IRCA and the Evolution of the 'Nonimmigrant'

By Rob Sanchez

Using foreign immigrants for cheap labor has a long history in the United States. It's useful to look at the history of immigrant labor importation in order to understand how we ended up with visa programs such as H-1B.

In the year 1932 the concept of the "nonimmigrant" was formalized into law. Aliens who were to come into the U.S. for the purpose of performing temporary labor were classified as *"nonimmigrants"* because they were admitted into the U.S. for a specified period of time. Timelines were set for their departure from the U.S. that were often enforced by requiring employers to post bonds that were redeemable when the alien departed from the U.S.

The Bracero program of 1942-1964 was the first major guest worker farm program in the United States. It permitted Mexicans to take temporary work in the U.S. agricultural industry. While the Bracero program succeeded in expanding the farm labor supply, it was very unpopular because it resulted in depressed wages in the Southwest. Organized labor groups who viewed the Bracero program as destructive to the American workforce managed to stop the program in 1964.

Running in parallel with the Bracero program, the H visa guest worker program was created in 1952. It hummed along without any major changes or controversy for 13 years. For the most part this labor importation program received scant attention because it was used mostly to import sheepherders and goatherders who worked in squalid conditions on western ranches.

Abolishing the Bracero program didn't mean the end of nonimmigrant labor. One year later the landmark 1965 immigration act marked the beginning of the H-2 program, which was written into law in order to placate farmers that claimed they couldn't find enough American workers to tend to their farms. H-2 marked an escalation in guest worker visas because it allowed employers to hire foreign workers for both agricultural and non-agricultural jobs in locations that were deemed to have a shortage of domestic workers. The H-2 laws stipulated that all foreign sheepherders from the 1952 law be governed by the new H-2 program.

By 1986, the H-2 program was criticized as having similar problems as the Bracero program — it depressed wages and American citizens were losing jobs as they were replaced by nonimmigrant aliens that came into the U.S. legally with H-2 visas. The Immigration Reform and Control Act of 1986 (IRCA) was enacted to solve all the problems caused by the Bracero program and the H-2 visa.

IRCA contained two major sections that dealt with the supply of foreign labor:

1. A general amnesty for illegal aliens that have been in the U.S. for a specified period of time.

2. An escalation of the H-2 visa program to cover a wider variety of job categories.

IRCA set up two classifications of amnesty in order to allow illegal aliens to stay in the U.S. One was called Legal Temporary Resident (LTR), for agricultural workers who claimed they had applied for adjustment of status within a 24-month period starting in December 1987. The other was called Special Agricultural Worker (SAW), which granted aliens amnesty if they could prove they performed agricultural work for 90 days during a one year period before May 1986.

Farmers and ranchers weren't happy that IRCA would give amnesty to their large pool of illegal alien laborers. They argued that if illegal aliens were given amnesty, then agribusiness wouldn't be able to find enough workers that would do stoop labor for paltry

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salaries. The theory was that once illegal aliens were given a path to citizenship, they would start demanding fair salaries and living conditions that were on par with those of the average American citizen. As a compromise to the farmers, new guest worker programs were created by splitting the H-2 visa into two new categories: H-2A for agricultural laborers and H-2B for non-agricultural. Agri-businesses were assured that these programs would provide a means for them to continue to exploit plentiful labor supplies from third world nations.

Congress sweetened the pot for farmers by allowing additional agricultural workers to replenish the labor supply vacated by aliens who are granted amnesty. Additional aliens were allowed entry to the United States as temporary residents between 1990 and 1993. All farmers had to do to hire the aliens was to prove there was a shortage of farm workers — which has never been difficult if the wages and working conditions are so substandard that Americans would prefer other jobs.

Unlike the Bracero program and for the most part the H visa, which used workers almost exclusively from Mexico, the H-2A program expanded the list of countries the aliens could come from. Currently there are over 50 different countries on the list, including Brazil, Chile, Croatia, Fiji, Poland, Romania, Samoa, Serbia, Turkey, and Tuvalu. Significantly, the H-2A/B visa programs marked the beginning of the internationalization of the guest worker labor supply and the broadening of the types of jobs that aliens could be employed for.

IRCA established provisions that were touted as protections for the wages and living conditions of nonimmigrant agricultural workers. Employers are required to provide housing and to give compensation for medical care for work-related injuries. It all sounds good on paper, but enforcement of the rules by the Department of Labor (DOL) is almost non-existent. IRCA gave the DOL primary enforcement power for the H-2A program but didn't ensure that it would have adequate manpower or the budget to enforce the rules.

The number of investigators has actually gone down since IRCA was enacted. Between 1974 and 2004 the number of investigators was reduced by 14 percent and the number of actual claims against employers has declined by 36 percent.

Enforcement of the rules is problematic because many of the H-2A employees work in remote rural areas. Conducting investigations and audits is time consuming and expensive, so it's simply not practical to enforce IRCA rules, as lax as they are. Of course the lobbyists who designed the program were well aware of the impracticalities involved with enforcement.

Although the DOL is empowered with enforcement responsibility, the lines of authority aren't straightforward. Several government agencies manage the program. In addition to the ETA division of the DOL, which has enforcement power there is the U.S. Citizenship and Immigration Services (USCIS), the Department of Homeland Security (DHS), and the U.S. Department of State (DOS). Various state workforce agencies are involved also. Given the complexity of the program it's very easy for bureaucrats to pass the buck when something goes wrong. Nonimmigrants and citizens with complaints must try to navigate the web of bureaucracy if they want employers to be investigated.

H-2A has provisions that penalize employers for hiring illegal aliens, but often employers prefer the illegals because it's slightly less of a hassle than using the H-2A program, and of course the risk of getting caught for violating the law is very low. Providing a cockroach infested mobile home for a crew of H-2A workers is more expensive than providing a piece of land for the illegal aliens to pitch a tent. Although the program has no limit as to the number of nonimmigrants that can be hired is rarely used because the pool of illegal aliens is so ample.

It is important to keep in mind that claims that farmers cannot find enough legal farm help are false because the H-2A program is unlimited. Farmers can hire as many aliens as they want but, they don't feel that following the rules is worth their time and/or money.

IRCA provides an illusion that nonimmigrants can protect themselves from abuse by allowing individual employees to file lawsuits against their employers if the

rules have been violated. This "protection" is rarely used by exploited laborers because they are not able to afford expensive lawyers, and of course nonimmigrants who complain are subject to job loss, blacklisting, and deportation. IRCA forbids groups of H-2 visa holders from filing class action lawsuits, which puts them at a huge disadvantage when going against large employers who have a pattern of violating the rules.

As Philip Martin said in his article "Guestworker Programs for the 21st Century", the purpose of the H-2A program was to "add workers temporarily to the U.S. workforce without adding permanent residents to the population, and to do so in a manner that does not adversely affect U.S. workers." Unfortunately the H-2A/B programs have been miserable failures at all those goals.

In 1987 regulations were provided by the Department of Labor Employment and Training Administration (DOLETA) to offset the adverse effects of immigration on U.S. workers in regards to wages and working conditions. It was an official admission that the government understood that American workers would suffer as a result of the changes to the H-2 visa.

Guestworker programs such as H-2A/B fail to limit the number of permanent residents that would be created because IRCA didn't provide penalties for employers who don't make sure that their H-2A workers go back to their home country after their visa has expired. Requirements in the 1932 law were gutted that stipulate that bonds must be posted that could be redeemed when it's certified the alien worker left the U.S., so employers had no incentive to make sure their nonimmigrants are sent back to their home countries. Most of these people become "out-of-status" after their visa expires and end up becoming part of the illegal alien population. This loophole has never been plugged, so the number of out-of-status illegal aliens continues to grow.

From its beginning, IRCA was a complete failure at everything besides giving illegal aliens amnesty. To fix the problems it created, the Immigration Act of 1990 was passed.

The 1990 act made several changes to IRCA in an attempt to prevent employers from paying H-2 employees below market wages. Wages for H-2A/B are calculated using a formula called the Adverse Effect Wage Rate (AEWR). The number is calculated regionally by individual state agencies. It's supposed to guarantee that Americans that want to do similar back-breaking work don't have to accept below-market wages in order to compete with the nonimmigrants. Of course the AEWR is subject to statistical anomalies and political manipulation, but it does require that H-2A/B workers must make at least minimum wage. Assuming the employers really pay AEWR, Americans are assured they can have these stoop labor jobs for similar pay scales.

The 1990 Act did nothing more than add to the problems created by the previous nonimmigrant programs. It gave birth to the infamous H-1B guest worker program, which many people now call the "high tech Bracero visa." It would be more accurate to call H-1B a global labor arbitrage bill that forces American wage earners to compete with the cheapest labor that can be found anywhere in the world. ■