



# **Litany of Abuses**

**More – Not Fewer – Labor Protections  
Needed in the H-2A Guestworker Program**

**A Report by Farmworker Justice**

## About Farmworker Justice

Farmworker Justice is a not-for-profit organization that empowers migrant and seasonal farmworkers to improve their wages and working conditions, immigration status, health, occupational safety, and access to justice. Using a multi-faceted approach, Farmworker Justice engages in litigation, administrative and legislative advocacy, training and technical assistance, coalition-building, public education and support for union organizing.

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## ***A Bad Program About to Get Worse***

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For years agricultural employers have used a little-known program to bring in foreign citizens on temporary visas to work on our nation's farms and ranches. The program, known as the H-2A temporary foreign agricultural worker program, is plagued with abuses of both U.S. workers and guestworkers. Despite these extensive abuses, the Bush Administration is about to make the H-2A program far worse. In doing so, they are bypassing sensible solutions that have been endorsed by major labor and management representatives – solutions that have already won bipartisan support in Congress.

The H-2A guestworker program permits employers to apply for permission to hire foreign labor for jobs lasting ten months or less. To bring in H-2A guestworkers, employers must show that they have tried and are unable to hire U.S. workers and that the wages and working conditions of U.S. workers won't be adversely affected by the employment of the guestworkers. Although the H-2A program does contain some labor protections, the program is rife with abuses due to lax enforcement of the weak protections that do exist. Abuses in the program range from discriminatory rejections of qualified U.S. workers and arbitrary firings to systemic wage violations and deplorable housing conditions.

History has shown time and again the problematic nature of guestworker programs. Due to their restricted status, guestworkers are vulnerable and lack the bargaining power of other workers. Often guestworkers may only work for the one employer that obtained their visa and may only work for a limited period of time. If they want to be hired back in a future season, they must hope that that employer invites them and requests a visa for them. Also, many guestworkers arrive deeply in debt, having paid enormous recruiters' fees back in their home countries for what they think will be good-paying jobs in the United States. When they arrive, they often find they were grossly misled.<sup>1</sup> Because of their indebtedness, guestworkers have no choice but to accept onerous and illegal conditions that would be rejected by workers who have a union contract or the freedom to quit and find another job. It's no wonder that many employers prefer guestworkers to domestic workers.

This report highlights common abuses in the H-2A program. At the time of writing, the Bush Administration is preparing to issue major changes in the H-2A program. In February of 2008, the Department of Labor (DOL) announced plans to weaken government oversight, minimize recruitment obligations inside the U.S., lower wage rates, reduce housing requirements and worker protections, and cause other harm to both domestic and foreign farmworkers. The Administration is about to finalize these changes, perhaps with some modifications, and, in doing so, will make a bad program even worse. Our nation's reputation for fairness will be tarnished and our legal system burdened for years to come with lawsuits stemming from unnecessary abuses.

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<sup>1</sup> See "In the Fields, a Rude Awakening" *Los Angeles Times*, November 5, 2006; "Low Pay and Broken Promises Greet Guestworkers" *New York Times* February 28, 2007; and "When Guest Equals Ghost, *Chicago Tribune*, November 11, 2007.

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## ***Barely Enough: Worker Protections in the Current Program***

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The H-2A program, like the infamous Bracero program, was created during World War II. It was formerly known as the H-2 program. While the Bracero program ended in 1964 amid great controversy over the abuses workers suffered under that program, the H-2 program continued and became the H-2A program in 1986.

The Florida sugar industry used the H-2A program for over 50 years until it mechanized the sugar cane harvest. Eastern apple growers have used the H-2A program for decades, even when there were domestic labor surpluses. The program has now spread to most states. North Carolina uses more H-2A workers than any other state. (Most of that state's H-2A guestworkers are now under a union contract negotiated by the Farm Labor Organizing Committee, AFL-CIO.) Of the nation's 2.5 million farmworkers, about 80,000 are H-2A workers, but this number has been growing lately as more employers file requests for guestworkers.

The H-2A program has long been criticized for mistreating both foreign and domestic workers. The current program does contain some protections, but not enough, and all too often they are unenforced. Nevertheless, some agribusiness employers have been lobbying vigorously to eliminate key protections altogether. As we wait to see how much the Bush administration will comply with that goal, here is a brief description of the protections contained within the current program.

The H-2A program is a labor certification program, which means that the DOL must certify (approve) an employer's application only if the applicant can prove that (a) there are not enough U.S. workers who are "able, willing, qualified and available to perform work at the place and time needed," and (b) the wages and working conditions of workers in the United States... will not be "adversely affected" by the importation of guest workers.

More specifically:

**Wages** must be at least the highest of: (a) the local labor market's "prevailing wage" for a particular crop as determined by DOL and state agencies; (b) the state or federal minimum wage, and (c) the "adverse effect wage rate" (the "AEWR"). 20 C.F.R. § § 655.102(b)(9). The current methodology for calculating the AEWR is only minimally protective because it is based on the USDA's findings of the prior year's average regional hourly wages for field and



livestock workers. In theory, however, the AEWL alleviates the foreign workers' depressing effect on prevailing wages. Agribusiness has been lobbying to end the AEWL and lower the H-2A program wage rates. In the proposal published earlier this year, the DOL announced a new methodology that would yield lower wage rates. If the DOL adopts that complex formula, many farmworkers' wages would be cut and the only real floor would be the federal or state minimum wage, even if they are earning more than that now.

The **three-fourths minimum work guarantee** requires that employers provide recruited workers with employment opportunities for three-quarters of the number of hours in the job offer or pay for any shortfall (with exceptions for Acts of God). This provision protects against over-recruitment designed to drive down wages and assures migrants who travel long-distances that the job will be worth the trip.

The "**fifty percent rule**" is the principal job preference mechanism for U.S. workers. It requires H-2A employers to hire any qualified U.S. worker who applies for work until one-half the season has ended, even if a temporary foreign worker must be discharged or transferred (which rarely, if ever, happens, according to a Congressionally-required study in 1990). Due to the nature of seasonal work, many farmworkers arrive after the first day of the season, and many farms do not need their full labor force until later in the season.

Workers who complete half the season at an H-2A program employer must be reimbursed for the **transportation and subsistence costs** associated with traveling to the place of employment. Those who complete the full season must be paid for their transportation costs of returning home.

H-2A employers must also provide **housing** for their workers at no cost to the worker. The housing must meet federal and state safety standards.

**Recruitment** obligations require employers to use the interstate Employment Service system (a joint system of the federal government and state workforce agencies) and private-market methods of recruiting workers, known as "**positive recruitment**," to locate U.S. workers.

Employers soliciting H-2A workers must offer **Workers' Compensation** for occupational injuries (but not health insurance coverage).

These modest protections are vital to prevent the H-2A guestworker program from displacing U.S. workers, driving down wages and working conditions, and allowing agribusiness employers to increasingly rely on "cheap foreign labor" to harvest our nation's crops. Most of these protections existed even under the notorious Bracero guestworker program.

Despite employers' complaints about the allegedly heavy burdens of the H-2A system, the DOL rejects very few applications for temporary foreign workers and once in the program, growers tend to stay. Protecting workers' rights is in everyone's interest.

### ***Global Horizons: A Model of Bad Behavior***

Global Horizons, a farm labor contractor based in California, in short time developed a notorious reputation for violations of workers' rights under the H-2A guestworker program. An estimated twenty-eight lawsuits around the country attest to their shameful track record. One particularly illustrative case is ***Perez-Farias v. Global Horizons***, a class action on behalf of at least 600 U.S. workers in Washington State.

In 2004, Global Horizons requested 150 guestworkers for a farm in Washington State. As part of the application for H-2A workers, Global was obligated to advertise for U.S. workers through the state workforce agency. The state agency found 150 U.S. workers interested in these jobs and referred them to Global Horizons. Global accepted the workers but just two days before the work period started it wrote the DOL again claiming that only 7 of the 150 U.S. workers remained on the job. Global claimed that 98 workers failed to report for work, 22 were fired for job-related reasons and 19 started work but then left; Global was requesting an additional 140 workers. If 140 U.S. workers could not be found within 72 hours they wanted permission to bring in guestworkers. DOL granted them 131 guestworkers. Two days later, the Washington State Employment Security Department emailed the DOL saying it had evidence suggesting there was indeed a "willing and available pool of [U.S.] workers" and that it had found several problems with Global's hiring practices. The DOL did nothing.

A similar process occurred with Global's other applications for guestworkers. On June 25, 2004, it filed a job order for 70 guestworkers for another Washington state farm. The state agency referred 46 local workers to them. Global hired only 8. Then they fired a crew of some 27 U.S. workers for supposedly not meeting a previously undisclosed production requirement. The DOL granted them permission to hire 62 guestworkers instead.

On May 10, 2005, the Employment Security Department of Washington State sent a notice of Discontinuation of Employment Services to Global for consistently failing to make a good faith effort to hire U.S. workers. Overall, "of the 1,026 referrals made to ...Global, only 166 individuals were hired."

Did Global Horizons intentionally discriminate against U.S. workers? Ebony Williams, a former supervisor for the company, indicated as much when she described its "elimination process". The following is an excerpt of her sworn testimony in 2007:

A: *The elimination process was getting rid of local workers basically so we could get the H-2A approval...[Mordechai Orian, the owner of Global Horizons,] fed in our mind that that's what we had to do to get rid of these workers so we can get the H-2A approval....*

Q: Is that your own term or did – did Global have a policy incorporating an elimination process?

A: *Sir, yes, it was an elimination process. Basically in order to get the H-2A visas approved, we had to prove that there was a scarcity in the local workers and that we didn't have any available local workers, so it was an elimination process. And as Mr. Orian, he – I think he even termed that himself. I am not even going to say think. He did term that himself; that, you know, we have to eliminate, you know, certain workers so we can get the approval for the H-2A.*

Q: Would you – was there a policy at Global Horizons in 2004 to discourage local

workers from working with the two growers in Washington state?  
A: *It wasn't a policy, but I know that that's what his objective was....*  
Q: And, when you say "he," you are referring to Mr. Orian?"  
A: *Mr. Orian, yes.*  
Q: And what was his objective?  
A: *To get an H-2A approval, get all these H-2A Thai workers in there and, you know, expedite the process of moving them from one farm to the next to keep his money flowing, basically.*

*Ebony Williams Deposition Transcript excerpts, May 3, 2007, pp. 20, 35, 121-122, & 182; Perez-Farias v. Global Horizons, Eastern District of Washington, No. CV-05-3061-RHW.*

In October of 2007 a jury found in favor of the plaintiffs and awarded the workers in this class action lawsuit \$317,000 for punitive damages and lost wages.

The new regulations for the H-2A program will likely do nothing to control unscrupulous farm labor contractors such as Global Horizons, leaving workers –both U.S. and foreign—wide open to the kind of abuse and exploitation illustrated in this case.

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### ***A Cautionary Tale: Why We Need More –Not Fewer-- Worker Protections in the H-2A Guestworker Program***

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Below are examples of just a few of the known abuses of farmworkers by H-2A employers that the DOL fails to prevent or adequately remedy. The abuses described below were all documented in lawsuits with the exception of the first three, which were the subject of formal administrative agency complaints. Given how difficult and risky it is for U.S. workers and especially H-2A workers to speak out, there are certainly many more abuses that have occurred and continue to occur under the H-2A program that go unreported.

- In early 2008, Tanimura & Antle, one of the largest lettuce growers in the country, laid off over a dozen U.S.-worker employees and then hired H-2A guestworkers to fill open jobs. In March, the United Farm Workers filed a complaint with DOL challenging the employer's unlawful hiring of guestworkers while US workers were available and, after being forced to rehire the former employees, offering an illegally low wage. The administrative complaint is in the process of being settled.
- When Vreba Hoff Farms a "concentrated animal-feeding operation" in Michigan requested H-2A workers, the state workforce agency referred them over 104 U.S. workers interested in the jobs. Despite being referred in a timely manner, none of the 104 U.S. workers was offered employment as required by the current federal regulations. An administrative complaint was filed and the farm was subsequently banned from the H-2A program.



- Vreba Hoff Farms also engaged in a “bait and switch” scam. The employer told the DOL that workers would be housed at a local Ramada Inn and the hotel was certified as the official housing. When the H-2A workers were not found at the Ramada, state officials conducted an investigation. They discovered not only that no H-2A workers had ever stayed at the Ramada, but that the employer never intended them to. The manager of the hotel reported that it was understood that the housing certification was merely a technicality.
- In California, over 200 H-2A guestworkers were fired when they did not meet an undisclosed production requirement. The workers were also subjected to unsafe and unsanitary housing conditions, denied meals that the employer was required by law to provide, and denied wages for travel time and other work hours required by state and federal law. The case settled with plaintiffs securing classwide monetary damages, improvement in practices, as well as attorneys’ fees and costs. ***Salinas de Valle v. Sierra Cascade***, filed 2006 (SC CV 06 1378, Superior Court for the State of California, County of Siskiyou).
- In Arizona, over 200 hundred U.S. workers lost their jobs when their employer decided to apply for H-2A workers instead. A federal lawsuit alleging discrimination and violation of the employer’s H-2A job offer is pending. ***Figueroa, et al v. Servicios Agrícolas MEX, Inc.***, filed December 2007 (07-CV-2581 United States District Court for the District of Arizona).
- In Georgia, 80 H-2A workers sued their employer for violating the Fair Labor Standards Act by routinely underpaying them and not paying them regularly. The employer prepared back-dated checks to hide late payments and false checks to hide non-payments. The employer also required workers to endorse blank checks. The case was settled favorably in 2008 with the workers receiving \$221,500 for violations of the federal minimum wage and \$324,264 for violation of their H-2A contracts. ***Morales-Arcadio, et al., v. Shannon Produce Farms, Inc., et. al.*** 2007 U.S. Dist. LEXIS 51950 (S.D. Ga. 2007).
- Also in Georgia, 51 guestworkers from Mexico charged their employer, Wendell Roberson Farms, which has used the H-2A program since 1989, with violation of the Fair Labor Standards Act and breach of contract. The case became a [class](#) action lawsuit and was mediated and settled for \$150,000 in 2005. The employer was also obligated by the court to change its payroll practices and to re-employ the workers. However, in two subsequent seasons, the workers had to return to court to obtain court orders protecting them from retaliation. In the first contempt proceeding, the workers obtained \$50,000 in additional damages. A year later, in the second contempt proceeding, the Court awarded the workers \$44,000 in lost wages, rehire for the coming season, and attorney’s fees. ***Vergara-Perdomo et al. v. Wendell Roberson Farms, Inc., et al.*** (04-CV-77-4, United States District Court, Middle District of Georgia, Albany Division).

*"We have talked to hundreds of H-2A workers at dozens of employers in the area, and virtually every one of them has complaints. However, 95 percent of the workers we talk to are too afraid to complain."*

*Melody Fowler-Green,  
Texas Rio Grande Legal Aid*



- In Texas, three agricultural employers misclassified their jobs as being non-agricultural in order to bring workers in under the H-2B visa program instead of the H-2A program, as the H-2B program has even fewer labor protections than the H-2A program. These growers requested and received over 400 guestworkers who came into the country on H-2B visas and were put to work harvesting watermelons and onions. State workforce agencies in Texas and Arkansas had referred about 720 local workers interested in these jobs but almost all the U.S. workers were rejected. Nevertheless, DOL knowingly approved these fraudulent H-2B applications. During a 2005 inspection, a DOL representative reported seeing the H-2B workers performing agricultural work in the field. Yet the DOL continued to certify the employer for the H-2A program for two more years. Texas RioGrande Legal Aid sued the growers and DOL on behalf of 22 Texas farmworkers. The suit with the growers was settled in April 2008. The companies agreed to pay the workers \$64,000 for lost wages. DOL refused to acknowledge any wrongdoing or rectify its unlawful H-2B procedures, and asked the court to dismiss the case. On September 30, 2008, the court dismissed the case against DOL without finding any wrongdoing on the part of the agency, and upheld all the H-2B procedures. *Riojas, et al. v. Chao, et al.* (DR:07-CV-058, United States District Court, Western District of Texas, Del Rio Division). *Javier Riojas, the attorney of record, testified regarding this case in front of the House Committee on Education and Labor on May 6, 2008.*
- Six H-2A guestworkers in Tennessee sued their employer for failing to pay the contract wage mandated by the guestworker program over several years, for failing to pay them for all the time that they worked, and for not reimbursing them for their transportation costs as required by both the Fair Labor Standards Act and their contracts. ***Gaona-Gaona v. Allison Tree Digging***, filed Apr. 3, 2008 (No. 4:08-CV-28 E.D.Tenn.).
- In 2001, when farmworkers' wages were rising, the Bush Administration stopped issuing the H-2A annual wage rates, allowing employers to pay the previous years' wage rates instead. The United Farm Workers, Farm Labor Organizing Committee and others sued the Department of Labor successfully to stop the Administration from this blatant violation of its legal obligation. ***UFW v Chao***, 227 F. Supp. 2d 102 (D.D.C. 2002).



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## ***DOL Not Forthcoming with Information about H-2A Employers***

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Because the Department of Labor has been reluctant to comply with its obligations the H-2A program, farmworker advocates have had no choice but to conduct their own investigations. In order to obtain information about available jobs and ensure that employers are offering legal wages and working conditions, farmworker advocates have been asking the DOL to publicize the names of employers using the H-2A guestworker program and the details of their job offers.

In the past, farmworkers' organizations have had access to such information in order to inform US workers' about open jobs and prevent both domestic and foreign workers from being subjected to illegal wages and other job terms. This Administration has become secretive, however, refusing to release information or releasing it only after it is too late to prevent DOL from approving illegal wages and working conditions and too late to help US workers obtain the jobs.

After nearly a year of unsuccessful attempts to persuade the DOL to release information at the proper time, the United Farm Workers and Farmworker Justice, with assistance from Public Citizen Litigation Group, filed a lawsuit under the Freedom of Information Act (FOIA). The lawsuit sought the release of information in a timely manner and also asked the court to overturn unlawful fees for disclosing public information. It is currently being settled, with DOL finally releasing thousands of documents. ***UFW and Farmworker Justice v DOL (filed December 2007)*** D.D.C. No.: 07-2241. Unfortunately, the case cannot guarantee that DOL will comply in the future or that further litigation will not be necessary.

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## ***Telling the Tale(s): Stories of the H-2A Guestworker Program in the Media***

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The media has played an important role in exposing H-2A abuses. The following news stories further illustrate the problems with the H-2A program. Some refer to cases listed above; others address the problematic program more broadly.

These stories are not without precedent. Earlier media reports also called for reform of the guestworker program. The Florida sugar cane industry, previously one of the primary users of the guestworker program, was the subject of several exposés, "H-2 Worker," a 1990 documentary by Stephanie

Black won two awards at the Sundance Film Festival, and Alec Wilkinson, a writer for *The New*

*"If we had a bunch of American workers, we'd have to hire someone like a personnel director to deal with all the problems...The [guestworkers] we have now, they come and they work. They don't have kids to pick up from school or to take to the doctor. They don't have child support issues. They don't ask to leave early for this and that. They don't call in sick. If you say to them, 'Today we need to work 10 hours,' they don't say anything. 'The problems you have with American workers are endless.'"*

*--Georgia onion farmer quoted in 1998  
Chicago Tribune article "Immigration clash leaves  
Vidalia onion farmers bitter"*

*Yorker*, published “Big Sugar” which won the 1990 Robert F. Kennedy Memorial Book Award. Also, in 2001, Marie Brenner published a feature article in *Vanity Fair*, “In the Kingdom of Big Sugar,” (Feb. 2001, p. 115).

Beginning in the mid-1990’s, North Carolina became known for the abuses documented by the award-winning series “Desperate Harvest” by Lean Beth Ward in the *Charlotte Observer*. (The Farm Labor Organizing Committee has since won a collective bargaining agreement for several thousand H-2A workers in that state.)

Long before any of these journalistic investigations, the renowned researcher, Ernesto Galarza, published Merchants of Labor in 1964, detailing similar kinds of abuses under the old Bracero guestworker program, which began during World War II. The Bracero program ended in 1964 in response to concerns about worker abuses; however, the H-2A (then “H-2”) program continued and was revised by Congress in 1986.

A more complete list of recent media coverage can be found in the Appendix.

***Other Resources:***

Other recent reports covering the abuses within the H-2A agricultural guestworker program include:

The Southern Poverty Law Center’s “Close To Slavery: Guestworker Programs in the United States” (2007)

A Human Rights Watch Report, *Unfair Advantage* (2001) (chapter five).

“Defending the Rights of H-2A Farmworkers” by attorney Mary Lee Hall (published in *Journal of International Law and Commercial Regulation*, vol 27; pp. 521,522 (2002).

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***There Is a Better Solution***

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The vulnerable status of guestworkers leaves them open to abuse. Guestworkers’ lack of freedom and their poverty means that they will perform work at very high productivity rates for wages that are considered in the U.S. to be too low. Fearful of being discharged or not called back in a following season, guestworkers often will not challenge unfair or illegal conduct. Moreover, those H-2A guestworkers willing to challenge illegal practices lack a meaningful mechanism to bring a lawsuit in federal court against their employers for violations. A right to file a lawsuit in federal court would deter employer violations and provide remedies for vulnerable foreign workers.

Congress recognized the risks of allowing employers access to temporary foreign workers when it created and revised the H-2A program. There are some modest protections in the law, last amended in 1986, and in the current regulations issued by the Reagan Administration in 1987. These protections should be enforced vigorously. The Department of Labor is the primary administrative agency charged with protecting workers but too often it fails to live up to this mandate.

The recently announced plans by the Bush Administration to weaken labor protections and government oversight of the H-2A program even further are about to be finalized. The planned changes are extraordinarily unfair and counterproductive and major aspects of them, if finalized, would be illegal.

Instead of allowing these changes to go forward, Congress should act to address the agricultural immigration crisis. There is a bipartisan, compromise bill called AgJOBS, which most farmworker advocates and agribusiness representatives support. The AgJOBS compromise was reached after years of Congressional and labor-management conflict resulting in tough negotiations between the United Farm Workers (UFW), major agricultural employers, and key federal legislators. AgJOBS would allow eligible undocumented workers to apply for a legal immigration status and would revise the H-2A guestworker program in balanced ways. Employers would benefit by having a stable, legal labor force, a smoother H-2A application process and other changes. Workers would benefit by having a meaningful opportunity to be treated more fairly. Under the H-2A program, for the first time, guestworkers would have the right to enforce their contract rights in federal court. The Administration's backward-looking approach to farmworker immigration policy should be rejected. Our nation and our nation's farmworkers deserve better.



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## ***Appendix: Recent Media Coverage of H-2A Abuses***

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- “Guestworker Program Poorly Run, Critics Charge” by Susan Ferriss, *Sacramento Bee* October 4, 2008.
- “Legal Guestworkers Sue [Labor] Contractor” by Susan Ferriss, *Sacramento Bee* August 22, 2008.
- “Guestworkers sue Tennessee Nursery Owner for violations of FMLA, H-2A visa contracts” by *BNA* May 5, 2008 (Gaona-Gaona v. Allison Tree Digging).
- “Guestworkers sue employer, say rights violated” by Janell Ross, *The Tennessean* April 11, 2008 (Gaona-Gaona v. Allison Tree Digging).
- “Suit alleges employer abused visa workers” by Janell Ross, *The Tennessean* April 10, 2008 (Gaona-Gaona v. Allison Tree Digging).
- “Empresa Niega Quejas de la UFW” *El Sol* March 28, 2008.
- “Laid off Worker Says Salinas firm didn’t try to rehire him” by Robert Rodriguez, *Fresno Bee* March 14, 2008.
- “Guestworker Programs: Are we treating them like guests?” ABC Eyewitness News Report, ABC Raleigh-Durham-Fayetteville, November 15, 2007.
- “When Guest Equals Ghost, Documented foreign workers often suffer abuses, enforcement lacking” by Stephen Franklin and Darnell Little *Chicago Tribune*, November 11, 2007.
- “Suit claims discrimination favoring undocumented” by Hernan Rozemberg San Antonio-Express News, November 1, 2007 (Riojas v. Chao).
- “US farmworkers win damages versus Global Horizons in Washington state” *Daily Labor Report* October 9, 2007.
- “Guestworker program isn’t the labor and immigration panacea it’s cracked up to be” by Sarah Stuteville and Alex Stonehill, *Seattle Weekly* June 27, 2007.
- “Low Pay and Broken Promises Greet Guestworkers” by Steve Greenhouse, *New York Times* February 28, 2007 (Perez-Farias v Global Horizons).
- “In the fields, a rude awakening: For some laborers, US guestworker program was a bitter letdown” by Lee Romney, *Los Angeles Times* November 5, 2006.