AGRICULTURAL LABOR: FROM H-2A TO A WORKABLE AGRICULTURAL GUESTWORKER PROGRAM

HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION AND BORDER SECURITY

OF THE

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AGRICULTURAL LABOR: FROM H-2A TO A WORKABLE AGRICULTURAL GUESTWORKER PROGRAM

TUESDAY, FEBRUARY 26, 2013

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON IMMIGRATION AND BORDER SECURITY
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Subcommittee met, pursuant to call, at 2:02 p.m., in room 2141, Rayburn Office Building, the Honorable Trey Gowdy, (Chairman of the Subcommittee) presiding.

Present: Representatives Gowdy, Goodlatte, Poe, Smith, King, Jordan, Amodei, Labrador, Lofgren, Conyers, Jackson Lee, Gutierrez, Garcia and Pierluisi.

Staff present: (Majority) George Fishman, Chief Counsel; Allison Halatei, Parliamentarian & General Counsel; Graham Owens, Clerk; (Minority) Perry Apelbaum, Staff Director & Chief Counsel; and David Shahoulian, Minority Counsel.

Mr. GOWDY. Good afternoon. The Subcommittee on Immigration and Border Security will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time, and in that regard I would apologize to the four witnesses upfront. There will be votes called at some point during this hearing. I will commit to you to come back as quickly as these tired old legs will bring me back. So I apologize in advance for any inconvenience, but it is unavoidable.

With that, I would like to welcome, on behalf of all of us, all of our witnesses.

There are at least three things that we all remember from this year's Super Bowl: the power shortage; the assault and battery that was not called in the end zone on fourth down; and most importantly, a commercial with Paul Harvey's voice celebrating the respect that all of us have for the American farmer.

Farming is more than just a means of securing a safe, reliable food source. Farming is more than just living in harmony with land and withstanding the vagaries of nature. Farming is a way of life. It is a culture, a uniquely American culture in many regards. We would do well to place ourselves in the shoes of farmers because we sometimes lose track of what it takes for growers to actually put this bounty on the world's tables. We lose track of what it

takes for them to give us the safest, most efficient, most reliable agricultural system in the world.

For those crops that are labor-intensive, especially at harvest time, hard labor is critical. One grower might need only one or two hired workers to help plant, tend and harvest several hundred acres of wheat. However, another might need hundreds of seasonal workers to harvest hundreds of acres of fruits or vegetables, and a dairy or a food processor might need hundreds of workers year round.

It is universally agreed that at least half of our seasonal agricultural labor supply is made up of workers without legal residency status. This figure is probably much more than half, and could comprise upwards of 1 million unauthorized workers. As Congress considers yet again immigration reform, we must decide whether and under what circumstances and conditions growers can continue to rely on these workers.

We all seek a future without reliance on unauthorized workers. But to accomplish that, we need a guestworker program to provide growers with the labor they need, indeed all of us need.

What about the current H-2A agricultural worker program? This program is numerically capped, and initial expectations were that growers would use hundreds of thousands of H-2A workers each year. Yet, the State Department only issues about 50,000 visas a year. So why is it so under-utilized?

What I am going to do today is ask the farmers, because in the eyes of many, the program itself is designed to fail. It is cumbersome. It is full of red tape. Growers have to pay wages far above the locally prevailing wage, putting themselves at a competitive disadvantage with growers who use illegal labor. Growers are subject to onerous rules, such as the 50 percent rule, which requires them to hire any domestic worker who shows up even after the H-2A worker has arrived from overseas. Growers can't get workers in time to meet needs dictated by the weather. And finally, growers are constantly subject to litigation by those who don't think the H-2A program should even exist.

What growers need is a fair and workable guestworker program. They need a program that gives them access to the workers they need, when they need them, at a fair wage and with reasonable conditions, and they need a partner in the Federal Government, not what is often perceived as an adversary.

A reformed guestworker program will work better for growers and for workers. If growers can't use a program because it is too cumbersome, none of its worker protections will benefit actual workers. If a program is fair to both growers and workers, it will be widely used and workers will benefit from its protections.

I look forward to hearing today's witnesses and learning how they would reform our agricultural guestworker system.

I now would recognize the past Chairman of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Gowdy, for your comments about our first hearing of the Immigration Subcommittee. I am glad we are here to talk about our country's agricultural labor needs, and I welcome the four distinguished witnesses that are with us today.

We talk about how our agriculture industry depends on the migrant labor. Right now, half or more of the 2 million farmworkers picking our crops and harvesting our fruits and vegetables, I am sorry to say, are undocumented immigrants. I think this is unsustainable, and I think that the entire Committee is motivated to try to do something about this.

I feel that we all have the common goal of solving this problem, and I believe the discussion with the witnesses before us can help bring us closer to the solution.

I want to begin by talking about what we mean when we talk about our agricultural labor needs. We know that these are hard jobs. We know it is back-breaking work. In many ways, it is also skilled work. Maybe you don't need a Ph.D. in engineering, but I doubt most engineers would be very good at cutting lettuce in exactly the right way to bring it to market.

We also know that there are Americans and immigrants with work authorizations who perform this work, and there are not nearly enough of them to get the job done. This is important to Members of Congress from districts that produce the hand-picked produce that we all enjoy. Their local economies are built upon a, frankly, untenable situation. They depend on the labor of undocumented immigrants, which means they depend on our willingness to tolerate that unacceptable situation.

The U.S. Department of Agriculture reports that every on-the-farm job supports 3.1 upstream and downstream jobs in processing, trucking, distribution. These jobs are generally held by American workers, so the destruction of agriculture and the offshoring of all these farm jobs means the loss of millions of other jobs in communities across the country.

It is important to us. So the question that we are faced with is what do we do? Last Congress, we heard over and over that the solution is to reform the H-2A program for temporary seasonal agricultural workers, or to create an entirely new program to accomplish that same goal. This Committee never considered proposals to allow all of our current undocumented workers who work year after year at the same farms, provide skilled, dependable labor that benefits us all, to earn permanent legal status. These are people who have families, have been paying taxes, are good people, and are already doing the work that benefits us all.

Does it make sense to anyone that we should deport all of our current workers and replace them with half a million new temporary workers who can only stay for 10 months and must come and go back every year? It would take billions of dollars to deport the farmworkers we already have, something that we know can never happen, and we would require growers across the country to spend hundreds of millions of dollars bringing in new farmworkers.

So, I conclude with these suggestions. Number one, let's find a way to provide legal status to current undocumented farmworkers. And secondly, let's see if we can collectively create a new temporary visa program to bring in new farmworkers when we need them, and this would be efficient for both the employers and give the much needed and deserved protection to the workers.

And so we welcome you, gentlemen, and I thank the Chairman for his indulgence, and I yield back my time.

Mr. GOWDY. I thank the gentleman.

The Chair would now recognize the gentleman from the great State of Virginia, the Chairman of the full Committee, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I appreciate your holding this hearing. As former Chairman of the House Agriculture Committee, I have had the opportunity to learn first-hand what farmers face in dealing with the H-2A program. It is a costly, time-consuming, and flawed program. Each year, employers have to comply with a lengthy labor certification process that is slow, bureaucratic, and frustrating. It is a process that forces them to expend a great deal of time and money each season in order to prove to the Federal Government what nearly everybody already knows is the case: that legal, dependable farm labor is very hard to find.

In addition, the law forces them to pay an artificially inflated wage rate, higher than the prevailing wage in their region, and provide housing and daily transportation for their workers at their own expense. These farmers are paying an average of $10 an hour or more, and still cannot find enough Americans willing to take the jobs. Even worse, as a result of complying with these H-2A regulations, H-2A farms almost always find themselves at a competitive disadvantage in the marketplace.

What all of this tells us is that farmers who participate in the H-2A program do so as a matter of last resort and conscience. They do it because they know that realistically, most of the available farm labor is illegal, and they don't want to break the law. A guestworker program should help farmers who are willing to pay a fair wage for law-abiding, dependable workers, not punish them. For this reason I support replacing the H-2A program and implementing new policies that will bring our illegal agricultural workers out of the shadows as a first step in the process of overhauling our Nation's immigration system.

Addressing the complex labor issues of the relatively small agriculture sector can help us understand how we can build our broader immigration laws and enforcement mechanisms in order to enhance the U.S. economy and make our immigration laws more efficient and fair for all involved.

Instead of encouraging more illegal immigration, successful guestworker reform can deter illegal immigration and help secure our borders. I believe we should enable the large population of illegal farmworkers to participate legally in American agriculture. Those eligible will provide a stable, legal agricultural workforce that employers can call upon when sufficient American labor cannot be found.

In addition, a successful guestworker program will provide a legal, workable avenue for guestworkers who are trying to provide a better life for their families. It is well past the time to replace the outdated and onerous H-2A program to support those farmers who have demonstrated that they will endure substantial burdens and bureaucratic red tape just to employ a fully legal workforce and to offer a program that is amenable to even more participants in today's agricultural economy.

We can do this by designing a program with practical safeguards and expanding the current universe of jobs to include dairy jobs and work in food processing plants, among other things.

I thank Chairman Gowdy for holding this important hearing, and I look forward to hearing from all of our distinguished witnesses today.

Mr. GOWDY. I thank the gentleman from Virginia.

The Chair would now recognize the gentlelady from the great state of California, the Ranking Member of the Subcommittee, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I want to thank both you and Chairman Goodlatte for holding this hearing.

As we know from the three hearings we held on this issue in the last Congress, as well as many other hearings before that, nowhere is evidence of our broken immigration system more glaring and acute than in the ag sector, where as much as 75 to 80 percent of the workforce is undocumented. I am sure we agree that we can't begin to fix our immigration system without finding a solution to the agricultural problem. I expect that both Chairmen are committed to finding such a solution. I am committed to working with them to finding solutions in this Congress.

Let's quickly look at the facts. As we know from past hearings, mechanized crops like corn, wheat and soy are not the issue here. The challenge is with seasonal, labor-intensive fruit and vegetable production, as well as year-round dairy and livestock. These areas require a migrant, flexible, and experienced workforce. While farmers do their best to plan harvests, unexpected changes in humidity or temperature can suddenly move a harvest up, giving growers just days to pick valuable crops. Failure to find experienced workers or any workers at all can lead to significant losses. These losses can ripple through our economy.

Agriculture continues to be a major sector of our economy and a primary U.S. export. In fact, we export so many agricultural products, many more than we import, that this sector is regularly the largest in which we see a trade surplus. Yet, Congress has long ignored the labor needs of this sector.

For decades, our country has rightfully educated our children for work in other areas. At the same time, our immigration laws have made it all but impossible to fill the resulting void with legal foreign workers. For example, despite a need for millions of workers, some on a permanent basis, our immigration laws issue only 5,000 green cards per year to people without bachelor's degrees. That is 5,000 per year to be shared not just by ag employers but also landscapers, restaurants, hotels and nannies, and many other jobs where immigrant workers fill a crucial need.

The H-2A temporary worker program has not filled the gaps either. Farmers often complain that the program is too bureaucratic and slow, and surveys show that H-2A workers often arrive weeks after they are first needed. Many growers feel they cannot make the program work, and that is why the program has been used so sparingly, reaching the high water mark of 64,000 visas in 2008.

In that environment, should anyone be surprised that market forces work their magic to pair up willing employers and willing workers? If we are honest, we must admit that Congress essen-

tially left farmers with no choice but to hire undocumented workers. Let's not fool ourselves; we all knew it was happening, and we looked the other way as workers came to fill the jobs that our country desperately needed filled. Many of our constituents are still in business because those workers came here.

So what do we do now? Do we accept responsibility for creating this mess, recognize that we have an experienced workforce that has been providing critical services to the country for years, and provide a way for them to attain legal status and continue to help this country succeed? Or do we, as some have previously suggested, attempt to throw out millions of agricultural workers just to force our growers to import millions of other workers through government controlled programs that have not worked in the past?

I think we will all agree that the only viable solution is a balanced approach that both preserves the current workforce and makes it easier to meet future needs with new workers. If we learned anything from our many hearings on this issue, it is that a one-sided solution won't work. There was a time when we understood that. Years ago, growers and farmworkers came together to craft the ag jobs compromise. Supported by both business and labor, ag jobs also had the strong support of many Members on both sides of the aisle.

We know that some growers no longer support that compromise, and that most Republicans withdrew their support in years past. But it nevertheless shows that all sides can reach a balanced, bipartisan agreement when we work together for a common purpose.

Now, I am heartened by the news that the American Farm Bureau and the United Farm Workers have reengaged in talks to reach a balanced and thoughtful compromise, and I welcome those negotiations, and I commit to doing what I can to ensure their success. The country really needs that you all succeed. We must do now what America does best, be pragmatic. We must recognize that our laws have been broken for decades, failing to meet the needs of entire industries, particularly agriculture, so people took matters into their own hands. Yes, the farm workers came without obeying immigration rules, and almost every fruit and vegetable farm in the country also broke the law by hiring them, and the government essentially let it all happen.

Congress can't escape our role in this. We need to recognize that and to do what is right for our country, and I have confidence actually that we will do so.

Thank you, Mr. Chairman.

Mr. GOWDY. I thank the gentlelady from California.

The entire Committee welcomes a very distinguished panel of witnesses today. I am going to introduce you en banc, and then I will recognize you individually. Many of you have testified before, so you are familiar with the lighting system. Green means go, yellow means speed up—I hope there is no law enforcement around—and red means, if you can, go ahead and conclude.

We are first delighted to have Bob Stallman. Mr. Stallman is a rising cattle farmer from Columbus, Texas. He is the President of the American Farm Bureau Federation. Mr. Stallman was first elected president in January 2000. The American Farm Bureau Federation is an independent, non-governmental, voluntary organi-

zation governed by and representing farm and ranch families. Prior to becoming President of the American Farm Bureau Federation, Mr. Stallman served as President of the Texas Farm Bureau. He became a member of AFBF's Board of Directors in 1994. Mr. Stallman graduated with honors from the University of Texas at Austin in 1974.

After he testifies, it will be Mr. Chalmers Carr, who is the President and CEO of Titan Peach Farms, which is in South Carolina, its largest commercial peach operation. He is also treasurer of the South Carolina Peach Council, Chairman of the South Carolina Farm Bureau Labor Committee. Mr. Carr began his farming career in 1990 and has been with Titan Farms since 1995. He has participated in the H-2A program for 13 years. He received his Bachelor's degree from Clemson University.

Mr. Michael J. Brown currently serves as the President of the National Chicken Council. The National Chicken Council is a national non-profit trade association representing the U.S. chicken industry. Prior to his joining the NCC, Mr. Brown served as Senior Vice President for Legislative Affairs of the American Meat Institute. He also served as the treasurer of AMI's political action committee, AMI PAC. Mr. Brown earned his Bachelor of Science in political science and history from the State University of New York, Brockport.

And finally, we have Mr.—I'm just going to tell you right now I am going to mess this up, but I think the last name is pronounced Kashkooli. Is that fair? Okay, all right. Mr. Kashkooli is the legislative and political director and third Vice President of the United Farm Workers of America, overseeing the union's political, legislative, research and communications work. He served with the UFW for 14 years throughout California, New York, Washington and Florida, and across to California. He graduated in 1989 from Brown University in Rhode Island, where he first became active in supporting the United Farm Workers' cause.

Mr. Stallman, we will begin with you. On behalf of all of us again, we welcome you and thank you for your participation.

TESTIMONY OF BOB STALLMAN, PRESIDENT, AMERICAN FARM BUREAU FEDERATION

Mr. STALLMAN. Thank you, Mr. Chairman, Members of the Subcommittee. My name is Bob Stallman. I am a rising cattle producer from Texas and serve as President of the American Farm Bureau Federation. I appreciate the opportunity to testify today regarding my organization's views on the agricultural labor challenge facing food production in the United States.

America's farmers, livestock producers, fruit and vegetable growers, and dairy producers all have specific labor demands. But those demands vary by region, by commodity, by season, and by market characteristics. We desperately need—in fact, we have needed for some time—a system that is flexible, adaptable, efficient and economic for producers. This system must attract a sufficient number of competent, willing and able employees to sustain and grow production, allow the recruitment and hiring of non-resident agricultural workers when the need is demonstrated, and allow an oppor-

tunity for some current non-resident agricultural workers to apply for legal resident status.

This need for change is partly driven by the failure of the current H-2A program. Farmers and ranchers have witnessed increased denials, seemingly arbitrary changes in the interpretation of longstanding agency rules, dates of need that have gone unmet. In short, the program as it is administered today is simply not doing what Congress designed it to do.

A year ago, American Farm Bureau set out to identify what such a system would look like. We established a working group from around the country that considered the needs of fruit and vegetable growers from California and Florida, livestock producers and custom harvesters in the Midwest, dairy farmers in upstate New York and everywhere in between. And we didn't just talk to ourselves. We sought input from worker advocates, Members of Congress on both sides of the aisle, Committee staff, labor unions, and labor advocate groups.

We also talked to other agricultural interests. This led to the founding of the Agriculture Workforce Coalition. Clearly, we wanted to identify the needs of growers, but we also wanted to be sensitive to the rights and needs of workers. To summarize briefly, our program would be a wholly new program that is market based. We envision that, over time, it would entirely replace H-2A. It would be administered by the U.S. Department of Agriculture. Further, it would eliminate unnecessary bureaucracy and expenses both for the government and employers, and it would provide workers job portability and the freedom to quit and leave for other positions if they wish, a right they currently do not have under H-2A.

Importantly, it would broaden the program to all of agriculture, including year-round jobs. There is currently no program, even H-2A, which provides this opportunity to workers or employers.

It would allow employers to offer a contract for certain jobs, but would not require workers to take such positions, an option they currently do not have.

My written submission to the Committee goes into much greater detail about our proposal, and I will be pleased to answer questions from the Committee about any specific provision.

Provided that this Committee and Congress can adopt such a program, my organization would be prepared to accept greater employer verification obligations, such as E-Verify. As you may recall in the last Congress, Farm Bureau could not support the E-Verify legislation approved by this Committee for the simple reason that we were not provided a workable program.

There is an important additional provision to our program that I would like to stress. In order to provide short-term stability and an orderly, effective transition to this new guestworker program, we believe Congress should include provisions permitting certain workers who have worked in U.S. agriculture who might not otherwise qualify to obtain work authorization. Granting existing experienced agricultural workers work authorization is a crucial part of making sure that there is not economic dislocation in the agricultural sector while we transition to a new program.

Last, while I am testifying today on behalf of American Farm Bureau, I want to reiterate the impact of the Agriculture Workforce

Coalition. Agriculture has faced disagreements in the past. Today, the AWC represents a range of broad agricultural interests from coast to coast. The unity of this group speaks volumes for the importance of this issue for the industry. The proposal I have outlined today is aligned with the views of the AWC, and all of agriculture is united behind this common effort to break with the past and construct a model program that will work for us in the future.

All of us recognize the highly contentious nature of this debate, but we urge the Committee to remember one overriding fact: U.S. agriculture needs a comprehensive, workable solution. We cannot wait, and we pledge our support to you and all Members of the Committee as you grapple with this issue.

I appreciate this opportunity to testify and will be pleased to answer any questions from the Committee.

[The prepared statement of Mr. Stallman follows:]

Statement of the American Farm Bureau Federation

TO THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION AND BORDER SECURITY

RE: AGRICULTURAL LABOR REFORM: FROM H-2A TO A WORKABLE AGRICULTURAL GUESTWORKER PROGRAM

FEBRUARY 26, 2013

Presented by:
Bob Stallman
President

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600 Maryland Ave. SW | Suite 1000W | Washington, DC 20024 | p. 202.406.3600 | f. 202.406.3606 | www.fb.org

Good afternoon and thank you for the opportunity to testify before the subcommittee on behalf of the American Farm Bureau Federation (AFBF). Reforms to the immigration system must assure that American agriculture has a legal, stable supply of workers, both in the short- and long-term. This includes attracting a sufficient number of competent, willing and able employees to sustain and grow production; allowing the recruitment and hiring of non-resident agricultural workers when the need is demonstrated; and allowing an opportunity for some current non-resident agricultural workers to apply for legal resident status.

We appreciate Chairman Goodlatte's recognition of this vital issue for agriculture and appreciate the opportunity to provide insight to the committee, not only about the demonstrable failings of the H-2A program, but what we believe agriculture needs in a modern guestworker program to ensure access to a legal workforce into the future. There is a critical need in agriculture for a legal, stable supply of labor, and that need has only been exacerbated in the last several years.

Two developments in particular are driving this need for change:

1. The expanded use of E-Verify by state governments and the potential enactment of mandatory E-Verify in any potential reform legislation. The reason for farmers' concern is not that they wish to employ unauthorized workers: it is that they know that once E-Verify is required, their ability to retain some of their existing workers, replace workers who leave and to retain those new workers will be severely jeopardized without a workable guest worker program.

2. Over the past four years, the Department of Labor's implementation of the H-2A program has made a difficult program increasingly less workable. Farmers and ranchers have witnessed increased denials, seemingly arbitrary changes in the interpretation of longstanding agency rules, dates-of-need that have gone unmet – in short, the program as it is administered today is simply not doing what Congress designed it to do. Many farmers have reached the regrettable conclusion that the H-2A program, even with reforms, will never work, nor will the Department of Labor allow it to work.

As a result, today's hearing could not come at a more opportune time. Knowing that immigration reform discussions are occurring and reform proposals are developing, it is imperative that we all work together to find a solution to agriculture's labor problem for today and for the future. In our view, this is not a partisan issue and should not become one. In a nutshell, we want to keep farmers in the U.S. growing food, tending livestock and contributing to the American economy. We want to keep these jobs in America for U.S. workers, not outsource them. It is only when U.S. workers cannot be found that producers need the flexibility to use foreign-based workers.

Farmers and ranchers strive to produce a high quality food product for our consumers grown in American soil. They work hard every day to ensure the vast array of products on grocery store shelves are fresh, safe, and in excellent condition. To ensure that high quality product, farmers and ranchers must have access to a stable work force. Over a million workers are required to ensure that perishable, fragile crops are harvested on time and that our cows are milked.

work on farms and in fields. Jobs in agriculture are physically demanding, conducted in all seasons and are often transitory. To most U.S. residents seeking employment, these conditions are not attractive. A number of studies document this fact, and farm worker representatives also acknowledged this in recent congressional testimony. Yet, for many prospective workers from other countries, these jobs present real economic opportunities. Farmers have done their best in the last two decades to work within a broken system. A few have been able to navigate the difficulties and expense of the H-2A program; for many others, they have relied upon work authorization documents that, in too many instances, are fraudulent. But federal law has strictly barred them from questioning those documents, and as a result we now have a labor force that is far too reliant on workers who lack proper work authorization. Due to faulty administration of the H-2A program, demographic shifts, an aging workforce, and the likelihood of heightened enforcement, this system is near collapse. It is not sustainable. Agriculture seeks a solution that provides our farmers and ranchers access to a stable, legal, reliable solution.

This issue is not new for agriculture. However, rather than providing a solution that works for all sectors of the industry, past legislative attempts divided the industry. The most notable proposal, AgJOBS, provided a short-term remedy by allowing some currently experienced agricultural workers to adjust their status under certain conditions; it did not, however, reform the H-2A program in any meaningful way and provided virtually no access to a workforce in the future. Other bills have proposed changes to a guestworker program without addressing our current experienced workforce. It is critical that agriculture has a solution that addresses both.

In an effort to find a solution that our broad membership could rally around, last year AFBF formed a grassroots working committee to discuss this issue and develop a proposal that could work for fruit and vegetable growers in California or Florida; sheepherders and custom harvesters in the Midwest; dairy farmers upstate in New York and everywhere in between. But we did not just talk to ourselves. At the outset, we sought the input of and met with representatives from a broad spectrum of interested groups, from worker advocates at Farmworker Justice, the staff of this subcommittee, representatives of the AFL-CIO, La Raza, and Senator Feinstein of California to seek their input. In short, we wanted to develop a framework that could serve as a catalyst that would not only unite the agricultural industry but that would command the respect of workers and their representatives. The future health of the industry is linked closely to the well-being of our employees; we respect their rights, their aspirations and their needs and we undertook our task with that perspective. At the conclusion of Farm Bureau's efforts, we helped create the Agriculture Workforce Coalition (AWC). The AWC represents the broad swath of agricultural interests – all of which recognize that past legislative attempts are no longer viable. The proposal I am outlining this morning enjoys unqualified support from across the spectrum of agricultural employers.

The AWC proposal addresses agriculture's two prominent issues: 1) how to address agriculture's long-term needs; and 2) how we can ensure short-term stability in the sector. Any legislative reform must include both of these components.

To ensure access to a legal and stable workforce in the future, we propose the creation of a new modern guestworker program. I think I can say without contradiction that agricultural producers have lost confidence that the H-2A program can be reformed to adequately meet our future needs or that the Department of Labor will ever administer the program in a way that is designed to make it work. Therefore, the new market-based program we are advocating would serve as a substitute and eventual natural replacement of the H-2A program.

The program, administered by the U.S. Department of Agriculture, would allow employers the stability of a contract or the flexibility of portability depending on their business needs. In that same vein, it provides workers with options and the choice to decide which job situation best fits their needs and interests; in other words, a worker in our proposal – unlike the current H-2A program – would not be required to enter into a contract for a set period. The program would not be restricted by seasonality requirements – rather an agricultural employer demonstrating a year round need could hire workers under contract to fit those needs. To account for the extended length of need, contract workers would have the ability to remain in the country for up to 3 years, with a commitment to their home country of 30 days during that period. But to accurately reflect the sector of agriculture that has more short-term labor requirements, portable visa workers would be granted work authorization for an 11 month period. E-verify could serve as the mechanism to ensure visa holders are not unemployed for more than 30 consecutive days while continuing to meet the terms of their visa. To protect domestic workers, employers would be subject to a domestic recruitment requirement but it would be streamlined. Employers also would be required to pay a reasonable agreed upon wage that reflects market conditions. To address any employment disagreements and to ensure an expedited remedy for any employer wrong, an employer would be required to cure any defect or face arbitration proceedings.

This is not a reform of the H-2A program. By developing a modern program structure, we have provided employers with greater certainty that they will have the workers they need, when they need them and at a cost that keeps us competitive in the marketplace. At the same time, workers are granted flexibility, choice, and the ability to work for multiple employers while continuing to have a structure that enforces their rights and protects them from exploitation. The program also allows us to set up a new system that steers clear of the largest problems in the existing H-2A structure. It is not that we eliminated those provisions; it is that they no longer are necessary protections because of the framework of this program.

This market based system attempts to replicate the domestic labor market - a model that works on the ground, providing workers with freedom of choice, market-based wages, and adequate protections, while taking into consideration security concerns realized by having a largely foreign-based labor force. We recognize that through this process it will require political vetting and accommodation for legitimate concerns of worker advocates. As I mentioned earlier, we began those discussions nearly a year ago and they are continuing. Ultimately, agriculture's goal is to develop a program that treats workers fairly, while being efficient and economical for employers to use.

In order to provide short-term stability and an orderly, effective transition to a new guest worker program it is imperative that any legislation approved by Congress include provisions permitting current agricultural workers who might not otherwise qualify to obtain work authorization. The existing state of affairs in agriculture did not happen over night; it has grown up over the last twenty-five years, and has been allowed to continue while all observers recognized that the H-2A program was not meeting the sector's needs. For better or for worse, agriculture has acknowledged that anywhere between 60-70 percent of agricultural workers are falsely documented. Any new program will take time to be implemented fully. Granting existing experienced agricultural workers work authorization is a crucial part of making sure that there is not economic dislocation in the agricultural sector while we transition to a new program.

Our proposal focuses on the need for a legal work force in agriculture – leaving the broader policy debate to you as members of Congress. Therefore, we recommend that experienced agricultural workers be granted work authorization in the United States. Because the basis for that authorization was agricultural experience, the authorization would require a minimum commitment to agriculture for a five-year set term. The workers would not be restricted to solely working in agriculture. After the five-year term, workers could access immigration channels to adjust to a permanent status or continue to work in agriculture under the Ag Card.

We recognize the highly contentious nature of this debate. We also recognize that there will be political decisions that must be made directly relating to this issue. But we ask your recognition that this is a labor issue for agriculture. The agricultural economy and the broader U.S. economy, cannot afford to lose millions of dollars in lost productivity because we lost 70 percent of the labor force – a production loss that, according to Farm Bureau economists, could range as high as $9 billion per year or more

The American Farm Bureau Federation appreciates the opportunity to provide testimony to the committee. We also appreciate the recognition of agriculture's unique needs and the problems that farmers and ranchers are facing on the ground. It is critical that reform addressing both our long and short-term concerns be implemented. We look forward to working with the committee to developing that legislative solution.

5

Mr. GOWDY. Thank you, Mr. Stallman.
Mr. Carr.

TESTIMONY OF CHALMERS R. CARR, III, PRESIDENT, TITAN FARMS, RIDGE SPRING, SC

Mr. CARR. Thank you for allowing me the opportunity to explain my experiences and my views of the deficiencies in the H-2A pro-

gram and share with you the needed reforms to create a viable guestworker program.

I am the farmer in the group. I am the one here that does this every day. My name is Chalmers Carr, and I own Titan Farms in Ridge Spring, South Carolina, where I grow 5,000 acres of peaches and farm 700 acres of vegetables. I have been working within the H-2A program for the last 14 years, employing 500 legal alien workers just last summer.

Looking beyond the role that agriculture plays in national security, I ask you to think about food safety and the impact that the fruits and vegetables imported into this country have on our society. Due to labor shortages, domestic production of fruits and vegetables is declining, while imports are increasing. An FDA report shows that imported vegetables are three times more likely to be contaminated with foodborne pathogens and four times more likely to be treated with pesticides exceeding domestically grown produce.

I ask you to ponder this one statement: A country with an abundant food supply has many issues. However, a country that cannot feed itself only has one.

In order to have a vibrant and robust agriculture industry, we must have a workforce that is vibrant and robust as well. The current U.S. labor market is experiencing a negative demographic trend. The Baby Boomers are getting older, and our younger generations, who are far less in numbers, are using their brains instead of their backs.

There is also an enormous misconception that our country has an abundant supply of American workers willing to work in the agriculture industry. Even in the recent recession, unemployment of domestic workers at the farm level did not increase. Furthermore, it is commonly accepted that 50 percent of the 1.2 million workers in agriculture are undocumented. I heard today it is 75 to 80 percent. Because of this large percentage of undocumented immigrants, states have felt abandoned by the Federal Government and have begun to pass their own immigration and employment verification laws. Such cavalier legislation is having a negative impact on the availability of farm labor.

Currently, there is a shortage of workers regardless of their legitimacy. Demographic trends clearly show that this is an ongoing problem and that this is only going to get worse. This is why agriculture must have a viable guestworker program.

The current H-2A program only supplies 4 percent of the labor force needed in agriculture. This statistic alone verifies the fact that the H-2A program is riddled with problems and is cumbersome to use, that the vast majority of agriculture employers have stayed clear of it.

I would like to highlight the major problematic areas of the H-2A program, details of which are contained in my written statement before you. First and foremost, the program is limited in who can participate. The wage rate is not market-based and not realistic. The 50 percent rule for recruitment, the application process, the requirement to provide housing, the transportation and visa fees, and lastly, the litigious nature of the program, these are the key reasons why the agriculture industry has not used the H-2A program.

As Mr. Stallman said, the agriculture community has been divided, and we have come together. The Agriculture Workforce Coalition, or AWC, is now speaking with a united voice, representing the diverse needs of agriculture employers from across the country. As you begin the debate on guestworker reform, I would ask you to consider the problematic nature of the current program and incorporate solutions that I have provided in my written statement which are consistent with the AWC's principles on guestworker reform.

Lastly, I would address this Committee and ask you to hear just one statement very clearly. The agriculture industry cannot endure another election cycle. Whether you tackle comprehensive immigration or not, the agriculture community needs immigration reform, and we need a guestworker program now.

I would like to leave you with this last question. Would you rather have the food you feed your family grown on the fertile soils under the governance of the USDA and the FDA being harvested by lawfully admitted foreign nationals, or are you willing to accept putting food on the dinner table tonight that was grown in a foreign country with unknown production practices, unknown food safety protocols, while either way that food is still going to be harvested by a foreign national?

It is my hope that Congress desires to ensure that American farmers can continue to feed Americans at home, with plenty left over to feed the rest of the world. Thank you for your time and consideration.

[The prepared statement of Mr. Carr follows:]

Written Statement

of

Chalmers R. Carr III

President

Titan Farms LLC

Ridge Spring, South Carolina

February 26, 2013

United States House of Representatives

Committee on the Judiciary

Subcommittee on Immigration and Border Security

Hearing on Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program

Chalmers R. Carr III
President, Titan Farms LLC
Ridge Spring, South Carolina

United States House of Representatives
Judiciary Subcommittee on Immigration and Border Security
February 26, 2013

Subject:
Hearing on Agricultural Labor: ***From H-2A to a Workable Agricultural Guestworker Program***

Thank you for allowing me the opportunity to not only share my experience and views on the current deficiencies of the H-2A program, but to also share with you the needs of today's agribusiness industry in a workable guest worker program. I would like to thank the members of this committee for recognizing the tremendous need for creating a guestworker program that addresses the needs of all aspects of agriculture.

My name is Chalmers Carr. I am the owner and operator of Titan Farms in Ridge Spring, South Carolina. Currently we are producing 5000 acres of peaches and 700 acres of vegetables crossing 25 square miles. For the past 14 years my company has been legally employing foreign workers via the H-2A guest worker program and this summer we provided jobs, housing, and transportation for over 500 workers.

I am currently president of USA FARMERS, a national organization of agricultural employers with over 1000 members representing 44 states and all facets of agriculture. Central to the mission of USA FARMERS is to represent agricultural employers in our efforts to obtain a modern guest worker program. USA FARMERS recently joined with other labor-intensive agricultural trade associations to form the Agricultural Workforce Coalition and push for immigration and guest worker reform with a unified voice.

In addition, I am also active in Farm Bureau and serve as Chairman of the South Carolina Farm Bureau Labor Committee and have previously served as Chairman of the American Farm Bureau Labor Committee.

Before I explain how the current H-2A system is broken and share with you my views of a future guestworker program, it is important to understand the ***need*** for a modern guestworker program for agriculture. There are three areas of grave concern affecting today's workforce that have resulted in a labor-starved agricultural industry and a threat to the food supply of this great nation. First, our current limited domestic agriculture labor force is aging - the baby boomers are getting older - and not being replaced by younger workers. Second, my personal experience, which mirrors so many other employers, demonstrates there are insufficient numbers of agricultural workers and a general unwillingness of available American workers to take on these jobs. The third issue negatively impacting the agriculture industry is the lack of action on immigration at a national level that has forced states to act independently. All of these issues put at risk our domestically produced safe food supply and our national security.

The overall labor force participation rate has declined and this trend is expected to continue and even accelerate from now until 2020. The US labor market is currently experiencing a negative demographic effect in which a large segment of the population is aging with less participation in the labor force and it is not being replaced at an equivalent rate by the younger generation. The Bureau of Labor Statistics reports workers who were 55 years and older accounted for approximately 13% of our labor force in the year 2000. By 2010 that number had grown to 19% and is projected to be 25% by the year 2020. Above and beyond having an aging workforce, we must recognize that we are training our future generations to use their brains and not their backs. Parents from all countries dream of better lives for their children and future generations. We simply want more for those who come after us. Coupled with these demographic changes, a segment of our labor force is not willing to perform the exigent labor required in agriculture. On a daily basis, our workers are required to work out the elements in jobs that can be physically challenging. Imagine harvesting peaches in July when the temperatures climb to over 100° F with 80% humidity while you are picking hundreds of thirty pound bags of fruit; or pruning a peach tree with lopping shears held over your head for an entire day in January in nearly freezing temperatures.

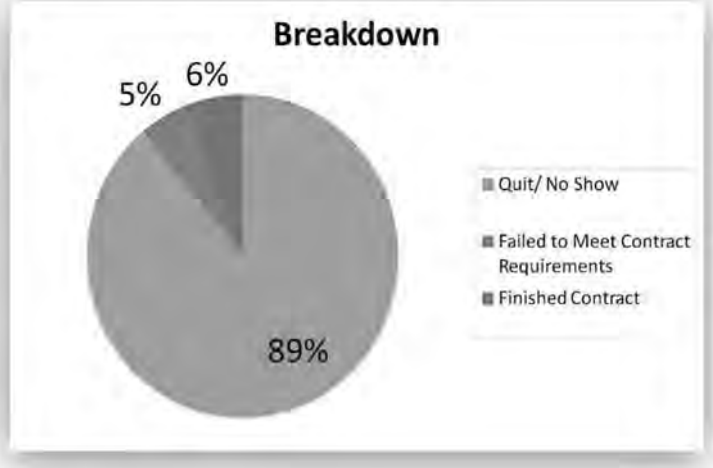
There is an enormous misconception that our country has an abundant supply of Americans willing to work in the agricultural industry. Even with the recent recession, employment of

domestic workers did not increase at the farm level. From 2010 thru the end of 2012 my farm advertised for 2000 job opportunities (see Figure 1.1). Four hundred eighty-three US referrals applied for these jobs and were hired accounting for less than 25% of my workforce need. One hundred nine of the referrals that were hired never showed up to work and 321 of them quit - the vast majority in the first two days! Those who quit and those who never reported to work account for 89% of the workers who accepted the job! Of the 321 who reported to work, only 31 worked the entire season. There is no way I could have produced my peach and vegetable crops with a domestic workforce!

Titan Farms US Referrals and Visa's

Figure 1.1

	2010		2011		2012			
	Visas Applied For	US Referrals	Visas Applied For	US Referrals	Visas Applied For	US Referrals	US Referrals Total	Precentage of US Referrals
Total Hired	615	106	681	279	700	98	483	24%
Quit		76		190		55	321	66%
No Show		12		67		30	109	23%
Failed to Meet Contract Requirements		5		12		5	22	5%
Finished Contract		13		10		8	31	6%
Applied/No Show		7		6		6		
No Rehire Policy				5		3		
Not Qualified						6		



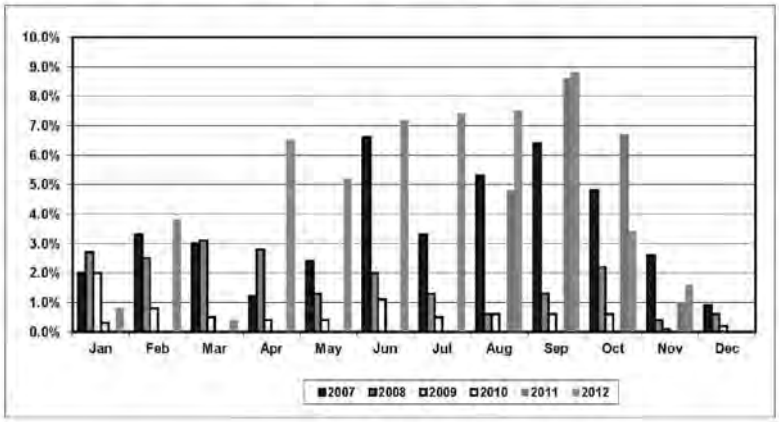
The current American workforce is comprised of a percentage of undocumented workers. Surveys conclude there are 11,000,000+ undocumented foreign nationals living in our country today. Eight million of them are actively working making up 5% of the total US workforce. However, it is commonly accepted that 50% of the 1.2 million workers in agriculture are undocumented. The National Milk Producers Federation reports over 50% of their workers are immigrant laborers producing 62% of the nation's milk supply. The agricultural industry has been left in a vulnerable position because of its reliance on workers possessing documents showing legal presence in the US, but who, in reality may be unauthorized to work. Because of this large percentage of undocumented immigrants, states have felt abandoned by the federal government and have begun to pass their own immigration and employment verification laws. As a result of such legislation, many farms all over the US are having more and more trouble finding needed labor. Ensuing shortages of workers have pushed domestic production of fresh fruits and vegetables abroad costing American producers millions of dollars. In 2010, Georgia's legislature passed a state immigration law that had a substantial negative effect on the state's agricultural industry that accounts for 12% of the state's GDP. A year later Georgia's farm gate losses were estimated to exceed $300 million and the total financial impact to the state was close to $1 billion. Another report prepared by the American Farm Bureau Federation estimates the national effect of state immigration legislation could exceed **$9 billion** in farm gate losses for agricultural producers.

However, even in states where new immigration laws are not on the books, widespread agricultural labor shortages have been reported from coast to coast. Results from a 2012 agriculture employment survey conducted by the California Farm Bureau Federation reported 61% of respondents claimed labor shortages. In labor-intensive fruit and vegetable crops, the shortage reported was even greater at 71%. Washington state has the highest state minimum wage, nearly $2.00 above the federal minimum wage, yet their labor shortages have increased over the past several years as well. (see Figure 1.2)

Figure 1.2

Seasonal Agricultural Employment Shortage (in Percent)
Weighted by Labor Force, Size of Employer Reporting
Washington State: 2007, 2008, 2009, 2010, 2011, 2012
Source: ESD/LMEA, Monthly Agricultural Labor Employment and Wage Survey

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Avg
2007	2.0%	3.3%	3.0%	1.2%	2.4%	6.6%	3.3%	5.3%	6.4%	4.8%	2.6%	0.9%	3.5%
2008	2.7%	2.5%	3.1%	2.8%	1.3%	2.0%	1.3%	0.6%	1.3%	2.2%	0.4%	0.6%	1.7%
2009	2.0%	0.8%	0.5%	0.4%	0.4%	1.1%	0.5%	0.6%	0.6%	0.6%	0.1%	0.2%	0.7%
2010	0.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
2011	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	4.8%	8.6%	6.7%	1.0%	0.0%	1.8%
2012	0.8%	3.8%	0.4%	6.5%	5.2%	7.2%	7.4%	7.5%	8.8%	3.4%	1.6%		



Food safety is another area that must considered in our country's need for a guestworker program. As domestic production has slowed or moved abroad due to labor shortages, imports of fruits and vegetables have increased annually over the last ten years. It is a staggering statistic that 50% of the fruits and 20% of the vegetables consumed in the United States are now grown outside of our borders. The FDA estimates that 15% of our average daily diet consists of products grown or processed outside the country. Furthermore another FDA report shows that of all the vegetables imported into the US, less than 1% is actually inspected. The results of those inspections are quite alarming. Imported vegetables are three times more likely to be contaminated with food borne pathogens and four times more likely to have been treated with pesticides exceeding the standards of domestically grown produce. **It is evident that our food supply is going to be harvested by foreign workers, whether in this country or abroad. I would rather see this country admit foreign workers and be able to grow, harvest, and pack our food supply on our fertile American soils under our regulations than to import our food supply from abroad.**

An even more significant component to food safety is food security and its direct link to national security. History illustrates that development of a secure food source has led developed nations to political independence, stability and international influence. In a recent speech by Vice-President Joe Biden noted an intrinsic link between access to an adequate food supply and prosperity and stability. Former Secretary of Agriculture Dan Glickman alluded to soaring food prices and supply shortages as major contributors to the 2011 political uprising and governmental upheaval in Egypt. Wealthy Arab countries that watched what happened in Egypt and surrounding regions have begun actively purchasing agricultural land all over the world to ensure their citizens have a dedicated food supply. This is known as the "great land grab". One look at China and you recognize the fine line between political stability and an adequate food source. Currently China houses the largest population on the planet and they have also become the largest purchaser of land. China is dedicating their resources to ensure an adequate food supply in the years to come. **A country having an abundant supply of food has many problems, however a country that cannot feed itself only has ONE problem!** I trust you can conclude the availability of an abundant legal labor supply for agriculture is paramount to our country's prosperity, food safety and national security.

It is clear that we have a need for a guest worker program, however, the H-2A guestworker program in its current state only supplies 4% of the labor force used in agriculture. That statistic alone verifies the current H-2A program is riddled with so many problems and is so cumbersome to use that the vast majority of employers in the agriculture industry have steered clear of it even though the documentation of their workforce may be questionable. The present H-2A agricultural guest worker program was created in 1986 as a part of an overall immigration reform package that included unearned amnesty for about 1.1 million agricultural workers. Amnesty was erroneously assumed to be a long-term fix for future agricultural labor needs, so the law creating the H-2A program was a brief, general description of how such a program would work. Over the years, as administered by the US Department of Labor, the H-2A program became a nightmare of regulations and costs, while the amnestied workers immediately left the farm for other job opportunities in the wider economy. Following I will highlight some of the major problematic areas of the H-2A program preventing widespread adoption and use of the program:

- **Limited Participation** – The program mandates that the job is seasonal in nature and that it must last no longer than ten months. This precludes participation in the program for any year round producer, such as the dairy, livestock and nursery industries, penalizes operations for diversifying and prevents growth within our industry.
- **Wage Rate** – the Adverse Effect Wage Rate (AEWR) created by DOL is the #1 reason reported by producers across the country for not using the H-2A program. DOL uses a USDA wage survey of agriculture wages (not designed for this application) and manipulates the data to establish an artificial geographic wage rate that has no realistic comparison to market wages for actual jobs in the same area. On average, the present AEWR is 49% higher than market wages. Furthermore DOL adjusts the AEWR each year often after employers have entered into employment contracts. Employers must increase wages when the new wage is published thus putting them at further competitive disadvantages with non-H-2A producers both domestically and abroad. Lastly, the wage rate methodology appears to be subject to political agendas. This was never more evident than in 2010 when my company incurred a 28% wage increase costing us nearly $2 million in the ensuing twelve month period.

- **The 50% Rule** – This provision of the H-2A program requires that employers recruit and hire all US workers regardless of their skills and background through the 50% point of the employer's contract. The requirement continues even though guest workers are present and working on the farm. Farmers are willing to hire US workers who want to work these jobs, but we need more certainty in the hiring process. At my farm, less than 6% of US workers who are hired actually finish the contract. Of 431 US hires in the past two years, only 31 actually completed the contract. The costs we incurred for additional staff, processing and training to fill those 31 positions was over $100,000!

  Advertising and recruitment as required by H-2A is a huge cost in time, money and productivity. First, growers must advertise in newspapers EVERY time they apply for workers, regardless of whether that advertising has produced any results in the past. Newspaper ads are expensive, especially Sunday papers in larger towns and metropolitan areas. Often several growers in the same small geographical area are advertising simultaneously, several times year. In addition, in today's modern world very few people think of a newspaper as a place to look for a job.

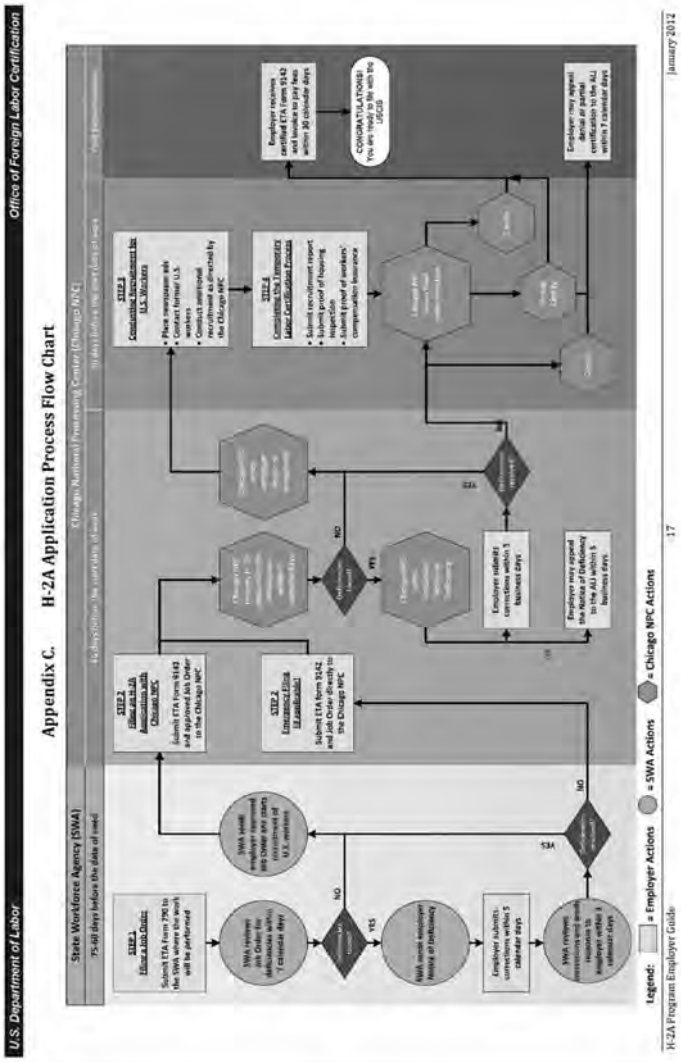
  A forthcoming study from the Center for Global Development and the Partnership for a New American Economy that analyzes H-2A employer records finds that in the two year period of 2011-2012, the nation's largest H-2A employer spent $90,000 on newspaper advertisements to recruit U. S. farm workers. During that two-year period, only five U. S. farm workers who applied stated they first learned about the job through a newspaper advertisement. Of those five, only one stayed on the job to complete the crop, earning roughly $8,000 in wages.

  Additionally, a recent DOL change under the current administration that reduces the number of visas requested by an employer based on the recruitment report makes the recruitment provision even more ineffectual for employers. For every US worker who says he will work the contract, a visa is lost by the employer. This happens even though there is no binding requirement for the US worker to actually show up to work or to finish the contract. This reduction of visas leaves employers shorthanded and forces them to incur additional costs and time delays requesting more workers. **Thus the 50% Rule is the #2 reason employers do not use the H-2A program.**

- **Application Process** – The current H-2A program application process is riddled with excessive bureaucracy, dozens of confusing requirements and other "gotchas" (see Figure 1.3) that force many employers to hire attorneys or other third party agents to help navigate through the process. Presently an employer or his agent must contend with the State Workforce Agency (SWA), the Department of Labor (DOL) and the US Citizenship and Immigration Services Agency (USCIS). The application has several steps with defined timelines for each one. The first step is making a request for need of workers. This request must be made no more than 75 days, but no less than 60 days from the date of need (there are crops that can be planted and harvested within 60 days!). How can producers of time sensitive crops that are greatly influenced by Mother Nature make employment commitments so far out? Furthermore the next steps must occur at 45 and 30 days from the date of need. Any misstep along the way, regardless of how minor, requires the process to restart and delays approval of the request. Yet the crops in the field cannot be put on hold, nor will they wait! The Department compounds these difficulties with its frequent disregard for the statutory requirement that it approve applications 30 days before the employer's date of need.
  A US Governement Accountability Office (GAO) report released in September of 2012 highlights DOL's inadequacies in processing applications in a timely manner.

  > *"For example, the Department of Labor (Labor) processed 63 percent of applications in a timely manner in FY 2011, but 37 percent were processed after the deadline, including 7 percent that were approved less than 15 days before workers were needed. This left some employers little time for the second phase of the application process, which is managed by the Department of Homeland Security (DHS), and for workers to obtain visas from the Department of State (State). Although workers can apply for visas online, most of the H-2A process involves paper handling, which contributes to processing delays. In addition, employers who need workers at different times of the season must repeat the entire process for each group of workers."*

Figure 1.3


U.S. Department of Labor
Office of Foreign Labor Certification
Appendix C. H-2A Application Process Flow Chart
State Workforce Agency (SWA)
Chicago National Processing Center (Chicago NPC)
75-60 days before the date of need
STEP 1
File a Job Order
Submit ETA Form 790 to the SWA where the work will be performed
SWA reviews job Order for deficiencies within 7 calendar days
NO
YES
SWA sends employer-approved Job Order for start of recruitment of U.S. workers
With more employer Notice of Deficiency
Employer submits corrections within 5 calendar days
SWA reviews corrections and issues Notice of Deficiency to employer within 5 calendar days
NO
53A
STEP 2
File an H-2A Application with Chicago NPC
Submit ETA Form 9142 and approved Job Order to the Chicago NPC
STEP 2
Emergency Filing If applicable!
Submit ETA form 9142 and Job Order directly to the Chicago NPC
NO
YES
Employer submits corrections within 5 business days
Employer may appeal the Notice of Deficiency to the ALJ within 5 business days
53A
STEP 3
Conducting Recruitment for U.S. Workers
• Place newspaper ads
• Contact former U.S. workers
• Conduct other mandatory recruitment as directed by the Chicago NPC
STEP 4
Completing the Temporary Labor Certification Process
• Submit recruitment report
• Submit proof of housing inspection
• Submit proof of workers' compensation insurance
Employer receives certified ETA Form 9142 and Job Order from the SWA within 30 calendar days
CONGRATULATIONS! You are ready to file with the USCIS
Employer may appeal denial or partial certification to the ALJ within 7 calendar days
Legend:
= Employer Actions
= SWA Actions
= Chicago NPC Actions
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January 2012

- **Housing** – the requirement to provide housing is the **second** largest barrier preventing employers from using the program. Farm labor housing is expensive to build and maintain with construction costs often ranging between $5,000 and $10,000 per bed or worker. In the last five years, I have built four labor camps to meet standards set by OSHA, DOL, and my county government. Construction cost of each was over $7500 per bed or $250,000 per 32-man housing unit. (See Figure 1.4) In the past, some farmers built housing as an incentive to attract traditional migrant workers to their area, however, this was not the standard in all areas of the country. In many areas of the country today urban sprawl has reached the door steps of American farms bringing zoning and other codes preventing farmers from building worker housing. It should also be noted owner provided housing adds a laundry list of regulations and requirements often leading producers to steer away from providing housing.

Figure 1.4

- **Transportation and Visa Fees** – These are another set of issues that have become heavily regulated by the current DOL. At an average cost of over $600 per worker, the present regulations require an employer to reimburse the cost of each worker's incoming transportation, visa fee, recruiter fee, border crossing and daily subsistence while traveling to the US when the worker completes 50% of the work contract. However the US DOL website notes the Fair Labor Standards Act applies independently from the work contract and, as a result of a court ruling in the Arriaga case, employers are reimbursing these costs within the first week of employment..
- **The Unknown costs of participating in the H-2A program** – By design and implementation the litigious nature of this program as regulated by DOL over the last 27 years has unequivocally weighed heavily on a farmer's decision of whether or not to enter the H-2A Program. The publically funded Legal Services Corporation agents across the country have a long history of filing what most people would call frivolous lawsuits against agricultural employers over relatively minor issues. Because an employer has no ability to cure minor mistakes or to have binding mediation or arbitration, they often fall prey to these lawsuits and typically settle out of court because the expense to battle in court is higher than the cost to settle.

These key issues along with numerous others explain why the American agriculture industry DOES NOT use the current H2A program. Congress must address these issues if they truly desire to create a viable guest worker program for agriculture.

Thus far I have explained why we need a guest worker program for agriculture and the disaster of the current H-2A program that only provides 4% of the agriculture labor force. Without argument the H-2A program is broken and in the midst of comprehensive immigration reform I propose that as an alternative, we create a new flexible market-based guest worker system, not only for today's agriculture industry, but for tomorrow's as well. The new uncapped agricultural guest worker visa program should be flexible to address the unique needs of a very diverse and time sensitive industry. The first step should be to broaden the definition of Agribusiness to include all sectors of agriculture including processors. The new program should remove the artificial restriction to seasonal employment and permit farmers with year

round operations to participate. For example, dairy farmers have no access to the H-2A program because cows are milked all year long.

Once employers have made the job available to US workers through some modern process and have not had sufficient hires to fill all the positions, they should be free to participate in the new guestworker program. Agriculture production and process varies from crop to crop, animal to animal from state to state. Operations labor needs can be as short as 15 days, to year round and a new program must be flexible to ensure it is available to all of agriculture. A **key** component of a new program is the creation of a visa that would allow a worker to enter the country under a contract with a U.S. employer, or with a certified job offer with an "at will" work authorization. The visa should be valid for up to 12 months and be renewable, provided the guest worker complies with the law and periodically returns to his or her home country for a period of time each year. The program should also include foreign workers who live near the border and want to cross into the U.S. each day to work and then return home. Furthermore, the bar on entry into the U.S. for workers who have been here in undocumented status should be waived so that a worker who has worked in U.S. agriculture and broken no other laws can obtain a visa.

The program should be administered by the U.S. Department of Agriculture (USDA), the agency that has the working relationship with the industry and is accustom to administering agricultural programs. Employers should register with the USDA for participation. Following is a description of major features of a viable guest worker program that would create a future flow of legal workers into the agriculture industry:

1. **Agricultural employers, associations of agricultural employers, and farm labor contractors should be eligible to participate in the new program by registering with USDA:** Registered employers will file an attestation application stating the total number of workers needed, anticipated date of need, general overview of the agricultural work provided, and designation of employment under contract or at-will, or combination thereof.
2. **Recruitment of U.S. Workers:** An employer must recruit and hire any qualified U.S. workers. The recruitment period ends 30 days before the date of need or when the visa worker departs his/her home country, whichever is later. Due to the time sensitivity of many agricultural crops

and the influence of weather on these crops, the program should have procedures to quickly address emergency labor needs and account for sudden weather or market changes.

3. **Petition Process with DHS:** Upon registration, an employer can file a visa petition with DHS stating the number of workers needed, whether it is under contract or at will and if known, may name any beneficiaries of its petition. Unless there are independent grounds for exclusion under the INA, the employer's petition must be granted by DHS.
4. **A flexible visa program:** We need a program that will accommodate the different sectors of the industry and their locality. It is imperative that in a new program ALL operations have access to workers. Regardless of an employer's duration of need (very short seasons to very long), the geographic location of the job (distance from the border), or lack of other agriculture jobs in the area, all employers must have access to an adequate supply of workers. Employers would have the option to offer contract or at-will employment and workers would have the option of choosing whether they wanted to accept contract or at-will employment.
    - Workers would have portability to select additional work opportunities. Upon completion of a contract, the worker may elect to continue working in the U.S. by moving to another position with a registered employer.
    - At-will visa workers would have portability to move from employer to employer throughout the duration of their work authorization.
5. **Labor Standards and Conditions.** There needs to be a realistic approach to these issues that recognizes the competitive domestic and international marketplace we live and work in. The wage rate should be transparent and predictable - and not be based on questionable surveys and suspect methodologies. Wages should reflect the marketplace in agriculture, as they do in other parts of the economy. At that same time, we must also recognize that farmers already have thin profit margins and international competition from regions where labor is plentiful results in constant pressure on farms to remain competitive.

A new, modern visa program should remedy the shortcomings of the H-2A program that is burdened with excessive costs found in no other visa program. For example, no other visa program requires employers to be responsible for transportation costs and no other visa program requires employers to provide housing. In addition, a new program must avoid the "gotchas" and resulting abusive litigation in the H-2A program. The vast majority of employers want to play by the rules and do the right thing, but the endless bureaucracy, conflicting requirements and fine print in the H-2A program leave too many opportunities for innocent and relatively minor mistakes to balloon into tens of thousands of dollars of added costs. For

violations that don't pose an imminent threat to safety, employers should have the right to cure alleged violations before being hit with massive fines and lawsuits.

Employment disputes between employers and workers should be subject to arbitration to ensure disputes are resolved quickly and efficiently without enriching lawyers. If a worker's pay was miscalculated, that should be corrected and the worker should be paid quickly. If a farmer has complied with the rules, he should not have to face years of litigation and tens of thousands of dollars of legal fees to prove it. A private right of action to file more lawsuits is not the answer to resolving disputes - unless, I suppose, you are a lawyer who makes a living off of litigation. Fines and even debarment from participation for serious repeat offenders in the program should be sufficient to deter bad behavior. Employers want to comply with the law and we should avoid creating a complex program that becomes nothing more than a trap for the unwary, which is too often what the H-2A program is.

I would be remiss if I failed to address the argument of worker advocates that farmers only want cheap labor and exploitation of workers is rampant in agriculture. These arguments are old and I am tired of hearing them. I welcome each of you to visit my farm. You will see the vast majority of our foreign workers using personal cell phones, most of which are known as "smart phones" with cameras, e-mail and data plans. Today's technology is the best friend of anyone working in America. They do not need an advocacy organization who does not even know them to speak for them. I have provided a wi-fi hotspot on my farm that any of our employees may use. In the evenings and on the weekends, many workers use this internet connection to contact family and friends all over the world via e-mail, skype and other real-time communication options. The retail market has long required producers like me to address Food Safety practices long before the federal government became involved. Likewise, the pressures of social responsibility and social media will have a greater impact on the treatment of workers and work conditions than any advocacy group or government regulations.

The call for comprehensive immigration is louder than I have ever heard in the past 15 years and, quite frankly, it's about time! However I caution you that comprehensive immigration without prioritizing guest worker reforms will be as incomplete as the Immigration Reform Act of 1986 where Congress gave unearned amnesty to 1.3 million foreign nationals. The failure

was three-fold – belief the amnestied workers would solve agriculture's long term labor needs, failure to create a fraudulent proof employment authorization program, and the failure to properly address the need for a future flow of workers. When IRCA passed I was working for my uncle and personally escorted over 100 migrant workers from his tobacco and peach operation thru the amnesty process. Many workers left the farm immediately, the vast majority had moved on within a couple of years and within five years, all had left the farm or no longer returned seasonally as they had for the previous decade. Twenty-seven years later because of this short sightedness, eleven million plus undocumented foreign nationals are present in the United States. In my opinion Congress has been short-sighted and irresponsible regarding this ever growing problem. Polarized by extremists on each end of the spectrum and fearful of repercussions in polling booths on election day, Congress has avoided this issue for far too long. Individual states are taking a national issue and making it their own and have made the entire issue WORSE!

I implore you to be the statesmen you were elected to be and meet immigration reform head-on. Creating viable market based guest worker programs for the future should be your priority in comprehensive immigration reform. Programs allowing for a legal future flow of workers to all industries, from low-skilled domestic food production to ensure a safe and abundant food supply, to highly-skilled workers allowing for information exchange and entrepreneurial growth that will lead this country into the next century. Address the 11 million undocumented foreign nationals presently residing inside our borders in such a way that they will feel safe to come out of the shadows so we can account for all who reside in this country. Do not displace families from one another; instead provide them with legal work status allowing them to continue to be a productive part of our society, yet not rewarding them for breaking the law by placing them in front of or equal to an immigrant who has followed the rules. Adjusted workers should not be able to take jobs from any presently employed US worker or any guest worker who has been lawfully working within our system. In order to prohibit the mistakes of the past from recurring I encourage you, as part of this effort, to utilize the latest technology available to create an affordable, fraudulent-proof workforce authorization program. If this is done our border problems will be dramatically reduced and rather than focusing on workers who want to come to this country to work on our farms, the government can focus its attention on those

individuals who want to come to the US to do harm.

Understanding the enormous debate this topic will generate and the numerous other challenges Congress is facing, I foresee little time to properly address comprehensive immigration reform. However, I believe the failure by Congress to act on immigration at the federal level will have a disproportionate impact on American agriculture. An increase in action at the state level does nothing to repair this broken system. States have the ability to enforce immigration laws but they are unable to create guestworker programs. The agriculture industry MUST have guest worker reform this year whether it is a part of a large comprehensive bill or as industry specific legislation.

The agriculture community has been divided over the last decade in regard to immigration reform. However recently we have come together in a unified voice as a group of organizations representing the diverse needs of agricultural employers from across the country. I join the members of USA FARMERS and a host of agricultural organizations from across the country in support of the Agricultural Workforce Coalition (AWC) and its principles of agriculture immigration and guestworker program reform. I humbly request that you consider the framework for program reform outlined by AWC as you delve into guestworker reform. These principles are highlighted above. This unity in agriculture surrounding guestworker reform is unprecedented and I would hate to lose that momentum by Congress's failure to move forward.

The realization that currently the US labor force is changing demographically, the lack of interest in available agricultural jobs, the adoption of immigration and employment verification legislation at the state level and the current complex and costly H2-A program that is insensitive to the unique needs of today's agriculture leaves my industry and the security and prosperity of our country at risk. I hope you will consider the principles outlined herein as the framework for a future guest worker program that will address the needs of agriculture and provide a future flow of legal workers to the agriculture industry providing food, fiber, and shelter to America and across the globe.

And so I leave you with this question – would you rather have the food you feed your family grown on our fertile soils under the governance of the USDA and harvested by lawfully admitted foreign nationals? Or will you accept putting food on your dinner table tonight that was grown in a foreign country with unknown production practices and food safety protocols? Either way, the food will still be harvested by a foreign worker. It is my hope that Congress desires to ensure American farmers can continue to feed Americans at home, with plenty left over to feed much of the rest of the world.

Thank you for your time and consideration.

Mr. GOWDY. Thank you, Mr. Carr.
Mr. Brown.

TESTIMONY OF MIKE BROWN, PRESIDENT, NATIONAL CHICKEN COUNCIL, ON BEHALF OF THE FOOD MANUFACTURERS IMMIGRATION COALITION

Mr. BROWN. Mr. Chairman, Chairman Gowdy and Ranking Member Lofgren, I appreciate the opportunity to testify here today on the important issue of comprehensive immigration reform.

I am Mike Brown, President of the National Chicken Council. NCC's members produce and process more than 95 percent of the chicken consumed in the United States. I am testifying today on behalf of a broader Food Manufacturers Immigration Coalition. To date, much of the immigration reform discussion has focused on the need to retain highly skilled workers such as scientists and engineers, and the need for additional temporary agriculture workers. These are important objectives, but they do not meet the needs of our industry sector.

We seek workers who will stay on the job to become skilled and efficient, helping us to keep our food products and employees safe. This takes investment, up to thousands of dollars spent on training and equipment for each employee.

The coalition's principles are as follows. Under enforcement, while border security has improved significantly over the past decade, improvements can be made to further lower the number of illegal border crossings. One suggestion the coalition has is to provide exit or expiration data to E-Verify to aid the government in its effort to track visas and prevent overstays.

Under strengthening employment verification and preventing identity fraud, unfortunately the government does not provide employers with a reliable verification method to prevent identity fraud. E-Verify is a step in the right direction, but it must be strengthened. Our industry has had nearly 20 years of experience using this program.

If strengthened, this program will serve as an effective and efficient virtual border, if you will, because the electronic data will keep folks from seeking employment if they know they can't pass.

Over the past decade, the government has discovered thousands of ineligible employees working for employers who have processed these employees through E-Verify. The system does not account for identity fraud. Currently, multiple people can earn wages on the same Social Security number or use the Social Security number of a deceased individual.

The solution? Employers should be allowed to require an E-Verify Self Check. E-Verify Self Check is an online service that allows individuals to check their employment eligibility before beginning a new job. The Self Check entry portal helps prevent identity fraud by melding E-Verify with an automated Connect The Dots program, similar to credit background checks when we all apply for credit cards or other information.

Under the current interpretation of the Office of Special Counsel for Unfair Immigration-Related Employment Practices, employers may not require anyone to use Self Check in the employment process. In fact, we may not even discuss it with a prospective em-

ployee. The Social Security Administration must be required to verify that Social Security numbers are not being used in duplicate locations or are not matched to deceased individuals. In return for participating in these aggressive screening programs, a safe harbor should be provided for employers that utilize the E-Verify Self Check and follow the automatic referral process.

Under anti-discrimination, employers can often be caught between an employee verification obligation and non-discrimination enforcement. For example, the Department of Justice's Office of Special Counsel has cited employers for allegedly acting too aggressively in verifying work authorization status of new hires. Simultaneously, the same business is often targeted for worksite enforcement action for not being vigilant enough. Statistic-based discrimination penalties have been imposed on employers who recruit outside the local community or work with the State Department to hire workers with refugee status when Americans are unavailable or unwilling to fill these jobs.

Immigration reform legislation should require that DHS, DOJ, DOL, and other enforcement or anti-discrimination agencies consult internally and publish rules of the road; in essence, harmonize the law throughout the Federal Government.

Access to labor. An effective occupational visa system may be the most important barrier to illegal immigration. The existing temporary programs for general labor skilled workers are for seasonal labor only, which does not help manufacturers whose occupational needs are year-round and ongoing. Ag jobs legislation, as important as it is, does not benefit food manufacturers.

A manufacturing visa program should include flexible annual goals or targets for immigration that emphasize economic migration, predominantly employment-based migration. These goals or targets should be flexible and adjustable to reflect changing conditions.

On earned legalization, our coalition supports an earned legalization program. Our broken immigration system has resulted in up to 11 million undocumented immigrants living in the shadows. Congress must provide a fair and practical roadmap to address the status of unauthorized immigrants in the United States.

Mr. Chairman and Members of the Committee, again, I appreciate the opportunity to testify before you today.

[The prepared statement of Mr. Brown follows:]

Testimony of Mike Brown
President, National Chicken Council
On Behalf of the Food Manufacturers Immigration Coalition
Before the
House Judiciary Committee Subcommittee on Immigration and Border Security

Hearing on Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program

2:00 p.m. February 26, 2013
2141 Rayburn House Office Building

Thank you Chairman Gowdy and Ms. Lofgren. I appreciate this opportunity to testify today on the need for comprehensive immigration reform.

I am Mike Brown, President of the Nation al Chicken Council. NCC's members produce and process more than 95 percent of the chicken consumed in the United States. Collectively, the chicken industry is directly responsible for 260,000 U.S. jobs and through supplier and ancillary industries, helps support almost 800,000 more.

I am testifying today on behalf of a broader Food Manufacturers Immigration Coalition that is advocating some of the most progressive and far reaching immigration reform concepts proposed to date. The Coalition is comprised of the National Chicken Council, North American Meat Association, U.S. Poultry & Egg Association, National Turkey Federation, Virginia Poultry Federation, Georgia Poultry Federation, The Poultry Federation (representing Arkansas, Oklahoma and Missouri), California Poultry Federation and American Meat Institute.

Collectively, the meat and poultry industry contributes about $832 billion in total to the U.S. economy and, through its production and distribution linkages, impacts firms in all 509 sectors of the U.S. economy. In total, there are approximately 1.3 million employees whose jobs depend on the sale of meat and poultry products to the public.

We are focused on five major themes: border security; a very simple improvement to the E-verify system as an alternative to a national identity card; clarity in anti-discrimination laws; an occupational visa category that our industry can use that could be tied to local or regional employment; and, options to effectively address the 11 million undocumented workers in the shadows of our economy.

To date much of the discussion has focused on the need to retain highly skilled workers such as scientists and engineers, and the need for additional temporary agricultural workers. These are important objectives, but they do not meet the needs of our industry sector. Our workers are neither highly skilled nor temporary. We are manufacturers, wanting a stable and permanent workforce that can help sustain the rural communities where we do business.

Some think there is an economic incentive for manufacturing employers to hire illegal immigrants at below-market wages. Nothing could be further from the truth. Our industry needs a stable workforce. We seek workers who will stay on the job long enough to become skilled and efficient, helping us to keep our food products and employees safe. This takes investment – up to thousands of dollars spent on training and equipment for each employee. In order to retain talent, we offer good wages, family health care, 401(k) plans, and language training.

Immigrant workers bring many benefits to the communities where we have plants – often communities with declining populations. These workers and their families pay taxes and put down roots. They help prevent shrinking school enrollment. They use health benefits to support local health services. And they help keep local businesses open.

Our principles:

Enforcement
While border security has improved significantly over the past decade, improvements can be made to further lower the number of successful illegal border crossings and address visa overstays. Congress must provide additional resources (technology, infrastructure, personnel) for reasonable enforcement of immigration laws (at the borders and in the interior). One example is to provide "exit" or expiration data to E-Verify to aid the government in its efforts to track visas and prevent overstays.

Strengthen Employment Verification & Prevent Identity Fraud
U.S. employers who hire unauthorized workers currently face stiff fines and criminal penalties. The criminal prohibitions in current law are extensive, and there is no need to expand them. Unfortunately, the government does not provide employers with a reliable verification method to prevent identity fraud and confirm whether new hires are legally authorized to work in the United States. E-Verify is a step in the right direction but does not work adequately in its current form. If strengthened, this program will serve as an effective and efficient "virtual border."

Over the past decade, the government has discovered thousands of undocumented immigrants working for employers who made good faith efforts to verify the status of their employees including processing all new hires through E-verify. Only 1.7% of employees run through the E-Verify system come back as non-confirmed. 98.3% of employees clear E-verify in less than 24 hours. The system however does not account for our most common issue, identity fraud—a valid SSN# that does not relate to the person presenting it. Currently, multiple people can earn wages on the same Social Security Number (SSN) or use the SSN of a deceased individual. The tools currently available to employers do not indicate if the SSN presented is a duplicate or belongs to a deceased individual. The Social Security Administration (SSA) provides little cooperation to employers trying to combat identity fraud.

The solution: in addition to documents such as a driver's license or social security card which are easily falsified, we believe employers should be allowed to require an E-Verify Self Check. The system is already in existence and relies on information that would prevent identity fraud.

E-Verify Self Check is an online service that allows U.S. employees to check their employment eligibility in the United States before beginning a new job. E-Verify Self Check was designed to provide confidence that E-Verify results are accurate prior to applying for employment. The Self Check "entry portal" (to prove identity before moving to the employment verification step) helps prevent identity fraud by melding E-Verify with an automated "Connect the Dots" program that pulls data from publicly available records and requires employees to take a test based on that publicly available data . Under the current interpretation of the Office of Special Counsel for Unfair Immigration-Related Employment Practices, employers may not require anyone to use Self Check in the employment process and may not even ask about Self Check.

Of course not all applicants will be able to successfully complete the self check. They may have inadequate information in public data bases. When this is the case, programs must be in place to ensure eligible employees are able to appeal the results or address the issue with the appropriate government agency in a timely fashion. The Department of Homeland Security (DHS) should provide employers with an automatic referral process for these employees. Having this system in place will ensure that only legal applicants even apply, and that they should have no fear in working with the DHS to get their accurate information into the system.

The Social Security Administration (SSA) must be required to verify that SSNs are not being used in duplicate locations or are not matched to deceased individuals. The Social Security Number Verification System (SSNVS) can verify via Internet that employee SSN information matches Social Security's records; however, they can currently only be used for tax and wage reporting (Form W-2) purposes. It is also limited to matching information that is easily acquired by an individual committing identity fraud (Name, SSN, DOB, Gender). Providing employers with the additional information of duplicate or deceased SSNs can help stop identity fraud by unauthorized workers and also alert authorized employees that they may be the victim of identity theft. Employers who discover employees with duplicate or deceased SSN should use the same DHS automatic referral process previously described.

In return for participating in these aggressive screening programs, a safe harbor should be provided for employers that utilize the E-Verify Self Check and follow the automatic referral process. This safe harbor should insulate an employer from liability unless the government can show beyond a reasonable doubt that the employer failed to use these tools in good faith. This trade-off is only fair. An employer that does everything possible to avoid hiring unauthorized aliens should not be exposed to further liability. At the end of the day, it is the obligation of the government – not U.S. employers -- to provide a secure worker verification system.

Anti-Discrimination

Employers can often be caught in the middle, between employee verification obligations and non-discrimination enforcement. For example, the Department of Justice's Office of Special

Counsel (OSC) has cited employers for allegedly acting too aggressively in verifying work authorization status of new hires. Simultaneously, that same business is often targeted for worksite enforcement action for not being vigilant enough. Statistics-based discrimination penalties have even been imposed on employers who recruit outside the local community or work with the State Department to hire workers with refugee status when our economy is creating jobs and qualified Americans are unavailable or unwilling to fill those jobs. This situation discourages voluntary compliance and is simply unfair.

Immigration reform legislation should require that DHS, DOJ, DOL and any other enforcement or antidiscrimination agency consult internally and then publish "rules of the road" for this two-way street. If an employer follows these rules, there should be no liability for its actions – from either the immigration enforcement or the antidiscrimination perspective.

Access to Labor Pool (General Labor Skilled Visa Program)

An effective occupational visa system may be the most important barrier to illegal immigration. The right visa system with the right screening tools will in effect be a second "virtual border." It will prevent future waves of illegal immigration by preserving the available jobs for qualified US workers or legal immigrants. The majority of general labor skilled illegal entrants to the United States come seeking employment, yet there is currently no clear legal immigration avenue. There are very limited permanent visas for general labor skilled workers. The existing temporary programs for general labor skilled workers are for seasonal labor only, which does not help manufacturers, whose occupational needs are year-round and ongoing. AgJobs legislation, as important as it is, does not benefit food manufacturers.

Training and experience investments, cost of relocation, and finding housing, make any work authorization of less than three years not feasible. During times of full employment, when our economy is creating jobs and qualified Americans are unavailable or unwilling to fill those jobs, employers need access to a pool of legal, general labor skilled immigrant workers. This challenge can be particularly acute for employers in rural areas where unemployment rates may be lower than the national average.

Congress must create a general labor skilled immigrant visa for the manufacturing industry to recognize that employer needs in industry are permanent in nature, not temporary. Employers should have the ability to recruit outside of the U.S. and sponsor workers for a defined period of time. The process would be much less complex and cumbersome than the professional visa process and be created to meet high quantity labor needs.

A manufacturing visa program should include flexible annual goals or targets for immigration that emphasize economic migration, predominantly employment-based migration. These goals or targets should be flexible and adjustable, to reflect changing market conditions. The number of available permits could be dependent upon local and industry-wide employment data (Local Area Unemployment Statistics of the Bureau of Labor Statistics.)

An employer would register/petition the USCIS for a designated number of workers in this visa status. Qualified individuals should then apply for visas abroad (or for a change of status if in the US) based upon the approved petition, and would be counted against the allotted number of visas. Visas should be mobile to allow employees to work for any registered employer within the designated industry and employment areas.

Given the costs associated with relocation, training and housing, and the constant and permanent need for labor in the industry, the proposed lower-skilled immigrant visa should provide work authority for no less than three years. An individual may apply for an extension of his or her stay in this visa class. A path to permanency should exist for workers successfully performing in their jobs and community. An application to continue employment should not count towards the annual cap for this visa class. The Immigration and Nationality Act (INA) already allows for "dual intent" for certain individuals admitted to the US in nonimmigrant status, and that approach should be applied to this category as well. As a result, an individual can be admitted as a nonimmigrant but still apply for permanent status without becoming inadmissible.

Earned legalization

Our coalition supports an earned legalization program. Our broken immigration system has resulted in up to 11 million undocumented immigrants living in the shadows. Congress must provide a fair and practical roadmap to address the status of unauthorized immigrants in the United States.

Again Mr. Chairman and member of the committee, I appreciate the opportunity to testify on behalf of food manufacturers who offer some of the most progressive immigration reform concepts under discussion.

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Mr. GOWDY. Thank you, Mr. Brown.

Mr. Kashkooli.

TESTIMONY OF GIEV KASHKOOLI, 3RD VICE PRESIDENT, UNITED FARM WORKERS

Mr. KASHKOOLI. Thank you, Chairman Gowdy, Ranking Member Lofgren, and Members of this Subcommittee. Thank you so much

for the opportunity to testify today. I know that from Florida to Idaho, you have extraordinary experience here, from Congressman Gutierrez to Chairman Goodlatte, the amount of years that you have put in, along with Congressman Gowdy and Ranking Member Lofgren. It is extraordinary what you have put in, and we really do believe we are now in a very special moment.

My name is Giev Kashkooli. I am a Vice President of the United Farm Workers of America. We are honored to speak with you today, to share alongside the American Farm Bureau and Mr. Brown and Mr. Carr some of the issues that confront American agriculture for agriculture employers and for agricultural workers, for farmers and for farm workers.

America's farms and ranches produce an incredible bounty that is the envy of the world. The farmers and farm workers that make up our Nation's agricultural industry are truly heroic in their willingness to work hard and take on the risk as they plant and harvest the food all of us eat every day.

But our broken immigration system threatens our Nation's food supply. Thankfully, many of you have devoted many years to help fix this, and while our views have diverged in the past from those of Chairman Goodlatte, we do not question Congressman Goodlatte's commitment to improving our immigration system for agriculture, and we are very grateful for the seriousness with which you have studied these issues.

The UFW and our Nation's agricultural employers have often also been at odds on many policy issues, but we have been working diligently to see if we can come to an agreement that would unify our agricultural employers and our agricultural workers in the agricultural industry, and we believe we are making progress toward that end. We really are in a unique moment to get something done.

Let me speak a little bit about what is at stake for the women, men, and children who work in the fields and do some of what Congressman Goodlatte recently called the hardest, toughest, dirtiest jobs. Every day across America, about 2 million women, men and children labor on our Nation's farms and ranches, producing our fruits and vegetables and caring for our livestock. At least 600,000 of these Americans are U.S. citizens or permanent legal residents. Our migrant and seasonal farm workers are rarely recognized for bringing this rich bounty to supermarkets and our dinner tables, and I think that is why, Chairman Gowdy, so many of us were struck by the commercial that you mentioned. Most Americans cannot comprehend the difficult struggles of these new Americans who work as farm workers.

Increasingly, however, American consumers are asking government and the food industry for assurances that their food is safe, healthy, and produced under fair conditions.

The life of a farm worker in 2013 is not easy. Most farm workers earn very low wages. The housing in farm worker communities is often poor and overcrowded. The Federal and state laws exclude farm workers from many of the labor protections other workers enjoy, such as the right to join a union without being fired for it, overtime pay, many of the OSHA safety standards, and in many states they don't even have workers compensation for farm workers.

Farm workers were excluded from these Federal laws in the 1930's, and that is one of the sadder chapters in the history of our Nation, the reasons why. Even in California, where we have won many of these protections and farm workers get many of these protections, we still have seen dozens of farm workers die over the last several years for the simple lack of water or shade working in that hot sun. Not everyone is able to work on Mr. Carr's farm, a farmer who is really following the law. Such poor conditions and discriminatory laws have resulted in substantial employee turnover in agriculture.

So we also want to have a serious discussion about the future of the workforce upon which American agriculture and American consumers depend. First and foremost, we seek an end to the status quo. Our number one priority is reform of our immigration process that includes a workable legalization program for the 1 million or more farm workers who are currently working in the fields and their immediate family members, with a roadmap toward a permanent resident status, and then to citizenship.

We believe that the farm workers who harvest our food and feed us deserve, at the very least, the right to apply for permanent legal status. To the extent a new path is needed to bring professional farm workers from abroad to this country, these workers should be accorded equality, job mobility, strong labor and wage protections, and an opportunity to earn immigration status leading to citizenship.

We have seen Europe's failed experiment of second-class legal status, and we at the United Farm Workers, we believe that America really is exceptional, like I think all of you do. Our agricultural system is just one more example of how America is exceptional. So we should honor the new Americans who continue to build our agricultural system as the heroes that they are for our country.

Now, there are agricultural employers who will need to continue to have the security of a contract with farm workers so that they can make sure to meet those needs, and we are hopeful that complaints about bureaucracy that we all understand would not justify reducing wages and job opportunities of U.S. workers, or eliminate wage, housing, and transportation protections.

We thank you very much. We believe that we can come to a system that can honor our American values and our exceptional agricultural system.

[The prepared statement of Mr. Kashkooli follows:]

Statement of Giev Kashkooli
3rd Vice President of United Farm Workers of America
Before the House Judiciary Committee's
Subcommittee on Immigration and Border Security
"Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program."
February 26, 2013

Chairman Gowdy, Ranking Member Lofgren, and members of the subcommittee, thank you for the opportunity to testify today. My name is Giev Kashkooli. I am a Vice-President of the United Farm Workers of America. The UFW is the nation's first successful and largest farm workers union. We are honored to speak with you today and to share alongside the American Farm Bureau and USA Farmers some of the issues that confront American agriculture.

America's farms and ranches produce an incredible bounty that is the envy of the world. The farmers and farm workers that make up our nation's agricultural industry are truly heroic in their willingness to work hard and take on risk as they plant and harvest the food all of us eat every day.

But our broken immigration system threatens our nation's food supply. Thankfully, many of you on this sub-committee are very committed to fixing our broken immigration system. And while our views have diverged in the past from those of Judicial Chairman Goodlatte, we do not question his commitment to improving our immigration system for agriculture and we are grateful for the seriousness which he has studied these issues. The UFW and our nation's agricultural employers have also often been at odds on many policy issues – but we have been working diligently to see if we can come to an agreement that would unify our nation's agriculture industry and we believe we are making progress toward that end. We are in a unique moment in our nation's history – and together with a lot of work you on this committee can make the changes we need to secure our nation's food supply.

Let me speak a little about what is at stake for the women, men, and their children who work in the fields and do some of what Congressman Goodlatte recently called the "hardest, toughest, dirtiest jobs." Every day, across America, about two million women, men, and children labor on our nation's farms and ranches, producing our fruits and vegetables and caring for our livestock. At least 600,000 of these Americans are US Citizens or permanent legal residents. Our migrant and seasonal farmworkers are rarely recognized for bringing this rich bounty to supermarkets and our dinner tables. And most Americans cannot comprehend the difficult struggles of these new Americans who work as farmworkers and their family members. Increasingly, however, America's consumers are asking government and the food industry for assurances that their food is safe, healthy and produced under fair conditions.

The life of a farm worker in 2013 is not an easy one. Most farm workers earn very low wages. Housing in farmworker communities is often poor and overcrowded. Federal and state laws exclude farmworkers from many labor protections other workers enjoy, such as the right to join a union without being fired for it, overtime pay, many of the OSHA safety standards, and even workers' compensation in some states. Farm worker exclusion from these basic Federal Laws in the 1930s is one of the sadder chapters of our history. In California, where state laws thankfully provide most of these protections, we have still seen dozens of farm workers die over the last several years for the simple lack of water and shade.

Such poor conditions and discriminatory laws have resulted in substantial employee turnover in agriculture.

Immigration policy reform can play a role in achieving the aims of numerous federal commissions that have addressed the labor needs of agriculture. Let me highlight one of these reports for you today. President Ronald Reagan and Congress created the Commission on Agricultural Workers. The Commission had 4 members appointed by President Reagan; 4 by the Senate President Pro Tempore at the time – Senator Strom Thurmond -- and 3 by the Speaker of the House. Their report – the "Report of the Commission on Agricultural Workers" in 1992 made recommendations for the "development of a more structured and stable domestic agricultural labor market" that would "address the needs of seasonal farmworkers through higher earnings, and the needs of agricultural employers through increased productivity and decreased uncertainty over labor supply."[1] One such recommendation was that "[f]armworkers should be afforded the right to organize and bargain collectively . . ." We believe, as the mostly Republican authors of the report suggested, that improving wages and working conditions and increasing farmworkers' legal protections would help attract and retain current workers in the farm labor force and end chronic employee turnover.

We also want to have serious discussions about the future of the work force upon which American agriculture and American consumers depend. First and foremost, we seek an end to the status quo of poverty and abuse; we should not continue to treat farm workers as second-class workers. Our number one priority is reform of our immigration process that includes a workable legalization program for the one million or more farm workers who are currently working in the fields and their immediate family members with a roadmap first to permanent resident status, and then to citizenship. We believe that farm workers who harvest our food and feed us deserve at the very least the right to apply for permanent legal status.

To the extent a new path is needed to bring professional farm workers from abroad to this country, these workers should be accorded equality, job mobility, strong labor and wage protections, and an opportunity to earn immigration status leading to citizenship. We have seen Europe's failed experiment of second class legal status. We believe that

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[1] *Report of the Commission on Agricultural Workers*, Executive Summary, p. xxiv, Washington D.C. November, 1992.

America is exceptional. Our agricultural system is just one more example of how America is exceptional, so we should honor the new Americans who continue to build our agricultural system as the heroes that they are for our country.

There are agricultural employers who will continue to need to have the security of a contract with farm workers in order to make sure they have the correct number of professional farm workers for the right period of time to do the work by the unpredictable schedule of a harvest. The H-2A program needs to serve the needs of both agricultural employers risking capital and their livelihoods and of agricultural workers who risk their lives and sacrifice their bodies. The H-2A program's labor protections evolved over decades in response to the harms posed by the Bracero program and the former H-2 program. The H-2A program's protections were primarily written by the Reagan Administration. The Department of Labor has been approving over 90% of employers' applications and we support efforts to make the system more efficient. But we're hopeful that we can all agree that any complaints about bureaucracy do not justify reducing the wages and job opportunities of US workers; or eliminating wage, housing, and transportation protections for professional foreign workers who we have invited to harvest our food.

We ask this subcommittee to support a new, comprehensive immigration process that grants current farmworkers and their family members a reasonable and prompt opportunity to earn legal immigration status and citizenship, and ensures that future workers are brought here in a manner that elevates farm work. By having such a system, we can ensure that we continue to have an agricultural industry that is the envy of the world – and honor all of the women and men who have built such an exceptional domestic food supply.

Mr. GOWDY. Thank you, Mr. Kashkooli.

The Chair will now recognize the Chairman of the full Committee, the gentleman from Virginia, Mr. Goodlatte, for his 5 minutes of questioning.

Mr. GOODLATTE. Thank you, Mr. Chairman, and thank you all for your excellent testimony.

Mr. Stallman, let me start with you. The fundamental basis of your guestworker proposal is a market-driven approach in which workers with portable visas could seek agricultural employment around the country. I certainly recognize and appreciate the need for that.

However, doesn't the risk exist that these guestworkers will seek illegal employment outside of agriculture? And if that is the case, doesn't your proposal depend upon the existence of a mandatory E-Verify to ensure that guestworkers can't get jobs outside of agriculture?

Mr. STALLMAN. Yes, we have readily acknowledged that there has to be a system and process for monitoring these workers to be sure they are meeting the requirements of their work status, and E-Verify is definitely a way to do that.

Mr. GOODLATTE. And I say this not to punish these workers. I say this because this is a balance that we are trying to find between the interests of American workers and workers that we need because there is a shortage, as Mr. Kashkooli acknowledged. If you have 2 million workers in agriculture, and 600,000 of them are United States citizens, obviously there is a big need for non-U.S. citizens. We would like to get as many U.S. citizens into this area as possible, and if it is a market-driven approach where you are paid a fair market wage, we would like to see that accomplished.

But we also need to have a system where people come, and then don't go into other sectors of the economy and compete with U.S. workers in areas where they are willing to work and take the jobs and undercut the wage rate in that area. That is a separate issue from what happens to them long term, and I would argue that there will be a number of different ways where people who have this opportunity could ultimately find other opportunities. They might marry a United States citizen. They might get an education and petition for a job that requires more skill, and that is not to say that this is not skilled work, but more skill that would enable them to qualify for a different type of work with a green card.

But that is a separate thing from a temporary worker program that is needed, and if you don't have a mechanism to allow them to come here, work, send money home to their families and so on, you're going to find that you have a system where you are constantly replenishing a huge number of people, over 1 million a year. If they do it for several years, it might be several hundred thousand new people a year that you would have to then be providing a green card.

So we need to have, if we are going to do a broader base, some call it comprehensive immigration reform, we need to have a component here that will work for this industry that is not only heavily dependent upon these workers, but also heavily competitive with international competition. Food can be produced in lots of different countries around the world.

So designing something that works for agriculture is a critical part to designing something that works for a solution to this entire problem.

Let me ask you also, Mr. Stallman, do you believe that meat processors and fruit and vegetable canners, which are not in the fields—they have raised that product, they have harvested that crop and now brought it into a processing plant—do you believe they also should have access to a new guestworker program?

That is directed to you, Mr. Stallman.

Mr. STALLMAN. I am sorry. I thought that was Mr. Carr. We, in our proposal, talk about extending our program up the chain for basically unfarm packing facilities. When you get into the more advanced food processing and processing facilities, in fact, a lot of those entities, particularly in the livestock sector, have not wanted to be part of the agriculture program, and those sectors generally have a different labor need and different labor conditions than what we do on the farm because it is permanent work, for the most part it is indoor work.

Mr. GOODLATTE. Right, but there are certain farm works—for example, if you have a dairy farm, your work is not temporary. It can be indoors because those dairy parlors are indoors. So there is sort of a transition there between the temporary field workers that we definitely recognize, and the traditional H-2A worker program is not well-designed, but is it is designed to address, moving to farms that produce a product every day of the year, milk in this instance, to folks who take that product off the farm and further process it. If you visit those facilities around the country, you will find that there is a need for workers in that area that may be just as great as in the farming area.

Mr. STALLMAN. We are basically using the current definitions in our proposal for what constitutes a——

Mr. GOODLATTE. Would you be open to a broader definition to try to address this problem from a broader standpoint?

Mr. STALLMAN. I think I would leave that to those particular industries and those particular entities to come up with that.

Mr. GOODLATTE. Okay. Well, let me ask Mr. Brown and Mr. Kashkooli.

Mr. BROWN. Thank you, Chairman Goodlatte. As you know, in our industry, we look for a more permanent employee. But as far as a temporary visa program to help with our labor needs, particularly in times when the economy is doing quite well and it is difficult to attract labor, we would be very open to a new visa category for employees for, say, a 24- to 36-month period. When you think of the up-front investment you have made in time and training and the thousands of dollars, we would certainly be open to that and support such a move forward.

Mr. GOODLATTE. Mr. Kashkooli?

Mr. KASHKOOLI. Sure. I think in terms of dairy, it is clear there is a case to be made there. In terms of packing houses, I think we are more comfortable with the existing definitions. I think for us, there are, in fact, a lot of ways to do this. What is important is that there are certain guideposts. There are 600,000 farm workers now who are U.S. citizens and permanent legal residents we are talking about, we hope. All of us are talking about taking the existing workforce who does not have legal status and allowing them to earn legal status.

So the three things in terms of just guideposts is, first, we just cannot hurt the job opportunities for those people, and that would be true if it was in packing houses as well. Second, we have got to therefore be concerned about what does recruitment look like so that those people know about the work. And third, we need to be learning about wages.

I have heard that the current wage rates are artificial. We do believe they are artificial. We believe they are artificially low. The majority of the workforce doesn't have legal status, and therefore the wages have been artificially depressed in any real market.

Mr. GOODLATTE. Well, let me just interrupt you there. Do you believe that if we had a system where they had now legal status in the United States, whatever that might be, but they had legal status, and as Mr. Stallman describes, they have the ability to leave a job where they feel they are being treated unfairly, and they have the ability to move from farm to farm without having an H-2A petition filed for each and every farm location, if they had that, their wages might well go up, might it not, under a market-driven approach? As opposed to having a bureaucracy trying to figure out what that wage should be, which is what we do right now.

Mr. KASHKOOLI. Right. You may be surprised to know that we believe that private citizens acting collectively can be more effective than government regulation.

Mr. GOODLATTE. And I am glad to hear that. I agree with that.

Mr. KASHKOOLI. Great. I thought so. What President Stallman described, actually, sounds right. But the problem here is the written proposal that they have proposed does not do that. In their written proposal, there is an ability to tie a worker to a contract and have their visa impacted by that contract. So what we would be in favor of is two programs, one truly free market, and I want to get to that in just a second; and second, a contract program that is either H-2A or modeled after the protections of H-2A, which, after all, were a compromise originated by President Reagan.

And for the employers that need the security of knowing that a worker needs to show up exactly at that date and for however long the season is, knowing the weather variations, they are probably going to continue to need to use that contract program and then connect themselves to a set of government protections for all of the historic reasons that have had to take place.

On the free market, we think that makes a lot of sense. We want to make sure that it is not an artificial free market, so there should not be an endless supply of minimum-wage labor. That is not a truly free market. It should not be an unlimited supply. So there needs to be some kind of cap. There really does need to be portability. A worker really does need to be able to move. They need to have equal labor rights. There cannot be an incentive to hire that person over the other people who are working in the United States, and there needs to be some kind of roadmap to citizenship, we believe.

And the reason is because, as Chairman Gowdy just mentioned in referencing that commercial, the people who are harvesting our food which we eat every day, it is a euphemism to call them guestworkers. These are the new Americans who are working our land and feeding us. That is honorable, sacred, beautiful work. And to

say to the people who do that work—we believe that the people who do that work should be able to, at least at some point, if they are not in fact temporary, if they in fact are coming back year after year, at least be able to earn the right to apply for legal status.

Mr. GOODLATTE. Both Mr. Stallman and Mr. Kashkooli offered good contributions here to something that needs to be resolved.

My time has long expired. I think we have a vote pending.

Mr. GOWDY. I thank the Chairman.

I would now recognize the Ranking Member, the gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. Before asking my questions, I would like to ask unanimous consent to put into the record statements from the Western Growers, from Farmworker Justice, the Southern Poverty Law Center, California Rural Legal Assistance, Global Workers Alliance, and several others, if I could.

Mr. GOWDY. Without objection.

[The information referred to follows:]

U.S. House of Representatives

Statement for the Record at the Committee on Judiciary, Subcommittee on Immigration Policy and Enforcement

Hearing on "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program"

Tom Nassif

President and CEO of Western Growers

Tuesday, February 26, 2013

2:00 p.m.

Chairman Gowdy, Ranking Member Lofgren and members of the committee, thank you for the opportunity to submit the following statement for today's hearing. Western Growers Association is an agricultural trade association headquartered in Irvine, California. Western Growers members are small, medium and large-sized businesses that produce, pack and ship almost 90 percent of fresh fruits, nuts and vegetables grown in California and approximately 75 percent of the fresh fruits, nuts and vegetables grown in Arizona. Our members produce in – and directly contribute to the economies of – 29 states overall. In total, our members account for nearly half of the annual fresh produce grown in the United States, providing American consumers with healthy, nutritious food.

Agricultural producers across the country want a legal and stable workforce. My statement will lay out the importance of agriculture to the U.S. economy, unique concerns and challenges the specialty crop industry particularly in the west faces, and the opportunity and need to move forward on a solution to the current labor crisis. We are at a critical moment in our nation's immigration policy, let's pave a new path forward and not repeat mistakes of the past.

Agriculture is Critical to the Health of the U.S. Economy

With 81,500 farms and ranches, California agriculture is a $43.5 billion dollar industry that generates at least $100 billion in related economic activity. Agriculture contributes $10.3 billion to Arizona's economy. The United States fruit, vegetable and floral industry contributes over a half-trillion dollars annually to the nation's economy.

Not only is agriculture's role in maintaining a safe and secure food supply vital to our economic recovery, it is critical to the strength of rural America. Congress' failure to pass immigration reform, combined with a diminishing labor supply, threats due to I-9 audits by ICE, and mandatory E-Verify legislation emerging at the state and the federal levels, it is clear that U.S. agriculture will be decimated without a workable mechanism to hire and continue to employ the labor we need. The current debate regarding immigration reform provides the best opportunity in years to finally get the solution right for agriculture.

Demographics of U.S. Agricultural Work Force

There are about 1.8 million people who perform hired farm work in the United States. Approximately 1.2 million or more of these people are not authorized to work here. Studies demonstrate that for a variety of reasons including the seasonal nature of the work, the difficulty of the work, and the unique skill set required for many agricultural jobs, unemployed Americans are unwilling to work in the labor intensive agriculture sectors—produce, dairy, nursery, livestock. The labor force in each of these sectors is overwhelmingly made up of foreign born employees.

In the late 1990's, a multi-county welfare-to-farm work program was launched in California's Central Valley. Regional unemployment ran 9 to 12 percent; in some localities, unemployment exceeded 20%. State and county agencies and grower associations collaborated to identify cropping patterns, labor needs, training, transportation, and other factors impacting employment levels. Out of over 100,000 prospective "welfare to work" placements, three individuals were successfully placed. In the aftermath of the program, several employment agencies stated – in writing – that they would no longer seek to place the unemployed in seasonal agricultural work because it suffered from such a low success rate, and that seasonal agriculture was "not a fit" for these individuals.

In 2010, the United Farm Workers Union launched the "Take Our Jobs" campaign, and a media blitz which included national coverage. As of mid October, which generally marked the end of the growing season and the campaign, 10,021 people had inquired about jobs in the fields, yet only nine people had taken jobs in the fields. Most of them quit after a few days.

Some might be tempted to consider wage rates as an additional factor that might discourage unemployed American workers from seeking agricultural jobs, but the facts do not bear this out. According to a November 2012 USDA farm labor analysis, wages for

field workers averaged $10.71 per hour. Piece rate wages in certain commodities can be significantly greater. Yet, for a variety of other factors, American workers do not seek nor stay in farm jobs, even today with unemployment hovering at 7.8 percent. The fact is the majority of farm jobs in this country must be filled by foreign workers.

Challenges to a Secure, Stable Workforce

The Immigration Reform and Control Act (IRCA) mandates procedures for employers to verify the employment eligibility of their workforce. Failure to comply with IRCA can lead to substantial civil penalties and, in some cases, criminal charges. However, employers are prohibited from questioning the documents the employee presents if they appear to be valid. When U.S. Immigration and Customs Enforcement (ICE) conducts workplace audits, the employees' work authorization is scrutinized and run through DHS databases, often times with severe consequences for agricultural employers.

The Obama Administration has made worksite enforcement a priority, substantially increasing the number of ICE audits and investigations of employers' work authorization practices. In fiscal year 2011, the federal government initiated 2,496 audits of employer's I-9 records, up dramatically from past years, and 383 of them received final fine notices totaling more than $10 million. Also, criminal charges were brought against 221 owners, managers, and supervisors. In fiscal year 2012, ICE initiated over 3,000 audits for the first time ever. With offices in all 50 states and more than 20,000 employees, there is no indication that ICE will be backing off workplace enforcement any time soon. Although egregious actors are most often said to be the intended target of these enforcement actions, innocent employers who unknowingly hire unauthorized workers are also the subject of immigration enforcement activities which are costly and disruptive.

Agriculture and food processing are among a select group of industries that are receiving the most attention.

For example, in March of 2011, 85 percent of a California wholesale nursery's year round workforce had to be terminated at the peak of their Mother's Day floral season when DHS determined their work documents were false. The status quo is not working.

H-2A Does Not Work

Right now, the only program we have available to us to secure legal workers is the H-2A temporary agricultural visa program. As has been well-documented, it is utterly failing the agricultural industry including Western Growers members.

For example, H-2A is used to address only 2-3 percent of U.S. agriculture's labor needs. And even then, a 2011 nationwide study of H-2A users commissioned by the National Council of Agricultural Employers that was presented to the House Subcommittee on Workforce Protections in September 2011, reports that 72 percent of employers had late arriving employees, on average, 22 days after the date of need. In 2010, employers in the H-2A program reported $320M in losses due to their inability to get the workers they needed or to get workers when they were needed.

The Department of Labor appears, at best, indifferent to agriculture's needs. The Western Growers members who farm in Yuma, Arizona hire Mexican H-2A workers who live in Mexico and commute to work. Many of these H-2A employees prefer to return home after each work day. These employees decline to use the approved housing that is required to be provided to them by the growers under H-2A regulations. Despite repeated requests for an adjustment to the requirements, the Department of Labor has taken the position that employers must make the housing available for the H-2A commuters *prior* to obtaining employer H-2A certification, regardless of whether the H-2A workers intend to use it. This imposes a significant cost on the growers without affording any benefit to the intended H-2A worker beneficiaries.

H-2A does not afford any ability for workers to follow cropping patterns because their status is tied to a single employer. In a state like California, produce is a year-round business with lettuce being harvested in Salinas in the spring, summer, and fall; berries in Ventura county through the summer and fall; tree fruit and table grapes in the San Joaquin Valley in the summer months; citrus in the central San Joaquin Valley from late fall to early spring; and vegetables in the Imperial and Coachella Valley's during the winter months. Additionally, significant production takes place in less rural area, where constructing farm worker housing is impossible based on local zoning. H-2A was never designed for this type of market.

H-2A is administratively burdensome, implemented ineffectively, and is not responsive or flexible enough to meet the labor needs of U.S. agriculture.

The Department of Labor also appears to target growers who use H-2A with wage and hour investigations. 8 percent of H-2A employers report that they were audited before they participated in the program, but 35 percent report being audited since entering the program.

As noted earlier, the H-2A program is used by a small percentage of agricultural employers. We are talking about the need for a program that will work for the remaining 97 percent of us and the greater than one million people we need to hire each year.

Americans Understand the Predicament of Agriculture and Support a Solution

Last year, Western Growers released a nationwide poll conducted by The Tarrance Group, a well known and respected national polling firm. Questions were asked of 1,000 likely voters to gauge voter attitudes towards immigration reform with a particular focus on a workable program for agriculture. For years, we have made the case that agriculture has unique labor needs and needs a solution to address those concerns. Americans, across

political lines, agree with this assertion. In fact, when asked whether they would support legislation that includes many of the components agriculture considers important, 70 percent approved of such a proposal, with 64 percent responding that they'd be more likely to vote for a candidate who supported such legislation.

While many Americans are anxious about the economy and jobs, very few consider immigrants that do farm work a cause of unemployment. It is clear that American voters aren't caught up in the harsh rhetoric claiming immigration reform should be about punishing hard working farm workers or leaving American family farmers without a work force. Americans know that we need a practical and streamlined national program that allows immigrants to come out of the shadows to work here on our farms. The fact of the matter is that Americans know farm work is and will continue to be done by foreigners, and they accept that reality.

More than 85 percent of survey respondents agree that both creating these legal channels for temporary immigrant farm workers and developing the ability to register and track them will improve the nation's security and allow for better control of the border.

Passage of immigration reform legislation with a workable solution for agriculture seems like an economic and political no-brainer, providing all employers with certainty about the legality of their workforce and at the same time providing stability and certainty to agricultural employers.

Steps Toward A Solution

Western Growers is a founding member of the Agriculture Workforce Coalition (AWC), a historic and broad coalition of agriculture producers representing a diverse group of commodities and covering every region of the country. Since its launch in January, the AWC membership has continued to grow, with regional groups and particular commodity groups adding their support to this critical effort.

The AWC partners universally agree that we need a new model for our future agriculture worker program. Even among those who have used H-2A, there is agreement that this program is broken beyond repair. We are pleased that Bob Stallman, President of the American Farm Bureau Federation (AFBF), another founding member of the AWC is able to testify on the panel today. The similarity between our statements is a testament to the unity within our coalition.

In order to move us closer to a solution to meet our labor needs, we must consider a new approach to an employee visa program: one that resembles the current labor market. The number of visas would be determined in a market driven fashion.

A workable program would also provide farm workers with the same protections as U.S. workers with respect to all employment related laws and employment taxes. Thus there would be no reason for an employer to prefer a temporary foreign worker over a U.S. worker. The perception of such preference is often a criticism levied at temporary worker visa programs. In reality, employers generally prefer to hire local workers first rather than rely on long distance migrants.

The program would include incentives for workers to return home after the terms of their visa or work obligations are completed. Additionally, workers' visa status would be synced with an E-Verify system, guaranteeing that someone with a visa to work in agriculture would not be able to gain legal employment in another sector. Additionally, we would like to see this program administered by the Department of Agriculture with enforcement of labor laws handled by the Department of Labor.

It is also imperative for this program to address, not only the need for future employees, but also the need to retain our experienced employees, the people who are already here. Our farms could not function without these valuable farm employees; yet most work without proper immigration status. Any attempt to address the farm labor problem in this country needs to provide a vehicle for these skilled, hard-working and valuable immigrants

to continue working in agriculture legally. This is critical to ensuring a stable agricultural labor force.

We hope that this Committee and the Congress can quickly come to an agreement on a workable solution for agriculture.

Conclusion

The labor emergency affecting American agriculture threatens not only farmers and rural communities' livelihoods; it puts at risk our stable and reliable food supply. If there are indeed 1.2 million or more falsely documented workers in agriculture and they were no longer able to work, then the 2 nonfarm jobs that they create in the related economy will also be lost. That is a loss of 3.6 million jobs.

There is a workforce willing to grow and harvest crops, but it exists in other countries. Ensuring a stable and legally authorized farm workforce is about growing jobs in the United States, promoting economic activity in both rural and urban communities. It's also about avoiding a dependency on foreign food supplies. With less domestic production, more food will have to be imported, compromising the safety and security of our food supply since only 1-2% of imported food is inspected.

There is not a person in our country that is not connected to this problem. If you eat fresh produce, drink milk, grill steaks or purchase plants for your yard, you are benefiting from the hard work of a foreign agricultural worker. And do not forget that 90% of those working illegally in this country do not work in agriculture.

I urge the Members of this Committee who are concerned about the survival of agriculture in your states to work together and reach out to your colleagues to craft a workable bipartisan solution to this important economic issue.

Foreign workers will harvest the produce Americans eat. The question is whether they will do so in the United States or abroad. The absence of a workable agricultural labor program will answer this question and it will not be in the best interest of America.

In a Wall Street Journal Op-Ed from last year, I wrote about the way Congress worked in 2006 to create a new program for Major League Baseball to secure foreign-born workers. I will repeat what I said there:

> *While the baseball industry can now smooth the way for its work force, American agriculture is in dire need of the same guest-worker reform. How is it that elected officials can move with speed to clear the way for one specialized group of foreign workers and not find a way to fix a broken and unworkable system for another group? Americans can survive without international guest workers who swing a bat, but we would not survive long without guest workers who hand-cut our fresh vegetables and fruit.*
>
> *If the president and Congress can find a solution for baseball, surely they can find a solution for agriculture.*

On behalf of Western Growers, I am appreciative of this Committee's willingness to examine the need various industries have for guaranteeing a legal workforce, including U.S. agriculture. Thank you for the opportunity to submit this statement. I look forward to working with the Committee as this process moves forward, and testifying regarding some of these issues at a future hearing.

Testimony of Farmworker Justice
Before the House Judiciary Committee
Subcommittee on Immigration and Border Security
"Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program"

February 26, 2013

Farmworker Justice submits this statement for inclusion in the record of the February 26, 2013 House Judiciary Subcommittee on Immigration and Border Security's hearing on "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program." For thirty years, Farmworker Justice has engaged in policy analysis, education and training, advocacy and litigation to empower farmworkers to improve their wages and working conditions, immigration status, health, occupational safety and access to justice. Since its inception, Farmworker Justice has monitored the H-2A program throughout the country and analyzed proposals for policy changes.

Farmworker Justice welcomes efforts to reform the nation's immigration system and seeks to ensure that agricultural workers and their families are treated fairly and consistently with our nation's democratic and economic freedoms.

Our nation's broken immigration system, labor laws that discriminate against farmworkers, and the labor practices of many agricultural employers have combined to create an agricultural labor system that is unsustainable and fundamentally unfair to our farmworkers. The resulting turnover in the farm labor force means that now more than one-half of the approximately 2 million seasonal farmworkers lack authorized immigration status.[1] The presence of undocumented workers depresses wages for all farmworkers, including the 600,000 to 1 million U.S. citizens and lawful immigrants in agriculture. But undocumented farmworkers are not leaving and they are needed.

Congress should enact legislation that reforms our broken immigration system and creates a roadmap to citizenship for the 11 million aspiring Americans, including farmworkers and their families. Proposals for anachronistic guestworker programs should be rejected as inconsistent with America's economic and democratic freedoms. Any needed future workers from abroad must be afforded the same legal rights as U.S. workers and should be given the opportunity to earn citizenship. Immigration reform should be a stepping stone toward modernizing agricultural labor practices and treating farmworkers with the respect they deserve.

The Current Landscape: Greater Protections Needed for Farmworkers

The treatment of U.S. farmworkers (U.S. citizens and lawful resident immigrants) in this country is unreasonable and unsustainable. As in generations past, today's farmworkers experience high rates of unemployment and low wages. Poverty among farmworkers is more than double that experienced by other wage and salary workers.[2] Farm work is one of the most hazardous occupations in the country, with routine exposure to dangerous pesticides, arduous labor and

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[1] Findings from the National Agricultural Workers Survey (NAWS) 2001 – 2002: A Demographic and Employment Profile of United States Farm Workers, available at http://www.doleta.gov/agworker/report9/chapter1.cfm#eligibility.
[2] *See* Kandel, W. Profile of Hired Farmworkers, A 2008 Update, United States Department of Agriculture, Economic Research Report, No. 60, July 2008. Available at http://www.ers.usda.gov/Publications/ERR60/.

extreme heat. Despite these working conditions, farmworkers are excluded from many labor protections other workers enjoy, such as many of the OSHA labor standards, the National Labor Relations Act, overtime pay, and even the minimum wage and unemployment insurance at certain small employers.

Such poor conditions and discriminatory laws have resulted in substantial employee turnover. In the absence of an immigration system that functions sensibly to control our borders and to provide immigration visas when workers are needed, most of the newly hired farmworkers have been undocumented. Still, conservatively estimated there are at least 600,000 legally authorized U.S. workers in the agricultural labor force.[3] Improving wages and working conditions, increasing farmworkers' legal protections, and implementing the other recommendations made by the Commission on Agricultural Workers, such as affording farmworkers the right to organize and bargain collectively, with appropriate protections, would help attract and retain U.S. workers in the farm labor force.[4]

Employers already have an agricultural guestworker program available to then, the H-2A program. and its provisions do not need to be expanded because – unlike most other visa programs -- it has no limit on the number of guestworkers that may be brought in annually.

The H-2A program's wage and other labor protections developed over many decades in response to U.S. workers' lost job opportunities and depression in wage rates and other job terms under the Bracero program and former H-2 program. These past programs and the current H-2A program have not only harmed U.S. citizens and lawful permanent residents, but have taken undue advantage of thousands of vulnerable guestworkers. Stronger protections and enforcement are needed.

The experiences under the Bracero program and former H-2 program resulted in several important safeguards that are intended to protect U.S. workers' jobs and labor standards and prevent exploitation of vulnerable guestworkers. These include:

- Minimum wage protections: Under the H-2A program, employers must pay the higher of the state or federal minimum wage rate, the local prevailing wage, or the adverse effect wage rate (the average wage of nonsupervisory field and livestock workers as determined by a USDA survey). Wage protections are necessary for several reasons. First, without them U.S. workers would be competing against job applicants who would be willing to work for much lower wages than U.S. workers due to the lower costs of living and lower earnings in

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[3] Estimates of the number of farmworkers vary depending on the methodology, ranging from 1. 8 million to 2.4 million. We assume 2.0 million farmworkers. If only 30% of farmworkers are citizens or authorized immigrants, then there are 600,000 U.S. farmworkers. . Official government statistics indicate a rate closer to 50%, amounting to roughly 1 million documented farmworkers. See Kandel, at App. 2, p. 56. Martin, P., "Hired Farmworkers," Choices Magazine, 2d Qtr. 2012, http://www.choicesmagazine.org/choices-magazine/theme-articles/immigration-and-agriculture/hired-farm-workers

[4] *Report of the Commission on Agricultural Workers*, Washington D.C. November, 1992. *See also* the testimony of Robert A. Williams, Director of Florida Legal Services' Migrant Farmworker Justice Project, before the House Judiciary Committee, subcommittee of Immigration Policy and Enforcement, Hearing on H.R. 2847, the "American Specialty Agriculture Act," September 8, 2011 (incorporated herein by reference). Available at http://judiciary.house.gov/hearings/pdf/Williams%2009082011.pdf.

their home countries. Second, because H-2A workers are tied to their employers by their visas, they lack economic freedom to switch employers and are unable to bargain for higher wages. Third, under the H-2A program, the employer need not offer more than the minimum wage required by the H-2A program even when there are U.S. workers available to accept the job if the wage rates were higher. A worker who asks for a higher wage rate can be deemed to be "unavailable for work" and the available job can be filled with a guest worker at the minimum required wage. For these reasons, it is necessary to require H-2A employers to offer and pay a market-based wage.

- Job preference for U.S. workers. The longstanding "50% rule" is the principal mechanism to give U.S. workers a meaningful opportunity to obtain jobs with employers who claim they need guestworkers to fill labor shortages. The 50% rule requires employers to hire qualified U.S. workers who apply for work until the first half of the season has elapsed. Due to hiring patterns and the nature of agricultural production, which often involves varying start times and a gradual development leading up to the peak season, it makes perfect sense to ensure that qualified job applicants are hired even after the first "official" day of work. A 1986 Congressionally-mandated study concluded that the 50% rule served the purpose of protecting American jobs and did so with no significant burden to employers.
- Minimum work guarantee. The "three-fourths guarantee" requires the employer to identify the planned contract period and then provide working hours for at least ¾ of that period, or pay wages for any shortfall. This protection discourages employers from recruiting an over-supply of workers and provides some reasonable minimum earnings assurances for foreign and domestic migrant workers who spend the time and resources to travel long distances to accept employment.
- Prohibition against workers paying for jobs. The H-2A program rules prohibit employers or their recruiters from requiring workers to pay recruitment fees to obtain employment. Frequently, H-2A guestworkers pay for the opportunity to be hired and enter the U.S. in debt and desperate to retain their jobs under any circumstances.
- Housing: Employers must provide housing that meets safety standards at no cost to the worker. Long-distance migrant workers, especially those from other nations, have little ability to arrange for housing, ensure that housing is safe, or to afford the cost of housing in the U.S.
- Transportation: Workers who complete one-half the season are entitled to reimbursement of their in-bound travel costs; workers who complete the season are entitled to their outbound costs. Transportation expenses are a large burden for low-paid farmworkers working for a few weeks or months. This payment also helps ensure that workers can afford to return home.
- Workers' Compensation: Employers soliciting H-2A workers must provide workers' compensation insurance for occupational injuries (but not health insurance coverage).

Unfortunately, even with these protections, violations of the rights of U.S. workers and guest workers by H-2A program employers are rampant and systemic. Included with our testimony is our report, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers.* Our report explains that the H-2A program's structural flaws create a system in which many employers prefer guestworkers over U.S. workers because of several factors, including (1) H-2A workers may only work for the employer that obtained their visa, must leave the country when their job ends, and must hope that the employer will request a visa for them in a following year. Because of their dependence on their employer, H-2A workers are vulnerable to abuse and are

unlikely to challenge illegal conduct, join a labor union, or demand better job terms; (2) H-2A workers typically arrive heavily indebted due to travel costs and recruitment fees and are desperate to work to repay their debt; (3) guestworkers will work at the limits of human endurance for low wages, while U.S. workers seek more sustainable productivity expectations; (4) the H-2A employer does not pay Social Security or Unemployment Tax on the H-2A workers' wages, but must do so on the U.S. workers' wages; (5) H-2A workers are excluded from the principal federal employment law for farmworkers, the Migrant and Seasonal Agricultural Worker Protection Act; and (6) while recruiting in foreign countries, employers select workers based on age and gender, which is illegal inside the United States.

The H-2A workers' restricted, "non-immigrant" status not only deprives them of economic bargaining power but also prevents them from acquiring political power and influencing government policies that directly affect them. No matter how many years H-2A workers return for agricultural work, they never obtain the right to remain in the U.S., become citizens, or exercise the right to vote. Government officials represent the interests of citizens, not guestworkers. Thus far, relatively few H-2A workers have been able to join labor unions that can represent them in policy debates.

These factors have led to tremendous obstacles for U.S. workers who seek jobs at H-2A employers. As our report shows, H-2A employers discourage U.S. workers from applying for H-2A jobs, refuse to hire them or subject them to such unfair working conditions that workers either vote with their feet or are fired. Once the one million or so undocumented farmworkers obtain legal immigration status and employment authorization, their job opportunities and labor standards will need to be protected as well.

The Bush Administration, in its last few days, sought to appease growers by making drastic anti-worker changes to the H-2A program regulations, slashing wage rates and job protections for U.S. and foreign workers. We commend Former Secretary of Labor Solis for restoring the H-2A protections that the Bush Administration unconscionably removed. The restored protections have evolved over several decades and were issued in 1987 by conservative President Reagan. For example, the principal wage protection requires H-2A employers to recruit U.S. workers using at least the average hourly wage paid to nonsupervisory farmworkers in their region, as determined by U.S. Department of Agriculture. The Bush Administration's formula was fundamentally flawed in several ways. Among other things, it set most H-2A wages at the average of the lowest paid one-third of farmworkers in a local area, resulting in pay cuts of $1 to $2 per hour for thousands of U.S. and H-2A workers. For the 2009 calendar year, our estimate of the total wage loss for all H-2A workers was around $121.2 million combined with about $4.7 million in lost transportation reimbursement, or about $1,900 per worker, a significant portion of the per capita GDP in many Mexican states.

We also commend DOL's increasingly effective oversight of H-2A applications, as required by the statute, which has led to the rejection of unlawful job terms that discourage U.S. workers from applying for H-2A jobs. One example is a contract clause that waives farmworkers' right to bring lawsuits for illegal employment actions and requires them to accept arbitration instead. Nonetheless, DOL's resources are limited, and, as detailed in our report, violations of basic program requirements are rampant, harming both U.S. and H-2A workers. Our report recommends strengthening protections and enforcement.

Many employers' complaints that the H-2A program is unworkable and overly bureaucratic are due to a dislike for DOL oversight and the modest standards that are critically important in protecting U.S. workers' jobs and labor standards, such as the wage requirements. Contrary to complaints about the program, in FY 2012, DOL approved 96.8% of applications.

Some growers complain about DOL delays in processing their H-2A applications even though they caused the delay by submitting illegal job terms. DOL has made many improvements to improve the efficiency of processing applications, including creating an electronic filing system, putting into place an H-2A Ombudsman, publishing an employer handbook and public FAQs and corresponding with employers by email rather than mail. If necessary to accommodate increased numbers of applications, the government could increase program fees and expand its staff.

It makes no sense to bring in hundreds of thousands of new guestworkers – under either the H-2A program or a new guestworker program -- when there are already hundreds of thousands of undocumented farmworkers, in addition to citizens and documented immigrants, performing agricultural work productively. More, not fewer protections are needed to improve farmworker wages and working conditions and prevent all too common abuses of farmworkers.

The Farmworkers of the Future: An Immigration System Worthy of Our Democracy

The immigration policy debate has always featured demands by powerful agribusiness interests for new, exploitative guestworker programs and devastating, anti-worker changes to the H-2A program. The present debate is no exception. We strongly oppose these demands.

Guestworker programs are anathema to American values not only because they harm U.S. workers but because they take advantage of foreign workers by depriving them of economic freedom and denying them the opportunity to participate in our democracy. 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.

Any program to address future labor needs should meet several criteria:

1) A roadmap to immigration status and citizenship: If future farmworkers from abroad are needed, they should have a meaningful opportunity to become immigrants and citizens. While some foreign workers may choose to work only seasonally and not remain permanently in the United States, they should have the chance to become full-fledged members of the nation that they help feed. The H-2A program should be modified to enable its participants to earn immigration status and citizenship. Farmworkers should also have a meaningful right to live with their family members: the United States should not encourage family separations.

2) Strong and equal labor protections: U.S. farmworkers should be included in the same labor protections that cover other workers, including the right to join a labor union free from retaliation. Guestworkers should be covered by those protections as well. Because temporary foreign workers hold a restricted status that limits their ability to bargain for better labor standards, strong protections are needed to prevent exploitation of foreign workers, beginning with the recruitment in their home countries. Strong protections must also preserve U.S. workers' job opportunities and prevent depression in wage rates and other job terms. Effective government oversight is also imperative due to frequent violations of the labor protections in guestworker programs.

3) True economic freedom and mobility: Like any other industry, growers should have to compete in the marketplace to attract and retain workers by paying competitive wages and providing desirable working conditions. Any visa should provide workers with true visa portability so they can move among employers and freely bargain for better jobs.

4) Sensible limits: The H-2A program has no cap on the number of visas that employers may obtain each year. It does contain important economic disincentives that discourage employers from seeking more workers than they need in an effort to distort the labor market. The H-2A program and any program in the future should contain a cap tied to true market needs to ensure that employers do not have unlimited access to vulnerable foreign workers that could easily lead to job displacement and lower wages for U.S. workers.

A Practical, Realistic Solution is Possible

Now is the time to move forward on immigration reform. Compromise among legislators, farmworker organizations and agricultural employers has occurred before and with hard work can occur again. Farmworker Justice is committed to immigration reform that empowers farmworkers to improve their inadequate wages and working conditions. For today's and tomorrow's farmworkers, a roadmap to immigration status and citizenship, combined with strong labor protections and economic freedom, is essential to these goals.

Statement of the Southern Poverty Law Center
Submitted to the Subcommittee on Immigration and Border Security
Committee on the Judiciary
U.S. House of Representatives
February 26, 2013

Thank you for the opportunity to submit comments on the important issue of the H-2A temporary foreign agricultural worker program and to supplement the record of the February 26, 2013, House Subcommittee on Immigration and Border Security hearing on "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program."

We welcome the recent efforts to reform our immigration system, but we believe that temporary foreign worker programs cannot be the solution to the future flow of immigrants to this country. Current guestworker programs are rife with human and civil rights abuses and are contrary to our nation's core values of democracy and fairness. The H-2A guestworker program is structurally flawed and should not be the model for any future agricultural guestworker programs.

The Southern Poverty Law Center (SPLC), known for its innovative civil suits against hate groups, launched the Immigrant Justice Project (IJP) in 2004 to protect the rights and dignity of immigrants in the Southeastern United States. In its nine-year history, IJP has represented more than 10,000 immigrants, including several thousand guestworkers, in lawsuits aimed at protecting their workplace rights from wage theft, discrimination, illegal recruitment practices and other abuses.

Last week, the SPLC released a report titled *Close to Slavery: Guestworker Programs in the United States*, which provides a comprehensive assessment of the H-2 guestworker program.[1] This report represents the culmination of thousands of interviews with H-2 guestworkers and numerous class action lawsuits filed on their behalf over the past decade. It documents the rampant exploitation of foreign workers imported under the H-2 program and describes how this program also degrades the wages and working conditions of low-wage U.S. workers.

H-2 guestworkers frequently pay thousands of dollars for the opportunity to work in a low-wage job in the United States. Upon arrival, they often find themselves subjected to working conditions that violate labor and employment law, as well as civil and human rights. Bound to a single employer, deeply in debt, and without access to legal resources, H-2 guestworkers are routinely:

- Cheated out of wages;
- Forced to mortgage their futures to obtain low-wage, temporary jobs;
- Held virtually captive by employers or labor brokers who seize their documents;
- Subjected to human trafficking and debt servitude;

[1] *Close to Slavery: Guestworker Programs in the United States* is available at http://cdna.splcenter.org/sites/default/files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf.

- Forced to live in squalid conditions; and
- Denied medical benefits for on-the-job injuries.

When guestworkers complain about abuses, they often face blacklisting, deportation and other forms of retaliation. Moreover, government enforcement of the few protections that H-2 guestworkers are afforded is limited and often ineffective. As a result, H-2 guestworkers, who are lawfully working in this country, rarely have meaningful recourse for violations of their rights.

An SPLC case filed by a class of H-2A farmworkers illustrates many of the failings of the H-2A guestworker program. Starting in 2003, the Arkansas-based company Candy Brand brought in hundreds of Mexican H-2A workers each year to harvest and pack tomatoes. The workers each paid significant sums of money to cover visa and recruitment expenses for the opportunity to work for Candy Brand. Some of the workers paid an additional $1,000 in illegal fees to recruiters who extorted this payment by threatening to destroy workers' passports or commit violence against their families. After they arrived in the United States, Candy Brand routinely paid them less than the required Adverse Effect Wage Rate and denied overtime pay to the packing shed workers. In addition, the company never reimbursed the workers for their travel and visa expenses, as required by law. As a result, over the course of five years, the company cheated the workers out of more than $1 million in wages. After reaching a settlement in 2011, workers succeeded in recovering $1.5 million in back wages and damages for a class of more than 1,800 workers.

Unfortunately, the workers still have not received the money owed to them under the settlement. In 2012, Randy Clanton, one of the principle operators of Candy Brand, and now one of the operators of the newly formed family business known as Clanton Farms, LLC, the successor to Candy Brand, filed for bankruptcy along with Clanton Farms, LLC. The bankruptcy was filed primarily because Randy Clanton was unable to fulfill his obligations to pay the workers pursuant to the class action settlement agreement in the Candy Brand lawsuit. Despite the bankruptcy filing and ample evidence of worker exploitation presented in the lawsuit against Candy Brand, the U.S. Department of Labor continues to certify Clanton Farms for H-2A workers. Remarkably, Clanton Farms is still one of the top ten users of the H-2A program among employers nationwide. This lack of government oversight is especially unfortunate given that SPLC clients who still work at the farm report that the company continues to violate wage-and-hour laws.

Candy Brand is not simply a "bad apple" H-2A employer. The SPLC's longstanding experience representing H-2 workers has proven that violations of workers' rights are pervasive in the current H-2 program. The program is structurally flawed and inherently unfair to both U.S. and H-2 workers. It should not be expanded as a solution to the future flow of immigrant workers to our country. If the H-2 program is allowed to continue, it should be completely overhauled. Any new guestworker program should:

1. Use immigrant visas that create a roadmap to citizenship for foreign workers and their immediate families so they may eventually become full members of our society.

2. De-couple workers' ability to enter the United States from a particular employer. Like any other employee, workers should be allowed to change employers without sacrificing their visa status. Employers should rely on market forces – including paying market wages and providing desirable working conditions – to attract workers.
3. De-privatize the foreign labor recruitment market to eliminate fraud, extortion, debt servitude, discrimination, and other human rights violations.
4. Allocate visas to their most productive uses. There are possibilities other than the first-come-first-served model we use now – market-based systems, for example.
5. Ensure employers using a foreign worker program have sufficient capital to pay their employees the promised wages and to otherwise comply with labor and employment laws.

For more detailed solutions for reform of the H-2 guestworker program, please see *Close to Slavery: Guestworker Programs in the United States* at: http://cdna.splcenter.org/sites/default/files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf.

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WEAK LABOR PROTECTIONS, AND INADEQUATE US DOL OVERSIGHT, HAVE LED TO PERSISTENT WORKER EXPLOITATION IN THE H-2A PROGRAM IN CALIFORNIA

WRITTEN TESTIMONY
SUBMITTED
TO THE

SUBCOMMITTEE
ON
IMMIGRATION AND BORDER SECURITY
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FOR THE HEARING:

From H-2A to a Workable Agricultural Guestworker Program

February 26, 2013

The CRLA Foundation Receives No Funds from the Legal Services Corporation

I. INTRODUCTION

The California Rural Legal Assistance Foundation (CRLAF) is a public interest law firm representing low wage farm workers in rural California. In the last 30 years we have recovered millions of dollars in wages stolen from thousands of workers, including hundreds of thousands of dollars stolen from both US and H-2A workers by H-2A employers in California. Our current docket includes 1 pending case where we represent H-2A workers alleging violations of state and federal law. We collaborate regularly with legal services agencies that also represent California farm workers; they have 2 pending cases representing H-2A workers.

Our written testimony addresses the recent expansion of the H-2A program at a time when California is experiencing historic rates of high unemployment, and outlines continued abuses in the H-2A program here over the past dozen years.

II. DESPITE RECORD HIGH UNEMPLOYMENT IN CALIFORNIA, THERE HAS BEEN A SHARP RECENT EXPANSION IN THE USE OF H-2A WORKERS

During fiscal year 2012 *(10/1/2011 to 9/30/2012):* the US DOL Office of Foreign Labor Certification certified 3,089 H2-A workers for California.[1] That is a sharp increase from fiscal year 2011, where 1,598 H-2A workers were certified by the OFLC.[2]

Currently, there are at least 1,000 H-2A workers employed in California, and many of these workers are laboring in the important winter lettuce harvest in the Imperial Valley and near Yuma, Arizona.[3] This is notwithstanding that, according to the state EDD, 19,700 workers were unemployed in Imperial County in a peak employment winter month of December 2012 and the official unemployment rate was 25.5%[4]

2013 H-2A applications are also pending and/or have already been approved elsewhere throughout the state for: lettuce; avocados; vineyards; strawberries; wine grapes; apples; grapes; citrus; and lemons. Some of these applications are for summer harvest work in the Salinas Valley, where the most recent peak harvest unemployment data (in Monterey County, for June, July, August and September 2012) were:[5]

Month	Number of Unemployed	Unemployment Rate
June	23,100	9.7%
July	22,500	9.5%
August	21,400	9.1%
September	19,900	8.5%

[1] Email to CRLAF from California EDD, February 21, 2013
[2] US DOL, ETA, OFLC, FY 2011 Annual Report Performance Data
[3] Email to CRLAF from California EDD, February 21, 2013: "For Q1 FFY 2013, (10/1/2012 to 12/31/2012): OFLC certified 1,002 H2-A workers for California."
[4] State of California, EDD, Report 400C (Monthly Labor Force Data for Counties December 2012 – Preliminary)
[5] Ibid. Report 400C (Monthly Labor Force Data for Monterey County, June through September 2012)

Current unemployment rates for the California's Central Valley--where some growers are complaining about a tightening of farm labor supplies--are demonstrative of how little economic recovery there has actually been: US DOL recently reported the following unemployment rates in San Joaquin Valley counties in December 2012[6]:

Fresno County	14.9%
Kern County	13.5%
Kings County	14.4%
Madera County	13.9%
Merced County	17.2%
San Joaquin County	14.5%
Stanislaus County	15.0%
Tulare County	15.7 %

Even during a peak of harvest period last summer, e.g., last August 2012, these same counties had the following numbers of unemployed and unemployment rates[7]:

	Number of Unemployed	Unemployment Rate
Fresno County	62,500	14.0%
Kern County	49,000	12.7%
Kings County	8,500	13.5%
Madera County	8,500	13.0%
Merced County	17,200	15.8%
San Joaquin County	42,800	14.2%
Stanislaus County	34,100	14.5%
Tulare County	31,000	15.0%

Clearly, the recent upward trend in certifications and the growing diversity of crops employing H-2A workers suggest that in California and, indeed elsewhere, this program needs little additional change to make it "workable" for agricultural employers.[8]

III. RECENT DOCUMENTED ABUSES IN THE H-2A PROGRAM IN CALIFORNIA ARGUE FOR STRONGER, NOT WEAKER, LABOR PROTECTIONS

Monitoring of H-2A applications in California by CRLAF, CRLA, Inc. and UFW over the last dozen years has demonstrated a persistent pattern of application deficiencies --not identified or acted upon by US DOL-- and employment practices that violate the H-2A Act and regulations, federal labor protections and California recruitment, minimum wage, overtime and housing laws.

[6] US DOL, Bureau of Labor Statistics, News Release 13-265 SAN (February 13, 2013)
[7] State of California, EDD, Report 400C (Monthly Labor Force Data for Counties August 2012 – Revised)
[8] According to the OFLC's 2012 Annual Report, p.46, in FY 2011 a total of 83,844 H-2A agricultural labor positions were requested nationwide and a total of 77,246 were certified.

Our experience shows that the "burdensome provisions" that growers complain about are the only wall of protection between H-2A workers and indentured exploitation. Violation of these basic worker rights have resulted in significant hardship for H-2A and U.S. workers and have displaced hundreds of documented U.S. workers from work they have performed for decades.

Increased use of H-2A workers in San Diego County has provided an unfair advantage to growers who can impose production standards that are higher than local practice by simply requiring that all crew members "keep up" and driving the H-2A workers -- who are primarily men in their 20s -- to work harder, faster and carry greater weight than mixed crews of men and women ranging from their late teens to their 40's.

Growers in the Imperial Valley have recruited and hired documented workers living along the border near Calexico, California for work in the broccoli, cauliflower and lettuce fields in Imperial, Riverside and Yuma counties for more than 25 years. Over the last 3 years more than a thousand of these workers were displaced and replaced by H-2A workers housed in Yuma, Arizona. Meanwhile, as noted above, the unemployment rate in Imperial County hovers at 25% even during the peak employment periods during the winter months.

Since 2000, a number of actions have been filed against H-2A employers on behalf of H-2A workers and U.S. workers alleging significant violations of the H-2A regulations or contract and federal and state labor and housing protections:

- Correa, et al. v. SAMCO, et al. Ventura County Sup. Ct. Case No CIV 214493

In 2001, SAMCO received an H-2A certification for citrus workers for the 2001-2002 season. Domingo Correa and several other workers were recruited by SAMCO representatives in Hermosillo Mexico where they were told they would have work from February, 2002 through June 30, 2002. Each H-2A worker incurred transportation expenses of $400-$500 to travel to Ventura County, and were told that those expenses would be reimbursed. Once they arrived in the U.S. they were provided a written contract that offered work only through mid-April -- reducing their work period by two and one-half months. When they began work they were told they had to meet a production requirement that was not disclosed to them during recruitment or included in the H-2A job order.

One by one many of the H-2A workers, including Domingo Correa were terminated because they could not meet the production requirement. They were not reimbursed for the transportation costs, which meant that during the first week of work they were not paid the federal minimum wage. Most were never fully reimbursed for those costs. While at work they were supervised by abusive foreman who put them under constant pressure to meet the unlawful production standard. They were denied meal and rest periods, or found it impossible to take them and meet the production standard. Several workers became ill but were provided no access to medical care, despite the fact that they lived in a labor camp and had no personal transportation.

When work ended, either as a result of being fired, or the end of the season, the workers had not earned at least three-fourths of the contract amount and SAMCO did not pay them that amount. 10 of the H-2A workers sued SAMCO in 2002 after nearly three years of litigation they successfully settled their case for $75,000 and finally received reimbursement for the lost wages and out of pocket expenses they incurred. These experienced farm workers were interviewed after their case was resolved and characterized their experience as the worst treatment they had ever been subjected to working in the U.S. or Mexico.

- Urias Lozano, et al. vs. Harry Singh & Sons, et al. USDC So. Dist CA, Case No. 02 CV 2075 K

In late August of 2002, Eusebia Urias Lozano and approximately 80 other U.S. workers from Imperial County were hired by Harry Singh & Sons for the 2002 tomato harvest, which would have lasted into December of that year. Lozano had worked for Harry Singh & Sons during the 2001 tomato harvest. They were paid minimum wage at $6.75 per hour and provided transportation to the fields which were several hours away in San Diego County. Unbeknownst to Lozano and the other workers, Harry Singh & Sons had submitted an H-2A application and certification of 200 H-2A workers was granted by U.S. DOL for the same harvest, from September 26-December 15, 2002. The AEWR at that time was $8.02 per hour and Harry Singh & Sons were to provide housing to the workers under the terms of the order.

As soon as the H-2A workers entered the country, Harry Singh & Sons terminated Lozano and the other 80 U.S. workers. These workers were never offered housing, never paid the AEWR and certainly were not paid the three-fourths guarantee. Lozano and others filed suit and District Court Judge Judith Keep issued a temporary restraining order and preliminary injunction against Harry Singh & Sons directing that the U.S. workers be offered work at the AEWR and provided housing, if requested.

During the investigation, it was discovered that dozens of other documented U.S. workers were referred to Harry Singh & Sons for this harvest, but were rejected by Harry Singh & Sons. Litigation was filed that resulted in a settlement of $68,000 (which represented payment to workers of the difference between the AEWR and the minimum wage they were paid). They also received the right to reinstatement, if they chose to live in the housing provided to the H-2A workers. However, the H-2A program had done its damage. Harry Singh & Sons stopped recruiting, hiring and transporting workers from the Imperial Valley, even though they had been doing so for several years. Imperial Valley workers who chose not to relocate from their homes and families to live in barracks housing were denied employment because the company stopped providing bus transportation. They were displaced by H-2A workers that season and in several subsequent seasons.

- Zepeda v. Global Horizons U.S. District Court EDCA, Case No. 1:01 CV-01599

In August of 2003, Mede Zepeda was living in Kings County and was out of work. He used the job service system to identify work available with Global Horizons, a farm labor contractor, for work in Bakersfield, California. He received a referral from Employment Development Department (EDD) and contacted Global Horizons. Pursuant to the job order he was offered work at the AEWR of $8.44 per hour, free housing and employment from August 8, 2003 through April 30, 2004. He accepted and relocated to Bakersfield to accept employment.

He and approximately 30 other workers were housed at a local motel and put to work. But Zepeda was not provided meals, had the cost of the housing deducted from his wages and was never paid the AEWR rate. His work week went from 30-40 hours a week to 15 hours a week, some of it spent washing cars. After six weeks he was told there was no more work. He was never paid the three-fourths guarantee. Subsequently, Mr. Zepeda filed suit in 2006 and, after extensive litigation, Zepeda's case was settled for $8,000.00 We estimate that as many as 30 other workers were owed this much or more.

- Acuña v. Fresh Harvest, Monterey County Superior Court

Roberto Acuña was an experienced lettuce worker out of work and seeking employment through the job service office of the California EDD in Delano, California. In April of 2006 he applied for a job with Fresh Harvest, who was advertising through the job service system as a condition of its pending application for H-2A workers in Monterey County. With the assistance of EDD Acuña was able to get and interview and was offered employment at the advertised AEWR rate, and free housing.

Based on that offer, Acuña traveled to Monterey County ready to accept his new job and move into his housing. When he arrived he was told there was no work for him, and to check back later. He persisted and was ultimately offered work starting six weeks after his promised start date at a rate of pay $1.75 less than the AEWR and with no housing.

Mr. Acuña filed litigation and successfully resolved his case against Fresh Harvest for $8,000. Several other U.S. workers had the same experience but chose not to pursue claims against the company.

- Salinas de Valle v. Sierra Cascade Nursery, Inc. Superior Court, Siskiyou County, Case No. SC CV 06-0001378

In 2006 legal services attorneys were contacted by a community member in remote Siskiyou County and told that a group of workers from Mexico were being housed in substandard housing and subjected to terrible working conditions, and needed help.

Upon investigation, it was discovered that an H-2A certification for 730 workers had been granted to Sierra Cascade. Those workers were recruited from Mexico and brought to Tule Lake

to perform work in strawberry nurseries. Workers were housed in mixed sex barracks, with only a curtain between the men and the women in overcrowded and substandard conditions that lacked adequate heat, lighting and toilet facilities. One female worker reported that she was sexually assaulted. The meals provided were inadequate.

Shortly after they began work they were advised that if they did not meet a production requirement they would be sent back to Mexico. Although production incentives were explained during recruitment, workers were never told they could be terminated for not meeting any particular standard.

The work was difficult and performed in frigid conditions and some workers became ill. They worked hours for which they were not paid, did not receive their meal and rest periods, and were not reimbursed for their travel expenses. Within weeks, many workers were being put on a bus and returned to Mexico because they could not meet the production quota. They were not paid the three-fourths guarantee when they were terminated, and were not immediately paid all wages due as required by California law.

Several workers filed suit and obtained an immediate temporary restraining order requiring that the employer bring the housing into compliance with heating and spacing requirements and to provide meals meeting federal nutrition standards. The lawsuit was ultimately settled for more than $300,000.00 and included injunctive relief requiring compliance with H-2A recruiting, transportation and pay requirements, and guaranteed minimum housing standards.

- Job Service Complaint against E.C.Labor

In 2008, E.C. Labor was granted an H-2A certification for 150 workers. Several U.S. workers, including Francisco Ornelas and Salvador Rosas applied for jobs through the EDD job service, but were not hired. After the complaint was filed and investigated it was discovered that several other U.S. workers had applied but not been hired. The company ultimately offered work to the complainants and other U.S. workers only after filing of the complaint.

- Lopez Rodriguez, et al. v. SGLC, et al., USDC Eastern District of California, Case No. 2:08-CV-0971-MCE-KJN

In 2008, SGLC, Inc., a farm labor contractor, with the assistance of four growers, submitted an application for H-2A workers to perform work in several different crops over the course of six months. The application was approved for 200 workers.

SGLC and grower representatives held recruitment meetings in Colima, Mexico and made job offers to workers. Workers incurred visa and travel expenses to come to the U.S. that were not reimbursed during the first week of work. As a result they earned significantly less than the state and federal minimum wages due for the first weeks of work. From the day they arrived, workers

complained that the housing provided was substandard, and the FLC was ordered by the housing inspector to correct a variety of issues. Workers also reported inadequate meals.

For a variety of reasons, SGLC was not able to provide regular full-time work for all of the H-2A workers. Many sat idle for days, earning no money but still responsible for paying for their meals. Some of the growers that had provided support for the H-2A application refused to allow the H-2A crews to work in their fields. Dozens of the H-2A workers quit and were forced to return to Mexico because they couldn't afford to go without work. Others stayed until the end of the contract period, but still did not earn the three-fourths guarantee, and were not paid that amount when the contract ended.

Forty-five workers filed suit in federal court claiming violation of their H-2A contract and various federal and state labor and housing violations. Another 25 workers opted into the lawsuit after the court certified an opt-in class under the FLSA. In 2012, the workers settled with two of the grower Defendants for $320,000. The action against the FLC and two remaining grower Defendants was set for trial in January of 2013. However, the U.S. District Court judge refused to grant Plaintiffs' motion to present representative testimony and indicated that all remaining 68 workers would have to personally testify at trial. Of course, most of the workers had returned to Mexico as required by their temporary visas and H-2A workers have no right to return to the U.S. to pursue their claims. Accordingly, the trial court continued the trial to January of 2014 to allow Plaintiffs the opportunity to seek review of the decision disallowing representative testimony and to pursue the tourist or humanitarian parol visas necessary to get all 68 workers into the country for trial.

- Rodriguez v. Fernandez Farms, Incorporated, Monterey County Superior Court No. M114478

Fernandez Farms Incorporated obtained H-2A certifications for strawberry workers in the Salinas Valley for 2009, 2010, 2011 and 2012.

In 2010, Oscar Rodriguez Chavez was recruited by Fernandez Farms from Michoacan, Mexico. He was hired and obtained one of the 200 H-2A visas issued for Fernandez Farms 2011 job order. Rodriguez paid several hundred dollars for his visa and travel expenses to come to Salinas to accept the work. Those costs were not reimbursed during his first weeks of work.

Under the terms of the H-2A Order, he was to be paid $10.31 per hour, but was paid a piece rate instead that resulted in gross pay that was less than the state or federal minimum wage. He was not provided all meal and rest periods, or paid the overtime rates applicable under California law.

Rodriguez worked under these conditions for several months, but became ill due to the working conditions and had to quit. He was not paid all wages owed to him or reimbursed for his expenses. He filed suit on October 6, 2011. He knew that the other H-2A workers had been

subjected to similar treatment, but could not persuade any of them to join him in the action because many were fearful of retaliation and had been promised H-2A visas for the next year.

Subsequently, however, twelve additional workers came forward and are now seeking leave to join the lawsuit to raise similar complaints for the 2009, 2010 and 2012 contract periods, including the claims for reimbursement for the $1,200 to $1,650 they were told they had to pay for their jobs. Additionally, unlike Rodriguez, these workers were provided the housing guaranteed under the H-2A order, but were charged for that housing in violation of the H-2A contract and regulations.

- Vilcapoma v Western Range Association, et al. Imperial County Superior Court, Case No. EDU07266

Ronal De La Cruz Vilcapoma was recruited by Western Range Association in Peru in 2009 to perform work as a sheepherder (under the special H-2A sheepherder provisions for a visa renewable for up to 3 years). While still in Peru he was told that he had to pay $650 for his job, which he did. He then was placed at a sheepranch in Brawley, California managed by Martin R. Auza, Jr. While there he was required to perform non-sheepherding work, but paid at the sub-minimum sheepherding wage for all hours worked and was not paid applicable overtime. He was also denied meal breaks required by California law and was not paid all wages due when he terminated.

In 2012, Vilcapoma sued Western Range Association and Martin R. Auza, Jr., both of whom claim that they are not his employer even though he was recruited by Western Range Association, and worked directly under the control of Martin R. Auza. Instead, the Defendants are claiming that Martin Auza, Sr., who is located in Yuma, Arizona, is his employer.

IV. APPARENT VIOLATIONS OF THE H-2A PROGRAM EVIDENT IN REVIEW OF RECENT AND CURRENTLY PENDING H-2A APPLICATIONS IN CALIFORNIA

- Applications frequently include provisions that violate California law, and we believe they would have been approved by US DOL if not brought to the attention of the certifying agency by CRLAF or other legal services advocates. These include:

  A. Meal charges that exceed the daily maximum provided by California law

  B. Provisions requiring reimbursement for damaged tools, equipment or housing from worker wages in violation of California law.

  C. Descriptions of wage statement disclosures that fail to meet the requirements of California law, including the requirement that each grower for whom an FLC provides labor be identified on the wage stub.

D. Failure to guarantee pay for required travel or waiting time that is compensable under California law.

E. Rest period guarantees that don't comply with California law.

F. Workers required to provide their own gloves or other necessary tools in violation of California law.

When these issues were brought to the attention of the Office of Foreign Labor Certification (OFLC) in connection with several recent orders, the OFLC replied by saying "These are matters that should be directed to the Division of Labor Standards Enforcement with the State of California".[9]

- Applications Include Provisions that Violate H-2A requirements

  A. Meals are not provided by the H-2A employer, but by a private vendor and the employer is not required to guarantee that three meals a day will be available for purchase at less than the daily maximum amount.

- Applications Include Pay or Practices that Do Not Comport with Prevailing Practices

  A. Avocado workers are required to be able to carry 80 lb. bags while the prevailing practice is 60 lbs. They are also expected to use 9-12 foot picking poles while the standard is 6-10 feet; and they are expected to climb ladders up to 40 feet high when the standard is 28-32 feet (with occasional use of 32 foot ladders).

  B. Group or Crew incentive standards are included in the Order and then used as a production requirement when workers "can't keep up" and are therefore terminated.

  C. Offering work for 30 to 40 hours per week during peak harvest periods when the normal work week would be 50 to 60 hours per week. This has the effect of dissuading U.S. workers from applying, since they have no reason to believe they will have full time work, it also artificially deflates the three-fourths guarantee and makes it possible for FLC's and others to leave workers idle for days and even weeks but still make the three fourths guarantee over the contract period by working regular weeks.

  D. Artificial combining of worksites and elimination of traditional recruiting practices that result in the displacement of U.S. workers. For several years, Tanimura & Antle, like other Imperial Valley growers, recruited workers in Calexico and transported them to the fields around Brawley, Yuma and Holt, California. Over the last several years, these workers have been displaced by H-2A workers who are

[9] Letter from William L. Carlson, Administrator, OFLC, to Cynthia L. Rice, dated December 27, 2010

housed in Yuma, Arizona. Many impediments are placed in front of U.S. workers who would take the jobs, even if it meant moving to Yuma.

-- Recruitment is no longer done in Calexico in a change to what was a 20 year recruitment practice. Although this has been repeatedly brought to the attention of Office of Foreign Certification, they refuse to require daily recruitment during the 50% period, and have not required any demonstration of effective recruitment efforts in Calexico.

-- Workers who want to apply for work must do so, through EDD and then be interviewed in person, in Bard, California, 65 miles from Calexico. Despite the fact that the 2011 Foreign Labor Certification Manual for H-2A Employers provides that employers must conduct interviews "by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited at little or no cost to the worker" the OFLC allowed Tanimura & Antle to require that former Tanimura & Antle workers from Calexico to travel to Bard -- at their own expense -- in order to be interviewed and have an orientation for jobs they had held for several years. As a result, some workers who had no personal means of transportation were denied jobs

In conclusion, the foregoing summary of recent labor law violations in the H-2A program represents only a fraction of what is likely occurring in California or, indeed, throughout the country. The abuses of this exploitative program are well-documented and the CRLA Foundation urges the Congress to follow the recommendations made by both the United Farm Workers Union and Farmworker Justice to both strengthen its protections for workers and to also increase legal accountability of unscrupulous H-2A employers.

Respectfully Submitted

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Written Statement of Cathleen Caron
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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

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.

[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.

MAFO

A National Partnership
of Farmworker and Rural Organizations

Friday, February 22, 2013

Statement of MAFO, Inc.

Submitted to the Immigration and Border Security Subcommittee of the U.S. House of Representatives Committee on the Judiciary
February 26, 2013 Hearing:

"Agricultural Labor: From H-2A to a Workable Agricultural Guest Worker Program."

MAFO, Inc. submits this letter to supplement the record of the February 26, 2013 House Judiciary Subcommittee on Immigration and Border Security hearing on "Agricultural Labor: From H-2A to a Workable Agricultural Guest worker Program."

Most of our MAFO members, if not all, have been farmworkers in our early lives. We understand the plight of farmworkers, i.e. the poor working and living conditions derived from temporary agriculture employment, since we have endured and lived it. Some of us have also been around since the 'Bracero Program and have witnessed the misery from that era and that type of importation of workers. The working conditions and wages have not improved much in 50 or more years. And, today's' H-2A program has not helped.

We welcome efforts to reform our immigration system but we wish to ensure that agricultural workers and their families are included in any immigration legislation rather than having a disastrous, separate system that is not consistent with our nation's democratic and economic freedoms. We write to express our views about immigration policy and the H-2A temporary foreign agricultural

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worker program, which is the subject of the February 26, 2013 hearing before the House Subcommittee on Immigration and Border Security.

Undocumented farmworkers and their immediate family members should be granted a reasonable and prompt opportunity to earn legal immigration status and citizenship. More than one-half of the farm labor force—over one million current agricultural workers—lack authorized immigration status. An earned legalization program would help ensure stable, productive farm labor, and fair treatment of the people who help put food on our table.

The H-2A temporary foreign agricultural worker program provides agricultural employers with the opportunity to gain an unlimited number of visas to hire seasonal farmworkers each year. While the H-2A program's wages and other labor protections have been developed over many decades in response to the problems experienced by temporary workers, many U.S. farmworkers have experienced the lost of job opportunities, as well as opportunities for year round employment. Programs such as the H-2A, more often than not depresses wage rates. Past guest worker programs and the current H-2A program have not only harmed U.S. citizens and lawful permanent residents, but have taken undue advantage of thousands of vulnerable people.

Stronger protections and enforcement are needed.

There have been proposals for new agricultural guest worker programs. Any new program should meet several criteria:

1) **A roadmap to immigration status and citizenship**: if future farmworkers from abroad are needed, they should have a meaningful opportunity to become citizens. While some foreign workers may choose to work only seasonally and not remain permanently in the United States, they should have the chance to become full-fledged members of the nation that they help feed.

2) **Strong and equal labor protections:** U.S. farmworkers should be included in the same labor protections that cover other workers, and guest workers should be covered by those protections as well. Because

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temporary foreign workers hold a restricted status that limit their ability to bargain for better labor standards, strong protections are needed to prevent exploitation of foreign workers, beginning with the recruitment in their home countries.

Strong protections must also preserve U.S. workers' job opportunities and prevent depression in wage rates and other job terms.

Effective government oversight is also imperative due to frequent violations of the modest labor protections in guest worker programs.

3) **True economic freedom and mobility**: Like any other industry, growers should have to compete in the marketplace to attract and retain workers by paying competitive wages and providing desirable working conditions. Any visa should provide workers with true portability so they can freely bargain for better jobs.

4) **Sensible limits**: The H-2A program has no cap on the number of visas that employers may obtain each year. It does contain economic disincentives that discourage employers from seeking more workers than they need in an effort to distort the labor market. The H-2A program and any program in the future should also contain a cap tied to true market needs to ensure that employers do not have unlimited access to vulnerable foreign workers that could easily lead to job displacement and lower wages for U.S. workers.

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MAFO

MAFOs' mission is to facilitate the sharing of concerns, ideas, and strategies to improve services to farmworkers in partnership with others.

MAFO began in the early 1970's to represent issues facing migrants and the midwest farmworker organizations that serve them at the national level. The federal government focused their attention primarily on migrant's home states and ignored the midwest and/or receiver states. As a result, farmworker organizations began grouping together in the midwest on a federal regional level.

Today, as a National Partnership of Farmworker and Rural Organizations, MAFOs' uniqueness has allowed it to marshal its' resources and provide a national institute for farmworkers, farmworker organizations, and federal and state agencies as a forum in which to coalesce and address issues and policies impacting farmworkers. These issues and policies are not limited to programmatic items but encompass them and others that affect all aspects in the lives of farmworkers. Currently, MAFO is the only national organization that has a broad-based participation.

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Statement of Interfaith Worker Justice
Submitted to the Immigration and Border Security Subcommittee of the U.S. House of Representatives Committee on the Judiciary
February 26, 2013 Hearing: "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program."

Interfaith Worker Justice submits this letter to supplement the record of the February 26, 2013 House Judiciary Subcommittee on Immigration and Border Security hearing on "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program."

"When a foreigner lives with you in your land, don't take advantage of him. Treat the foreigner the same as a native. Love him like one of your own. Remember that you were once a stranger" Leviticus 19:33–34

Interfaith Worker Justice welcomes efforts to reform our immigration system, however any changes must first and foremost ensure that all workers are treated with dignity and respect. When we allow immigrant workers to be exploited, we lower the standards for all workers, native born and immigrant, current and future. All the major faith traditions speak with one voice regarding honoring and respecting those who work your lands. Therefore let us pay close attention to farmworkers who are the often unacknowledged drivers of this nations agricultural might.

One half of the farm labor force (over one million agriculture workers) lack authorized immigration status. Though they work extremely hard in often dangerous conditions, they work in the shadows where they fall prey to abuse and exploitation. Undocumented farmworkers and their immediate family members should be granted a reasonable and prompt opportunity to earn legal immigration status and eventually citizenship. An earned legalization program would ensure a healthy farm sector, fair treatment of all farm workers, and a just reward for the farmworker's crucial role in feeding America.

The H-2A temporary foreign agricultural worker program provides agricultural employers with the opportunity to gain an unlimited number of visas to hire seasonal farmworkers each year. The H-2A program's wage and other labor protections developed over many decades in response to the problems experienced by U.S. farmworkers who lost job opportunities and experienced depression in wage rates and other job terms under the Bracero program and former H-2 program. These past programs and the current H-2A program have not only harmed U.S. citizens and lawful permanent residents, but have taken undue advantage of thousands of vulnerable guest workers. Stronger protections and enforcement are needed.

There have been proposals for a new agricultural guest worker program as part of immigration reforms. While there are many intricate issues at play, any new guest worker program must have at its core several criteria:

1. **An inclusive and humane path to immigration status and citizenship:** if farmworkers from other countries are needed they should have available to them a clear and well defined path to becoming immigrants and then citizens. IWJ understands that some farmworkers only wish to work seasonally and not seek permanent status, however the opportunity for immigration status should be presented to them. America is not a nation of 'guests', but a nation of citizens. It is from this we gain our strength. This strength must be enshrined in our immigration laws.

2. **Strong and equal labor protections:** The labor and safety protections that cover other workers should include US farmworkers. Without strong protections an environment is created that is ripe for exploitation. Past guest farm worker programs permitted egregious workplace violations due to inadequate legal protection and lackluster enforcement of the little legal protection farmworkers did have. Any new program must guarantee equal protection under current labor law, including the right to organize. In addition, due to the prevalence of labor violations in past temporary farm worker programs, special enforcement measures must be taken by the government to ensure employers are adhering to the law.

3. **Only high road employers should be permitted guest workers:** If a company claims a labor shortage they must prove the shortages are not the result of substandard wages, benefits, or working conditions. A high road employer is an employer that ensures a living wage and good benefits to its workers. Combined with the above mentioned 'strong and equal labor protections' this will help guard against depression in wage rates and other job terms.

4. **True economic freedom and mobility:** Like all other well regulated industries, growers should compete in the marketplace to attract and retain workers. Any visa issued to farm workers must be fully portable so they can freely bargain and accept better jobs.

5. **Common sense limits:** The current H-2A program has no cap on the number of visas an employer may obtain each year. While it does contain economic disincentives that discourage employers from seeking more workers than they need, this is not sufficient to prevent a distortion in the labor market. The H-2A program and any program in the future should also contain a cap tied to true market needs to prevent employers from having unlimited access to vulnerable foreign workers that could easily lead to job displacement and lower wages for U.S. workers.

Do not take advantage of a hired worker who is poor and needy, whether that worker is a fellow Israelite or a foreigner residing in one of your towns. Deuteronomy 24:14

Rochester • Kingston • Albany

Statement of Worker Justice Center of New York
Submitted to the Immigration and Border Security Subcommittee of the U.S. House of Representatives Committee on the Judiciary
February 26, 2013 Hearing: "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program."

The Worker Justice Center of New York submits this letter to supplement the record of the February 26, 2013 House Judiciary Subcommittee on Immigration and Border Security hearing on "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program." The Worker Justice Center of New York (FKA Farmworker Legal Services) represents the merger of Farmworker Legal Service of NY (FLSNY) and the Workers' Rights Law Center of NY (WRLC). Our merger builds on decades of achievement in providing direct legal services to immigrant and low-wage workers, empowering communities, and advocating for institutional change.

We write to express our views about immigration policy and the H-2A temporary foreign agricultural worker program, which is the subject of the February 26, 2013 hearing before the House Subcommittee on Immigration and Border Security. We welcome efforts to reform our immigration system but we wish to ensure that agricultural workers and their families are treated fairly and consistently with our nation's democratic and economic freedoms. Our thirty plus years of experience with immigrants employed under guestworker visas have convinced us that the current H-2A program should be abolished and plans to either expand it or establish some other form of it be terminated.

Undocumented farmworkers and their immediate family members should be granted a reasonable and prompt opportunity to earn legal immigration status and citizenship. More than one-half of the farm labor force—over one million current agricultural workers—lack authorized immigration status. An earned legalization program would help ensure a productive farm sector and fair treatment of the people who put food on our table. Farmworkers' poor working and living conditions are very much a product of our immigration policy's flaws.

The H-2A temporary foreign agricultural worker program provides agricultural employers with the opportunity to gain an unlimited number of visas to hire seasonal farmworkers each year. The H-2A program's wage and other labor protections developed over many decades in response to the problems experienced by U.S. farmworkers who lost job opportunities and experienced depression in wage rates and other job terms under the Bracero

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program and former H-2 program. These past programs and the current H-2A program have not only harmed U.S. citizens and lawful permanent residents, but have taken undue advantage of thousands of vulnerable guestworkers. Based on our historical experience with guestworker programs, we firmly believe that such programs are inherently flawed as a method of labor recruitment of immigrant farmworkers.

There have been proposals for new agricultural guestworker programs. Despite our general opposition to guestworker programs, in the event that our current political climate prompts a revision, expansion, or complete overhaul of the current H2-A program, we believe that the following minimum criteria are essential to avoid the most egregious forms of abuse currently rampant within the agricultural sector:

1) A roadmap to immigration status and citizenship: if future farmworkers from abroad are needed, they should have a meaningful opportunity to become immigrants and citizens. While some foreign workers may choose to work only seasonally and not remain permanently in the United States, they should have the chance to become full-fledged members of the nation that they help feed. The H-2A program should be modified to enable its participants to earn immigration status.

2) Strong and equal labor protections: U.S. farmworkers should be included in the same labor protections that cover other workers, and guestworkers should be covered by those protections as well. Because temporary foreign workers hold a restricted status that limits their ability to bargain for better labor standards, strong protections are needed to prevent exploitation of foreign workers, beginning with the recruitment in their home countries. Strong protections must also preserve U.S. workers' job opportunities and prevent depression in wage rates and other job terms. Effective government oversight is also imperative due to frequent violations of the modest labor protections in guestworker programs.

3) True economic freedom and mobility: Like any other industry, growers should have to compete in the marketplace to attract and retain workers by paying competitive wages and providing desirable working conditions. Any visa should provide workers with true portability so they can freely bargain for better jobs.

4) Sensible limits: The H-2A program has no cap on the number of visas that employers may obtain each year. It does contain economic disincentives that discourage employers from seeking more workers than they need in an effort to distort the labor market. The H-2A program and any program in the future should also contain a cap tied to true market needs to ensure that employers do not have unlimited access to vulnerable foreign workers that could easily lead to job displacement and lower wages for U.S. workers. We recommend that an annual audit of the program be conducted by an independent third party to verify that genuine recruitment efforts are carried out by agricultural employers among U.S. job seekers before employers can qualify to participate.

Statement of National Farm Worker Ministry
Submitted to the Immigration and Border Security Subcommittee of the U.S. House of Representatives Committee on the Judiciary
February 26, 2013 Hearing: "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program."

National Farm Worker Ministry (NFWM) submits this letter to supplement the record of the February 26, 2013 House Judiciary Subcommittee on Immigration and Border Security hearing on "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program."

We write to express our views about immigration policy and the H-2A temporary foreign agricultural worker program, which is the subject of the February 26, 2013 hearing before the House Subcommittee on Immigration and Border Security. We welcome efforts to reform our immigration system but we wish to ensure that agricultural workers and their families are treated fairly and consistently with our nation's democratic and economic freedoms.

Undocumented farmworkers and their immediate family members should be granted a reasonable and prompt opportunity to earn legal immigration status and citizenship. The great majority of farm workers, the people who labor every day to harvest the food on our tables, are undocumented. NFWM staff and volunteers have heard first hand reports from many farm workers of the ongoing abuse they suffer in the fields because they are threatened with firing or deportation if they complain. They should not now have to experience a punitive immigration process. The opportunity to earn legal status would make it possible for them finally, to work, live and participate in their communities without fear. We have all benefited from farm workers' labor!

NFWM has also heard from workers who harvest food for US families, but haven't been able to cross the border to their countries of origin to see their own families for years. Achieving legal status would help end this moral travesty.

The H-2A temporary foreign agricultural worker program provides agricultural employers with the opportunity to gain an unlimited number of visas to hire seasonal farmworkers each year. The H-2A program's wage and other labor protections developed over many decades in response to the problems experienced by U.S. farmworkers who lost job opportunities and experienced depression in wage rates and other job terms under the Bracero program and former H-2 program. These past programs and the current H-2A program have not only harmed U.S. citizens and lawful permanent residents, but have taken undue advantage of thousands of vulnerable guestworkers. Stronger protections and enforcement are needed.

There have been proposals for new agricultural guestworker programs. Any new program should meet several criteria:

1) A roadmap to immigration status and citizenship: if future farmworkers from abroad are needed, they should have a meaningful opportunity to become immigrants and citizens. While some foreign workers may choose to work only seasonally and not remain

permanently in the United States, they should have the chance to become full-fledged members of the nation that they help feed. The H-2A program should be modified to enable its participants to earn immigration status.

2) Strong and equal labor protections: U.S. farmworkers should be included in the same labor protections that cover other workers, and guestworkers should be covered by those protections as well. Because temporary foreign workers hold a restricted status that limits their ability to bargain for better labor standards, strong protections are needed to prevent exploitation of foreign workers, beginning with the recruitment in their home countries. Strong protections must also preserve U.S. workers' job opportunities and prevent depression in wage rates and other job terms. **Effective and ongoing government oversight** is also imperative due to frequent violations of the modest labor protections in guestworker programs. For example, NFWM has visited crowded H2A labor camps in which inspections were held before the workers moved in but not held later to determine if more than the agreed upon number of workers were housed or conditions remained acceptable.

3) True economic freedom and mobility: Like any other industry, growers should have to compete in the marketplace to attract and retain workers by paying competitive wages and providing desirable working conditions. Any visa should provide workers with true portability so they can freely bargain for better jobs.

4) Sensible limits: The H-2A program has no cap on the number of visas that employers may obtain each year. It does contain economic disincentives that discourage employers from seeking more workers than they need in an effort to distort the labor market. The H-2A program and any program in the future should also contain a cap tied to true market needs to ensure that employers do not have unlimited access to vulnerable foreign workers that could easily lead to job displacement and lower wages for U.S. workers.

Statement of Migrant Support Services of Wayne County (NY)
and Wayne Action for Racial Equality
Submitted to the Immigration and Border Security Subcommittee of the U.S. House of Representatives Committee on the Judiciary
February 26, 2013 Hearing: "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program."

Migrant Support Services of Wayne County (NY) and Wayne Action for Racial Equality submit this letter to supplement the record of the February 26, 2013 House Judiciary Subcommittee on Immigration and Border Security hearing on "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program."

We write to express our views about immigration policy and the H-2A temporary foreign agricultural worker program, which is the subject of the February 26, 2013 hearing before the House Subcommittee on Immigration and Border Security. We welcome efforts to reform our immigration system but we wish to ensure that agricultural workers and their families are treated fairly and consistently with our nation's democratic and economic freedoms.

Undocumented farmworkers and their immediate family members should be granted a reasonable and prompt opportunity to earn legal immigration status and citizenship. More than one-half of the farm labor force—over one million current agricultural workers—lack authorized immigration status. An earned legalization program would help ensure a productive farm sector and fair treatment of the people who put food on our table. Farmworkers' poor working and living conditions are very much a product of our immigration policy's flaws.

The H-2A temporary foreign agricultural worker program provides agricultural employers with the opportunity to gain an unlimited number of visas to hire seasonal farmworkers each year. The H-2A program's wage and other labor protections developed over many decades in response to the problems experienced by U.S. farmworkers who lost job opportunities and experienced depression in wage rates and other job terms under the Bracero program and former H-2 program. These past programs and the current H-2A program have not only harmed U.S. citizens and lawful permanent residents, but have taken undue advantage of thousands of vulnerable guestworkers. Stronger protections and enforcement are needed.

Working directly within the farmworker communities in Wayne County, NY, with the largest population of migrant labor and their families in Western NY due to the second largest production of apples in the country and a large producer of pears, potatoes, onions, and tart cherries, we have witnessed the difficulties imposed by draconian H-2A policies. Separation of families, poor working conditions, contractual breeches, human rights violations, and poor labor law enforcement. We cannot support any program that does not include the following criteria:

1) A roadmap to immigration status and citizenship: if future farmworkers from abroad are needed, they should have a meaningful opportunity to become immigrants and citizens. While some foreign workers may choose to work only seasonally and not remain permanently in the United States, they should have the chance to become full-fledged members of the nation that they help feed. The H-2A program should be modified to enable its participants to earn immigration status.

2) Strong and equal labor protections: U.S. farmworkers should be included in the same labor protections that cover other workers, and guestworkers should be covered by those protections as well. Because temporary foreign workers hold a restricted status that limits their ability to bargain for better labor standards, strong protections are needed to prevent exploitation of foreign workers, beginning with the recruitment in their home countries. Strong protections must also preserve U.S. workers' job opportunities and prevent depression in wage rates and other job terms. Effective government oversight is also imperative due to frequent violations of the modest labor protections in guestworker programs.

3) True economic freedom and mobility: Like any other industry, growers should have to compete in the marketplace to attract and retain workers by paying competitive wages and providing desirable working conditions. Any visa should provide workers with true portability so they can freely bargain for better jobs.

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Sincerely,

John L. Ghertner, MD
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Statement of The Greater Rochester Coalition for Immigration Justice
Submitted to the Immigration and Border Security Subcommittee of the U.S. House of Representatives Committee on the Judiciary
February 26, 2013 Hearing: "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program."

The Greater Rochester Coalition for Immigration Justice submits this letter to supplement the record of the February 26, 2013 House Judiciary Subcommittee on Immigration and Border Security hearing on "Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program."

We write to express our views about immigration policy and the H-2A temporary foreign agricultural worker program, which is the subject of the February 26, 2013 hearing before the House Subcommittee on Immigration and Border Security. We welcome efforts to reform our immigration system but we wish to ensure that agricultural workers and their families are treated fairly and consistently with our nation's democratic and economic freedoms.

Undocumented farmworkers and their immediate family members should be granted a reasonable and prompt opportunity to earn legal immigration status and citizenship. More than one-half of the farm labor force—over one million current agricultural workers—lack authorized immigration status. An earned legalization program would help ensure a productive farm sector and fair treatment of the people who put food on our table. Farmworkers' poor working and living conditions are very much a product of our immigration policy's flaws.

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In our farming communities in the Genesee Valley Region surrounding Rochester, NY and in the domestic and construction trades within Monroe County, New York we have witnessed the effects of harsh treatment and immigration enforcement on the families who come to support our economies. These families must be recognized for their potential to bolster not only our economy, but also our lives. We recognize their contributions now and into the future. It is time that our Congress recognizes the humanity of this large population within our communities.

There have been proposals for new agricultural guestworker programs. Any new program should meet several criteria:

1) A roadmap to immigration status and citizenship: if future farmworkers from abroad are needed, they should have a meaningful opportunity to become immigrants and citizens. While some foreign workers may choose to work only seasonally and not remain permanently in the United States, they should have the chance to become full-fledged members of the nation that they help feed. The H-2A program should be modified to enable its participants to earn immigration status.

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Sincerely,

John L. Ghertner, MD
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Mr. GOWDY. And without taking any of your time, I would ask the same for a statement from our colleague, Doc Hastings.

[The information referred to follows:]

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Congress of the United States
House of Representatives

Testimony from Congressman Doc Hastings
Hearing on Regional Perspectives of Agricultural Guestworker Programs
Subcommittee on Immigration Policy and Enforcement
February 9, 2012

I would like to thank Chairman Gallegly and Ranking Member Lofgren, as well as Chairman Smith and Ranking Member Conyers, for holding this important hearing on "Regional Perspectives of Agricultural Guestworker Programs." Agriculture, and in particular specialty crops, is the backbone of the economy in Central Washington, and labor shortages are a constant threat to the economic vitality of our communities.

My district is a top-producing region of a diverse range of crops. Without Pacific Northwest growers, the United States would lose more than half of its apple and cherry production, more than 70 percent of its pear production, and more than 77 percent of its hops production. In addition to feeding the United States, many of these products are exported and contribute significantly to our agricultural trade surplus.

The crops I mention above share one thing in common – they are all labor-intensive. When I was younger, Americans traveled from state to state, picking these crops as they became ready for harvest before moving on to the next as the seasons progressed. However, that is no longer the case. In my home state, this past harvest was a clear example of the labor challenges faced by our growers.

Due to a cold growing season, the apple crop was unusually late this year. This caused many of the workers who traditionally pick Washington state apples to move on to other regions before the harvest begun – causing the worst worker shortage our region has faced in decades.

In September of last year – the height of the apple harvest – Washington state faced an unemployment rate of 9.1 percent. Growers put out signs, advertised on the radio, and worked with workforce training centers throughout the state to try and recruit American workers willing to pick fruit. Some offered wages as high as $150 a day to workers with no experience. Despite these efforts, growers had only a handful of pickers show up – and they were often times gone within hours or days after realizing how difficult the work was.

The worker shortage caused as much as two percent of the crop to be left on the trees. Even more economically damaging, some of the fruit was harvested so late that it impacted the storage capability – substantially reducing growers' rate of return.

Unfortunately, the current H2-A Program is not a viable alternative to meet the labor needs of our growers. In his opening statement, Chairman Smith mentions that there is no limit to the number of visas that can be issued as a part of the program. While that may be the case, this should not be misunderstood to mean that the program is meeting the labor needs of the agricultural community.

A number of growers in my district apply for workers through the H2-A program. More often than not, growers get only a small percentage of the workers they have requested. Equally damaging for growers of highly perishable products – which most labor-intensive crops are – are the delays that growers face in securing H2-A workers, who often don't arrive until weeks or months after they are needed. Most of these crops have a short harvest period and these delays can be the difference between making money or breaking even, and suffering a loss on the year's crop.

The H2-A program is also very difficult for growers to administer. The high cost, burdensome paperwork requirements, and ever-changing enforcement by the Department of Labor make it impossible for most small and medium-size growers to participate at all. The larger growers don't have just one staff member dedicated to meeting H2-A requirements – they have an entire team.

As it currently exists, the H2-A program denies American farmers the workers they need and invites chaos at our borders. I have long said that a workable and enforceable guestworker program that gives our growers and processors access to a stable legal workforce while ensuring that our government is in control of immigration is critical to our national security and our economy.

In my view, as Congress looks at ways to control our borders and crack down on illegal immigration, we must establish a new temporary guestworker program that provides employers with the legal and willing workforce they need in a simple, timely manner. This program must meet the growing labor needs of our farmers, and it must respect the seasonal nature of Central Washington's agriculture economy. Once Americans have passed over an agricultural job opening, employers should have a means to bring in a legal workforce.

Once again, I would like to thank Chairman Gallegly and Ranking Member Lofgren, as well as Chairman Smith and Ranking Member Conyers, for holding this important hearing. I stand ready to work with you to address this critical economic – and homeland security – issue.

Ms. LOFGREN. I would also like to just note that a wonderful person who is leading a delegation from California is here in our hearing room, Professor Cynthia Mertens from the University of Santa Clara School of Law, my alma mater. So welcome, Professor Mertens, and the students and others that you have brought here today. It is wonderful to see you.

I have a number of questions. First, our prayers are with President Rodriguez. We know that he had a death in his family and was unable to be here, but we are very pleased to have you, Mr. Kashkooli, and your terrific testimony.

You have talked a little bit about the portability issue and the idea that you really would be for portability, but there is a flaw in

the proposal that has been put forward. I am not sure I understand that flaw. Could you explain it clearly to us?

Mr. KASHKOOLI. Sure. I will be sure to pass on your condolences to Arturo.

In the existing written proposal that the Growers Association has put together, in the so-called free-market program, they want the ability to tie workers to a contract that the Federal Government is involved in, and their visa, it has control over that visa. Therefore, the worker would have to go home if they broke the contract. That, therefore, is not portable. That worker does not have the ability to do that.

We do not object to an employer being able to tie a worker to a contract even if the Federal Government is involved. But then if that happens, we need to make sure that the set of protections that were negotiated under President Reagan or something like them, their equivalent, continue to be in place.

Senator Rubio has said that if an employer has a lot of leverage over the worker, then the worker needs to have more sets of protections from the government, and we subscribe to that.

Ms. LOFGREN. So if I understand it correctly, you are actually not objecting to having a temporary worker program, provided that it is truly portable, there are labor protections that don't incentivize employers to hire guestworkers as compared to American citizens or legal permanent residents, and that there is cap so that you actually have a market, not a limitless supply of foreign workers. Would that be a fair summary of your position?

Mr. KASHKOOLI. That is exactly right, with two other additions. One, equality of treatment; and second, a roadmap to citizenship for people who are not, in fact, temporary. Somebody who is temporary, but someone who is here year after year and most of the year, that is no longer temporary.

Ms. LOFGREN. So that is addressing people who have been here for a long time and people who might in the future come for a very long period of time.

Mr. KASHKOOLI. Correct.

Ms. LOFGREN. You know, even though we don't have agreement yet, it seems to me that there are the elements for getting an agreement here, and that is a piece of good news that we can actually make progress on.

I am happy that the California Farm Bureau is represented by the American Farm Bureau, I guess. We had testimony from the California Farm Bureau in the last Congress that they would oppose mandatory E-Verify without a solution for transitioning the current workforce into legal status, because just doubling down on the current situation would be a catastrophe. And they also indicated that the H-2A program simply didn't work for them. I realize that the H-2A program has worked in some locations. We had testimony to that effect. But I think for most farmers, it has not worked.

Do you agree, Mr. Stallman, that it would be really impossible to replace the current undocumented workforce with just a temporary program? Are you clear about that?

Mr. STALLMAN. So you are talking about not doing anything to craft a program for those workers that are——

Ms. LOFGREN. Well, we had Dr. Richard Land from the Southern Baptist Convention who was a witness at the Committee a number of years ago. I don't want to steal his line because it was so well put, but he said that for years and years we had two signs at the southern border. One sign said "No Trespassing," and the other sign said "Help Wanted." In response to the latter sign, 10 or 11 million people came in. There was no legal way for them to enter and do this job. Many of those individuals have been here for many, many years, decades.

So, if those skilled individuals are working in agriculture, can they all be replaced just by a temporary worker program? If they were removed, could you actually make this work?

Mr. STALLMAN. Unlikely, at least at the level that exists today, and that's why our proposal takes into account both of those factors.

Ms. LOFGREN. Right.

Mr. STALLMAN. You know, how do you handle that experienced workforce that is here? They have been referenced as undocumented. They are documented, but the documents probably are fraudulent.

Ms. LOFGREN. Right.

Mr. STALLMAN. The law prevents employers from questioning the validity of the documents.

Ms. LOFGREN. I understand that.

Mr. STALLMAN. Yes, they are here, and that group needs to be dealt with. Part of our proposal deals with that.

In addition, though, we need that future flow capability——

Ms. LOFGREN. I understand. But I wanted to press you, because some people have asserted in the past that we could simply eliminate the vast undocumented group of workers and just replace them with a temporary worker program, and I know your testimony was that that was not the case. But I thought it was important that that be very clear, that that is just not a workable scenario for your industry.

Mr. STALLMAN. Because of all that experience that exists there, although it is the long-term employees that have all the experience, it would be highly disruptive if the scenario that you described occurred where we couldn't continue to use those who are currently here, not with legal status, and just try to replace those with some kind of future flow or temporary program.

Ms. LOFGREN. Thank you. I see my time has expired, so I will yield back.

Mr. GOWDY. I think the gentlelady.

They have a call for a vote, so I am going to try to squeeze in Judge Poe before we go. I would just say to my colleagues on both sides, I am coming back. I am going to go last. So if you are able to come back after votes, I promise you will not be the last one to ask your questions.

With that, Judge Poe.

Mr. POE. Thank you, Mr. Chairman.

Thank you for being here, gentlemen. Mr. Stallman, it is good to see you. I notice you grow rice and Columbus. I represent a lot of rice farmers in Liberty County, Texas. Many times I am asked, well, how many illegals work for the rice farmers in Liberty? Well,

the answer is always none. They are too poor to hire anybody. It is all family farms. They have the sons and the daughters and the uncles and aunts all working those rice farms, and I am sure that is the same with you. Rice farming to me is the hardest farming there is.

But anyway, I think the whole concept of food, Mr. Carr, is like you said. It is one thing for the United States to be dependent on foreign oil, but I think we can never get into a situation where we are dependent on some other country for what we eat. It is a national security issue. It is also a national health issue. So I operate on that premise.

I do think the concept that it is working to some extent with the H-2A visas has merit, and I think that is a good place to start to fix it, and I also believe we should have a verified, expanded guestworker program in other areas, but deal with this issue first, and then, as the Chairman has said, let the market drive the whole issue of guestworkers.

I commend all of you for trying to work together to find a solution that works, because you all are in the business, and I hope, as the other side has mentioned, we can come up with a solution that works, that is verifiable, but keeps that issue of national security in the forefront.

Mr. Carr, I don't know who is minding the farm now that you are in Washington, D.C. I don't think this is peach season picking yet, but you had mentioned that in your experience, I want to address the issue that Americans will take the jobs that foreign nationals are taking. You have heard that since you ever started the farming business. I used to kind of subscribe to that philosophy as well. I think now we have developed a culture where, unfortunately, there are many Americans who would rather get paid not to work than will work on your farm. They just weigh the good and the bad and they decide they can get paid not to work through government programs. That is another issue we have to fix.

So, if I understand you correctly, you advertised for a couple of years, 2010 to 2012, for American workers, and you had 2,000 positions available for workers, farm workers, and 483 Americans applied, and they were hired.

Mr. CARR. Yes, sir.

Mr. POE. One hundred nine did not show up on the first day of work; is that right?

Mr. CARR. That is correct.

Mr. POE. And then after a couple of days, 321 quit for various reasons.

Mr. CARR. That is correct.

Mr. POE. And therefore you ended up with 31 Americans working the whole season; is that correct?

Mr. CARR. That is correct.

Mr. POE. Is that experience—and I know that applies to your farm—is that experience that you have had typical of the industry, in your opinion?

Mr. CARR. Yes, sir. That is very typical of the industry, in my opinion.

Mr. POE. And what were you paying those folks?

Mr. CARR. My prevailing—I mean, my A-wage last year was $9.39 an hour, along with free housing and free transportation, although for domestic workers the base wage would have been my A-wage at $9.39.

Mr. POE. Okay. And is that typical? I am about out of time. Is that typical or not?

Mr. CARR. That is very typical of the industry. If you look at the statistics, basically 6 percent, roughly 6 percent of all U.S. workers that are hired under H-2A contracts finish the job. I would say that my numbers are low compared to my neighbors to the south in Georgia, who have experienced 1,700 referrals in 1 year not to produce any that will finish a contract.

Mr. POE. And you are required to hire Americans if you can.

Mr. CARR. Yes, sir. We are required to. When I advertised these 2,000 positions, this was over a 3-year seasonal period where I basically averaged about 650 visas a year, and in doing that we have to hire any willing and able U.S. worker that comes through the door, with no background check. All we can ask them is have they read the contract and can they do the work there. We take them to the field. We go through a 2-day training process. Quite frankly, most of them leave before the training process is even over with.

But as you reported right there, 109 never even showed up, which is another problem within the system right now because under current regulations, pre-recruitment, we lose a visa requested for every U.S. worker that says they are going to show up. So that 109 under new regulations would have lost one-for-one. We would have lost visas to bring foreign workers over here, causing further delays in the program.

Mr. POE. Thank you, Mr. Chairman. I yield back my time. I believe we can fix this problem and be beneficial to the United States. Thank you, sir.

Mr. GOWDY. Thank you, Your Honor.

We will be in recess pending votes, and then we will return. Thank you. I appreciate your patience.

[Recess.]

Mr. GOWDY. The Committee is back in session. Again, we appreciate everyone's indulgence with that.

I would recognize the gentlelady from the state of Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Let me thank the Chairman and the Ranking Member for the beginning of a series of very important hearings, and these witnesses, who hopefully are being part of history today as we try to look at this large question of immigration reform.

I want to acknowledge the American Farm Bureau by acknowledging the Texas Farm Bureau, who I have had the pleasure of working with very often. It just shows that in Texas, you can't run away from our true roots. So I am delighted to see you here and to have the insight that you are giving to us.

I want to, before I start my questioning, to just emphasize that I believe that there is a sense of urgency. It should be a sense of urgency on moving forward on comprehensive immigration reform. What we are gaining today is to understand, as I have done for over a decade now, having had witnesses such as many of you before this Committee before, that there are pieces of the immigra-

tion puzzle that have distinctive needs. But I don't believe we can ride one horse into the sunset and have the kind of approach that will help any of you, that as we fix what you need, we still need a system of a comprehensive approach because the very tradition of farming in many instances, except for family farms, is you do want workers who are consistent, skilled, but I think you all can see that maybe at some point, it may differ now in 2013, those workers may go somewhere else. Maybe they are assisting in poultry, and they may go on to some other area. And then, as in every profession or every work site, new ones come in. But you need a consistency. Your business needs to stay in place; you need a consistency.

I don't think we can get there when we say we can fix this, and then we leave a whole gaping hole and leave out comprehensive immigration reform.

I serve as the Ranking Member on the Border Security Subcommittee, maritime security, and we met this morning, and I said the same thing, that it must be a continuum between border security and comprehensive immigration reform, securing the border. But I also said that you can't move one without the other, because you need to have a certainty on the side of the immigration process in order to ensure that our friends at the border, the resources, the new way of approaching it, having outcomes, will be able to discern those who are here who are intending to do harm or the cartels or the drug violence versus individuals who are seeking to better their lives.

So let me go to Mr. Kashkooli on, I think, a package that you gave us. I was trying to recount from your testimony what you would be interested in and having the right kind of package. Why don't you continue to expand? Could you expand on this concept? Is this your concept, tying the workers to a contract, and then the Federal Government protect their status as workers? Could you just expand on that?

Mr. KASHKOOLI. Sure. For employers who want to have a contract and the security of a contract with workers, we want to see the protections that are in the H-2A program. We want to see the H-2A program. And those protections are wage protections to make sure that farm workers are given the average wage, housing, transportation, and that they have some kind of security that they will be getting at least 75 percent pay for the work. I want to just emphasize what that means, because we have been talking about——

Ms. JACKSON LEE. And my time is short. Can I just interrupt with a question that Mr. Brown and all others can answer?

Mr. KASHKOOLI. Absolutely. So those are the big things. And when we say wage rates, what we are looking for is the average wage rate of what is paid. In South Carolina, that is $9.78. So for someone working for 27 weeks, 40 hours a week, which is a job order, we are talking about $10,562.

Ms. JACKSON LEE. For that particular skill?

Mr. KASHKOOLI. Yes.

Ms. JACKSON LEE. And let me just say that I view that as a skill, and I don't like the issue of high skill/low skill.

But my question would be would you take the workforce from the existing undocumented individuals, and I know the H-2A, or are

you leaving the pathway open for others to come as H-2A? So let me ask, because we have a population of those who are here in the United States.

Mr. KASHKOOLI. Right.

Ms. JACKSON LEE. And their difficulty is when they finish, they have the protection of being on a site when they are doing their farm work, which is seasonal. Then they are left, in essence, without status, without a job, because it is seasonal. The question is do they go back? Do they stay? If they go back, because they are undocumented, they can't get back in.

So let me just ask, are we talking from the existing base of workers, or are we recognizing that there may be caps on what we can bring in?

Mr. KASHKOOLI. We want to see existing farm workers, the farm workers who have the skills, who are feeding us right now, be able to earn a roadmap and a legal path to citizenship.

Ms. JACKSON LEE. Mr. Brown?

Mr. BROWN. Our industry is uniquely different than the other industries at the table as far as the production of agriculture that is dependent on H-2A seasonal, and we are on the manufacturing side of agriculture.

Ms. JACKSON LEE. Meat packing.

Mr. BROWN. So we assume that the employees in our industry are eligible to be employed by passing through E-Verify. Now, when we are talking about a visa program from our industry's perspective, we are looking at the future for when legislation does pass that recognizes those that are in the country now undocumented as legal. Once they are recognized as legal, they can continue to be employed wherever they so choose, whether it is on a farm, whether it is in a meat plant, where have you.

We also recognize the challenge that work groups do move and migrate, as all of our people have through industries. In good economic times in this country, people will gravitate toward other jobs. So we then recognize a work shortage. We want to expand the current visa category and perhaps a new category outside of the H-2A program, or if H-2A can accommodate it, then we would look at that.

Ms. JACKSON LEE. Mr. Carr?

Mr. GOWDY. The gentlelady's time has expired. Mr. Carr, if you want to answer it——

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

Mr. GOWDY [continuing]. As quickly as you can, that would be great. We are 2 minutes over on this one.

Mr. CARR. Thank you, Mr. Chairman. Yes, I would like to answer that question. First of all, agriculture is united in the fact that we do need to keep our labor force that is here presently working. So we need to put them into a lawful status that allows them to continue to work in agriculture. But by the same token, history will show you that when we did this in 1986 and we gave amnesty to 1.1 million agricultural workers, they very quickly left the farm. So any type of proposal has got to have a valid guestworker program that is going to provide us a future flow of future workers into this country legally.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I think we have some challenges to respond to ahead of us, and I think we have some complexities that can be handled in the comprehensive immigration reform. I yield back.

Mr. GOWDY. I thank the gentlelady from Texas.

The Chair would now recognize the immediate past Chairman of the full Committee, the gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman. Mr. Chairman, I have three concerns, and what I would like to do is address one concern to each of three witnesses. The first concern is this, and, Mr. Kashkooli, let me ask you to respond.

In 1986, we had a special agricultural worker program. It was riddled with massive fraud. After the program went into effect, the Government Accounting Office said that two-thirds of the individuals who had been approved as guestworkers were fraudulent. About 1 million people were expected to qualify as being eligible; 3 million people were approved.

How do we avoid fraud on that scale if we have another guestworker program where virtually anybody can apply for it, and how do we avoid what happened in 1986? We had hundreds of taxi drivers in New York City qualify as ag workers and obviously were allowed to stay in the country.

Mr. KASHKOOLI. So I certainly hope we have all learned our lesson. In the ag jobs proposal, there was a pass work requirement and a future work requirement, so I think that is the first. That is important.

Mr. SMITH. But the problem with fraud is that nobody checks that. That is what happened in 1986. We just simply don't have the resources, the personnel, to check to make sure that that individual actually worked where they said they worked. That is why we had the New York City taxi drivers claiming to have worked on local farms, and clearly that was not the case.

Mr. KASHKOOLI. So what we have proposed and in the past had agreed on is that there would also be a future work requirement to work in agriculture, and my understanding is that any proposal that we talk about in a comprehensive way would include E-Verify. So I think that is a basic way to make sure that we get rid of fraud.

Mr. SMITH. I don't know that E-Verify is going to block someone from becoming eligible for a guestworker program because E-Verify or any other biometric system that we might come up with is just going to check a single identifier. It is not going to check background or work or anything else. In other words, we recognize that we are trying not to repeat some of the same problems, whether they be with enforcement or anything else that we had in 1986, and I am just not convinced yet that we have come up with any way to avoid the massive fraud that occurred in 1986. We will have you just discuss that a little bit more, if we could.

Mr. Stallman, nice to see a Texan here. A question for you, and I think you may have addressed it earlier to some extent, but I would like to follow up on it. My second concern is the endless pipeline. You have individuals admitted to work in this country, and if they can work in more than one location, you have the endless pipeline as they move on to other jobs, and meanwhile the

need is still there, so they are followed by more individuals who are admitted to work who then leave that job and move on, and you end up with millions of people coming into the country not working in the jobs that they were requested.

Mr. STALLMAN. Well, our proposal is not an open pipeline. It is restrictive and——

Mr. SMITH. You limit it to the ag field, right?

Mr. STALLMAN. Yes, yes.

Mr. SMITH. Okay.

Mr. STALLMAN. It is a proposal where ag employers have to register with USDA first to be able to provide a valid job to these individuals who come in either under an 11-month portable program, that is our portability program, or under a longer-term contract program. Now, these employees have the ability to move from registered employer to registered employer, but they are time-limited, and also they can be tracked.

Mr. SMITH. I think you have narrowed the diameter of the pipeline there, but I still think you have a modified pipeline, because individuals who are needed to pick peaches in the hill country of Texas might leave, and then you are still going to need people to pick peaches in the hill country of Texas. Then you still have that phenomenon, I think, to some extent.

Mr. STALLMAN. Well, if they leave the program, they would be out of status.

Mr. SMITH. No. But they can move from that job to another job, is the point.

Mr. STALLMAN. To another ag job.

Mr. SMITH. To another ag job. So you are still leaving the original grower with a labor shortage that has to be filled.

Mr. STALLMAN. But as long as you have the capability, if need is demonstrated and you don't have domestic workers willing to do it, as long as you have the ability to bring in those workers, I mean, there is not going to be an unlimited number of agricultural jobs.

Mr. SMITH. Right, right. So you hopefully hit that, and then we will see if that works. I hope it might. We will find out.

Mr. Brown, my third concern is this. If individuals are admitted to this country as guestworkers and they stay here for any substantial length of time, then they are not guestworkers, they are permanent workers. But that occurs because they are not going home. If you have someone here for 3 years who doesn't have to go home until the 3 years is up but only has to go home for a very short period of time during a several-year period, I don't think they are ever going to go home, particularly if family members have been able to join them and so forth.

That is why I think a true guestworker program—and I see my time is up—would be a short guestworker program. Real quickly, can you respond on that? Turn your mic switch on there, yes.

Mr. BROWN. I would respond in two ways. One, there are ways to track these people currently, and there are ways to improve E-Verify, with E-Verify Check. But also when we bring——

Mr. SMITH. I am talking about the length of time now.

Mr. BROWN. But when we bring guestworkers into this country, we can establish through E-Verify electronic data for an exit visa.

So the government will know when the time is up and prevent them from going to another——

Mr. SMITH. But do you think they should go back every year for some period of time, or do you think they should be allowed to stay for many years? In which case, I would argue they are no longer temporary or guestworkers.

Mr. BROWN. I think there should be a path to legalization, and I am going to leave that judgment——

Mr. SMITH. You are going in the opposite direction. Okay. But that is not a guestworker program.

Thank you, Mr. Brown. Thank you, Mr. Chairman.

Mr. GOWDY. I thank the gentleman from Texas.

The Chair would now recognize the gentleman from Illinois, Mr. Gutierrez.

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

First of all, I have been here 20 years and I have never seen a panel put together like the one that we have before us that has been put together by the Republican majority and with invitations from the Democratic minority in which I have to say that in each and every instance, all of the witnesses, I am able to share values, I am able to share perspectives with you, I am able to sympathize, I am able to say that is how I think.

Now, I think that bodes well for finding a solution to a problem. So I just want to say to all four of the witnesses—Mr. Gowdy, I want to congratulate you. I want to say that the first set of witnesses that we had from the STEM industry was very much the same; that is, people giving their perspective so that Congress can find a solution. What an incredible thing. I think that that is exactly what is going to happen here. I think that is part of the magic of the moment in which we live in, number one.

Many people question why I would leave 20 years of seniority on the Financial Institutions Committee to come here and be a junior member. I would tell you, the answer is right here, because all of the Members of the Subcommittee showed up, and all the witnesses have brought information that helps us solve a problem. So that is why I came here, because I thought that that is exactly what the men and women of this Committee were going to do independent of their political affiliation. They were going to look for a solution. I think the testimony that all of you have given today is a reflection of that.

Now, I want to say to Mr. Carr, I want you to be a successful farmer, and I want you to have the workers that you need, and I want you to have the reliable workers. I want you to have happy workers. I want you to have American workers. I want you to have people who share the same bond to this country and to that land that you and your parents and your grandparents shared with that land. I want them to adopt this and make it their own, as I am sure you have made it your own, and your family has. So that is always going to be where I look at this particular issue.

So I think, Mr. Stallman, as you begin to talk about a pathway to legalization—and let me just say, as Democrats, when we first introduced bipartisan comprehensive immigration reform in 2005, I did it with Congressman Flake here, and Colby, and it was Kennedy and McCain. The first of 700 pages, the first 400 were en-

forcement issues, with E-Verify there. So we passed that stage a long time ago. The Democrats have always been, and those who believe in comprehensive immigration reform and are looking for solutions understand that we need a verification system, because I don't want another underclass of immigrants in this country again. I want to end illegal immigration and undocumented workers once and for all in this country, and I think that that should be the solution that we are looking at.

So I want to say to Mr. Brown, look, I am ready to see what we need to do with dairy and poultry and those that pick garlic and those that pick lettuce and tomatoes and peaches and see how it is we categorize them. Whatever makes the most sense for productivity and for putting food on our tables and making sure that America is independent, because I think Mr. Carr makes a great point. We talk about energy dependence and the dependence on oil. We are quickly going to become a country that is going to be dependent on the fuel that Americans need each and every day as human beings, and that is food to put into our bodies and to fuel ourselves. So I think that is the place where I am going to be at.

So I want to thank the Chairman. I want to say to Zoe Lofgren, I am so excited to be working with both of you and under your leadership in this Committee.

I have just one question that I want to put, because I want to be also true to who I am and the values that I bring to this. So I guess I will ask Mr. Stallman. If Mr. Kashkooli organizes workers, do the members of your association, do the farmers have the right to fire one of your workers on one of your farms for joining a union and organizing in that union? Do you think that is right, that they should be able to be fired? They are doing a great job. They are picking the peaches. They are picking the grapes. They are picking the lettuce. They are picking the tomatoes. They are a great worker. But they decide to join a union. Should that farmer be able to fire that worker for joining a union or organizing a union?

Mr. STALLMAN. We, in our proposal, have basically indicated that we do not want an expansion of collective bargaining rights beyond where they are now.

Mr. GUTIERREZ. But what does that—I am in the union. I am picking on Mr. Carr's farm peaches, and I am doing a good job of picking peaches. I doubt that I could do it, but just let us for a moment imagine that I did, and I wanted to join a union. Should Mr. Carr be able to fire me for joining that union even though I am doing a good job in every other respect?

Mr. STALLMAN. If South Carolina is a right-to-work state, which I believe it is currently, they should have the ability to do that.

Mr. GUTIERREZ. Thank you.

Mr. SMITH [presiding]. Thank you, Mr. Gutierrez.

The gentleman from Iowa, Mr. King, is recognized for his questions.

Mr. KING. Thank you, Mr. Chairman. I want to thank all the witnesses. I think this is an excellent panel, and I appreciate you coming and delivering your testimony here before Congress today.

I listened to the testimony that is here, and I am hearing from interests along the way that our jigsaw puzzle pieces to the broader

picture of what America has become and what America will become, depending on what decisions are made in this Immigration Subcommittee and in the fuller Judiciary Committee and by the voice and the will of the American people, hopefully reflected here by the United States Congress.

I usually think that we should address these problems by asking the bigger questions first. For example, there is something over 6.3 billion people on the planet. We know feeding them is a very difficult task, and that is what we are trying to get done.

How many people would come to America if we adopted an open border policy? I ask that question rhetorically. I know no-one can deliver the answer to that, but we have to ask that question. We will have to answer that question, because each time that we open this up, it opens another gate, and we can't count the number of people who will come through that, but it was 1.1 million under the '86 act, and Chairman Smith said, and I agree, it is the numbers I have been dealing with, over 3 million people actually came through that gate. How many might come through a limited gate in a guestworker program? We don't know that answer, but it has always been more than has been announced.

There are 11 million people here illegally. Well, some of that data holds up, and some of that I question. I think the number is larger. But those are things that we have to answer here as a panel, and I don't want to put you all on that particular spot, but I would ask this.

If we do a guestworker program and the question becomes, as Mr. Smith said, they become permanent residents under anything that we can devise, one of the things I would suggest is if we go that path, why not bond those workers so that we can ensure that they do return to their home if it is going to be a guestworker?

I ask first Mr. Stallman if you and your organization can support a bonding philosophy and insurance. Here is what I do in my business. I guarantee that I will perform on the contracts that I enter into. So if the employer or the agency that he hires can post a bond that says we will ensure that they will go back home at the end of this period of time and then there will be no claim on the insurance, that would guarantee that. That would be the bonding concept. I would guess from the look on your face that you have not discussed that. Is that correct?

Mr. STALLMAN. That is correct. Our program depends on setting up a legal structure for the process to occur, and then having an enforcement mechanism with technology and biometric identifiers and all of those things. The enforcement technology is available to where you control what happens under that visa. They are not flowing into the country in an unlimited fashion or staying. Our proposal contemplates returning back for certain periods of time, returning back to their home country.

Mr. KING. We have seen the lack of enforcement since '86, and I would submit that since the '86 amnesty act was passed, there has been a decreasing enforcement of our immigration law in each succeeding Administration. So we are back to this question that all of this is predicated upon enforcement of the law, and I am suggesting instead that some of you have testified you would like to see the market forces take care of the migration. Why not allow the

surety companies to take care of the law rather than the Administrations, that have demonstrated they will not do that?

I would just ask you this. Would you be open to that kind of discussion, to nail down a better way to ensure that the law would be enforced?

Mr. STALLMAN. We are always looking for better ways for the law to be enforced. I think the problem that would exist with a bonding requirement, as we envision this program working with portability for workers, is who is going to be responsible?

Mr. KING. Exactly.

Mr. STALLMAN. We are basically allowing workers to work for multiple employers, which meets the needs of agricultural employers.

Mr. KING. And if you had the bonding, and then the financial services portion of this would make that insurance, and we wouldn't have to rely upon the government to enforce the law.

I would pose another one here to Mr. Brown. And that is, would you agree that wages and benefits knowingly paid to people who cannot lawfully work in the United States should not be tax-deductible as a business expense?

Mr. BROWN. We would support any enforcement proposal that guarantees or helps to guarantee that the people we are hiring are eligible, and if that is part of the component, then we would support that.

Mr. KING. And if we were to amend E-Verify so that prospective employees could be utilized, and also that current employees could be checked by the employer? And when I say utilize, utilize E-Verify for prospective employees and current employees. Would you support that so that an employer could clean up their workforce if they chose?

Mr. BROWN. Being an industry that has used the program for over 20 years, we would find it very difficult to expand E-Verify until it is fixed. If E-Verify is fixed and we can get past the issues outlined in my testimony, then we would be for expanding E-Verify's use. But currently, Congressman, you cannot determine other than whether a name and a Social Security number matches. That is why people get through the net on the one hand, and enforcement comes our way. On the other hand, if we are too aggressive without something similar to Self Check, then we are set up for the discriminatory provisions.

So we will work with every Member of this Committee to make E-Verify effective, and our industry will use it 100 percent.

Mr. KING. I thought your recommendations on that were solid, and I am glad that you followed through and fleshed it out.

I see that I am out of time. Mr. Chairman, I thank you and I yield back.

Mr. SMITH. Thank you, Mr. King.

The gentleman from Florida, Mr. Garcia, is recognized for questions.

Mr. GARCIA. How are you gentlemen doing? Let me just reiterate, I think the position on this side, we want agricultural workers. As you may or may not know, we have a densely packed agricultural area in my district. It is the most productive land. But we have some of the similar problems that Mr. Carr is talking about. I don't

think anyone there would agree with the statement that we have been decreasing enforcement, right? I don't think any of you would think that that is what is going on, right? You can say it into the mic. It's all right. We can hear you over here.

Mr. STALLMAN. Based on the reports from our members in various parts of the country, it seems like enforcement by ICE has been increasing.

Mr. GARCIA. Right. Mr. Carr?

Mr. CARR. Not just by ICE but by the Department of Labor it has been increasing quite a bit.

Mr. GARCIA. Mr. Brown?

Mr. BROWN. ICE, Department of Labor, and Department of Justice.

Mr. GARCIA. That's good to hear.

Mr. KASHKOOLI. ICE enforcement is absolutely up. All you have to do is look at how much it costs for somebody to get across the country. That market is working.

Mr. GARCIA. We spent $18 billion on enforcing the border. That is more than we spend on the FBI, DEA, and all other Federal law enforcement. We had negative immigration last year. So I clearly understand your position.

I had a meeting with my farmers last week. We were not here working, so I was meeting with some farmers, and my farmers said—at one point I said to my farmers—I was trying to be sympathetic. I said, you know, we need to get these folks documentation. They all smiled. A few of them chuckled, and they said, well, Congressman, they all have documentation. Whether it is real or not, we have no clue. Which I think basically spoke to the truth, that they don't have documentation.

Here is what I know. I know I can be in a canoe in Thailand and buy a mango for 15 cents, and the 15 cents at my home in Miami. The reality is we can figure out who they are and where they are if we really want to, and I think some of your positions on E-Verify make sense. I think these should be agricultural workers. I don't think they should be able to move to another line.

The farms in my district are relatively small, the nursery business or the tropical fruit business. They work for a few months, and then they go up to Wisconsin to pick cherries, and then they come back and they work on the perennials. These folks want to work the land.

You know, Mr. Carr, I tend to think of the American worker as the greatest worker in the world. They are certainly the most productive worker. Obviously, your experience is not the same. So I have to assume that these are super-humans we are importing to do our work.

Why is it that these people work harder than native Americans? My grandfather was a gardener, so I worked with him, and I know what it is to do back-breaking work. So, what is the matter?

Mr. CARR. In my opinion, what you are looking at is they are wanting to live the American Dream. People that have been here in this country, we are living it every day. People that are coming in on these immigrant programs, the guestworker programs, this is a pathway to a better life for them, so they are willing to work hard. I am not saying that they work harder than the Americans

that we have. What I am saying is that the Americans we have here are not willing to do the jobs that we have at the farm level.

Mr. GARCIA. Well, these are pretty special people, so I think they deserve treatment of some sort. I know we are sympathetic. I know you guys are in a tough place. I deal with farmers all the time in my district. I know you are trying to do right by them, just like I know those who organize laborers are trying to do the right job. But we need something that gives them some ability to make you compete for their work, but obviously most of you are too small to do contracts or contracts that lock them. I know that in the dairy industry, we may have to look at a special type of relationship there. But I am sure that on your farm it is seasonal, too. So they get to work other places, too. Correct?

Mr. CARR. That is correct. I am farming seasonal, which is part of the problem with the program.

Mr. GARCIA. Correct.

Mr. CARR. Right now, the program requires employment to be seasonal in nature. What we need to do is put the seasonal nature on the worker and make the worker have a home tie to his home country, so making him temporary but not the job. Therefore, my company has progressed from 16 weeks a year harvest to 38 weeks a year harvest. I am bumping the boundaries of being able to participate in the program. This program needs to expand to all of agriculture no matter what your employment needs are, but let the worker be temporary in nature but not exclude anybody from participating just because your job is year round.

Mr. GARCIA. Very good. Mr. Chairman, I yield back the balance of my time. I appreciate it.

Mr. SMITH. Thank you, Mr. Garcia.

The gentleman from Idaho, Mr. Labrador, is recognized for questions.

Mr. LABRADOR. Thank you, Mr. Chairman.

I read recently that Chamber and labor groups have come to an agreement in which they have agreed to principles regarding a new guestworker visa program, and one of the issues they agreed upon is the need to have a new government agency to analyze the market and come up with the right numbers of visas to issue.

Mr. Stallman, is there currently a cap on the number of visas that are issued through the H-2A program?

Mr. STALLMAN. The visas that are issued are subject to indicating the need. I don't know if there is——

Mr. LABRADOR. There is no cap, right? So even though there is no cap on the number of visas that are available, the program that I hear the most complaints about in my office is actually the H-2A program. It is quite problematic. I was an immigration lawyer for 15 years. I heard a lot of those complaints as well.

It is so bureaucratic and inefficient that many employers actually prefer to work outside of the system and they are not working within the system, and I hear the same about the H-2B program, which is no better. In fact, just recently I had a constituent in my office whose livelihood depended upon receiving a piece of paper from the Department of Labor. He was waiting for the Department of Labor to approve the certification, and he flew all the way across the country. He came all the way from Idaho to Washington just

so he could sit at the Department of Labor and wait for somebody to give him an approval so he could get the bureaucratic permission to proceed with his business.

We need to figure out how many visas are needed, as the Chamber and labor groups are saying. But I am not sure that a new agency is the right way to do it. What are your thoughts about that, Mr. Stallman?

Mr. STALLMAN. Well, I am not sure a new agency to determine the number of workers and putting caps is the right way to do it at all. Our program is based on the concept of demonstrating need and having a market-based presence, basically, to allow those to come in to meet whatever the market needs. Some type of artificial caps determined by an agency of the government is probably not going to work very well for agriculture because agriculture's needs are very variable, and government response to addressing those needs in terms of assessing the number of visa permits or the number of individuals that need to come in will probably fall behind the curve.

Mr. LABRADOR. What are your thoughts about that, Mr. Carr?

Mr. CARR. I do believe that a new agency needs to administer this program. First of all, it is in the Department of Labor right now, which currently has put all the regulations on the program, which prevents most employers from using it. By putting it in the USDA, an agency that is used to working with the farming industry, you can leave enforcement in the Department of Labor. But actually administering the program, I do believe it needs to move over to the USDA, who has the background of working with farmers in administering farm programs.

Mr. LABRADOR. And do you think the Federal Government should be determining what the needs are of the farmworkers, or do you think that we should allow the market to?

Mr. CARR. Currently, the H-2A program is uncapped, and I believe that any future program should be uncapped. If you create a system that has been put out there by the AWC, and you have a portable visa and a contract visa, within a certain amount of time and whatever you do with the adjustment of workers, you will fill up the workforce, and then your basis will be there. The transition and understanding what the transition is going to look like and putting an artificial cap on it could hinder business and continue to move operations outside our borders.

Mr. LABRADOR. Mr. Kashkooli, you said in your testimony that you want the free market to work, but the free market is not an unlimited supply. I was a little bit confused by that statement. What is the free market if——

Mr. KASHKOOLI. Well, it shouldn't be an unlimited supply of minimum wage labor. What we are talking about is that there needs to be certain guideposts. Right now in the country, there are 600,000 U.S. citizens and legal residents who are professional farm workers. There is an additional million or so farm workers that we hope will be able to earn legal status through this program.

So the Department of Labor's job should be to make sure that, at a minimum, that U.S. workers, their wages are protected, that we have some kind of opportunity for them to get the job, and let us be clear about what we are talking about here. We are talking

about the farm worker who is a U.S. citizen who right now is making maybe $10 an hour. If another employer can bring in a job at $8 an hour without having to offer that job to the person who is making $10 an hour, the job at $10 an hour, of course, that person is not going to apply for that job. So that doesn't make sense.

So a program that would allow an unlimited supply of people making minimum wage, that is not a market——

Mr. LABRADOR. So who determines the supply? Is it going to be some government agency here in Washington D.C.? Is that what you want?

Mr. KASHKOOLI. That is not actually what the United Farm Workers have suggested.

Mr. LABRADOR. So what are you suggesting?

Mr. KASHKOOLI. We think there are a number of ways you can do it. In the H-2A program, that is a program that does not have a cap right now. So that program is always going to be available. We think you should take the number of people who are going to earn legal status through the new program and allow other visas to be added based on the number of those people who leave. We do think that there does need to be a basic wage test. If farm worker wages on average are going down, then by definition there is going to be an oversupply, and therefore there shouldn't be any new visas based on the average farm worker wages. And it is not, in fact, that complicated to get the average wage. The USDA does this every year. They get the average wage that farm workers are paid and, by definition, it is an average. So some employers don't like it because they have to pay a little bit more. Some farm workers don't like it because, therefore, they are getting paid less. But it is actually not that complicated. The USDA does it every year.

Mr. LABRADOR. Thank you.

Mr. SMITH. Thank you, Mr. Labrador.

The gentleman from Puerto Rico, Mr. Pierluisi, is recognized for questions.

Mr. PIERLUISI. Thank you, Chairman.

I have a couple of questions for Mr. Brown. I saw from your testimony that you and your coalition of food manufacturers support an earned legalization program for undocumented immigrants living in the shadows. You specifically stated that Congress must provide a fair and practical roadmap to address the status of unauthorized immigrants.

What, in your view, what would be a fair and practical roadmap? And would it include or would it bar immigrants from ever attaining citizenship?

Mr. BROWN. Our coalition doesn't go that far, sir. But I would say that we would begin with the thought that if we are talking about undocumented workers, that we would be talking about a pathway forward for people that are actually in the country now, working and contributing to the system. I think that would be the pool of people that we would be referencing.

Mr. PIERLUISI. I also notice that you discuss the many benefits that immigrant workers bring to the communities in which your coalition has its businesses, including paying taxes, preventing shrinking school enrollment, and keeping businesses alive in communities with declining populations. Can you expand on the bene-

fits to rural and distressed communities from growing immigrant communities?

Mr. BROWN. Absolutely. As the son of an immigrant, there are many attributes that they bring to communities, from their cultural aspects, it could be religious aspects, working with boys and girls in the various sports programs, et cetera, working with law enforcement, the entire cultural experience, the fabric of our society is supported with these people.

Mr. PIERLUISI. I will address these next questions to either Mr. Stallman or Mr. Kashkooli. When I think about farm workers, I immediately think about their wages and working conditions. I just heard that the H-2A program doesn't have cap. But I know that it does have certain requirements that discourage employers from seeking more workers than they need, and that is what comes to my mind.

It seems it would be in the interest of employers to bring in as many workers as possible, because under the laws of supply and demand, a large supply of workers will lead to lower wages. Yet, these lowered wages and working conditions would harm farm workers and could lead to U.S. citizens losing jobs to foreign workers from poorer countries.

It sounds to me like a cap makes sense. We should have a cap on any guest farm worker program.

Mr. KASHKOOLI. The United Farm Workers agrees with that position. There is a program right now, the H-2A program, that does not have cap. That is okay. There is a set of protections to make sure that people are not abused. They are imperfect. We would like to see the protections stronger. The employers would like to see them in a different direction. But, yes, any new program we think needs a cap.

Mr. PIERLUISI. Would you agree with that, Mr. Stallman?

Mr. STALLMAN. No, we do not agree with a cap because of the variable needs of agriculture and how quickly those needs can change. That is why we are promoting a market-based program that will allow the market to make those adjustments. An ag employer can indicate that they need positions and workers who wish to come in and work for the conditions that exist, which in many cases will be wages that are above minimum wage for sure, and as we have already talked about, the average is over $9 an hour.

So the question is, to establish that workflow to meet the needs that exist, if you used a market-based program, you can do that, and we don't think a cap is suitable because if someone gets the cap wrong, agriculture gets hurt.

Mr. PIERLUISI. I yield back.

Mr. SMITH. Thank you, Mr. Pierluisi.

I would like to recognize myself to ask a follow-up question that came to mind as a result of Mr. Pierluisi's questions. You responded by saying you believe in a market-based approach. One concern I have and that I am sure you have as well is that oftentimes the government does not give us the statistics or the figures or the metrics for the information we need for a market-based approach until after 6 months or a year, or sometimes 2 years. So how would you be able to respond in a timely way if you are not

getting those figures or statistics for a number of months or perhaps a year?

Mr. STALLMAN. And that is the whole point in not allowing the government to set artificial wage rates, as they do in the H-2A program. What we are talking about doing is an ag employer can indicate that there is a need that cannot be filled with domestic workers, and then they will be a pool, if you will, of workers that are willing to come in.

Mr. SMITH. But aren't you going to be dependent to some extent on what the unemployment rate is among some of those workers, or not?

Mr. STALLMAN. I suspect an unemployment rate among those workers or those that aren't working, particularly if they are there under the program we have envisioned and they have portability, they will be moving to where the jobs and the wages are.

Mr. SMITH. Okay. That is a pure market approach, and it is reliant upon, as you say, no government information whatsoever. Is that correct?

Mr. STALLMAN. Well, the government role in this is to establish the structure of the visa program and the restrictions——

Mr. SMITH. Right. No, I am talking about as far as unemployment figures or anything else. You are not going to respond to anything the government does.

Mr. STALLMAN. Because you would have to do a correlation directly with specific agricultural jobs, because you can't do it in general.

Mr. SMITH. Okay. Thank you. That answers my question.

No other Members are here to ask questions.

Thank you all for your testimony today. It was very, very helpful, and appreciate your input.

[Whereupon, at 4:40 p.m., the Subcommittee was adjourned.]

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