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H-2A VISA PROGRAM: MEETING THE GROWING NEEDS OF AMERICAN AGRICULTURE?

HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION POLICY AND ENFORCEMENT

OF THE

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HOUSE OF REPRESENTATIVES

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H-2A VISA PROGRAM: MEETING THE GROWING NEEDS OF AMERICAN AGRICULTURE?

WEDNESDAY, APRIL 13, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION
POLICY AND ENFORCEMENT,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:01 a.m., in room 2141, Rayburn Office Building, the Honorable Elton Gallegly (Chairman of the Subcommittee) presiding.

Present: Representatives Gallegly, Smith, King, Lungren, Gohmert, Poe, Gowdy, Lofgren, Conyers, and Jackson Lee.

Staff present: (Majority) George Fishman, Subcommittee Chief Counsel; Marian White, Clerk; and David Shahoulian, Minority Counsel.

Mr. GALLEGLY. I call the Subcommittee to order, and good morning to everyone.

This morning we are going to talk about seasonal agricultural labor. As we know, seasonal agricultural labor is a class by itself. Unlike almost all other occupations, there are simply not enough Americans willing to take the jobs of a migrant farm worker. In fact, our Government's policy for generations has been to remove Americans from such labor.

The labor-intensive branch of agriculture, fruits, vegetables, and horticultural specialties hires over 1.2 million individual farm workers every year. The U.S. Department of Labor's National Agricultural Workers Survey annually surveys hired crop farm workers. It reveals that over the period between 2007 and 2009, 48 percent admitted being in our country illegally. The actual figure may be higher. In fact, quite frankly, I am sure it is. NAWS shows that 85 percent of first-time hired farm workers admit to being here illegally.

What legal labor force option do growers really have? Since 1986, the H-2A program has made available visas for temporary agricultural workers. However, 16 years ago, American agricultural representatives told this Subcommittee that the H-2A program was "characterized by extensive complex regulations that hamstring employers who tried to use it and by costly litigation challenging it use when admissions of an alien worker are sought." They alleged that the Department of Labor was "opposed to the program."

Front and center in the growers' minds was ensuring the availability of sufficient labor to meet the crucial needs like harvesting, whose timing varies with the weather. Unfortunately, timeliness has never been the H-2A's strong suit. Neither has realism about the availability of domestic labor.

We are here 16 years later and apparently little has changed. The president of the Virginia Agricultural Growers Association, an apple grower, has testified that "were it not for the H-2A program, broken, costly, and perilously litigation-prone as it is, we would be unable to farm at all . . . One of the most frequently cited reasons for our region's farmers to go out of business is that simply they cannot continue under the burdens of the H-2A program."

The Bush administration's Labor Department initiated a bold plan to revamp the H-2A program. The plan remade the program into an attestation-based system designed to "eliminate cumbersome regulatory practices" and speed the guest workers to growers in need. It was also designed to make the costs of the program more manageable for the growers. Although it did not resolve all the agricultural needs, the regulations received generally positive reviews from the grower community. Unfortunately, one of the first actions of the Labor Department under the Obama administration was to rescind those regulations.

We will receive testimony today from the Labor Department and also from one of the architects of the Bush Labor Department regulations. We will hear from the growers who utilize the H-2A program and try to make the best of it. We will hear from an advocate for farm workers who believes the program harms both American workers and the guest workers themselves. We hope that this hearing will plant the seed for needed reform.

And with that, I would yield to my friend, the Ranking Member, Zoe Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

There is no question that our immigration system is broken, and nowhere is that more evident than in our agricultural sector.

Of the 2 million jobs on Americans' farms and ranches, more than half are held by undocumented workers. The Department of Labor estimates that over 50 percent of all seasonal agricultural workers are undocumented, and experts believe that due to underreporting, that number may actually be closer to 75 percent. Either way, it doesn't get much more broken than that.

Our Ag sector has long suffered from the lack of available U.S. workers to grow and pick America's fruit and vegetables. And even in today's tough economic climate, an insufficient number of U.S. workers are filling manual seasonal and migrant Ag jobs.

One reason for this is that Americans are better educated today than they were before. In the 1950's, some 50 percent of the U.S. workforce did not have a high school diploma. By 2009, that number had plummeted to 5.7 percent. We as a country are simply training our workers to do things other than farm work.

I could go on and on about the many large-scale attempts to recruit U.S. workers over the years. I could even mention the recent Take Our Jobs campaign by the United Farm Workers which we explored in a Subcommittee hearing last year with the president of the United Farm Workers and another witness whose name es-

capes me now. But we all know this. We already know that while there are U.S. workers in the fields now, whom we have a duty to protect, their numbers are shrinking, and we know that if we somehow deported the 1 million to 1.5 million undocumented workers on our farms and ranches right now, there are too few Americans jumping at the chance to fill those jobs. And I suspect that is why we are having this hearing.

My colleagues on the other side of the aisle want people to play by the rules, as well they should. And we are trying to find a way for farmers and ranchers to do just that. I expect we will see increasing pressure in this Congress to find a solution in this area, especially as enforcement efforts continue to grow and this Congress considers whether to mandate the use of e-Verify by all employers.

As I see it, this hearing is really an admission. It is an admission that not only do we have a problem, but the solution to that problem involves immigrants. This hearing is proof that our country has a need it desperately needs to meet, and it desperately needs immigrants to meet that need.

Discussing the H-2A program is definitely part of finding a solution, but surely we know it is not enough. I hope we can agree that the solution to our problem is not to deport 1.5 million farm workers now in our country only to replace them with 1 million to 1.5 million new temporary workers on a yearly basis. I don't think that is a viable option. On its face, the solution would be inefficient, wasteful, and incredibly expensive.

How many times have we heard my colleagues on the other side of the aisle question the ability of the Federal Government to manage even the smallest tasks? I join them now in questioning the wisdom of putting an entire industry in the hands of Government bureaucrats tasked with the responsibility of moving over a million workers in and out of the country every year and ensuring that the right workers are in the right location at the right time.

Indeed, one of the majority's witnesses will testify today that the biggest problem he now faces in getting H-2A workers is getting enough consular appointments for visa interviews and background checks. Knowing the Chair of the full Committee, as I do, I know those requirements won't be going away anytime soon. Just imagine how much more difficult it will get when we as a country need not the 150,000 H-2A workers who were admitted in fiscal year 2009, but 10 times that many.

We need to be honest with ourselves and put ideology aside. We have over a million undocumented farm workers in this country and we need them. Yes, they violated our immigration laws, but we as a country also share some of the blame here. For decades, our immigration system has not been designed to meet the needs of our economy. Dr. Richard Land, president of the Southern Baptist Convention, testified at a Subcommittee hearing last year, and we may recall his comment. He said we have two signs at the border. One says "no trespassing," and the other says, "help wanted."

Our employers, by hiring these workers, and our Government, by failing to fix the broken system and looking the other way for years, are both complicit here, and to some extent so is the entire Nation. These farm workers have filled an important need, and

each of us has literally benefitted from the fruits of their labor. Not only have they fed this country, but they have also kept a critically important American industry alive. That industry ensures that we don't have to rely on other countries for food as we do oil. And it keeps millions of U.S. workers employed. We must remember that every farm workers supports 3.1 upstream and downstream jobs in manufacturing, seed production, processing, packaging, transportation, accounting, advertising. Those jobs go to Americans, and if we don't get this right, those jobs go away too.

I look forward to hearing from our witnesses today, and I yield back the balance of my time.

Mr. GALLEGLY. I thank the gentlelady.

At this time, I will yield to the gentleman from Texas, the Chairman of the full Committee, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, there are no jobs Americans will not do, but there is one job that neither Americans nor immigrants seem to choose if they have other options: seasonal agricultural work. That is why many illegal immigrant farm workers who received amnesty in 1986 soon left the fields for better jobs in the city. As the president of the American Farm Bureau has stated, any new amnesty such as AgJOBS would have the same result. Because of this, U.S. employers often face a shortage of available American workers to fill seasonal agricultural jobs.

There is no numerical limit to the H-2A temporary agricultural work visas. And yet, usage of the program has always been below expectations. Why is that? That is the focus of today's hearing. Why don't more growers who have heavy demands for seasonal agricultural labor make better use of the program?

In addition to the concerns that Chairman Gallegly has mentioned, growers are troubled by the great cost of using the H-2A program, especially the "adverse effect wage rate" that they must pay guest workers. Growers also have to provide free housing for guest workers and free transportation from the guest workers' home countries. And they are concerned about the "50 percent rule"—under which they have to offer jobs to all American workers who apply even after their guest worker application has been approved and the guest worker has actually arrived.

In 2008, the Department of Labor concluded that the vast majority of growers, "find the H-2A program so plagued with problems that they avoid using it altogether." In response, the Labor Department issued new regulations to address the concerns of growers. The new Bush administration regulations attempted to streamline the application process for growers by moving to an attestation-based system in which growers made commitments backed up by Department of Labor audits. The regulations sunsetted the 50 percent rule and restricted grower responsibility for transportation expenses only to guest workers who fulfilled at least half of their work contract. That makes common sense. The regulations did not do away with the adverse effect wage rate but altered its calculation to more reliably mirror local labor cost.

When the new Administration took office in 2009, it almost immediately sought to suspend the Bush administration's regulations, and that is regrettable because the Administration's actions made

the situation worse. When told by a Federal court that it had to adhere to the processes of the Administrative Procedures Act, the Obama administration Labor Department proposed and then implemented yet more regulations, making the situation yet worse. These Obama administration regulations, as noted by the Farm Bureau, rolled back common-sense improvements and bring us back to the old, problematic system.

The H-2A program needs to be fair to everyone it impacts, especially American farm workers, guest workers, growers, and American consumers. It must provide growers who want to do the right thing with a reliable source of legal labor. It must protect the livelihoods of American workers. It must protect the rights of guest workers, and it must keep in mind the pocketbooks of American families.

Just like tilling the land, accomplishing all of these goals will be a lot of work. At today's hearing, we will examine how to improve the H-2A program. U.S. farmers need to be able to keep growing our crops and our economy.

Mr. Chairman, let me finally say that I think any solution we come up with has to be a bipartisan solution, and for that reason, I am sorry to have heard the Ranking Member's comments a minute ago. I thought she was particularly and unnecessarily partisan, and that is not conducive to getting to a bipartisan solution.

I will yield back.

Mr. GALLEGLY. At this time, we will yield to the gentleman from Michigan, the Ranking Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Elton Gallegly. I am starting off here trying to sort out these arguments here. My friend, the distinguished Chairman of the full Committee, Mr. Smith, said there are no jobs Americans won't do. I think he went on to explain that there were some jobs Americans won't do.

But we have had four hearings, starting on January 26 through February 10, March 1—this is this Subcommittee—March 10, March 31, all immigration hearings. And if I didn't hear it once, I heard it a dozen times from my dear friend from Iowa, Steve King, who said essentially let's deport all immigrants. If he didn't say that at least 10 times, we will go get the record.

And yes, I will yield to you. Didn't you say it 10 times?

Mr. KING. Mr. Ranking Member——

Mr. CONYERS. Yes or no?

Mr. KING. No.

Mr. CONYERS. Oh, okay.

Mr. KING. I can expand on that if you would yield.

Mr. CONYERS. No, I am not going to yield. I just wanted to make sure that we were in agreement.

Now, I will look up the record for you. Fortunately, everything that we say in Committees is taken down by a court stenographer and transcribed. So I will be prepared to apologize to you real soon because I am asking my staff to go start checking that statement right now.

Now, the thrust of all the four hearings I thought—and I stand to be corrected again—is that we have got to get rid of immigrants, especially illegal immigrants. As a matter of fact, somebody that I

mistakenly apparently thought was Steve King has said we ought to take them all out of the country, all 11 million. There were 12 million. Now it is down to 11 million. They all ought to be taken out of the country. I guess nobody ever said that on the other side. I was hearing that. That was a mistake too.

Well, I am sure you are getting your stories straightened out now, my friends, because today's hearing is about how desperately our country needs immigrant workers because we don't have enough Americans to do the job. And so if we don't get more immigrants into the country, these farms are just going to have to close up.

In the first four hearings, the witnesses for the majority and the Members on the majority side said that if we just got rid of the immigrants supposedly who were taking our jobs, employers would then increase wages to Americans to take those jobs.

But in today's hearings, the majority witnesses will be explaining to us that we are paying foreign agricultural workers too much as it is. There is going to be testimony, unless somebody changes it, that $9 an hour is too much to pay a farm worker, and they want to drop the wages to $8 an hour. Not only that, the growers say that even $8 is too much for a seasonal migrant farm worker. Under current law, growers have to pay for farm workers to travel to and from their home country, usually of Mexico. But now the growers think that the poor Mexican farm worker is better able to pay for these travel costs.

Now, you will remember the hearings that Chairwoman Zoe Lofgren had on this same Committee in which my friend, Stephen Colbert, came in here to testify, and I was one of the few that didn't want him to testify. He is an entertainer and he is as smart as the devil, and he didn't come in here to give a serious discussion about immigration.

But Steve King—well, I won't say Steve King anymore. Somebody on the other side and the majority witnesses argued then at that hearing that if we deported the undocumented farm workers, Americans would fill their jobs.

But at today's hearing, my same colleagues on the other side and some more new majority witnesses will say exactly the opposite. Today the growers that are here today will testify that we need immigrants to fill jobs on Americans' farms. And in today's hearings, you are going to hear an interesting solution to the problem. Rather than do something with the million undocumented farm workers who have been living here for years, who have raised families, who have paid taxes and are now filling the jobs that we need, there are some that want to deport these workers and replace them with a million new temporary farm workers under the H-2A program where they can only stay for—get this—10 months, and then they must go back home and then come back if they want to come again.

And so for this hearing, we have called one of the witnesses, a former official of the Department of Labor. As Labor is charged with protecting American workers, one would expect him to have a pretty good sense of the best ways to ensure good wages and working conditions for such workers. But he, this witness, was the main drafter of the H-2A rules that were issued by former President Bush just before he left office. These rules sought to lower

wages for farm workers and eliminated worker protections. In that rule, the Department of Labor said that it was necessary to lower the wages of foreign workers in order to better protect the wages of U.S. workers. And I am going to introduce this for the record.*

Mr. GALLEGLY. I thank the gentleman.

Mr. CONYERS. With that, Mr. Chairman, I thank you for allowing me to exceed the time, and I will end my statement there.

Mr. GALLEGLY. I would like to just take a brief moment and respond to a couple things and what my intent is as Chairman of this Committee.

All too often, we have a habit of mixing illegal and legal when we talk about immigration. We are a country of immigrants. We are also a Nation of laws. And in the previous hearings that we have had in this Committee, I have never heard anyone advocate the deportation of someone that is legally in this country. And I think that we need to be very careful, when we talk about deportation and the issue of immigration, not to mix illegal immigration when we talk about a person being an anti-immigrant or opposing immigrants being in this country. The reference should be very careful. Sometimes these things are mixed for reasons, and I understand the politics of that.

But we are working today on this issue to look at the issues of unmet domestic needs and see if there is a way to do this legally through the immigration laws, as we have for 200 years. So let's all try to be sensitive, when we talk about immigrants and deportation, that we refer to legal and illegal and not mix the two.

We are fortunate today to have two panels of very distinguished witnesses, all with very impressive credentials. Each of the witnesses' statements today will be entered into the record in its entirety, and I would ask that the witnesses please be sensitive to the 5-minute rule because we have a limited amount of time, unfortunately, as is always the case. But it will give every Member of this Committee an opportunity to ask questions and get them on the record. And of course, as I said, your written statement will be made a part of the record of the hearing in its entirety.

Our first witness on panel I—in fact, we have only one witness on panel I—is Ms. Jane Oates. Ms. Oates served as Assistant Secretary for Employment and Training at the U.S. Department of Labor and now leads the Employment and Training Administration. Prior to her appointment, Ms. Oates served as executive director of the New Jersey Commission on Higher Education and senior advisor to Governor Corzine. She also served for nearly a decade as senior policy advisor to Senator Edward Kennedy. Ms. Oates began her career as a teacher and she received her bachelor's degree from Boston College.

Welcome, Ms. Oates. And as this time, I will yield to you 5 minutes for your testimony.

*The information referred to was not available for this hearing record.

TESTIMONY OF JANE OATES, ASSISTANT SECRETARY FOR THE EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPARTMENT OF LABOR

Ms. OATES. Chairman Gallegly, Ranking Member Lofgren, and Members of the Committee, thank you for the invitation to appear to discuss the Department of Labor's role and administration of the H-2A temporary agricultural guest worker program, a program designed to serve a critical workforce need for agricultural employers.

As the Chairman said, I am the Assistant Secretary of Employment and Training, and the Office of Foreign Labor Certification is in ETA and we have the responsibility for the nonenforcement H-2A duties. Our friends at Wage and Hour do the enforcement.

I would like to just spend a few minutes highlighting some of the points from my written testimony.

The Department of Labor has two primary concerns with regard to its statutory mandate for the H-2A program. First is maintaining a fair and reliable process for employers with a real need for temporary foreign agricultural workers. Second is establishing necessary protections for both U.S. workers and those temporary foreign workers.

Within the statutory mandate is the important responsibility of ensuring that U.S. workers have first access to these jobs. To ensure these mandates are met, the Department implements the H-2A regulation and accepts and processes employer-filed H-2A applications for labor certifications.

For the last 20 years preceding 2008, the Department's H-2A regulations remained largely unchanged. In 2008, new regulations were promulgated which significantly revised the program. A comprehensive review of these changes as the Department changed hands demonstrated that these new regulations did not adequately satisfy our Department's mandate to protect U.S. workers. It also found that the regulation failed to allow for sufficient, robust, and meaningful enforcement.

To address shortcomings identified in the review, the Department published a final rule which became effective in March 2010. As I note in my written testimony, the 2010 final rule in many ways reflects a return to the processes and procedures which were in place for all but 13 months over a 23-year period. As examples, we returned to the documentation of compliance as opposed to self-attestation. We continue to use the USDA Farm Labor Survey as the basis for determining the wage rate and we reinstituted the role of the State workforce agencies in the housing inspection and approval process.

The Department believes that the provisions in the 2010 final rule achieve a reasonable balance between meeting the seasonal workforce needs of growers, who are very important to us, while still protecting the rights of agricultural workers who are also important to us. The regulation protects the integrity of the program, protects workers from potential abuse by employers who fail to meet the requirements of the program, and quite frankly, levels the playing field for those employers who are and always have played by the rules.

The underlying statutory requirement which governs development and implementation of the regulation, that the employment

of temporary foreign workers does not adversely affect the wages and working conditions of U.S. workers who are similarly employed, has never been more important.

Many of you on this Committee are still witnessing persistently double digit unemployment. The Department takes very seriously its obligation to ensure that U.S. workers have first access to these jobs. In these difficult economic times, we need to do all that we can to make sure that American workers are aware of these opportunities and have the choice to take advantage of them. So in addition to enhancing recruitment, the 2010 final rule created an online job registry so U.S. workers could more easily access information about and apply for these jobs if they so chose.

The Department planned and implemented a number of stakeholder meetings and briefings to reintroduce users, growers, of the program and many of the features that had been in place prior to the 13-month period. Activities included public briefings across the country, national webinars, and a question and answer process through a dedicated public email box.

I hope that I will hear lots of questions, and please, I would like all the Members of this Committee to know ETA and the Department of Labor are anxious and enthusiastic about working with you on all projects related to H-2A regulations. Thank you very much.

[The prepared statement of Ms. Oates follows:]

WRITTEN TESTIMONY OF JANE OATES
ASSISTANT SECRETARY FOR THE EMPLOYMENT AND TRAINING ADMINISTRATION
U.S. DEPARTMENT OF LABOR
BEFORE THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION ENFORCEMENT AND POLICY
UNITED STATES HOUSE OF REPRESENTATIVES
April 13, 2011 10:00 a.m.

Introduction

Chairman Gallegly, Ranking Member Lofgren, and Members of the Committee, thank you for the invitation to appear before the Judiciary Committee's Immigration Enforcement and Policy Subcommittee to discuss the U.S. Department of Labor's role and administration of the H-2A temporary agricultural guest worker program, a program designed to serve a critical workforce need for agricultural employers. I am Jane Oates, Assistant Secretary for the Employment and Training Administration at the U.S. Department of Labor.

DOL's Role in the H-2A Program

The Immigration and Nationality Act assigns specific responsibilities for the H-2A program to the Secretary of Labor. The Department's primary concerns with regard to its statutory mandate are maintaining a fair and reliable process for employers with a legitimate need for temporary, foreign, agricultural workers and enforcing necessary protections for both workers in the U.S. and temporary foreign workers.[1] The non-enforcement duties are delegated to the Employment and Training Administration, specifically the Office of Foreign Labor Certification. The Department's Wage and Hour Division has been delegated responsibility for enforcing the terms and conditions of the work contract and worker protections.

Among the responsibilities delegated to the Office of Foreign Labor Certification is the important responsibility of ensuring that U.S. workers are provided first access to temporary agricultural jobs and that both workers in the U.S. and temporary foreign workers are provided with appropriate worker protections. The U.S. Department of Homeland Security may not approve an H-2A visa petition unless the Department of Labor has certified that there are not sufficient U.S. workers qualified and available to perform the labor requested in the visa petition and that the employment of the temporary foreign worker(s) will not have an adverse effect on the wages and working conditions of similarly employed workers in the U.S. The Department of Labor ensures this important statutory responsibility is met through regulatory standards and the acceptance and processing of employer-filed H-2A applications.

Regulatory History

The Immigration Reform and Control Act of 1986 (IRCA) established a separate H-2A program for temporary agricultural guest workers. The first H-2A regulations were issued by the

[1] 75 Fed. Reg. 6884, 6903 (Feb. 12, 2010)

Department in 1987 in accordance with IRCA.[2] The Department's H-2A regulations remained largely unchanged from the 1987 rule until 2008, when the Department issued regulations that significantly revised the program.[3] The 2008 Final Rule significantly revised the program and substituted an attestation-based application process, in which the applicant merely asserts that they have met regulatory requirements, such as having recruited U.S. workers, obtained workers' compensation insurance and requested a housing inspection, for the long-standing evidence based program model, in which the applicant actually produces documentation of having met such requirements. Numerous other substantive changes to the program were made, including a significant reduction in the role that State Workforce Agencies (SWAs) play in the processing of job orders, the mechanism by which employers seek domestic workers through our nation's labor exchange system.

In 2009, the Department undertook an exhaustive review of the policy decisions underpinning the 2008 Final Rule as well as a review of our actual program experience. During this review, the Department focused on access to these jobs by U.S. workers, individual worker protections, and program integrity measures. This review also examined the process for obtaining labor certifications, the method for determining the program's prevailing wage rate which, by statute, must avoid an adverse effect on the wages of similarly employed U.S. workers, and the level of protections afforded to both temporary foreign workers and domestic agricultural workers.

The Department determined that the 2008 Final Rule did not adequately satisfy its statutory mandate to protect U.S. workers and the regulation failed to allow for sufficient, robust, and meaningful enforcement of the terms of the approved job orders and other regulatory requirements. In September 2009, the Department published a Notice of Proposed Rulemaking designed to address the findings from its review.[4] Nearly 7,000 interested parties submitted comments. The Department's H-2A rulemaking process concluded with the publication of a Final Rule on February 12, 2010, which had an effective date of March 15, 2010.[5]

2010 Final Rule

The 2010 Final Rule, in many ways, reflects a return to processes and procedures that were in place between 1987 and 2008. Regulatory improvements include enhanced mechanisms for enforcement of the worker protection provisions that are required by the H-2A program to properly carry out the Department's statutory obligations to protect U.S. workers from any adverse effect due to the presence of temporary foreign workers in U.S. labor markets. Among other provisions, the 2010 Final Rule requires employers to document compliance with the program's prerequisites for bringing H-2A workers into the country, including the requirement to recruit for qualified U.S. workers, rather than merely attesting to compliance. This return to the requirement that was in place before the 2008 Final Rule was necessary because, even with employers making assurances on their Applications that they would comply with specific provisions, the Department continued to see high rates of violations of fundamental requirements, such as meeting housing safety and health standards. The 2010 Final Rule also

[2] 52 Fed. Reg. 20496 (June 1, 1987)
[3] 73 Fed. Reg. 77110 (Dec. 18, 2008)
[4] 74 Fed. Reg. 45906 (Sept. 4, 2009)
[5] 75 Fed. Reg. 6884 (Feb. 12, 2010)

returns to the long-established use of the USDA Farm Labor Survey as the basis for determining the Adverse Effect Wage Rate or AEWR. The employer must pay H-2A workers and domestic workers performing the same work the highest of the AEWR, the agreed-upon collective bargaining wage, the Federal or State minimum wage or the prevailing hourly wage or piece rate. In addition, the 2010 Final Rule reinstates the requirement that the SWA inspect and approve employer-provided housing before the Department may issue an H-2A labor certification, extends the H-2A program benefits to workers in corresponding employment to ensure that all similarly employed workers are not paid a lower wage and fewer benefits than a temporary foreign worker (thereby creating an adverse effect that the statute prohibits), and strengthens the Department's revocation and debarment authorities.

The Department believes that the enforcement provisions in the 2010 Final Rule achieve a reasonable balance between meeting the seasonal workforce needs of growers while simultaneously protecting the rights of agricultural workers, including U.S. workers hired as part of the H-2A process, H-2A temporary foreign workers, and workers already employed in corresponding employment with that employer. This enforcement is necessary to protect workers from potential abuse by employers who fail to meet the requirements of the H-2A program and to ensure that law-abiding employers with a legitimate need for temporary workers have a level playing field.[6]

The 2010 Final Rule's enhanced enforcement provisions allow the Department to sanction those employers who fail to meet their legal obligations to recruit and hire U.S. workers or fail to offer required wages and benefits to workers. Enhanced civil money penalties do not impact those employers who play by the rules. These penalties impact violators who disregard their obligations, and they provide the Department with an effective tool to discourage potential abuse of the program and to deter violations, discrimination, and interference with investigations. The increase in monetary penalties demonstrates the Department's commitment to strengthening the necessary enforcement of a law that protects workers who are unlikely to complain to government agencies about violations of their rights under the program.[7]

In addition to stronger mechanisms for enforcement of the requirements of the H-2A program, the 2010 Final Rule also strengthened certain worker protections to ensure that the program's underlying statutory requirement is being met – that the employment of the temporary foreign worker in such labor or services does not adversely affect the wages and working conditions of workers who are similarly employed in the U.S. These protections include clarifying the rules to ensure employers do not pass on fees associated with recruitment to the workers being recruited, recovering back wages in the event a U.S. worker is adversely affected by an improper layoff or displacement, reinstating U.S. workers who are displaced by a temporary foreign worker in violation of the program's requirements, and ensuring that corresponding workers who are employed by an H-2A employer performing the same work as the H-2A workers are paid at least the H-2A required wage rate for that work.

The Department takes seriously the need to ensure that job duties for agricultural occupations in H-2A are not presented in such a way as to inhibit the recruitment of U.S. workers. The standard

[6] 75 Fed. Reg. at 6940 (Feb. 12, 2010)
[7] 74 Fed. Reg. at 45926 (Sept. 4, 2009)

applicable to the H-2A program since its inception in 1987 requires the Department to compare the jobs in H-2A applications to those open with employers not seeking H-2A workers. If the employers of non-H-2A workers do not commonly seek those qualifications or require those special skills sought by an H-2A applicant, the application will be questioned. Employers seeking solely to eliminate potential U.S. workers will be denied the opportunity to hire temporary foreign workers, in keeping with the Department's obligation to ensure that U.S. workers receive preference for these jobs.

The 2010 Final Rule also created an online registry of H-2A jobs to make it easier for U.S. workers to access information about and apply for temporary agricultural jobs. This online registry became available in July, 2010 and offers a range of customizable searches, giving users the ability to view, print, or download information about agricultural jobs easily and without the need to file a request under the Freedom of Information Act. Since the online job registry became available in July, 2010 over 4,100 job orders offering one or typically more job opportunities with U.S. farmers have been posted, leading to substantially greater access for U.S. workers to these available jobs.

Outreach and Education

Despite the similarity of the 2010 Final Rule to the 1987 rule, the Department planned and implemented extensive stakeholder meetings and briefings designed to familiarize program users and others with the regulatory changes. For example, the Department undertook a number of steps to educate the employer community about the H-2A application process and program requirements. Well-publicized public briefings were held in San Diego, California; Dallas, Texas; and Raleigh, North Carolina between February 2010 and March 2010, during the period between the Final Rule's publication date and its effective date. Almost 200 parties representing large numbers of growers and agricultural associations attended these briefings.

The Department also conducted a national webinar[8] for program participants that was publicized widely, including in the Federal Register.[9] Weekly consultations were held with the SWAs to provide guidance on the implementation of their responsibilities in the recruitment of U.S. workers. The Department established a public e-mail box dedicated to receiving questions related to the Final Rule. Responses to some of these inquiries have been posted as Frequently Asked Questions (FAQs) to make answers to commonly-asked questions and clarifications easily accessible to all stakeholders via the OFLC website.[10]

Future plans include the publication of a user's manual aimed at assisting smaller employers understand the legal obligations of the program. The Department also continues to meet with different groups and constituencies and explain the H-2A program's requirements.

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[8] Although the webinar is no longer available online, a PowerPoint briefing for stakeholders is available on the Office of Foreign Labor Certification's website at: http://www.foreignlaborcert.doleta.gov/h2a_briefing_materials.cfm.

[9] 75 Fed. Reg. 13784 (Mar. 23, 2010)

[10] www.foreignlaborcert.doleta.gov

Program Implementation

The H-2A program continues to be a source of legal temporary foreign workers for our nation's agricultural community. Thus far in FY 2011, more than 3,150 H-2A agricultural labor applications have been processed with 2,890 (92 percent) of applications certified. Each year, more than 70 percent of all H-2A applications are filed during the peak filing period from December through April. Despite the tight processing deadline of 15 calendar days and a large filing volume, 70 percent of all H-2A applications are processed timely.

During the 2010 Final Rule's first year of implementation, the Department has been focused on ensuring that the program is meeting the needs of both U.S. workers and employers. In order to ensure that the H-2A program is efficient and effective for employers with a legitimate need for temporary foreign workers, the Department continues to provide employer assistance and to implement program improvements. For example, the current regulations enable the Department to evaluate each application on a case-by-case basis to determine if the application meets regulatory requirements. In the event that deficiencies are found, the employer is provided with an opportunity to make the corrections necessary to permit the application to be accepted for further processing. Once an employer has corrected the deficiencies, the application is accepted for processing and the employer is provided instructions for completing the application process by undertaking the required recruitment and providing required documents. Through this process, the Department is guiding employers as they become familiar with the application process and identifying for employers the documents and information necessary to enable the Department to issue a final determination.

Recognizing that the program's appellate process could create delays and uncertainty around processing timeframes, the Department recently designed a more flexible process and determined that where employers have not originally timely submitted the required documents, such as recruitment reports and proof of workers' compensation insurance, we can add some small amount of additional time for the receipt of these documents. This allows employers seeking certification additional time to comply with program requirements and receive a certification rather than a denial and subsequent appeal. The Department has already seen an increase in the ability of employers to comply within the revised time frame and expects this trend to continue.

In certain instances, at the end of the case review, the Department will issue partial, rather than full, labor certifications. Since the implementation of the new Final Rule, the most common reasons for partial certification include issues such as insufficient housing capacity for the full number of workers requested, hiring commitments made to U.S. workers, and the apparent unlawful rejection of U.S. worker applicants. The most common reason for denials is the employer's failure to provide the documentation required to issue a labor certification, even with the additional time permitted, such as proof of workers' compensation, which is a mandatory statutory requirement. Another common reason for denial is the employer's failure to provide appropriate housing that meets the Department's standards. Each employer must provide a recruitment report, evidence of workers' compensation, and compliant housing in order to receive certification.

Conclusion

The H-2A program serves the American people by helping those employers who have a legitimate need for temporary, foreign workers. The Department will continue to focus on maintaining a fair and reliable process for these employers while enforcing necessary protections for both U.S. and nonimmigrant workers. To do so is good not only for workers but also for law-abiding employers. The Department is confident that as program users become more familiar with requirements, overall program compliance will increase and any delays attributed to failure to follow the program's rules will continue to decrease.

Mr. Chairman and Members of the Committee, thank you again for the opportunity to discuss the U.S. Department of Labor's role and administration of the H-2A temporary agricultural guest worker program. I look forward to answering your questions.

Mr. GALLEGLY. Thank you, Ms. Oates.

Ms. Oates, when the H-2A program was originally created, the expectations were that applications would be close to or more than 200,000 guest worker requests per year. However, in the year 2010, there were less than 56,000 visas to H-2A workers. Why do you believe that the H-2A program was not used more by the growers?

Ms. OATES. Congressman, that is a question that we have no data. So I can't give you anything but an opinion, and opinions are limiting. So I am open to other opinions.

I think it is a mix of American workers not understanding what these jobs are about and not knowing how to access them. I think it is also a mix of folks that have been here before through other means taking those jobs with employers. But I have no data to support either of those, and I would feel that I would rather not give you a stronger opinion as opposed to undocumented workers or the American workers' willingness or unwillingness to take these jobs.

Mr. GALLEGLY. Don't you believe that it would be reasonable that someone should be asking the question, why are we having only one-fourth of what the expectations are? Or do we need to maybe downgrade and say that we have maybe four times the number of people or do we have one-fourth the number of people we actually need? I could see if it was within a 5 or 10 percent margin, but when it is 300 percent or 400 percent different, I think that certainly would justify someone reviewing whether the numbers are correct or whether it is a problem with the process. Is that reasonable?

Ms. OATES. Congressman, I not only think it is reasonable, I think it is a responsible question and I think it is one that we should all be asking and seeking an answer to. Let me tell you a little bit about what we are doing to try to get a better answer to that.

As you know, my agency also operates the Unemployment Insurance program and the Workforce Investment System programs so that we have a close relationship with the States. We are having ongoing and frequent conversations with States about making sure these jobs are advertised and trying to get better data about who these workers are. Unfortunately, we have limited statutory mandated responsibilities. Those are our first priority, making sure the protection piece is there and making sure that we are making these jobs available. But I think you and many of the Governors share the same concern about figuring out who these workers are, and you have our partnership in trying to come up with those answers.

Mr. GALLEGLY. Do you think it is possible that the need is actually closer to 200,000 than 50,000? And if so, do you think it is also possible that the regulations or the bureaucracy may be more cumbersome than the benefits of the worker would ultimately be?

Ms. OATES. Well, I trust employers, so I think that employers are giving us accurate information about who they are employing and not employing people, you know, in quotes, under the table. So I basically have a trust of employers.

But I would say to you we are open to putting everything on the table in terms of investigating what the best next moves are to keep the agricultural industry vibrant and to also ensure the rights of the workers in those jobs regardless of their documentation status or not. That is not the Department of Labor's job. We don't decide documentation. We ensure safety and protection of all workers on a job site.

Mr. GALLEGLY. Can you give me your assessment of the wage you believe American workers would inquire that would fill the 1.2 million hired farm worker positions, fruit, vegetable, horticultural

specialists, growers seek to fill each year? What do you see as what the wage rate should be?

Ms. OATES. Congressman, I see that the wage rate in agricultural jobs just like in any other jobs, as States have the right to set minimum wage above the Federal minimum wage. I see that as best determined at a local level. That is why I think the AEWR is so important. It is a survey done so that—for instance, this year some States' wages went up and other States' stayed the same and some States' wages went down. I think like many decisions this is a decision that needs to be made at the State level. And the agricultural survey allows us to do that.

Mr. GALLEGLY. I recently talked to some growers in my area. Many know I have a very large agricultural area. We would like to think of ourselves as the strawberry capital of the world.

Ms. OATES. We like to use your products.

Mr. GALLEGLY. A lot of citrus and so on. But celery happens to be a crop that I have had my local Farm Bureau folks tell me that they have a pretty good documented record that the average pay for celery packers, the folks that are cutting the celery in the field and packaging them, is between $28 and $30 an hour because they work really on a piecework basis. They are not paid that much per hour, but when you count the number of boxes—it is so much per box—that it does, and obviously they are working very hard to do that. But are you aware of numbers like this?

Ms. OATES. I'm not aware of that and would love to work with your growers.

I will tell you quite frankly in personal experience I have picked—I haven't picked celery or packaged it, but I picked strawberries, and after about 2 hours, I am ready to go home and take a long hot bath. These are tough jobs.

And I don't think we want to pick out sectors. There are people in other sectors that do very difficult, tedious jobs, and they get paid for it. So if the local area—if that is the going rate in your district, Congressman, I would have to respect it. But again, I am more than willing to talk to your growers about whether $28 an hour is a fair wage in that area.

Mr. GALLEGLY. Well, when you were picking strawberries, were you picking strawberries as an——

Ms. OATES. As a mother.

Mr. GALLEGLY [continuing]. Occupation and as a mother——

Ms. OATES. Yes.

Mr. GALLEGLY [continuing]. Or as an experiment?

Ms. OATES. Not as an occupation. As you know, so generously reading my bio, I was a teacher and, in my teaching responsibilities, often would take my own family out to learn about different things. And we lived in Philadelphia and south Jersey is not a strawberry capital like your congressional district is, but they do have a few plants. And let me tell you it is tedious work.

Mr. GALLEGLY. But it wasn't for the wages for the day. It was an experiment.

Ms. OATES. I never earned a wage, purely a volunteer.

Mr. GALLEGLY. We take a lot of volunteers.

The gentlelady from California, the Ranking Member, Ms. Lofgren?

Ms. LOFGREN. Thank you. Before asking my questions, I would like to ask unanimous consent to enter into the record statements prepared for today's hearing. The statements are from our colleague, Representative Raul Grijalva, from Arturo Rodriguez, President of the United Farm Workers, from the Agricultural Coalition for Immigration Reform, a coalition of growers and grower associations from across the United States; and from Karen Narasaki, President of the Asian American Justice Center. I would ask unanimous consent.

Mr. GALLEGLY. Without objection.

[The information referred to follows:]

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April 12, 2011

The Honorable Elton Gallegly, Chairman
The Honorable Zoe Lofgren, Ranking Member
House Judiciary Subcommittee on Immigration Policy and Enforcement
U.S. House of Representatives
Washington, DC 20515

Re: UFW Written Statement on House Judiciary Subcommittee on Immigration Policy and Enforcement Hearing on "The H-2A Visa Program – Meeting the Growing Needs of American Agriculture?"
April 13, 2011

Dear Chairman Gallegly and Ranking Member Lofgren:

The United Farm Workers of America (UFW) thanks Chairman Gallegly, Ranking Member Lofgren, and the Subcommittee for the opportunity to offer insights and expertise regarding the H-2A program and immigration policy. We also wish to underscore the urgent need not only for H-2A reform, but also for much broader-based policy reforms needed to ensure the survival of much of the farming sector in the U.S. and keep farm worker families intact. Agricultural workers have confronted difficulties in immigration policy since the founding of this nation. Our government policies and enforcement efforts have often contributed to an imbalance in power that has subjected farmworkers to poor wages and working conditions.

The Bracero guestworker program, initiated during World War II to bring Mexican laborers to the U.S. for farm work, became known for its abusive treatment of Mexican workers, despite the existence of protections for wages and benefits, and was finally ended in 1964. Out of that tragic history, Cesar Chavez, and the United Farm Workers, built another vision. Cesar demanded and the UFW still demands that farmworkers be afforded the same rights, enjoyed by other workers, to a fair wage, safe working conditions and the right to organize. Our slogan "Si, Se Puede" or roughly, "Yes, it can be done," is at its core a symbol of our commitment to the unbending pursuit of justice for all U.S. farmworkers -- be they immigrants or natives.

We believe that every one of our goals, and indeed the future of agriculture, are intrinsically tied to sensible immigration policy that allows the current agricultural work force the opportunity to earn legalization and provides new channels for future workers to come to the U.S. that would be responsive to the labor market and which would not tie workers to one employer. We do not believe either enforcement or a massive influx of temporary guestworkers will do anything other than further aggravate the labor problems endemic to agriculture.

Sadly, this Congress seems on the hunt for a stale and unwise solution. The H-2A guestworker program is seriously flawed, and, but for the current leadership at the Department of Labor, would be worse. This program has provided agricultural employers with workers whose restricted, nonimmigrant status ensures that they will not challenge unfair or illegal conduct. Generally, our guestworker programs have tied workers to a particular employer; if the job ends, the worker may not look for another job and must leave the United States immediately. The guestworker who wishes for a visa in the next year must hope that the employer will request one, because the employers control access to visas. Such workers are often fearful of deportation or not being hired in the following year, and are therefore reluctant to demand improvements. They work very hard for low wages. U.S. workers often recognize that they are not wanted by the employers who use the guestworker system. Currently, there are about 50,000 H-2A jobs approved annually, out of an agricultural work force of 2 to 2.2 million.

There are many abuses under the H-2A program ranging from minor to very serious trafficking in human beings. Unfortunately, our government has rarely enforced the protections in the H-2A program. In recent years, the United Farm Workers and the Farm Labor Organizing Committee have been asked by guestworkers from several nations to help them improve conditions at their jobs in Washington State, Hawaii and North Carolina. We believe that unionization is the best hope that guestworkers have for better treatment and the best hope the government has of removing the H-2A program's reputation for abuse.

Today, we have reached a situation in agriculture that demands urgent action. There are over two million farmworkers in this country, not including their family members. More than 80% of them are foreign-born, mostly but not all are from Mexico. Virtually all of the newest entrants to the farm labor force lack authorized immigration status. The helpful reports from the National Agricultural Workers Survey by the U.S. Department of Labor state that about 53% of farmworkers are undocumented. But most observers believe the figure is 60% or 70%, and much higher in specific locations. Many employers now hire farm labor contractors in the hope that they can shield themselves from liability for hiring undocumented workers in violation of our immigration law and from liability for labor law violations.

Labor contractors compete against one another by offering to do a job for less money, and the cut-throat competition means that the workers must take lower wages. When one labor contractor is prosecuted for violating labor laws, he is easily replaced. Our current immigration system is causing employers to attempt to evade responsibility for their employees, while undocumented workers are too fearful of being deported to demand changes. In many cases, due to inadequate enforcement of labor laws, employers take advantage of undocumented workers by subjecting them to illegal wages and working conditions.

When the majority of workers in an economic sector are living in the shadows of society something must be done. The current situation is not good for farmworkers who want to be able to work legally and earn a decent living to support their families. It is not good for employers who want to hire people without worrying that they will be raided by the immigration service at the peak of the harvest of their perishable fruits and vegetables. It is not good for the government, which needs to know who is working in our economy and living among us. But it is no answer to say we will deport them and start again. The growers need these experienced workers to cultivate and harvest their crops. In fact, many growers contend that there are labor shortages in some areas because undocumented workers are too fearful of immigration raids to come to the open fields.

The United Farm Workers recognized several years ago that the status quo needed to be remedied. We also recognized that some of our long-held beliefs would need to be modified if we were to achieve any sort of reform. During the late 1990's, we strenuously and successfully opposed efforts in the House and Senate by agricultural employers to weaken H-2A protections and procedures and transform most farmworkers into vulnerable guestworkers with no path to citizenship. Our successful opposition led to a stalemate since we did not have the legislative support needed to enact our ideas about immigration and labor reform.

Simply reforming the H-2A program is not enough. H-2A reform will not address the problem of a half million farm worker children whose parents are without legal status. Most of these children are U.S. citizens. While implementation of E-verify will cause major dislocations in the agricultural industry and serious economic losses, it will truly have terrible consequences for these children. In our zeal for more enforcement, we should not let these children become collateral damage. We need a better solution than simply lowering the labor standards under the H-2A program.

Since deporting all undocumented farmworkers currently in this nation would cause the collapse of the agricultural industry, the only equitable and practical solution is letting undocumented workers here now earn legal status by continuing to work in agriculture. That is exactly what would happen under the broadly supported bipartisan AgJOBS bill, negotiated by the United Farm Workers and leaders from the nation's growers.

AgJOBS, which is embraced by leading Democrats and Republicans in Congress, is a compromise of both side's vision. It offers growers a legal and stable work force, ensures domestic workers receive jobs before foreign workers are imported and protects guest workers from being exploited as they have been in the past. One-sided changes to the H2A program do not solve our nation's agricultural labor supply issues. We need Congress to pass the AgJOBS bill.

AgJOBS would provide agricultural employers and the nation with a legal, stable, productive workforce while ensuring that basic labor protections would apply to farmworkers. AgJOBS has two parts. First AgJOBS would create an "earned adjustment" program, allowing many undocumented farmworkers to obtain temporary resident status based on past work experience with the possibility of becoming permanent residents through continued agricultural work. Second, it would revise the existing H-2A agricultural guestworker program.

The earned legalization program certainly should not be called "amnesty." It is a difficult two-step process. The applicants for earned legalization will have to show that they have worked at least 150 days in U.S. agriculture during the past two years, and then must work at least 150 days per year in each of three years or at least 100 days per year in each of five years. Farmworkers will also have to show that they have not been convicted of a felony or serious misdemeanors. Spouses and minor children of the farmworkers will be eligible for a temporary status, too. If they fulfill their obligations, they will be granted a green card for permanent resident status. They will have to pay substantial fees and fines at both steps. Through this multiyear process, the United States will have a stable, legal farm labor force that is highly productive.

This is a tough program. Farm work is dangerous, difficult, seasonal and low paid. This truly will be an *earned* legalization.

AgJOBS also would revise the H-2A guestworker program. We feel that we made painful concessions to achieve this compromise. The program's application process will be streamlined to become a "labor attestation" program similar to the H-1B program, rather than the current "labor certification" program. This change reduces paperwork for employers and limits the government's oversight of the employer's application. AgJOBS would retain both the "prevailing wage" and "adverse effect wage rates," but would freeze the adverse effect wage for three years. The Government Accountability Office and a special commission would make recommendations to Congress about the wage rates within 3 years. If Congress has not acted within 3 years, then the wage rates will be adjusted by the previous years' inflation rate.

We believe that AgJOBS is a reasonable compromise under the circumstances.

To conclude, we recommend the following: (1) We encourage you to pass AgJOBS. (2) Congress and the Administration should be vigilant about abuses under guestworker programs. Strong enforcement of the labor protections for guestworkers will prevent guestworkers from being exploited, prevent the wages and working conditions of United States workers from being undermined, and will take away the incentive that employers have to hire guestworkers rather than U.S. workers, including those who would earn legal immigration status under the AgJOBS earned legalization program. (3) Congress needs to adopt protections against abuses associated with foreign labor contracting. The U.S. Government has refused to look at the abuses that occur during the recruitment of guestworkers in the foreign country. Yet, those abuses abroad, including payment of high recruitment fees, result in mistreatment of guestworkers on the job in the U.S., because the guestworkers must work to the limits of human endurance and avoid deportation at all costs to pay back those fees. We also ask you to recognize that the best protection workers – both U.S. and foreign -- have for an employer that participates in a guestworker program is a labor union.

Government policy should promote collective bargaining to reduce abuses under guestworker programs and give workers a meaningful voice at work. A review of the heat illness fatalities in California, the state with the largest number of farmworkers in the nation, demonstrates the role collective bargaining can play in keeping workers safe. While there have been 15 heat illness fatalities among farmworkers in recent years, none have taken place at an operation where farmworkers have collective bargaining. In fact, in the nearly 50 year history of the UFW, there has never been a heat illness fatality at a UFW worksite.

The UFW looks forward to working with Congress to address the long-overdue challenge of establishing a workable and sustainable agricultural labor program. Thank you.

Sincerely,

Arturo S. Rodriguez
President
United Farm Workers of America

Honorable Elton Gallegly
Chairman, House Judiciary Subcommittee on Immigration Policy and Enforcement

Honorable Zoe Lofgren
Ranking member, House Judiciary Subcommittee on Immigration Policy and Enforcement

Dear Chairman Gallegly and Ranking Member Lofgren,

Thank you for holding this important hearing on, "The H-2A Visa Program: Meeting the Growing Needs of American Agriculture?" Agriculture is very important to my district and faces the same challenges that agriculture throughout the country faces - a majority undocumented workforce with no opportunity for our current workforce to earn immigration status and become permanent members of our society. Reforming the H-2A program alone will not fix our broken system. Instead, we need meaningful immigration reform such as the AgJOBS bill.

Guestworker programs have a long history in this country. The Bracero program, established during World War II, brought thousands of temporary workers from Mexico to harvest crops for U.S. growers. My father was one of them. Though many of the provisions that aim to protect workers in today's H-2A program were also in place during the Bracero program, it was ended in 1964 amid widespread reports of abuses. We must avoid the mistakes of the Bracero program. Like the Braceros, H-2A guestworkers currently do not have an opportunity to earn immigration status, even if they return year after year. They have no political power because they cannot vote. The H-2A program's restricted guestworker status limits the workers' economic power. Our nation's values of economic and political freedom and democracy demand more. Workers who come to the U.S. to contribute to our bountiful harvest deserve better treatment and robust enforcement of their rights.

I am a strong supporter of AgJOBS, the bipartisan compromise agreed to by farmworker organizations and agribusiness groups. AgJOBS would allow eligible undocumented farmworkers to earn legal status while making balanced changes to the H-2A program. Deporting the large number of undocumented workers from our farms and ranches is not feasible or a good use of scarce resources and we cannot rely on the H-2A program to meet our country's agricultural needs. We should not rehash the stale debate over a guestworker-only approach, which Congress has already rightfully rejected. Instead, we need a smart and fair solution for our immigration system and for our nation's agricultural sector.

I urge you to consider AgJOBS as the solution to our nation's agricultural needs.

Respectfully,

/s/
Representative Raúl Grijalva

April 11, 2011

The Honorable Elton Gallegly, Chairman
The Honorable Zoe Lofgren, Ranking Member
House Judiciary Subcommittee on Immigration Policy
and Enforcement
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Gallegly and Ranking Member Lofgren:

We respectfully submit the following statement to be added to the official record for the hearing on the H-2A program scheduled for April 13. This is a matter of enormous economic significance in your districts, your state, and the nation. We have also attached a list of our coalition members. We look forward to working with you, and welcome the opportunity to provide further information and insights.

Sincerely,

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Agriculture Coalition for Immigration Reform
Statement on
House Judiciary Subcommittee on Immigration Policy and Enforcement Hearing on
"The H-2A Visa Program – Meeting the Growing Needs of American Agriculture?"
April 13, 2011

The Agriculture Coalition for Immigration Reform (ACIR) thanks Chairman Gallegly, Ranking Member Lofgren, and the Subcommittee for the opportunity to offer insights and expertise regarding the H-2A program. We also wish to underscore the urgent need not only for H-2A reform, but also for much broader-based policy reforms needed to ensure the survival of much of the farming sector in the U.S.

ACIR represents roughly 300 national, regional, state, and local organizations whose members are directly engaged in labor-intensive farming activities across the nation. Two of ACIR's three co-chairs, and many of the coalition's leaders, have long-time direct experience with the H-2A program in regions as diverse as southern California, New England, Florida, and Idaho. Working hand in hand with the National Council of Agricultural Employers (NCAE), the only national organization specifically dedicated to agricultural employment issues, ACIR taps into the broadest collective body of H-2A expertise in the nation.

Substantive limitations of the H-2A program are well-understood, and well-documented. Dr. James S. Holt, the foremost national expert on agricultural labor and H-2A until his untimely death in April, 2008, captured the essence of the program's structural limitations and chronic problems in his testimony before the House Committee on Agriculture, in October, 2007. These limitations and problems underlie why an "uncapped" visa program only provides two to three percent of the hired labor needs of America's farms and ranches. We attach for the hearing record a copy of Dr. Holt's comprehensive statement.

Dr. Holt's expert testimony was predicated on his and the industry's years of experience with the "1987 program" (the H-2A program administrative rules that were established at the time President Reagan signed the Immigration Reform and Control Act into law, through the end of 2008). The program is authorized by a few lines of statutory language in the Immigration and Nationality Act, and yet we have now seen two successive administrations adopt widely differing program regulations based on widely differing interpretations and policy goals. The simple fact is that agriculture needs the certainty that would be provided by a stable program based on a transparent statutory program framework that is not so vulnerable to shifting interpretations by successive administrations with differing political ideologies. The current program is deeply flawed.

After the failure of the Senate to pass comprehensive immigration reform in 2007, the Bush Administration launched a series of administrative initiatives focused primarily on immigration enforcement. However, the administration acknowledged the unique challenges confronting the agricultural sector. New rules were promulgated at the end of 2008; they took effect early in 2009. In the eyes of most H-2A users active in ACIR, the Bush-era regulations featured some beneficial provisions and some unattractive provisions. But in a general sense, the Bush rules sought to make the program easier to use, while significantly increasing penalties for violations.

Early in the Obama administration, the Department of Labor (DOL) moved to suspend the Bush rules. However, the suspension was blocked by a federal judge. In response, DOL moved to substantially rewrite the program regulations. New regulations took effect March 15, 2010. In general, the new Obama regulations eliminated the streamlining improvements yet retained the elevated penalties of the Bush rules.

The H-2A program has slipped into chaos under the new rules. Especially problematic is the way the DOL is administering the program. Users are encountering untimely processing, conflicting interpretations, and arbitrary denials of applications for a labor certification. DOL routinely fails to meet its statutory deadlines for handling H-2A applications, between 40 and 60% of the time. The rate of approvals has fallen drastically in the current fiscal year. The number of denials has skyrocketed, as has the number of denials which are appealed. In the vast majority of cases, denials by the DOL's Chicago National Processing Center which are appealed to the Office of the Administrative Law Judge are found indefensible, and remanded for approval. Yet, the workers often arrive well after the date they were needed to perform critical and time-sensitive tasks.

Yet, to step back from the legitimate frustrations of current program users over untimely processing, conflicting interpretations, and arbitrary denials, for decades the program has not been up to the task of providing a meaningful percentage of the farm and ranch workforce. Over decades, H-2A has only provided between two and five percent of the hired farm labor force; even at that low level, processing, adjudication, and consular delays have often meant that workers have not arrived when they are needed to prune, plant, or harvest crops or tend livestock. Farming activities don't wait for such delays. Economic loss can be irreversible.

For these reasons, ACIR has long advocated for extensive reform of the H-2A program in order to ensure a long-term legal labor supply safety net. In recent years, ACIR has advocated for such reform in the context of legislative proposals that have achieved broad bipartisan support, which history suggests is a necessity if a proposal is to become law. In our statement filed for the record of the recent hearing on E-Verify, ACIR described extensive yet failed efforts over years by producers, government, and worker advocates to recruit U.S. workers into farm jobs. We also described trends already underway that are leading the U.S. to import more food and to export jobs associated with labor-intensive agricultural production. Congress must act to create a sustainable agricultural worker solution to ensure an adequate legal workforce for the future.

That said, Members of Congress must bear in mind that even if broad political consensus emerges to fix H-2A, H-2A reform alone cannot address the near-term needs of the agricultural sector. The facts and the challenges are stark. According to the National Agricultural Worker Survey (NAWS), over 50% of the hired farm labor force is unauthorized. Experts believe that the actual percentage is much higher, as the NAWS relies on workers self-disclosing their status to an interviewer who is acting on behalf of the U.S. Government. Credible evidence resulting from employment-based immigration enforcement and other sources points to at least 70% of the farm labor force lacking proper work authorization. As ACIR detailed in our previously-referenced E-Verify testimony, extensive efforts over time to recruit and place U.S. workers into farm jobs have consistently failed.

There is no factual basis for concluding that that these workers could be replaced by an adequate and committed pool of U.S. workers and that U.S. workers could be attracted if farmers only paid more money. The adverse effect wage rate required by the current regulations is an inflated wage rate that ignores the prevailing market wage rate, yet it still fails to attract U.S. workers. Moreover, even if higher wages would attract more U.S. workers -- and they will not -- growers cannot afford to pay wages that would make them even more non-competitive with farmers in countries with lower wages and without the environmental and food safety regulations with which U.S. farmers must comply. Ultimately, it is the nature of the work that makes farm work unattractive—it is seasonal and it requires physical labor out of doors.

There is also no reason to conclude that these essential workers could be replaced in a timely manner by H-2A workers under a reformed H-2A program. As mentioned previously, H-2A now supplies only two percent of the farm workforce. The program involves three federal agencies, as well as state agencies, in a complicated multi-step approval process. Delays are commonly encountered at each step, often resulting in workers arriving days or even weeks after they are needed. With perishable crops, such delays are economically devastating.

If Congress were to set an ambitious goal of increasing H-2A use five-fold over the next several years, processing and consular capacity-related delays already being encountered would surely grow vastly worse. And yet, the program would still only be providing 10% of agriculture's labor force needs. The inescapable reality is this: the growing needs of the agricultural sector cannot be addressed without squarely addressing the status of the experienced farm employees that are sustaining many of America's farms, doing most of the work, but without proper immigration status. Congress cannot solve the problem and ensure a stable labor force without providing work authorization for currently-unauthorized farm workers who are otherwise law-abiding, trained, talented, and hard-working economic migrants.

Foreign-born (and often unauthorized) farm employees are essential in virtually every state across the nation. This is a national problem in need of a national solution. The risks are particularly acute in states that have the highest farm labor needs, and/or especially pronounced patterns of migration from crop to crop, farm to farm, or state to state. Notable examples include California, Florida, Oregon, Washington, and Texas.

An examination of overall labor needs versus H-2A program use in California, Florida, and Texas underscores how risky a gamble it would be to presume that an improved H-2A program could be ramped up and expanded fast enough to provide even one quarter or one half of needed farm hires. The numbers below are derived from the 2007 *Census of Agriculture* (the most recent census), and the DOL Office of Foreign Labor Certification annual report for FY2009. Bear in mind, when examining these numbers, that the NAWS survey shows at least 52% of farm workers are unauthorized; expert private estimates suggest that number is closer to 75%.

- California relies on the labor of at least 512,649 hired farm and ranch workers each year. In 2009, only 3503 farm jobs in California were certified for H-2A.

- Florida farmers directly hire farm employees to fill 115,306 positions. In 2009, 5820 jobs were certified for H-2A, meaning that H-2A provides, at most, 3.8% of Florida's needed farm labor.

- In Texas, about 100,000 workers fill roughly 155,000 farm jobs each year. In 2009, only 2807 farm jobs in Texas were certified for H-2A, meaning that H-2A currently fills only 1.8% of Texas' farm labor needs.

As noted in ACIR's recent E-Verify testimony, the consequences of inaction, or unwise and incomplete action, are huge. They include off-shoring much of our agriculture, exporting potentially several million on-farm and farm-dependent jobs, and importing more and more of our food. The implications for the nation's economy are significant; the implications for rural economies, where high-value crops and livestock are produced, are enormous.

Congress must act prudently to address this crisis. The longer it is ignored, the more intractable it will become. On a positive note, the agricultural sector offers an opportunity to test a balanced approach on a realistic scale. Replacement of the current H-2A program is one key element of badly needed reform. However, reform or replacement of H-2A, alone, cannot sufficiently address agriculture's urgent need for a legal and stable workforce.

The ACIR coalition looks forward to working with Congress to address the long-overdue challenge of establishing a workable and sustainable agricultural labor program. Thank you.

The Agriculture Coalition for Immigration Reform (ACIR) is the broad national coalition representing over 300 national, regional, and state organizations whose members produce fruit and vegetables, dairy, nursery and greenhouse crops, poultry, livestock, and Christmas trees.

Written Statement of Dr. James S. Holt
to the
Committee on Agriculture
U.S. House of Representatives

October 4, 2007

Mr. Chairman, thank you for the invitation to provide testimony for this hearing on the labor needs of U.S. agriculture

I am an agricultural labor economist. I was a professor of agricultural economics and farm management at The Pennsylvania State University for 16 years. For the past 30 years I have conducted research, consulted and lectured on agricultural labor and human resource management, immigration and employment issues, and the H-2A temporary agricultural worker program for government agencies, universities and private organizations. I have been a consultant to many grower associations, individual farming operations and other employers throughout the United States who use the H-2A program, and to national agricultural organizations, including the National Council of Agricultural Employers (NCAE). However, I am not representing any specific organization here today.

I do not speak lightly, nor engage in hyperbole, when I testify today that the U.S. agricultural industry is in the midst of a labor crises, the resolution of which will determine whether U.S. producers of fruits, vegetables, and horticultural and other specialty commodities are more than marginal participants in U.S. and global markets for the commodities they produce in future decades. The current agricultural labor crisis will also have a profound impact on the U.S. dairy and sheep industries, U.S. grain producers, the agricultural processing sector, and many other agricultural operations. It will also largely determine the future of the domestic upstream and downstream businesses that service these sectors.

The labor intensive fruit, vegetable and horticultural sectors are already overwhelmingly dependent on foreign workers, the majority of whom are working in the U.S. illegally. The U.S. dairy, meat packing, and food processing sectors are significantly dependent on a foreign, and preponderantly illegal, work force and becoming more so every year. U.S. custom combine operators who harvest the great plains grain crops, and sheep producers in the western states, are heavily dependent on foreign workers obtained through the nearly dysfunctional H-2A program. The labor problems of U.S. agriculture have been ignored and swept under the rug for decades, only to become more problematical with each passing year. At a minimum, several hundred thousand new farm workers have illegally entered the United States to work on U.S. farms and fill jobs vacated by several hundred thousand illegally present farm workers who have moved into the non-farm work force since the members of this Committee were last elected or re-elected. The public is now insisting, and our national security

demands, that our government and the Congress squarely face and resolve this problem. How you resolve it will determine the future of important sectors of U.S. agriculture.

Hired Farm Employment and the U.S. Hired Farm Work Force

Hired labor is an essential input in U.S. agriculture. More than 550,000 U.S. farmers hire workers to fill more than 3 million agricultural jobs each year. The farms that hire labor are the backbone of American agriculture, accounting for the overwhelming majority of U.S. agricultural production.

Farmers pay an annual payroll estimated at $ 21 billion for hired farm labor. Expenses for hiredlabor account, on average, for $1 of every $8 of farm production expenses, and up to $1 of every $3 or more of farm production expenses on farms in the labor intensive fruit, vegetable and horticultural sectors.

Because a high proportion of U.S. agricultural jobs are seasonal, the 3 million U.S. agricultural jobs each year are filled by a hired farm work force of about 2.5 million persons. About 1.6 million of these are non-casual hired farm workers who perform more than 25 days of hired farm work a year. Approximately 1.2 million of the non-casual hired farm work force are likely not authorized to work in the U.S.

The fact that the U.S. hired farm work force is overwhelmingly illegal is not speculative, it is well documented. Ironically, agriculture is the one sector of the U.S. workforce for which the federal government actually produces official statistics on illegal alien employment. These come from the National Agricultural Worker Survey (NAWS), a survey program begun after the enactment of the Immigration Reform and Control Act of 1986, and conducted biannually by the U.S. Department of Labor Among other questions, the survey asks seasonal agricultural workers whether they are authorized to work in the United States. In the first survey, conducted in FY 1989, 7% of U.S. seasonal agricultural workers said they were unauthorized. By FY 1990-91 the figure was 16%. By FY 1992-93 it was 28%. By FY 1994-95 it was 37%. In the most recently published NAWS survey, *53 percent of all seasonal agricultural workers admitted they were not authorized to work in the U.S.* Experience on the ground, based on work place audits and other evidence, suggests that closer to 75 percent of U.S. farm workers are not legally entitled to work in the U.S.

Even more significant for the future is that one sixth of seasonal agricultural workers are "newcomers", working their first season in U.S. agriculture. An astonishing 99 percent of these newcomers self-identify that they are not authorized to work in the U.S. This means that for all practical purposes every new worker entering the U.S. hired crop work force is illegal. The NAWS does not survey livestock workers, and the percentage of illegal livestock workers and replacements may be somewhat lower than in the crop sector. However, it would be a huge mistake to assume that illegal workers are not a large and rapidly growing proportion of the hired work force in the livestock sector as well. Dairying, in particular, is heavily dependent on foreign born, and likely preponderantly illegal, workers.

Social Security Administration no-match statistics also document the high level of illegal alien employment in agriculture. Agriculture, which accounts for only 1.2 percent of U.S. employment, accounts for 17 percent of all Social Security no-matches, more than any other sector of the U.S. labor force.

The origins of this problem lay in U.S. labor force demographics and U.S. immigration policy – an economy hat has grown more rapidly than the legal work force. The decade of the 1990's, in particular, was a period of unprecedented economic growth and job creation in the U.S. But it was also a decade when the rate of growth in the native-born U.S. work force continued to slow, and the number of new labor force entrants from the native born population and legally admitted foreign workers was far below the rate of new job creation. At the beginning of the decade, 31 % of the U.S. seasonal agricultural work force was still U.S. born. By the end of the decade, only 19 % was U.S. born. During the decade of the 1990's the real hourly wage rate in agriculture increased at a more rapid rate than for the non-agricultural work force. The U.S. average field and livestock worker wage rate now stands at $9.44 per hour. But the lure of year round work, easier jobs and more pleasant working conditions in most non-agricultural employment was obviously enough to attract many U.S. workers out of agriculture, even into jobs in which the hourly wage was lower than in agriculture. By the FY 1997-98 NAWS survey, 81% of U.S. seasonal agricultural workers were foreign born and 77% were born in Mexico. One-third had immigrated to the U.S. within the last 2 years. More than one-third were under the age of 25, and two-thirds were under the age of 35.

The U.S. seasonal agricultural work force is a very diverse work force in many respects. One of the respects in which it is diverse is in its international migratory status. About 40% of U.S. seasonal agricultural workers are international migrants whose permanent residence is outside the United States and who come into the U.S. temporarily for a portion of the year to perform agricultural work. This work force is preponderantly young, single and illegal. The other 60% of the seasonal agricultural work force are permanent residents of the U.S. This group includes most U.S. born farm workers, *but is also majority foreign born and majority illegal.* Over-all, only one half of the U.S. seasonal agricultural work force are married, and only one quarter have children with whom they reside in the U.S..

Agricultural migrancy *within the U.S.* is the exception rather than the rule. Almost two-thirds of U.S seasonal agricultural workers hold only one farm job in the U.S. during the year, and more than 90 % hold 3 or fewer jobs per year. Only 1% hold as many as 6 different agricultural jobs during the year. Only 17% are traditional "follow-the-crop" migrants, who hold two or more agricultural jobs during the year which are more than 75 miles apart and are more than 75 miles from their residence.

The Impact of Immigration Policy on Agriculture

Now let us relate this to immigration policy.

Economic growth in the United States (or any other country in the world) is determined by two factors, growth in the labor force – the number of persons who are engaged in producing goods and services – and growth in productivity – the quantity of goods and services each worker produces each hour and each day they work. The story of how the United States has become the economic engine of the world is largely the story of an expanding labor force coupled with phenomenal improvements in worker productivity. Although often overlooked or taken for granted in this story, the phenomenal growth in U.S. agricultural productivity has been the enabler of this U.S. economic growth. It has enabled an ever larger proportion of the U.S. labor force to engage in the production of other goods and services rather than food and fiber, to the point where less than 2 percent of the U.S. labor force is now engaged in agriculture.

Immigration has also been an important historical factor in the nation's economic growth. It has enabled the expansion of the U.S. labor force far more rapidly than would have occurred through normal reproduction of the native born population. Imagine, for example, that we had stopped immigration in 1776 and relied only on natural birth after that, or that we had closed our borders in 1812, or 1865, or 1910, or even 1950.

Immigration is even more important to sustaining U.S. economic growth today than it was in any of those past periods. That is because, like Japan and Western Europe before us, and increasingly even Mexico, China, India, and second world countries, the birth rate of native born Americans is declining. In some developed countries birth rates have declined to the point where they are not even replacing, much less expanding, the labor force. It is important that we understand that even in the U.S. we long ago passed the point where we were producing enough additional native born workers to fill all the new jobs being created in the U.S. economy. In fact, we long ago passed the point where we were producing enough native born workers AND legally admitting enough aliens, to fill all of the jobs we were creating in the U.S.

When I hear people say illegal aliens only take the jobs Americans won't do, I say that is a result, not a cause. *Illegal aliens take the jobs there aren't enough American workers to fill.* There are literally millions more JOBS in our economy than there are American workers to fill them, even if we include in the term "American worker" every person who is legally entitled to work in the United States, whether they were born here or not. Given this huge imbalance between jobs and legal workers, it is not surprising that American workers gravitate to the more attractive jobs, leaving the less attractive ones to be filled by illegal immigrants.

The reality is that the U.S. is dependent on illegal immigration for economic growth, and growing more so by the year. The rate of growth in the native born labor force continues to decline, and could become negative as it already has in some developed economies. The only way we can sustain our current level of economic activity, much less expand it, is through in-migration of alien workers. That is why Alan Greenspan was so concerned about immigration policy while he was chairman of the Federal Reserve. Job creation is one of the most important engines of economic growth. But job creation can not occur if there aren't workers to fill the jobs. The economic slow

down after 9/11 provided a window on the importance of immigration to the national economy. One of the most important contributors to that slow down was a temporary reduction in both legal and illegal immigration, coupled with a small exodus of foreign workers already here, because some foreign workers were afraid to be in the United States.

Imagine, therefore, what the economic impact of really effective border control that stopped illegal immigration would be. And then imagine, if you dare, what the economic impact would be of removing from the work force, through effective work place enforcement or otherwise, the illegal workers who are already here.

Some suggest that such a scenario would be a good thing. According to this view, agricultural employers would be left to "compete in the labor market just like other employers have to do." Under this scenario, there would be strict workplace enforcement and no guest workers. To secure legal workers and remain in business, agricultural employers would have to attract sufficient workers away from competing U.S. non-agricultural employers by raising wages and benefits. Those who were unwilling or unable to do so would have to go out of business or move their production outside the United States. Meanwhile, according to this scenario, the domestic workers remaining in farm work would enjoy higher wages and improved working conditions.

No informed person seriously contends that wages, benefits and working conditions in seasonal agricultural work can be raised sufficiently to attract workers away from their permanent nonagricultural jobs in the numbers needed to replace the illegal alien agricultural work force and maintain the economic competitiveness of U.S. producers. With hired labor accounting, on average, for 12 percent of all farm production costs, a substantial increase in farm workerwage and/or benefit costs will cause growers' over-all production costs to rise substantially. U.S. growers are economically competitive with foreign producers at approximately current production costs. If U.S. producers' production costs are forced up by, for example, restricting the supply of labor, some U.S. production will become uncompetitive in the foreign and domestic markets in which U.S. and foreign producers compete. U.S. producers will be forced out of business until the competition for domestic farm workers has diminished to the point where the remaining U.S. producers' production costs are again at global equilibrium levels. *The end result of this process will be that domestic farm worker wages and working conditions (and the production costs of surviving producers) will be at approximately current levels, while the volume of domestic production will have declined sufficiently that there is no longer upward pressure on domestic farm worker wages.* Given the large proportion of illegal workers in the current farm labor market, the reduction in domestic production is likely to have to be very substantial to clear the labor force of illegal workers. Consumers will likely feel little impact, because the market share abandoned by U.S. producers will be quickly filled by foreign production.

The domestic employment impacts of this adjustment will not be limited to alien farm workers and U.S. farmers. Since agricultural production is tied to the land, the labor intensive functions of the agricultural production process cannot be foreign-sourced

without foreign-sourcing the entire production process. We cannot, for example, send the harvesting process or the thinning process overseas. Either the product is entirely grown, harvested, transported and in many cases initially processed in the United States, or *all* of these functions are done somewhere else, even though only one or two steps in the production process may be highly labor intensive. When the product is grown, harvested, transported and processed somewhere else, *all* the jobs associated with these functions are exported, not just the seasonal field jobs. These include the so-called "upstream" and "downstream" jobs that support, and are created by, the growing of agricultural products. U.S. Department of Agriculture studies indicate that there are about 3.1 such upstream and downstream jobs for every on-farm job. Most of these upstream and downstream jobs are "good" jobs, i.e. permanent, average or better paying jobs held by citizens and permanent residents. Thus, we would be exporting about three times as many jobs of U.S. citizens and permanent residents as we would farm jobs filled by aliens if we restrict access to alien agricultural workers.

The U.S. farm workers and workers in upstream and downstream jobs that would be displaced by the elimination of the alien farm labor supply would presumably be absorbed into the non-agricultural economy, which would be hungry for domestic workers to replace the foreign workers to whom they no longer had access. But the total volume of U.S. economic activity (and GDP) would have been reduced. And the U.S. would be substantially more dependent on foreign suppliers for food.

Background on the H-2A Temporary Agricultural Worker Program

The only current program for legally employing foreign agricultural workers in the United States is the H-2A temporary agricultural worker program. This program was enacted 55 years ago as a part of the Immigration and Nationality Act of 1952. From 1952 until 1986, there was no statutory distinction between temporary agricultural and non-agricultural workers -- both entered under the "H-2" program. However, almost from the outset, the Department of Labor promulgated separate regulations governing the requirements for H-2 agricultural and non-agricultural programs, and this distinction was recognized statutorily in the division of the H-2 admission category into H-2A and H-2B in the Immigration Reform and Control Act of 1986.

From 1970 through the late 1990's the number of H-2 and H-2A agricultural job opportunities certified fluctuated from about 15,000 to 25,000 annually. In the past decade usage has increased substantially, with 59,112 H-2A agricultural job opportunities certified in FY 2006. Many alien workers fill two or more H-2A certified job opportunities within the same season, so only about half as many individual H-2A aliens are admitted each year as the number of job opportunities which are H-2A certified.

Despite its recent dramatic growth, use of the H-2A program is miniscule in comparison with U.S. agricultural employment. Fewer than 2 percent of the 3 million U.S. agricultural job opportunities are H-2A certified, and only about 1 percent of the hired farm work force are H-2A aliens.

The above statistics underscore that we currently have *two* agricultural guest worker programs operating in this country – a *legal* guest worker program that fills a miniscule 2 percent of U.S. agricultural jobs, and an *illegal* guest worker program that fills at least half, and likely more than three quarters, of U.S. agricultural jobs. This situation exists as a result of a cascade of failures – failure of our border control system, failure of our system for interior enforcement, failure of our work authorization documentation procedures, failure of our immigration laws to address realistic labor force needs, and the Labor Department's antagonistic administration of the H-2A program.

Benefits and Problems of the H-2A Program

A legal, workable agricultural guest worker program benefits farmers, alien farm workers, domestic farm workers, and the nation.

It benefits farmers by providing assurance of an adequate supply of seasonal workers at known terms and conditions of employment. In an industry where more than 80 percent of jobs are seasonal, and a work force must be reassembled at the beginning of every season, it provides assurance that when farmers and their families invest millions of dollars in farm production assets, there will be a labor force to perform the work. It also promotes continuity, stability and productivity in agriculture. While there are no official statistics, anecdotal evidence is that three-quarters or more of the H-2A work force in any given year are returning workers. H-2A employers almost universally find that this stable, experienced work force is more productive, and employers can get by with fewer workers than when they are recruiting a new, inexperienced work force every year.

A workable guest worker program benefits alien workers by providing a legal, regulated way for aliens to work in the United States in jobs where their services are needed. It may surprise members of the Committee to learn that the pressure on employers to participate in the H-2A program often comes from their illegal workers, who pay exorbitant costs to be smuggled into the U.S., often under life threatening conditions, and face fear and abuse while they are here. As H-2A guest workers, they enter legally and work with rights and guarantees. Not withstanding the allegations of opponents of the program, H-2A aliens value their jobs, are careful to comply with program requirements, and return as legal workers year after year. In the words of one former illegal alien whose employer got into the H-2A program, "I thank God every day for the H-2A program".

The program also benefits domestic farm workers. It assures open recruitment for and access to H-2A certified job opportunities for local and non-local domestic workers who want such work. It assures that U.S. workers have preference in these jobs. It provides labor standards and employment guarantees that are above the norms for most agricultural jobs and for many rural non-agricultural jobs. Equally important, the H-2A program assures the viability of the jobs of U.S. workers in the upstream and downstream jobs that are dependent on agricultural production in the U.S.

An adequate supply of legal labor also benefits the nation. Food and fiber are basic commodities. It is not in our national interest to be significantly dependent on foreign sources for such commodities. However, it is also clearly not in our national interest to have such a basic industry as food and fiber production almost entirely dependent on a work force which has entered the U.S. and is living and working here illegally and without control. In a mature economy like that of the U.S., where the native born work force is growing at a substantially lower rate than job growth, our *only* policy options are a workable agricultural guest worker program or dependence on foreign producers for our food and fiber.

That is what works about the H-2A program. What often doesn't work are the cumbersome, bureaucratic procedures of the program. Farmers seeking to use the program must first apply for a labor certification from the U.S. Department of Labor and attempt to recruit qualified U.S. workers. If the employer's application meets the requirements of the Department of Labor and sufficient U.S. workers cannot be found, a labor certification is issued. The employer then files a petition with the U.S. Citizenship and Immigration Service (USCIS) for the admission of H-2A aliens. Meanwhile, a supply of alien workers must be recruited. If the employer's petition is granted, it is transmitted to the U.S. consulate where the aliens will apply for visas. The aliens complete visa applications and are interviewed. They must meet the same criteria as any other applicant for a non-immigrant visa. The aliens who are granted visas then travel to the port of entry and apply for admission to the U.S. Those who are admitted travel to the employer's farm. In order for workers to arrive at the by the employer's date of need, the entire process described above must take place in 45 days. Once the workers arrive, H-2A employers face a barrage of compliance monitoring and enforcement officers, outreach workers, social service agencies and legal service activists. Nowhere else are so few monitored by so many. Lawsuits are commonplace.

Many employers are daunted by the imposing H-2A administrative processes, and simply never try to use the program. Those who do use it must navigate a gauntlet of obstacles. Not withstanding statutory performance deadlines, H-2A labor certifications are often issued late and after interminable haggling over the wording of application documents. The problem of late labor certifications is compounded by processing delays in approving petitions at the Department of Homeland Security and in securing appointments for visa applicants at U.S. consulates. During the 2007 season, the arrival of many H-2A workers was seriously delayed, imposing substantial costs and potential losses on employers who are paying a premium to do things right and comply with the law. Even brief delays in the arrival of workers can be disastrous to producers of perishable agricultural commodities.

The H-2A certification process is also unnecessarily complicated. Even though 97.5 percent of H-2A labor certification applications, and 92 percent of the job opportunities on those applications, were certified in FY 2006, it nevertheless required an extremely labor intensive, paper intensive process for individually processing, recruiting on and adjudicating every single one of the 6,717 H-2A applications certified. This process is repeated annually, not withstanding the fact that approval rates have been in

the 90 percent range for decades, and the availability of legal U.S. workers as a percentage of the need has been in single digits. This repetitious and labor intensive process for demonstrating annually that there are not sufficient able, willing and qualified eligible (i.e. legal) workers to take the jobs offered for each and every application, even when the same labor market is tested multiple times a week and month for identical job opportunities, and when the USDOL's own statistics show that more than half of the domestic agricultural work force is illegal, is government bureaucracy at its worst.

The Need for Reform

The nation's agricultural labor policy is in desperate need of reform. Reforms are needed in the administration of the H-2A program, the H-2A regulations, and the nation's basic agricultural immigration statutes.

In August of this year the Administration announced its intent to incorporate Social Security no-match information into its strategy for immigration enforcement, and the rules employers would be expected to follow upon receipt of no-match notifications in order to protect themselves from charges of knowing hiring or continued employment of illegal workers. In recognition of the impact the no-match regulation was likely to have on agriculture, the Administration also promised to make every effort to reform the H-2A administrative procedures and regulations in order to make it as useable an option as possible for agricultural employers to meet their needs for adequate legal labor.

The National Council of Agricultural Employers has presented the Administration with a list of more than 3 dozen administrative and regulatory actions that need to be taken to remove obstacles and bottlenecks in the H-2A program and make it reasonably cost competitive for potential users. I understand that the NCAE will include copies of these letters in its written statement filed with the Committee, and I will not reiterate them here. Suffice it to say here that the labor certification process, in particular, is predicated on woefully outdated assumptions with respect to the demographics of the U.S. agricultural work force and labor supply and U.S. agricultural labor markets. This is compounded by a culture of hostility toward the program and program users within the Department of Labor. The H-2A petition adjudication and visa issuance processes are bogged down by the shear volume of other work these agencies are mandated to perform.

Unless the no-match regulation is blocked by the courts, it will begin having an immediate impact on agriculture in the southern growing areas this winter, and its effects will quickly march northward with the 2008 growing season. It is imperative that the administration make a good faith effort to quickly implement the administrative reforms, and immediately begin work on regulatory reform. *However, it is also imperative that Congress realize that administrative and regulatory reform of the H-2A program is not enough.* Many of the most important long term reforms of our broken agricultural labor system can only be made statutorily. The responsibility for these statutory reforms lies squarely with the Congress.

The Agricultural Job Opportunities and Benefits Act (AgJOBS)

In 2001 agricultural employers and farm worker advocates and unions achieved an historic milestone in negotiating an H-2A reform legislation package known as the Agricultural Job Opportunities and Benefits Act, or AgJOBS. AgJOBS has broad bipartisan support in Congress as well as among ethnic groups, religious groups, and farm worker and agricultural organizations that have historically battled over agricultural guest worker policy and procedures. It is intended to address many of the economic, justice and administrative problems with the current H-2A program.

AgJOBS reforms the administrative structure of the H-2A program to make it more efficient and more reliable as a source of timely legal labor. It also reforms the conditions for use of the program, making it more economically accessible to agricultural employers. It does this in a way that protects U.S. farm workers and assures access to agricultural jobs for those who want them. It also protects alien farm workers. Finally, it addresses the heavy reliance of U.S. agriculture on a currently illegal work force by providing a pathway to adjustment of status for illegal farm workers that is humane, and which will not cause chaos and disruption in the U.S. agricultural economy.

It is impossible to overstate the significance of the broad support AgJOBS has among historic adversaries. AgJOBS has the support of the two major U.S. farm worker unions, the United Farm Workers and the Farm Labor Organizing Committee, hundreds of other immigrant advocacy and labor advocacy groups, religious organizations, and the overwhelming majority of agricultural employer organizations.

Conclusion

The United States faces a serious economic, labor market and security challenge. The demographics of the U.S. population are such that we are barely replacing the existing work force through native born workers. We are not coming close to producing enough native born workers to meet the requirements of our growing economy. This has been true for more than a decade. Yet our legal immigration policies have been largely blind to the labor force needs of the economy. As a consequence, we now have millions of persons living and working in the U.S. illegally. And a good thing for us that this is so. Our economic growth over the past decade has been sustained and nourished by our failed immigration policies.

Agriculture has been particularly affected by the shortage of legal native born and immigrant workers, for reasons that are obvious on their face. With more available jobs than legal workers, the legal workers have migrated to the more skilled, year round, more pleasant, urban, higher paying jobs. This is not an indictment of U.S. agricultural employers. It is a reflection of the reality that when there are more jobs than workers, the less attractive jobs are more likely to go unfilled. If these jobs were not critical to our national economy and security, this would not necessarily pose a problem. But when they are in an industry as critical as the food and fiber sector, it poses a serious problem.

It is clear that the status quo – a U.S. agricultural industry almost completely dependent on unauthorized workers who have entered the U.S. illegally, is untenable. It is equally clear that ceding U.S. production of food and fiber to foreign producers is untenable. Congress and the administration have ignored this problem far too long.

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KANSAS NURSERY AND LANDSCAPE ASSOCIATION

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WASHINGTON ASSOCIATION OF WINE GRAPE GROWERS
WASHINGTON GROWERS CLEARING HOUSE ASSOCIATION
WASHINGTON GROWERS LEAGUE
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Written Statement of Karen K. Narasaki
President and Executive Director
Asiau American Justice Center,
A Member of the Asian American Center for Advancing Justice

House Committee on the Judiciary
Subcommittee on Immigration Policy and Enforcement

Hearing on: "The H-2A Visa Program: Meeting the Growing Needs of American Agriculture?"

April 13, 2011

Today the House Subcommittee on Immigration Policy and Enforcement will hold a hearing titled "The H-2A Visa Program: Meeting the Growing Needs of American Agriculture?" On behalf of the Asian American Justice Center (AAJC), a member of the Asian American Center for Advancing Justice, I urge the Subcommittee to work toward fair and humane immigration reform that will benefit all Americans.

Founded in 1991, AAJC is a national organization whose mission is to advance the human and civil rights of Asian Americans, and build and promote a fair and equitable society for all. AAJC is one of the nation's leading experts on issues of importance to the Asian American and Pacific Islander community including: immigration and immigrants' rights, affirmative action, anti-Asian violence prevention/race relations, census, language access, television diversity and voting rights.

The current situation is disastrous for both farmworkers and agricultural employers and must be fixed. Our nation's broken immigration system needs comprehensive reform, which must include a path to legalization. The majority of farmworkers – perhaps as many as 70% - are undocumented. America depends on these workers for the food we eat and agricultural businesses need a stable labor supply. However, farmworkers' lack of immigration status contributes to the very real problems they experience in the workplace, including low wages, poor working conditions, pesticide poisoning, and substandard housing.

Enforcement-only approaches will not solve the problems farmworkers experience nor provide employers with the stable productive workforce they need. Deporting the large number of undocumented farmworkers is not feasible and would significantly harm our agricultural production. Congress should work on reforming our broken immigration system.

The H-2A visa program is not the right solution for meeting our nation's agricultural labor needs. The H-2A program is flawed for several reasons. Currently, workers are tied

to their employers and are, therefore, dependent on their employers for continued and future employment. Further, guestworkers have only nonimmigrant status and they do not have an opportunity to become permanent members of our society. Their nonimmigrant status and desperate need to earn money leaves guestworkers vulnerable to exploitation and abuse in the workplace. This same vulnerability puts U.S. workers at a competitive disadvantage. We urge the Subcommittee to consider positive solutions such as the AgJOBS bill, which represents the type of bipartisan compromise that is needed to begin fixing our broken immigration system. Thank you.

Ms. LOFGREN. I think this is a complicated question to some extent and in other ways not. You know, we talk of this as unskilled work, but that is not really accurate. A lot of people don't realize. They say, well, these people ought to come here legally, but when people say that I don't think they realize that we have 5,000 permanent resident visas a year for people that don't have college degrees. Now, they may have high skills, but being a farm worker doesn't require a college diploma. And so the people who have come here over the past 20 years to do hard farm work didn't really have an option for the most part, and the farmers who employed them, for the most part, did not have options either.

I don't hold myself out as an expert, but I do recall my husband's stories of his very short career harvesting carrots in Bakersfield where you just couldn't do it. I mean, the people who knew how to harvest it could make some kind of wage. Somebody who was just willing to work hard couldn't do it.

And I remember in my own district when I was in local government, the mushroom cutters down in Morgan Hill and San Martin who—it was highly skilled and very sharp knives in the dark areas. They were paid well and they were highly skilled. I couldn't walk in and do that, I will tell you.

And so I think we need to put that on the table that these are hard jobs but they are in many cases skilled jobs. And they are often in remote locations. So when I went out and visited the strawberry growers—I don't have any in my district, but over on the coast, I mean people are living in barracks and it is not like you could live at home or anywhere nearby. I mean, it is in a remote location. So I think in addition to the wages, there are other elements of this profession that really weigh against people in urban settings saying, you know, I will go sign up and do that.

Having said that, I think the wages do matter. We have talked about 50 percent to 75 percent of the farm workers in America don't have their proper papers. But that means that 50 percent to a quarter percent are Americans and they deserve the same kind of wage protection that any other American worker has.

I was kind of surprised that apparently the Bush administration at the end put out their regulation that lowered the wages, and the assertion seemed to be that somehow this would protect U.S. workers from wage competition from undocumented workers. But that didn't make any sense to me. At the time, Congressman George Miller and I wrote a letter noting that wage competition for Americans is just as bad from temporary workers as it is from undocumented workers and that lowering the wages would bring about exactly what the Department of Labor said it was trying to prevent.

What do you think of that rationale, that by lowering the wages for temporary workers, we could somehow protect the wages of American workers? Does that make sense to you?

Ms. OATES. Congresswoman, there is absolutely no other area, no other sector that we have ever done that and seen it not have an impact. So I am confused by that.

But, you know, I can't tell you what the thinking was, and I have to respect my colleagues from the last Administration.

Ms. LOFGREN. That is fair.

Ms. OATES. What I can tell you is that when we made the change, we did it at the beginning of our Administration so that we could learn by our mistakes and make adjustments and we have done that. As I said in my oral testimony, we have had challenges and we have adapted to those challenges.

Ms. LOFGREN. Well, under the H-2A program, workers can't switch employers, and they have to leave the United States when the job ends. And if they want to return in the following year, they have to depend on an employer to apply for a visa for them, and of course, they have no rights to transition to any kind of permanent protected status.

Given that, is the Department concerned that H-2A workers might be particularly vulnerable to abuse and limited in their ability to ask for better job terms because of the bargaining position they have, the way that we have set this up? What do you think about that?

Ms. OATES. Absolutely, Congresswoman. I mean, it is why getting information from them is so difficult. In many instances, they are loyal to their employer and things work well, but in the instances when they have problems, it is very difficult—and I am sure you will hear that from the advocate groups—to get them to say anything because their family's livelihood is dependent on their ability to work for the full crop cycle.

Ms. LOFGREN. So given that this group—and that is not to say that every employer would exploit or abuse them. I am not certainly saying that. But as a group, they are particularly vulnerable to abuse and they are in no position to argue about it. Would that cause you concern that unscrupulous employers—not the bulk, but unscrupulous employers—would discriminate against American workers to obtain a group that they could exploit?

Ms. OATES. Well, I think that is exactly the reason that we think it is so important to have the State workforce agency involved. We think the States are in a unique position. They know the employers. They know employers that have played by the rules before. And actually many Governors have spoken to me about the fact that those that played by the rules often felt disadvantaged by the folks that you are defining as unscrupulous employers. So I think it is our statutory responsibility to make sure that we are doing all that we can to make sure that more employers are playing by the rules.

Mr. GALLEGLY. The time of the——

Ms. LOFGREN. In closing, if I may ask unanimous consent for another 60 seconds.

Mr. GALLEGLY. Without objection.

Ms. LOFGREN. I would just note—I think it was last week—we had the former Chairman of the Committee, Bruce Morrison, saying we ought to trust the market rather than the regulations. And if we gave some stature to these employees so that they were not in a position to be abused, that is likelier to protect them than an army of enforcers. You will never have enough enforcers out in the field to protect against that. Isn't that correct?

Ms. OATES. That is exactly right. I mean, our average over the past few years in terms of Wage and Hour, as I said, our enforcement arm, is about 131 investigations a year.

Ms. LOFGREN. I thank the Chairman for the additional time and yield back.

Mr. GALLEGLY. The gentleman from Iowa, the Vice-Chair of the Subcommittee, Mr. King.

Mr. KING. Thank you, Mr. Chairman.

I appreciate your testimony, Ms. Oates.

And I think about some of the things that were said. First, I look forward to the apology that I expect will be coming from Mr. Conyers, and I don't feel the need to defend myself. I will let the facts unfold here over time.

But also, on the statement made by the Chairman of the Subcommittee, "we are a country of immigrants," I would make the point that every nation is a nation a immigrants. I haven't found anyone who came up with an exception to that, although some have tried.

I would take you to this. You are the Department of Labor. So do you look at the big picture items such as our population is somewhere around 306 million to 308 million people? Do you know what our labor force is, the overall labor force?

Ms. OATES. In all sectors?

Mr. KING. Yes.

Ms. OATES. I don't have that number with me, Congressman, but I am happy to get that for you.

Mr. KING. Well, I would appreciate that. I know that there is a chart that is published on your website that is very available. The last time I looked at it, it was about 142 million.

Ms. OATES. I would have said a little under 150 million. So I think that is probably right, but I would rather give you an accurate number.

Mr. KING. And I am confident that 142 million has gone up some. So let's say we are in conceptual agreement here.

Do you ever look at those numbers then at the number of Americans that are not in the labor force? And do you happen to have a conceptual estimate of what that might be that we would find if we looked on that chart? I am waiting for it to come to me.

Ms. OATES. No, no. Absolutely. I think that the number is growing, unfortunately, separating from the labor force, people getting fatigued from looking after being dislocated. And the critical number that I would point out to you is the abysmal participation of those 25 and younger right now who are actively looking for jobs, and that is particularly marked when you are talking about disaggregating by people of color. In your State, both Black and Latinos in Iowa are twice as likely to be unemployed 25 and under than——

Mr. KING. I appreciate your perspective on that, and that is something I wanted to explore here. From some old numbers, mostly from memory for me, I remember going to that chart and adding up. Would you agree that 16 is a legitimate age to start counting the available labor force?

Ms. OATES. Yes, sir.

Mr. KING. So from 16 to 19, if I remember, the last time I looked it was 9.7 million in that group. And then from 20 to 25, I believe is the next segment. There was another group, a little larger than

half that size. And as I added that up, I went up to 74 because Walmart hires at 74 and we are paying unemployment at 74.

Now, I am making this point because I think we will find, when we look at this chart, that those not in the workforce, those who are formally unemployed and those who are not in the workforce but not formally unemployed, come to a number that will approach or perhaps exceed 80 million. And if we have 80 million Americans that are eligible for work—now, all of them are not eligible perhaps for picking strawberries, but this is a huge universe of people. 80 million people. That is a greater population than most countries in the world by far.

So I want to make this point also that there are at least 71 means-tested Federal welfare programs that we have in this country that compete for a large share of that labor that is not in the workforce. And so when we look at an equation and hear a statement that there are a million illegals working in the farm sector and we need them, I am thinking about a nation that has a lot of people that are riding along on this boat and not pulling on the oars. Wouldn't a logical nation want to employ all of those that are eligible for work before they would bring people in, especially given that we have 71 means-tested welfare programs and we have established a welfare state and that welfare state supplements low wages also in the United States?

And when you consider that the lowest 50 percent of income pays only 2.7 percent of the income tax, would you agree that there are many things out of balance in this economy and that it would be probably difficult to try to fix it by going in and adjusting to the demand in the H-2A program?

Ms. OATES. Well, I don't represent an agency that operates any of those 71 means-tested welfare programs, so I don't think I can speak on their behalf.

But let me tell you what I can speak about. I think it is critical that we don't make inside-the-beltway decisions about what American workers will and won't do. I think we need to make sure that American workers are aware of the work that is available near to their home or near to a place where they are able to go to work.

And I think anecdotally in the summer of 2010, we saw community college students and high school graduates picking fruit that never dreamed they would be picking it before.

And I think that our responsibility statutorily is to do everything in our power to make sure that Americans are aware of jobs that are available and that the guest workers that we bring over come over in a fair and equitable way and that no worker working in the agricultural business adversely affects the wages of American workers.

So I mean, I would be happy to look at numbers with you. I would also be happy to look at any mechanism you or any other Members of the Committee would have to help us get the word out.

Mr. KING. Mr. Chairman, I would ask unanimous consent for an additional minute.

Mr. GALLEGLY. Without objection.

Mr. KING. Thank you, Mr. Chairman.

I would just pose this question. There are over 600,000 acres in the San Joaquin Valley that have been dried up because of water

policy primarily coming out of California but also that this Congress has some oversight over. Wouldn't it be rational to think that there would be a demand for fewer Ag workers in the San Joaquin Valley if we can't get the water opened up to the farmers down there?

Ms. OATES. Again, it is not an area of my expertise with the San Joaquin Valley, but it would seem to me that we should be doing everything as a Federal Government that we can to open up employment opportunities in every sector, and if clearing arid land and making it farmland again is a way to create jobs and create businesses, we should be actively looking at that.

Mr. KING. Thank you.

Thank you, Mr. Chairman.

Mr. GALLEGLY. The time of the gentleman has expired.

Mr. Conyers?

Mr. CONYERS. I don't have any questions.

Mr. GALLEGLY. Mr. Conyers has no questions.

We would yield then to the gentleman from Texas, Mr. Gohmert—Mr. Poe. I am sorry. Mr. Lungren is next. If Mr. Lungren will join us, he will be next.

Mr. LUNGREN. Ms. Oates, I just have to say that I am as disappointed by your testimony as just about anything I have ever heard. This is as nonresponsive as Steve Colbert last year.

Ms. OATES. I am sorry to hear that, sir.

Mr. LUNGREN. Well, I am very sorry to hear it too because listening to your testimony and reading your testimony, you would think that the H-2A program is working well. It is a failure right now for agriculture, and those of us in this Congress on the Democrat and Republican side are going to pass e-Verify. I don't think there is too much doubt about that. And when we pass e-Verify, we are going to have a crisis in the agricultural area, and we need to have something that works. And I hear from you about you don't have an opinion as to why only 50,000-some people have made applications when there seems to be a demonstrated need for 200,000. You don't have an opinion on that? I mean, you are open to opinions, but you evidently weren't open to the opinions of the previous Administration when they attempted to make it work.

We have a crisis and some people are talking about the fact that California is the reason we don't have water. The reason we don't have water is a Federal court decision based on Federal law that says that the delta smelt is more important than homo sapiens in the central valley of California who don't have jobs. And we have hundreds of thousands of acres now fallow. We are going to have millions of acres fallow if we don't do something to solve this problem.

To hear somebody come up here and testify as to how well the H-2A program is working when it is a demonstrated failure right now for agriculture—we are going to have a crisis and you are telling us that you are concerned about your statutory authority after you folks decided that you would get rid of the regulations of the previous Administration, but you are open to other opinions. I mean, frankly, I am very, very frustrated because I know what is going to happen. We are going to have a crisis in agriculture in the United States. A lot of it is going to be in California, but not just

California. And we are going to be sitting here talking about how well the H-2A program has worked, and it isn't working. I am astounded.

The fact of the matter is we have had foreign labor working in agriculture for 150 years. It has been legal or illegal, depending on whether we had a workable program. And I am not going to defend the Bracero program because I think it had all sorts of problems with it. I have tried to come up with alternatives. But the fact of the matter is it is frustrating.

In 1986, I was the Republican who led the charge for the votes to pass Simpson-Mazzoli, and what happened was what someone else mentioned here. A lot of those people who were legalized went on to other work. They didn't stay in the fields. I am not saying they should have stayed in the fields. I wouldn't have stayed in the fields either. The fact of the matter is it is tough work, as you have said. And I don't think we can get American workers to work there. I wish we could. And if that is not the case, we need to have a workable program.

The H-2A program is not working, demonstrably not working. And to have you come up here and testify as if the thing is just working fine, I am sorry, is extremely disappointing because some of us are trying to work our way out of it. Some would like to have comprehensive immigration reform. We are not going to have it. Let's just be honest about it. We are going to have e-Verify I think, and if we do, e-Verify and no comprehensive program, agriculture is going to be clobbered, and maybe some people think they ought to be clobbered. They are being clobbered by the lack of water right now and no one seems to give a whole lot about that.

But I am sorry. I am just very, very frustrated.

Let me ask you this question. If we pass e-Verify, do you have an opinion as to whether that will have any impact in the agricultural labor market?

Ms. OATES. Congressman, if the Congress passes e-Verify, we will do everything that we can to work with——

Mr. LUNGREN. That is not my question. My question is do you think it will have an impact in terms of the labor market in agriculture in the United States.

Ms. OATES. If the NAWS data is correct, as we believe it is, absolutely it will have an effect.

Mr. LUNGREN. And what recourse will agricultural workers have? Advertise for American workers to work in agriculture? Will that solve their problem in your opinion?

Ms. OATES. In my opinion, it is a part of the solution but not the entire solution.

And Congressman, if I may, with great respect, just correct something. I never said that the H-2A program is working well. I told you what we were doing.

Mr. LUNGREN. I am sorry. I guess I misinterpreted the words when you were talking about the great job that the Department of Labor is doing.

Ms. OATES. I respect that. But you need to hear what I did say. What I did say is we are working very hard to make sure that the information gets out and that we are in the process of continuous——

Mr. LUNGREN. Do you think it is going to work? If you get enough information out, are we going to have enough American workers to fill the void of those foreign workers who will now not be eligible under e-Verify?

Ms. OATES. I don't know the answer to that, but I will tell you we——

Mr. LUNGREN. Do you have a suspicion? Do you have a suspicion? Do you have an inkling?

Ms. OATES. I am not a suspicious person.

Mr. LUNGREN. Do you have an inkling?

Ms. OATES. I have an inkling that we would have to ramp up what we are doing to address increased claims and we would be willing to do that.

Mr. LUNGREN. I thank you very much for your candor.

Ms. OATES. Thank you, Congressman.

Mr. GALLEGLY. The time of the gentleman has expired.

The gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Ms. Oates, welcome?

Ms. OATES. Thank you, Congresswoman.

Ms. JACKSON LEE. And thank the Secretary and the Department for doing such great work on behalf of American workers.

You know that our chief responsibility for all of us and I believe the crux of the Department of Labor's founding premise is to protect American workers, protect workers.

Ms. OATES. That is correct.

Ms. JACKSON LEE. And as well, I believe it is to be part of the nucleus of job creation and generation that we are trying to and that we have been successful on for many of us with the policies that we have worked on here in this Congress. It has been about investing in job creation. And a lot of what you do is based upon that. Am I correct?

Ms. OATES. That is correct.

Ms. JACKSON LEE. So it is interesting on this particular hearing on the H-2A program—and I was reading materials, and it looks as if we are conflicted on the potential of this program. What is the jurisdiction that the Department of Labor has with respect to farm workers?

Ms. OATES. Congresswoman, it is our responsibility at the Employment and Training Administration to work with the employers to take the applications, to work with the States in taking those applications, and then it is our sister agency, Wage and Hour's responsibility at the Department of Labor to do the enforcement.

Ms. JACKSON LEE. So do you think it is productive to suggest that the wages of farm workers, as you have stated them, over the maybe period that you have been in place to be lowered? Do you have any documentation that suggests that these are outrageous hourly rates and that you are creating multi-millionaires in the farm working business?

Ms. OATES. I do not, and I think it is really important. Unlike many other sectoral workers in the United States, farm workers don't enjoy the privilege of overtime. So, therefore, their hourly wage is what they get whether they work 8 hours a day or 16 hours a day. And I think their work ethic is such that in partner-

ship with the employer, they often do work extended hours because of mother nature and the crop times. So I think that it would be very difficult to become a wealthy person as a farm worker.

Ms. JACKSON LEE. Though this is not something we are promoting, I know I have heard from adults who have said they started as they were children, and in fact, we do know that in a number of farming communities, there is an issue of when the child will go to school and taking children out of school. So we know that they are working during that timeframe. We know that they are working as young adults during the time that women are in their childbearing stages, and some may even be working during pregnancy. We know that there are those who might be considered senior who are working. And the work—is it light labor in your interpretation?

Ms. OATES. As I shared with my personal experience, I couldn't do it for 2 hours. I think it is absolutely difficult labor particularly with those crops that are picked in the high-point heats of the summer and late fall.

Ms. JACKSON LEE. I know as a Members of this Committee for a number of years, one of the things that we talked about is the poor living conditions that farm workers are in. Have you assessed that in the U.S. Department of Labor?

Ms. OATES. It was something that there was a fair amount of time and energy spent on as we contemplated changing the rule because the self-attestation on housing clearly was not meeting a livable standard. That was part of the anecdotal evidence that was brought to us and we investigated, that housing was one of the serious problems under self-attestation.

Ms. JACKSON LEE. So the whole question of living conditions and travel, the idea of lowering wages and then having the workers be responsible for their travel and then poor working conditions might make this a very challenging work to be involved in.

Ms. OATES. Absolutely. And one of the things that is out of all our control, except our friends at the Department State, who is another valued partner in this, is the abysmal behavior of some of the agents in foreign countries, what they charge people even to get on a list. So we need to make sure that we are being as clear and transparent as possible here in the United States on our part because we really don't have the same degree of control over those unscrupulous agents in other countries.

Ms. JACKSON LEE. So let's get to the crux of this. How many American workers do you believe are being blocked from participating in farm work, and is there a complexity and a seemingly contradiction in the call for more farm workers and then the call that immigrants, because these happen to be immigrants, are taking jobs away from American workers? Is there a way that the Department of Labor can assist in getting American workers into the farm industry?

Ms. OATES. Well, I think what we are trying to do, what we started last year, and what we are amplifying this year is, in our close partnership with States, to get clear information out about the work that is available, about the hourly wages that are available, and the earning potentials, particularly for young people who may be willing to do this to help pay their way through college and

for those who have experienced no luck in looking for jobs after their last unemployment status ran out.

So with the States, different States are doing different things. Actually the Texas Workforce Board in your State has been very aggressive working with us, even though Texas is not suffering to the great extent as some other States. Their unemployment is somewhere around the middle 8's right now, 8.5. They have done much better in the recovery earlier. But the Texas Workforce Commission has been a great partner in terms of getting that information——

Ms. JACKSON LEE. So our U.S. Department of Labor is making themselves available with information for American workers.

Ms. OATES. That is exactly right.

Ms. JACKSON LEE. And when we hear the cry for more workers, it is not because we have not let American workers be aware of their opportunities, and it is the farm industry that has cried out for more immigrant workers to be able to ensure that their crops go from farm to market.

Mr. GALLEGLY. The time of the gentlelady has expired.

Mr. Gowdy from South Carolina?

Ms. JACKSON LEE. Thank you, Mr. Chairman. I hope we can talk about comprehensive immigration reform. Thank you.

Mr. GOWDY. Thank you, Mr. Chairman.

Ms. Oates, let me apologize to you. One of the frustrations of being in Congress is there are multiple hearings at the same time, and I have been in a markup in OGR. But I wanted to come over because nary a week has gone by that farmers from South Carolina have not come into my office and expressed to me their frustration with trying to abide by our laws and also make a living at the same time. So my questions to you hopefully will capture some of their frustration and enable me to go back and provide them with some answers.

Since the creation of the department's online job registry that lists job opportunities with growers who have applied for H-2A workers, how many American workers have received jobs through the registry?

Ms. OATES. I don't have that information, and I don't think we collect that information. So we list the jobs just like we would do on a job board for any sector, and as people go and fill that job, all we know is that the job has been removed. We don't know whether a worker from Texas took it or a worker from South Carolina. Just like we wouldn't know whether the job order was filled and removed, we wouldn't know who took that job.

Mr. GOWDY. Can you cite me to any studies, or do you have evidence other than anecdotal evidence that the H-2A program is costing American workers jobs, that there is a pool of American workers who would take these jobs absent the program? Is there a study you can cite me to or something to support that proposition?

Ms. OATES. No, Congressman, unfortunately not, but it would be no different. I don't know your district, but I can tell you South Carolina—we had an Ohio metalworking company move to South Carolina, and they called us and said we can't find workers. And what we did for them was the same thing we would do for any of your folks, is get them connected with the State and get them con-

nected with the local workforce board. And I am happy to tell you that within 8 weeks they had a full workforce. So I only give you that anecdotal outside of the agricultural work because it is a recent example in your State. What we are doing is advertising those jobs, hoping that that will get the word out through a number of means, and then maybe this time next year I will have a better answer for you.

But right now, I know of no study and I have no hard data that explicitly says 10 American workers took a job and removed the need for 10 guest workers to come in and take those jobs.

Mr. GOWDY. Are there any requirements that putative employers are not allowed to pursue? Here is the scenario. I want to apply for an H-2A visa, and I have got American workers that may apply in that slot. Can I run a background check on American workers before I hire them in lieu of my H-2A visa?

Ms. OATES. You, as an employer, can put any bells and whistles on getting that job that you would like. Background checks would be included in what I would put under the category of bells and whistles.

Mr. GOWDY. So if folks in the agricultural field are under the misapprehension that they cannot run background checks on American workers who want to apply, then you and I together today can correct that misapprehension.

Ms. OATES. So let me be very explicit about this. I apply for a job, any job. The employer has any right to tell me what they are going to do, drug test me, do a background check or anything else, as long as I know that, as I continue the application.

Where there could be a problem—and I would want to get back to you on this, if you chose to do a background check on me and didn't notify me. When I took my job in the U.S. Senate, they notified me that I was going to have a background check. When I was nominated by the President, they notified me that there was going to be a background check. There might be something different if you did that background check without my knowledge.

But I would love to get you that information. Again, I am not an enforcement agency. So I am not as familiar with these details as some of my other assistant secretaries might be. So I would love to keep the door open so that I could get you more accurate information on that from our attorneys and the people in the enforcement agencies.

Mr. GOWDY. I would like that because I want to be able to tell the folks in the agricultural business in the upstate of South Carolina what they—I mean, this is a category of folks who very much want to comply with the law. To the extent that they can figure out what it is, they want to. And if they are operating under the misapprehension that they are not allowed to screen workers because they have applied for an H-2A visa, I would like to disabuse them of that misapprehension with your help.

Ms. OATES. Absolutely. I don't know whether this would ruin your reputation or not, but we would be happy——

Mr. GOWDY. You couldn't do nothing to ruin my reputation that I have not already done.

Ms. OATES [continuing]. To join those meetings or happy to meet with your constituents and your staff.

Mr. GOWDY. That would be very helpful.

Ms. OATES. You know, we are your Department of Labor.

Mr. GOWDY. That would be very helpful to me.

When I graduated law school, I ruined my reputation. So there is nothing you can do.

[Laughter.]

Mr. GOWDY. Last question. And again, this is born out of their frustration. I am nothing but the conduit to ask you, and if you are not the proper person for me to ask, then tell me. And I acknowledge that you are not in charge of the Wage and Hour Division.

Ms. OATES. The Assistant Secretary is much taller and much younger.

Mr. GOWDY. There is a sense of frustration or there is an allegation, shall we say—and bald allegations don't carry any weight with me, but I am going to pass it on in case you can't knock it back—that Wage and Hour investigators hand out lower penalties to H-2A growers who publicly support the AgJOBS amnesty; in other words, that there is a disparity in the punishment based on your support or lack thereof for certain programs. Have you seen any evidence of that at all?

Ms. OATES. I haven't, Congressman, but I might not. So that doesn't mean that it doesn't exist. If you would allow me to get back to you. I do have a staff person here from Wage and Hour who will take your question back and we will get you an answer through the Chair with your permission or individually, whatever you would prefer. I haven't worked with this Committee before. But whatever way you would like us to get that information, Chairman, we would be happy to do it.

Mr. GALLEGLY. That is totally appropriate and we always summarize the request for that at the end of the hearing.

The time of the gentleman has expired.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. GALLEGLY. I have no further questions for the witness. Ms. Oates, thank you for being here.

At this time we will bring up the second panel.

Ms. OATES. Thank you, Chairman, very much.

Mr. GALLEGLY. Our three panelists today on panel II starts with Mr. Leon Sequeira who is of counsel for the Washington, D.C. office of Seyfarth Shaw LLP. He is former Assistant Secretary of Labor during the George W. Bush administration. Mr. Sequeira has a background in business-related immigration matters and was involved in the Department of Labor's 2008 revisions to the H-2A and H-2B temporary worker program regulations.

Prior to his service at the Department of Labor, Mr. Sequeira worked in the U.S. Senate where he served as legal counsel to now Republican Leader Mitch McConnell.

Mr. Sequeira received his B.A. from Northwest Missouri State University and a J.D. with honors from George Washington University Law School.

The second witness is Mr. Lee Wicker. Mr. Wicker is Deputy Director of the North Carolina Growers Association, the largest H-2A program user in the Nation.

Prior to this position, he worked for the North Carolina Employment Security Commission as the technical supervisor for farm em-

ployment programs and the statewide administrator for the H-2A program.

Mr. Wicker has been growing flue-cured tobacco with his family in Lee County, North Carolina since 1978.

He graduated from the University of North Carolina at Chapel Hill.

And our third witness, Mr. Bruce Goldstein, is President of Farmworker Justice here in Washington, D.C. He has substantial experience regarding the H-2A temporary foreign agricultural worker program.

Prior, he worked as a labor and civil rights lawyer in southern Illinois and became a staff attorney at Farmworker Justice in 1988.

He received his bachelor's degree from Cornell University and his law degree from Washington University in St. Louis.

We will start with Mr. Sequeira. And am I pronouncing that correctly? Close enough?

Mr. SEQUEIRA. Sure. Sequeira.

Mr. GALLEGLY. Thank you.

TESTIMONY OF LEON R. SEQUEIRA, OF COUNSEL, SEYFARTH SHAW LLP

Mr. SEQUEIRA. Good morning, Chairman Gallegly, Ranking Member Lofgren, and Members of the Committee. Thank you for the opportunity to testify at today's hearing.

Nearly 4 years ago to the day, I appeared before this Subcommittee as an Assistant Secretary of Labor to discuss the importance of legal immigration to our Nation's economy. Today, however, I appear before the Subcommittee in my personal capacity to discuss whether the H-2A temporary non-immigrant worker program is meeting the needs of American agriculture. And Mr. Chairman, I would submit the answer to that question is no.

Since the Department of Labor issued new H-2A regulations last year, American farmers with the need for seasonal labor to help plant, tend, and harvest their crops find themselves frequently trapped in a dysfunctional Department of Labor bureaucracy that is either unable or unwilling to make coherent decisions in a timely manner. This is not what Congress had in mind when it created the H-2A program 25 years ago.

When establishing the program, Congress understood that the timing of a farmer's labor needs is dictated by the weather, not by the arbitrary whims of some Government bureaucracy in a faraway city. For that reason, Congress established precise deadlines by which the Department of Labor has to act on H-2A applications. But on a near daily basis, we now see the Department ignores this clear congressional intent, not to mention the clear and explicit statutory language.

The Department's mission in administering the H-2A program is to provide farmers with timely access to labor and to review their applications to ensure that agricultural workers are being properly recruited and paid so that the employment of these foreign temporary workers does not result in an adverse effect on U.S. workers. That mission, however, is being perverted by arbitrary administrative practices that routinely impose substantial delays and added costs on employers while delivering few, if any, measurable

benefits. Rather than helping facilitate timely access to seasonal labor, the Department instead subjects farmers' applications to multiple rounds of nitpicking over minor, nonsubstantive paperwork issues and typographical errors that have nothing to do with ensuring U.S. workers are properly recruited and paid for these jobs.

The examples of the questionable behavior by the Department are virtually endless. To cite just a few recent examples, the Department frequently imposes requirements on farmers that appear nowhere in the statute or the regulations. In countless cases, the Department rejects applications without any legitimate reason whatsoever. Numerous farmers see their applications delayed as a result of State and Federal bureaucratic in-fighting. Still others have their paperwork accepted at the State level as meeting all the H-2A program requirements, only to have the Federal Department of Labor reject the same paperwork saying it does not meet the program requirements. Other employers have their paperwork accepted by the Department of Labor but then a month later, the Department will change its mind, send them a letter, and claim the application doesn't meet the standards for acceptance after all.

When subjected to this arbitrary decision-making, H-2A employers, who by definition have a pressing need for workers, are left with few options but to submit to the Department's unreasonable demands if they are to have any hope at all of securing workers in a somewhat timely fashion.

But increasingly, employers are pushing back at this bureaucratic bullying. The Department's questionable approach to the H-2A program has led to a recent explosion of litigation both before administrative law judges and in Federal court. Notably in the past 6 months, there have been more than 300 administrative appeals filed with the Department of Labor's administrative law judges challenging the Department's decisions. That is more than twice the number of appeals filed during the same period the year before. The results of these appeals demonstrate the Department's decisions overwhelmingly fail to withstand scrutiny. In the hundreds of appeals in the past 6 months, the Department's position has prevailed less than 10 percent of the time. That loss record speaks volumes. Out of every 10 tries, the Department gets it right just once.

Unfortunately for employers, the appeals process is becoming yet one more required step in a long application process because the Department routinely refuses to correct its own erroneous actions. A recent decision issued by an administrative law judge in an H-2A appeal summed up the issue very well. The judge implored the Department to review its policy and consider the costs it imposes on employers, the administrative law judges, and the taxpayers. The judge also noted that forcing employers to file these appeals was, quote, a patently inefficient and unnecessarily expensive way to proceed and that it seems to reflect a breakdown in common sense. Mr. Chairman, I could not say it better myself.

And I will close by noting that since the judge issued that opinion in February, American farmers have been forced to file more than 100 additional appeals of the Department's decisions.

Thank you. I look forward to your questions.

[The prepared statement of Mr. Sequeira follows:]

WRITTEN TESTIMONY OF LEON R. SEQUEIRA

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

April 13, 2011

Chairman Gallegly, Ranking Member Lofgren and members of the Subcommittee, thank you for the opportunity to testify at today's hearing on the H-2A temporary worker program.

It has been nearly four years to the day since I last testified before the Subcommittee. Four years ago, I was here as an Assistant Secretary of Labor to testify about the economic benefits our nation receives from legal immigration. Today, I appear before the committee as an attorney in private practice to discuss whether the H-2A temporary worker program is working as intended by Congress.

In the intervening four years since I last appeared before this Subcommittee, there have been a number of changes in our economy and in Washington, including at the White House, the Department of Labor and even this Subcommittee. In that time, we have seen the Department of Labor administer and propose no less than four different H-2A regulatory regimes. Throughout all of this change and uncertainty about the H-2A program, the American farmer's need for seasonal labor to help plant, tend, and harvest crops has remained fairly constant.

Unfortunately, in the past two years, the Department of Labor has routinely ignored the clear Congressional intent and statutory language detailing how the H-2A program is supposed to operate. Rather than helping facilitate timely access to seasonal labor, the Department instead regularly subjects farmers to a bureaucratic and regulatory morass that has left the program in near total disarray.

The H-2A program was designed by Congress to provide American farmers with a means to hire legal temporary workers on an expedited basis when there are insufficient numbers of U.S. workers willing or able to accept the jobs. But this simple concept - and the Congressional intent in creating the program - has been hindered by near-constant bureaucratic inefficiencies since the Department of Labor first issued H-2A regulations in 1987.

Indeed, as a result of the Department ignoring congressional intent and subjecting farmers to interminable application processing delays, Congress changed the governing statute in 1999 to require the Department to render decisions on applications even more quickly: by no fewer than 30 days before the employer needs the workers. Less than a decade later, by 2007, it was abundantly clear that the Department regularly failed to meet its statutory obligation to administer the program in a timely manner.

In 2008, the Department proposed a series of regulatory reforms to modernize the H-2A program by reducing redundant bureaucracies in order to ensure employers could meet their seasonal workforce needs on a timely basis consistent with Congressional intent. The Department's 2008 reforms, which became effective in January of 2009, addressed many of the longstanding problems with the program that had been repeatedly discussed over the years by farmers and farm worker advocates alike, including the unnecessarily duplicative application process and artificially-high mandated wages. The Department's 2008 reforms also included important worker protections and increased penalties for substantial and repeat violations of program requirements. To be sure, the regulatory reforms did not deliver everything every stakeholder wished to see from the H-2A program. Overall, the reforms provided important and balanced improvements, but they were not a panacea, particularly with regard to those issues that require statutory changes to effectuate.

The 2008 H-2A reforms were not in effect for long before the current Administration began a concerted effort to reverse them. The Department's first effort to rescind the 2008 reforms was enjoined by a federal judge in the summer of 2009. The Department finally implemented an entirely new H-2A regulatory regime in March of 2010, despite protests from H-2A employers that the Department's changes would reinstate the old bureaucratic processes that had long plagued the program and would lead to increased costs, delays and uncertainty for farmers.

The Department of Labor's mission in administering the H-2A program is to provide farmers with timely access to labor and to review applications to ensure that agricultural workers are being properly recruited and paid, so that the employment of foreign temporary workers does not result in an adverse effect on the wages and working conditions of similarly employed U.S. workers. Today, a year after the current Administration's H-2A rules went into effect, it is clear that mission is being perverted by questionable administrative practices that routinely impose substantial delays and added costs to employers, while delivering few, if any, measurable benefits. The program is so riddled with inconsistent and arbitrary decisions by state and federal agencies, and is so prone to delays, that many employers simply turn to other sources of labor to plant and harvest their crops.

The fact that the Department's administration of the program has employers turning to other sources of labor to meet their needs is an unfortunate and ironic result of the Department's current misguided approach. While the Department no doubt would claim that it is putting H-2A employers through the wringer in an effort to ensure U.S. workers are not adversely affected, the Department's efforts are more likely to contribute to causing the very result they claim to be attempting to prevent.

As the Department noted in its 2008 H-2A rulemaking, it is the workers who are illegally present in the U.S. that pose the greatest threat to the wages and working conditions of U.S. farm workers. The Department of Agriculture estimates that there are more than 1.1 million hired farm workers in the U.S. each year. The Department of Labor's own National Agricultural Workers Surveys reveals that more than 50 percent of farm workers

admit to being in the country illegally. Although, as the Department noted in the 2008 rulemaking, advocates for farm workers have estimated that the number who are illegally present in the U.S. is actually closer to 70 percent. In fiscal year 2010, the State Department reports that fewer than 56,000 H-2A visas were issued, which means that there are well in excess of ten times more illegal workers performing agricultural labor in the U.S. than there are legal H-2A workers.

Given this stark contrast and the potential adverse effect on U.S. workers, one wonders why the Department is not doing more to encourage farmers to utilize the legal H-2A program when they cannot meet their labor needs with sufficient numbers of U.S. workers. There is after all, year in and year out, a persistent shortage of U.S. workers to fill this nation's seasonal farm labor jobs. No one can reasonably dispute that fact.

This shortage has existed for decades and the demographic changes in rural America, as well as in the overall American workforce, show no signs of abating. American workers are not lining up to take farm jobs even in times of relatively high unemployment. Yet, despite the scarcity of U.S. farm workers, there are more mouths to feed in the country than ever before. If our nation's farmers do not have reliable and timely access to seasonal labor to plant and harvest crops, then our competitors abroad will increasingly meet the food demands of the American consumer.

The federal government and the Department of Labor should be pursing policies that assist U.S. farmers in their efforts to secure workers and to provide U.S. consumers with a healthy and domestically-produced food supply. Instead, the Department has adopted what appears by many to be an unjustified hostility toward farmers who file H-2A applications.

When creating the H-2A program, Congress understood that the timing of a farmer's labor need is dictated by the weather and not by the arbitrary whims of a government bureaucracy in some far away city. For that reason, Congress established precise deadlines for the Department to act on H-2A applications. On a near daily basis, however, the Department regularly disregards the clear intent of Congress that the H-2A program operate in an expedited manner.

The Department routinely employs dilatory tactics in processing H-2A applications. Many of the Department's actions are perhaps best described as nitpicking over minor and nonsubstantive paperwork issues and typographical errors that have absolutely nothing to do with ensuring U.S. workers are properly recruited and paid for these jobs. To add insult to injury, the Department often engages in this lengthy and wasteful exercise in multiple rounds over several weeks, rather than just notifying an employer of all the alleged deficiencies in an application at one time. The Department also exacerbates the delays in this process by communicating with employers through the exchange of paper correspondence by mail, rather than just simply sending the employer an email or placing a phone call. The Department requires employers to provide email addresses and phone numbers, so one wonders about the purpose of such requirements

given that the Department routinely ignores these efficient and fast means of communication.

Examples of the Department's recent troubled administration of the program are virtually endless. The Department frequently imposes on employers requirements that do not exist in statute or regulation; rejects applications for unsupported or outright illegitimate reasons; adopts positions that are directly contrary to the plain language of the statute; issues contradictory decisions when presented with identical facts; and routinely refuses to respond to even basic inquiries requesting clarification or guidance. The Department has even disabled an email account previously established for the specific purpose of collecting questions from employers seeking guidance about how to comply with various H-2A program requirements.

Some of the most egregious examples of needless delay and questionable decisions by the Department involve instances in which State Workforce Agencies and the Department disagree about the requirements of the program. It is not uncommon for the State to approve an employer's Job Order as being in compliance with the program requirements, but then days or weeks later the Department of Labor rejects the application claiming the Job Order is not in compliance. Of course, in the midst of all the duplicative contradictory reviews and bureaucratic infighting that often takes weeks to resolve, an employer's application is delayed even more and the timely planting or harvesting of crops is jeopardized.

As noted, the Department frequently delays employer applications by requiring nonsubstantive modifications to the paperwork. Once the employer agrees to make the changes, the application is approved as meeting all program requirements. But all too often that is not the end of the delays. Many of these employers find that weeks later the Department will send them a letter claiming the application does not meet the program requirements after all, and demand even further changes to the application. This costly and time consuming process plainly conflicts with the statutory requirements governing the program, yet the Department persists. The Department also routinely fails to advise employers of their due process rights to appeal these decisions, as required by the statute.

Faced with these arbitrary decisions, H-2A employers who, by definition, have a pressing need for workers to perform time-sensitive agricultural tasks are left with few options but to submit to the Department's demands if they are to have any hope of securing workers in a timely fashion. But this is beginning to change.

The Department's questionable approach to the H-2A program has led to a recent explosion of litigation - both before administrative law judges and in federal court. One federal lawsuit recently filed against the Department details a series of contradictory decisions and the Department's inconsistent application of H-2A requirements to various employers.

Also, in the past six months there have been more than 300 administrative appeals filed with the Department of Labor's Office of Administrative Law Judges challenging the

Department's decisions. That is more than twice the number of appeals filed during the same period the year before. The results of these appeals demonstrate the Department's decisions overwhelmingly fail to withstand scrutiny.

In last six months, the Department has prevailed in fewer than 10 percent of the appeals filed by employers. In the remaining cases, the judge found in favor of the employer and/or the case was remanded back to the Department for approval or certification. Notably, the Department often asks the judge to remand a case as a way of avoiding an adverse decision when it is clear that there was no legitimate basis for the Department to reject the employer's application in the first place. Although this means that the employer prevails in the case, it requires the employer to endure additional delays, as well as expend additional time and money to file an appeal that would not have been necessary if the Department had simply complied with the statutory standards established by Congress. Unfortunately, this appeals process is becoming a regular step in the application process because of the Department's arbitrary decision-making and general lack of common sense, as the judges themselves have noted.

In the recent opinion, *Virginia Agricultural Growers Association, Inc.*, 2011-TLC-00273 (Feb. 11, 2011) the Judge expressed significant displeasure with the Department's recent administration of the H-2A program. In that case, the Judge noted that the Department's refusal to reconsider a decision that was obviously erroneous and that necessitated the employer filing an appeal was "a patently inefficient and unnecessarily expensive way to proceed" and that requiring the employer "to file a request for administrative review . . . seems to reflect a breakdown in common sense." *Virginia Agricultural Growers Association, Inc*, at 3. In addition, the judge admonished the Department, stating "I implore the Office of Foreign Labor Certification ("OFLC") to review this policy . . . and consider the costs it imposes on employers, the administrative review process, and the public coffers." *Id.* Since that opinion was issued two months ago, however, more than one hundred additional appeals have been filed protesting the Department's rejection of employer applications.

It is clear that there are substantial problems with the Department's administration of the H-2A program. The Department routinely disregards the clear intent of Congress that the program operate in an expedited fashion. The Department's inefficient processes unnecessarily drive up costs for employers, as well as for taxpayers, and compound the difficulties faced by farmers who already compete in a highly competitive global marketplace. If the Department persists on its current course, it appears likely that its actions will have substantial adverse effects both on U.S. workers and on the future of American agriculture.

Mr. GALLEGLY. Thank you very much.
Mr. Wicker?

TESTIMONY OF H. LEE WICKER, DEPUTY DIRECTOR, NORTH CAROLINA GROWERS ASSOCIATION

Mr. WICKER. Good morning, Mr. Chairman, and Committee Members. I am Lee Wicker, Deputy Director of the North Carolina Growers Association. Thank you for holding this hearing on a critical issue for labor-intensive agriculture.

As the largest H-2A program user in the Nation, NCGA currently has 600 grower members that will employ nearly 6,000 H-2A workers and many thousands more U.S. workers this season. I am extremely proud of the growers I represent because they are the most compliant farmers in the Nation when it comes to the various State and Federal labor laws.

Without farm workers, crops rot in the fields, farmers will lose their farms, and grocery store shelves across America will be void of fresh local produce. It is that simple. We must never take farmers, farm workers or our food supply for granted. If farms don't have farm workers, then our food supply is in jeopardy.

Farmers need a legal, available, affordable workforce, and the H-2A program has the potential to fill that need. Presently H-2A is the only option for farmers if they want to ensure they employ a legal workforce. Unfortunately, the H-2A process is not working well because it is costly, time-consuming, and flawed. Farmers have to complete a lengthy labor certification process that is slow, bureaucratic, and frustrating. In addition, they are forced to pay an artificially inflated adverse effect wage rate. Many producers simply have no confidence that they can successfully navigate, afford, or comply with the onerous requirements.

The H-2A rules that were written in 1987 were in desperate need of reform because the program had become too expensive and bureaucratic for farmers to use. In 2008, new rules were written by Secretary of Labor Elaine Chao. These regulations were a mixed bag, but on balance, the 2008 regulations made real improvements to important areas and more new growers signed up to use the program.

But in 2010 the H-2A rules were rewritten by current Secretary Solis who took the worst from the '87 rules, combined with the bad from the 2008 rules, maintained harsh penalties, added unnecessary barriers and unwarranted burdens, and created the current regulations which are horrendous for farmers, making the program harder than ever to use.

Currently H-2A is too litigious, too expensive, and too much of a bureaucratic morass at three Federal agencies that oversee the program. Since the Solis regulations took effect, the number of North Carolina farmers using the program has declined. Those farmers haven't stopped farming. They have merely switched to illegal workers, which the current Administration hopes to build pressure and increase the chances of success for amnesty bills like AgJOBS.

Farmers need workers not amnesty to grow crops. To ensure that growers have an adequate and legal workforce, the solution is not amnesty bills like AgJOBS but rather permanent statutory reform

of the broken H-2A program so that farmers can and will use it. Farmers want to comply with the law, but to do so, the program must be viable, sustainable, and predictable.

Having endured the regulatory exercise twice in 24 months demonstrates clearly that improvements to the H-2A program must be put into statute to avoid the regulatory whipsawing of the regulated community where farmers lose confidence in the program when Administrations, agendas, and priorities change.

In order to fix the H-2A program so that it is workable, there are four crucial areas of the program that must be corrected in statute.

Number one, reform the wage rate. Link it to a statutory minimum wage, State or Federal, whichever is higher in each State. An H-2A wage rate of 110 percent of minimum wage is a fair rate that will prevent an adverse effect on U.S. farm workers. While farmers would use piece rates to create incentive, the 110 percent would be the absolute minimum. It is important to remember that H-2A workers get free housing, utilities, and transportation each day to the job, all provided by the farmer. If you add the costs to obtain H-2A workers using the economic model developed in 2006 by Phillips and Brown, Ag economists at NC State, the expense equals on average an additional $2.06 per hour. This is a conservative estimate.

Number two, mandate binding mediation and arbitration. Growers and workers should quickly resolve legal issues through mediation and arbitration. Growers sign contracts all the time that contain this kind of language. And so if it is okay for farmers, then it should be okay for farm workers.

Number three, visa cost and transportation reimbursement. Cost associated with the worker applying for the visa should be borne by the worker. Inbound transportation should be reimbursed to the worker by the farmer, as it currently is, upon completion of 50 percent of the work contract. If the reimbursement is issued upon arrival, the financial incentive for the worker to remain on the farm is reduced, and workers who quit leave the farmer shorthanded.

Number four, streamline the H-2A process. There are too many unnecessary delays at Labor, Homeland Security, and State. The entire system must be streamlined and simplified. Farmers want statutory language that describes in detail the labor market test/certification criteria to avoid the regulatory whipsawing with executive branch changes. We have learned this the hard way that when the language is ambiguous, administrators and courts with an agenda or bias can interpret legislation in ways that Congress never intended.

We would also like to see the definition of "agriculture" expanded to allow greater participation from farmers with an 11-month standard visa rather than 10 and a 3-year special visa which would allow certain sectors of agriculture and year-round farms to continue to thrive.

In summary, without these changes, H-2A is simply too expensive, too litigious, and too onerous for most growers to use. Most farmers prefer to employ illegal aliens because it is cheaper and they remain off the Federal and legal radar screens. Even high profile farmers employ illegal workers with impunity because they

have allegedly been told by ICE agents that they won't be investigated.

As Members of the House Judiciary Immigration Policy and Enforcement Subcommittee, you have the forum and the ability to articulate the problem and offer policy solutions that will ensure American agriculture has an adequate and legal labor force.

The H-2A program is not and never has been about immigration. H-2A reform should be decoupled from the comprehensive immigration reform debate. Please remember our growers need a workable H-2A program, not amnesty. Amnesty didn't work in '86 and so-called comprehensive immigration reform bills like AgJOBS with its amnesty provisions will not work today. It will only make matters worse.

Thank you for your attention, and I look forward to answering any questions you have.

[The prepared statement of Mr. Wicker follows:]

Hearing before the House Committee on the Judiciary
Subcommittee on Immigration Policy and Enforcement

"The H-2A Visa Program: Meeting the Growing Needs of American Agriculture?"

2141 Rayburn House Office Building
Wednesday, April 13, 2011
10:00 PM

Testimony of H. Lee Wicker

North Carolina Growers Association
Vass, North Carolina

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Good morning Mr. Chairman and Committee members I'm Lee Wicker, Deputy Director of the North Carolina Growers Association. Thank you for holding this hearing on a critical issue for labor intensive Agriculture.

As the largest H– 2A Program user in the nation, NCGA currently has 600 grower/members that will employ nearly 6000 H-2A workers and many thousand more U.S. workers this season. I am extremely proud of the growers I represent because they are the most compliant farmers in the nation when it comes to the various state and federal immigration, labor, housing, field sanitation, pesticide, and wage and hour laws.

Without farm workers, crops will rot in the fields, farmers will lose their farms and grocery store shelves across America will be void of fresh local produce. It is that simple. We must never take farmers, farmworkers or our food supply for granted – but if farmers don't have Farmworkers, then our food supply is in jeopardy.

Farmers need a legal, available, affordable workforce and the H-2A Temporary Agricultural Visa program has the potential to fill that need. Presently, the H-2A program is the ONLY option for farmers if they want to ensure they employ a legal workforce. Unfortunately, the H–2A process is not working well. For years, farmers have had to deal with participating in a costly, time-consuming, and flawed program. Employers have to complete a lengthy labor certification process that is slow, bureaucratic, and frustrating. In addition, they are forced to pay an artificially inflated wage rate called the Adverse Effect Wage Rate. Many producers

simply have no confidence they can successfully navigate, afford or comply with the onerous H–2A Program requirements.

The H-2A rules that were written in 1987 were in desperate need of reform because the program had become too expensive and bureaucratic for farmers to use. In 2008, new H-2A rules were written under Secretary of Labor Elaine Chao. These Chao regulations were a mixed bag - both good and bad – but, on balance, the 2008 Chao regulations made real improvements to important areas and more new growers signed up to use the program. But in 2010, the H-2A rules were re-written by current Secretary of Labor Hilda Solis, who took the worst from the 1987 rules, combined with the bad from the 2008 rules, maintained harsh penalties, added unnecessary barriers and unwarranted burdens – and created the current regulations, which are completely horrendous for farmers – making the program harder than ever to use.

Currently H–2A is too litigious, too expensive, and too much of a bureaucratic morass at the three Federal agencies that oversee the program. And not surprising to us, since the Solis regulations took effect, the number of farmers using the program has declined. Those farmers haven't stopped farming – they've merely switched to using illegal workers – which the current administration hopes will build pressure and increase the chances of success for amnesty bills like AgJobs.

Farmers need workers, not amnesty, to grow crops. To ensure that growers have an adequate and legal labor force, the solution is not amnesty bills like AgJobs but rather

permanent statutory reform of the broken H–2A Program so that growers can and will use it. Farmers want to comply with the law – but to do so, the program must be viable, sustainable, and **predictable**.

Having endured the regulatory exercise twice in 24 months – a process which included expensive (not to mention ongoing) litigation demonstrates clearly that improvements to the H-2A program must be put into statute to avoid the regulatory whipsawing of the regulated community where farmers lose confidence in the program, when administrations, agendas, and priorities change.

In order to fix H–2A so that it is workable for farmers, there are four crucial areas of the program that must be corrected in statute.

1. **Reform the wage rate; link it to the statutory minimum wage** – State or federal, whichever is higher in each state, an H2A wage rate of 110% of minimum wage is a fair wage rate (for both farmers and workers) that will prevent an adverse effect on US Farmworkers. Farmers would still use "piece-rates" to create incentive, the 110% would be the absolute minimum wage. It is important to remember, unlike American citizens who earn only a wage, H2A workers get free housing, free utilities, and free transportation each day to the job, all of which is provided by the farmers. If you add the additional acquisition costs to obtain H-2A workers through NCGA using the economic model developed in 2006 by Phillips and Brown, Ag Economists at NC State, the expense equals, on average, an additional $2.06 per hour.

2. **Mandate binding mediation and arbitration.** Growers and workers should be required to resolve legal issues through mediation and arbitration. Growers sign contracts all the time that contain mandatory mediation agreements. If it is okay for farmers, then it should be okay for farm workers. Since 1989, the growers of NCGA have been sued over 30 times and have paid over $5 million in attorneys' fees and settlement costs. This is a common experience among H–2A Program users around the country. I believe that you can protect farm workers without being sued by an attorney with a political and social agenda.

3: **Visa cost and transportation reimbursement.** Cost associated with the worker applying for the visa should be borne by the worker. Inbound transportation should be reimbursed to the worker upon completion of 50 percent of the contract. If the money is reimbursed upon arrival, the financial incentive for the worker to remain on the farm is reduced - and workers who quit leave the farmer short-handed.

4: **Streamline and simplify the H–2A process.** There are many delays with the U.S. Departments of Labor, Homeland Security, and most problematic has been the issue of getting enough appointments from the State Department contractor for the one-on-one interviews and background checks. The entire system needs to be streamlined and simplified, eliminating redundant needless rubber stamping by bureaucrats. We would like to see statutory language that describes in detail the labor market test/certification criteria to avoid regulatory whipsawing with executive branch changes. We've learned the hard way that when the statutory language is ambiguous, administrators and courts with an agenda can interpret legislation in ways that never match the intent of Congress. We would also like to see the definition of agriculture

expanded to allow greater participation from farmers – with an 11 month standard visa and a 3 year special visa, which will allow certain sectors of Agriculture and year-round farms to continue to thrive.

In summary, without these four changes, the H–2A Program is simply too expensive, too litigious and to onerous for most growers to use. Most farmers prefer to employ illegals because it is cheaper, and they remain off the Federal and legal radar screens – even high profile farmers can use illegal workers with impunity because they have been told by ICE agents they will not be investigated. But on the flip side, if you employ legal H–2A workers, you can expect to have investigations by the U.S. Departments of Labor, Homeland Security, Justice, State, the OIG, the GAO, the FBI, the IRS, multiple state regulators, reporters, attorneys, and farm worker advocates.

As members of the House Judiciary, Immigration, Policy and Enforcement Subcommittee, you have the forum and the ability to articulate the problem and offer policy solutions that will ensure American agriculture has an adequate and legal labor force. The H-2A program is not about immigration. H-2A reform should be decoupled from the CIR debate. Please remember our growers need a workable H–2A Program, not amnesty. Amnesty did not work in 1986, and so-called comprehensive immigration reform bills like AgJOBS, with its amnesty provisions, will not work today. It will only make matters worse.

Thank you for your attention and I look forward to answering any questions you have.

Mr. GALLEGLY. Thank you, Mr. Wicker.
Mr. Goldstein?

TESTIMONY OF BRUCE GOLDSTEIN, PRESIDENT, FARMWORKER JUSTICE

Mr. GOLDSTEIN. Mr. Chairman and Members, thank you for the opportunity to testify about the H-2A agricultural guest worker program and farm workers, the poorest of the working poor. But it is good to hear, Mr. Chairman, that some far workers are making $28 per hour in California.

The H-2A program is deeply flawed and should not be the major vehicle for filling the Nation's 2 million to 2.5 million jobs on farms and ranches.

In addition, Congress should not get mired in previously fought battles. Many agribusiness groups lobbied in the 1990's for changes to streamline the H-2A program by cutting worker protections and reducing Government oversight. These legislative efforts failed as did efforts of farm worker advocates to pass their own policy proposals.

Recognizing the need for a solution, major grower and farm worker groups reached a compromise called AgJOBS. It would allow eligible undocumented farm workers to earn a legal immigration status, revise the H-2A program in balanced ways, and provide America with a stable, productive, and decently treated farm labor force.

The Bush administration in its last few days made drastic anti-worker changes to the H-2A program regulations, slashing wage rates and job protections for U.S. and foreign workers. Fortunately, Secretary Solis reversed these changes, mostly restoring the Reagan regulations' modest wages and labor protections. The Department also instituted additional common sense protections such as a surety bond requirement for labor contractors and a requirement to disclose job terms to workers by the time of their visa application.

Deporting the large number of undocumented farm workers in this country is not feasible. It would bring chaos to agriculture and would be a vast waste of taxpayers' money. Undocumented workers constitute 52 percent to 70 percent of the farm labor force.

Moreover, the H-2A program, which presently provides 3 to 5 percent of the farm labor force, cannot be a meaningful solution for meeting the bulk of agriculture's labor needs. The H-2A program cannot be expanded rapidly enough to replace the current unauthorized work force.

Moreover, the H-2A program should not be the model for the farm labor force. Pervasive abuses have characterized the H-2A program decades in part because it is inherently flawed. The worker is tied to a single employer. The employer holds the power to decide whether workers can come to the United States and whether they can return in the future. In fear of deportation or not being called back in the following year, workers are extremely reluctant to challenge unfair treatment.

Many guest workers also fear seeking better treatment because they borrow large sums to pay recruiters for the opportunity to work and for their travel costs. If they lose their job, they cannot repay their loans.

While a small number of H-2A workers have rights under collective bargaining agreements, the vast majority have no union, and

with legal aid programs being underfunded and few private attorneys willing to take such cases, the H-2A workers often lack access to the justice system.

Once employers decide to apply for H-2A workers, guest workers are cheaper than U.S. workers for at least two reasons. First, the H-2A employer does not pay Social Security or unemployment tax on the guest worker's wages but must do so on the U.S. worker's wages. Second, guest workers' vulnerability also means that they work to the limits of human endurance for lower pay than U.S. workers. These financial incentives lead to discrimination against U.S. workers by H-2A employers. Unfortunately, the main job preference for U.S. workers, known as the 50 percent rule, is not adequately enforced.

The H-2A program also contravenes our democratic values. No matter how many years they work under the H-2A program, guest workers never obtain the opportunity to become permanent immigrants or citizens with the right to vote. Despite restored protections and unionization of some H-2A employers, systemic problems persist that the Department of Labor should stop. Illegal job terms are being approved by the Department of Labor. Employers frequently fail to pay the wages owed, often relying on a piece rate scam to cheat workers. Many employers fail to pay transportation costs home for migrant workers who complete the contract season. They tell the Department an artificially long season, for example, from April to November, even though few people are needed for that length of time. When workers leave at the end of the summer, due to lack of work, such employers refuse to pay transportation costs home and claim the workers abandoned their contract but will recall them the next year if they don't complain.

My written testimony includes the complaint of H-2A workers hired to pick strawberries at Bimbo's Best Produce in Louisiana. In addition to violations of basic protections, these workers experienced frequent verbal abuse and feared for their safety due to their employer's violence.

In conclusion, the H-2A program abuses are rampant and should be cleaned up. More than 1 million undocumented farm workers, at least one-half the workforce, are making U.S. agriculture productive but suffer low wages and poor working conditions. We need to stabilize the agricultural workforce and keep agriculture productive by allowing undocumented workers to obtain legal immigration status and by improving wages and working conditions.

Thank you.

[The prepared statement of Mr. Goldstein follows:]

Written Testimony
Bruce Goldstein, President, Farmworker Justice
before the Judiciary Subcommittee on Immigration Policy and Enforcement
April 13, 2011

Mr. Chairman and Members: Thank you for the opportunity to testify in this important oversight hearing of the H-2A temporary agricultural guestworker program. The conditions for farmworkers in this country are not what they should be and Congress should address discriminatory immigration, labor, occupational safety, health and other policies that impede farmworkers' efforts to achieve the American dream for themselves, their families and their communities.

The H-2A program allows agricultural employers to hire temporary foreign workers for labor shortages in seasonal jobs if they can show that they have actively recruited U.S. workers and have offered and are paying wages and working conditions that do not "adversely affect" the job terms of U.S. workers. Between World War II and 1986, the program's rules evolved through Department of Labor regulations. In 1986 Congress revised the H-2A statute, primarily by codifying in the law what had primarily been in regulations while continuing to give the Secretary of Labor substantial discretion in carrying out the law's purposes.

The H-2A program is deeply flawed and should not be a vehicle for filling the nation's 2 to 2 ½ million jobs on farms and ranches. In addition, Congress should not allow history to repeat itself. Many agribusiness groups lobbied in the 1990's for changes to "streamline" the H-2A program by cutting worker protections and reducing government oversight. Their legislation would have created a farm labor system of exploitable guestworkers with wages and other job terms at unconscionably low levels. These legislative efforts failed, as did efforts of farmworker advocates to pass their own policy proposals. Recognizing the need for a policy solution and the inadequacy of the H-2A program, growers and workers reached a compromise, known as the AgJOBS bill. That compromise would allow eligible undocumented farmworkers to earn legal immigration status, revise the H-2A program in balanced ways, and provide America with a stable, decently-treated farm labor force.

After the failure of comprehensive immigration reform in 2007, the Bush Administration turned to the H-2A program as the solution for agriculture's labor needs. The reform's intent was to give agricultural employers unlimited access to cheap foreign labor with little government oversight. The Bush Administration's changes were devastating to workers and to our nation's most basic democratic, labor and immigration policy tenets. Under the Bush regulations, worker protections were slashed, key recruitment protections for U.S. workers were eliminated, and government oversight in an already abusive program was restricted. Farmworker wages fell an average of about $1.00 to $2.00 per hour. Most H-2A employers in North Carolina, for example, were permitted to pay $7.25/hr instead of the $8.85/hr in 2008 and $9.34/hr in 2009 that they would have earned under the long-standing H-2A wage formula. Under the prior, longstanding regulation adopted by the Reagan Administration, which has been reinstated, DOL required H-2A employers to offer workers at least the average regional hourly wage for farmworkers as determined by the USDA Farm Labor Survey. Although this survey's results are low because of the presence of a large number of undocumented workers, the Bush Administration decided to

lower the wage rates even further by switching to a different, utterly inaccurate formula. The Bush Administration based its H-2A wage levels on the Bureau of Labor Statistics' Occupational Employment Survey, which does not even survey farms and therefore included few farmworkers. However, that survey does include farm labor contractors, the lowest paying employers of farmworkers. In addition to using this skewed survey, the Bush Administration applied a mathematical manipulation of the survey results; it allowed employers to pay one of four "wage levels" that were arbitrarily created. Most employers were permitted to pay the lowest level, which was the average wage received by the lowest-paid one-third of farmworkers in a geographic area (i.e., generally the 16th percentile). In no way did this wage formula protect U.S. workers from adverse effects on their wages.

Fortunately, the Department of Labor, under Secretary of Labor Solis, reversed these harmful changes. While the Bush regulations remained in effect for more than one year, thousands of U.S. farmworkers and guestworkers at H-2A employers suffered low wages and other harm. The Department also instituted additional common-sense protections, such as a surety bond requirement for labor contractors, a requirement to disclose job terms to foreign workers by the time of the visa application, and increased opportunity for U.S. workers to learn about H-2A jobs via online posting of approved H-2A applications. With these changes, the DOL and state workforce agencies were able to exercise more meaningful oversight of worker protections, farmworker wages increased, transportation reimbursements again reflected true costs to workers, the right of U.S. workers to H-2A jobs was restored and increased protections against recruitment fees and potential trafficking abuses such as passport confiscation were implemented. Despite these improvements, abuses are still rampant and stronger protections and additional resources are needed to adequately police the H-2A program and address the many abuses.

The Bush administration failed to understand that the H-2A program cannot and should not be a solution for agriculture's labor needs. Undocumented workers constitute anywhere from 52% to 70% of the estimated 2 to 2.5 million workers on farms and ranches. Deporting the large number of undocumented farmworkers is not feasible and would harm our agricultural production. Currently, the H-2A program only provides 3-5% of the total agricultural workforce. Even if it were desirable, the H-2A program cannot be expanded rapidly enough to provide a replacement workforce for the current unauthorized workforce. DOL, DHS and the State Department do not have the capacity to accommodate such a huge deportation and massive new influx of guestworkers. Employers would not have their needed workforce in a timely manner and crops would rot in the fields, wreaking havoc not only farmworkers and farmers but on the broader economy. Such efforts also would be a vast waste of taxpayers' money. Even today, with H-2Aworkers making up such a small percentage of the total workforce, DOL needs more resources to adequately police the H-2A program.

Abuses continue to occur in the H-2A program because it is inherently flawed. One fundamental flaw in the H-2A program is the worker's tie to a single employer – H-2A workers can only work for the one employer that obtained their visa. The workers do not have a right to seek a job at another employer if they are dissatisfied with or mistreated by that employer. If the worker leaves the job, or is fired, the worker must return to his home country. In addition, it is the employer who decides whether the worker will be offered the opportunity to obtain a visa in

the next year. Under these constraints, most guestworkers are extremely reluctant to complain about their treatment on the job and are very vulnerable to abuse. In addition, the employers can extract very high levels of productivity from these vulnerable guestworkers without paying them higher wages or offering special incentives.

The H-2A workers' restricted, "non-immigrant" status not only deprives them of economic bargaining power but also prevents them from acquiring political power. No matter how many years an H-2A worker returns for agricultural work, he is not entitled to earn immigration status. Guestworkers never obtain the right to remain in the U.S., become citizens, or exercise the right to vote. The political powerlessness of the temporary foreign workers in comparison to their employers contributes to worker vulnerability and an inability to persuade government officials to protect them from abuse. Government officials represent the interests of citizens, not guestworkers. Thus far, few H-2A workers have been able to join unions. The H-2A program's restrictions are not consistent with our nation's commitment to economic and political freedom. Ours is a nation of immigrants, not a nation of guestworkers.

Further compounding this vulnerability, many guestworkers arrive deeply in debt, having paid enormous recruiters' fees for the opportunity to work in the United States, often under very misleading descriptions. Depending on their country of origin, workers pay anywhere from hundreds to thousands of dollars. In addition, workers are sometimes required to leave collateral, such as a property deed, with recruiters to ensure that workers will complete their contract. False promises of potential earnings, misleading or undisclosed contract terms, excessive recruitment fees and increasingly, the involvement of organized crime found in countries of origin often lead to cases of debt bondage and human trafficking in the United States. Although Secretary Solis strengthened the prohibition on recruitment fees, recruitment abuses continue, and more must be done by DOL, DHS, and the State Department to effectively prevent recruitment fraud in the home countries of guestworkers.

The vulnerability of H-2A workers makes them attractive to many agricultural employers in comparison to immigrants and U.S. citizens, but the H-2A employers also have financial incentives to hire foreign guestworkers rather than U.S. workers. Once in the H-2A program, employers often prefer foreign workers for the substantial tax benefits. Under the H-2A program, employers do not pay Social Security (FICA) or unemployment (FUTA) taxes on their H-2A employees' wages. This means that an H-2A employer saves more than 10% by hiring a foreign worker instead of a legal U.S. resident. It should not be cheaper for employers to hire H-2A workers than to hire U.S. workers.

Another incentive to hire H-2A workers is that while recruiting in foreign countries, employers can and do select workers based on ethnicity, age, gender, and race, which is far more difficult to do inside the United States. "[D]iscrimination based on national origin, race, age, disability and gender is deeply entrenched in the H-2 guestworker system."[1] Almost uniformly, H-2A workers are single relatively young men who are not accompanied by their families. Women, who once worked side-by-side with male counterparts, are absent from the H-2A workforce but still represent about 21% of the national farmworker population.[2] In addition

[1] Southern Poverty Law Center, "Close to Slavery," (2007), p. 34.
[2] National Agricultural Worker Survey, NAWS Findings: 1989-2007

to not having any daily family responsibilities to distract them from performing their H-2A jobs, H-2A workers have no ties to the local community outside of work and return at the end of the day to a barracks or trailer shared by other male workers. As one grower stated, "[H-2A workers] are here with one thing on their mind -- to work. They don't have vehicles. It's perfect." [3] Even within the H-2A program itself, discrimination and stereotypes about the characteristics of workers from countries and ethnicities abound. For example, one employer criticized the Hispanic population for "Americanizing," which he defined as "becoming lazy." [4] He subsequently decided to hire Asian H-2A workers "just to try a new breed."[5] When employers discriminate against protected traits in foreign countries under the H-2A program, their discriminatory intent can carry over to their recruitment in the U.S. For example, age discrimination impacts many U.S. agricultural workers who were legalized as a result of the Special Agricultural Worker ("SAW") provisions of the Immigration Reform and Control Act of 1986 or workers who have been a part of the agricultural workforce for years. Race and national origin discrimination have impacted the ability of many Puerto Rican workers to get agricultural employment in traditional workplaces such as North Carolina.

These and other incentives in the H-2A program have led to tremendous obstacles for U.S. workers who seek jobs at H-2A employers. While the majority of the agricultural workforce is undocumented and in need of an earned legalization program, there are still several hundred thousand legal immigrants and citizens who still seek employment in agriculture. Unfortunately, employers routinely turn away U.S. workers, discourage them from applying for H-2A jobs, or subject them to such unfair and illegal working conditions and production standards that workers either vote with their feet or are fired. For example, two American women in Georgia were fired from an H-2A employer after just a few days in the fields for allegedly failing to meet a production standard which had not been approved by the government and about which the workers had not been told until arriving at the farm.[6] The H-2A application's job offer stated the workers would be paid $9.11 an hour and would be provided with 40 hours of work a week. During the few days they worked, these women were not allowed to begin working until after the H-2A workers had started picking; they were only allowed to work for a few hours in the morning even while H-2A workers continued to work; and they were forced to spend time bringing their buckets of zucchini a great distance to tractors. One of these women had actually grown up on the farm in question and spent many years during her childhood working the fields of this farm. Their discharges illustrate the challenges willing U.S.workers face at many H-2A employers.

Also common is the experience of U.S. workers who had worked in agriculture for years before being displaced by employers who preferred to hire vulnerable guestworkers.[7] There are many similar cases in Arizona and around the country. The regulations governing recruitment,

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[3] *The Atlanta Journal Constitution*, "Debate Over Illegals Roils Onion Country," Apr. 6, 2006.
[4] Comments submitted by Farmworker Justice on behalf of Farmworker Justice, the United Farm Workers, and other farmworker advocates to RIN 1205-AB55, 4/14/08, p. 25; Exhibit R-4 at 320.
[5] Id. at 25, Ex, R-4 at p. 226.
[6] See OSC Charge Form, EEOC Atlanta Office, Kathern Bentley v. J &R Baker Farms, LLC, March 25, 2011; OSC Charge Form, EEOC Atlanta Office, Mary Jo Fuller v. J &R Baker Farms, LLC, March 25, 2011.
[7] See Baeza v. S & H Farm Labor, L.L.C., 2:10-cv-01151-MHM (D. Ariz. 2010).

including the 50% rule, which is the principal job preference for U.S. workers in the H-2A requirements, are key measures designed to protect the ability of U.S. workers to obtain employment with H-2A employers.

In addition to abuses already mentioned, other abuses abound: workers are frequently not paid the wage rate they have been promised, they are routinely exposed to pesticides and other unsafe workplace conditions, they are housed in unsafe and unsanitary housing, and they do not receive the transportation costs they have been promised, among other problems. In one case, H-2A workers were hired to pick strawberries in Louisiana at Bimbo's Best Produce.[8] Upon their arrival, the employer confiscated their passports and H-2A visas. Throughout their employment, the workers were routinely threatened with deportation and blacklisting if they did not continue working or if they did not work according to the employer's specifications. The employer carried a gun, shot it over their workers while they worked and shot and killed a neighboring dog befriended by the workers near the fields while the workers were harvesting. On one occasion, the employer screamed at a worker and shoved him for weeding incorrectly, and he routinely berated and insulted the workers while they worked, including for standing to stretch out their backs.

Another common problem is the failure of employers to pay workers' inbound and outbound transportation costs. Many employers tell the Department of Labor an artificially long season, such as April to November, even though few people are needed for that length of time. When the workers begin to leave at the end of the summer due to lack of work, many employers contend that the workers are "abandoning" their employment before the end of the contract and are therefore not entitled to the payment of their transportation costs. Most workers know that if they complain about losing the transportation costs, they are not likely to be called back the next year.

The experience in North Carolina demonstrates the value of union representation under the H-2A program, which admittedly is a rare event and has not been able to reform all abuses. Prior to entering into a contract with the Farm Labor Organizing Committee, the North Carolina Growers Association was notorious for its abuses of workers. Workers arriving in North Carolina were instructed to throw away the "know your rights" booklets they received from nonprofit legal advocates and were warned against contacting legal services. Workers who did seek to enforce their rights were "blacklisted." While the FLOC contract has helped workers employed through NCGA and is continuing to address problems that persist, other H-2A workers are not so fortunate and continue to experience such threats. In many instances, employers confiscate the workers' passports and other forms of identification to ensure that the workers do not leave, or threaten to call immigration enforcement on workers who complain. Because workers do not have freedom of choice, the H-2A regulatory protections are invaluable, and outside enforcement and oversight by DOL is essential to ensuring that protections are meaningful.

Even where workers find the courage to come forward regarding their treatment, they face many obstacles pursuing justice. H-2A workers are excluded from the Migrant and

[8] Israel Antonio-Morales, et al v. Bimbo's Best Produce, Inc. and Charles "Bimbo" Relan, individually and d/b/a Bimbo's Best Produce, No. 08-cv-5105, United States District Court for the Eastern District of Louisiana, filed 1/29/09.

Seasonal Agricultural Worker Protection Act (AWPA), the primary law protecting farmworkers. AWPA gives U.S. workers protection against abusive labor contractors, unsafe transportation, assurances that their employers' promises are enforceable, and the right to file a lawsuit in federal court to enforce these rights. AWPA's exclusion of H-2A workers deprives them of these substantive protections and denies them the ability to go to federal court to enforce the promises made to them. Another barrier to H-2A guestworkers seeking redress for illegal actions and worker abuses is their difficulty, and often inability, to obtain visas to return to the United States to testify at their trials or to provide deposition testimony.

In conclusion, the H-2A program abuses are rampant and should be cleaned up. As history and H-2A experiences demonstrate, the H-2A program should not and cannot be the principal mechanism in our free market economy for hiring farmworkers. More than one million undocumented farmworkers are making U.S. agriculture productive. In fact, we have a positive trade balance in labor-intensive agriculture due to the value of the exports produced by farmworkers, but farmworkers are not sharing in their contribution to our economy. We need to stabilize the workforce and keep agriculture productive by allowing undocumented workers to obtain legal immigration status. We also must improve wages and working conditions to attract and retain farmworkers, which requires both improvement in employer practices and reforms in employment laws and regulations. Rather than repeating battles of the past, Congress should embrace the hard-fought AgJOBS compromise that would provide employers and consumers with a stable, legal supply of farm labor by offering farmworkers the opportunity to earn legal immigration status and by making balanced changes to the H-2A program. The nation would be well-served by such policy improvements.

Sources of Information on the H-2A Program
News stories

- Leah Beth Ward, "Desperate harvest: N.C. growers' trade in foreign farm workers draws scrutiny," *Charlotte Observer* (North Carolina), October 30, 1999.
- Barry Yeoman "Silence in the Fields," *Mother Jones*, 2001
- David Bacon, "Be Our Guests," *The Nation*, September 27, 2004
- Eduardo Porter, "Who Will Work the Farms?" *New York Times*, March 23, 2006
- Dan Frosch, "In Loneliness, Immigrants Tend the Flock," *New York Times*, February 21, 2009
- Dan Rather Reports, "All I Want Is Work," Episode 532, 2010

Reports

- Migrant Farm Worker Division of Colorado Legal Services, "Overworked and Underpaid: H-2A Herders in Colorado," January 2010
- EPI Briefing Paper, "Farm Exports and Farm Labor: Would a raise for fruit and vegetable workers diminish the competitiveness of U.S. agriculture?" Phil Martin, March 21, 2011, Briefing paper #295

- Human Rights Watch, Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards, 2001 (includes case studies on agricultural workers under the H-2A guestworker program in North Carolina and apple industry workers in Washington State)
- Farmworker Justice Report: Litany of Abuses: Why we need more --not fewer-- protections in the H-2A Guestworker Program, December 2008, LitanyofAbuseReport_Dec2008_FINAL.pdf
- Farmworker Justice and Oxfam Report: Weeding out the Abuses: Recommendations for a law-abiding farm labor system, 2010
- Southern Poverty Law Center, "Close to Slavery," 2007
- U.S. General Accounting Office (GAO) Reports on the H-2A guestworker program:
  - The H-2A Program: Changes Could Improve Services to Employers and Better Protect Workers (Dec. 31, 1997)
  - H-2A Agricultural Guestworkers: Status of Changes to Improve Program Services (June 15, 2000)
- U.S. Department of Labor, The Foreign Labor Certification Report: 2009 Data, Trends and Highlights Across Programs and States.

Books

- Hahmovitch, Cindy. "'In America Life is Given Away': Jamaican Farmworkers and the Making of Agricultural Immigration Policy" in The *Countryside in the Age of the Modern State: Political Histories of Rural America*. Eds. Catherine McNicol Stock and Robert D. Johnston. Cornell University Press, 2001. 134-160.
- Galarza, Ernesto. *Merchants of Labor: The Mexican Bracero Story*. Rosicrucian Press, 1964
- Wilkinson, Alec. *Big Sugar: Seasons in the Cane Fields of Florida*. Knopf, 1989.

Mr. GALLEGLY. Thank you very much, Mr. Goldstein.

Mr. Wicker, in North Carolina, the North Carolina Growers Association have been sued, as you mentioned in your testimony, something—what? 30 times for using the H-2A program. Would you consider any or a good portion of these lawsuits as being frivolous? Could you explain?

Mr. WICKER. Yes, we do consider some of the litigation to be frivolous. It is expensive, and we have been sued by attorneys that get tax dollars from the United States Congress through the Legal Services Corporation. And these are small farmers who are trying to defend themselves, and they are frequently attacked on technicalities in the H-2A program. And so, yes. The answer to your question is we do believe that.

Mr. GALLEGLY. Can you tell me why your growers use the H-2A program when it would appear that maybe it might be much easier to just hire illegals?

Mr. WICKER. Well, I think the primary reason is that they want to comply with the law, and then a very close second would be that they want farm workers on the farm and there is not an adequate supply of farm workers in North Carolina. The estimates range anywhere from 50,000 to 80,000 farm workers in North Carolina, but that is not necessarily on the ground at any given time when you need to plant, cultivate, or harvest crops. These crops are time-sensitive. And so these growers have put their faith and relied on the H-2A program that Congress has authorized to be able to have legal farm workers on their farms when they need them to plant and harvest crops.

Mr. GALLEGLY. Thank you.

Mr. Goldstein, isn't it true that if illegal immigrant farm workers were granted amnesty as in AgJOBS, they would be likely to leave the Ag fields and seek easier jobs in the city?

Mr. GOLDSTEIN. I don't believe that is true for the bulk of the agricultural workers. The AgJOBS earned legalization program would require people to prove that they have been working in American agriculture recently and then would be obligated to work an additional 3 to 5 years in American agriculture in order to be able to earn an immigration status. During that time, it would be our goal to work with employers and government to improve wages and working conditions to retain those workers and stabilize the farm labor force.

Mr. GALLEGLY. But once they get their amnesty or designation legal, would they likely stay in agriculture?

Mr. GOLDSTEIN. I believe that many of the people who perform farm work actually enjoy it and that if employers act like capitalists in our market economy and don't have easy access to undocumented workers in the future, then the employers will do what is necessary to attract and retain employees, just the way I hope I do the necessary things in my organization to attract and retain our low-paid attorneys and health professionals.

Mr. GALLEGLY. As I have said in some of my earlier comments, I live in a large Ag district in California, and while many people do come to this country because of the Ag industry and how easy it is to get a job in agriculture illegally, historically they are only there long enough until they can get into construction or some other job that either pays more. That is pretty common knowledge. Would you not say that that is pretty fair? I don't think everybody really enjoys being on their knees picking strawberries or any number of other row crops for the rest of their life.

Mr. GOLDSTEIN. You know, if you are making less than minimum wage and you don't have the same rights as other workers, of

course. But in many places now around the country, farm worker groups are working with employers to actually upgrade these jobs and improve, and many growers now are having multiple crops so they extend their season. So it is not like you work 6 weeks and then you are gone to the next employer. These workers are settling out in areas where they get 8 or 10 months' worth of work. And as you say, there are some employers paying enough, $28 an hour. Mr. Wicker's proposal is to pay basically under $8 an hour under the H-2A program. Well, what U.S. worker would apply for a job at an H-2A employer, if they can make $28 an hour, but would only be paid $8 an hour? And what employer would pay $28 an hour if they could enter the H-2A program and pay less than $8 an hour?

Mr. GALLEGLY. I thank the gentleman.

The gentlelady from California, the Ranking Member, Ms. Lofgren?

Ms. LOFGREN. Thank you, Mr. Chairman.

In terms of evaluating the testimony, the North Carolina Growers Association—you don't yourself grow crops or run a farm. You represent growers. Correct?

Mr. WICKER. We are a growers cooperative, and we have a board of directors that are—five board of directors who are all farmers.

Ms. LOFGREN. Right, thank you.

Mr. WICKER. We have advisory committees that are made up——

Ms. LOFGREN. I don't have very much time.

You get fees, correct, from the growers for the H-2A program? They pay you to submit paperwork for them. Is that correct?

Mr. WICKER. I am employee of the growers association, and they pay the——

Ms. LOFGREN. Right, but the association gets the fees from the growers to help them with this program. Is that correct?

Mr. WICKER. Well, they pay fees to employ me and my colleagues at the office and then——

Ms. LOFGREN. But the source of the fees is from the——

Mr. WICKER. And then we pay fees to the workers to reimburse them for their transportation costs.

Ms. LOFGREN. But the source of the fees is the H-2A program. Correct?

Mr. WICKER. I am sorry. Again, please.

Ms. LOFGREN. The source of the fees is associated with the H-2A program?

Mr. WICKER. The source? I don't understand.

Ms. LOFGREN. Never mind. I can see I am going to lose all of my time asking you this question because I think there is a reason why you would oppose the AgJOBS program, which is that the association is funded through fees associated with the H-2A program which I really think the answer here is something like the AgJOBS proposal.

I mean, listening to my colleague from California, Mr. Lungren, you are right. The H-2A program is not working and it is not going to work. We are not going to get a million and a half people a year into the United States on the H-2A program. It ain't going to happen. And as I look at what is happening, increased I-9 audits, increased ICE enforcement, put aside the e-Verify program, we are

going to have a crisis in Ag with no workforce unless we do something about AgJOBS.

Mr. Goldstein, I was interested in your testimony about the streamlining in the 1990's that would have really created a farm labor system that would exploit workers. It sounded a lot like the Bracero program of years ago.

The groups that were traditionally at odds, the farm workers union, the growers, came together to support—and I thought it was a surprise actually—the AgJOBS bill. Can you explain how those divergent perspectives were able to compromise when traditionally they were at odds so that they could support the AgJOBS bill as more beneficial than the H-2A bill?

Mr. GOLDSTEIN. Well, groups like mine and the United Farm Workers Union and others were banging their head against the wall, saying, look, we want a repeat of the 1986 special agricultural worker program that just granted legal immigration status to the undocumented farm workers and leave it at that. And agribusiness groups had numerous legislative proposals that would basically have slashed the wage rates under the H-2A program and done what is being asked by some witnesses here today to do. We all tried to get these bills passed, and they weren't happening.

But our job is to help farm workers improve their wages and working conditions. They want to work in agriculture and they want to be treated well, and growers need a productive labor force. So there is this strange bedfellows' negotiation that occurs over a period of time, led by the United Farm Workers Union and the National Council of Agricultural Employers and other groups, and they fought over every "is," "the," and "and" and came up with the AgJOBS bill. And it is a very balanced approach. It is just ironic that for several years now, I go on these road shows talking with these grower representatives, and on almost every other issue, we are at each other's throats, but on this one we agree.

Ms. LOFGREN. Could I ask a question? One of the questions—the H-2A program, as we have discussed, is tied to a single employer, which I think is a flaw in terms of the potential for abuse. How does the AgJOBS bill address this flaw? And how would you keep from releasing a worker from a singular employer to prevent abuse and yet maintain an adequate Ag labor force? Does the AgJOBS bill address that?

Mr. GOLDSTEIN. Well, the AgJOBS bill would address the main agricultural need in this country by offering a chance for undocumented farm workers to legalize their status, and then it would make additional changes to the H-2A program. Unfortunately, a number of us are critical of the changes that wouldn't be made in the H-2A program. It would not——

Ms. LOFGREN. But the question was really about the AgJOBS bill.

I would just close in noting that although I think there are many workers in Ag who are not treated well, I had the privilege of going out to visit with strawberry pickers over in Davenport last year, and they were represented by the United Farm Workers. They had an income of about $18,000 a year. They had health care. They had a 401(k). It is a modest living, but it was a decent living. And yet, I noticed that it was still entirely an immigrant workforce. I give

credit to the farm workers and the growers that are working with them, but I think there are a lot of elements of farm work that have enticed immigrants into the field.

And with that, I would yield back to the Chairman.

Mr. GALLEGLY. The gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

Mr. Goldstein, in 1986 when we passed the Simpson-Mazzoli bill, I swallowed hard and accepted the SAW/RAW program against my best inclinations, but wasn't that supposed to do what you are talking about here? The SAW program, the Seasonal Agricultural Worker program; RAW program, the Replenishment Agricultural Worker program. Those who could prove that they had worked in the field then got a status here in the United States so that they were able to continue to work in the agricultural field.

Mr. GOLDSTEIN. It was, and what happened was——

Mr. LUNGREN. A lot of them left.

Mr. GOLDSTEIN. A whole bunch of farm workers stayed in agriculture for many years, but there was no real immigration enforcement. Agribusiness was able to hire undocumented workers. There was no real effort to upgrade the laws about wages and working conditions for farm workers, which discriminated against farm workers as an occupation. And so the workers had limited bargaining power, and there was——

Mr. LUNGREN. So my point is that is the reason why they left agricultural work?

Mr. GOLDSTEIN. People leave jobs when the conditions and the wages are poor.

Mr. LUNGREN. So if the conditions and wages were better than they had been in the intervening years, the great bulk of them would have stayed in agriculture?

Mr. GOLDSTEIN. I think a substantial percentage would have stayed in agriculture if wages and working conditions substantially improved.

Mr. LUNGREN. Isn't that sort of contrary to the experience of just about every other group in America, that they start in jobs sort of analogous to agriculture, but they move on to other things. They want their children to have a better life and then, if they have a chance, they have a better life. Isn't that true?

Mr. GOLDSTEIN. Sure, and it is going to be true for some people. They will go into agriculture and then they will leave.

Mr. LUNGREN. So how do we maintain a sustainable workforce in agriculture if you are going to have that continuing aspiration of people to move on to other things?

Mr. GOLDSTEIN. Well, the Economic Policy Institute just issued a report authored by Professor Philip Martin of the University of California at Davis that said that we can improve the wages of farm workers by 40 percent in this country and just raise the cost of fruits and vegetables to families in this country per year by $16. A 40 percent wage increase would keep a lot of farm workers. He also pointed out that we have a positive trade balance on fruits and vegetables.

Mr. LUNGREN. So let me ask Mr. Sequeira. How do you respond to those statistics and analysis?

Mr. SEQUEIRA. Well, Congressman, I think no disrespect to economists. When I was at the Department of Labor, the Department's chief economist was in my office, but you can't get two economists to agree on the time of day.

Mr. LUNGREN. No, no. Ronald Reagan said if you took every economist in the world and you laid them down end to end, they wouldn't reach a single conclusion.

Mr. SEQUEIRA. Right, or the old joke about every economist has two hands and that's the problem because on one hand, it is this, and on the other hand, it is something else.

I think the record in history is clear that there is a perennial shortage of American farm workers in this country, that we have had foreigners come to this country to harvest our fruits and vegetables for the better part of 100 years, that farm workers who were in this country illegally in the 1980's and that achieved a legalization, moved on to other jobs. And I don't think anyone would blame them for that. As you noted, the history of immigration in this country is people come in and work at lower skilled jobs and in successive generations, they move up the economic ladder.

Mr. LUNGREN. See, that is why—I mean, Mr. Goldstein mentioned strange bedfellows in his coalition to get together with their group. We have strange bedfellows here. It is called the Senate and the House. And my best inclination is the Senate and the House are not going to pass the AgJOBS bill.

The SAW/RAW program has not done what it was supposed to do.

We are probably going to have e-Verify. I doubt anybody running for President, including the incumbent, is going to run on the fact that he is going to be softer on immigration enforcement than he has been.

We are going to have, as the gentlelady from California agreed with me, a crisis in agriculture. And while it sounds great to say, man, AgJOBS will take care of it, it is not going to pass. It is not going to pass because it has frankly what, Mr. Goldstein, you want to have in there, a path to citizenship which has been what has doomed all the immigration reforms in the past two Administrations. And I say that with regret.

So we can say that agriculture is going to be the bystander here, but agriculture in many ways is going to be—and I hate to say it—a victim or they are going to be maybe not the coincidental victim in this. Maybe this is the intention. I don't know. Maybe some people think it is great. We will have Ag collapse and that will force a decision. I just think that is shortsighted, and I am struggling to find a response to this when, in fact, the history has been that we have had a significant number of foreign workers in agriculture long before you ever saw it in construction, long before you ever saw it in landscaping, long before you ever saw it in hotel/recreational. I think that is a fact. And if that is, then I think we are duty-bound to try and respond to that.

Ms. LOFGREN. Would the gentleman yield for a brief comment?

Mr. GALLEGLY. The time of the gentleman has expired.

Ms. LOFGREN. I would unanimous consent that the gentleman be given an additional 30 seconds.

Mr. GALLEGLY. Without objection.

Ms. LOFGREN. You and I have talked often on this subject, and I think one of the—and I wasn't in the Congress during the Reagan amnesty.

Mr. LUNGREN. I was very young then and we did not call it "amnesty."

Ms. LOFGREN. I know you were. But there was no provision for the future flow of employees coming in, and I think there were enforcement issues.

Mr. LUNGREN. I understand. If I could reclaim my time, I will just say one of the responses to that failure to have a continuing flow was the other side, if I might say, said we will solve that problem with the SAW/RAW program. We did pass it. It didn't, and we have this problem that confronts us today.

I thank the gentleman for the extra time.

Mr. GALLEGLY. The Ranking Member of the full Committee, Mr. Conyers?

Mr. CONYERS. Thank you, Mr. Gallegly.

Mr. Goldstein, it has been predicted here that we will never get an Ag bill through and we know it.

Mr. GOLDSTEIN. I am sorry. I couldn't hear.

Mr. CONYERS. I said it has been predicted here that we will never get an Ag bill through and we know it. And even though we know it, are you familiar with what is in that bill?

Mr. GOLDSTEIN. Yes.

Mr. CONYERS. Roughly? Well, tell me a couple of things that are in it. We have tried to rearrange the way that we process immigrants from an illegal status to a legal status. Right?

Mr. GOLDSTEIN. Right.

Mr. CONYERS. What else?

Mr. GOLDSTEIN. Well, it just seems to me that if groups like ours and the United Farm Workers Union and others could actually reach an agreement with the employer groups that we have reached an agreement with, Congress should be able to reach a similar agreement.

In the AgJOBS bill, in the transition from undocumented status to legal immigration status, it would require workers to stay in agriculture for 3 to 5 years. I characterize previous proposals like that as indenture servitude. To reach a compromise, farm worker advocates have recognized we have to make concessions like that. We did.

On the H-2A program, as part of a broader comprehensive reform of agriculture, we agreed that under AgJOBS that the H-2A could shift from labor certification to labor attestation. What that means is instead of more Government oversight over the way these H-2A employers abuse guest workers, we will agree to less Government oversight to make it quicker for them to get access to guest workers.

This is a complex, long, painful compromise, and it just seems to me Congress should be more open to adopting it rather than fight these battles over these ideological issues about immigration on and on and on for decades.

Mr. CONYERS. Well, let me ask you this. There has been agreement between the major parties already, the unions and the employers. Is that much correct?

Mr. GOLDSTEIN. Correct.

Mr. CONYERS. Well, then what is so impossible if we could get beyond ideology and a little partisanship every now and then? Why can't the Congress get to it?

Mr. GOLDSTEIN. Congressman, there are people all over the country who I report to who ask me that question all the time, and I don't have a logical answer. I wish that were not the reality.

Mr. CONYERS. Well, do you have an opinion?

Mr. GOLDSTEIN. I have an opinion. My opinion is that Congress should get down to it and pass the AgJOBS bill and give farmers the legal workforce that they want and get done with this ideological battle about immigration. It will help farm workers improve their conditions for years into the future and help us maintain a positive trade balance and keep us providing—keep getting healthy food that we need.

Mr. CONYERS. This is a very friendly Subcommittee, as you found out. I will yield to Mr. Lungren to explain to you what is more difficult.

Mr. LUNGREN. Well, if the gentleman would yield. I would be happy to ask the gentleman in return what is ideological about the basic question of citizenship in the United States? Because that is what we are talking about. The farmers on their side did engage in the negotiations, but you say those are the principal parties.

There are also those who are not involved in agriculture, the greater American public, who I think has a right to be heard on the question of the importance of American citizenship and whether or not you have people who go to the front of the line. Now, some would say that those in agriculture have earned a cut in line because they have been working here. others would say those who remained in their countries from whom the agricultural workers came or other people who came to this country illegally—those who remained behind to follow the law would feel that they were cheated by being negatively impacted for following the law.

And I don't think that is ideological. I don't think there is anything ideological when you are on the playground or whether you are in school in first, second, or third grade and you are lined up for water, you are lined up for lunch, and someone cuts in. It is not an ideological thought that that is unfair that someone has cut in. It seems to be an essential issue of fairness.

And all I am saying is in my estimation the reason why AgJOBS could not go forward is an intrinsic piece of it was that people got to jump in front of the line. Again, we can argue about whether that is fair, whether because you have had some years in the United States working while your fellow citizens from the country that sent you or that you came from don't have a chance to come to the United States, but that is an argument that I think is not ideological. I think that is a fair-minded argument that ought to be dealt with on its merits.

Mr. CONYERS. Thank you, sir.

Ms. LOFGREN. Would the gentleman yield?

Mr. CONYERS. Mr. Chairman, I ask for 2 additional minutes, if it pleases the Chair.

Mr. GALLEGLY. Without objection, there will be 2 additional minutes, but we will summarize and adjourn this meeting by 12 o'clock.

Mr. Conyers?

Mr. CONYERS. Thank you, sir.

Ms. LOFGREN. Would the gentleman yield?

Mr. CONYERS. I yield to the gentlelady.

Ms. LOFGREN. Just briefly. In listening to Mr. Lungren, I think that the issues that he has raised, which I think trouble him more than they trouble me, can be accommodated. In fact, there are many occasions when, if it is an employee we need to make the business run, we put them in the front of the line because that is what everybody needs who needs employment. But if it is an issue about when the residence attaches, that can be dealt with. That could be dealt with in good faith, and I would suggest that we should discuss that further probably not on C-SPAN.

I do think that the stability of having someone with a permanent status—it is not citizenship. It is a legal permanent resident status so that they have some portability, they have some standing so they can't be exploited—is an important concept. Mr. Goldstein has mentioned it. Economists have mentioned it. Really, the Department of Labor witness talked about the ability to exploit people if they are dependent upon a sponsoring employer year after year.

So I do think that there are the elements here of consensus. And it is hard to move forward on an immigration matter in this political environment because no matter what you do, somebody is going to start screaming about it. But I think that we could make this happen.

And I will be happy to talk to Mr. Lungren further, if he is interested in doing that. I would hope that we could also talk to Mr. Berman who has been the lead sponsor on this for so many years and certainly the coalition of growers and the farm workers to see whether we could come up with some new element that addresses the issue that has been raised today and get to the finish line on this because if we don't do this, if we don't do this, we are, in fact, going to have a crisis in agriculture. And the H-2A program is not going to save it. We are just going to have a big, big problem.

And I am willing to solve that problem, and I am hopeful that we can, in a bipartisan way, get it done because it is a freight train coming at us in Ag with the enforcement efforts that are going on. What do you think when you go in with an I-9 audit into ag? You are going to find at least half the workers can't produce their papers. This is a disaster. And I hope that we can rapidly move forward. I pledge my best efforts.

And I would yield back to Mr. Conyers and thank him for giving me the time.

Mr. CONYERS. I thank Chairman Gallegly.

Mr. GALLEGLY. Thank you, Mr. Conyers. The gentleman's time has expired. All time has expired.

I want to thank all of our witnesses today for their testimony.

And without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which will be forwarded and I ask that the witnesses re-

spond as promptly as possible so that we may make the questions and their answers a part of the record of this hearing.

With that, thank you for being here today, and the Subcommittee stands adjourned.

[Whereupon, at 12 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Statement for the Record
House Judiciary Subcommittee on Immigration Policy and Enforcement
The H-2A Visa Program: Meeting the Growing Needs of American Agriculture?
Rep. Judy Chu
April 13, 2011

I have long been involved in the issues facing our country's agricultural workforce and care deeply about our nation's immigration system. The status quo is untenable. Our immigration system is broken, and we need a lasting solution that will provide a stable labor supply for our nation's agricultural employers, while ensuring fair and humane treatment for farmworkers. Some ten years ago, growers and worker advocates arrived at a bipartisan compromise, called AgJOBS. AgJOBS would allow eligible undocumented farmworkers to earn legal status, while making balanced changes to the H-2A program. AgJOBS is the best way to achieve a stable, productive, and profitable agricultural industry that protects the needs and rights of its workers.

The H-2A program cannot and should not be the solution for meeting our nation's agricultural labor needs. The H-2A program ties workers to a single job, making them dependent on their employers for current and future employment. This opens up ample opportunity for mistreatment and abuse of foreign workers. Furthermore, tax-related and other incentives encourage H-2A employers to hire foreign guestworkers, even if domestic workers are available. These factors and others put domestic workers at a competitive disadvantage in the labor market.

We are a nation of immigrants, not guestworkers. H-2A guestworkers have a non-immigrant status and do not have an opportunity to become permanent members of our society, no matter how many seasons they return to work here. This is contrary to our nation's values of economic and political freedom and democracy.

Immigration law enforcement without meaningful immigration reform will not solve the problems farmworkers experience nor provide employers with the workforce they need. Deporting the large number of undocumented farmworkers is expensive, infeasible, and would harm our agricultural production. For many reasons, relying on the H-2A program to meet our country's agricultural needs is not a solution. Indeed, Congress has already debated and rejected a guestworker-only approach to our nation's agricultural workforce. Our nation's broken immigration system deserves a lasting solution, one that will stabilize the agricultural workforce and protect workers from abuse.

I urge you to consider AgJOBS as the best solution to our nation's agricultural needs.

Statement of the American Farm Bureau Federation

TO THE

HOUSE SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

HOUSE COMMITTEE ON THE JUDICIARY

HEARING REGARDING "THE H-2A VISA PROGRAM: MEETING THE GROWING NEEDS OF AMERICAN AGRICULTURE?"

April 13, 2011

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The American Farm Bureau Federation (AFBF), the nation's largest general farm organization, submits this testimony to the subcommittee and requests that it be included in the record of this hearing. AFBF represents farmers and ranchers in all 50 states and Puerto Rico, including growers who currently utilize the program and suffer from its deficiencies; others who would like to avail themselves of H-2A but cannot due to regulatory or statutory obstacles; and still others who, while eligible, cannot take on the risks and costs inherent in the program because it would jeopardize their ability to harvest and market their crops.

We will share with the subcommittee some examples of how the program fails to work, but at the outset we urge the committee to review and reform the H-2A program without delay. The reason is simple. H-2A, if properly implemented and administered, would give many farmers far greater assurance than they have today that their workers are legally authorized to work in the United States.

Congress, 25 years ago, gave farm employers two conflicting instructions. First, they made it unlawful for them to hire or employ individuals not authorized to work in the United States. At the same time, they told employers that they could not question an applicant for work about the worker's work eligibility status, nor could they question the documents that an employee proffered in the I-9 process. This legal obligation is explicitly spelled out on the website of the U.S. Department of Agriculture (USDA), where it states:

> *Employers with four or more employees are prohibited from committing document abuse. Document abuse occurs when an employer requests an employee or applicant to produce a specific document, or more or different documents than are required, to establish employment eligibility or rejects valid documents that reasonably appear genuine on their face. Employers must accept any of the documents or combination of documents listed on the back of the INS Form I-9 to establish identity and employment eligibility. Examples of document abuse include requiring immigrants to present a specific document, such as a "green card" or any INS-ISSUED document, upon hire to establish employment eligibility, and refusing to accept tendered documents that appear reasonable on their face and that relate to the individual. U.S. citizens and all immigrants with employment authorization are protected from document abuse.* [1]

So while many point the finger at farmers for hiring workers with fraudulent documents, in fact they are only doing what Congress has told them to do. As a result, we are now in a situation in which a significant number of agricultural workers lack work authorization. That is not the fault of farmers and ranchers. It is the fault of the system under which they have been forced to operate.

AFBF could support efforts to reform the work verification system under certain conditions. First, such increased obligations must not come at the expense of America's farmers and ranchers, nor should they jeopardize U.S. agricultural production. If and when such reforms are instituted, they should be undertaken judiciously and implemented carefully. AFBF released a report in January 2006 that underscored how important this matter is. Our economists estimated

[1] http://www.usda.gov/oce/labor/ina.htm

at that time that $5-$9 billion in agricultural production would be put in jeopardy if Congress does not resolve this matter correctly. Due to the rising value of fruit and vegetable production in particular, that figure is at least 20 percent higher today. Similarly, net farm income would decline by as much as $3 billion. A copy of that report is included with this statement and we request that it also be included in the record of this hearing.

As many people know, agricultural production is unique. Our "manufacturing system" is subject to the vicissitudes of weather, soil conditions and other factors. Our finished product is perishable. For long periods, we may need only a handful of workers to tend the fields or orchards. During harvest, the demand for labor can increase exponentially. A critical factor is having sufficient labor available at a time and day of need and at a cost that keeps the product competitive in the market. For some sectors, such as fruits and vegetables, farmers may require a very large number of workers for only a short period of time. And while there is clearly skill required in hand-picking fruits and vegetables, it is also a fact that farm work is often physically demanding, can require long hours over brief periods, and, for harvesting crops in the field, does not require much formal education. On top of that, farm wages have been rising. According to a recent publication by the National Agricultural Statistics Service[2] the average wage for hired workers in January of this year was $11.29 per hour, an increase of 21 cents from a year earlier. This figure is significantly above the federal minimum wage of $7.25 an hour.

More importantly, however, this wage is well above what individuals in Mexico receive for the same occupation. USDA discussed the wide disparity between agricultural wages in Mexico and the U.S. in a report prepared by its Economic Research Service (ERS) several years ago. According to the ERS:

> *The wage differential between Mexican and U.S. agriculture is huge. The daily wage for 8 hours of farm work in Mexico is about $3.60 in U.S. currency, compared with the U.S. average of $66.32 in October 2000. However, these figures overstate the real wage differential between Mexican and U.S. agriculture because the cost of living in Mexico is lower than in the U.S.* [3]

Thus, for a worker in Mexico, work in U.S. fields provides an enormous economic opportunity. This fact should put to rest the false notion advanced by some that farmers and ranchers are to blame for the number of undocumented workers in our sectors. Far too often, people say that if farmers would only pay a higher wage, U.S. citizens would be attracted to the jobs, and we would not have the problem of unauthorized workers. Given the disparity between U.S. and Mexican wages, it is hard to see how raising wages would eliminate the problem.

Much more importantly, however, is the simple fact of economic life. If producers were forced to pay wages higher than the economic system can bear in order to achieve some social or civic goal – for instance, to remedy the problems of a broken immigration system – simple economics would determine the outcome: many either would go out of business, change their crops or otherwise alter their mode of operation. Fruit and vegetable imports from South and Central

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[2] http://usda.mannlib.cornell.edu/usda/current/FarmLabo/FarmLabo-02-17-2011.pdf
[3] http://www.ers.usda.gov/publications/AgOutlook/Jan2001/AO278G.pdf

America have been rising for decades. Unless farmers can produce their crops and remain economically competitive, they will not stay in business. It is that simple.

Frankly, there is nothing growers want more than to stay competitive. And they can be. But the challenge is getting harder day by day. With more and more states adopting E-Verify requirements, and the prospects of federal legislation also mandating E-Verify, it is more imperative than ever that growers know that they have access to a legal, reliable, affordable supply of workers. An ideal solution, in our view, must take into account and accommodate the large number of existing agricultural workers who lack proper work status, assuring that they can transition into proper work status in the U.S. Were E-Verify mandated for agricultural employers, the impact in the near term could well be devastating if not coupled with provisions to accommodate existing workers. In the long run, growers will need a guest worker program that actually does what it is supposed to do – provide growers with a source of legal workers to accommodate their labor needs when U.S. workers are not available. Whether it is H-2A or something else, growers need to know that they have access to workers who will tend and harvest their crops and who are authorized to work in the U.S. The system we have today simply does not meet that need.

This problem is not new. Fifteen years ago, in the 104th Congress, agricultural employers pushed hard for amendments offered on the floor of the House to reform H-2A. Similar legislation was introduced in the Senate. In every Congress since, legislation has been introduced to reform the H-2A program. The fact is, farmers and ranchers want and need a workable H-2A program. Contrary to the claims of some, we are not looking to exploit workers who come here illegally. We are not trying to "game" the system by paying lower wages. Farmers and ranchers today are obeying the law. That is what has gotten us in trouble. It's the law that needs to change. And now more than ever, the H-2A program needs to be fixed.

Following are some graphic examples of how broken the system is:

- In late 2010, a number of H-2A employers in New York encountered difficulties with Jamaican H-2A workers who have a long history working in that area. Those problems have carried into the application process of 2011, and growers began experiencing problems this past January. Some of these Jamaican workers have come to the same U.S. farms each season for years. U.S. Citizenship and Immigration Services (USCIS) is delaying H-2A applications by requesting that farmers supply additional information from the foreign Jamaican recruiters stating that the Jamaican Central Labour Organization does not require payments or deductions from wages from workers as a condition of employment. The statements that are required from the recruitment agency must be signed and completed by the agency itself; however, the employer effectively turns into a functionary for two governments.

- In Washington state, some growers have recently submitted applications for workers in H-2A and have included language to the effect that the applicant affirms that he is authorized to work. Government officials are insisting that this language be taken out of the application.

- In Tennessee, the Department of Labor (DOL) has been instructing growers to remove a provision in the H-2A contract that a worker waives his right to sue, in exchange for which he has the right to submit any grievances to arbitration. This provision has been used in the past, yet, DOL now is apparently refusing to recognize it.

- In the 2008 regulatory revisions to H-2A, state workforce agencies (SWAs) were required to determine the work authorization status of the individuals it refers to growers recruiting for the H-2A program. DOL has eliminated this simple safeguard. In one instance, a grower who entered the H-2A program after an I-9 audit received a list of names from the state SWA that included individuals the Department of Homeland Security had informed the employer were not authorized to work, putting the employer in the unusual circumstance of having one government office telling him to do something another government office has instructed him not to do.

- Earlier this year, a nursery grower filed an application with a date of need (DON) of Feb. 11. The application was denied by the state but approved on appeal by DOL, and visas were received by the grower on Feb. 8. The DON was pushed back to Feb. 15. The employer followed all pertinent guidelines and began on Feb. 8 to make a reservation for interviews at the U.S. Consulate in Mexico for a border crossing on Feb. 14 or 15, using the reservation system stipulated by the government. That system, operated by a private contractor, failed to reply and it was only after intervention by a U.S. senator with the U.S. consulate in Nogales that the private contractor finally called – on Feb. 24, more than two weeks after the initial contact was made. Furthermore, the private contractor refused to provide contact information and stated that no one was available to be in contact. The workers finally arrived on Friday, March 4 and began work on March 7 – nearly 3 weeks after they were needed at a cost of more than $3,000 per worker.

- In Arizona, there has been a long of history of individuals crossing the border daily or weekly to work in the fields. There is no prevailing practice of growers providing housing or transportation to such commuters, but H-2A lacks the flexibility to accommodate these needs.

- Since 1986, the department has provided sheepherders the ability to utilize H-2A by adapting the program for the special needs of that sector while denying such treatment to other sectors (like dairy and packing and processing). The previous administration reviewed this arrangement, which has bipartisan support, and kept it intact but failed to extend it to other parts of agriculture, which require it as well.

- One state which previously had screened domestic referrals, forwarding applications to employers, no longer does so, and farmers now have to read entire job descriptions over the phone to prospective applicants.

- Some employers in the past had performed criminal background checks but the DOL is now rejecting any applications with this provision.

- Some H-2A employers are being denied the ability to request prior experience with applicants, even though in the past this was commonly done.

- Under new training requirements, some workers can possibly be employed for five days without actually performing any work. One farmer has reported that this has cost his operation $61,000.

- The DOL appears to have revised its interpretation of the 50 percent rule by now requiring H-2A employers to consider for employment all workers who present themselves for employment during the first half of the contract (not simply the number of workers certified in the application). Given the high rate of attrition of SWA referrals, this could expose a farmer to a potentially unlimited amount of applicants.

- In one state, use of the H-2A program adds greater than $4.00 per hour to the cost of each employee, including costs for application and transportation of the worker, housing, transportation from housing and other program fees.

- The adverse effect wage rate is not based on real wages paid in the market but is a formula devised years ago in an effort to counter supposed wage suppression by the presence of undocumented workers. It discourages employers from using the program.

- Legal activists have long targeted H-2A employers[4] in lawsuits. Currently, one lawsuit is pending in Washington state against a farmer and agent alleging – although there is no regulatory requirement to do so – that they must provide a copy of the H-2A contract to all employees working for the employer when the H-2A application is filed. Legal services attorneys have filed a class action lawsuit.

We commend the subcommittee for convening this hearing and we strongly urge you to consider legislative reforms that truly improve the program. At a minimum, we would urge legislative reforms in the H-2A program that would:

- Eliminate bureaucratic delays and uncertainty so that farmers and ranchers have reasonable assurance that they will have the workers they need when they need them.

- Provide an opportunity for all sectors of agriculture to participate in the program. This is particularly important for sectors like dairy and others that employ agricultural workers year-round. It also is critical that border states like Arizona, where workers have traditionally commuted to work, have an opportunity to utilize H-2A.

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[4] Litigation abuse of the program was amply documented in *Harvest of Injustice: Legal Services vs. the Farmer* by Rael Jean Isaac (1996)

- Eliminate unnecessarily burdensome provisions (such as requirements for housing and transportation; mandating a wage that does not reflect actual prevailing market wages; and imposing a 50 percent rule) that make the program unattractive, unwieldy and uneconomic.

- Assure that workers' rights and employers' rights are fairly and equitably balanced. The program has a long history of litigation that has done little more than discourage participation in the program without truly protecting workers.

- Examine the possibility of additional changes, such as a longer, 3-year visa that is renewable multiple times.

These are just a few of the most important changes that should be made to the H-2A program. While substantive reform of H-2A is a critical component of any overall legislative approach, we also cannot minimize the importance to agriculture in the near term of resolving the status of many existing workers. Should E-Verify be mandated for agriculture without addressing this fundamental matter, the results could be truly devastating. We stand ready to work with the committee on these and all issues so that agricultural production in the United States is not harmed, either directly or indirectly, by any legislation adopted by Congress.

We appreciate the opportunity to submit this testimony to the subcommittee in its examination of the H-2A program.

ATTACHMENT

Impact of Migrant Labor Restrictions on the Agricultural Sector

American Farm Bureau Federation – Economic Analysis Team
February 2006

Preface

This report assesses the impact on U.S. agriculture of eliminating access to migrant farm labor.[1] The report concludes that the agricultural sector would suffer significant economic losses if the law that governs the hiring of migrant labor were changed without providing for a viable guest worker program and a reasonable transition into such a program.

I. Introduction/Summary

Of all the major sectors of the U.S. economy, agriculture is the most dependent on migrant labor. After almost a century of transferring excess labor to the rest of the economy, agriculture's demand for labor has stabilized at approximately 3 million workers. Of these 3 million workers required to operate the sector, approximately 2 million are drawn from farm families and about 1 million are hired from non-family sources. An estimated 500,000 or more of this 1 million would be affected by restrictions on the hiring of migrant labor.

This report concludes that if agriculture's access to migrant labor were cut off, as much as $5-9 billion in annual production of primarily import-sensitive commodities most dependent on migrant labor would be lost in the short term. Over the longer term, this annual loss would increase to $6.5-12 billion as the shock worked its way through the sector. This compares to an annual production average for the entire agricultural sector of $208 billion over the last decade.

Production of fresh fruits, vegetables, and nursery products would be hit hardest as 10-20 percent of output would shift to other countries, and increasing the U.S. trade deficit on virtually a dollar-for-dollar basis. A fifth to a third of production for the fastest growing fresh component of the fruit and vegetable market would be lost. An adequate labor force is critical to the economic health of our fruit and vegetable industry. Fruit and vegetable production is labor intensive and producers are already confronted with competitiveness issues due to low cost labor available in competing markets.

Costs would rise and production would fall in the other field crop and livestock sectors which are not as sensitive to imports or as dependent on migrant labor. With higher costs, these farm operators would produce a smaller volume of products ranging from

[1] The term "migrant labor" as used in this report refers to foreign-born workers who travel to the U.S. for employment in the agricultural sector. The report does not consider migrant labor working in agriculture-related industries such as the livestock slaughter and packing industry. This definition is consistent with the definition used in USDA survey activities but differs from the definition of migrant labor (any and all workers who routinely move to different work sites) used in the Department of Labor survey activities and reporting.

grains, oilseeds and cotton to meat and milk. However, with labor accounting for a smaller share of costs, the drop in production would be more limited than in the fruit and vegetable sector. In addition, with the U.S. a major exporter rather than importer of most of these products, import displacement would be minimal. Hence, most of the impact on field crop and livestock operations would be concentrated in higher costs on remaining production.

The impact of this combination of lower production and higher costs on the farm sector as a whole would be a $1.5-5 billion loss in farm income in the short term and a $2.5-8 billion loss in the longer term (Table 1). The drop in production would reduce market receipts and net farm income. With farmers being price-takers rather than price-makers, much of the increase in production costs would also have to be paid for out of farm income. Aside from the specialty crop sector, this combined farm income impact would be most pronounced in livestock operations (such as dairy) where structural changes have increased dependence on hired labor. In dairy and many other livestock categories, the typical farm family workforce has simply become too small to operate enterprises large enough to capture economies of scale. These losses compare to a sector income average of $56 billion per year over the last decade.

Table 1. Losses in Farm Production and Income With the Elimination of Migrant Labor

Loss Type	$Billion
Production Loss	
Short Term	5.0 - 9.0
Long Term	6.5 - 12.0
Cost Increase on Remaining Production	
Short Term	2.5 - 7.0
Long Term	3.0 - 9.0
Income Loss from Reduced Production and Cost Increase	
Short Term	1.5 -5.0
Long Term	2.5 - 8.0

Adjustments would have to be made in all of the states (Table 2). However, adjustments would be largest in California, Florida, Washington, Oregon, Texas, North Carolina, Michigan, Idaho, Arizona, and New York. States with extensive fruit, vegetable, and nursery operations and large industrialized livestock operations would be the most severely impacted. But the majority of commercial field crop operations has grown large enough to need hired labor and would also face considerable adjustment challenges.

The reason for these losses is simple. There is no readily available pool of excess labor in the farm sector, the rural economy, or the general economy to draw upon to replace 500,000 or more migrant workers. The sector has already exhausted most on-the-shelf

mechanization alternatives and next-generation robotics are decades away. Hired farm worker wages would have to increase significantly above and beyond the increases necessary over the last two decades to attract and hold workers in an increasingly tight labor market. This effort to replace lost migrant farm workers would be complicated by the demanding and often seasonal nature of many hired jobs in agriculture. It would be further complicated by similar efforts by employers in other sectors of the economy affected by migrant worker restrictions to attract and hold their own replacement workers. At a minimum, hired farm worker wages would have to increase from the current $9.50 average to possibly $11 to $14 per hour or more in order to attract and hold labor currently employed in other jobs requiring comparable skills.

The analysis reported here draws on farm labor data developed by USDA and the Department of Labor (DOL) and basic labor supply and demand relationships to estimate the wage impact of replacing lost migrant labor.[2] The analysis then uses farm income accounts developed by USDA as part of the income reporting program as well as Census of Agriculture data on the distribution of farm income to estimate sector vulnerability to higher labor costs.[3] The relationships built into the agricultural sector model developed at the University of Missouri's Food and Agricultural Policy Research Institute (FAPRI) were then used to estimate farm economy impacts.

The main body of this report looks first at the changing supply and demand for hired farm labor. The second section looks at several of the factors driving farm labor demand. The third section looks at the impact of bidding for hired farm labor, and the fourth section looks at mechanization as a possible answer to labor shortages. The report then looks at the key components of a viable guest worker program from an agricultural economic perspective. The report closes with a methodology section.

[2] The two most important sources of data are the National Agricultural Labor Survey (NALS) conducted by USDA's National Agricultural Statistics Service and the National Agricultural Workers Survey (NAWS) conducted by the Department of Labor.

[3] USDA's farm income information is available at www.ers.usda.gov/data/FarmIncome and www.usda.gov/data/ARMS while the Census of Agriculture data is available at www.nass.usda.gov/census.

Table 2. State Impacts of Migrant Labor Restriction

	Short Term				Long Term			
	Production Loss		Income Loss		Production Loss		Income Loss	
	Low	High	Low	High	Low	High	Low	High
State	$Million							
United States	5,000.0	9,000.0	1,500.0	5,000.0	6,500.0	12,000.0	2,500.0	8,000.0
Alabama	34.8	62.6	10.4	34.8	45.2	83.5	17.4	55.6
Alaska	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Arizona	114.1	205.3	34.2	114.1	148.3	273.8	57.0	182.5
Arkansas	7.9	14.2	2.4	7.9	10.2	18.9	3.9	12.6
California	1,733.1	3,119.6	519.9	1,733.1	2,253.0	4,159.5	866.6	2,773.0
Colorado	59.9	107.8	18.0	59.9	77.8	143.7	29.9	95.8
Connecticut	26.9	48.4	8.1	26.9	35.0	64.5	13.4	43.0
Delaware	10.7	19.2	3.2	10.7	13.9	25.6	5.3	17.1
Florida	560.4	1,008.7	168.1	560.4	728.5	1,344.9	280.2	896.6
Georgia	100.5	180.8	30.1	100.5	130.6	241.1	50.2	160.7
Hawaii	50.6	91.0	15.2	50.6	65.7	121.3	25.3	80.9
Idaho	147.1	264.9	44.1	147.1	191.3	353.2	73.6	235.4
Illinois	46.5	83.7	13.9	46.5	60.4	111.6	23.2	74.4
Indiana	29.0	52.2	8.7	29.0	37.7	69.6	14.5	46.4
Iowa	10.4	18.8	3.1	10.4	13.6	25.1	5.2	16.7
Kansas	7.6	13.7	2.3	7.6	9.9	18.3	3.8	12.2
Kentucky	14.1	25.4	4.2	14.1	18.3	33.8	7.1	22.6
Louisiana	47.4	85.3	14.2	47.4	61.6	113.8	23.7	75.8
Maine	23.2	41.8	7.0	23.2	30.2	55.7	11.6	37.2
Maryland	41.5	74.7	12.5	41.5	54.0	99.6	20.8	66.4
Massachusetts	39.3	70.8	11.8	39.3	51.1	94.4	19.7	63.0
Michigan	151.0	271.8	45.3	151.0	196.3	362.4	75.5	241.6
Minnesota	83.1	149.6	24.9	83.1	108.0	199.5	41.6	133.0
Mississippi	11.8	21.2	3.5	11.8	15.3	28.3	5.9	18.8
Missouri	18.0	32.4	5.4	18.0	23.4	43.2	9.0	28.8
Montana	12.5	22.6	3.8	12.5	16.3	30.1	6.3	20.0
Nebraska	25.8	46.5	7.8	25.8	33.6	62.0	12.9	41.4
Nevada	6.1	11.1	1.8	6.1	8.0	14.7	3.1	9.8
New Hampshire	10.4	18.7	3.1	10.4	13.5	24.9	5.2	16.6
New Jersey	64.5	116.1	19.4	64.5	83.9	154.8	32.3	103.2
New Mexico	32.1	57.8	9.6	32.1	41.8	77.1	16.1	51.4
New York	99.2	178.6	29.8	99.2	129.0	238.2	49.6	158.8
North Carolina	158.7	285.7	47.6	158.7	206.3	380.9	79.4	254.0
North Dakota	52.4	94.4	15.7	52.4	68.2	125.9	26.2	83.9
Ohio	88.7	159.7	26.6	88.7	115.3	212.9	44.4	141.9
Oklahoma	44.9	80.9	13.5	44.9	58.4	107.8	22.5	71.9
Oregon	188.1	338.5	56.4	188.1	244.5	451.4	94.0	300.9
Pennsylvania	97.2	175.0	29.2	97.2	126.4	233.3	48.6	155.5
Rhode Island	8.5	15.4	2.6	8.5	11.1	20.5	4.3	13.7
South Carolina	36.6	65.8	11.0	36.6	47.5	87.7	18.3	58.5
South Dakota	8.3	15.0	2.5	8.3	10.8	20.0	4.2	13.3
Tennessee	33.4	60.2	10.0	33.4	43.5	80.2	16.7	53.5
Texas	180.1	324.2	54.0	180.1	234.1	432.2	90.0	288.2
Utah	9.4	17.0	2.8	9.4	12.3	22.6	4.7	15.1
Vermont	9.9	17.8	3.0	9.9	12.8	23.7	4.9	15.8
Virginia	37.6	67.7	11.3	37.6	48.9	90.3	18.8	60.2
Washington	327.8	590.0	98.3	327.8	426.1	786.7	163.9	524.5
West Virginia	5.9	10.7	1.8	5.9	7.7	14.3	3.0	9.5
Wisconsin	84.1	151.4	25.2	84.1	109.3	201.8	42.0	134.5
Wyoming	8.6	15.5	2.6	8.6	11.2	20.7	4.3	13.8

II. Changing Supply and Demand for Hired Farm Labor

In the mid-1980s, after almost a century of transferring surplus labor to the rest of the economy, the farm labor market shifted into balance, with the supply of readily available labor roughly equal to the labor needed to operate the sector. Figure 1 makes this point drawing on USDA data collected as part of its agricultural labor survey activities. As recently as the 1960s and 1970s, the farm work force declined by 100,000- 200,000 workers per year. From 1985 forward, however, the sector has operated with a more or less steady workforce of just under 3 million. About 2 million of these workers come from within the farm sector and include farm operators and their family members. About 1 million are hired from non-family sources.

Figure 1. U.S. Farm Workers (1910-2005)

The current 2 million farm family workers is an all-time low and reflects several demographic factors including the size and aging of the farm operator pool, decreasing farm family size, and the continued movement of people off the farm. As recently as 1960, the farm family work force was over 5 million. Since then, however, Census of Agriculture data indicate that the farm operator pool has steadily decreased in size and has aged as fewer beginning farmers have entered the pool and the proportion of farmers at or past retirement age has hit successive all-time highs.

The Census Bureau's population estimates indicate that average farm family size has also decreased sharply over this same period, reflecting both a general trend in the overall population and the fact that older farmers generally have fewer family members to draw on in operating the farm. In addition, the Census Bureau's population estimates show that the farm population continued to shift to jobs elsewhere in the rural economy or the urban sector. Combined, these factors translate into the smallest family farm labor pool on record.

In absolute terms, the labor force hired to augment farm family labor has also declined over time. As many as 2 million hired workers (less than a fourth of the total) were

drawn from the rural economy as recently as the 1960s. Since 1985, the number has stabilized at the current level of 1 million. Measured as a share of the total farm work force (one-third), this figure is at an all-time high.

This change in the balance between farm labor supply and demand has been reflected in increased hired worker wages (Figure 2). USDA's National Agricultural Labor Survey indicates that the average hired farm worker wage in 1985 was $4.50 per hour. This was close to the minimum wage in effect for the general economy and included a very limited benefits package. By 2005, the wage had increased to $9.50 per hour and included an improved benefits package that pushed the average cost up to $11-12 an hour. This compares with a 2005 minimum wage of $5.15 per hour and DOL survey results showing wages in representative jobs with similar skill requirements ranging from $6.65 per hour for food preparation to $11 for janitorial workers and $14.34 for construction labor, according to DOL surveys.

III. Factors Driving Farm Labor Demand

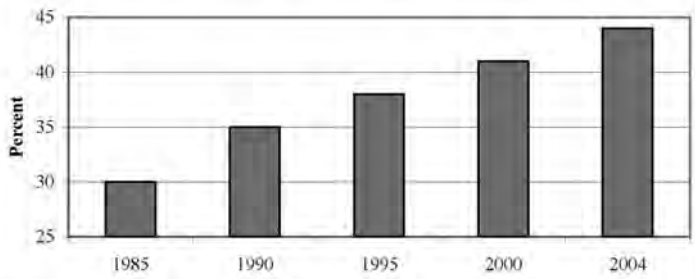
This farm sector demand for 3 million workers reflects several factors. The long-standing substitution of capital for labor reduced the demand for labor. Sustained increases in labor productivity allowed farmers to operate with less labor. Offsetting this, however, were changes in consumer demand, farm structure, and farm size that worked in reverse to increase demand for labor.

For example, consumer demand for farm products has changed dramatically since 1985. The change has been especially pronounced in the fruit and vegetable sector, where demand for fresh products has increased from 30- 45 percent of an expanding produce consumption total (Figure 3). Where possible, growers have met this demand using existing resources – particularly machinery resources. However, the fresh market puts a premium on top quality, peak ripeness and visual appeal. This limits the extent to which

functions such as picking and packing can be mechanized. Existing mechanization technology often cannot meet added technical concerns such as lack of uniform maturity, incomplete fruit removal, and differences in readiness criteria common in the specialty sector. Simply stated, human dexterity and judgment are necessary in the fresh produce sector.

This dependence on labor is reflected in produce costs and prices. Fresh fruits and vegetables meeting stringent consumer expectations can receive a 50-100 percent premium over produce used for processing. However, hired labor costs for operations specializing in production for the fresh market also range from one-third to over half of the total cost of production. This compares to an agricultural sector labor cost average of 14 percent.

Figure 3. Fruits and Vegetables - Percent Fresh



Structural changes in the livestock and field crop sectors have also reinforced dependence on hired labor. These changes – the so-called "industrialization" of agriculture – have brought technological advances that have meant new ways to produce and market farm products. Increasingly, farms using the latest technology in the livestock sector simply require more labor than a farm operator family can generally provide.

For example, the typical dairy farm identified in the Agricultural Resource Management Survey conducted by USDA's Economic Research Service (ERS) reported spending $21,000 on hired labor as recently as 1995 (Figure 4). However, the same operation spent $40,000 in 2004 as machinery operation and livestock management jobs grew more demanding. While relatively slower, growth in dependence on hired labor in the field crop sector has been significant as more mechanized operations require more labor to run high-cost machinery than most operators can provide.

Looking more broadly across the entire agricultural sectors, growth in the average size of farm enterprises indicates that commercial production has simply outgrown family labor.

The typical commercial enterprise (i.e., farms selling more than $100,000 in products per year) increased from sales of about $335,000 per year to over $480,000 over the last decade. Supplementing this USDA survey data with Census of Agriculture data suggests size in the mid-1980s was below $275,000. These farms produce about 85 percent of the sector's output and account for an equally large share of labor. In a growing number of cases, even after adjusting for inflation, these operations are simply too large to operate with family labor alone (Figure 5).

Figure 4. Hired Labor Costs in Hog and Dairy Operations

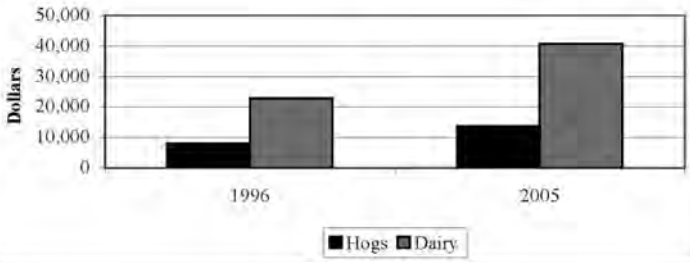
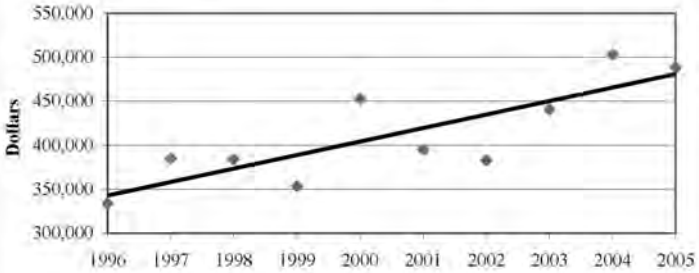


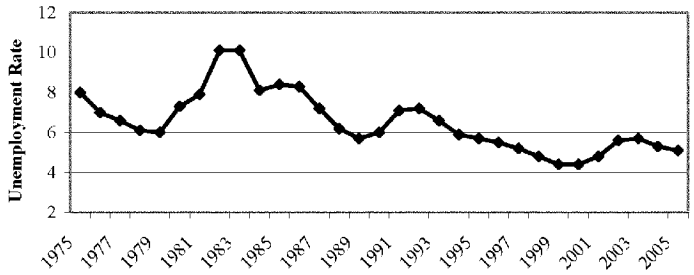
Figure 5. Commercial Farm Revenues



Meeting this hired labor need has become an increasingly demanding part of farm management. Reference has already been made to the declining farm family work force. Changing demographics have also made it difficult to attract and hold a hired farm work force. As Figure 6 indicates, unemployment in the broader rural economy has been low and is currently near what is commonly viewed as a 5 percent structural minimum. Rural

unemployment has been lower than the current rate (5.3 percent) in only four of the past thirty years. There are fewer rural workers available for farm work today than there have been in nearly all of the last three decades.

Figure 6. Non-Metropolitan Unemployment Rate



The potential for drawing on urban workers is also limited. The urban unemployment rate is comparable to the rural rate and is also near structural minimums. Moreover, farm employment is typically located too far from cities where the number of individuals unemployed is high, even if unemployment rates are roughly comparable. The Census Bureau's population data on employment indicate that urban workers have historically been hesitant to relocate to rural areas. Even farm operators located closer to urban areas report difficulty in drawing the urban unemployed to farm jobs. Hence, there is no easy way to fill farm jobs with the urban unemployed.

Perhaps even more telling, however, is the fact that farm jobs are difficult to fill with either the rural or urban unemployed given the nature of the work involved. This is particularly true in the fruit, vegetable and nursery sector where approximately half of hired workers are employed and where the work requires difficult manual labor. Nor is it a "job" in the conventional sense that some take it to be. The work at any one location can be temporary, and sustained employment often requires the willingness and ability to move from site to site over a broad area and work for more than one employer, coinciding with the crop-harvesting calendar. But even site-specific jobs in the livestock and field crop sectors are difficult to fill despite the significantly lower wages that the DOL reports for jobs elsewhere in the economy with comparable skill requirements.

IV. Bidding for Hired Labor

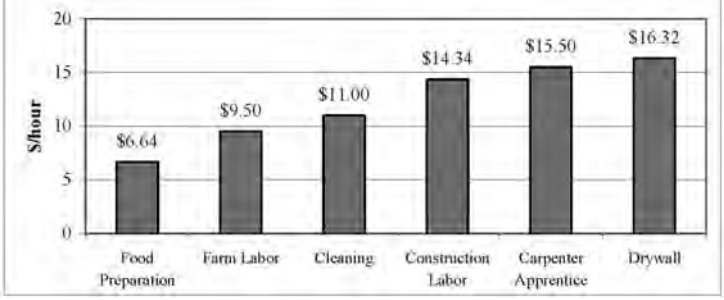
In this setting of balanced farm labor supply and demand, a change in federal law that effectively cuts off farmers' access to migrant labor would necessarily force the agricultural sector to bid in the general economy for replacement workers. While there is

no precise count of the migrant workers that would be affected, DOL's National Agricultural Worker Survey suggests that 500,000 – 50 percent of agriculture's hired work force – would be affected. Other, less formal, counts put the number affected significantly higher.

How high agriculture would have to bid to replace this large a share of its workforce would depend on labor supply and wages in the general economy for jobs with similar skill requirements. DOL surveys of wages and employment identify large pools of workers and the average wages for these pools. Figure 7 shows *representative* pools and wages for a range of jobs with skills comparable to those typically required of hired farm workers.

The DOL surveys indicate that the number of workers now employed in food preparation at wages averaging $6.65 per hour far exceed the number that would be needed in agriculture. As already noted, farm wages average $9.50 per hour. Food preparation workers could raise their earnings today by switching to farm employment, yet very few do. Agricultural employers have not been able to enlist these workers in farm employment, and that fact is buttressed by widespread, anecdotal reports from farm operators about recruitment difficulties. In short, the perception of farm jobs is such that a large segment of the native worker population apparently prefers to take lower paying food preparation jobs rather than higher paying farm jobs.

Figure 7. Wage Rates for Selected Job Categories



DOL surveys indicate that there are two other representative pools of workers that are large enough and the skill requirements comparable enough that they could supply agriculture's replacement needs: a janitorial classification with wages averaging $11 per hour and a construction laborer classification with wages averaging $14.35 per hour. With workers in lower paying jobs such as the food preparation classification choosing not to work in agriculture, farm operators would have to bid for workers in these higher-

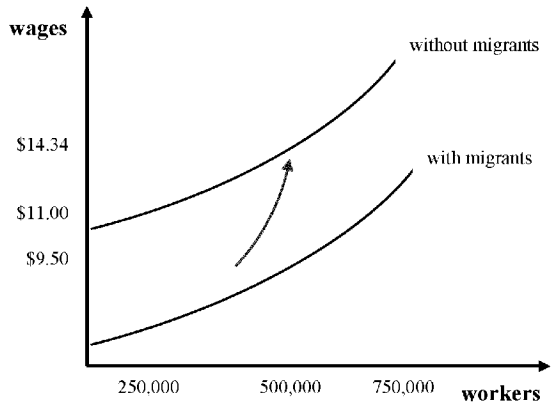
paid categories to replace migrant workers. This would entail raising wages from the current average of $9.50 to possibly $11-14 per hour.

While there are more than enough workers in the janitorial category with $11 per hour wages to fill agriculture's replacement needs, several considerations suggest that replacement wages would have to tend toward the upper end of this $11-14 range. First, the number of replacement workers needed would be large compared to the number of workers in this pool. Many workers in this pool would likely choose to stay in their current jobs. This suggests that agriculture would have to be prepared to tap the higher paid construction worker pool. This replacement effort would be complicated by the fact that, as already noted, farm work is often perceived as less desirable work.

Second, employers in these higher wage pools would likely respond to any significant loss of labor to agriculture with wage increases of their own to maintain their workforce. Equally important, these other sectors also employ migrant workers and would be affected by hiring restrictions. Hence, they would face the same replacement pressure – albeit less acutely than agriculture given the smaller proportion of migrant labor in their overall work forces – as farm operators.

As Figure 8 indicates, this broader pressure to find replacement workers would tend to drive up wages generally. Theoretically, the labor supply curve describing the number of workers available at specific wages would shift up and to the right. This means that, all other factors constant, the cost of the same number of workers providing the same services would be higher even before a specific sector such as agriculture moved to attract workers from elsewhere in the economy.

Figure 8. Migrant Farm Labor Supply Curve



The impact of increasing the average hired wage from $9.50 into this $11-14.35 per hour range on the sector would vary depending on producers' use of migrant labor. As already noted, half of this replacement labor would be demanded by fruit, vegetable and nursery producers, particularly for fresh produce operations. This dependence on migrant labor combined with their exposure to imports suggests that the greatest impact would be in this sector.

USDA's Agricultural Resources Management Survey provides a snapshot of the financial health of these fruit, vegetable, and nursery producers and an indication of the impact a significant increase in labor costs would have. Surveys from 2003 indicate that, on average, about 10 percent of producers in the specialty crop category are financially vulnerable (Figure 9). That is, these producers report negative farm incomes and debt-to-asset ratios over 40 percent. They are currently generating too little revenue to pay all of their bills and have essentially borrowed what most banks will lend on farm assets.

USDA's farm income records and farm financial analysis indicate that, historically, operations in this category are most dependent on continuation of the status quo – in this case continuation of a $9.50 wage. However, while operating at the margin, these producers supply a significant share of sector production. And with year-to-year developments in weather and local marketing circumstances, producers can shift in and out of this category over time.

With migrant labor eliminated and replacement labor costs up 16-51 percent, the situation would worsen significantly for these vulnerable producers. Fresh fruit and vegetable producers most dependent on hired migrant labor would be the most severely affected. However, the rest of the specialty crop sector would also face sharp cost increases. We expect that the 11 percent of fruit, vegetable and nursery producers who fall into this "vulnerable" category would ultimately fail with the replacement of $9.50 per hour labor with $11-14 per hour labor (Figure 9).

Figure 9. Vulnerable Speciality Crop Producers with Current Labor Costs

A significant increase in labor costs would also pull some share of producers who are not vulnerable with $9.50 per hour labor into the vulnerable category with $11-14 labor. USDA research on farm financial vulnerability and Census of Agriculture data on the distribution of farm income suggest that raising wages to $11 per hour would move an additional 2 to 3 percent of fruit, vegetable and nursery producers into this vulnerable category (Figure 10). The same data indicate that raising wages to $14.35 would likely put another 10 percent of these producers in this vulnerable category (Figure 11).
It is important to note that this 10-20 percent loss would be for the fruit and vegetable sector as a whole. A fifth to a third of the fastest growing fresh fruit and vegetable component would be affected as production shifted abroad.

Figure 10. Vulnerable Specialty Crop Producers with Minumum Increase in Labor Costs

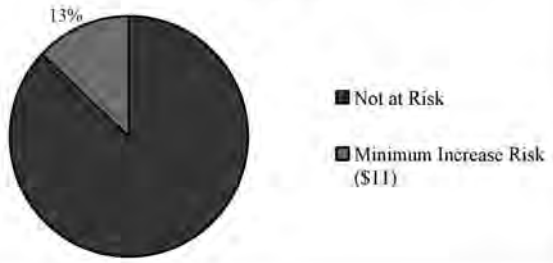
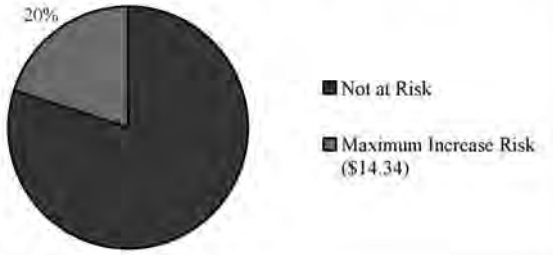


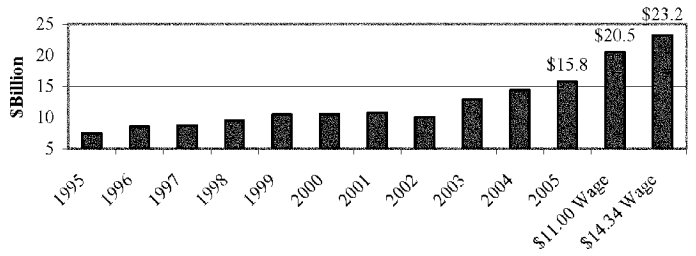
Figure 11. Vulnerable Specialty crop Producers with Maximum Increase in Labor Costs



Since the loss of migrant labor would be permanent, these newly vulnerable producers would eventually go out of business as their losses accumulate and their borrowing options are exhausted. In short, while they would likely continue operating with a reasonably open labor market setting wages at $9.50 per hour, they would not be able to continue operating with a closed labor market generating $11-14 wages.
The loss in U.S. production would be roughly comparable with the loss of producers. USDA vulnerability research suggests that smaller producers make up a larger share of at-risk farmers. In this case, however, the challenge of finding replacement labor would tend to favor small producers. Small producers could, in theory, improvise by using overtime family labor, part time laborers or local replacement workers to a greater extent than larger operators faced with a much larger labor deficit. Hence, migrant labor restrictions would pull larger producers into the vulnerable category and keep the drop in production and producers roughly comparable.

The resulting loss of $5-9 billion in fruit and vegetable production reflects not only wage increases but also the availability of large replacement supplies of fruits and vegetables from outside the U.S. The rapid growth in imports over the last decade indicates the readily available supply of foreign fruit and vegetables with U.S. farm wages at the current $9.50 per hour (Figure 12).

Figure 12. Historical Fruit and Vegetable Imports and Effects of Potential Wage Increases



Restricting migrant workers could well enhance foreign competitiveness even more than the increase in U.S. costs and expand the share of producers in the vulnerable category more than estimated here. Mexico, the chief U.S. supplier of specialty products, could well see its costs of production decrease as several million migrant workers were locked out of the U.S. and had to find employment at home. Surveys of Mexican fruit and vegetable production costs suggests that labor is the single largest expense and that access to a significantly larger labor pool would allow producers to market the same or larger volume at lower costs. A drop in Mexican prices of 10 percent, for example, would put significantly more U.S. producers at risk of failure.

With a significant share of U.S. specialty crop production essentially outsourced, the affected farm resources would be available for alternative uses. Normally, at least some of the resources of displaced producers are bought up by generally larger, more profitable operators. This works to reduce the net drop in production. Given USDA survey indications of the value of the resources (such as land and water) in question, the resources affected would generally have to continue to be used in high return activities such as specialty cropping. However, this potential for offsetting resource shifts would be limited in the migrant worker case since other operators normally looking to expand would themselves be under pressure due to higher labor costs.

The much smaller role played by hired labor and the more limited potential for imports would translate into a different adjustment in the rest of the agricultural sector. Loss of migrant labor would translate into higher production costs and the loss of a small proportion of field crop and livestock producers, most of whose resources would likely be bid away by more profitable operators. The agricultural sector models used at FAPRI and USDA to develop agricultural baseline projections suggest that the responsiveness of field crop and livestock sectors to increases in cost is approximately 0.2 (i.e., a 10-percent increase in costs is associated with a 2-percent decrease in production). Consequently, the drop in production would be small.

However, the vast majority of field crop and livestock producers who remained in business would face higher costs for their ongoing production activities. Given the farm sector's historical role as a price-taker rather than a price-maker, most of the cost increase associated with $11-14 per hour labor could not be passed on in the form of higher prices. Historically, half or more of cost increases come out of farm income.

In conclusion, overall agricultural production would fall $5-9 billion in the short term and $6.5-12 billion in the longer term as the shock of a labor shortage and wages increases worked through the sector. This would be due to large losses in the fresh fruit and vegetable sector and smaller losses in the rest of the fruit and vegetable sector and in the field crop and livestock sectors (Table 1). Producers who remained in production would face a sector-wide increase in costs of $2.5-7 billion in the short term and $3-9 billion in the longer term.

These two impacts can be converted into a farm income loss using USDA's farm accounts to estimate the share of production dollars that normally accrue to farmers as income and the share of production expenses that typically come out of farm income. The farm accounts data suggest that 20-30 percent of production receipts accrue to farmers as income. The same accounts and the agricultural sectors models used here suggest that 50-66 percent of an increase in production expenses normally is paid out of income. These parameters change with the size of the change in production and expenses considered. Using them as guidelines, the production losses and cost increases estimated here translate into a $1.5-5 billion income loss in the short term and $2.5-8 billion loss in

the longer term (Table 1)[4]. These estimates compare to an annual farm income average of $56 billion over the last decade.

Table 1. Losses in Farm Production and Income With the Elimination of Migrant Labor

Loss Type	$Billion
Production Loss	
Short Term	5.0 - 9.0
Long Term	6.5 - 12.0
Cost Increase on Remaining Production	
Short Term	2.5 - 7.0
Long Term	3.0 - 9.0
Income Loss from Reduced Production and Cost Increase	
Short Term	1.5 -5.0
Long Term	2.5 - 8.0

Note: See footnote 4

Given the limited experience agriculture and the broader economy has had with labor disruptions even approaching the magnitude involve in restricting migrant labor, these production and income estimates could prove conservative. Several factors could work to raise them substantially. For example, underlying the analysis is the assumption that labor moves freely and immediately between jobs in the U.S. economy. In other words, agriculture would pay more to bid labor away from the general economy while the majority of operators continue to function with higher costs but without interruption. Vulnerable producers leave the sector. In actual fact, labor markets are far more rigid and the adjustments more complicated. Moving 500,000 replacement workers between sectors would require considerable time and involve significant disruption.

This is a particularly important assumption in the agricultural sector, given production cycles that make many producers sensitive to short term disruptions. This potential for disruption is most marked in the fruit and vegetable sectors – i.e. the sector with the most perishable product and greatest dependence on migrant workers. However, vulnerability to labor disruption extends to livestock operations, such as dairy, and field crop

[4] Note: For example, the $1.5-5 billion in short term income loss assumes that $4 billion out of the $5-9 billion in lost production would have generated no income and that the income loss on the remaining $1-5 billion ($5-9 billion minus $4 billion) would be $250 million to $1.25 billion. The $2.5-7 billion in higher costs translate into $1.25-3.5 billion in income loss, assuming farmers can only pass along half of their cost increase. This puts the total short term loss, after rounding to the nearest $500 million, at $1.5-5 billion. Over the longer term, the $2.5-8 billion in income loss assumes that $4 billion out of the $6.5-12 billion in lost production would have generated no income and that the income generated on the remaining $2.5-8 billion ($6.5-12 billion minus $4 billion) would be $625 million to $2 billion. The $3-9 billion in higher costs translates into $2-6 billion in income loss using a .66 long term ratio versus a .5 short term ratio for cost increases absorbed by farmers. Rounding to the nearest $500 million puts the total income loss for the long term at $2.5-8 billion per year.

operations faced with harvest-time labor needs. As a result, an analysis based solely on wage rates may seriously understates farm impacts. How restrictions on migrant labor were implemented would also be of critical importance. The estimates outlined here assume implicitly that restrictions were implemented with enough lead-time for the sector to adjust. Without this lead-time, the impact would be significantly greater than estimated here.

In addition, the analysis makes no provision for the upward pressure on wages above the $14.35 per hour level that eliminating migrant workers could have. While there is no precise count of the total number of migrant workers currently in the U.S, even the 10-11 million estimates at the low end of the range would be large enough to spark an economy-wide increase in wages. In this setting, agriculture would have to match the new wages in effect rather than the old $11-14 per hour wages. This could also increase farm sector adjustment costs significantly.

Other factors could potentially work to lower adjustment costs. For example, the estimates describe here also make no provision for the sector's capacity to make structural changes that minimize the need to hire replacement labor. This would work to lower adjustment costs. While limited in the short term, the sector has adjusted to input cost increases in the past by modifying production technologies and changing the mix of inputs used in the production process. The adjustment that comes to mind immediately is falling back on the substitution of machinery for labor. As the following discussion suggests, however, the potential in the short term of one to five years is limited at best.

V. Mechanization

One alternative to the adjustments identified in this report often cited by supporters of restricting migrant workers is increased mechanization. However, a closer look at the supply of mechanization technology on the shelf, the long lead-time involved in developing new technology and the changing nature of hired labor demand suggests that mechanization would have a very limited role to play in the short and intermediate term.

Farmers have historically favored development and adoption of mechanization technology as a means of controlling costs, boosting incomes and minimizing the difficulties involved in hiring and retaining non-family labor. Consequently, most of the ready stock of mechanization technology has already been adopted. Decreased public and private investment in research and development over the last two decades has also worked to limit new technology in the pipeline. Given the farm sector's past experience with mechanization, the lead-times in question could be 10-15 years.

Mechanization of processing tomatoes, for example, took 10-15 years from the late 1940s through the early 1960s. There were none of the challenges associated with fresh fruits and vegetables where quality and appearance are at a premium. The process involved a concerted effort by several universities' agricultural engineering departments, USDA support and strong grower interest. Once available, the technology was quickly adopted and proved to be a major factor in making the U.S. one of the most competitive producers

of processing tomatoes in the world. But the quick adoption once there was a prototype may be the exception, not the rule.

Mechanization in other commodity markets has made sense only at scales large enough to rule out adoption for all but a minority of operators. The livestock sector, such as dairy, is a good example. Advances have been made in mechanical milking with the use of robotics but the technology generally requires 1,000 or more milk cows to reach the minimum scale necessary to justify the investment. Robotic milkers were introduced several years ago, yet costs are still so high that such a chance is prohibitive for 95 percent of all dairy operators.

While there is certainly potential for some added mechanization over the long term, the potential for many commodities is very limited or non-existent, regardless of the time frame. The fresh fruit and vegetable market is a good example. As already noted, human dexterity and judgment is needed in the picking and packing of produce to meet consumer demand and to address concerns about the lack of uniform maturity, incomplete mechanical fruit removal, mechanical bruising, and differences in readiness criteria. Next generation technology that addresses these needs is not even on a drawing board at this time.

Hence, advanced mechanization alternatives would require a revival of public-private investment in public-private research and development and a long-term congressional funding commitment. Even then, the contribution would likely be limited to some products and not others, concentrated in the longer term, and economically viable only at large enough scale to further restrict its impact.

VI. Designing a Viable Guest Worker Program

One approach to meeting U.S. homeland security concerns while accommodating agriculture's need for labor is to develop a viable guest worker program as an integral part of any legislation affecting migrant labor. The economic considerations identified earlier in this report suggest that such a program would have to have several critical components.

First, a viable guest worker program would have to accommodate a large number of workers efficiently. Providing just the agricultural sector with an uninterrupted supply of guest workers would require a program capable of handling 500,000 workers each year. The current H-2a program accommodates about 30,000. Handling the much larger volumes needed in agriculture would require streamlining the application and review process in both the U.S. and the country of origin in order to protect homeland security and facilitate worker flow.

Second, a viable guest worker program would allow the open market to determine wages and benefits. The existing program's "adverse effect" provisions have led DOL to issue arbitrary guidelines to protect the American worker from an influx of low-cost foreign labor that would bid down wage rates. Such has not been the case. As noted earlier,

agricultural wages are well above the minimum wage and wages in other industries such as food preparation. The DOL provisions in question do, however, work to raise wages and benefits for foreign farm workers above market-clearing levels without leading to any increase in Americans seeking farm jobs. Migrant farm labor hired through the program often costs $14-17 per hour compared to the $9.50 average for the sector. The increase in hired farm worker wages shown in Figure 2, combined with farm operator difficulties in securing American workers even at the higher wages paid over the last decade, indicate that any adverse impact on American workers is minimal at best. Market forces would prevent any widespread abuse in the future as Americans vote with their feet for jobs elsewhere in the economy even at substantially lower wages. Access to administrative remedies would be sufficient to address any isolated cases of abuse.

Third, a viable program would include provisions designed to meet agriculture's unique labor needs. For example, farmers generally need to lock in labor well in advance as part of their farm management plans. However, fluctuations in weather could move up or push back the dates labor is actually needed. Given the perishable nature of agricultural production, many farmers in question would not be able to "wait in line" behind other employers with non-perishable products. Many farmers' labor needs are also concentrated in short periods of time centered around harvest. Hence, a viable program would allow for worker movement between employers to provide a guest worker with long enough employment to make the program worthwhile. Many other farmers need year round labor that would not "fit" into a seasonal worker program.

Fourth, the NAWS survey indicates that migrant workers typically have an established work history with specific employers. The NAWS survey indicates that the average migrant worker has worked for the same employer/employers for more than four years and has been doing farm work in the U.S. for up to 10 years. A viable guest program would provide for continuing these established employer-employee links.

Note on Methodology

This analysis is subject to several limitations relating to data and methodology. On balance, these limitations suggest that the impact ranges cited in the text are best interpreted as orders of magnitude rather than precise estimates.

Regarding data, there are several sources with often conflicting observations. While the data tend to paint the same general picture, they can differ on specifics in any one year. For the purposes of this report, the National Agricultural Labor Survey conducted by USDA and the National Agricultural Workers Survey done by the Department of Labor were treated as definitive. Hence, for example, the report assumes than 53 percent of agriculture's hired work force would be affected by restrictions on migrant labor despite indications from other largely anecdotal sources that the number affected would be higher and the impact of restrictions consequently greater.

Regarding methodology, there has been relatively little research on farm labor markets done by USDA or the land grant universities. Hence, the econometric basis for doing

impact analysis does not exist. The same is true for the broader labor market, particularly for the range of jobs relevant for this analysis. The analysis here is based on the assumption that farmers would have to bid in the open market for labor to replace lost migrant workers. This makes understanding how labor markets operate and how the agricultural sector adjusts to across-the-board increases in labor costs critical.

Regarding operation of labor markets, this analysis assumes that the Department of Labor's surveys of wages and employment can be used to develop a rough approximation of the labor supply curve for the range of jobs relevant for a farm labor analysis. There are undoubtedly many other job categories with wages that fall between Figure 7's benchmarks, but not with sufficient numbers likely to shift to fill agriculture's job vacancies. In addition, the wages shown are averages, with distributions including significantly higher and lower wages. However, it was assumed that Figure 7's benchmarks could be used to sketch out a rudimentary schedule of the higher wages agriculture could expect to pay to attract and hold replacement workers.

As already noted, the analysis also assumes that labor moves freely between categories, and that labor movement between categories is based solely on relative wages as opposed to a combination of wages and job characteristics. And as already noted, the analysis makes no provision for the generalized upward pressure on wages above the $14.35 per hour level that eliminating migrant workers across the economy could have. All of these labor assumptions work to reduce and "smooth out" the labor adjustment in agriculture.

These are particularly important assumptions for the agricultural sector, given production cycles that make producers sensitive to short term disruptions. This potential for disruption is most marked in the fruit and vegetable sectors – i.e. the sector with the most perishable product and greatest dependence on migrant workers. However, vulnerability to labor disruption extends to livestock operations faced with day-to-day operational needs and field crop operations faced with harvest-time labor needs. This suggests that an analysis based solely on replacement wage rates understates farm impacts. It also suggests that how restrictions on migrant labor are implemented is also of critical importance. The estimates outlined here assume implicitly that restrictions were implemented with enough lead-time for the sector to adjust – to find replacement workers. Without this lead-time, the impact would be significantly greater than estimated here.

Regarding operation of the agricultural economy, this analysis assumes that farmers have little flexibility in substituting other inputs for hired labor. The analysis also assumes that the farm sector would have difficulty passing higher labor costs on to consumers. The elasticities for the short and long term were .50-.66, indicating that half or more of the impact of a labor cost increase would take the form of an added production expense and income deduction. The analysis also assumes that the long term relationship between production receipts and income holds – that is, farmers loose $.25 in income for every dollar in production displaced. These assumptions are consistent with the relationships at work in the Food and Agricultural Policy Institute's agricultural sector model and the USDA analysis underpinning the Department's Baseline. While these assumptions about

the labor market and the agricultural economy suggest that this report's estimates of the costs of restricting migrant labor could be low, several factors suggest that they could be high. For example, the estimates describe here make no provision for the sector's capacity to make structural changes that would minimize the need to hire replacement labor. While limited in the short term, the sector has adjusted to input cost increases in the past by modifying production technologies and changing the mix of inputs used in the production process. The materials presented here suggest, however, that the potential in the short term of one to five years is limited at best.

The analysis also provides for a distinction between short and long term impacts. The short term impacts are defined as one - two year impacts and do not provide for the full effect of a sustained across-the-board labor cost increase. The longer term impacts – three years or more – provide for the full impact of higher wages as agriculture moves up toward the top end of the $11-14.35 range discussed in the text. The longer term impacts also incorporate the full impact of cost increases working through the vulnerability analysis to reduce production and raise costs.

These assumptions can be varied to establish a range around the income estimates described here. A lower bound on the income loss estimate can be established by assuming labor replacement costs would be lower, that farmers can pass along more of a cost increase to consumers, and that less production will exit the sector. This would lower the $1.5-5 billion estimate to $1-3.5 billion in the short term and the $2.5-8 billion estimate for the long term to $1.5-5 billion. Alternatively, assuming replacement wages are higher, that farmers are less able to pass along cost increases to consumers, and that more producers are forced to exit, the short term income loss would be $2-6.5 billion and $4-9.5 billion in the longer term.

In short, the impact of restricting agriculture's access to migrant labor is significant even with alternative more favorable assumptions for key parameters.

Written Statement of Cathleen Caron
Executive Director
Global Workers Justice Alliance
www.globalworkers.org

Committee on the
Judiciary Subcommittee on Immigration
Policy and Enforcement

Hearing on "The H-2A Visa Program: Meeting the Growing Needs of American Agriculture?"

Wednesday, April 13, 2011

Statement of Cathleen Caron, Global Workers Justice Alliance
Hearing on "The H-2A Visa Program: Meeting the Growing Needs of American Agriculture?" - Wednesday, April 13, 2011

Global Workers Justice Alliance ("Global Workers") combats worker exploitation by promoting portable justice for transnational migrants through a cross-border network of advocates and resources. Global Workers believes that the concept of ***portable justice***, the right and ability of transnational migrants to access justice in the country of employment even after they have departed, is a key, under addressed element to achieving justice for today's global migrants. Global Workers' core work is to train and support the Defender Network, comprised of human rights advocates in migrant sending countries, to educate workers on their rights before they migrate, to work in partnership with advocates in the countries of employment on specific cases of labor exploitation, and to advocate for systemic changes. We currently operate programs in the United States, Canada, Mexico, and Guatemala and regularly provide advice and referral for cases around the world.

In this brief statement, Global Workers will limit its comments to two discrete issues:

1. **Discrimination based on age and gender in the H-2A program.**

2. **DOL Over-certification resulting in a labor surplus of foreign workers.**

A startlingly fact of the H-2A program today is that the public or Department of Labor does not know the composition of the workforce (age or gender) or how many H-2A visa workers actually end up employed at the job site. For a country concerned about security, the lack of information on how our H-2A program is operated is astounding.

Simple, low-cost, steps encouraged by Congress will shed light on these issues and enable us to craft informed solutions which, will improve the H-2A program for employers and workers alike.

Lack of Data Allows Age and Gender Discrimination to Flourish in H-2A Program

H-2A workers are mostly men under forty years of age.[1] Although anecdotes abound that women and older men are discouraged from applying during the overseas recruitment process, no data is publicly available to reveal the composition of the H-2A work force. Discrimination hurts U.S and foreign workers as well as U.S. employers who abide by the law but are undercut by cheating competition.

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[1] *See e.g*, Reyes-Gaona v. N.C. Growers Association, 250 F. 3d 861, 863 (4th Cir. 2001) (noting that men over forty need not apply unless previously employed by company).

Only one of the three agencies involved in the H-2A process requests data on individual workers, the Department of State (DOS). The Department of Labor (DOL) asks employers for the numbers of aliens they seek. The Department of Homeland Security (DHS) asks the employers in which countries the employers will recruit the H-2A workers. It is only the third and final step, which occurs at the U.S. consulates that personal data for the H-2A applicants is requested in order to process the individual visas.

From interviews with consular officials in the field, I have been told that the consular databases have fields for gender and age (birthdate) but those fields are not searchable. That means DOS cannot easily run a report to indicate the gender or age of H-2A visa holders. The challenge, therefore, is not the lack of data, rather the manner in which the database is maintained. A review of individual H-2A visa applications is a time consuming and costly endeavor. However, a solution is to make more fields in the database searchable, a seemingly simple technological adjustment. DOS should then publish the information annually on its website.

Baseline data on the composition of the H-2A workforce will either support worker advocates anecdotal evidence that H-2A employers seek only men under forty or not. Without this baseline data is it difficult to argue one way or another.

The U.S. cannot and should not operate a H-2A worker program that unlawfully excludes potential employees during the overseas recruitment process. U.S. workers are hard pressed to compete with an H-2A workforce selected on a discriminatory basis. With the data on the composition of the H-2A workforce, employers, workers, and advocates can discuss the significance and seek possible solutions.

Over-Certification Of H-2A Workers Results In an On-Demand Labor Surplus

DOL certifies the number of aliens a U.S. employer is allowed to seek through the H-2A program. However, DOL never knows, because it does not ask, how many workers were ultimately employed. Anecdotal evidence suggests that U.S. employers sometimes exaggerate the need to DOL so it certifies many more aliens than are actually needed. Say for example, Employer X states that it needs 1,000 workers. DOL verifies that the requirements for recruiting U.S. workers have been met and certifies 1,000 workers. But maybe Employer X only needs 500 workers. By receiving permission to bring in more workers than needed, the employer has created for itself a foreign labor surplus. This means that if H-2A workers complain about working conditions or become sick, the employer can easily send them home and bring in new workers. The fear to complain about poor labor conditions means that the labor standards on farms will continue to decline, resulting in farm jobs even less attractive to U.S. labor.

If U.S employers were certified only for the number of workers they truly needed—a true labor assessment—the whole dynamic changes. H-2A workers would not be easily disposable because the U.S. employer would not have the time to go through the H-2A process quickly enough to bring in replacement workers. The result is that U.S employers will have to recruit local workers to fill those jobs. It also means that H-2A workers are more valuable to the U.S. employer. That will result in a more secure H-2A work force that may feel more empowered to complain about poor working conditions.

There are various ways to shed light on to this practice. One way is for DOS to publish the information it already collects. DOS knows how many workers were issued H-2A visas under which employer. This information should be published on the DOS website annually and provided to DOL. DOL should use this information as it engages in the certification process for the following year. If DOS data reveals that Employer X had many less than 1,000 H-2A visas issued under its name, it can engage in a discussion of why DOL should certify 1,000 in the present year. Of course, labor need changes. But if the employer cannot justify the higher need, than DOL should certify only what is actually needed, not a labor surplus.

Another approach is for DOL to start asking employers for past data during the certification process. The advantage of this approach, is that DOL can review payroll records to determine how many H-2A workers were ultimately employed, a more exacting number than DOS's number of visas issued. This information could also be used to address another common abuse of the H-2A program, that petitioners provide H-2A workers to other employers, and do not end up employing the workers themselves.

In conclusion, thank you for considering these very narrow, yet significant, issues about the H-2A program. As stated, some seemingly easy, low–cost changes could provide us very meaningful information so we can improve the H-2A program.

STATEMENT OF MOST REVEREND JOSÉ H. GOMEZ

Archbishop of Los Angeles, California

Chair, U.S. Conference of Catholic Bishops' Committee on Migration

On

The H-2A Visa Program

Submitted to

The House Judiciary Subcommittee on Immigration Policy and Enforcement

April 13, 2011

I am José H. Gomez, Archbishop of Los Angeles and Chairman of the U.S. Conference of Catholic Bishops' (USCCB or the Conference) Committee on Migration. I submit this statement to you on behalf of the USCCB Committee on Migration.

I would like to thank Subcommittee Chairman Elton Gallegly (R-CA) and Ranking Member Zoe Lofgren (D-CA) for permitting me to submit our statement on this important matter.

Today's hearing is entitled "The H-2A Visa Program: Meeting the Growing Needs of American Agriculture?" In my statement, I will outline the U.S. Bishops' opposition to the expansion of the current H-2A Visa Program and our support, instead, for reform through the passage of the Agricultural Job Opportunity, Benefits, and Security (AgJOBS) Act.

The Role of the U.S. Catholic Bishops in the Immigration Policy Dialogue

Mr. Chairman, the issue of immigration is complex and elicits strong opinions and emotions. It touches upon our national economic, social, and cultural interests and has been analyzed and dissected predominately in those terms. From the perspective of the U.S. Catholic Bishops, immigration is ultimately a humanitarian issue because it impacts the basic human rights and dignity of the human person.

The U.S. Catholic Church has a long history of involvement in immigration. The U.S. Catholic Church has a rich tradition of welcoming and assimilating waves of immigrants and refugees who have helped build our nation throughout her history. And, in 1988 USCCB established a legal services subsidiary corporation which currently includes 196 diocesan and other affiliated immigration programs with 290 field offices in 47 states. Collectively, these programs serve some 600,000 low-income immigrants annually.

The U.S. Catholic Bishops' interest in advocating on behalf of migrant farmworkers springs from our recognition that all persons are endowed with basic human rights and dignity.

Catholic Social Teaching upholds the right of persons to achieve dignity through work and to work to support their families. For more than 100 years, papal teaching has affirmed the rights of workers and of those whose livelihood comes from the land. In his encyclical, *Laborem Exercems*, Pope John Paul II spoke to the importance of agricultural work and the need to protect those toiling in the fields. Pope John Paul II stated that workers who enter a country to labor temporarily should be afforded the same rights as workers who live there permanently: "The person working away from his native land, whether as a permanent emigrant or a seasonal worker, should not be placed at a disadvantage in comparison with the other workers in that society in the matter of working rights. Emigration in search of work should in no way become an opportunity for financial or social exploitation." [1]

In 2003, the U.S. Bishops published a pastoral letter on farmworkers in our country. In the letter, "*For I Was Hungry and You Gave Me Food: Catholic Reflections on Food, Farmers and Farmworkers,*" the U.S. Bishops stated: "Food sustains life itself; it is not just another product.

[1] Pope John Paul II, *Laborem Exercems* (On Human Work), 1981, par. 23.

Providing food for all is a Gospel imperative, not just another policy choice. Agriculture.... is not just another economic activity. A key measure of agricultural, immigration, and labor policies is whether they reflect fundamental respect for the dignity, rights, and safety of agricultural workers and whether they help agricultural workers to provide a decent life for themselves and their families."

USCCB's Position on the H-2A Visa Program

As you know, Mr. Chairman, the H-2A Visa Program creates a legal avenue for U.S. employers to bring temporary foreign workers into the United States to perform temporary or seasonal agricultural work.[2]

Under the Program, there are no annual limits on the number of temporary foreign workers that may be admitted into the United States. The Department of Labor (DOL), however, requires that employers certify that there are no U.S. workers able, willing, qualified, and available to perform the work prior to hiring a foreign, non-immigrant laborer. Moreover, employers must also show that the employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.[3]

Workers who enter on an H-2A Visa are typically authorized to remain and work in the United States for no longer than one year.[4] H-2A classification may be extended in increments of up to one year, with a maximum period of stay of three years. An individual who has held H-2A nonimmigrant status for a total of three years must depart and remain outside the United States for an uninterrupted period of three months before seeking readmission as an H-2A nonimmigrant.[5]

Mr. Chairman, by its nature, agricultural work is difficult and exacts a substantial physical and social impact on farmworkers. But by definition, H-2A temporary foreign agricultural workers face even greater difficulties. They leave their homes, families, and cultures in order to work long hours in a strange land.

When they arrive in the United States, H-2A workers are often exposed to substandard working conditions which affect their health; are paid insufficient wages and no benefits; have limited access to adequate housing and sanitation facilities; lack meaningful labor protections, which are minimal for migrant farmworkers and inconsistently enforced; and do not have a meaningful opportunity to organize or collectively bargain to improve their situations.

Moreover, the strictly temporary status of H-2A workers in the United States makes them even more vulnerable to exploitation and abuse. Indeed, migrant farmworkers often fail to complain about poor working conditions or an employer's demands out of fear that they will be retaliated

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[2] Immigration and Nationality Act (INA), § 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a).
[3] *See* "H-2A Temporary Agricultural Workers," Department of Homeland Security (DHS), *available at* http://www.uscis.gov/portal/site/uscis.
[4] *See* 8 CFR 214.2(h)(5).
[5] *See* 8 CFR 214.2(h)(5)(viii)(C).

against by not being recalled the following season.

All agricultural workers – those here both temporarily and permanently – are entitled to safe working conditions, adequate housing, a living wage and benefits for themselves and their families, and the opportunity to become permanent members of U.S. society.

Because of this, Mr. Chairman, the U.S. Conference of Catholic Bishops opposes any expansion of the current H-2A nonimmigrant worker program and instead supports reform through AgJOBS.

The AgJOBS bill has historically been a bipartisan, labor-management compromise which creates an avenue for a legal and stable labor supply, while strengthening protections for farmworkers. The AgJOBS bill would streamline and improve the H-2A guest worker program, giving workers the right to appeal to federal court for enforcement of their rights and to receive higher wages, both changes that are sorely needed to the current program. Moreover, it would provide an important path to legal residency that migrant farmworkers – including those documented and undocumented alike - should be afforded given their undeniable and inseverable importance to our agricultural industry and economy.

Conclusion

Mr. Chairman, the U.S. Catholic Bishops oppose the expansion of the current H-2A Visa Program and support, instead, reform through the passage of AgJOBS.

In lieu of maintaining or expanding upon the status quo in the H-2A Program, we urge Congress to consider truly workable alternatives. To do otherwise hurts workers and employers alike and diminishes us as a nation.

Thank you for your consideration of our views.

Statement for the Record

House Judiciary Committee
Subcommittee on Immigration Policy and Enforcement

Hearing on, "The H-2A Visa Program:
Meeting the Growing Needs of American Agriculture?"

April 13, 2011

The National Immigration Forum works to uphold America's tradition as a nation of immigrants. The Forum advocates for the value of immigrants and immigration to the nation, building support for public policies that reunite families, recognize the importance of immigration to our economy and our communities, protect refugees, encourage newcomers to become new Americans and promote equal protection under the law.

We are submitting our views about the subject of this hearing on the H-2A Visa program and the labor needs of American Agriculture.

The first step in resolving American Agriculture's need for a stable workforce must be to provide the 50 to 70 percent of that workforce that is now undocumented with some way to gain legal status and remain in the workforce without fear of deportation. Such a solution has been offered in the past several Congresses in the form of the Agricultural Job Opportunities, Benefits, and Security Act (AgJOBS). AgJOBS includes a program by which farmworkers can earn temporary legal status and, by continuing to work in agriculture and meeting other requirements, eventual permanent resident status. It is an important component of immigration reform that is desperately needed to fix our outdated immigration system.

AgJOBS tackles an increasingly serious problem faced by many of our agricultural producers: the threat of losing their most experienced employees to immigration enforcement. These hard-working, experienced, and otherwise law-abiding farm employees deserve a chance to work with proper legal status. They are, after all, the backbone of a system that feeds us all.

It would be in the best interest of the nation for Congress to enact the reforms embodied in AgJOBS. Failure to act will drive some of our food production to other countries, and as a result the U.S. will become more dependent on food that is imported.

AgJOBS represents a historic compromise between agricultural producers and agricultural workers and their advocates. We believe that if workers and growers have been able to work out a common position, Congress should be able to follow their lead and enact this important piece of broader comprehensive immigration reform.

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