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AGRICULTURAL EMPLOYMENT LAW AND POLICY

A Study of the Impact of Modern Social and Labor
Relations Legislation on Agricultural Employment

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Chapter 12

ALIEN FARMWORKERS AND IMMIGRATION AND NATURALIZATION LAWS

It has frequently been suggested that one of the more serious problems facing American farmworkers is the adverse impact of alien workers on job opportunities, wages, and working conditions. The concern is not only with those who have gained entry illegally, but also with those who are in the United States legally. Mexico, because of its proximity, its lower level of economic development, and its high unemployment rate, is the source of most alien farmworkers. The flow of alien farmworkers, both documented and illegals, from the Caribbean area, while substantially less than from Mexico, is also a matter of concern.^{1/}

There are three basic categories of alien farmworkers: (1) aliens who have legally entered under the auspices of the U.S. Employment Service; (2) commuter workers, some in agriculture and some in other walks of life, who enter legally with their so-called "green cards;" and (3) illegal aliens who are in the country in violation of U.S. immigration laws.^{2/} This latter group, from what statistics are available, appears to be by far the largest of the three. A brief historical survey puts the current situation in perspective.

Historical Development

With the exception of a ban on Asian immigrants introduced in the late 1800's, quotas were not a part of U.S. immigration policy until the enactment of the Immigration Act of 1924.^{3/} Fogel indicated: Until legislation excluded Asian immigrants in the late Nineteenth Century, restrictions on the migration of people to the U.S. had only been qualitative, banning criminals, persons with various diseases, and those who were thought unlikely to be able to earn a living in the U.S. The last qualification was interpreted loosely because immigration policy until World War I was dominated by the desire to provide unskilled labor for America's farms and industries. Able bodied workers were admitted when national unemployment was high as well as when it was low.^{4/}

The quotas as initially established in the Immigration Act of 1924 did not extend to Western Hemisphere countries.^{5/} Many persons who crossed the Mexican border nevertheless failed to obtain available visas. Little attention was paid to this situation until the Great Depression, when legal immigration from Mexico was reduced by strict enforcement of provisions in the immigration laws banning people likely to become public charges.^{6/} Illegal entry from Mexico also declined because of the high unemployment in the United States.^{7/} Massive "rounding up" and "sending home" of Mexican nationals also occurred during this period, creating a tension in the relations between the United States and Mexico that continues to cause adverse comment.^{8/}

Illegal entry increased again after World War II, but the level was held down by Public Law 78, commonly referred to as the bracero program, which was in effect from 1951 through December 1964.^{9/} Under this program, Mexican contract labor was supplied, primarily to U.S. agriculture in Texas and California, with the number of foreign workers exceeding 400,000 a year from 1956 through 1959.^{10/} Strong organized labor opposition, together with other forces, brought the program to an end and set the stage for the current situation.^{11/} In 1968, an immigration quota of 120,000 for the Western Hemisphere became law.^{12/} However, the ceiling has had no real effect with respect to Mexico since the number of legal immigrants has increased since 1968.^{13/}

Today, illegal entry from Mexico is at unprecedented levels and the problems that have been allowed to develop seem to defy solution. However, only approximately 20 percent,^{14/} of employed illegal aliens work in agriculture. Therefore, the overall policy problems that must be faced transcend concerns with farm labor policy.

Not all aliens who work in U.S. agriculture are in the country illegally. The two categories of legal alien farmworkers and the illegal alien farmworker category must be considered in turn.

Current Status of the Law

"H-2" Workers

The first of the three categories of aliens includes those who enter the United States farm work force legally under the so-called "H-2" program of the U.S. Employment Service.^{15/} These aliens are classed as nonimmigrants under the Immigration and Nationality Act.^{16/} The statutes offer this description:

(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 temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country....^{17/}

In the last few years, the largest users of the H-2 program have been East Coast apple growers. There have also been requests from Florida growers for sugarcane workers, from Montana farmers for irrigation pipelayers, and from Idaho ranchers for sheepherders.^{18/} Statistics for the year ending June 30, 1967, and the nine following years indicate that the number of agricultural workers entering through this program has been quite small and that they have come primarily from the West Indies. For example, for year ending June 30, 1976, 572 H-2 workers entered from Canada, 11,568 from the West Indies, and 185 Basque sheepherders from Spain.^{19/} No Mexican laborers entered under the program from July 1, 1968, to June 30, 1976. A 1978 House of Representatives report on undocumented workers indicated that there was a request for 800 workers by Imperial Valley growers in the late 1970's, but there has been little incentive for farm employers in the Southwest to apply for H-2 workers.^{20/}

The Department of Labor (DOL) has issued extensive regulations governing the admission of non-immigrant workers under the H-2 program.^{21/} Agricultural, as well as certain other employers, anticipating a labor shortage, may request certification for the use of temporary foreign labor, but the application must be filed 80 days prior to the anticipated need to permit a 60-day search for domestic workers.^{22/} The applicant must give assurance that he will cooperate in the active recruitment of U.S. workers including the placement of at least two advertisements in local newspapers of general circulation.^{23/} By the sixtieth day of recruitment or 20 days before the date of the specified need, the appropriate regional administrator must grant the application to the extent that there has been a determination that there will not be enough U.S. workers to fill the employers' needs.^{24/}

The DOL periodically sets adverse hourly wage rates which will be the prevailing hourly rates in the area for the type of employment involved. Employers must pay the foreign workers at these levels or above. This regulation exists because of a perceived need to prevent adverse effects upon U.S. workers.^{25/}

An employer who hires temporary foreign labor through the H-2 program is subject to numerous additional regulation. The job offer that is made must comply with regulations regarding wages, housing, and insurance where there is no worker's compensation coverage, supplying of tools, cost of meals, transportation, term of employment, and guaranteed number of work-days, record keeping, payroll deductions, and a number of other items.^{26/} If U.S. workers are supplied to fill the declared need, they must be hired on at least the same terms as those proposed for the foreign laborers. These many regulations, coupled with the fact that it is often very difficult for an agricultural employer to be aware of his manpower needs 80 days in advance, have tended to keep many employers from using this method of hiring foreign nationals. There has also been a suggestion that the DOL has engaged in foot-dragging when H-2 applications have been made, with one member of Congress speculating that there has been pressure from organized labor to discourage the use of the program.^{27/} During public hearings in 1978, a DOL official conceded "that we are not without sin in this whole situation," but added that there had been cases where farm employers preferred foreign workers and, for that reason, did not search the domestic labor market in an appropriate way.^{28/}

In Elton Orchards v. Brennan,^{29/} a New Hampshire apple grower sued when his request for certification of West Indies workers for his orchards was turned down. The grower had instead been given inexperienced domestic workers from Louisiana. He alleged that, since other orchards in the area were given West Indies laborers, denial of such workers to him was an arbitrary and capricious act. The Court of Appeals held that the DOL need only have a rational basis for excluding him from certification. To recognize the right of this grower to use aliens for his business would negate the policy of first using domestic workers.

Given the numbers involved, and given the fact that foreign laborers are brought in under the H-2 program ostensibly only when there is a shortage of available domestic labor, it is difficult to see that the program presents a serious threat to the U.S. farm labor force.

"Commuters"

Canadians and Mexicans are able to attain what is known as "commuter" status and are commonly referred to as "green-carders." The name is derived from the original color of the Alien Registration Receipt Card (formerly Immigration Form I-551) that the worker must carry. Most commuter crossings are at the U.S.-Mexican border.

A commuter is required to initially obtain an immigrant visa and is charged to the appropriate numerical ceiling. The visa must then be presented at a port of entry where an Alien Registration Receipt Card is issued. The cards, which are issued to both daily and seasonal commuters, is issued for a six-month period at the end of which the employment status of the individual is reaffirmed and another card issued.^{30/} As of 1976, about 64,000 persons had commuter status with most being daily commuters and less than 15 percent being seasonal commuters.^{31/}

In 1924, when Congress passed the immigration act, residents of the Western Hemisphere were deemed "non-quota immigrants."^{32/} Nationals of these countries had to obtain immigration visas only if they wished to reside permanently in the United States. Otherwise, they passed freely across the borders as members of various nonimmigrant classes.^{33/} This created a large loophole in U.S. immigration law since aliens barred from the United States under quota restrictions simply migrated to Canada or Mexico and commuted to the United States from these countries to work. This led to the promulgation of General Order 86, which applied quota restrictions on aliens of quota countries regardless of where they crossed the border.^{34/}

However, immigration officials did not want to upset established employment patterns of citizens of Canada and Mexico, many of whom held jobs in the United States without protest by American organized labor. Therefore, immigration officials created an "amiable fiction" under which these foreign commuter workers were considered immigrants even though they did not establish permanent residence in the United States. Under that scheme, Canadian and Mexican nationals had to apply for entrance to the United States as nonquota immigrants. Upon satisfying all the ordinary entrance requirements, these aliens were given visas that allowed them to live permanently in the United States but did not require them to do so. Thus, the commuter practice was established and has continued relatively unchanged.^{35/} A daily or seasonal commuter is classified as a "special immigrant" under the statute,^{36/} as one lawfully admitted for permanent residence, who is returning from a temporary visit abroad. The nature of the amiable fiction becomes clear as one observes that a person who returns to his residence in Mexico after a day's work, or, in the case of a seasonal commuter, after a harvesting season is over, and then returns to the United States to work, is categorized as returning to the United States from a temporary visit abroad.

In Saxbe v. Bustos,^{37/} an American farmworker brought suit against the United States challenging the commuter system's legality. The U.S. Supreme Court, in allowing the existing commuter practice to remain undisturbed, upheld the Immigration Service's amiable fiction that a commuter's place of employment coincides with an unrelinquished lawful permanent residence in the United States. Schnidman has suggested that the opinion in Saxbe "reflects an underlying concern that termination of the longstanding administrative practice would have important economic, political and social implications."^{38/} Without doubt, any sudden change in the present commuter system could cause economic hardship for affected aliens, their families, and their communities.

As the court noted in Saxbe, some have suggested that a termination of the commuter program would also have a deleterious effect on international relations.^{39/} Others, according to Schnidman, disagree and observe that when Congress allowed the bracero program to lapse, there were no repercussions from Mexico.^{40/} However, U.S.-Mexican relations were proceeding under substantially different conditions in the 1960s, as will be indicated more fully later.

There may be substantial displacement of domestic workers as a result of the continued operation of the commuter program. There may also be a tendency for commuters to depress wages, lower working conditions, and impede unionization and collective bargaining. If this is true, it would be a matter of particular concern to domestic farmworkers in the western and southwestern United States where green-carders are most numerous. However, given the numbers involved and the fact that only a portion of commuters are involved in agricultural work, there is serious doubt that there is real basis for these concerns. There is no solid statistical evidence to indicate that alien commuter workers depress

wages and working conditions in American Agriculture.

"Illegal" Aliens

Aliens who have entered the United States illegally constitute the third category of alien farmworkers employed in this country. The "illegals" provide the greatest potential for adverse effects on domestic farmworkers, if for no other reason than the sheer numbers involved. The extent of the suggested adverse impact, if any, is exceedingly difficult to assess. As Leonel J. Castillo, former Immigration and Naturalization Service commissioner, indicated in a 1978 hearing:

The social and economic impact of this undocumented alien population on the United States is difficult to assess. This is because the present state of valid research on undocumented aliens is generally insufficient for a meaningful evaluation of their effect on the United States.^{41/}

However, there are some estimates of the possible extent of illegal migration into the United States. The Social Security Administration estimated that in 1973 there were four million with a range of 3 to 6 million illegal aliens in the United States.^{42/} Testifying on May 17, 1978, Castillo indicated that there had been "1 million apprehensions last year" with approximately 900,000 of those apprehensions along the Mexican border. Some 30 percent of those apprehended were repeaters.^{43/} It must be assumed that many who enter illegally are not apprehended and remain in the United States causing the total illegal population to grow annually. Zero Population Growth concludes that an assumption that 800,000 enter and remain each year is reasonable.^{44/} That figure is probably on the high side, particularly with respect to the number remaining.

While the number of illegals who seek and find employment in agriculture may be substantial, there is good reason to believe that it amounts to only a fraction of the total illegal population. Immigration officials estimated that in 1975 about 1 million jobs were held by illegals, with approximately 335,000 of them in agriculture.^{45/} A 1977 report indicates that there were more than 64,000 illegals in the Grain Belt states: Colorado, 26,500; Kansas, 12,500; Missouri, 10,000; Wyoming, 5,000; Iowa, 4,000; Nebraska, 3,000; North Dakota, 2,000; and South Dakota, 1,400.^{46/} There was, however, no indication of how many of the Grain Belt aliens were employed or of how many were employed in agriculture. Another report indicates that in the summer of 1980 the number of farmworkers in California increased by 10,000 as a result of an influx of illegal aliens.^{47/}

A survey reported in 1973 found that 72 percent of the apprehended illegals were involved in or seeking farm work.^{48/} A 1970 survey showed that 40-45 percent of the workers in Mexican border cities were either holding or had held jobs in the United States and that agriculture was the largest source of employment.^{49/} Another commentator reports that nearly three-fourths of illegal aliens come to seek farm work.^{50/} A broader focus and an attempt to look at actual employment is more appropriate. In that context, the 335,000 figure reported by immigration officials, while a very rough estimate, is probably the most reliable indicator at the moment. Fogel, who feels that only about 20 percent of the illegals are employed in farm work, notes that "their predominant employment is in all types of low-wage nonfarm firms, with concentrations in apparel and textile manufacturing, food processing and preparation, and other services."^{51/}

In spite of the lack of sound statistical data, there have been strong assertions that illegal aliens are having an adverse effect on the U.S. economy, including the agricultural sector. A labor spokesman indicated during congressional hearings in 1973 that illegally employed aliens take jobs that would be filled by U.S. workers, depress wages and working conditions of domestic workers, compete with unskilled and uneducated locals, reduce the effectiveness of employee organizations, increase the burden on U.S. taxpayers through added welfare costs, and constitute a group highly susceptible to exploitation by employers.^{52/}

Although isolated data can be gathered to support these contentions, there are many who question the basis for such concerns. Nafziger has indicated that "there is strong and persuasive evidence that the undocumented Mexican alien takes jobs no one else wants."^{53/} Sterba concluded that there are indications that many employers pay illegal workers the same wages as other workers and provide the same benefits and working conditions.^{54/} However, Sterba conceded that many employers probably take advantage of the situation by paying less than the minimum wage and by requiring illegals to work under unsafe and unhealthful conditions.^{55/} Abuses such as issuing stop-payment orders on payroll checks that have been issued to workers just prior to deportation have been noted.^{56/} Abuses as extreme as the existence of underground labor exchanges where illegal aliens are bought and sold and forced to work for little or nothing have been reported.^{57/} Other dramatic cases of violations of antislavery and peonage statutes are also coming to light.^{58/}

According to Fogel, there are those who feel that to the extent competition exists from foreign workers, it probably mostly in the higher-paying categories where undocumented Mexican aliens are of little significance.^{59/} Natziger noted that the secret-ballot provisions under the California Agricultural Labor Relations Act have helped to strengthen organized labor in agriculture even in the presence of undocumented aliens.^{60/} A recent DOL study ^{61/} based on interviews with apprehended illegals showed that 77 percent paid Social Security taxes, 73 percent had federal tax withheld from their paycheck, just 1.3 percent had received food stamps, and only 0.5 percent were on welfare.^{62/} The truth of the matter is that as long as migration across the U.S.-Mexican border is largely out of control, there is little chance of generating statistical data that will give a clear picture of the plight of the "illegals" or the impact of illegals on employment opportunities and conditions in agriculture for domestic workers.

Any analysis of the phenomenon of illegal aliens in the United States must deal with the reasons for this mass migration. In the case of Mexicans coming to the United States, the critical factors seem to be social and economic. Castillo has referred to a "push-pull" factor.^{63/} The source country—in this case Mexico—contributes the "push" factor given its burgeoning population, high unemployment, low wages, poor living conditions, and the like. The "pull" country—in this case the United States—offers available employment at relatively higher wages, no penalties or the remote chance of penalty on those who hire illegals, and no real penalties for illegals who are caught other than being sent back to Mexico and the inconvenience of having to reenter the United States. While there are infractions of U.S. law when one enters the country illegally, there are no practical consequences other than being deported. The poor cannot be fined and hundreds of thousands cannot be imprisoned.^{64/} In addition, the United States as a pull country offers better living conditions, greater educational opportunities, and the drawing power of family already living here. Castillo discounts geographic proximity as a major factor and concludes that the push-pull factor will continue to operate as long as there are great differences in economic opportunity between developed and underdeveloped countries.^{65/} Once these differences are largely eliminated, the migration will slow and a situation such as that which exists on the U.S.-Canadian border can be expected.

The current state of U.S. immigration law and the enforcement capabilities of border authorities, as currently staffed, equipped, and funded, allows the push-pull factor to operate virtually unimpeded. The rather cumbersome nature of the H-2 program and the commuter scheme, coupled with the Western Hemisphere quota for immigration, does not begin to deal with the pressure to emigrate from Mexico or to leave temporarily to work in the United States. The lack of penalties for employing illegals and the inability under the present state of the law to impound the vehicles of smugglers of people create a situation where jobs can be had and transportation to reach them exists. Smugglers who have been caught have been punished lightly by a couple of months in prison and fines of a few hundred dollars.^{66/} The border itself, while not wideopen, is relatively easy to cross without detection. The border patrol has basically the same number of people it had 30 years ago.^{67/} Castillo, testifying in 1978, indicated that there are about 2,200 border patrol officers for the entire United States with about 300 on duty at any one time on the 2,000-mile southern border.^{68/} Further, current methods of documentation of workers is such that, once they are in the United States, they have no difficulty in getting Social Security cards, driver's licenses, and other standard forms of identification. According to Fogel, some have suggested that the design of current U.S. law, the level of border patrol funding, and the known operation of the push-pull factor represents a *de facto* U.S. policy to tolerate the movement of illegals into the Southwest and other parts of the United States to meet the labor requirements of U.S. agriculture and industry.^{69/}

Emerging Developments

The Carter administration manifested an awareness of the problem of alien workers in the United States. The president's cabinet committee studying the problem made the following recommendations: (1) employers who hire illegal aliens should be subject to civil fine, (2) new identity cards for legal aliens that are difficult to counterfeit should be issued, (3) illegals who are already in the United States should, under certain conditions, be granted amnesty and allowed to remain in the country, and (4) efforts should be made to create jobs in the immigrant's homeland by means of investment, development aid, and more liberal trade agreements.^{70/}

Certain of the Carter administration's proposals will not be easily implemented. Opposition from certain political quarters and from the press has been manifested. James Reston of the *New York Times*, in commenting on Secretary of Labor Marshall's and former Attorney General Bell's proposal for limited amnesty for those illegal aliens who have been in the United States for five years on good behavior, indicated that giving such persons the status of legal resident aliens would result in their bringing

their immediate families and dependents into the United States in formidable numbers.^{71/} Reston asserted that there is an average of more than five dependents living in Mexico for each illegal Mexican now living in the United States.^{72/} The suggestion is that an influx of such numbers of unemployed Mexicans could constitute a serious strain on the United States' economy. Assuming that Reston's numbers are correct, there is some doubt that amnesty provisions would lead to such a result. On the other hand, the presence of large numbers of family members in Mexico may be providing a pull in that direction which the amnesty scheme might eliminate.

The amnesty proposal has not been introduced in the 96th Congress. However, a number of other related bills were introduced. The major issues which those bills sought to address were: (1) imposing civil and possibly criminal sanctions on employers who knowingly hire illegal aliens, (2) denying the deduction, under the Internal Revenue Code, for labor expense incurred in hiring illegals, (3) increasing the size of the border patrol, (4) improving the documentation provided to legal aliens working in the United States, (5) instituting strict reporting requirements regarding employment of legal aliens, (6) authorizing the use of sophisticated electronic sensing devices in border patrol operations, (7) reduction in the time to 20 days between application and date of need for the H-2 program as it applies to agriculture, (8) authorizing impounding of vehicles, vessels, and aircraft used to smuggle people into the United States, (9) extensive disclosure of illegals receiving public assistance, and other miscellaneous measures.^{73/}

Notable in their absence from the bills were provisions designed to grant amnesty to illegal aliens who have been in the United States since a certain date or for a set length of time, provisions designed to increase the quota for immigration to the United States from Mexico and other Western Hemisphere countries, and provisions for substantially increased bilateral or multilateral aid to Mexico.

Some states have not been waiting for Congress to make the intentional employment of illegal aliens unlawful. A 1977 study reported that 12 states have passed such legislation.^{74/}

The California Labor Code provides:

"No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers."^{75/}

The penalty is a fine of not less than \$200 nor more than \$500 for each offense. The U.S. Supreme Court, in De Canas v Bica,^{76/} found the California statute to be constitutional and thus sanctioned state legislation regulating the employment of illegal aliens. The Court held that the doctrine of federal preemption had not been violated and that there had not been an infringement of the exclusive congressional power of immigration and naturalization. However, the problems of proof for a prosecutor, who must demonstrate that the employment was with knowledge of illegal status and under circumstances where there would be an adverse affect on lawful resident workers, make enforcement extremely difficult with the result that the practical effect of the statute is very limited.

Recommendations

Given the present state of the law in the United States, there appears to be little prospect of making substantial inroads into the number of illegal aliens entering the country from Mexico short of the construction of a "Great Wall of China," the stationing of a vast number of border patrol officers, and significant air and sea surveillance. Few seriously advocate such drastic measures. The traditions of this society and moral and political concerns over our relationship with oil-rich Mexico rule out such an approach. Mexico's official attitude is that the "silent migration," as President Lopez Portillo terms it, whether legal or not, is something the United States needs and should not complain about.^{77/} Unofficial comments in Mexico indicate a feeling that the illegals are going into Texas, New Mexico, Arizona, and California by right since those areas were historically a part of Mexico.^{78/} There can be no doubt that the Mexican government views the opportunity for its underemployed and unemployed to go into the United States as an important "safety valve" and of critical importance to the welfare of Mexico.

Efforts have been made to construct 12-foot-high fences along short stretches of the border where traffic has been the heaviest. Labeled the "Tortilla Curtain," construction began on June 19, 1979, of a four-mile-long segment in the vicinity of El Paso, Texas.^{79/} Much controversy arose in the United States over this plan. There was a substantial outcry over earlier fence designs which had called for razor-sharp projections capable of severing fingers and toes.^{80/} Such efforts are likely to have very limited effect on the overall migration into the United States and may well be a source of irritation in the developing relationship with Mexico.

On the other hand, the creation of an open border with no restrictions whatsoever does not seem to be an acceptable alternative. Such a move may release a mass migration from Mexico to the United States on a scale heretofore unimagined. Further, an open border would be an invitation for persons from countries other than Mexico to use such a route into the United States.

The current state of affairs is also not a viable alternative. It is manifestly undesirable to have immigration laws which are, with respect to the Mexican border, virtually meaningless.^{81/} It is also undesirable to have a situation where millions of people in the United States, many on a permanent basis for all practical purposes, must live day to day classed as "illegals." The attempt to speak of such persons as "undocumented," and admittedly less inflammatory term, does not alter the fact they are in constant violation of U.S. immigration laws and are a class apart from legal U.S. residents. This illegal status is to their ongoing disadvantage and makes them subject to continual suspicion, exploitation, and derogation by many elements in our society. Unfortunately, the taint probably rubs off on many Mexican-Americans who are U.S. citizens, or who are here legally under the immigration laws. Yet, by virtue of U.S. immigration laws and related administrative policies, the United States has "allowed" these illegals to enter and remain, some now having been here for many years. As one commentator has suggested, it is no accident that we have massive numbers of foreign laborers in this country.^{82/} Cheap, docile labor has been attractive to U.S. employers, including those engaged in agriculture.^{83/} Political, moral, and practical considerations rule out mass deportation and closing of the border.

Further, the impact of the illegal element on the administration and enforcement of many of our domestic laws must be significant, although this is impossible to document. It stands to reason, however, that a person in the country illegally is not likely to come forward to report child labor violations, wage and hour infractions, occupational safety and health problems, wage and hour complaints, unfair labor practices, abuses under the Social Security system, misuse of workers' compensation and unemployment schemes, and other matters. In addition to not being hired in the future—a threat to many domestic migrant and seasonal workers—there is, for the illegal, the added threat of detection and being deported.

Some have suggested that the answer to the current crisis may lie in part in a massive increase in the use of H-2 or commuter status with strict penalties on employers who knowingly hire illegals. As part of such a scheme, aliens who fail to attain H-2 or commuter status would be subjected to an increased program of deportation. However, it is doubtful that widespread compliance would be expected by domestic employers or alien workers. Such a system would simply be too cumbersome to accomplish much. Further, it would not effectively deal with the illegals currently in the country.

The only long-range answer to the problem seems to be the economic development of Mexico to largely eliminate the "push" aspect of the push-pull phenomenon. Some hope is on the horizon in the anticipation that Mexico will soon have substantial revenues from the sale of oil and gas. Expansion of the oil and gas industry should substantially upgrade the Mexican economy and generate many jobs at better pay levels than at present. However, some feel that there is reason to doubt that the Mexican government will pour substantial resources into the development of its poorer northern states where most of the migration into the United States originates. Yet, it seems inevitable that unless progress is severely impeded by continued high rates of population growth,^{84/} further development and industrialization of areas in Mexico other than the northern states may create a pull to those developing parts of Mexico, thus taking some of the pressure off the U.S. border.

Those who are skeptical about the Mexican government's intentions toward poorer rural areas should note a growing Rural Development Public Investment Program, known as PIDER.^{85/} Seventy percent of the investment is in promoting productive activities to provide permanent jobs, raise personal income, and generally improve the social lot of those in chronically depressed rural areas.^{86/} The Mexican government spent \$320 million on PIDER in 1979, the figure is to climb to \$500 million in 1980.^{87/} The United States is giving no direct assistance, but has backed loans to Mexico from the World Bank and the Inter-American Development Bank.^{88/} It is too early to measure the impact of this program on immigration from Mexico. However, it is the kind of program that may eventually have an important impact.

The United States cannot sit by and wait a number of years for Mexico to take the pressure off the U.S. border. So long as substantial migration continues and so long as the U.S. has great numbers of illegals within its borders, the most promising alternative appears to be to somehow legalize the migration to the point where the legal route will be reasonably attractive and the illegal route much riskier than at present. If the number of illegals crossing the border diminishes substantially, there may be a chance that the remaining illegal traffic can be dealt with and in the end reduced to a trickle.

A substantial reduction of illegal traffic will involve some hard decisions, and whether they are politically salable in the United States remains to be seen. Certainly, some program of amnesty for certain illegals already in the United States should be a part of the package. Evidence of ability to provide financial support could be a prerequisite to authorization to those granted amnesty to bring in additional family members from Mexico. In the alternative, a numerical limit could be placed on how many could enter for family reunification.89/

A second part of the program would call for an increased immigration quota for Mexico. Realistic standards in terms of qualitative requirements would have to be adopted. Under normal conditions, the U.S. economy should be resilient and expandable enough to accommodate substantially more immigrants than are presently permitted from Western Hemisphere countries.90/ The U.S. economy will probably have to absorb these people as "illegal" in any event and the absorption may as well be accomplished "above board," with dignity and in a systematic way. For those who desire to work in the United States temporarily the H-2 and commuter programs may still serve a purpose.91/ If administration of these programs can be improved so that the decision that there will be no adverse effects on the U.S. work force can be made quickly, farmers and other employers may be more willing to use the program, particularly if penalties are imposed for knowingly hiring illegals. One commentator has suggested that sanctions should be imposed without scintilla if the employer hires an unreasonably large number of illegals, 25 for example. 92/

Better border patrol control will also have to be a part of the program with an increase in the number of officers and an updating of equipment available to them. Some immediate efforts to provide more meaningful assistance to improve employment opportunities and wage rates in the northern states of Mexico would also seem important. It has been suggested that past efforts to move American industry into these areas has yielded low-paying jobs, but probably has contributed to the migration to border cities, exacerbating unemployment problems and leaving many with their next step, illegal entry into the United States.93/ More meaningful bilateral and multilateral assistance seems to be called for.94/

President Portillo has suggested giving legal status of "guest migrant worker" similar to that of Turkish workers in West Germany.95/ He suggests granting this status to 750,000 Mexicans a year and, at the same time, increasing the U.S. annual immigration quota.96/ He also advocates some form of amnesty for Mexicans now in the United States illegally in return for which Mexico would attempt to tighten its own borders to prevent illegal movement into the United States.97/ Whether the guest migrant worker concept should be substituted for expansion of current H-2 and commuter programs is questionable, but the amnesty program deserves serious study, particularly if it will bring the side-benefit of intensified Mexican border patrol activity. Strong objections to the guest migrant worker proposal come from those who fear institutionalization of a second-class citizenry with attendant exploitation.98/

If a comprehensive program, fashioned from these suggestions, is instituted, there would no doubt be a difficult period of transition. However, the end result could well be a stemming of the tide of illegals entering the United States. The gross numbers of Mexicans entering the United States might not fall substantially until the push factors are reduced, but, in the meantime, some semblance of control could be brought to the situation, the crisis atmosphere substantially eliminated, and good relations with the Mexican government fostered.

The most compelling argument for the recommendations set forth above is that, if people are going to enter the United States under any foreseeable circumstances, something ought to be done to record their entry and give it legal status. Once this occurs, the United States can begin to determine just what impact the whole phenomenon is having on domestic society, something that is now virtually impossible. Recent efforts to gather meaningful statistics have failed miserably.99/ Once the situation is under reasonable control and data are available, it should be possible to make some reasonably accurate determinations about adverse effects, if any, on the domestic work force. If the poor and uneducated in the United States are really being harmed, a "liberal dilemma" truly arises.100/ Does the United States at that point move to assist its own poor or those who stand without, assuming such a choice has to be made? The decision will be difficult given the traditions of this society, but at least a decision, if politically feasible, to assist those legally inside the borders, will be made intelligently and with some chance of corrective measures being implementable.

After the border is under some semblance of control, it should be possible, if politically feasible, to cut back on H-2 workers or commuter workers for a time or adjust the immigration quota and actually be able to deal with any increased efforts at illegal entry that may follow. Further, it is reasonable to suggest that, if we reach a more controlled state, good cooperation from Mexicans legally

in the United States may be forthcoming since it would be in their own self-interest to discourage illegal entry at a time of domestic unemployment or other economic difficulty.

The key to the handling of the current problem is a comprehensive approach in the United States that the Mexican government can tolerate. President Portillo has indicated that his country wants to export goods, not people, and there is no reason to doubt the sincerity of his statement.¹⁰¹ However, the "safety valve" of immigration to the United States remains important to Mexico for the foreseeable future and, considering the United States' need for Mexican oil and gas, there may be no way that U.S. policy can be formed in a vacuum and without close bilateral cooperation with Mexico.¹⁰²

Piecemeal legislation in the United States is not likely to yield desired solutions. Unfortunately, much that is being proposed in the Congress falls into the piecemeal category. Further study is not likely to yield a better understanding of the situation, better data, or a panacean solution. Comprehensive legislation needs to be devised and acted on at an early date.

Notes to Chapter 12

1. See account of plight of Haitian agricultural workers illegally in the U.S. at N.Y. Times, August 24, 1980, at 1.
2. Many commentators and officials now refer to such persons as "undocumented" aliens, but in this study they will continue to be called "illegal" aliens.
3. Immigration Act ch. 190, 43 Stat. 153 (1924), current version at 8 U.S.C. §§1151 et seq. (1976).
4. Fogel, "Illegal Alien Workers in the United States," 16 Industrial Rel. 244 (1977).
5. Ib.
6. Ib.
7. Fogel, supra note 4, at 245.
8. Ib. Many studies refer to massive deportation activities. Technically, this is not correct since quasi judicial deportation proceedings have normally not been resorted to, and are not currently resorted to, in connection with returning Mexican nationals to Mexico. This is done without formal proceedings and it is only where the individual claims a right to remain that deportation will be used.
9. See, Craig, The Bracero Program: Interest Groups and Foreign Policy (1971); Act of July 12, 1951, Pub. L. No. 78, 65 Stat. 119 as amended, 7 U.S.C. §§1161-1468 (1968) as amended, 7 U.S.C. §§1462-1467 (Supp. III 1962).
10. U.S. Labor Department files.
11. Fogel, supra note 4, at 245.
12. Id. at 244.
13. Id. at 248.
14. Id. at 254.
15. 8 U.S.C. §1101(a)(15)(H)(ii) (1976).
16. 8 U.S.C. §1101(a)(15)(A)-(J) (1976), as amended.
17. 8 U.S.C. §1101(a)(15)(H)(ii) (1976).
18. Hearings on Undocumented Workers: Implications for U.S. Policy in the Western Hemisphere Before the Sub-committee on Inter-American Affairs of the House Committee on International Relations, 95th Cong., 2nd Sess. 22 (1978) (hereinafter Hearings on Undocumented Workers).

19. Dept. of Justice: I & N S Annual Report 1976, Table 18, at 116.
20. Hearings on Undocumented Workers, *supra* note 18, at 22.
21. 20 C.F.R. §§602.10-602.10b (1978), replaced effective April 10, 1978 by 20 C.F.R. §§655.200 et seq.
22. 20 C.F.R. §655.200(a) (1978).
23. 20 C.F.R. §655.203(d) (1978).
24. 20 C.F.R. §655.206(a) (1978).
25. 20 C.F.R. §655.207 (1978); 44 Fed. Reg. 32211-12 (1979); 44 Fed. Reg. 55826 (1979).
26. 20 C.F.R. §655.202 (1978).
27. Hearings on Undocumented Workers, *supra* note 18, at 22.
28. Id. at 23-4.
29. 508 F.2d 493 (1st. Cir. 1974).
30. Dept. of Justice: I & N S Annual Report 1976, at 8.
31. Ib.
32. Immigration Act ch. 190, §4(c), 43 Stat. 153 (1924), current version at 8 U.S.C. §1151 (1976).
33. "Commuters, Illegals and American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems, 48 N.Y. Univ. Law Rev. 439 (1973).
34. "Aliens in the Fields: 'The Green-card Commuter Under the Immigration and Naturalization Laws,'" 21 Stan. L. Rev. 1750 (1969).
35. "Commuters," *supra* note 33, at 462.
36. 8 U.S.C. §1101(a)(27)(A), formerly designated (27)(B).
37. 419 U.S. 65, 95 S.Ct. 272, 42 L.Ed.2d 231 (1974).
38. Schnidman, "Saxbe v. Bustos: 'Amiable Fiction of the Alien Commuter - An Old Farm Hand That Should be Retired,'" 2 Ohio North. L.R. 766 at 771 (1975).
39. Saxbe v. Bustos, 419 U.S. 65, at 79.
40. Schnidman, *supra* note 38, at 773.
41. Hearings on Undocumented Workers, *supra* note 18, at 4.
42. Id. at 3; compare Crewdson, "Study Suggests 6 Million or Fewer Illegal Aliens in U.S.," N.Y. Times, Feb. 3, 1980, at 1, reporting somewhat lower figures.
43. Id. at 7.
44. N.Y. Times, Aug. 10, 1977, §B at 2.
45. Sterba, "Aliens: Where They Come From, What Awaits Them," N.Y. Times, May 1, 1977, §4 at 3.
46. N.Y. Times, Feb. 13, 1977, §1 at 31.
47. L.A. Times, Aug. 10, 1980, at 1.
48. "Commuters," *supra* note 33, at 481.

49. 93 Monthly Labor Review 22 (1970).
50. Nafziger, "A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States," 56 Ore. L. R. 63 at 86 (1977).
51. Fogel, supra note 4, at 254.
52. H. Rep. No. 108, 93rd. Cong., 1st. Sess. (1973).
53. Nafziger, supra note 50, at 70.
54. Sterba, supra note 45.
55. Ib.
56. Ib.
57. Crewdson, "Thousands of Aliens Held in Virtual Slavery in U.S.," N.Y. Times, Oct. 19, 1980, §1, p. 1., col. 1.
58. Ib.
59. Fogel, supra note 4, at 255.
60. Nafziger, supra note 50, 92.
61. N.Y. Times, May 1, 1977, §4 at 3.
62. See also Nafziger, supra note 50 at 73-75.
63. Hearings on Undocumented Workers, supra note 18, at 2.
64. Fogel, supra note 4, at 250.
65. Hearings on Undocumented Workers, supra note 18, at 2.
66. Fogel, supra note 4, at 250.
67. Hearings on Undocumented Workers, supra note 18, at 10.
68. Id. at 7.
69. Fogel, supra note 4, at 246.
70. N.Y. Times, May 1, 1977, §4 at 2.
71. N.Y. Times, May 4, 1977, §A at 23.
72. Ib.
73. H.R. 225; 244; 326; 405; 800; 1517; 1934; 2213; 2214; 2442; 2614; 5254; 5261 (96th Cong., 1st Sess.).
74. Fogel, supra note 4, at 261.
75. Cal. Lab. Code §2805.
76. 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976).
77. Reston, "Mexico Lectures the U.S.," N.Y. Times, Feb. 16, 1979, p. 27, Col. 1.
78. Ib.
79. Columbus Dispatch, June 20, 1979, §A at 4.

80. Time Magazine, Oct. 30, 1978, p. 47; Dec. 4, 1978, p. 11.
81. Concur, Nafziger, supra note 50, at 105.
82. Midgley, "The 'Informal' Masses," N.Y. Times, May 20, 1979, §4, p. 21, col. 5.
83. Ib.
84. Population growth in Mexico is estimated to be between 3.2 and 3.6%. A 40% underemployment and unemployment rate has been cited. 2.8 million new entrants to the work force are anticipated between 1978 and 1982. Hearings on Undocumented Workers, supra note 18, at 14, 17, and 31.
85. Riding, "Mexican Plan Slows Emigrant Flow to U.S.," N.Y. Times, Feb. 15, 1979, p. 3, col. 4.
86. Ib.
87. Ib.
88. Ib.
89. Hearings on Undocumented Workers, supra note 18 at 91.
90. See, Fogel, supra note 4, at 255 for estimated data on U.S. growth.
91. Concur as to "H-2," Nafziger, supra note 50 at 103.
92. Id. at 101.
93. Crewdson, "U.S. Industry in Mexico's Border Cities, A Promise Dims," N.Y. Times, Feb. 22, 1979 at 18.
94. Hearings on Undocumented Workers, supra note 18, at 14.
95. N.Y. Times, Feb. 19, 1979, at 5. The example involving Turkey and West Germany is but one example of a number of treaties and conventions involving freedom of movement of persons and Social Security for migrant workers. Consult Encyclopedia of European Community Law and such publications as Social Security for Migrant Workers (ILO) 1977.
96. Ib.
97. Ib.
98. L.A. Times, July 31, 1980 at 1.
99. 40 U.S. News & World Report 40 (1979).
100. Fogel, supra note 4, at 259.
101. N.Y. Times, Feb. 17, 1979 at 5.
102. Compare Houston Chronicle, editorial, Sept. 7, 1980, §4 at 2.