberg. No.[16]

In testimony in 1961 before the House Select Subcommittee on Labor, Mr. Harold F. Edwards, who continues in his position as chief liaison officer of the British West Indies Central Labour Organisation (BWICLO) today, began by stressing that "the British West Indies program is for supplemental labor needed only when American citizens are not available." [17] He noted that the program could be judged to be about 95 percent effective, as measured by the fact that about 95 percent of the employers filed repeat requests and about 95 percent of the workers requested to come back. Mr. Edwards credited the success of the program—which was unquestioned during the course of his testimony—in part to the close liaison work performed by the representatives of the BWI Governments. In response to a question by Congressman James O'Hara (Democrat of Michigan) as to "what steps you take and what your processes are to protect the interests of the British West Indies workers," the following exchange took place:

Mr. Edwards. Before we would sign a contract, we inspect the housing, and the work conditions offered by the employer. If by chance the contract is not followed, then we would withdraw the workers from the employer.

The men are told the address and the telephone number of their nearest liaison officer, and they are entitled to call him collect if there is a problem arising at any time, and the liaison officer will visit those men immediately or as quickly as possible, and most camps are seen by a liaison officer at least once, and possibly twice, a month.

Mr. O'Hara. And if you found that an employer was not abiding by the terms of the contract, you would first, I suppose, attempt to get him to abide by the terms of the contract, and then if he refused or failed to do so, you would withdraw the workers?

Mr. Edwards. Yes, sir. We would remind him of his obligations. That has usually happened to do the trick. We have had to withdraw on a few occasions, but in the last 9 years, I can only think of three times.[18]

As an indication of the scope of the program, Mr. Edwards said that "between January 1951 and December 1960 the average number of [BWI] workers engaged in agriculture each month was 6,246." [19] In response to a question as to the type of agriculture in which the workers were employed, Mr. Edwards replied:

It is easier to tell you what we don't work in, sir. We don't work in cotton, but we have worked in everything else, and we do work in every kind; citrus in Florida, sugar cane in Louisiana, on ranches in Texas, apples in Michigan, tomatoes, Indiana, peas and corn in Wisconsin, shade tobacco in Connecticut, potatoes and cranberries in New Hampshire and New Jersey.[20]

President John F. Kennedy indicated in October 1961 that he was signing the legislation extending the bracero program through December 31, 1963 reluctantly:

The adverse effect of the Mexican farm labor program as it has operated in recent years on the wage and employment conditions of domestic workers is clear and cumulative in its impact. We cannot afford to disregard it. We do not condone it. Therefore, I sign this bill with the assurance that the Secretary of Labor

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[16] Ibid., pp. 235–236.
[17] House Education and Labor hearings (1961), p. 126.
[18] Ibid., p. 142.
[19] Ibid., p. 127.
[20] Ibid., pp. 142–143.

will, by every means at his disposal, use the authority vested in him under the law to prescribe the standards and to make the determinations essential for the protection of the wages and working conditions of domestic agricultural workers.[21]

In response to this direction, the Labor Department held public hearings in all States using foreign workers, and in May 1962 set an adverse-effect rate for each State which employers were required to offer foreign workers. In the majority of cases, the adverse-effect rates were higher than the prevailing rates. Where piece-rates were paid, the hourly earnings had to equal the established adverse-effect rates. Since U.S. employers were required to offer domestic workers wages equal to those offered to foreign workers as a prerequisite for labor certification, these adverse-effect wage scales were also applicable to domestic workers in cases where farmers intended to seek foreign workers. Adverse-effect rates continue to be published annually in the Federal Register, the most recent on August 9, 1977.[22]

Also in 1962, the Department of Labor issued a bulletin stating that Mexican workers could not remain in the United States for periods exceeding 6 to 9 months. AFL–CIO President George Meany wrote to the Secretary of Labor strongly urging on behalf of the AFL–CIO that the BWI workers be allowed to remain on a year-round basis. He also took the opportunity to warmly praise the BWI program, noting, for instance, that "It is well known that the standards of the BWI program improve the lot of domestic workers in regard to housing, workmen's compensation, and racial matters." He expressed the opinion that, through the program, "the United States is making a substantial aid contribution to the West Indies at no cost to the American taxpayer, at no loss of self-respect to the West Indians, but merely as a fair return for a fair day's work on the part of law-abiding and ambitious West Indian workers." Mr. Meany concluded his comments to the Secretary of Labor with the observation that, "The Government of Jamaica would not be opposed to a treaty similar to that between Mexico and the United States, and it is believed that most of the American employers would not be opposed to such action." [23]

In 1963, the Kennedy Administration proposed a 1-year extension of the bracero program. A 2-year extension was defeated in the House on May 29, 1963 by a vote of 158–174. On August 15, a 1-year extension with amendments favored by the Labor Department but opposed by the growers, passed the Senate by a vote of 62–25. An unamended 1-year extension passed the House on October 31 by a vote of 173–160, and the Senate agreed to the House provisions, by 50–36, on December 4, 1963. The bill, extending Public Law 78 until December 31, 1964 without amendment, was signed into law December 13, 1963 (Public Law 88–203).

After the House defeat in May of the 2-year extension, the legislative alternatives presented to the proponents of the bracero program were quite limited. They were essentially given their choice of a 1-year

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[21] Quoted in S. Rept. No. 391, 88th Cong., 1st sess., 1963, p. 13.

[22] 42 Fed. Reg. 40192 (1977); the adverse effect rates are defined here as "the minimum wage rates which the Department has determined must be offered and paid by the employers of temporary alien agricultural workers. The purpose of the adverse effect rates, and thus of this rule, is to prevent the employment of such aliens from having an adverse effect on the wages of U.S. workers who are similarly employed." The methodology for determining the adverse effect rate is reprinted in part from 41 Federal Register 25018 (June 22, 1976). The methodology has changed since 1962, but the purpose remains the same.

[23] George Meany, "The British West Indian Agricultural Labor Program," Apr. 24, 1962. Reprinted in Congressional Record, Sept. 13, 1965, pp. 23528–23529.

extension, with or without amendments, or nothing. In bringing the bill to the Senate floor, Senator Ellender promised that he would not seek a further extension of the program in 1964.

However, it was generally assumed by proponents of the program during the 1963 debates that, barring insuperable objections by the Mexican Government, the importation of Mexican workers would continue under the authority of Public Law 414, the Immigration and Nationality Act. During House hearings in 1963, an INS official, Mr. Irvin Shrode, indicated that "through an agreement, I think an executive agreement made a number of years ago between the committees involved, no effort has been made to extend Public Law 414 to Mexican national workers so long as a special statute is on the books, to wit, Public Law 78." [24] In response to questioning, Mr. Shrode agreed that, in the absence of Public Law 78, there was nothing in Public Law 414 that would prohibit the importation of Mexican labor. The point was also made in a 1963 Senate report that:

> If Public Law 78 should not be extended, they [Mexican farmworkers] could also enter as nonimmigrants under sections 101(a)(15)(H) and 214 of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H) and 1184).[25]

A discussion of the relationship between Public Law 78 and Public Law 414 also occurred during the August 15, 1963, Senate debate on the unamended 1-year extension of Public Law 78 reported by the Senate Committee on Agriculture and Forestry. Senator Spessard Holland commented at some length on the differences between the importation of temporary foreign workers under Public Law 414, with which he indicated he was very familiar in connection with the BWI program widely used in Florida; and Public Law 78, which he believed to be more desirable for the Mexican situation. This was followed by an exchange between Senator Holland and Senator Allott of Colorado:

> Mr. ALLOTT. If Public Law 78 should not be extended, there would be nothing to prevent employers in the western part of the country from using Public Law 414 for the importation of labor. Is that correct?
>
> Mr. HOLLAND. Nothing at all, until such time as the abuses might again become so evident that perhaps the Mexican Government would take the same position it did prior to the enactment of Public Law 78. [26]

In fact, however, on December 19, 1964, Secretary of Labor Willard Wirtz published regulations which made it clear that it was not the intention of the Labor Department that the bracero program continue under the auspices of Public Law 414. In promulgating the regulations, Secretary Wirtz expressed the hope that the use of foreign workers "will be very greatly reduced, and hopefully eliminated." The Congressional reaction to the regulations, and administrative results under them are discussed in the following section.

As indicated in Table 1, the number of braceros admitted annually decreased steadily during the period under discussion above, 1960–64. According to a Department of Agriculture study, this was "mainly because of increased labor saving technology—particularly the mechanization of the cotton harvest, a tightening of the certification of need for braceros, and more rigid enforcement of wage guarantees

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[24] U.S. House of Representatives Committee on Agriculture. "Mexican Farm Labor Program," Hearings 88th Cong., 1st sess., 1963, p. 53.
[25] S. Rept. No. 391, 88th Cong., 1st sess., 1963, p. 2.
[26] Congressional Record, Aug. 15, 1963, p. 15187.

to imported and domestic workers." [27] In contrast, the number of BWI admissions steadily increased during the same period. According to a Department of Labor representative, "the increased use of British West Indians as opposed to the decreased use of other foreign workers, is directly attributable to the increased sugar cane acreage in Florida where sugar cane is not mechanized." [28]

VI. 1965–1966 TRANSITION FROM THE BRACERO PROGRAM

U.S. Department of Labor Regulations: Action and Reaction

On December 19, 1964, Secretary of Labor Willard Wirtz announced a three-step program he planned to pursue in connection with the legislative termination of the bracero program, as follows:

> First, there will be no administrative extension of the situation existing under Public Law 78.
>
> Second, the responsibilities of the Secretary of Labor under Public Law 414 will be strictly administered in accordance with the Regulations which are being issued today. . . .
>
> Third, an active domestic labor recruitment program has been instituted and must be continued.[1]

There had been little serious expectation of a formal extension of Public Law 78 by either legislative or administrative means, and there was little objection to an expended domestic recruitment program, although apparently it proved to be of limited success. However, there was considerable surprise and consternation at the new regulations regarding the certification of temporary workers pursuant to Public Law 414.

Secretary Wirtz made his intentions clear in his statement accompanying the revised regulations:

> The issuance of the new Regulations is essential to the orderly administration of Public Law 414, but it does not imply that there will be any large scale use of foreign workers in the future. To the contrary, it is expected that such use will be very greatly reduced, and hopefully eliminated.[2]

The regulations required that, as a prerequisite for requesting foreign workers, employers must offer domestic workers wages which were substantially higher than the adverse effect wages employers previously had been required to offer domestic workers in order to petition for Mexican or other foreign workers. The regulations also required that U.S. workers be offered other benefits, such as minimum housing, transportation, and insurance, which had generally been offered to braceros. In addition, certification was limited to 120 days, to emphasize "that the only justification for bringing in labor is to meet special peak conditions in the highly seasonal agricultural industry." [3]

The regulations were the subject of hearings before the Senate Committee on Agriculture and Forestry on January 15 and 16, 1965. Secretary Wirtz indicated that he interpreted the Congressional intent in ending the bracero program as a desire to reduce the country's

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[27] U.S. Department of Agriculture, Termination of the Bracero Program, Agriculture Economic Report No. 77, June 1965, p. 7.

[28] House Judiciary hearings (1963), p. 17.

[1] U.S. Department of Labor, Year of Transition: Seasonal Farm Labor 1965, A Report from the Secretary of Labor [1966], pp. H–3, H–4.

[2] Ibid., p. H–4.

[3] Ibid.

dependence on imported labor. He expressed his complete agreement with this goal in view of rising unemployment and the generally depressed wages and working conditions in agriculture as compared to the rest of the economy. He indicated further that the regulations were intended to be a very strict interpretation of the statutory requirement in Public Law 414 that "unemployed persons capable of performing such services or labor cannot be found in this country," in order for foreign workers to be admitted.

In a key question, Senator Kuchel of California asked the Secretary of Labor:

> I share your desire to have the maximum number of our fellow citizens again fully employed who are now unemployed, but I do not see the difference between that condition which was a condition precedent under Public Law 78, and Public Law 414 and the sections to which you refer. In other words, what would the difference be between your conceded duty under the law to make those decisions under Public Law 78 last year and under the Immigration Act this year? [4]

Secretary Wirtz replied, in part:

> I think it goes very close to the heart of the most difficult problem here. And the answer to it would necessarily include these factors. It would include the factor of the intention of the Congress in terminating Public Law 78, which with its legislative history I think can only be interpreted as requesting or as indicating a proposed different treatment of this situation with the legislative record being quite clear, of clear indications, that the Congress wanted this importation if not stopped completely, certainly cut way down, and this would be a large part of my answer to your question. A fuller part of it would necessarily include recognition of the fact that we are taking a much closer look at this situation today than we did perhaps in the accumulated experience under Public Law 78, and I make the point not from sentiment but from straight economics that our largest concern, so far as the Department of Labor is concerned, is that we may in this country let unemployment become a reality because we first let it become a habit, and there has been now almost 7 years of unemployment over 5 percent. I think that it is time we look again to see what we can do to lick that problem.[5]

In addition to definitively preventing a resurfacing of the bracero program under the legislative authority of Public Law 414, the Labor Department regulations also had a significant impact on the BWI program which had been operating under the authority of that act since 1952. The implications of the new regulation for the BWI program were outlined at the Senate hearings by Mr. George H. Wedgeworth, President of the Sugar Cane Growers Cooperative of Florida, who said that the new criteria made it clear "that the Secretary of Labor has set out on a path for the complete elimination of the program." [6] Later that year, 600 British West Indians were approved by the Labor Department to cut sugar cane in Florida for 2 months, according to Senator Holland, only "after extraordinary and intensive recruitment failed to turn up domestic workers. . . . The amount of the expenditure was enormous." [7]

In the spring of 1965, the Labor Department's regulations were unsuccessfully challenged in court in the Florida case of *Chase Glades Farms* v. *Wirtz*, Civil No. 65–86 (M. D. Fla., filed May 5, 1965). Florida celery growers filed an action to restrain and enjoin the Secretary of Labor from refusing to extend certification for celery cutters from

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[4] U.S. Senate Committee on Agriculture and Forestry, "Importation of Foreign Agricultural Workers," 89th Cong., 1st sess., 1965, p. 69.
[5] Ibid.
[6] Ibid., p. 141. See pp. 141–142 for a summary of their objections.
[7] Congressional Record, Sept. 13, 1965, p. 23512.

April 30 to June 15, 1965, arguing that the Labor Department's action in refusing to extend the certification was arbitrary, capricious, and would cause irreparable losses of the celery crop. The trial court refused to issue a restraining order on the grounds that the Secretary of Labor was performing an advisory function which was not subject to injunction:

> This court concludes that under the law . . . the Secretary of Labor, his subordinates and the agencies of the Department of Labor are not vested with any authority to grant or deny the admission or the continuance in this country of any nonimmigrant laborer. Because of that, the determinations made by the Secretary of Labor in connection with such matters are solely advisory and can be accepted or rejected by the Attorney General in the exercise of his statutory authority on this subject. The giving of such advice is not subject to injunction.[8]

Finally, Senator Holland sponsored an amendment, accepted in committee, to the Food and Agriculture Act of 1965, which would have legislatively transferred the advisory certification responsibility regarding the importation of foreign farm workers from the Department of Labor to the Department of Agriculture. A heated Senate debate on this provision occurred in response to a floor amendment offered by Senator Bass of Tennessee to delete section 703, containing Senator Holland's committee amendment, from the bill. Senator Bass' amendment, deleting the transfer of the certification function from the Labor Department to Agriculture, passed by a vote of 46 to 45, with the initial tie vote broken by Vice President Hubert Humphrey.[9]

The chief proponents of the transfer of the certification authority from Labor to Agriculture were Senators from Florida and California, according to Senator Holland, "the two States most affected by the present arbitrary actions of the Secretary of Labor." [10] While there was considerable discussion of the jurisdictional issues involved, in terms of both Cabinet-level Departments and committee responsibilities, many of the key issues were, as Senator Harrison Williams noted, similar to those raised during the recent debates over the bracero program.[11] These included the issues of whether there were, in fact, sufficient domestic farm workers without a supplementary foreign farm labor program; and whether such a program would have an adverse impact on domestic agricultural wages and working conditions. These arguments were restated in the specific context of what Senator Holland and his supporters saw to be the arbitrary and capricious actions of, quoting Senator Holland, "this idealistic, evangelistic Secretary of Labor, who thinks he has authority to set wages."[12]

Senator Holland was particularly disturbed by the disruption of the BWI program, which was widely used in Florida; as well as with what he saw to be the violation of the express Congressional intent that Mexican workers be admitted under Public Law 414 after the expiration of Public Law 78.[13] It was generally argued that the Secretary of Agriculture not only would be more sympathetic to the needs of agriculture, but was also in a better position to gauge those needs and

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[8] Quoted ibid., p. 23511; the case is summarized and discussed by Senator Holland on p. 23510.
[9] Food and Agriculture Act of 1965, Congressional Record, Sept. 13, 1965, pp. 23504–23530.
[10] Ibid., p. 23509.
[11] Ibid., p. 23515.
[12] Ibid., p. 23509.
[13] Ibid., p. 23512.

evaluate them for the Attorney General. In defense of the Secretary of Labor, Senator Muskie (Democrat of Maine) argued that despite an initial determination to eliminate the foreign workers Secretary Wirtz had clearly adopted a more realistic attitude as the year had progressed; "when we were able to demonstrate that there were not sufficient laborers available the Secretary authorized importation of Canadian workers." He opposed the transfer of certification authority to the Department of Agriculture, stating "I do not think it is administratively sound to place a labor supply and working condition question in the hands of the Secretary of Agriculture or any department or agency head other than the Secretary of Labor." [14]

As noted above, this position prevailed by a one vote margin, and Secretary Wirtz's regulations remained in effect. In a monograph entitled "Year of Transition," summarizing the transition from the bracero program, Secretary Wirtz noted that there was an 83 percent reduction in the use of foreign farm labor in 1965 compared to 1964, although it was harder to determine the increase in the number of domestic workers employed. Summarizing the impact of the new regulations on the BWI program in Florida, Secretary Wirtz estimated that the total man-months dropped from 81,000 in 1964 to 64,000 in 1965.[15]

A Department of Labor representative recently traced the regulations in effect as of December 1977 back to the 1965 regulations, as revised in 1967, noting that they "have changed little in the intervening decade." [16] As will be discussed below, major and very controversial revisions in these regulations were proposed in January 1977; final regulations were published March 10, 1978.

Statistical data on the BWI program are not consistent, making it difficult to measure the impact of the 1965–1967 regulations on the program. For instance, one important difference resulting from the 1965 regulations was the restriction on the individual certifications to 120 days. Previously workers were admitted in some cases for up to three years, so yearly admissions were not an accurate reflection of the actual yearly work forces.

Foreign workers admitted for temporary employment in U.S. Agriculture, 1942–72, are shown in Table 2. BWI entries in the same U.S. Government series for 1973–77 follow: 1973—11,924; 1974—11,346; 1975—11,668; 1976—9,944; 1977—13,300. As another measure, peak number of West Indian Agricultural Workers by State, 1960–76, are shown in Table 3; the source of these statistics is the BWICLO.

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[14] Ibid., p. 23529.
[15] Report of the Secretary of Labor [1966], p. 3, p. 6, p. 9.
[16] U.S. Senate Select Committee on Small Business, "Agricultural Labor Certification Programs and Small Business," Hearings, 95th Cong., 1st sess., 1977, p. 29.

TABLE 2.—FOREIGN WORKERS ADMITTED FOR TEMPORARY EMPLOYMENT IN U.S. AGRICULTURE, BY YEAR AND NATIONALITY, 1942–72

Year	Total	Mexican	British West Indian [1] [2]	Canadian	Japanese and Filipino
1942 [3]	4,203	4,203	----------	INA	----------
1943	65,624	52,098	13,526	INA	----------
1944	83,206	62,170	19,622	1,414	----------
1945	72,900	49,454	19,391	4,055	----------
1946	51,347	32,043	13,771	5,533	----------
1947	30,775	19,632	3,722	7,421	----------
1948 [4]	44,916	35,345	3,671	5,900	----------
1949	112,765	107,000	2,765	3,000	----------
1950	76,525	67,500	6,225	2,800	----------
1951	203,640	[5] 192,000	9,040	2,600	----------
1952	210,210	[5] 197,100	7,910	5,200	----------
1953	215,321	[5] 201,380	7,741	6,200	----------
1954	320,737	[5] 309,033	4,704	7,000	----------
1955	411,966	[5] 398,650	6,616	6,700	----------
1956	459,850	[5] 445,197	7,563	6,700	390
1957	452,205	[5] 436,049	8,171	7,300	685
1958	447,513	[5] 432,857	7,441	6,900	315
1959	455,420	[5] 437,643	8,772	8,600	405
1960	334,729	[5] 315,846	9,820	8,200	863
1961	310,375	[5] 291,420	10,315	8,600	40
1962	217,010	[5] 194,978	12,928	8,700	404
1963	209,218	[5] 186,865	12,930	8,500	923
1964	200,022	[5] 177,736	14,361	7,900	25
1965	35,871	20,284	10,917	4,670	0
1966	23,524	8,647	11,194	3,683	0
1967	23,603	6,125	13,578	3,900	0
1968	13,323	0	10,723	2,600	0
1969	15,830	0	13,530	2,300	0
1970	17,474	0	15,470	2,004	0
1971	13,684	0	12,143	1,541	0
1972	12,526	0	11,419	1,107	0

[1] Due to carryover of workers from year to year, the number admitted is sometimes less than peak employment.
[2] Includes Bahamians.
[3] Data from 1942 through 1947 were obtained from reports prepared by the U.S. Department of Agriculture.
[4] Data from 1948 through 1972 were compiled from administrative reports of the Manpower Administration, U.S. Department of Labor.
[5] Admitted under Public Law 78.

Source: U.S. Department of Labor, Rural Manpower Developments, fall, 1973, p. 20.

TABLE 3.—PEAK NUMBER OF WEST INDIAN AGRICULTURAL WORKERS BY STATE, 1960–76

	Total	Connecticut	Florida	Maine	Maryland	Massachusetts	Michigan	New Hampshire	New Jersey	New York	Vermont	Virginia	West Virginia	Other
1960	13,629	1,533	8,997	-------	17	-------	281	32	674	300	-------	102	-------	1,693
1961	13,773	1,567	9,663	-------	16	-------	172	33	875	310	-------	261	-------	876
1962	15,471	1,565	11,668	-------	20	-------	144	29	693	456	-------	369	-------	527
1963	15,937	1,628	12,727	-------	8	-------	218	39	451	299	-------	564	-------	3
1964	16,841	1,845	13,020	-------	8	-------	211	21	629	300	-------	804	-------	3
1965	15,265	777	13,099	-------	7	-------	1	-------	577	247	30	524	-------	3
1966	10,135	50	8,762	----------		25	-------	17	-------	647	60	374	200	------
1967	11,401	89	9,056	----------		56	-------	150	-------	910	147	665	328	------
1968	10,602	96	8,711	----------		80	-------	52	-------	802	145	440	276	------
1969	10,909	89	8,230	----------		140	-------	60	-------	1,044	124	756	466	------
1970	11,887	303	9,319	1	-------	88	-------	22	-------	944	165	638	407	------
1971	12,244	92	9,050	40	-------	188	-------	210	-------	1,105	234	492	833	------
1972	11,425	86	8,276	51	-------	218	-------	238	-------	1,154	237	720	443	2
1973	12,837	103	8,639	105	182	286	-------	309	-------	1,595	213	887	515	3
1974	12,582	104	8,224	176	124	334	-------	289	-------	1,788	323	759	458	3
1975	12,813	93	8,427	206	184	345	-------	228	-------	1,570	303	927	526	4
1976	10,958	76	8,052	224	-------	305	-------	269	-------	996	233	473	326	4

Source: British West Indies Central Labor Organization.

It will be noted that the BWICLO figures show 1964 as the peak year, compared to 1970 as measured by the U.S. Government figures based on yearly admissions. A significant number of the workers still present in 1965 were those fulfilling contracts entered into before the December 1964 regulations went into effect. The drop between 1965 and 1966 in the BWICLO statistics, and in the admission of BWI workers in 1965 compared to 1964, would both appear to reflect the impact of the more stringent regulations. However, the increasing use of mechanization in agriculture during this period was also a contributing factor and, as noted earlier, the figures would have been far lower had it not been for increased unmechanized sugar cane acreage in Florida.

Immigration and Nationality Act Amendments of 1965 [17]

During hearings on the far-reaching 1965 amendments to the Immigration and Nationality Act, the AFL–CIO urged that the amendments specify that immigrants be admitted only for permanent jobs and not for jobs which were temporary or seasonal in nature.[18] Largely in response to this request, the amended definition for sixth preference immigrant status expressly restricts eligibility "to qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature" (sec. 203(a)(6)). Despite George Meany's praise for the BWI program in 1962, the AFL–CIO also requested that the following proviso be added to section 214(c):

> *Provided,* That nothing in this section shall be construed as authorizing the importation of any alien as a nonimmigrant under section 101(a)(15)(H) for the purpose of employing the alien in the production of agricultural commodities or products.[19]

The combined effect of these amendments proposed by the AFL–CIO to the immigrant and nonimmigrant labor provisions would have been to completely shut off the Immigration and Nationality Act as a means of importing alien seasonal agricultural labor. However, the proposed amendment to section 214(c) was not accepted. The House report on the 1965 legislation addressed itself to the issue of foreign agricultural workers, as follows:

> The committee has given much thought to the practice of importing foreign labor to work in agricultural endeavors. Inasmuch as the Agricultural Act of 1949, as amended, 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.
>
> As the bill specifies, the committee has required the Attorney General to submit reports on each preference immigrant admitted to the United States for the purpose of undertaking gainful employment. 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 under the selective system.[20]

VII. THE BWI PROGRAM DURING 1967–1976

Summing up the use of the temporary foreign workers on U.S. farms in 1967, the Senate Subcommittee on Migratory Labor noted

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[17] Act of October 3, 1965, Public Law 89–236; 79 Stat. 911.
[18] U.S. House of Representatives Committee on the Judiciary, "Immigration," Hearings, 89th Cong., 1st sess., 1965, p. 322.
[19] Ibid., p. 323.
[20] H. Rept. No. 745, 89th Cong., 1st sess., 1965, pp. 14–15.

that 5 percent fewer man-months of foreign labor were used than in 1966, and that cutbacks were reported for strawberries, sugar cane, and tomatoes. Eleven States used foreign workers in 1966 and 1967, with three-quarters of the total reported by Florida in 1967, where additional BWI workers were brought in because of an urgent citrus situation. Sugar cane continued to be the crop requiring the highest number of foreign workers, in Florida and elsewhere.[1] As indicated in Table 2, BWI workers constituted the largest number of temporary alien farm workers, as they have since 1966.

During the late 1960's, the BWI program was subject to some criticism during the course of the Senate Subcommittee on Migratory Labor's extensive investigation of migratory farm labor problems in the United States. For instance, during May 1969 hearings, former Assistant Secretary of Labor Stanley Ruttenberg was critical of what he saw to be the increasing laxity of the administration of the temporary labor program under Secretary of Labor George Shultz.[2] However, the BWI program was generally viewed as being decidedly less of a problem than either the increasing number of illegal aliens or "green card" commuters. The latter are legally admitted aliens who live in Mexico or Canada and commute to work in the United States.

As a brief indication of the foreign policy implications of the BWI program, in November 1970, the Organization of American States (OAS) held a week-long seminar in Kingston, Jamaica on the subject of the Establishment of Migration Services in Labor Ministries for Seasonal Migrant Workers.[3] Quoting from the conclusions reached by the Seminar:

> From the presentation and the discussions of the Seminar, it is clear that the primary issues faced by the Caribbean and Central American countries, Mexico, and Panama continues to be that of development and employment. . . . .
>
> While the consensus of the Seminar placed proper emphasis on internal development in each country as the major solution for resolving unemployment, it was nevertheless agreed that migration, both temporary and permanent, has contributed and will in the future continue to contribute to the realization of the goals of development programs. . . .
>
> Seasonal agriculture migration has played a constructive role in meeting the needs of both sending and receiving countries. The volume has varied considerably, but the outlook does not hold promise for any measurable expansion and may even contract with further mechanization and other changes in methods of agricultural production.[4]

The following two recommendations would appear to be of particular interest to the United States, as a receiving country:

> The lessons of experience have demonstrated that organized programs for seasonal migrant workers, rather than spontaneous movement, are in the best interest of the workers, the employers, and the governments of both the receiving and the sending countries. . . .
>
> All basic arrangements should be negotiated in the first instance between the governments of the sending and receiving countries, or on a multilateral basis in common-market areas.[5]

In part because of rising unemployment, the BWI program has been the subject of considerable scrutiny during the 1970's by government

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[1] S. Rept. No. 1006, 90th Cong., 2d sess., 1968, p. 12.
[2] U.S. Senate Committee on Labor and Public Welfare, "Migrant and Seasonal Farmworker Powerlessness," 91st Cong., 1st and 2d sess., 1970, Part 5–B, pp. 2546–2547.
[3] Nov. 9–13, 1970. The United States was represented by Stanley M. Knebel of the Farm Labor and Rural Manpower Services, U.S. Department of Labor.
[4] OAS, Final Report, p. 8.
[5] Ibid., pp. 4–5.

and private groups, the courts, and most recently, by several Congressional committees. The following is a brief chronological summary of these inquiries and developments. The major issues considered include the central question of whether or not foreign workers are, in fact, displacing U.S. workers and/or having an adverse effect on wages and working conditions. Attention has also focused on more specific issues concerning the labor certification process, such as wages, the expanding use of the interstate clearance system, and the time frame in which the certification process occurs.

In the early 1970's, a public complaint was filed by the Migrant Legal Action Program with the Secretary of Labor alleging that the Labor Department's Rural Manpower Service exploited domestic migrant farm workers. One of the subjects examined by the Department of Labor's Special Review Staff was the certification of foreign workers for temporary agricultural employment. Writing in 1972, the Special Review Staff found:

> Foreign workers now account for only about one percent of the total seasonal worker employment and are restricted to very few crop activities, primarily planting and harvesting sugar cane and picking citrus fruit in Florida, harvesting potatoes in Maine, and picking apples in New England, New York, Virginia and West Virginia. The number of foreign workers used in each State for apple harvest is insignificant when compared to the total employment within the State. This crop is not dominated by foreign workers in any area. Sugar cane harvest in Florida is dominated by foreign workers, and some adjustments would be required if foreign workers were no longer available.[6]

They identified problems with the system, particularly in relation to wages:

> Wages or earnings of foreign workers have been a particular problem. While the adverse wage requirements have provided a minimum hourly earning level, they have been difficult to administer in reference to piece rates. Wage surveys normally do not translate piece rates into hourly earnings. Since most foreign workers are paid piece rates, it is difficult to determine whether the minimum hourly rate is being maintained. There is evidence that indicates that foreign workers do depress earnings.[7]

A related point was made by the U.S. General Accounting Office (GAO) in 1976, regarding wage calculations during the 1974 apple harvest in New Hampshire.

Also in 1972, an unsuccessful attempt was made by the United Farm Workers (UFW) to organize sugar cane cutters in Florida. According to a press report:

> Union officials in Florida charge that the growers are making only a perfunctory recruiting effort to obtain American workers. In fact, the union says, the industry does all in its power to keep Americans from taking cane cutting jobs in order to keep labor costs for this work as low as possible.

A union organizer was quoted as saying, "But the main thing is that the working conditions of the cane cutters are deliberately kept so bad that Americans will not apply for the jobs."

Representatives of the growers denied the allegations, saying that they had been unable to get U.S. cane cutters since 1946, that "there is a social taboo on this kind of work."[8] A U.S. District Court in

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[6] U.S. House of Representatives, Committee on Education and Labor, "Oversight Hearing on Department of Labor Certification of the Use of Offshore Labor," 94th Cong., 1st sess., 1975, p. 343. (Cited as House Education and Labor hearing (1975).)

[7] Ibid., p. 341.

[8] Philip Shabecoff, "Florida Cane Cutters: Alien, Poor, Afraid," New York Times, Mar. 12, 1973, p. 24.

Florida refused to grant the injunction the UFW sought against the bringing in of foreign workers, on the grounds that the necessary efforts had been made to hire U.S. workers.[9]

In 1974, the Labor Department won a case of major importance, *Elton Orchards, Inc.* v. *Brennan*.[10] Elton Orchards, a New Hampshire apple grower, challenged the validity of the Department of Labor's action in requiring it to use inexperienced Louisiana workers, while other New Hampshire apple growers were permitted to use experienced West Indian labor. The U.S. District Court in New Hampshire had found for the plaintiff, and ordered an equitable distribution of the experienced farm workers.[11] The U.S. Court of Appeals reversed this decision on December 19, 1974. Quoting from the case:

> At issue is the interstate clearance system for recruitment of agricultural workers (ICS) established by 20 C.F.R. §§ 602.2 and 602.9, under authority of the Wagner-Peyser Act, 29 U.S.C. § 49 et seq. The ICS is one element of a complex statutory structure designed to facilitate the employment of domestic workers for seasonal agricultural labor, and to permit the use of foreign nationals temporarily admitted to the United States to work for a specific employer if domestic workers are unavailable.[12]

As a Labor Department official, Mr. David Williams, subsequently noted, the Court upheld "the adequacy of the system as it applies to the certification procedure for temporary foreign workers." Mr. Williams also observed that "the most significant finding by the Court states that the employers' reliance upon experienced crews of British West Indians is subordinate to Congressional policy that domestic workers rather than aliens be employed wherever possible."[13] The key passage from the decision to which he clearly refers follows:

> We recognize that appellee's business depends on the proper harvesting of its crop during the brief span of weeks when the apples are ready, and that there may be good reason for appellee's wish to be able to rely on the experienced crews of British West Indians who have performed well in the past, but here that preference collides with the mandate of a Congressional policy. 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 alien be employed wherever possible.[14]

A similar point was made in November 1977 by Secretary of Labor Ray Marshall, in the context of current unemployment problems rather than legislative policy:

> One question that has been raised is whether you should import foreign workers just because they can do a better job than available domestic workers. We don't believe that is a reasonable consideration. The relevant question is whether there is an adequate available supply of domestic workers who can do the work. With American unemployment at 7.0 percent, it is unrealistic to apply intricate standards of quality in making the decision whether to import foreign workers.[15]

Also in 1974, the U.S. General Accounting Office (GAO) reviewed the labor certification of foreign workers for New Hampshire's 1974 apple harvest. They surveyed 15 growers, 8 of whom hired only domestic workers. Generally speaking, the GAO was critical of the

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[9] *United Farm Workers Union* v. *Kleindienst*, Civil No. 72-1439 (S.D. Fla., filed Feb. 26, 1973).
[10] 508 F. 2d 493 (1st Cir. 1974).
[11] *Elton Orchards, Inc.* v. *Brennan*, 382 F. Supp. 1049 (D.N.H. 1974).
[12] 508 F. 2d 493, 495 (1st Cir. 1974).
[13] House Education and Labor hearings (1975), p. 5.
[14] 508 F. 2d 493, 500 (1st Cir. 1974).
[15] Remarks before the Annual Meeting of the International Apple Institute, Hilton Head, South Carolina, Nov. 17, 1977, U.S. Department of Labor News, pp. 3–4.

Labor Department's certification procedures in the somewhat limited area in which they surveyed. Quoting from the conclusions:

> The Department of Labor delayed the certification of foreign workers for the 1974 apple harvest because it was concerned that due to high unemployment qualified domestic workers might be available. Federal regulations clearly state that temporary foreign workers be admitted to the United States only when domestic workers are not available. The New Hampshire employment agency did not give Labor the required information concerning either worker availability or recruitment efforts of the State agency or of growers who requested foreign workers. Although still uncertain about the availability of domestic workers, Labor began certifying foreign workers to avoid seriously disrupting the harvest.
>
> Three growers requesting foreign workers did not advertise for domestic workers, and the State employment agency did not make reasonable efforts to recruit domestic workers. The State agency did not interview job applicants or screen applicant signup sheets. Also, the State agency generally did not make referrals to growers until after foreign workers had arrived in New Hampshire.
>
> Growers employing foreign workers paid less money for each bushel picked than growers who hired only domestic workers. These lower rates may adversely affect growers' ability to hire domestic workers.[16]

In 1975, the Labor Department indicated there was an intensification of the Federal monitoring of the pre-certification process; and agreed to certification by August 1, provided certain conditions were met.[17]

In March 1975, the Labor Department's certification of the use of offshore (BWI) labor was the subject of an oversight hearing by the House Subcommittee on Agricultural Labor, under the chairmanship of Congressman William Ford (Democrat of Michigan). A major issue raised during the hearings was, quoting from Congressman Ford:

> How can you explain to me that you have British West Indians picking apples within an hour's driving distance of this capital with the kind of unemployment we have in Baltimore, Philadelphia, and Washington?
>
> Why is it cheaper to import somebody from the British West Indies and pay all of the expenses entailed than it is to recruit somebody from here or Baltimore to go out there and pick those apples? [18]

Mr. David Williams, Deputy Director of the Department of Labor's U.S. Employment Service, indicated that, despite the rising unemployment rate in the major metropolitan areas, "the certification of availability, nonavailability, of workers in areas such as Virginia, West Virginia, and Maryland, is due primarily to the test of availability of workers who are qualified, willing, and able at the time and place the work is to be performed." [19]

Several related points were made by a subsequent witness, Mr. Bert E. Perry, Monitor Advocate, Virginia Employment Commission, who indicated that the number of foreign workers "has been increasing primarily because of the increasing orchards that are being planted." [20] In response to questions regarding the certification of foreign workers in spite of high unemployment, Mr. Perry outlined the intra-and interstate recruitment efforts in some detail. Regarding long-distance recruitment efforts, he noted, "the requirements for unemployment compensation don't require a person to leave his home to get a job"; local workers, however, would be disqualified from unemployment

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[16] U.S. Comptroller General of the United States, letter report to Honorable James C. Cleveland, B-177486, Feb. 6, 1976, pp. 9–10.
[17] Ibid., pp. 10–11.
[18] House Education and Labor hearings (1975), p. 10.
[19] Ibid.
[20] Ibid., p. 78.

compensation if they refused a job.[21] The following exchange, on the subject of apple picking, is relevant:

Mr. FORD. What in your opinion could be done to change the situation so that agriculture in Virginia would be providing more job opportunities for the indigenous Virginians than is now the case?

Other than the obvious—of raising the pay.

Mr. PERRY. To jump on that comment, if you will note the average hourly rate for 1974 for that particular area—we are speaking about picking apples—that $3.94 average rate was not bad. I would hope that everybody could make that much money.

Mr. FORD. I would say that for that area of Virginia that is very good.

Mr. PERRY. That is very good.

Mr. FORD. Then why is it that local people won't do it?

Mr. PERRY. There are a lot of local people doing it. There are just not too many local people left that are not working in agriculture. There were some people out of work up there. The unemployment increased last year.

Mr. FORD. Couldn't you haul somebody from Richmond? Why isn't a crew leader able to make money by bringing people from Richmond to northern Virginia for $3.94 an hour? [22]

Mr. Perry indicated that crew leaders would come into Richmond and Petersburg to recruit domestic workers for the apple harvest, but wouldn't go to the Winchester area.

We have tried time and time and time again to get them to go to the Winchester area. They don't like big camps. They prefer the smaller camps.[23]

Earlier in the hearings, Congressman Ford expressed concern that farm labor contractors reportedly would not bring crews into sugar cane and increasingly, into fruit picking along the East Coast, apparently because of the known preference of the employers for foreign workers.[24]

Another area of concern in the 1975 hearings was the fact that hourly adverse-effect rates had not been published in the Federal Register by the Department of Labor during that period for Florida. This was due to the fact that the sugar wage rates determined under the Sugar Act had previously been higher than the Labor Department's adverse-effect rates, and were accepted as the operative rate.[25] In general, considerable controversy and confusion have surrounded the wage issue in recent year, both for apples (bushel versus hourly rates) and sugar cane. Two Federal Court of Appeals cases were decided in 1976 relating to the adverse effect wage rates and prevailing wage rates for sugar cane in Florida.[26]

In 1976, testimony was heard by the Senate Judiciary Subcommittee on Immigration and Naturalization from Mr. Fred Burrows, Executive Vice President of the International Apple Institute, in strong support of the BWI program. Noting that "several witnesses have indicated that the alien worker has an adverse effect on the wages and working and housing conditions of U.S. workers," he stated that,

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[21] Ibid., p. 80.
[22] Ibid., p. 80.
[23] Ibid., p. 81.
[24] Ibid., pp. 13–14.
[25] Ibid., pp. 15–16.
[26] *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299 (5th Cir. 1976); *Williams* v. *Usery*, 531 F. 2d 305 (5th Cir. 1976).

"this is definitely not true relative to the legal imported BWI's used in the apple harvest." Quoting further:

> Rather the opposite is true. Growers using the BWI's must provide all their U.S. workers with at least the same wage rates, housing and working conditions as those provided the aliens. Further, they must pay all their workers—U.S. domestics and alien—at least the adverse effect rates, established by the U.S. Department of Labor. These guaranteed rates in 1975 ranged from $2.34 per hour in Maryland to $2.54 in Vermont compared to the 1975 agricultural minimum wage of $1.80 per hour. The W–H [Wage and Hours] law would require growers not using the BWI's to pay their U.S. workers only the lower $1.80 rate.
>
> Most applepickers work on a piece rate basis, and in 1975 those rates ranged from 27 cents to about 45 cents per bushel. A good picker, working on a piece rate basis, can earn considerably above the adverse effect rates and the agricultural minimum. Growers using BWI's must pay a picker at least the adverse effect rate even though he does not pick enough bushels to justify the adverse effect rate.[27]

VIII. 1977: CONTROVERSY

In 1977, a series of events occurred with direct, indirect, or potential implications for the BWI program. These included proposed revisions in regulations for temporary employment of aliens, published by the Labor Department in January; President Carter's proposed illegal alien program, announced in August; the U.S. District Court decision in late August in favor of the Virginia apple growers seeking alien workers, and the earlier administrative decision to certify Mexican workers for onion picking in Presidio, Texas; and oversight hearings on agricultural labor certification by the Senate Select Committee on Small Business in December.

Proposed Labor Department Regulations and Response

Proposed new regulations governing the labor certification process for the temporary employment of aliens in agricultural and logging employment were published in the Federal Register January 25, 1977.[1] The proposed regulations were generally more restrictive and proved to be highly controversial. Final regulations were published on March 10, 1978,[2] and differ in significant respects from the proposed ones, which are not discussed here in any detail.

The Department of Labor received comments on the proposed regulations during 12 days of hearings across the country, as well as by letters submitted during the public comment period which was extended several times because of the very strong public response. The voluminous material amassed by the Labor Department in response to the proposed regulations was reviewed and summarized by a private consulting firm under contract to the Labor Department. The general response to the regulations was summarized as follows:

> Before embarking on the hearings a Department staff paper predicted that the Department would be strongly criticised by both sides during the course of the hearings—by growers who would maintain that the Department was being too tough and causing them to risk crop losses and by representatives of migrant farmworker groups who would maintain that the Department was not doing enough to safeguard the interests of American workers. That prediction proved correct, but the voice of the growers was louder and more persistent than that of the workers. Overall there was little support from any source for the regulations

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[27] U.S. Senate Committee on the Judiciary. "Immigration 1976", Hearings, 94th Cong., 2d sess. on S. 3074, 1976, p. 195.

[1] 42 Federal Register 4670–4673 (Jan. 25, 1977).

[2] 43 Federal Register 10306 (Mar. 10. 1977) (see Appendix).

as proposed, either in general or in specific terms. . . . In contrast to worker representatives who sometimes found something good to say, industry representatives were unanimous in their opposition to the proposed regulations.[3]

A number of the growers viewed the proposed regulations as an attempt to end the temporary foreign worker program.

Two recurring themes of general interest were identified by the consultants' analysis of the material commenting on the proposed regulations. The first of these was the relation perceived between illegal aliens and legal temporary workers. It was noted that:

Many agricultural employers, particularly those in the western states, apparently are looking toward the alien certification process as a future alternative to present use of illegals in the event that employers are made legally responsible for hiring illegals, or as they put it, if the supply of illegals is cut off. Pointing to the decline of the seasonal agricultural labor force, they are concerned that any tightening up of the alien certification process may pose future problems.[4]

The following discussion from the consultants' analysis is of particular relevance to the BWI program; the "issue" referred to is the suggestion that growers would "turn to illegals if the certification process were eliminated or phased out."

The issue is particularly significant for the east coast apple growers who must compete for the apple market with west coast growers. Apparently it is common knowledge that the west coast growers are using a substantial proportion of illegal aliens to pick their crop. As the flow of illegals from the Caribbean countries to eastern states increases and as the certification process is tightened up, it can be expected that the growing pool of illegal labor will become an increasingly attractive source for east coast apple growers.[5]

The second point of general interest was the recurrent criticism of the U.S. Employment Service (ES), particularly in the agricultural labor market, which came "from all sides—from growers, workers, academics, and government officials, even including representatives of the ES itself." [6] One criticism of particular interest related to "the conflict of ES objectives on the one hand, encouraging the elimination of migrancy, with ES local offices getting more credit for placement of migrants into permanent higher paying jobs which almost by definition are apt to be non-agricultural jobs, and the goal of improved service to employers—presumably agricultural employers." [7]

In other comments, the conditions imposed by the ES interstate clearance system were said to be too difficult to comply with, and both growers and farmworkers expressed the opinion that it had broken down. In general, criticism focused on the inability of ES to provide services to either growers or farmworkers; "testimony from these sources showed an underlying lack of trust—a lack of assurance that ES was committed to resolving the problems." [8]

President Carter's Undocumented Aliens Program

On August 4, 1977, President Jimmy Carter announced his program for the control of illegal aliens, or undocumented aliens, in the phrase preferred by the Carter Administration.[9] The major provisions in

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[3] Ruttenberg, Friedman, Kilgallon, Gutchess & Assoc., Inc., Letter report to Mr. Harold Kuptzin Department of Labor (Contract No. B-9-A-7-2920 under Requisition No. 440016), Sept. 19, 1977, Part III, p. 1.
[4] Ibid., Part II, p. 4.
[5] Ibid., Part V, p. 3.
[6] Ibid., Part V, p. 1.
[7] Ibid., Part V, p. 2.
[8] Ibid.
[9] "Undocumented Aliens," House Doc. No. 95-202, 95th Cong., 1st sess., 1977.

legislation (S. 2252/H.R. 9531) subsequently introduced at the request of the Administration relate to the permanent and temporary adjustment of status of certain illegal aliens presently in the United States, and civil penalties for a pattern or practice of employment of aliens not legally authorized to work.

In apparent recognition of the likelihood that an effective curtailment of the flow of illegal aliens would increase pressures for the legal importation of temporary foreign workers, President Carter also announced that he was requesting a comprehensive review of the temporary foreign worker (H–2) program. Quoting:

> I believe it is possible to structure this program so that it responds to the legitimate needs of both employees, by protecting domestic employment opportunities, and of employers, by providing a needed workforce. However, I am not considering the reintroduction of a bracero-type program for the importation of temporary workers.[10]

The latter point, regarding the intention not to seek a renewal of the bracero program, has been repeated several times since the August announcement.

The Virginia Apple Growers Case

On August 31, 1977, a U.S. District Court Judge in the Western District of Virginia ordered the U.S. Department of Labor to certify approximately 5,000 foreign workers—mostly Jamaicans under the BWI program—to pick apples, as requested by employers from 11 eastern apple-growing States, led by Frederick County Fruit Growers' Assoc., Inc.[11] The Labor Department complied with the order following initial strong criticism by Secretary of Labor Ray Marshall, who was quoted as saying that the order "undermines my fundamental responsibility to approve the importation of temporary foreign workers only when domestic workers are unavailable." [12]

The court-ordered certification of the foreign workers was the culmination of a complicated legal battle which dated back at least to 1975 and which turned in large part on Puerto Rican Public Law 87. In a district court case decided in September 1975, it was ruled that Puerto Rican workers were not available as agricultural workers because the terms and conditions imposed by Puerto Rican Public Law 87 are:

> More extensive and onerous insofar as the employers are concerned in that among other things, these terms require that disputes incident thereto be adjudicated in the courts of Puerto Rico, and that three hot meals a day be provided for the workers in the field and that insurance benefits more extensive than those required by the defendant Secretary of Labor be provided and that the employers post performance bonds. . . .
>
> Unless employers enter into such a contract prior to attempting to recruit workers in Puerto Rico, they may under Puerto Rican law be subjected to criminal prosecution. No such requirement exists insofar as recruitment activities are concerned in any of the states from which workers are drawn for this program.[13]

Subsequently, the Secretary of Labor in Puerto Rico agreed to waive Public Law 87 to allow recruitment in Puerto Rico without contracts, but the growers refused to do so on the grounds that they

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[10] Ibid., p. 6.
[11] *Frederick County Fruit Growers' Assoc., Inc.* v. *Marshall*, Civil No. 77-0104(H) (W.D. Va., filed Aug. 30, 1977).
[12] "U.S. is ordered to admit 5,000 foreign workers," Washington Post, Sept. 1, 1977, p. A10.
[13] *Galan* v. *Dunlop*, 411 F. Supp. 268, 270 (D.D.C. 1975).

might be liable for prosecution if they failed to comply with the contract requirements of Public Law 87. While this has been criticized as a diversionary tactic on the part of the growers, Mr. Steve Karalekas, the lawyer for the growers, was quoted as saying, "The migrant legal action people have said in their brief in the First Circuit Court of Appeals, and now in the U.S. Supreme Court, that it would be illegal for the Puerto Rican Secretary to refer workers without a contract so they take the same position as we do." [14]

By mid-August 1977, the Labor Department still refused to certify foreign workers, in part on the grounds that Puerto Rican workers were available. However, the Department of Labor did not prevail and, as noted above, was ordered to certify about 5,000 foreign workers. In hearings in December 1977, Labor Department official William B. Lewis, the Administrator of the U.S. Employment Service, indicated that efforts to recruit Puerto Ricans were continuing for the next season:

> There are certain legal problems involving Public Law 87, but the industry will be cooperating with us in a pilot program this year to bring in some Puerto Ricans.[15]

Hearings on Agricultural Labor Certification

In mid-December 1977, the Senate Select Committee on Small Business held two days of hearings on agricultural labor certification programs, under the acting chairmanship of Senator Robert Packwood (Republican of Oregon). The hearings focused on many of the issues relating to legal temporary workers which had been raised throughout the year. These included the feasibility of a legal temporary worker program as an alternative to illegal aliens, particularly in view of the Labor Department's less than enthusiastic attitude toward the foreign worker program.

Regarding the existing situation on the West Coast, Senator Packwork reacted with some skepticism to Mr. Lewis' statement, "We would like to emphasize that west coast fruit growers have not needed to resort to this [H–2] process in the past to meet their fruit harvest requirements." [16] Asking, "Are you saying that you have had no applications from the Northwest for the H–2 program because their employment situation is satisfactory?" Senator Packwood continued:

> I think any association would tell you that in the past on the west coast illegal aliens have been used extensively. You do not like that. I do not like that. Growers do not prefer it, they have been unable to get any other satisfactory source of help. So long as illegals were available and so long as INS was not seriously enforcing the laws, it was a practical solution to a problem that exists. That is a problem that cannot be allowed to continue.[17]

Concern was expressed about the consequences of the enactment of legislation which would make illegals unavailable. Senator Packwood explained the growers' apprehension as follows:

> * * * many of the growers today would admit that they are not looking too seriously at the documentation of the people they are hiring. They have been

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[14] "Growers win certification fight, but labor shortage still looms," The Packer, National Weekly Business Newspaper of the Fruit and Vegetable Industry, Sept. 3, 1977, p. 2A. For an account of the same events from a different viewpoint, see "Apple picker blues," New Republic, Oct. 29, 1977, pp. 15–16.

[15] U.S. Senate Select Committee on Small Business, "Agriculture Labor Certification Programs and Small Business," 95th Cong., 1st sess., 1977, p. 31.

[16] Ibid., p. 28.

[17] Ibid., p. 29.

very satisfied with migrant workers in the past. They are good workers and a good relationship. How many of them were legal and illegal was not a question that was seriously asked.

The day of the illegal alien in this country is going to dwindle very rapidly, I think, and should. You take that factor away and you are going to have if the growers are believed a substantial shortage. They think they are going to have a substantial shortage, and they are especially worried about trying to produce 7,000 workers in a small valley on a short-term basis. . . .[18]

Speaking on behalf of the National Council of Agricultural Employers, Mr. Perry Ellsworth, its Executive Vice President, stated:

It is my association's position that as the farmworkers situation continues to worsen and if Congress passes legislation prohibiting the employment of undocumented aliens, Congress must enact legislation that will set forth inflexible rules which the Department of Labor must follow in arriving at a decision regarding the certification of small growers for the use of temporary foreign agriculture workers. Legislation has been introduced to do just that and we urge your endorsement of it.[19]

In general, the witnesses testifying at these hearings were divided between those who supported the Labor Department's fairly restrictive administration of the H–2 program, and those opposed to it. As such, they tended to demonstrate the extent to which an adversary relationship has developed between the users and Labor Department administrators of the H–2 program, based to some extent on what appears to be a mutual assumption of lack of good faith. That is, the Labor Department appears to assume that many of the growers who seek certification for foreign workers prefer them and do not seriously try to find domestic workers; and many of the growers assume that the Labor Department is philosophically opposed to admitting foreign workers in the face of current high unemployment rates, and will go to considerable lengths to avoid doing so.

The need for increased cooperation between the Department of Labor and the growers was stressed at the hearings by Labor Department witnesses, as it had been in November by Labor Secretary Ray Marshall. Quoting from his speech to the International Apple Institute:

My preference is strongly on the side of cooperation. There are a number of reasons for this. An adversary relationship drains a lot of time and energy from both sides. Moreover, a cooperative relationship makes practical sense. In making administrative decisions, we need to get the participation from the people who actually have the problems. We believe in the participatory system. You, for example, know more about the unique problems of the apple industry than I do. If we can work cooperatively then we can take advantage of your expertise in framing regulations and making administrative decisions.[20]

An expansion of the existing temporary worker program was strongly opposed by representatives of the Migrant Legal Action Program, Inc. Mr. Burton Fretz argued:

Any effort at this time to review and revise the framework for certification of foreign labor would be somewhat hazardous. It would be hazardous in terms of its likely depressing effect on the wages of domestic labor. It would be hazardous in terms of the depressing effect of any incipient collective bargaining activity that may be going on among domestic agricultural workers. Before the committee and before the Congress is persuaded that this Pandora's Box should be opened, a really tight case needs to be made. We submit that that sort of case is not yet in the record.[21]

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[18] Ibid., p. 86.
[19] Ibid., p. 48.
[20] Remarks, Nov. 17, 1977, U.S. Labor Department News. p. 2.
[21] Senate Select Committee on Small Business hearings (1977), p. 85.

He argued that current wages, particularly in migratory agricultural work, were not high enough to attract U.S. workers; and that the manner and timing of recruitment did not "maximize the attraction of domestic labor." He also criticized current State work disincentives built into the welfare law, particularly in California where a head of a household with children is disqualified from receiving aid if he works more than 100 hours in a month.[22]

Mr. C. H. Fields, the Assistant Director of the American Farm Bureau Federation, summed up what he saw to be the assumptions on which the current attitude of the Labor Department is based, as follows:

> 1. If growers would pay high enough wages and provide improved working conditions, there would be plenty of domestic workers available to meet all of the seasonal needs in agriculture.
> 2. Growers prefer to hire foreign workers because they are more tractable, more appreciative of a lower wage, and less likely to be interested in forming or joining labor unions.
> 3. A considerable portion of the millions of people on welfare or on unemployment compensation could and would perform work on farms if growers would pay them enough, provide transportation, or make any real effort to recruit such people.[23]

He continued:

> These assumptions do not contribute to getting crops harvested when they are ready and must be harvested. It is time for the Department, the Congress, and the public to realize that the production of certain crops in certain areas and under certain conditions requires the importation of some foreign workers on a temporary basis.[24]

Mr. Perry Ellsworth also commented on what has been viewed by some as the conflicting mandate of the Labor Department:

> The U.S. Employment Service as a result of the Judge Richey court order issued here in the District has engaged in an extensive and very large outreach program, now, all agricultural workers applying in a U.S. Employment Service Office for a job must be interviewed and fill out a large questionnaire at which time they are told of all the other opportunities for labor. I do not argue with that. I think that is all right. Frankly, if I had to make my living as a farmworker, I would just as soon do it at one job year-around as I would traveling as a migrant worker. And I think that is all right. And if that program works, then the Department of Labor has to understand that it is cutting out available workers for farm jobs, and this is something that I just do not see coming through very clearly.[25]

As was noted by one witness, migrancy is a response and partial solution to the problems posed by the seasonality inherent in much agricultural work, but migrancy also poses serious problems of its own.[26] The same witness, Mr. Fields of the American Farm Bureau Federation, observed in 1976 hearings:

> The real problem, Senator, is not so much the wages and working conditions—and of course everybody would like to have more, including Senators and lobbyists—but the real problem is the seasonal, the temporary nature of these jobs. You cannot make a career of the job. No one can build a future doing this work, it's a temporary job, a few weeks. That's the essential problem, and I might say that no one has been smart enough to solve that "temporary" problem, that seasonal problem.[27]

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[22] Ibid., pp. 86–87.
[23] Ibid., p. 98.
[24] Ibid.
[25] Ibid., p. 49.
[26] Ibid., p. 98.
[27] Senate Judiciary hearings (1976), p. 180.

A related point was made by a Labor Department witness in 1963:

> Yes, I think that we do have many unemployed agricultural workers. But the real problem is the seasonality of the employment and the mobility of the domestic work force. . . . The nature of the employment, I don't think is as significant as the conditions of employment and the seasonality of the work and the geography involved.[28]

By the end of 1977, the strain in the relations between the Department of Labor and the growers appeared to have extended to the BWICLO as well. According to Mr. Harold Edwards, chief liaison officer, their previous very agreeable relations with the Labor Department had been replaced by a situation where "they tolerate us, that is about all." Quoting further:

> * * * the Department of Labor used to consult with us about certification, about the needs of the workers or the needs of the growers. And we would be in close contact with them. But I would say in the last 2 maybe 3 years we have had little or no contact with the Department of Labor except that in the fall of this year we were asked by the regional office in Boston to supply workers, West Indies workers to a grower in Massachusetts whose Puerto Rican workers had left him in the lurch. That I would say is the closest contact we have had in several years.[29]

When asked why, Mr. Edwards replied:

> Well, sir, I think there is a word that has been bandied about the Department of Labor in the last 6 months. They classify the West Indies workers as docile. What we regard as disciplined workers, men who have a lot of self-respect and a lot of ambition. And who, as long as they are receiving a fair deal on their contract are prepared to work hard and complete their contract. The Department seems to think those men are too docile. There should be trouble. I do not know why.[30]

In summary, at the end of 1977, the temporary foreign worker program, including specifically the BWI program, appeared to be at something of a crossroad, not unlike the situation in 1965. Barring direct Congressional action, factors in determining its future would appear to include what action, if any, is taken on pending legislation to curtail illegal aliens; the outcome of the efforts to solve problems relating to the use of temporary Puerto Rican workers; and, perhaps, a resolution of the Department of Labor's apparent ambivalence toward the placement of U.S. workers in migratory agricultural jobs.

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[28] Mr. Jack Donnachie, Deputy Director, Office of Farm Labor Service, House Judiciary hearings (1963), pp. 6–7.
[29] Senate Select Committee on Small Business hearings (1977), p. 65.
[30] Ibid.

APPENDIX

Analysis and Summary of Labor Department Regulations for Certification of Temporary Alien Agricultural Workers (20 CFR 655), Issued March 10, 1978

On March 10, 1978, the Employment and Training Administration of the U.S. Department of Labor published final revised regulations for the labor certification of temporary alien agricultural and logging workers in the United States. Proposed regulations published on January 25, 1977 had, as noted above, generated considerable public response, most of which was negative. The Labor Department reported that approximately 170 individuals and organizations testified at the public hearings held on the proposed regulations and/or submitted written statements.[1] The final regulations differ in significant respects from those published in the proposed rulemaking process. Specific differences are outlined in detail in the statement which precedes the revised regulations.[2]

According to the Labor Department, "it is the purpose of these [final] rules to more clearly define the roles of the Department, State employment service agencies, and employers in the temporary labor certification process."[3] This purpose underlies both the extensive reorganization of the regulations, as well as the increase in their length. The previous regulations, in effect until April 10, 1978, were organized as follows:

Sec. 602.10 The certification processes.
Sec. 601.10a Job offers and contracts.
Sec. 602.10b Wage rates.

The regulations issued March 10, 1978 have been relocated from 20 CFR 602.10 to 20 CFR 655. The table of contents for subpart C, entitled, "Labor Certification Process for Temporary Agricultural and Logging Employment", follows:

Sec.
655. 200 General description of this subpart and definition of terms.
655. 201 Temporary labor certification applications.
655. 202 Contents of job offers.
655. 203 Assurances.
655. 204 Determinations based on temporary labor certification applications.
655. 205 Recruitment period.
655. 206 Determinations of U.S. worker availability and adverse effect on U.S. workers.
655. 207 Adverse effect rates.
655. 208 Temporary labor certification applications involving fraud or willful misrepresentation.
655. 209 Invalidation of temporary labor certifications.
655. 210 Failure of employers to comply with the terms of a temporary labor certification.
655. 211 Petitions for higher meal charges.
655. 212 Administrative-judicial reviews.[4]

The effort to more clearly define the roles of the Labor Department and other participants in the temporary alien labor certification process is directed, first, at clarifying the nature of and statutory basis for the Labor Department's responsibilities. Second, and more significantly, the procedures to be followed by both the Labor Department and employers seeking temporary alien workers are specified in considerably more detail than in the past.

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[1] 43 Federal Register 10306 (Mar. 10, 1978).
[2] 43 Federal Register 10306–10311 (1978).
[3] 43 Federal Register 10306 (1978).
[4] 43 Federal Register 10313 (1978).

This is probably the single most important difference between the revised and prior regulations. It appears to be a response to criticism received during the lengthy consideration of the proposed regulations during 1977, and, possibly, to bills introduced in both the 94th and 95th Congresses which would legislatively mandate a more orderly H–2 certification process.

The following is a brief summary of major provisions of the revised regulations as compared with the regulations they supersede. It is generally organized according to categories used by the Labor Department in its prefatory summary in the March 10, 1978 Federal Register.

Scope and purpose of regulations

Based on the public response to the proposed regulations in 1977, the Labor Department concluded that "many employers, and many worker representatives, do not fully understand the purpose and scope of the temporary labor certification program and the Department's role thereunder." [5] Accordingly, a comprehensive "scope and purpose" section has been added at 20 CFR 655.0, for the purpose of clarification.

Application of the regulations to sheepherding

The previous exemption of sheepherders from the regulations has been eliminated, because "the Department is convinced that sheepherder employers should not be given a unique exemption from attempting to find U.S. workers absent compelling proof that no U.S. workers can be made available." [6]

Definition of employer

Employer associations continue to be recognized as employers, provided they meet the definition of "employer" contained in 20 CFR 655.200(b).

Recruitment process

Under the previous regulations, employers seeking alien workers were required to file job orders for U.S. workers and requests for temporary foreign workers with the local office of the State employment service in sufficient time to allow 60 days for the determination of the availability of U.S. workers, plus the time necessary for the employer to secure foreign workers if the certification is granted. The revised regulations retain the mandatory 60-day requirement, and recommend that "employers should file their temporary labor certification applications at least 80 days before the estimated date of need specified in the application" (20 CFR 655.201(c)). This is to allow time for an employer to appeal, in the case of denial, or to complete the process of bringing in the foreign workers if certification is granted.

The time limits on the recruitment and certification process contained in the revised regulations are geared to the recommended 80-day filing period. The Regional Administrator of the Employment and Training Administration is required to make a determination regarding certification "by the 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later."

The requirement under the previous regulations that "reasonable efforts" be made by the Employment Service and the employers to obtain domestic workers as a prerequisite for certification of foreign workers has been replaced by more specific recruitment requirements (20 CFR 655.203).[7] The Regional Administrator is required to make a determination within the time period indicated above as to whether the employer has complied with these recruitment assurances, and to grant certification upon a finding of compliance (20 CFR 655.206(a)). Provision is made for notification in writing and an expedited administrative-judicial review in the case of a finding of non-compliance (20 CFR 655.205(c)–(d)).

Family housing

Housing is provided without charge to the workers. Family housing is required under both the previous and revised regulations if it is the prevailing practice in the area of employment (20 CFR 655.202(b)(1)).

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[5] 43 Federal Register 10306–10307 (1978).
[6] 43 Federal Register 10307 (1978).
[7] The following requirement is of specific relevance to the BWI program: "If the employer, or an association of employers of which the employer is a member, intends to negotiate and/or contract with the government of a foreign nation or any foreign association, corporation or organization in order to secure foreign workers, . . . [he must make] the same kind and degree of efforts to secure U.S. workers" (20 CFR 655.203(d)(5)).

Worker transportation and subsistence expenses

Both the previous and revised regulations require employers to provide or pay for the workers' transportation and subsistence expenses to the place of employment provided the worker completes 50 percent of the contract period (20 CFR 655.202(b)(13)); and from the place of employment if he completes the contract (20 CFR 655.202(a)(5)). The revised regulations specify that if an employer intends to advance transportation costs to foreign workers, he must also offer to advance the transportation costs to U.S. workers (20 CFR 655.202(a)). Quoting from the preamble:

"In short, the regulations provide, with respect not only to transportation and subsistence costs but also with respect to all wages, benefits, and working conditions, that employers must offer and provide U.S. workers with at least the same level of wages, benefits and working conditions offered or provided to foreign workers." [8]

Work guarantee

The previous and revised regulations require that workers be offered employment for at least three-fourths of the workdays, defined as eight hours, of the contract period (20 CFR 655.202(b)(6)).

Travel to and from worksite

The prior and revised regulations require employers to provide free transportation between the worksites and the workers' living quarters (20 CFR 655.202(b)(5)(iii)).

Recruitment of U.S. workers after certification

The revised regulations specifically require employers to hire any qualified U.S. worker who applies for employment until 50 percent of the period of the contract of the foreign worker hired for the job has elapsed (20 CFR 655.203(e)). However, employers are only required to actively recruit U.S. workers up until the time when the foreign workers have departed for the place of employment (20 CFR 655.203(d)).

Penalty for hiring undocumented workers

There is no provision in the revised regulations. Quoting from the preamble:

"In view of the pendency of legislation on this matter before the Congress, the Department has concluded that the proposal in not an appropriate subject for these regulations, but rather for Congressional action." [9]

Assurance of compliance with Federal, State and local law

The revised regulations require an employer to comply with applicable Federal, State and local laws during the period for which the temporary labor certification is granted (20 CFR 655.203(b)).

Work equipment

The prior and revised regulations provide that all required tools, supplies, and equipment will be supplied at no cost to the workers (20 CFR 655.202(b)(3)).

Meal charges

The prior regulations allowed employers to charge workers from $2.55 to $4.00 for three meals a day; the revised regulations allow a range of $3.25 to $4.00 (20 CFR 655.202(b)(4)).

Work contracts

The prior regulations allowed employers to either provide workers with copies of the work contract, or to post it in a conspicuous place. The revised regulations require that each worker be given a copy of the work contract (20 CFR 655.202(b)(14)).

Adverse effect rates

Under prior regulations, the Labor Department published annual adverse effect rates for certain States and crops, preceded by an annual proposed rulemaking. "Adverse effect rates" are defined in the preamble as "either the prevailing wage rate or a somewhat higher wage rate; they are the wage rates which must be paid in order to ensure that the wage rates of similarly employed U.S

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[8] 43 Fed. Reg. 10308 (1978).
[9] 43 Federal Register 10309 (1978).

workers are not adversely affected."[10] The formula for computing the adverse effect rates is set forth in the revised regulations (20 CFR 655.207(b)(1)), with the result that, quoting again from the preamble, "adverse effect rates, which are merely computed mathematically using the formula, will be able to be published as a Federal Register notice, rather than through a time consuming rulemaking procedure."[11]

Piece rates

Prior regulations required that the piece rates be designed to produce earnings equal to that produced by the adverse effect rate. The revised regulations require that increases in adverse effect rates be accompanied by appropriate increases in piece rates, to avoid forcing workers to increase their productivity in response to the increased adverse effect rates (20 CFR 655.207(c)). Provision is also made for the periodic publication of adverse effect piece rates for selected occupations (20 CFR 655.207(d)).

Comparability of benefits

In more explicit language than the prior regulations, the revised regulations provide that U.S. workers be offered the same benefits as foreign workers: "So that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers, each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits which the employer is offering, intends to offer, or will afford, to temporary foreign workers" (20 CFR 655.202(a)).

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[10] 43 Federal Register 10310 (1978).
[11] Ibid.

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