AMERICAN SPECIALTY AGRICULTURE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION POLICY AND ENFORCEMENT

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

H.R. 2847

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AMERICAN SPECIALTY AGRICULTURE ACT

THURSDAY, SEPTEMBER 8, 2011

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

The Subcommittee met, pursuant to call, at 2:15 p.m., in room 2141, Rayburn Office Building, the Honorable Elton Gallegly (Chairman of the Subcommittee) presiding.

Present: Representatives Smith, Gallegly, King, Gowdy, Ross, Lofgren, and Jackson Lee.

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

Mr. GALLEGLY. I will call the hearing to order.

Today, the Subcommittee on Immigration Policy and Enforcement is holding a hearing on H.R. 2847, the "American Specialty Agriculture Act," which was introduced yesterday by Chairman Lamar Smith.

H.R. 2847 creates an entirely new agricultural worker visa program, referred to as the H-2C program, which is designed to provide a stable and secure labor force for American farmers.

I would like to commend my colleague and friend Chairman Smith for his hard work on this issue and for introducing this legislation. I share Chairman Smith's goal of creating a more user-friendly guestworker program that will help agriculture find qualified workers in a very timely manner.

I will not describe in detail the elements of the American Specialty Agriculture Act. However, I did want to highlight two important provisions which are an improvement over the current H-2A program.

First, the new H-2C program will be administered by the Department of Agriculture. This is the Federal department which is most familiar with the operations of the agricultural industry. From a California perspective, I believe the Department of Agriculture will better understand the labor needs of growers of specialty crops and the need to avoid long, bureaucratic delays.

Second, H.R. 2847 makes the H-2C program attestation-based, much like the H-1B visa program. This is in contrast to the much more time-consuming labor application process that is part of the H-2A program. Again, this will reduce delays which have often made the H-2A program unworkable for many if not most agricul-

tural employers. In my congressional district, where specialty crops are predominant, growers have repeatedly told me the key factor in being able to utilize a guestworker program is the ability to hire workers without long lead times.

Again, I thank the Chairman for bringing this work forward and dealing with this very complicated issue. And I look forward to the hearing of our witnesses.

And at this time I would yield to the gentlelady from California, the Ranking Member, Ms. Lofgren.

The bill, H.R. 2847, follows:]

I

112TH CONGRESS
1ST SESSION

H. R. 2847

To create a nonimmigrant H–2C work visa program for agricultural workers, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 7, 2011

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Education and the Workforce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

A BILL

To create a nonimmigrant H–2C work visa program for agricultural workers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "American Specialty Agriculture Act".

SEC. 2. H–2C TEMPORARY AGRICULTURAL WORK VISA PROGRAM.

Section 101(a)(15)(H) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)) is amended by

striking "; or (iii)" and inserting ", or (c) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services that are defined as agricultural labor in section 3121(g) of the Internal Revenue Code of 1986, as agriculture in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), and the pressing of apples for cider on a farm; or (iii)".

SEC. 3. ADMISSION OF TEMPORARY H–2C WORKERS.

(a) PROCEDURE FOR ADMISSION.—Chapter 2 of title II of the Immigration and Nationality Act (8 U.S.C. 1181 et seq.) is amended by inserting after section 218 the following:

"SEC. 218A. ADMISSION OF TEMPORARY H–2C WORKERS.

"(a) DEFINITIONS.—In this section:

"(1) AREA OF EMPLOYMENT.—The term 'area of employment' means the area within normal commuting distance of the worksite or physical location where the work of the H–2C worker is or will be performed. If such work site or location is within a Metropolitan Statistical Area, any place within such area shall be considered to be within the area of employment.

"(2) DISPLACE.—The term 'displace' means to lay off a worker from a job that is essentially equivalent to the job for which an H–2C worker is sought. A job shall not be considered to be 'essentially equivalent' to another job unless the job—

"(A) involves essentially the same responsibilities as such other job;

"(B) was held by a United States worker with substantially equivalent qualifications and experience; and

"(C) is located in the same area of employment as the other job.

"(3) ELIGIBLE INDIVIDUAL.—The term 'eligible individual' means an individual who is not an unauthorized alien (as defined in section 274A(h)(3)) with respect to the employment of the individual.

"(4) EMPLOYER.—The term 'employer' means an employer who hires workers to perform agricultural employment.

"(5) H–2C WORKER.—The term 'H–2C worker' means a nonimmigrant described in section 101(a)(15)(H)(ii)(c).

"(6) LAY OFF.—

"(A) IN GENERAL.—The term 'lay off'—

"(i) means to cause a worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract (other than a temporary employment contract entered into in order to evade a condition described in paragraph (3) of subsection (b)); and

"(ii) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer (or, in the case of a placement of a worker with another employer under subsection (b)(7), with either employer described in such subsection) at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

"(B) CONSTRUCTION.—Nothing in this paragraph is intended to limit an employee's rights under a collective bargaining agreement or other employment contract.

"(7) PREVAILING WAGE.—The term 'prevailing wage' means the wage rate paid to workers in the same occupation in the area of employment that is calculated using the same methodology used by the Department of Labor to determine prevailing wages for the purpose of the program described in section 101(a)(15)(H)(ii)(b) on January 1, 2011, except that if the wage rate is determined by means of a governmental survey, the survey shall provide at least four levels of wages commensurate with factors such as experience, qualifications, and the level of supervision (except that where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level), and that if the wage rate is determined by a survey that provides at least four levels of wages commensurate with factors such as experience, qualifications and the level of supervision, the prevailing wage shall be equal to the first wage level.

"(8) UNITED STATES WORKER.—The term 'United States worker' means any worker who is—

"(A) a citizen or national of the United States; or

"(B) an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 207, is granted asylum under section 208, or is an immigrant otherwise authorized, by this Act or by the Secretary of Homeland Security, to be employed.

"(b) PETITION.—An employer, or an association acting as an agent or joint employer for its members, that seeks the admission into the United States of an H–2C worker shall file with the Secretary of Agriculture a petition attesting to the following:

"(1) TEMPORARY WORK OR SERVICES.—

"(A) IN GENERAL.—The employer is seeking to employ a specific number of agricultural workers on a temporary basis and will provide compensation to such workers at a specified wage rate.

"(B) DEFINITION.—For purposes of this paragraph, a worker is employed on a temporary basis if the employer intends to employ the worker for no longer than 10 months during any contract period.

"(2) BENEFITS, WAGES, AND WORKING CONDITIONS.—The employer will provide, at a minimum, the benefits, wages, and working conditions required by subsection (k) to all workers employed in the jobs for which the H–2C worker is sought and to all other temporary workers in the same occupation at the place of employment.

"(3) NONDISPLACEMENT OF UNITED STATES WORKERS.—The employer did not displace and will not displace a United States worker employed by the employer during the period of employment of the H–2C worker and during the 30-day period immediately preceding such period of employment in the occupation at the place of employment for which the employer seeks approval to employ H–2C workers.

"(4) RECRUITMENT.—

"(A) IN GENERAL.—The employer—

"(i) conducted adequate recruitment in the area of intended employment before filing the attestation; and

"(ii) was unsuccessful in locating a qualified United States worker for the job opportunity for which the H–2C worker is sought.

"(B) OTHER REQUIREMENTS.—The recruitment requirement under subparagraph (A) is satisfied if the employer places—

"(i) a local job order with the State workforce agency serving the local area where the work will be performed, except that nothing in this clause shall require the employer to file an interstate job order under section 653 of title 20, Code of Federal Regulations; and

"(ii) a Sunday advertisement in a newspaper of general circulation in the area of intended employment.

"(C) ADVERTISEMENT REQUIREMENT.—The advertisement requirement under subparagraph (B)(ii) is satisfied if the advertisement—

"(i) names the employer;

"(ii) directs applicants to contact the employer or their representative;

"(iii) provides a description of the vacancy that is specific enough to apprise United States workers of the job opportunity for which certification is sought;

"(iv) describes the geographic area with enough specificity to apprise appli-

cants of any travel requirements and where applicants will likely have to reside to perform the job; and

"(v) states the rate of pay, which shall not be less than the wage as described in subsection (k)(2)(A).

"(D) END OF RECRUITMENT REQUIREMENT.—The requirement to recruit United States workers shall terminate on the first day of the contract period that work begins.

"(5) OFFERS TO UNITED STATES WORKERS.—The employer has offered or will offer the job for which the H–2C worker is sought to any eligible United States worker who—

"(A) applies;

"(B) is qualified for the job; and

"(C) will be available at the time and place of need.

This requirement shall not apply to a United States worker who applies for the job on or after the first day of the contract period that work begins.

"(6) PROVISION OF INSURANCE.—If the job for which the H–2C worker is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker unless State law

1 provides otherwise, insurance covering injury and
2 disease arising out of, and in the course of, the
3 worker's employment, which will provide benefits at
4 least equal to those provided under the State work-
5 ers' compensation law for comparable employment.

6 "(7) REQUIREMENTS FOR PLACEMENT OF H–2C
7 WORKERS WITH OTHER EMPLOYERS.—A non-
8 immigrant who is admitted into the United States as
9 an H–2C worker may be transferred to another em-
10 ployer that has filed a petition under this subsection
11 and is in compliance with this section.

12 "(8) STRIKE OR LOCKOUT.—There is not a
13 strike or lockout in the course of a labor dispute
14 which, under regulations promulgated by the Sec-
15 retary of Agriculture, precludes the hiring of H–2C
16 workers.

17 "(9) HOUSING.—Except for H–2C workers who
18 are reasonably able to return to their permanent res-
19 idence (either within or outside the United States)
20 within the same day, the employer will provide hous-
21 ing to H–2C workers through one of the following
22 means:

23 "(A) Employer-owned housing in accord-
24 ance with regulations promulgated by the Sec-
25 retary of Agriculture.

"(B) Rental or public accommodations or other substantially similar class of habitation in accordance with regulations promulgated by the Secretary of Agriculture.

"(C) Except where the Governor of the State has certified that there is inadequate housing available in the area of intended employment for migrant farm workers and H–2C workers seeking temporary housing while employed in agricultural work, the employer may furnish the worker with a housing voucher in accordance with regulations, if—

"(i) the employer has verified that housing is available for the period during which the work is to be performed, within a reasonable commuting distance of the place of employment, for the amount of the voucher provided, and that the voucher is useable for that housing;

"(ii) upon the request of a worker seeking assistance in locating housing for which the voucher will be accepted, the employer makes a good faith effort to assist the worker in identifying, locating and se-

1 curing housing in the area of intended em-
2 ployment; and
3 "(iii) payment for the housing is made
4 with a housing voucher that is only re-
5 deemable by the housing owner or their
6 agent.
7 An employer who provides housing through one of
8 the foregoing means shall not be deemed a housing
9 provider under section 203 of the Migrant and Sea-
10 sonal Agricultural Worker Protection Act (29 U.S.C.
11 1823) by virtue of providing such housing.
12 "(10) PREVIOUS VIOLATIONS.—The employer
13 has not, during the previous two-year period, em-
14 ployed H–2C workers and knowingly violated a ma-
15 terial term or condition of approval with respect to
16 the employment of domestic or nonimmigrant work-
17 ers, as determined by the Secretary of Agriculture
18 after notice and opportunity for a hearing.
19 "(c) PUBLIC EXAMINATION.—Not later than 1 work-
20 ing day after the date on which a petition under this sec-
21 tion is filed, the employer shall make a copy of each such
22 petition available for public examination, at the employer's
23 principal place of business or worksite.
24 "(d) LIST.—

"(1) IN GENERAL.—The Secretary of Agriculture shall maintain a list of the petitions filed under subsection (b), which shall—

"(A) be sorted by employer; and

"(B) include the number of H–2C workers sought, the wage rate, the period of intended employment, and the date of need for each alien.

"(2) AVAILABILITY.—The Secretary of Agriculture shall make the list available for public examination.

"(e) PETITIONING FOR ADMISSION.—

"(1) CONSIDERATION OF PETITIONS.—For petitions filed and considered under subsection (b)—

"(A) the Secretary of Agriculture may not require such petition to be filed more than 28 calendar days before the first date the employer requires the labor or services of the H–2C worker;

"(B) unless the Secretary of Agriculture determines that the petition is incomplete or obviously inaccurate, the Secretary, not later than 10 business days after the date on which such petition was filed, shall either approve or reject the petition and provide the petitioner with no-

1 tice of such action by means ensuring same or
2 next day delivery; and
3 "(C) if the Secretary determines that the
4 petition is incomplete or obviously inaccurate,
5 the Secretary shall—
6 "(i) within 5 business days of receipt
7 of the petition, notify the petitioner of the
8 deficiencies to be corrected by means en-
9 suring same or next day delivery; and
10 "(ii) within 10 business days of re-
11 ceipt of the corrected petition, approve or
12 deny the petition and provide the petitioner
13 with notice of such action by means ensur-
14 ing same or next day delivery.
15 "(2) PETITION AGREEMENTS.—By filing an H–
16 2C petition, a petitioner and each employer consents
17 to allow access to the site where the labor is being
18 performed to the Department of Agriculture or the
19 Department of Homeland Security for the purpose
20 of investigations to determine compliance with H–2C
21 requirements and the immigration laws. Notwith-
22 standing any other provision of law, the Depart-
23 ments of Agriculture and Homeland Security cannot
24 delegate their compliance functions to other agencies
25 or Departments.

"(f) ROLES OF AGRICULTURAL ASSOCIATIONS.—

"(1) PERMITTING FILING BY AGRICULTURAL ASSOCIATIONS.—A petition under subsection (b) to hire an alien as a temporary agricultural worker may be filed by an association of agricultural employers which use agricultural services.

"(2) TREATMENT OF ASSOCIATIONS ACTING AS EMPLOYERS.—If an association is a joint employer of temporary agricultural workers, such workers may be transferred among its members to perform agricultural services of a temporary nature for which the petition was approved.

"(3) TREATMENT OF VIOLATIONS.—

"(A) INDIVIDUAL MEMBER.—If an individual member of a joint employer association violates any condition for approval with respect to the member's petition, the Secretary of Agriculture shall consider as an employer for purposes of subsection (b)(10) and invoke penalties pursuant to subsection (i) against only that member of the association unless the Secretary of Agriculture determines that the association or other member participated in, had knowledge of, or had reason to know of the violation.

"(B) ASSOCIATION OF AGRICULTURAL EMPLOYERS.—If an association representing agricultural employers as a joint employer violates any condition for approval with respect to the association's petition, the Secretary of Agriculture shall consider as an employer for purposes of subsection (b)(10) and invoke penalties pursuant to subsection (i) against only the association and not any individual member of the association, unless the Secretary determines that the member participated in, had knowledge of, or had reason to know of the violation.

"(g) EXPEDITED ADMINISTRATIVE APPEALS.—The Secretary of Agriculture shall promulgate regulations to provide for an expedited procedure—

"(1) for the review of a denial of a petition under this section by the Secretary; or

"(2) at the petitioner's request, for a de novo administrative hearing at which new evidence may be introduced.

"(h) MISCELLANEOUS PROVISIONS.—

"(1) ENDORSEMENT OF DOCUMENTS.—The Secretary of Homeland Security shall provide for the endorsement of entry and exit documents of H–2C workers as may be necessary to carry out this sec-

1 tion and to provide notice for purposes of section
2 274A.
3 "(2) FEES.—
4 "(A) IN GENERAL.—The Secretary of Ag-
5 riculture shall require, as a condition of approv-
6 ing the petition, the payment of a fee, in ac-
7 cordance with subparagraph (B), to recover the
8 reasonable cost of processing petitions.
9 "(B) FEE BY TYPE OF EMPLOYEE.—
10 "(i) SINGLE EMPLOYER.—An em-
11 ployer whose petition for temporary alien
12 agricultural workers is approved shall, for
13 each approved petition, pay a fee that—
14 "(I) subject to subclause (II), is
15 equal to $100 plus $10 for each ap-
16 proved H–2C worker; and
17 "(II) does not exceed $1,000.
18 "(ii) ASSOCIATION.—Each employer-
19 member of a joint employer association
20 whose petition for H–2C workers is ap-
21 proved shall, for each such approved peti-
22 tion, pay a fee that—
23 "(I) subject to subclause (II), is
24 equal to $100 plus $10 for each ap-
25 proved H–2C worker; and

"(II) does not exceed $1,000.

"(iii) LIMITATION ON ASSOCIATION FEES.—A joint employer association under clause (ii) shall not be charged a separate fee.

"(C) METHOD OF PAYMENT.—The fees collected under this paragraph shall be paid by check or money order to the Department of Agriculture. In the case of employers of H–2C workers that are members of a joint employer association petitioning on their behalf, the aggregate fees for all employers of H–2C workers under the petition may be paid by 1 check or money order.

"(i) ENFORCEMENT.—

"(1) INVESTIGATIONS AND AUDITS.—The Secretary of Agriculture shall be responsible for conducting investigations and random audits of employer work sites to ensure compliance with the requirements of the H–2C program. All monetary fines levied against violating employers shall be paid to the Department of Agriculture and used to enhance the Department of Agriculture's investigatory and auditing power.

1 "(2) FAILURE TO MEET CONDITIONS.—If the
2 Secretary of Agriculture finds, after notice and op-
3 portunity for a hearing, a failure to meet a condition
4 of subsection (b), or a material misrepresentation of
5 fact in a petition under subsection (b), the Sec-
6 retary—
7 "(A) may impose such other administrative
8 remedies (including civil money penalties in an
9 amount not to exceed $1,000 per violation) as
10 the Secretary determines to be appropriate; and
11 "(B) may disqualify the employer from the
12 employment of H–2C workers for a period of 1
13 year.
14 "(3) PENALTIES FOR WILLFUL FAILURE.—If
15 the Secretary of Agriculture finds, after notice and
16 opportunity for a hearing, a willful failure to meet
17 a material condition of subsection (b), or a willful
18 misrepresentation of a material fact in a petition
19 under subsection (b), the Secretary—
20 "(A) may impose such other administrative
21 remedies (including civil money penalties in an
22 amount not to exceed $5,000 per violation) as
23 the Secretary determines to be appropriate;

"(B) may disqualify the employer from the employment of H–2C workers for a period of 2 years;

"(C) may, for a subsequent violation not arising out of the prior incident, disqualify the employer from the employment of H–2C workers for a period of 5 years; and

"(D) may, for a subsequent violation not arising out of the prior incident, permanently disqualify the employer from the employment of H–2C workers.

"(4) PENALTIES FOR DISPLACEMENT OF UNITED STATES WORKERS.—If the Secretary of Agriculture finds, after notice and opportunity for a hearing, a willful failure to meet a material condition of subsection (b) or a willful misrepresentation of a material fact in a petition under subsection (b), in the course of which failure or misrepresentation the employer displaced a United States worker employed by the employer during the period of employment on the employer's petition under subsection (b) or during the period of 30 days preceding such period of employment, the Secretary—

"(A) may impose such other administrative remedies (including civil money penalties in an

1 amount not to exceed $15,000 per violation) as
2 the Secretary determines to be appropriate;
3 "(B) may disqualify the employer from the
4 employment of H–2C workers for a period of 5
5 years; and
6 "(C) may, for a second violation, perma-
7 nently disqualify the employer from the employ-
8 ment of H–2C workers.
9 "(j) FAILURE TO PAY WAGES OR REQUIRED BENE-
10 FITS.—
11 "(1) ASSESSMENT.—If the Secretary of Agri-
12 culture finds, after notice and opportunity for a
13 hearing, that the employer has failed to pay the
14 wages, transportation, subsistence reimbursement, or
15 guarantee of employment attested by the employer
16 under subsection (b)(2), the Secretary shall assess
17 payment of back wages, or such other required bene-
18 fits, due any United States worker or H–2C worker
19 employed by the employer in the specific employment
20 in question.
21 "(2) AMOUNT.—The back wages or other re-
22 quired benefits described in paragraph (1)—
23 "(A) shall be equal to the difference be-
24 tween the amount that should have been paid

1 and the amount that was paid to such worker;
2 and
3 "(B) shall be distributed to the worker to
4 whom such wages are due.
5 "(k) MINIMUM WAGES, BENEFITS, AND WORKING
6 CONDITIONS.—
7 "(1) PREFERENTIAL TREATMENT OF ALIENS
8 PROHIBITED.—
9 "(A) IN GENERAL.—Each employer seek-
10 ing to hire United States workers shall offer
11 such workers not less than the same benefits,
12 wages, and working conditions that the em-
13 ployer is offering, intends to offer, or will pro-
14 vide to H–2C workers. No job offer may impose
15 on United States workers any restrictions or
16 obligations which will not be imposed on the
17 employer's H–2C workers.
18 "(B) INTERPRETATION.—Every interpreta-
19 tion and determination made under this section
20 or under any other law, regulation, or interpre-
21 tative provision regarding the nature, scope,
22 and timing of the provision of these and any
23 other benefits, wages, and other terms and con-
24 ditions of employment shall be made so that—

"(i) the services of workers to their employers and the employment opportunities afforded to workers by the employers, including those employment opportunities that require United States workers or H–2C workers to travel or relocate in order to accept or perform employment—

"(I) mutually benefit such workers, as well as their families, and employers; and

"(II) principally benefit neither employer nor employee; and

"(ii) employment opportunities within the United States benefit the United States economy.

"(2) REQUIRED WAGES.—

"(A) IN GENERAL.—Each employer petitioning for workers under subsection (b) shall pay not less than the greater of—

"(i) the prevailing wage; or

"(ii) the applicable Federal, State, or local minimum wage, whichever is greatest.

"(B) SPECIAL RULE.—An employer can utilize a piece rate or other alternative wage payment system as long as the employer guar-

antees each worker a wage rate that equals or exceeds the amount required under subparagraph (A).

"(3) REIMBURSEMENT OF TRANSPORTATION COSTS.—

"(A) REQUIREMENT FOR REIMBURSEMENT.—

"(i) IN GENERAL.—Except for H–2C workers who are reasonably able to return to their permanent residence (either within or outside the United States) within the same day, an H–2C worker who completes 50 percent of the period of employment of the job for which the worker was hired, beginning on the first day of such employment, shall be reimbursed by the employer for the cost of the worker's transportation and subsistence from—

"(I) the place from which the H–2C worker was approved to enter the United States to the location at which the work for the employer is performed; or

"(II) if the H–2C worker traveled from a place in the United States

1 at which the H–2C worker was last
2 employed, from such place of last em-
3 ployment to the location at which the
4 work for the employer is performed.
5 "(ii) CONSTRUCTION.—Notwith-
6 standing the Fair Labor Standards Act of
7 1938 (29 U.S.C. 201 et seq.), the employer
8 need not reimburse the cost of the H–2C
9 worker's transportation and subsistence
10 unless the worker has completed 50 per-
11 cent of the period of employment of the job
12 for which the workers was hired.
13 "(B) TIMING OF REIMBURSEMENT.—Reim-
14 bursement to the worker of expenses for the
15 cost of the worker's transportation and subsist-
16 ence to the place of employment under subpara-
17 graph (A) shall be considered timely if such re-
18 imbursement is made not later than the work-
19 er's first regular payday after a worker com-
20 pletes 50 percent of the period of employment
21 of the job opportunity as provided under this
22 paragraph.
23 "(C) ADDITIONAL REIMBURSEMENT.—Ex-
24 cept for H–2C workers who are reasonably able
25 to return to their permanent residence (either

1 within or outside the United States) within the
2 same day, an H–2C worker who completes the
3 period of employment for the job opportunity
4 involved shall be reimbursed by the employer
5 for the cost of the worker's transportation and
6 subsistence from the work site to the place
7 where the worker was approved to enter the
8 United States to work for the employer. If the
9 worker has contracted with a subsequent em-
10 ployer, the previous and subsequent employer
11 shall share the cost of the worker's transpor-
12 tation and subsistence from work site to work
13 site.

14 "(D) LIMITATION.—

15 "(i) AMOUNT OF REIMBURSEMENT.—
16 The amount of reimbursement provided to
17 a worker or alien under this paragraph
18 shall be equal to the lesser of—

19 "(I) the actual cost to the worker
20 or alien of the transportation and sub-
21 sistence involved; or

22 "(II) the most economical and
23 reasonable common carrier transpor-
24 tation charges and subsistence costs
25 for the distance involved.

"(ii) DISTANCE TRAVELED.—No reimbursement under subparagraph (A) or (B) shall be required if the distance traveled is 100 miles or less.

"(E) REIMBURSEMENT FOR LAID OFF WORKERS.—If the worker is laid off or employment is terminated for contract impossibility (as described in paragraph (5)(D)) before the anticipated ending date of employment, the employer shall provide—

"(i) the transportation and subsistence reimbursement required under subparagraph (C); and

"(ii) notwithstanding whether the worker has completed 50 percent of the period of employment, the transportation and subsistence reimbursement required under subparagraph (A).

"(F) CONSTRUCTION.—Notwithstanding the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.), the employer is not required to reimburse visa, passport, consular, or international border crossing fees or any other fees associated with the H–2C worker's lawful admission into the United States to perform

1 employment that may be incurred by the work-
2 er.
3 "(4) EMPLOYMENT GUARANTEE.—
4 "(A) IN GENERAL.—
5 "(i) REQUIREMENT.—Each employer
6 petitioning for workers under subsection
7 (b) shall guarantee to offer the worker em-
8 ployment for the hourly equivalent of not
9 less than 50 percent of the work hours
10 during the total anticipated period of em-
11 ployment, beginning with the first work
12 day after the arrival of the worker at the
13 place of employment and ending on the ex-
14 piration date specified in the job offer.
15 "(ii) FAILURE TO MEET GUAR-
16 ANTEE.—If the employer affords the
17 United States worker or the H–2C worker
18 less employment than that required under
19 this subparagraph, the employer shall pay
20 such worker the amount which the worker
21 would have earned if the worker had
22 worked for the guaranteed number of
23 hours.
24 "(iii) PERIOD OF EMPLOYMENT.—For
25 purposes of this subparagraph, the term

'period of employment' means the total number of anticipated work hours and workdays described in the job offer and shall exclude the worker's Sabbath and Federal holidays.

"(B) CALCULATION OF HOURS.—Any hours which the worker fails to work, up to a maximum of the number of hours specified in the job offer for a work day, when the worker has been offered an opportunity to do so, and all hours of work actually performed (including voluntary work in excess of the number of hours specified in the job offer in a work day, on the worker's Sabbath, or on Federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met.

"(C) LIMITATION.—If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, the worker is not entitled to the 50 percent guarantee described in subparagraph (A).

"(D) TERMINATION OF EMPLOYMENT.—

"(i) IN GENERAL.—If, before the expiration of the period of employment speci-

1 fied in the job offer, the services of the
2 worker are no longer required due to any
3 form of natural disaster, including flood,
4 hurricane, freeze, earthquake, fire,
5 drought, plant or animal disease, pest in-
6 festation, regulatory action, or any other
7 reason beyond the control of the employer
8 before the employment guarantee in sub-
9 paragraph (A) is fulfilled, the employer
10 may terminate the worker's employment.
11 "(ii) REQUIREMENTS.—If a worker's
12 employment is terminated under clause (i),
13 the employer shall—
14 "(I) fulfill the employment guar-
15 antee in subparagraph (A) for the
16 work days that have elapsed during
17 the period beginning on the first work
18 day after the arrival of the worker
19 and ending on the date on which such
20 employment is terminated;
21 "(II) make efforts to transfer the
22 United States worker to other com-
23 parable employment acceptable to the
24 worker; and

"(III) not later than 24 hours after termination, notify (or have an association acting as an agent for the employer notify) the Secretary of Homeland Security of such termination.

"(l) PERIOD OF ADMISSION.—

"(1) IN GENERAL.—An H–2C worker shall be admitted for a period of employment, not to exceed 10 months, that includes—

"(A) a period of not more than 7 days prior to the beginning of the period of employment for the purpose of travel to the work site; and

"(B) a period of not more than 14 days following the period of employment for the purpose of departure or extension based on a subsequent offer of employment.

"(2) EMPLOYMENT LIMITATION.—An alien may not be employed during the 14-day period described in paragraph (1)(B) except in the employment for which the alien is otherwise authorized.

"(m) ABANDONMENT OF EMPLOYMENT.—

"(1) IN GENERAL.—An alien admitted or provided status under section 101(a)(15)(H)(ii)(c) who

1 abandons the employment which was the basis for
2 such admission or status—
3 "(A) shall have failed to maintain non-
4 immigrant status as an H–2C worker; and
5 "(B) shall depart the United States or be
6 subject to removal under section
7 237(a)(1)(C)(i).
8 "(2) REPORT BY EMPLOYER.—Not later than
9 24 hours after an employer learns of the abandon-
10 ment of employment by an H–2C worker, the em-
11 ployer or association acting as an agent for the em-
12 ployer, shall notify the Secretary of Homeland Secu-
13 rity of such abandonment.
14 "(3) REMOVAL.—The Secretary of Homeland
15 Security shall promptly remove from the United
16 States any H–2C worker who violates any term or
17 condition of the worker's nonimmigrant status.
18 "(4) VOLUNTARY TERMINATION.—Notwith-
19 standing paragraph (1), an alien may voluntarily
20 terminate the alien's employment if the alien
21 promptly departs the United States upon termi-
22 nation of such employment.
23 "(n) REPLACEMENT OF ALIEN.—An employer may
24 designate an eligible alien to replace an H–2C worker who

1 abandons employment notwithstanding the numerical limi-
2 tation found in section 214(g)(1)(C).
3 "(o) EXTENSION OF STAY OF H–2C WORKERS IN
4 THE UNITED STATES.—
5 "(1) EXTENSION OF STAY.—If an employer
6 seeks approval to employ an H–2C worker who is
7 lawfully present in the United States, the petition
8 filed by the employer or an association pursuant to
9 subsection (b) shall request an extension of the
10 alien's stay and, if applicable, a change in the alien's
11 employment.
12 "(2) WORK AUTHORIZATION UPON FILING PE-
13 TITION FOR EXTENSION OF STAY.—
14 "(A) IN GENERAL.—An alien who is law-
15 fully present in the United States on the date
16 of the filing of a petition to extend the stay of
17 the alien may commence or continue the em-
18 ployment described in a petition under para-
19 graph (1) until and unless the petition is de-
20 nied. The employer shall provide a copy of the
21 employer's petition for extension of stay to the
22 alien. The alien shall keep the petition with the
23 alien's identification and employment eligibility
24 document, as evidence that the petition has

been filed and that the alien is authorized to work in the United States.

"(B) EMPLOYMENT ELIGIBILITY DOCUMENT.—Upon approval of a petition for an extension of stay or change in the alien's authorized employment, the Secretary of Homeland Security shall provide a new or updated employment eligibility document to the alien indicating the new validity date, after which the alien is not required to retain a copy of the petition.

"(C) FILE DEFINED.—In this paragraph, the term 'file' means sending the petition by certified mail via the United States Postal Service, return receipt requested, or delivering by guaranteed commercial delivery which will provide the employer with a documented acknowledgment of the date of receipt of the petition for an extension of stay.

"(3) LIMITATION ON AN INDIVIDUAL'S STAY IN STATUS.—

"(A) MAXIMUM PERIOD.—The maximum continuous period of authorized status as an H–2C worker (including any extensions) is 10 months.

"(B) REQUIREMENT TO REMAINS OUTSIDE THE UNITED STATES.—In the case of an alien outside the United States whose period of authorized status as an H–2C worker (including any extensions) has expired, the alien may not again apply for admission to the United States as an H–2C worker unless the alien has remained outside the United States for a continuous period equal to at least ⅕ the duration of the alien's previous period of authorized status as an H–2C worker (including any extensions).".

(b) PROHIBITION ON FAMILY MEMBERS.—Section 101(a)(15)(H) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)) is amended by striking "him;" at the end and inserting "him, except that no spouse or child may be admitted under clause (ii)(c);".

(c) NUMERICAL CAP.—Section 214(g)(1) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(1)) is amended—

(1) in subparagraph (A), by striking "or" at the end;

(2) in subparagraph (B), by striking the period at the end and inserting "; or"; and

(3) by adding at the end the following:

"(C) under section 1101(a)(15)(H)(ii)(c) may not exceed 500,000.".

(d) CLERICAL AMENDMENT.—The table of contents for the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended by inserting after the item relating to section 218 the following:

"Sec. 218A. Admission of temporary H–2C workers.".

SEC. 4. LEGAL ASSISTANCE.

(a) IN GENERAL.—A nonimmigrant worker admitted to or permitted to remain in the United States under section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(c)) for agricultural labor or service shall be considered to be an alien described in section 101(a)(20) of such Act (8 U.S.C. 1101(a)(20)) for purposes of establishing eligibility for legal assistance under the Legal Services Corporation Act (42 U.S.C. 2996 et seq.), but only with respect to legal assistance on matters relating to wages, housing, transportation, and other employment rights as provided in the job offer under which the nonimmigrant was admitted. The Legal Services Corporation may not provide legal assistance for or on behalf of any such alien, and may not provide financial assistance to any person or entity that provides legal assistance for or on behalf of such alien, unless the alien is present in the United States at the time the legal assistance is provided.

1 (b) MEDIATION.—An H–2C worker may not bring a
2 civil action for damages against their employer, nor may
3 the Legal Services Corporation or any other attorney or
4 individual bring a civil action for damages on behalf of
5 an H–2C worker, unless at least 90 days prior to bringing
6 the action a request has been made to the Federal Medi-
7 ation and Conciliation Service to assist the parties in
8 reaching a satisfactory resolution of all issues involving
9 all parties to the dispute and mediation has been at-
10 tempted.

11 (c) CONDITION FOR ENTRY ONTO PROPERTY FOR
12 LEGAL SERVICES CORPORATION REPRESENTATION.—No
13 employer of a nonimmigrant having status under section
14 101(a)(15)(H)(ii)(c) of the Immigration and Nationality
15 Act (8 U.S.C. 1101(a)(15)(H)(ii)(c)) shall be required to
16 permit any recipient of a grant or contract under section
17 1007 of the Legal Services Corporation Act (42 U.S.C.
18 2996f), or any employee of such a recipient, to enter upon
19 the employer's property, unless such recipient or employee
20 has a pre-arranged appointment with a specific non-
21 immigrant having such status.

22 **SEC. 5. MIGRANT AND SEASONAL AGRICULTURAL WORKER**
23 **PROTECTION.**

24 Section 3(8)(B)(ii) of the Migrant and Seasonal Agri-
25 cultural Worker Protection Act (29 U.S.C.

1802(8)(B)(ii)) is amended by striking "under sections 101(a)(15)(H)(ii)(a) and 214(c) of the Immigration and Nationality Act." and inserting "under subclauses (a) and (c) of section 101(a)(15)(H)(ii), and section 214(c), of the Immigration and Nationality Act.".

SEC. 6. ARBITRATION AND MEDIATION.

(a) APPLICABILITY.—Any H–2C worker may, as a condition of employment with an employer, be subject to mandatory binding arbitration and mediation of any grievance relating to the employment relationship. An employer shall provide any such worker with notice of such condition of employment at the time the job offer is made.

(b) ALLOCATION OF COSTS.—Any cost associated with such arbitration and mediation process shall be equally divided between the employer and the H–2C worker, except that each party shall be responsible for the cost of its own counsel, if any.

(c) DEFINITIONS.—As used in this section:

(1) The term "condition of employment" means a term, condition, obligation, or requirement that is part of the job offer, such as the term of employment, the job responsibilities, the employee conduct standards, and the grievance resolution process, and to which an applicant or prospective H–2C worker

must consent or accept in order to be hired for the position.

(2) The term "H–2C worker" means a nonimmigrant described in section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(ii)(c)).

SEC. 7. EFFECTIVE DATE; SUNSET; REGULATIONS.

(a) EFFECTIVE DATE.—The amendments made by this Act shall take effect on the date that is 2 years after the date of the enactment of this Act, and the Secretary of Agriculture shall accept petitions to import an alien under sections 101(a)(15)(H)(ii)(c) and 218A of the Immigration and Nationality Act (as added by sections 2 and 3 of this Act) beginning on such date.

(b) SUNSET.—Beginning on the date that is 2 years after the date of the enactment of this Act, no new petition to import an alien under sections 101(a)(15)(H)(ii)(a) and 218 of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(a); 8 U.S.C. 1188) shall be accepted. The Department of Labor H–2A program regulations published at 73 Fed. Reg. 77110 et seq. (2008) shall be in force for all petitions approved under such sections beginning on the date of the enactment of this Act.

(c) REGULATIONS.—Not later than 18 months after the date of the enactment of this Act, the Secretary of

1 Agriculture shall promulgate regulations, in accordance
2 with the notice and comment provisions of section 553 of
3 title 5, United States Code, to implement the Secretary's
4 duties under this Act.

○

Ms. LOFGREN. Thank you, Mr. Chairman.

I think we need to be honest about why we are here today. The majority wants to make E-Verify mandatory for all employers nationwide. That is their real goal.

But politically, they can't do that without having an answer to the disastrous impact that mandatory E-Verify has already had on the economies of several States, particularly agriculture. The reports are everywhere.

After making E-Verify mandatory, Georgia and Alabama lost many of the farmworkers they need to harvest their crops, not just the undocumented ones, but those with papers, too. As harvest time came, farmers tried everything to find workers. As a last-ditch effort, our former colleague, Governor Nathan Deal in Georgia, even resorted to busing ex-convicts to the fields, and nothing worked.

One of those probationers was quoted by Politico as saying, "Those guys out here weren't out there 30 minutes and they got the bucket and just threw them in the air and say, 'Bonk this. I ain't with this. I can't do this.'"

Farmers were forced to abandon acres of fruits and vegetables, which literally rotted in the fields. Bo Herndon, a farmer in Toombs County, Georgia, lost $150,000 in Vidalia onions. Georgia farmer Gary Paulk lost $200,000 when piles of his blackberries rotted on the floor.

It is estimated that Georgia alone will incur losses of $250 million to $300 million this year. That total could reach $1 billion next year, according to the Georgia Agribusiness Council. Families who have been working their land for generations are talking about having to give up their farms.

The majority says this bill is the answer, but it is not a solution. Instead, it is an acknowledgment that the majority's enforcement-only mantra is not the right approach, that mandatory E-Verify without other changes will hurt our country, and that America's farms are at least partially dependent on immigrant workers.

But rather than do something about immigrant workers who are already here, workers who, as this bill makes clear, we need and who have been providing critical services to the country for years, this bill's answer is to bring in a half million new workers each and every year in some misguided effort to replace the old workers.

How can anyone think the answer to our agriculture labor needs is to deport over a million ag workers already here, workers who have experience, who know where to go, what to do, when to do it, just to ship in a half million new workers every year, year after year after year? How does this make sense to anyone?

If we can admit we need the workers, why on Earth spend an exorbitant amount of money deporting the millions we already have just to bring in new workers who will need to be recruited and retrained by America's farmers, putting the financial burden on them?

And how can anybody possibly think this will work? The majority's own witness, Lee Wicker, testified in our last hearing on the H-2A program that a major problem with the program is how difficult it is to get consular interviews for prospective workers and

to have them be timely so that harvests aren't missed. This bill doesn't fix that problem.

Recently, I got a letter from an ag group that surveyed—that 72 percent of the growers they surveyed reported that workers in the H-2A program came after the date of need an average of 22 days after they were needed in the fields.

So instead of fixing the problem, that problem, this bill explodes it. If we have trouble getting 50,000 H-2A workers in for interviews and into the U.S. on time every year, imagine how much trouble we will have with 10 times that many.

But even if the government could magically make the program work, which I doubt, a big impact would be to increase unemployment for Americans. While undocumented workers make up the vast majority of fieldworkers, this is not true in other ag sectors, such as dairy, livestock, and animal husbandry.

In these areas where work tends to be year-round rather than seasonal, U.S. citizens and permanent residents still make up the bulk of the workers. And this bill for the first time would open up those jobs to foreign workers. Unlike current H-2A workers who can only fill seasonal jobs, the bill's workers could compete for permanent jobs as well. And because the bill slashes wages and worker protections, it actually would create an incentive for employers to replace their current American workers with cheaper H-2C workers.

The majority is selling this bill as a way to replace undocumented farmworkers, but it actually is designed to replace Americans, and that is no answer either.

But this is the choice the majority has left us. Why? Because the one answer that makes the most sense, finding a way to legalize and stabilize the current workforce for the good of both the farmer and farmworker, is off the table. And why is that? It is ideology, pure and simple.

Let's discuss the ideology. The only reason the majority will not even consider the most common-sense solution here is because of their supposed hatred of amnesty and devotion to the rule of law. But is that really the case?

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 farmworkers came here to work in the fields without obeying immigration rules. But essentially, every farmer in the country did the same thing by hiring them.

The majority says the farmworkers have to pay for their transgressions with deportation and family separation. But what about the farmers? Where is their penalty? Where is the bill to divest them of the money they made by relying on undocumented labor? Where is the majority's hatred for amnesty with respect to them? And what about the government? What price should we pay for essentially ignoring the needs of American businesses and families for decades?

We should all get real here and do what is right for the country. We simply can't allow ideology to trump common sense.

I yield back.

Mr. GALLEGLY. The gentlelady's time has expired.

The gentleman from Texas and the sponsor of the legislation, the Chairman of the full Judiciary Committee, Mr. Smith?

Mr. SMITH. Thank you, Mr. Chairman.

I also thank you, Mr. Chairman, for both your interest in this subject and your expertise in regard to this subject as well.

The agriculture industry needs to hire hundreds of thousands of seasonal workers each year to put food on Americans' tables. However, many workers with better options choose to work elsewhere. Even though Congress devised the H-2A program to meet the needs of our growers, half of farmworkers remain illegal immigrants. This is because, as the Department of Labor has admitted, most growers "find H-2A program so plagued with problems that they avoid using it altogether."

Our agriculture guestworker program needs to be fair to everyone it impacts—American growers, farmworkers, consumers and guestworkers.

A program must provide growers who want to do the right thing with a reliable source of legal labor. It must protect the livelihoods of American workers and the rights of guestworkers. And it must keep in mind the pocketbooks of American families.

H.R. 2847, the "American Specialty Agriculture Act," accomplishes these goals. It establishes an H-2C guestworker program responsive to the needs of American growers while maintaining strong policies to protect citizens and legal workers. And it does so without the fraud-ridden mass amnesty for illegal immigrant farmworkers that failed 1986.

The H-2C program makes commonsense changes to the current bureaucratic, unworkable H-2A program. Under the current H-2A program, users believe that they face a culture of hostility within the Department of Labor. That is why the bill puts the Agriculture Department in charge of the H-2C program.

Growers have to contend with a steep mountain of red tape to secure H-2A workers. The Bush Administration tried to streamline the process by making it "attestation"-based, just like the H-1B program for high-skilled workers. Unfortunately, the Obama Administration rescinded these changes. The bill makes H-2C program attestation-based as it once was.

Growers have long complained about the tremendous expense of the H-2A program and the required "adverse effect" wage rate, which, in my judgment, is artificially high. After factoring in other program expenses, such as housing, processing fees, and transportation costs, H-2A users have to pay up to $15 an hour for H-2A workers. This puts them at a competitive disadvantage in the marketplace.

The bill requires growers to pay H-2C workers and American workers the prevailing wage, which is lower than the "adverse effect" wage rate but is high enough to prevent the program from depressing the wages of American workers.

The H-2A program requires that growers provide H-2A workers with free housing. This can be burdensome for those growers who may need foreign workers for only a few weeks a year. The bill allows growers to provide a housing voucher instead of actual housing.

Dairies and certain other agriculture producers cannot use the H-2A program because they employ workers year-round, and the H-2A program is only available for temporary or seasonal work. The bill opens up the H-2C program to these employers.

Growers who use the H-2A program are constantly subject to abusive and frivolous litigation by H-2A workers. The bill allows growers to include binding arbitration in contracts with H-2C workers.

It is crucial to ensure that H-2C workers remain guestworkers. The bill, therefore, requires workers to return home after 10 months each year.

Finally, the bill allows up to a half-million foreign workers a year to receive H-2C visas. This will be more than enough to make up for a loss of illegal immigrant workers.

American specialty crop growers hire about 800,000 individual farmworkers each year on a seasonal basis. The U.S. Department of Labor reports that 48 percent of seasonal agriculture workers are illegal immigrants. Half a million H-2C workers more than meets the legitimate need.

The American Specialty Agriculture Act finally puts in place a fair and workable guestworker program for American growers. It will help American growers hire a legal workforce and protect American workers. And it will help ensure that American growers continue growing our crops and helping our economy.

I look forward to hearing from our witnesses today.

I yield back, Mr. Chairman.

Mr. GALLEGLY. I thank the gentleman.

Mr. Conyers is not here.

We have four very distinguished witnesses on our panel today. And I would ask that you all try to keep your initial testimony to 5 minutes, in the interest of time, so we will have an opportunity to ask questions. And your entire testimony, without objection, will be made a part of the record of the hearing.

Our first witness, Mr. Lee Wicker, is deputy director of the North Carolina Growers Association, the largest H-2A program user in the Nation. Prior to this position, he worked for the North Carolina Employment Security Commission as the technical supervisor for farm employment programs and the statewide administrator for the H-2A program.

Mr. Wicker has been growing flue-cured tobacco with his family in Lee County, North Carolina, since 1978. He graduated from the University of North Carolina at Chapel Hill, and I am sure our colleague Mr. Coble would be very happy to know that you are here today.

Our second witness is Mr. Chalmers Carr. He serves as president and CEO of the Titan Peach Farms Inc., which is South Carolina's largest commercial peach operation. He also is treasurer of the South Carolina Peach Council and chairman of the South Carolina Farm Bureau Labor Committee.

Mr. Carr began his farming career in 1990 and has been with Titan Farm since 1995. He has participated in the H-2A program now for 13 years.

Mr. Carr received his bachelor's degree from Clemson University.

Our third witness, Mr. Dan Fazio, is an attorney and the director of the Washington Farm Labor Association, a nonprofit trade association he founded in 2007 to serve labor-intensive agriculture employers and workers in the Pacific Northwest. Prior to working at the Labor Association, Mr. Fazio was the director of employer services at the Washington State Farm Bureau Federation.

His formal comments to the H-2A regulation led to changes which made the program much easier to use for Washington employers.

Mr. Fazio received his B.A. from the University of Rochester, his M.S. from the University of Southern California, and his J.D. from Seattle University.

And our fourth witness, Mr. Robert Williams, is the director of the Migrant Farmworker Justice Project at Florida Legal Services, Inc. He provides representation to migrant farmworkers in Florida and offers legislative and administration advocacy on their behalf.

Prior to this, he worked for the Florida Rural Legal Services, Inc. Mr. Williams also represents the United Farmworkers with respect to ongoing efforts to pass a farmworker immigration reform.

He received his B.A. from the University of Michigan and his J.D. from Harvard Law School.

So we have some very distinguished witnesses, and with that, we will start with Mr. Wicker.

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

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

As the largest H-2A program use in the Nation, NCGA currently has 600 grower members that will employ nearly 6,000 H-2A workers and many thousand more U.S. workers this season.

In this Committee's April 13 hearing on the H-2A program, I identified the chronic problems that undermine farmer confidence and make hiring illegal workers a more attractive option. While the American Specialty Agriculture Act is not perfect in all areas, from the perspective of this group of long-term H-2A program users, the proposed H-2C program is close enough.

The measured reforms go a long way toward solving the most onerous flaws in H-2A. This proposal is evidence the U.S. can have a workable farmworker program that treats workers well and carefully balances all the critical elements, worker protections, and economic viability for farmers.

Significant reforms are made to the prohibitive program costs, and H-2C makes improvements in other important areas. The bill provides a realistic market-based prevailing wage as a floor that surpasses the Federal minimum by more than 10 percent in North Carolina, on average, and even higher wages in specific areas.

It also authorizes piece-rate pay systems on top of the super-minimum wage to promote higher earnings as a financial reward for increased worker productivity.

It allows farmers and farmworkers who benefit from working together in the program to share the program costs, offers structured

portability, encourages a streamlined legal dispute resolution system to solve farmworker complaints quickly and efficiently, provides authority to the USDA for streamlined administration of the program, and makes farmer obligations clear and understandable.

These improvements will provide a viable alternative to employing illegal aliens and will give farmers confidence that they can participate in the H-2C program successfully.

This legislation continues the long-standing principle of giving American workers preferential consideration in obtaining these jobs by requiring farmers to solicit U.S. workers through the local employment service and prescriptive newspaper advertisements before foreign workers may be employed.

The bill maintains valuable employee benefits and critical worker protections for domestic and foreign workers, like extension of the minimum-hours guarantee, mandatory worker's compensation insurance coverage for workplace illnesses and injuries, and conditional perspective in- and outbound transportation, and subsistence reimbursement.

The bill continues the requirement to provide free, inspected on-farm housing and offers a housing voucher provision that will allow farmers without on-farm housing to participate. It requires comprehensive recordkeeping and reporting obligations.

The wage and benefit package will cost North Carolina farmers on average $10 to $12 per hour. The proposal imposes a robust enforcement regime and maintains a strong penalty structure for violations and severe penalties for gross material violations.

All the economic benefits and worker protections in this bill will provide workers who accept these jobs assurance they will enjoy a high-wage benefit package, a safer work environment, and quick resolution of their grievances.

When the public policy debate heats up about farm labor, we frequently hear worker representatives scream about the past and cite what the 60-year-old Bracero program was like and insist that all guestworker programs are the same. There is no legitimate comparison to H.R. 2847.

The NCGA board of directors voted unanimously to endorse and support this proposal. It offers great employment opportunities and provides growers with a program that is substantially more predictable and user-friendly. The delicate balance in this bill between administrative improvements for farmers, worker benefits and protections, represents a win for farmers, a win for farmworkers, and it secures a safe food supply for Americans into the future.

Passage of H.R. 2847 will save and help create more jobs for Americans on and off the farm. I applaud Chairman Smith's leadership on this issue.

There is no time to waste. The House should pass this legislation as quickly as possible.

The NCGA board also voted unanimously to join the U.S. Chamber of Commerce and others in support of H.R. 2164, the Legal Workforce Act, because it is time to level the playing field for all employers. More than 20 States have already enacted some version of E-Verify in the vacuum of Federal inaction. Recent decisions from the Supreme Court are signals that it is time for Congress to lead and pass a national standard so that employers, including

farmers, operating in multiple States can comply with the law more easily.

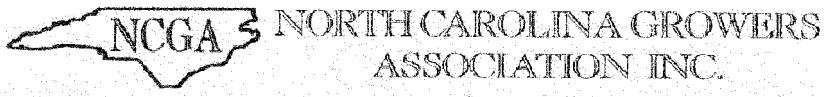
Some in agriculture are ringing the alarm bell in an effort to scare farmers to opposing H.R. 2164, because the bill mandates E-Verify only for new hires, proposes a special 3-year implementation provision, and offers an exemption for returning workers. We believe farmers and farmworkers have been given special consideration to preclude and avoid disruptive worker movements and extra time to transition into compliance.

Passage of H.R. 2847, the "American Specialty Agriculture Act," will help make this transition easier. The H-2C program will provide a predictable, efficient, and affordable process for hiring workers in temporary seasonal jobs.

Farmers and farmworkers want to comply with labor and immigration laws. Congress should pass the American Specialty Agriculture Act so they can.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Wicker follows:]



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

"American Specialty Agriculture Act"

2141 Rayburn House Office Building
Thursday, September 8, 2011
1:30 PM

Testimony of H. Lee Wicker

North Carolina Growers Association
Vass, North Carolina

Good morning Mr. Chairman and Committee Members. I'm Lee Wicker, Deputy Director of the North Carolina Growers Association. Thank you for holding this hearing regarding employment in labor intensive agriculture.

Jobs, Jobs, Jobs – you hear it every day….we need more jobs in America. We need to create more jobs and protect the jobs we currently have. Not all jobs are equal. It must be understood, that in order to plant, tend and harvest crops, farmers need temporary, seasonal (mostly unskilled) labor. And for most Americans – a temporary, seasonal job, paying under $10 an hour, out in the elements, performing physically demanding labor – these low skilled jobs aren't what our citizens want in order to provide for themselves and their families. Americans want full time, permanent jobs. And Agriculture provides these kinds of jobs to Americans, too. In fact, H-2A has the potential to be a great jobs program saving and creating full-time, permanent

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jobs for Americans. We've seen in North Carolina how this can work. The NC Growers Association is the largest H-2A program participant in the country – we currently have over 600 farmers who employ over 6000 H-2A workers who perform seasonal, temporary tasks – which then enables these same 600 farmers to hire several thousand Legal US workers on their farms to do permanent, full-time, higher skills jobs. Another 18,000 jobs can be attributed both upstream and downstream from the farm gate through the economic impact of the 600 NCGA farmers. But in order for these 20 to 25 thousand full time permanent jobs to exist, farmers need temporary seasonal farm workers as well – and for those jobs, farmers have two realistic options, navigating H-2A or hiring illegals.

When it was originally created, the H-2A program was a great concept. But unfortunately, unintentionally vague statutory language has resulted in politically motivated and ideologically based litigation and allowed bureaucrats to change the intent of Congress – making H-2A a program that is too litigious, too expensive and too difficult to navigate for most farmers. In 2008, new rules written under USDOL Secretary Elaine Chao made real improvements to the H-2A program – and more new farmers signed up to use the program. But in 2010, the H-2A rules were re-written by current USDOL Secretary Hilda Solis – creating rules and regulations that are absolutely horrendous for farmers – causing farmers to flee from the program and return to hiring illegal workers. H-2A has great potential – but only if Congress will fix it once and for all so that it is a workable and predictable program for farmers. This has the potential to improve wages and working conditions on all labor intensive farms.

The four biggest problems that preclude farmers from participating: H-2A is currently too expensive, too bureaucratic, too unlikely to deliver a workforce to the farm on time to perform time sensitive crop activities, and too likely to draw attacks from ideologues and bureaucrats. These problems undermine farmer confidence and make illegal workers a more attractive option.

Farmers need relief from the fluctuating, arbitrary wage rate of the Adverse Effect Wage Rate. This year, the Adverse Effect Wage Rate in North Carolina is $9.30 an hour. When you add in the benefits package of free transportation, free government-inspected housing, workers compensation insurance – that is a total H-2A cost of $12 - $14 per hour. That is much higher than what most family farmers can afford to pay for labor costs – especially when they see their competitors, who are employing illegal workers, are paying only $7.25 an hour with no benefits – it is not hard to see why most farmers in America don't use the H-2A program. When the public policy debate heats up about farm labor, we frequently hear worker advocates scream about the past and cite what the 60 year old Bracero program was like and insist that all guestworker programs are the same. The fact is there is no legitimate comparison. One last point on wages – according to NC State University economists Dr. Mike Walden and Dr. Blake Brown - every 10% increase in the H-2A wage rate above the Federal minimum wage results in about a 4% decrease in employment of full-time, permanent higher skilled US jobs. The American Specialty Agriculture Act provides a more realistic market based prevailing wage as a floor - which incidentally surpasses the Federal minimum by approximately 10% in NC, on average. Under the current program H-2A wages are nearly 30% higher than Federal minimum. This is not sustainable. If the 15 year trend in AEWR increases holds, in a few years we could be at 150% of Federal minimum wage. Wage improvements will make H-2A a more viable

alternative to employing illegal aliens and will give farmers confidence they can participate in the program successfully.

Farmers who use H-2A are plagued by lawsuits from ideologues. The complex, constantly changing rules are a boon for plaintiff lawyers – many of whom are ideologically opposed to the H-2A program. In North Carolina for example, Legal Aid has dedicated itself to filing harassing lawsuits on farmers who are merely trying to obey the law and hire LEGAL H-2A workers. Since 1989, NCGA has been sued over 30 times and has paid over $5 million dollars in attorneys fees and settlement costs. This is a common experience among H-2A employers. This harassment should be stopped. Farmers have to sign contracts with arbitration/mediation clauses every day – they should be allowed to have these same agreements with their workers.

U.S. Citizen Preference. The American Specialty Agriculture Act continues a long standing principal of giving American workers preferential consideration in obtaining these jobs by requiring farmers to first solicit U.S. workers through the local employment service and prescriptive newspaper advertisements before foreign workers may be employed. Obviously if an American worker wants these jobs, then they should be hired first.

Farmers need a simplified program that is not so bureaucratic. The American Specialty Agriculture Act allows farmers and farm workers who benefit from working together in this program to share in the costs, offers structured portability, encourages a streamlined legal dispute resolution system to solve farm worker complaints quickly and efficiently, provides authority to USDA for streamlined administration of the program that make farmer obligations clear and understandable.

While the American Specialty Agriculture Act is not perfect in all areas, from the perspective of a group of long term H-2A program users this bill is close enough. The reforms to the agricultural guestworker program proposed in the American Specialty Agriculture Act go a long way towards solving the four most onerous flaws with the program. This bill is also evidence that the U.S. can have a workable farmworker program that treats workers well and carefully balances all the critical elements, worker protections and economic viability. The American Specialty Agriculture Act maintains valuable economic benefits and critical worker protections for domestic and foreign workers like: the ¾ guarantee, mandatory workers compensation insurance coverage for work place illnesses and injuries, and conditional prospective in and outbound transportation and subsistence reimbursement that are articulated clearly in the legislative language. It continues the requirement to provide free inspected on farm housing and offering a housing voucher provision that will allow farmers without on farm housing to participate. The bill requires comprehensive recordkeeping and reporting obligations identical to current law. And the bill imposes a robust enforcement regime and maintains a strong penalty structure for violations with severe penalties for gross material violations. All the economic benefits and worker protections in the American Specialty Agriculture Act will provide workers assurances that if they accept these jobs they will enjoy a higher wage, benefit package, a safer work environment, and quick resolution of their grievances when compared to non H-2A workers.

The NCGA Board of Directors, who are all farmers who have participated in H-2A for at least twenty years have voted unanimously to endorse and support the American Specialty Agriculture Act. This legislation offers great employment opportunities and provides growers with a program that is substantially more predictable. On behalf of the members of NCGA and program users throughout the nation I applaud Chairman Smith's leadership on this issue. There is no time to waste; the House should pass this agricultural guestworker reform legislation as quickly as possible.

The NCGA Board of Directors also voted unanimously to join the U.S. Chamber of Commerce in supporting H.R. 2164, the Legal Workforce Act because it is time to level the playing field for all employers. More than twenty states have already enacted some version of E-Verify in the vacuum of Federal inaction. Recent decisions from the Supreme Court are signals that it is time for Congress to lead and pass a national standard so that employers, including farmers, operating in multiple states can more easily comply with the law. Some in agriculture are ringing the alarm bell in an effort to scare farmers into opposing H.R. 2164. Companion passage of the American Specialty Agriculture Act will certainly help to make the transition even easier for our industry.

In closing, farmers need an agricultural guestworker program that provides a predictable, efficient and affordable process for hiring workers for temporary, seasonal jobs. Farmers and farm workers want to comply with labor and immigration laws. Congress should pass the American Specialty Agriculture Act so they can.

Mr. GALLEGLY. Thank you, Mr. Wicker.

Our next witness, a constituent of one of our Committee Members, Mr. Gowdy, Mr. Chalmers Carr. Welcome.

TESTIMONY OF CHALMERS R. CARR, III, PRESIDENT AND CEO, TITAN FARMS, SOUTH CAROLINA

Mr. CARR. Thank you, Chairman.

Good afternoon. My name is Chalmers Carr, and I am the owner and operator of Titan Peach Farms in Ridge Springs, South Carolina.

Growing 5,000 acres of peaches and 700 acres of vegetable, my company has been legally employing H-2A guestworkers for the last 13 years.

I want to thank you for inviting me here today to share my thoughts with you on the American Specialty Agriculture Act and why I believe this bill will give lasting positive effects to agriculture as we know it today.

I am also president of USA Farmers, a national organization representing agriculture employers throughout the country, and our organization unanimously supports the Chairman's bill.

Presently, many States have passed their own immigration laws and employment verification bills. And without question, the greatest negative impact of these laws will be felt by the agriculture industry. These actions prove that now is time for Congress to reform the agriculture guestworker program, ensuring that farmers have access to a sufficient pool of legal labor.

If a bill creating a viable guestworker program, like the one offered by the Chairman today, is not passed, the agriculture industry as we know it in this country today will no longer exist, and we will become dependent on foreign countries to feed and clothe Americans.

Only a small portion of American agriculture employers participate in the H-2A program currently. It is not widely used because of its lack of accessibility, bureaucratic nature, high cost of participation, and the readily available supply of other labor sources. It is my opinion, though, that farmers would participate in a guestworker program, provided it is accessible to all sectors of agriculture, did not place a growers at a disadvantage in the marketplace, was simple to administer, and was free from frivolous lawsuits.

As proposed, the Chairman's bill positively addresses most of agriculture's major concerns that have been raised about guestworker programs. It expands the use of the program across the entire industry by dropping the illogical requirement for seasonal employment, but yet focuses on the guestworker being temporary other than the job.

In addition, I would also like to see that this bill clearly addresses agriculture processors—are able to participate.

Transferring the program from the Department of Labor to the Department of Agriculture is another very positive step. It is logical that the Federal agency most accustomed to servicing the agriculture industry should be the one to administer a guestworker program for that same industry.

The Chairman's bill calls for the use of a prevailing wage for similar employment in a regional area. This approach is much preferred to the current adverse wage effect rate, which has often been criticized for years for its artificially high wage rates that fail to reflect actual market wages in particular localities.

I support the Chairman's provision but would also suggest that consideration be given to a wage rate that is tied to the Federal minimum wage. Such a solution would provide the needed trans-

parency to the process and would help guard against manipulation of wages by administrative agencies.

The Chairman's bill also removes the requirement of hiring U.S. workers beyond the start date of employment period. Considering the high unemployment rates, there should be enough U.S. workers available for agriculture jobs. However, the reality of the situation is the vast majority of Americans choose not to work in production agriculture.

Last year alone, my company experienced a significant increase in the number of U.S. workers applying for jobs. However, of the 285 U.S. referrals applying for jobs and were offered employment, 60 never reported to work; 190 quit, most of them by the end of the second day; another 20 were terminated for cause; and only 15 workers actually made it to the end of the contract.

This bill makes much-needed improvements to the problem of predatory lawsuits by allowing the inclusion of mediation and arbitration language in job contracts to resolve employment disputes, as opposed to costly lawsuits.

It also allows employer-provided housing vouchers.

Reforms of this nature will increase grower participation in guestworker programs.

In closing, I would like to commend Chairman Smith for his vision in recognizing the dilemma that is facing specialty crop agriculture today, and for his leadership in offering a solution to this problem.

In America, we have the safest and cheapest food supply available in the world. Without a viable worker guest program in this country for agriculture, that will no longer be the case, and our domestic food production will be moved abroad.

And so I leave you with this question: Would you choose to have the food you feed your family grown on the fertile soils in America under the governance of USDA and harvested by lawfully admitted foreign workers, or would you accept having the food put on your dinner table tonight grown in a foreign country with unknown production practices and no food safety protocols? Understand either way the food will still be harvested by a foreign worker.

I sincerely hope Congress chooses to ensure that American farmers will continue to be able to feed Americans at home with plenty left over to feed the rest of the world.

Thank you for your time and consideration today.

[The prepared statement of Mr. Carr follows:]

Written Statement
of

Chalmers R. Carr III
President
Titan Farms LLC
Ridge Spring, South Carolina
September 6, 2011

United States House of Representatives
Judiciary Subcommittee Hearing
on
Immigration Policy and Enforcement

"American Specialty Agriculture Act"

September 8, 2011

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

United States House of Representatives
Judiciary Subcommittee on Immigration Policy and Enforcement
September 8, 2011

Thank you for inviting me to be here today to share with you my thoughts on the "American Specialty Agriculture Act" and why I believe this bill will have lasting positive effects on agriculture as we know it today. I would like to thank the Chairman and his staff for all their hard work on this legislation.

My name is Chalmers Carr. I am the owner and operator of Titan Farms in Ridge Spring, South Carolina. I currently grow 5000 acres of peaches and 700 acres of vegetables encompassing 20 square miles. For the past 13 years my company has been legally employing alien workers via the H-2A guest worker program and this summer we provided jobs, housing, and transportation for over 450 workers. I am also currently president of USA FARMERS, a national organization with over 1000 members representing 34 states and all facets of agriculture. Part of the mission of USA FARMERS is to represent agricultural employers in public policy concerning guest worker programs. In that respect the USA Farmers unanimously support Chairman's Smith Bill, the "American Specialty Agriculture Act". In addition, I am 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.

Due to growing public sentiment surrounding the vast population of undocumented and unauthorized foreign nationals present in our country, numerous states have passed their own immigration laws and/or mandatory E-verification bills. The combination of the states' action and Congressional discussion of a mandatory national E-verification law proves that now is the time for Congress to take steps to preserve agriculture and to reform the agriculture guest worker program to ensure American farmers have access to a sufficient pool of available legal labor.

Without question, the agriculture industry will continue to be adversely affected by these immigration and E-verification laws suffering greater negative impact than any other industry. Regardless of which statistics you read, it is commonly agreed that well over 50% of the agricultural workers in our country are unauthorized and using false documentation for employment. If bills creating a workable guestworker program, like this one offered by the Chairman, are not passed, then the agricultural industry as we know it today will no longer exist. Without a complete overhaul of the agricultural guest worker program we are at risk of becoming dependent on foreign countries to feed and clothe America. In that regard, this is not only an agricultural issue, but an issue of national safety and security. A country that cannot feed itself cannot defend itself and will be dependent on other countries for basic needs. I feel certain no United States citizen wants to ever see this become reality.

Only a small portion of agricultural employers who require manual labor to plant, cultivate, harvest, pack and process their crops participate in the current agricultural guest worker program offered by our government. This program, known as the H-2A program, is not widely used because of its lack of accessibility, bureaucratic nature, high cost of participation and the readily-available supply of other labor sources . I have made financial sacrifices to participate in this program because I support the laws of our country and this was the only legal means of obtaining the labor necessary for my operation. It is my sincere opinion that farmers are some of the greatest patriots today. We take sincere pride in waking everyday to go to work to produce the food and fiber that feeds, clothes, and provides shelter not only for every American but nearly 20% of the world's population. It is my opinion these same patriots would support the laws of our country and participate in a guest worker program if legal US workers willing to perform the work required were not available. Such a government offered program should allow access and use by all types of agricultural operations regardless of whether they are seasonal year-round employers or processors of agricultural products or animals. Furthermore their participation should not place them at a cost disadvantage in the marketplace, the program should be simple to administer, and frivolous lawsuits from organizations with ulterior agendas should be non-existent.

The agricultural industry has served as an entry gate for illegal foreign nationals to gain access to the US job market for decades. While imposing a nationwide E-verify mandate, Congress has a unique opportunity to find a solution to this repetitive cycle of illegal immigration by creating a new guest worker program coupled with a transitional period allowing agricultural employers and workers to move into the new program.

I commend the Chairman for his vision and comprehension of the dilemma facing agricultural employers and for his leadership in offering the American Specialty Agriculture Act as a solution to this very problem.

Upon passage, the positive initiatives contained in this bill will provide a better and more viable guest worker program for agriculture than exists today. It will also help to shut down the flow of illegal workers entering the US work force who end up in agriculture. As proposed, the Chairman's bill positively addresses most every major issue that has been raised by the agricultural industry for many years.

The bill expands use of the program across the entire industry by dropping the illogical requirement of seasonal employment for participation in the program. The bill properly focuses on the guestworker being "temporary" rather than the job. This provision recognizes the current trend of diversification within the agriculture industry where many growers raise multiple crops over multiple seasons. It also allows for participation by almost every agricultural employer whether they are a six week strawberry producer or a year-round milk producer. I would also like to see the bill clarify that on-farm processors are not subject to arbitrary restrictions on their eligibility to participate in the program.

The transfer of this program from the Department of Labor to the Department of Agriculture is another very positive step. It is logical that as the federal agency most accustomed to servicing the agriculture industry, USDA should be responsible for administration of a guest worker program designed to the meet the needs of agriculture. The bill offers substantial protections for US workers and also includes commonsense provisions to ensure its predictability and workability for employers.

While US workers are theoretically available for jobs in agriculture, the reality of the situation is that the vast majority choose not to work in production agriculture. Last year, due to the current administration's disdain for guest worker programs, my company was forced to absorb a 28% wage increase in the H-2A program. Wages jumped from $7.25 per hour to $9.12. As a result of high unemployment and DOL referring workers to our farm, I saw a significant increase in the number of US workers applying for jobs. What has not changed, however, is the number of US workers who will perform the job. Over the past year, I had 285 US referrals who applied for and were offered employment. Of that number, 60 never reported to work, another 190 of them quit, with most quitting before the end of the second day of work, and another 20 were terminated for cause. Just 15 workers -- or 5% -- actually completed the term of employment. No employer can effectively conduct business with this amount of turnover in employment and should not be forced to do so! In fact, we have had to hire another secretary just to process all the paperwork associated with hiring all of these workers who then do not show up to work or quit within a few days.

The Chairman's bill calls for the use of a prevailing wage rate for similar employment in the same regional area. This approach is preferred much more so than using the current adverse wage effect rate (AWER), which has been criticized for years for its artificially high wage rates that do not reflect actual market wages in the locality. Although I prefer the wage calculation methodology contained in the bill over the current wage program, I remain concerned about the unpredictability and volatility associated with wage surveys. To the extent Congress mandates a wage for the guestworker program, I support the Chairman's provision but would also suggest that consideration be given to wage rate that is truly market-based and tied to the federal minimum wage. Such a solution would provide much-needed transparency to the process and would help guard against manipulation of wages by administrative agencies, while providing protection for the US work force.

For decades, many farmers have attempted to comply with the law by hiring farmworkers through the overly complex H-2A program but have found themselves subject to predatory lawsuits. Many of these lawsuits involve questionable interpretations of law or hopelessly confusing or contradictory DOL requirements. Too often farmers are forced to settle these cases because it is simply cheaper to do so than to endure years of litigation. The Chairman's

bill would make much needed improvements in this area by including mediation and arbitration to resolve employment disputes, rather costly lawsuits. These reforms are vital to increasing grower participation in the program.

In closing I would like to again commend Chairman Smith for his vision and leadership. I would also like to remind the Committee and Congress that this issue goes well beyond a guest worker program for agriculture. It goes directly to the core of the life we enjoy as American citizens. We have the safest and cheapest food supply in the world. However that will no longer be the case without a viable guest worker program that is embraced by all branches of agriculture. Without guest workers in this country, our domestic food will increasingly be produced abroad.

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. I hope that Congress wants to help 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. GALLEGLY. Thank you, Mr. Carr.
Mr. Fazio?

TESTIMONY OF DAN FAZIO, DIRECTOR, WASHINGTON FARM LABOR ASSOCIATION

Mr. FAZIO. Good afternoon, Chair Smith, Chair Gallegly, and Ranking Member Lofgren, and Members of the Committee.

Thank you for allowing me the privilege of testifying before you today. My name is Dan Fazio, and I am the director of the Washington Farm Labor Association.

In my remarks today, I am speaking for my association and its members, representing many labor-intensive agriculture sectors across our State. Our association is responsible for about three-quarters of H-2A applications submitted in our State. As we all know, the H-2A program does not work for farmers or farmworkers.

I am here to testify in support of H.R. 2847, the "American Specialty Agriculture Act," and to urge that your Committee work to perfect it in a bipartisan manner.

I am here to testify on behalf of Steve Sakuma, a third-generation berry grower from Burlington, Washington, about an hour north of Seattle, who hires about 3,000 workers each year and who recently made headlines by admitting in an AP story that the majority of his employees are probably not work-authorized.

Mr. Sakuma is a retired Army colonel. His dad and uncles proudly fought in World War II, even though the Sakumas temporarily lost their farm to the internment of Japanese-Americans serving during the war.

We recently held a workforce summit, and I asked Mr. Sakuma why he spoke out on this issue when he surely risks a raid by ICE and unhappy corporate customers. He told me that he did it because it was the right thing to do. He told me that no one loves this country more than his family and it is our duty to work together to fix this problem.

So on behalf of Steve Sakuma and Sakuma Brothers Farms, please pass this bill.

This bill addresses immigration reform, but it is really a jobs bill. It will increase employment, and I will tell you how. Right now in Washington State, it is harvest time. The big crop is apples. We grow more apples than all States put together, and it takes a lot of workers, more than 30,000 of them, to pick those apples.

The workers earn about $13 an hour, and in the course of our 70-day apple harvest, the average worker will pick over 100 tons of apples. According to economists, each one of those workers will create 2.5 jobs in trucking, processing, and exporting. About 75 percent of those harvest workers or more are undocumented.

What happens when we don't have enough workers for the apples or the dozens of other commodities that are currently in harvest? It happens every year, and it almost always hits the small growers.

Let me tell you about one of the small growers, Julie Michener from Grandview, Washington. Julie had 28 acres of apples that didn't get picked in 2009 because there were no workers. She lost hundreds of thousands of dollars, and the world lost over 100 tons of apples. Next year, Julie pushed over most of the trees and created a pumpkin patch and a corn maze.

When small growers abandon their orchard, it robs workers of good-paying jobs, it robs our Nation of export revenue, and it robs a hungry world of nature's most healthy bounty.

So on behalf of Julie Michener, please pass this bill.

If there is one change I could suggest, it would be to allow employers and workers to extend the visas so that it makes it easier for full-time employers, like dairy farms, the shellfish industries, and dozens of other full-time agriculture employers to use the program.

Right now, I am working with Ian Jefferds, a shellfish producer from Oak Harbor on the Whidbey Island, who was notified by ICE last week that 34 of his 62 workers are not work-authorized, and so he needs to let them go. These are full-time, highly trained workers. Most of them make more than $50,000 a year in a rural town with limited job opportunities. And these workers are all going to be let go from jobs that they love.

So on behalf of Mr. Jefferds and his workers, please pass this bill.

I could go on and on, but I will leave you with this: Our immigration policy should serve our national interests. In this case, our economic interest is served when we allow people to come to do the jobs that Americans don't want to do and then return home.

The reason that seasonal agricultural doesn't attract Americans has nothing to do with Americans being lazy and everything to do with the job. This is hard, seasonal work that typically lasts for 6 months per year. In addition, it is sporadic. One week you work 20 hours; the next week you work 60 hours. There is little upward mobility, and the wages that are offered, generally $9 to $14 per hour, are not likely to increase, because it is a high limit in order to be internationally competitive.

If farmers are forced to pay more, they made to it, but they may also lose important export markets, just as we lost a large portion of our manufacturing sector when it was no longer internationally competitive.

By allowing people to do these jobs, we create more jobs that Americans do want, again benefiting our economy.

Finally, anyone who has been to Ellis Island knows that our immigration policy must serve a higher moral purpose. Right now, families in Mexico and Central America are starving because they can't find work. The typical agriculture job in southern Mexico, when you can find work, pays under $10 per day, while the standard in the U.S. is $100 a day. If you provide us a workable guestworker program, we can harvest our fruit and lift these human beings out of poverty.

I urge you to send this bill out with a bipartisan vote, and thank you very much.

[The prepared statement of Mr. Fazio follows:]

Prepared Statement of Dan Fazio

American Specialty Agriculture Act Hearing Dated September 8, 2011 Written Submission of Dan Fazio

According to the Congressional Research Office, there are approximately 1 million hired farm workers toiling in the U.S., and the majority of them are not eligible to work here. In Washington state, the most reliable figures indicate that 75 percent of the state's seasonal workforce (approximately 60,000 workers) is not work authorized.

But only 3,000 workers, about 5 percent of the total needed, come through the H-2A program in Washington state. In California and Oregon, less than one percent of the workers are provided by the H-2A system. In Washington, an employer can expect that it will add $4.00 per hour or more per hour to use the H-2A system. In other words, an employer who pays workers $13 per hour can expect this cost to rise to at least $17.00 per hour to use H-2A. Employers who use the government system to acquire a legal workforce are thus forced to pay a surcharge or tax, as compared to employers who simply hire the domestic workforce, which is largely undocumented.

Clearly, the H-2A program is not working. It is not being embraced by agriculture employers who desire a legal and stable workforce. And worker advocates tell us that the program does not work for their clients either.

I. Introduction: What is it going to take to solve the problem?

Farmer Perspective

What is the outcome that we are hoping to achieve, and how can we achieve that outcome?

The obvious outcome is a legal and stable workforce, in a cost effective manner. That outcome would support our nation's economic interest in having food produced in this country, where we have the world's best and safest food supply.

It would also satisfy our nation's moral imperative. We can provide jobs for people to help lift them out of poverty. The migrant workers who come from Mexico and Central America to my

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state earn over $100 per day in the apple harvest. In their country, they earn far less than $10 dollars per day. The vast majority of them want to come here, earn a good wage for 6 months, and then go back home. And in six months in Washington state, they can earn more than they earn in three years back home.

And that is what this bill attempts to do.

Others workers may want to stay here permanently, and I think that this committee should work in the future on a plan for them. And the farmers from my state would be happy to help you in offering ideas there as well.

What will it take? It will take bi-partisanship. Farmers are asking Congress to work together to deliver a program where we can access a legal and stable workforce in a cost effective manner, offering workers a safe and secure workplace and an excellent wage.

Farm Worker Advocate Perspective

I have asked advocates for farm workers the same question – what is it going to take to get us this program? The response I hear is the H-2A guest worker program is full of abuses. While we all agree that the H-2A program is administratively complex and loaded with red tape, I disagree that the program is being abused. But that does not answer the question.

According to many worker advocates, the H-2A system is "indentured servitude," meaning that the worker is contractually obligated to work only for one farmer.

From my perspective, employers would be content to permit workers to be responsible for all costs, and thereafter to work for any employer. But that is not being suggested by worker advocates. Apparently, the idea being put forth by worker advocates is for the farmer to pay all of the costs for the guest worker, to provide housing and transportation, and thereafter allow the worker to work anywhere she pleases. This is not reasonable, and I hope that advocates for farm workers can articulate a better plan to solve this problem.

Right now, the position of farm worker advocates appears to be that we don't need a guest worker program; we only need to provide status adjustment for the workers who are currently here now.

Adjusting the status of workers may be part of the solution. But it raises two issues:

- Is this the permanent solution? In 1986, we provided amnesty for undocumented workers, and they were replaced with more undocumented workers. In order to avoid the same fate, we need to adopt a program that works in the future.
- If we adjust the status of workers, where do these people fit in the "immigration line?" Are these workers given legal permanent residence status, thus placing them in front of the current guest workers who have obeyed our laws and only come to this country in a

legal way? Or do we offer currently undocumented workers the same status as other guest workers, who are required to return to their native countries at some point.

What will it take? It will take advocates of farm workers proposing a guest worker program they are willing to support, or, in the alternative, for these advocates to propose modifications to this bill that they would require in order to support it.

II. Why Don't U.S. Workers want these jobs?

This is a simple question. Americans don't want these jobs because they are not desirable jobs, for the following reasons:

- This is not full time work. On average, there is only reliable work from May through October, approximately six months. In contrast, the construction industry in Washington state generally lasts for eight or nine months.
- The hours are not desirable. This is not an eight hour a day job, or anything approaching that. One week requires 60 hours of work, while the next week may only be 20 hours, due to rain or some other event related to weather or crops. The worker must be willing to place his/her personal plans and desires behind the requirements of the job, as dictated by mother nature.
- The pay is not consistent with the level of skill and dedication required. Although the pay for seasonal farm work is better than some would imagine - some harvest jobs earn consistently in excess of $15 per hour – it is not good when compared with jobs in the U.S. market that are similar in terms or skill. The prevailing practice is to pay piece rate, where the individual is compensated based on production. This is not the norm in the U.S. People who do not produce up to the piece rate standard are generally paid at the minimum wage.
- Pay is constrained by international markets. U.S. agriculture competes globally. For example, the average daily wage of worker harvesting apples in the U.S. is $100 per day; in Mexico, 8 - $10 per day; In China, $3 dollars per day. China currently produces about double the apples that are produced in the U.S., due in part to this competitive advantage. The U.S. must rely on its quality advantage, due in part to its skilled workforce, to offset this tremendous labor cost advantage. In other industries, such as retail, restaurant, hospitality, and construction, there is little or no pressure from foreign labor.

In summary, the average (documented) American who may be out of work has not shown an interest in seasonal agricultural jobs, and is not able to replace the foreign or undocumented work force.

III. The American Specialty Agriculture Act

Moving to the bill itself, on the west coast, we have struggled to implement the H-2A program because we have a large domestic workforce that must be integrated into the program. This challenge will remain. Specifically, domestic workers don't want to be tied down to one employer, as is required under the H-2A program, but they would like to receive the benefits of the H-2A contract, specifically, the higher wages. This is a difficult issue that must be addressed, and there are several other impediments. I am going to cover four areas of the bill. They are: housing, moving the program to US Department of Agriculture, length of the visa, and the dispute resolution process.

HOUSING

Housing is in short supply and very costly. Many domestic workers are requesting housing, and this has been a tremendous problem with the current H-2A program. Under the current program, the employer must maintain large quantities of excess housing on the chance that a domestic worker will arrive and request housing. This has happened to our association.

The bill (American Specialty Agriculture Act, ASAA) alleviates this problem by ending the requirement to hire domestic workers when the first foreign workers arrive.

Another way to alleviate the problem would be to require the employer to secure housing, but allow the employer to charge a reasonable amount for it. Most domestic workers are not willing to pay for housing and would not request it if there were a cost. In this way, the employer would only be providing housing for workers who truly need it.

MOVE TO USDA

The bill moves the program to USDA. That is an excellent idea because the Department of Labor is struggling with this program and is in fact hostile to it. From my perspective, the agency is not acting as an honest broker.

Right now, the DOL Wage and Hour Division has been ordered to investigate all growers that use H-2A in Washington state. Does it make sense to target the few employers in the state who are attempting to hire legal workers? Of course not. The objective by DOL is clearly to create charges of "worker abuse."

Currently, there is a disagreement between two sections within DOL - the Wage and Hour division and the Education and Training Administration.

Let me give you one example of this disagreement. The current H-2A regulation says that employers should follow state law regarding workers' compensation for the H-2A program.

State law requires employers to collect a portion of the workers' comp premium, and the applications from Washington employers were approved by DOL ETA with this language.

Apparently DOL Wage and Hour does not agree with the plain language of the regulation. It's a huge issue because Washington state law requires employers to deduct a worker portion of workers' compensation insurance. Even though the DOL education and training administration approved applications which clearly state that the worker portion will be deducted in accordance with state law, but the DOL Wage and Hour division told employers that the employers were going to be fined because the DOL Wage and Hour training manual says differently. In addition, the DOL inspectors have refused to provide employers with a copy of the training manual.

DOL Wage and Hour inspectors told employers in June that unless the employers immediately begin paying the worker portion of workers' compensation, the employer would be fined. The employers are therefore in a tough position – either pay millions in state workers' comp insurance that you do not owe, of face a fine.

Two months ago, on July 7, I wrote a letter to Secretary Solis asking her to resolve this issue, and to stop these investigations until we can all work together on complying with the new regulation. I haven't heard anything back. I included a copy of the letter in my packet.

I strongly support turning this program over to the Department of Agriculture.

The Length of the Visa

The ASAA would allow employers from all agricultural industries access to the program, but would limit the program stay to a single ten month period.

This is not practical for full time operations. A dairy farm or other full time agricultural employer could not survive by rotating crews every ten months. On the other hand, one of the goals of the program is to discourage long term stays in this country. We would therefore propose that the USDA be able to designate certain industries that are full time, and these industries could offer a visa of up to three years.

Dispute Resolution

Under the current program, individuals claim a private right of action. How this works, in practice, is that a person who does not agree with a provision of the law or related regulation can attack an employer, even though the employer is in fact complying with the law. The employer is therefore left to defend the regulation.

Let me provide a real life example. The 2008 changes to the H-2A regulation provide specific expenses that were the responsibility of the grower, and others that were not. In addition, the regulation did not require that payments be coordinated with the Fair Labor Standards Act.

In Washington state, the legal services provider is interested in challenging this provision of the regulation. The Legal Services provider has therefore contacted our association and threatened legal action unless the farmer provides payments that are specifically excluded in the regulation. Legal Services attorneys have admitted that the reimbursement they are seeking is not required by the regulation, and would acknowledge that it is the regulation which is being attacked. Thus, due to the private right of action, the workers are able to initiate a claim against the farmer for the decision of the agency not to include the H-2A program reimbursements in the FLSA.

The ASAA addresses this concern. The ASAA would require a mediation before a suit can be initiated. This is a reasonable compromise between allowing and denying a private right of action.

ADDENDUM TO PREPARED STATEMENT

September 6, 2011

Hon. Rep. Lamar Smith,
Chairman, House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

RE: Testimony of Dan Fazio Regarding HR ___, the American Specialty Agriculture Act; Additional Page

Dear Chairman Smith:

In reviewing my written submission, I noticed that it does not clearly indicate our association's strong support for the above referenced legislation. I write to add that strong support.

In voicing support for this bill, I believe that I am speaking on behalf of all the major agricultural associations in our state who recently sent a letter to the Washington Congressional Caucus in this regard. I have included a copy of that letter with my testimony. It asks members to support a guest worker program that that will provide for the current and future flow of workers for farmers in our state. The American Specialty Agriculture Act would create the program we need. Thank you for your hard work in bringing it forth.

I look forward to working with you and the other members of the committee to make this bill the law of the land.

Sincerely,

Dan Fazio
Director

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ATTACHMENTS

July 7, 2011

Hon. Hilda L. Solis
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

RE: Workers' Compensation Deductions for Employers in Washington State using the H-2A program

Dear Secretary Solis:

I am writing to ask for your assistance in clarifying your agency's position regarding the payment of the worker portion of the workers' compensation payroll deduction in Washington State for employers who are enrolled in the H-2A program. A discrepancy apparently exists between the applicable regulation and what investigators are enforcing as it relates to this issue.

By way of background, several investigators from the Department of Labor Wage and Hour Division (DOL/WHD) recently advised an employer in Washington that employers were forbidden to deduct any portion of a workers' wage for the payment of workers' compensation premiums in the case of employers who use the H-2A program. This verbal notice was provided after eight days of investigation. I am personally aware of at least two other employers in similar circumstances, but neither has received a similar demand.

By further background, Washington State has a unique form of workers' compensation. All workers are covered, regardless of the employer, by a state plan (except certain self-insured employers). Employers do not purchase a traditional workers' compensation policy. Rather, coverage is provided through a payroll deduction system. Details of this rather unique system are provided in Title 51 of the Revised Code of Washington, or on the agency website, www.lni.wa.gov. Notably, employers are required to deduct certain worker contributions.[1]

Our association, in combination with the Washington Farm Bureau, and the American Farm Bureau Federation, has expended considerable resources explaining this to DOL personnel at various levels over the past several years. Our efforts included formal comments to the 2008 H-2A regulation, which caused DOL to examine the underlying statute (the Immigration and Nationalization Act). On the basis of this analysis, DOL concluded:[2]

> Section 218(b)(3) [of the INA] provides that if "employment for which the certification is sought *is not covered* by State workers' compensation law, the employer will provide, at

[1] See Revised Code of Washington (RCW) 51.16.140
[2] See Federal Register, December 2008, Volume 73, Number 244, page 77147.

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> no cost to the worker, insurance covering injury and disease arising out of and in the course of the workers' employment. . ."
>
> Where the employment in question is covered by State workers' compensation law, but subject to certain rules applied by the State, the statutory provision is inapplicable. Therefore, the Department has modified language in §655.104(e) to clarify that the employer should follow state law, but if the State excludes the type of coverage for which employment is sought, then the employer must purchase the insurance at no cost to the worker. (Emphasis retained from the original).

Accordingly, DOL modified its H-2A regulation in 2008 to reflect this reasoning[3] and the changes were preserved in the most recent H-2A rule revision.[4]

Since these provisions were enacted, our association has spent many hours working with DOL employees to inform them of the regulation in light of Washington's unique system. In short, we believe that Washington law requires employers to deduct a portion of the workers' compensation assessment via payroll deduction. I was therefore quite surprised to learn that DOL training manuals, and advice by inspectors, is being given that is contrary to the regulation and the state law. Here is what most recently transpired:

On Friday, June 17, DOL/WHD inspectors advised a liaison for certain workers that an employer could not deduct workers' compensation premiums from paychecks issued to H-2A workers. This word quickly spread among workers, and caused considerable hardship to the employer.

At a meeting on Monday, June 20, an attorney for the employer advised the DOL inspectors of the Washington law and the federal regulation. The DOL inspectors disagreed with the employer's position. The inspectors based their disagreement on a Wage and Hour Division training manual that apparently states that employers cannot deduct any portion of workers' compensation premiums.

The employer participating in my association and the subject of the audit has requested a copy of the training manual in writing. To date a copy of this manual has not been provided to the employer. To better assist all of the members of my association and this particular employer I request you provide a copy of the training manual to me so I may provide it to the employers within my association and my other members as a training tool for those utilizing the H-2A program.

On June 20, DOL inspectors promised to find the employee liaison who they had previously told that the workers' compensation deduction was not proper, in order to advise him that the issue was in dispute. They also promised to immediately request that DOL supervisors address this issue.

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[3] See 20 CFR 655.104(e). [2008 Version of H-2A Regulation].
[4] See 20 CFR 655.122(e)(1). [2010 Version of H-2A Regulation].

Hon. Secretary Hilda Solis
RE: Workers' Compensation Deductions in Washington State
July 7, 2011

On June 22, the lead DOL/WHD inspector advised the HR director for the employer that the interpretation of the agency was that the employer could not deduct a portion of the workers' compensation premium from the paychecks issued to H-2A workers. The inspector stated that the DOL/WHD team was leaving on June 23 (after eight days of inspections), but would be back in approximately one month to continue their audit. The lead inspector stated the employer could be exposing itself to potential liability if it continued to deduct the worker portion of the workers' compensation deduction.

Finally, on July 6, the same lead inspector told me that the agency position was unchanged: employers who utilize the H-2A program cannot deduct any portion of the workers' compensation payments from employee wages, for both foreign workers and domestic workers in corresponding employment.

As stated above, it appears that the federal regulation requires the employer to follow state law regarding workers' compensation. However, the position taken by DOL/WHD inspectors on this issue would appear to require employers to violate state law.

I have checked with other employers using the H-2A program who were inspected, and no such demand is being made. As of July 7, 2011, this issue has not been resolved. I would request that you provide us with the Department's position on this issue, and I would request that you cease further inspections to similarly situated employers until this issue is resolved. Because this is a pressing matter for employers using the H-2A program, your prompt attention to this matter is greatly appreciated. We would also appreciate receiving a copy of the training manual referenced above.

Sincerely,

Dan Fazio
Director

C: Hon. Gov. Chris Gregoire
Hon. Sen. Patty Murray
Hon. Sen. Maria Cantwell
Hon. Rep. Doc Hastings
Hon. Rep. Cathy McMorris Rodgers
Bob Stallman, President, American Farm Bureau Federation
Steve Appel, President, Washington Farm Bureau

Wage and Hour Division (WHD)

(February 2010) (PDF)

Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA)

This fact sheet provides general information concerning the application of the H-2A requirements to the agricultural industry for H-2A applications submitted on or after March 15, 2010. For applications submitted between January 17, 2009 and March 14, 2010, see Fact Sheet 26A. For applications submitted prior to January 17, 2009, see Fact Sheet 26B.

Introduction

The Immigration and Nationality Act (INA) authorizes the lawful admission of temporary, nonimmigrant workers (H-2A workers) to perform agricultural labor or services of a temporary or seasonal nature. The Department of Labor's regulations governing the H-2A Program also apply to the employment of U.S. workers by an employer of H-2A workers in any work included in the ETA-approved job order or in any agricultural work performed by the H-2A workers during the period of the job order. Such U.S. workers are engaged in corresponding employment.

Overview of Employer Contractual Obligations

Recruitment of U.S. Workers: In order for the Department of Labor to certify that there are not sufficient U.S. workers qualified and available to perform the labor involved in the petition and that the employment of the foreign worker will not have an adverse effect on the wages and working conditions of similarly employed U.S. workers, employers must demonstrate the need for a specific number of H-2A workers. In addition to contacting certain former U.S. employees and coordinating recruitment activities through the appropriate State Workforce Agency, employers are required to engage in positive recruitment of U.S. workers. H-2A employers must provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 50 percent of the period of the work contract has elapsed. Employers must offer U.S. workers terms and working conditions which are not less favorable than those offered to H-2A workers.

Termination of Workers: Employers are prohibited from hiring H-2A workers if the employer laid off U.S. workers within 60 days of the date of need, unless the laid-off U.S. workers were offered and rejected the agricultural job opportunities for which the H-2A workers were sought. A layoff of U.S. workers in corresponding employment is permissible only if all H-2A workers are laid off first. Employers may only reject eligible U.S. workers for lawful, job-related reasons.

In order to negate a continuing liability for wages and benefits for a worker who is terminated or voluntarily abandons the position, employers are required to notify the Department of Labor (DOL), and in the case of an H-2A worker the Department of Homeland Security, no later than two working days after the termination or abandonment.

Rates of Pay: The employer must pay all covered workers at least the highest of the following applicable wage rates in effect at the time work is performed: the adverse effect wage rate (AEWR), the applicable prevailing wage, the agreed-upon collective bargaining rate, or the Federal or State statutory minimum wage.

Wages may be calculated on the basis of hourly or "piece" rates of pay. The piece rate must be no less than the piece rate prevailing for the activity in the area of intended employment and on a pay period basis must average no less than the highest required hourly wage rate.

Written Disclosure: No later than the time at which an H-2A worker applies for a visa and no later than on the first (1st) day of work for workers in corresponding employment, the employer must provide each worker a copy of the work contract – in a language understood by the worker – which describes the terms and conditions of employment. In the absence of a separate written work contract, the employer must provide each worker with a copy of the job order that was submitted to and approved by DOL. The work contract must include:

- the beginning and ending dates of the contract period as well as the location(s) of work;
- any and all significant conditions of employment, including payment for transportation expenses incurred, housing and meals to be provided (and related charges), specific days workers are not required to work (i.e., Sabbath, Federal holidays);
- the hours per day and the days per week each worker will be expected to work;
- the crop(s) to be worked and/or each job to be performed;
- the applicable rate(s) for each crop/job;
- that any required tools, supplies, and equipment will be provided at no charge;
- that workers' compensation insurance will be provided at no charge; and
- any deductions not otherwise required by law. All deductions must be reasonable. Any deduction not specified is not permissible.

Guarantees to All Workers: H-2A employers must guarantee to offer each covered worker employment for a total number of hours equal to at least 75% of the workdays in the contract period – called the "three-fourths guarantee." For example, if a contract is for a

10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would need to be guaranteed employment for at least 360 hours (e.g., 10 weeks x 48 hours/week = 480 hours x 75% = 360).

If during the total work contract period the employer does not offer sufficient workdays to the H-2A or corresponding workers to reach the total amount required to meet the three-fourths guarantee, the employer must pay such workers the amount they would have earned had they actually worked for the guaranteed number of workdays. Wages for the guaranteed 75% period will be calculated at no less than the rate stated in the work contract.

Housing: Employers must provide housing at no cost to H-2A workers and to workers in corresponding employment who are not reasonably able to return to their residence within the same day. If the employer elects to secure rental (public) accommodations for such workers, the employer is required to pay all housing-related charges directly to the housing's management.

In addition, employers are required to either provide each covered worker with three meals per day, at no more than a DOL-specified cost, or to furnish free and convenient cooking and kitchen facilities where workers can prepare their own meals.

Employer-provided or secured housing must meet all applicable safety standards.

Transportation: Employers must provide daily transportation between the workers' living quarters and the employer's worksite at no cost to covered workers living in employer-provided housing. Employer-provided transportation must meet all applicable safety standards, be properly insured, and be operated by licensed drivers.

Inbound & Outbound Expenses: If not previously advanced or otherwise provided, the employer must reimburse workers for reasonable costs incurred for inbound transportation and subsistence costs once the worker completes 50% of the work contract period. Note: the FLSA applies independently of H-2A and prohibits covered employees from incurring costs that are primarily for the benefit of the employer if such costs take the employee's wages below the FLSA minimum wage. Upon completion of the work contract, the employer must either provide or pay for the covered worker's return transportation and daily subsistence.

Records Required: Employers must keep accurate records of the number of hours of work offered each day by the employer and the hours actually worked each day by the worker.

On or before each payday (which must be at least twice monthly), each worker must be given an hours and earnings statement showing hours offered, hours actually worked, hourly rate and/or piece rate of pay, and if piece rates are used, the units produced daily. The hours and earnings statement must also indicate total earnings for the pay period and all deductions from wages.

Additional Assurances and Obligations: Employers must comply with all applicable laws and regulations, including the prohibition against holding or confiscating workers' passports or other immigration documents. In addition, employers must not seek or receive payment of any kind from workers for anything related to obtaining the H-2A labor certification, including the employer's attorney or agent fees, the application fees, or the recruitment costs. Employers must also assure that there is no strike or lockout in the course of a labor dispute at the worksite for the H-2A certification which the employer is seeking. In addition, employers cannot discriminate against – or discharge without just cause – any person who has filed a complaint, consulted with an attorney or an employee of a legal assistance program, testified, or in any manner, exercised or asserted on behalf of himself/herself or others any right or protection afforded by sec. 218 of the INA or the H-2A regulations.

H-2A Labor Contractors

An H-2ALC is a person who meets the definition of an "employer" under the H-2A Program and does not otherwise qualify as a fixed-site employer or an agricultural association (or an employee of a fixed-site employer or agricultural association) and who is engaged in any one of the following activities in regards to any worker subject to the H-2A regulations: recruiting, soliciting, hiring, employing, furnishing, housing, or transporting.

While H-2A does not require labor contractors to register as such with the Department, any *person* who is subject to MSPA as a Farm Labor Contractor (FLC) must register with the Department and be issued an FLC Certificate of Registration prior to engaging in any farm labor contracting activity. In their H-2A applications, H-2ALCs required to be registered under MSPA are obligated to provide their respective MSPA FLC Certificate of Registration number and to identify the farm labor contracting activities they are authorized to perform.

In addition to meeting the same assurances and obligations as any other H-2A employer, H-2ALCs must fulfill the following requirements:

- list the name and location of each fixed-site agricultural business to which they expect to provide H-2A workers, the dates of each employment opportunity, and a description of the crops and activities the workers are expected to perform at each area of intended employment;
- submit a copy of each work contract agreement between the H-2ALC and the agricultural business to which they expect to provide workers;
- provide proof that all housing and transportation if provided or secured by the fixed-site employer complies with applicable safety and health standards; and
- obtain and submit the original surety bond with the H-2A Application.

Surety Bond: The surety bond must be written to cover liability incurred during the term of the work contract period listed on the H-2A Application and must remain in effect for a period of at least 2 years from the expiration date of the labor certification. H-2ALCs must obtain the surety bond in the following amounts:

$5,000 for a labor certification with fewer than 25 employees;

$10,000 for a labor certification with 25 to 49 employees;

$20,000 for a labor certification with 50 to 74 employees;

$50,000 for a labor certification with 75 to 99 employees; and

$75,000 for a labor certification with 100 or more employees.

The bond must be payable to the Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW, Room S-3502, Washington, DC 20210.

Where to Obtain Additional Information

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4US-WAGE (1-866-487-9243).

July 13, 2011

Patty Murray, U.S. Senate
Maria Cantwell, U.S. Senate
Jay Inslee, U.S. House of Representatives, Wash. 1st District
Rick Larsen, U.S. House of Representatives, Wash. 2nd District
Jaime Herrera Beutler, U.S. House of Representatives, Wash. 3rd District
Doc Hastings, U.S. House of Representatives, Wash. 4th District
Cathy McMorris Rodgers, U.S. House of Representatives, Wash. 5th District
Norm Dicks, U.S. House of Representatives, Wash. 6th District
Jim McDermott, U.S. House of Representatives, Wash. 7th District
Dave Reichert, U.S. House of Representatives, Wash. 8th District
Adam Smith, U.S. House of Representatives, Wash. 9th District

Re: Opposition to mandatory E-Verify and need for substantive guest worker reform

Dear Honorable Members of the Washington Congressional Delegation:

Washington State agriculture associations recently met to discuss the Legal Workforce Act (H.R. 2164), as introduced by Congressman Lamar Smith. We oppose it and any other legislation that seeks to mandate E-Verify and other enforcement-only measures on agriculture without providing for an adequate agricultural workforce.

If E-Verify is imposed on our industry, Congress must provide at the same time a reasonable guest worker program to supply workers for the current and future needs of agriculture. Any program must take into consideration the unique needs of all segments of Washington agriculture, including dairy, packers, and processors. The program must provide for a timely, reliable, stable, and legal agricultural workforce. It must also ensure that our employers can have access to their trained workforces for time periods consistent with the needs of their various commodities. Without a stable source of skilled farm workers, our country and Washington State are in peril of becoming dependent on foreign sources of food and fiber.

Nationally, mandating E-Verify will harm domestic food production at a time when agriculture is a bright spot in the economy. In just the past few weeks, we have already seen the devastation that E-Verify caused in Georgia. The Legal Workforce Act has a phase-in similar to the Georgia law and will likewise lead to the same immediate, disastrous loss of labor for farmers nationwide.

Imposing E-Verify on Washington State agriculture in the absence of other crucial reforms will lead to similar economic and social problems. Agriculture is the largest employer in our state, providing more than 160,000 jobs and accounting for 11 percent of the state's economy. Exports alone account for at least $11 billion annually. Despite high unemployment rates, Washington agriculture continues to have difficulty recruiting enough legal workers. Any further disruption in our agricultural workforce would spell trouble not only for agriculture, but for the whole economy of Washington State – with the largest impact occurring in our rural communities.

We have indications the House Judiciary Committee may mark up the Legal Workforce Act (H.R. 2164) shortly, perhaps before the August recess. As you consider this or similar legislation, we strongly urge you to support efforts to ensure a stable, ongoing supply of legal workers for all segments of agriculture. Done correctly, guest worker reform can turn the potentially devastating situation of mandatory E-Verify into an effective program consistent with American ideals.

Enclosed is a list of problems many agricultural producers have had with the current federal guest worker program, as well as a list of solutions we encourage you to adopt.

We ask you to oppose the enforcement-only approach of mandatory E-Verify in H.R. 2164. We ask you to support a guest worker program that will provide for the current and future flow of workers necessary for the success of Washington agriculture.

Sincerely,

Dan Coyne, Washington State Council of Farmer Cooperatives
Jon DeVaney, Yakima Valley Growers-Shippers Association
Scott Dilley, Washington Farm Bureau
Dan Fazio, Washington Farm Labor Association
Ed Field, Washington Cattle Feeders Association
Mike Gempler, Washington Growers League
Jay Gordon, Washington State Dairy Federation
Bruce Grim, Washington State Horticultural Association
Kirk Mayer, Washington Growers Clearing House Association
Jeanne McNeil, Washington State Nursery & Landscape Association
Charles Pomianek, Wenatchee Valley Traffic Association
Steve Rowe, Northwest Dairy Association
Vicky Scharlau, Washington Association of Wine Grape Growers
Alan Schreiber, Washington Asparagus Commission and Washington Blueberry Commission
Mike Shelby, Western Washington Agricultural Association
Chris Voigt, Washington State Potato Commission
Jon Wyss, Okanogan Horticultural Association

Enclosure

Cc: The Honorable Chris Gregoire, Governor, Washington State
The Honorable Dan Newhouse, Director, Washington State Dept. of Agriculture

Current Guest Worker Program Falls Short of Needs for Whole Industry

The H-2A temporary agricultural worker program is broken and does not provide adequate access to workers for Washington agriculture. We have not seen detailed solutions to fix the extensive problems with H-2A.

Washington farmers have had to deal with the inefficiencies and difficulties of the H2-A program. The current H-2A program is bureaucratic, expensive, does not cover all parts of agriculture, and does little to encourage participation. Here are some of the common complaints:

- The Department of Labor has required that advertising for domestic workers not include an "experience" requirement, and firing cannot be based on performance.
- State Workforce Agencies are not required to verify the legal work status of individuals referred for employment from the agencies to a prospective employer.
- The 50% rule – H-2A requires employers first to recruit domestic workers before bringing in foreign guest workers, but continues to favor domestic workers even *after* the H-2A workers arrive and begin to work. The farmer must hire any domestic worker who applies for the job up to halfway through the contracted term for an H-2A worker. Even though the domestic worker may not even meet the qualifications for the job, the employer must hire the worker and potentially terminate the H-2A worker.
- The 3/4 rule – Employers are responsible for employing H-2A workers through at least three-fourths of the total contract. However, if an employer terminates an H-2A worker or the worker quits and DOL is not notified, the employer could still be responsible for paying the three-fourths guarantee. This guarantee may also be required for domestic workers at H-2A employers.
- Employers must provide or pay for inbound and outbound transportation from the workers' permanent residence to the place of employment once 50 percent of the work contract has elapsed. Farmers must also provide or pay for transportation to and from the farm each day at no cost.
- Employers must provide free housing without an option to recoup costs for damage caused by the workers.
- Growers are required to provide $10 a day for meals to each H-2A worker or furnish free and convenient cooking and kitchen facilities.
- Growers with H-2A workers must pay a base wage rate that is historically well above market levels, making the program hugely expensive for farmers who now must compete with growers of the same product in other states and internationally.
- H-2A workers must be covered by workers' compensation. In almost all states, employers must cover this expense. DOL is now saying that H-2A employers in Washington must pay the full premium even though federal regulations dictate that state workers' comp laws should be followed. In Washington, employees may pay roughly 25 percent of the premium.
- Some of the federal farm worker housing standards are so exacting that most hotels and motels licensed in Washington State do not meet the guidelines. Also, HUD-financed farm worker housing facilities are not legally available to house H-2A employees.

Solutions

If the current H-2A program will not work to supply the short- and long-term labor needs for Washington agriculture, what kind of system will? The following are suggestions for a reasonable path forward:

- Recognize that establishing an entirely new guest worker program may be the simplest and most beneficial way of offering reforms. Such a program could exist alongside H-2A so that growers can choose the program that will work best for their operations.
- Establish a guest worker program for existing workers to apply for legal worker status. Many sectors in agriculture have employees in higher-skilled, specialized jobs that require tenure and training. Wholesale loss of huge percentages of experienced employees is a disaster for our farms, commodities, processors, and customers.
- Lift the 3/10-year rule bars. Under existing law, workers who have been in the United States illegally are barred from legal reentry for 3 or 10 years, depending on the length of their illegal stay. This law would effectively bar illegal workers from transitioning to a legal guest worker program. Changing this law to allow workers to enter a reformed guest worker program would help provide continuity of experience in agricultural workforces.
- The program must be quick and easy to use once a farmer shows that no local workers are available. The rules must allow the employer to require or prefer experienced workers. Employers must be enabled to legally hire guest workers without a long registration process. Expedited issuance of guest worker visas is necessary to accommodate the production, harvest, and processing of crops and livestock.
- The program should provide the option for year-round and multi-year visas. The terms of guest worker visas must be long enough to allow us to have stable, reliable employees who can gain experience and training to continue to provide quality care for farm animals and property. This provision is especially important for farmers dealing with livestock, such as sheepherders and dairy.
- The program should allow for guest workers to have portability. Guest workers should be able to move between employers and be able to travel to their home residency and return for personal reasons during their authorized visa term. However, because of this portability, employers should not be responsible for travel expenses incurred by guest workers.
- Make the program cost-effective. Agriculture faces growing international competition, and artificially inflated wages will not help our farms and ranches remain viable. Wages in a new program must also be based on prevailing, free-market figures.
- The Department of Agriculture is more suited to understand the needs of agriculture than the Department of Labor. Therefore, USDA should run any guest worker program.
- Provide for adjustment of status to allow workers to join a guest worker program for continuity in our workforce.
- Allow for packers and processors of agricultural commodities to participate in the guest worker program. Currently, participants in H-2A are limited to production agriculture, yet economic factors have forced more vertical integration and direct sales for many of our commodities.
- Approve hotels and motels licensed in Washington State to be used for farm worker occupancy. Allow H-2A workers to occupy HUD-financed housing facilities.

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Washington farmers short on seasonal workers

Some Washington farmers are worried their work force is dwindling.

By Melissa Powell

Seattle Times business reporter

Some Washington farmers are worried their work force is dwindling.

Most of the farmers rely on seasonal workers, and more than half of seasonal workers in Washington are illegal immigrants. But fewer than 100,000 illegal immigrants came from Mexico to the U.S. in 2010, down from about 525,000 annually between 2000 and 2004, according to the nonpartisan Pew Hispanic Center.

Things aren't likely to get easier for these farmers, as a number of trends and conditions converge to reduce the pool of seasonal workers.

Some farmers say their once-loyal workers are staying in Mexico because of the dangers of crossing the border with the stronger enforcement of border laws.

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Others say the immigrants who now live in the state permanently are leaving seasonal work to find year-round jobs.

Mark Ellis, a University of Washington geography professor, points to a similar concern for farmers: Once immigrants get offers of higher-paying or longer-term jobs, they will take them.

Upward mobility

"We've seen upward mobility among immigrants," said Ellis. "Where do the farmers go then, if they can't rely on seasonal labor coming from the south?"

But not all farmers are seeing a decrease in the number of seasonal workers. Ellis said that's because of the struggling economy and a large number of people looking for work.

"People are desperate with high unemployment so you have a larger than normal floating pool," Ellis said. But "if the economy picks up and the flow from the south stays the same, that knocking on the door will stop."

Amy Sills, of Terry's Berries near Tacoma, is one farmer who hasn't been hit with a seasonal-worker shortage. She said she has more people than she can accommodate, which she attributes to being five minutes from the city.

But Ellis predicts that as fewer people cross the border, even farmers like Sills will have issues finding help.

"Their workers will age and their workers' kids will not want to do the same jobs as their parents," he said.

One Lower Yakima Valley farmer, who usually hires 20 to 25 workers from Mexico for his cherry and fruit farm every summer, said he found himself without help at the beginning of the season.

The farmer, who did not want to be identified, said his laborers attempted to cross the border three times and got caught each time. Finally, they called to say they were staying in Mexico.

Meanwhile, legal migration for seasonal work continues to face obstacles. Dan Fazio, director of the Washington Farm Labor Association, encourages farmers to bring workers from Mexico legally, but said it's a slow and difficult process.

Only 20 growers in the state bring legal seasonal workers through the federal guest-work program, or H-2A, according to Fazio. In that program, the farmer pays for visas and transportation. Those 20 usually bring over about 3,000 legal workers.

Andrej Suske runs a nursery in Redmond and uses the H-2A program. This year he needed workers in early February, but did not get them until one month later after negotiating through government bureaucracies.

Suske said he paid more than $50,000 in recruitment and consulate fees and to transport, house and pay his workers. Farmers who hire undocumented workers don't have to deal with this cost and hassle, Fazio said.

"We just need a system for people to come into the country legally to do the jobs that Americans don't do," Fazio said. "And it's not that Americans are lazy, but no one wants a job where you work for six months a year, unless you're making $100,000. We have that job — it's called commercial fishing."

Ellis said one effect of stronger border enforcement is a more permanent Hispanic population.

"If the men could not go home to see their families and kids, they brought them here because then that's just one crossing instead of the men going back and forth," Ellis said.

The 2010 census put the number of Hispanics and Latinos who live in Washington at 755,790. Ellis said the large majority represents U.S.-born and legal immigrants. There is probably an undercount of the unauthorized population, he said.

The state usually needs about 60,000 seasonal workers each year from June to October, Fazio said. "That's only five months and not long enough to attract workers," Fazio said.

Fazio said farmers have to find a way to make the work last all year; otherwise, their laborers might look for jobs in other industries, such as construction."We can't compete with the construction industry because that's a seasonal job where people work 10 months, not five or six," Fazio said.

That's a familiar problem for Julie Michener.

Rotting apples

Last year, apples at her Grandview, Yakima County, orchard rotted after not being picked quickly enough because she could not find workers. She ripped up 26 acres of her 28-acre orchard.

"We couldn't do that again," Michener said. "We can't go in the hole like that again."

She said she used to have a loyal and stable crew that stayed in the area all year, but they started taking jobs where the work could last longer.

Some stayed in agriculture but moved to large farms with diverse crops so that the work extends almost the entire year.

Michener ended up hiring newly unemployed workers who were not experienced in the orchards and slow.

She said she decided to keep only 2 acres for this year's season, an amount her family can pick by themselves.

Now Michener is in cherry season, and she has about 10 fewer workers than normal.

"We're barely on the edge of what we would normally pick," she said.

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Mr. GALLEGLY. Thank you, Mr. Fazio.
Mr. Williams?

TESTIMONY OF ROBERT A. WILLIAMS, DIRECTOR OF MIGRANT FARMWORKER JUSTICE PROJECT, FLORIDA LEGAL SERVICES

Mr. WILLIAMS. Thank you, Chairman Gallegly, and Ranking Member Lofgren, and Members of the Subcommittee, for the opportunity to testify today——

Ms. LOFGREN. Would you bring your mic a little bit closer?

Mr. Williams—on the American Specialty Agriculture Act.

We are told that a new guestworker program is needed because mandatory E-Verify will make it more difficult for American agriculture to go on employing 1 million unauthorized farmworkers, and there are no Americans available to take these jobs. I am very skeptical that agriculture will stop using unauthorized workers even if the E-Verify bill becomes law. Allowing former employees to avoid verification on the fiction that they are returning from a seasonal layoff ensures that a large pool of unauthorized workers will be available to the agriculture industry for the foreseeable future.

I do agree that the million unauthorized workers cannot be easily replaced with Americans. However, it is all too easy to replace hundreds of thousands of American farmworkers with guestworkers, and that is what I believe will be the unintended consequence of this legislation.

Instead of moving us in the direction of a stable domestic workforce of better-paid and more productive U.S. workers, it will leave us more dependent than ever on foreign agricultural workers.

Bringing in an additional 500,000 guestworkers or roughly one-fourth of the entire current workforce with minimal labor protections at a wage rate considerably lower than what farmworkers are being paid today will dramatically lower the wages and working conditions for America's poorest workers, with the probable result that hundreds of thousands of U.S. workers will exit agriculture.

I want to focus my remarks on the wage issue, because at the end of the day, I think that is what this debate is really all about. The immediate effect of this bill is to transfer $150 million per year from the pockets of H-2A workers and maybe a few U.S. workers to the current H-2A employers. Many of these workers earn less than $10,000 per year, so they are going to miss the money. But if fully implemented, this bill could cost farmworkers in the United States $1 billion a year in lower wages.

Two weeks ago, the Department of Agriculture released its farm labor report for July, a report which is based on a survey of 12,000 ag employers that shows that in July field and livestock workers in the United States were paid an average of $10.25 per hour. That is certainly less than what non-ag workers make, but it is not the minimum wage, either. That is the real market wage. It is not an artificial wage. It is what growers actually report paying their workers.

We need to protect that wage. But if you bring in a half-million workers at a substantially lower wage, you will create a powerful economic incentive to replace U.S. workers with guestworkers, and that is exactly what this legislation does.

It allows an employer with guestworkers to offer a wage which is the median of the lowest one-third of the wage distribution. This is the so-called level one wage. In practice, this wage is generally in the 15th to 20th percentile range. In other words, 80 percent to 85 percent of the workers surveyed are paid more than this wage level. By definition, it is a substandard wage.

And perhaps a real-life example will make it clear, how large the incentive is to prefer a guestworker over U.S. workers. Currently,

according to DOL's online wage library, livestock workers in Ventura County, California, are being paid $12 per hour. For a year-round employee, this amounts to about $25,000 per year. But the level one wage is only $8.93 per hour.

My guess is that an employer advertising for American workers will get very few takers at a wage rate that is $3 less than the going rate. But under Chairman Smith's bill, he can get an H-2C worker.

The saving in employing a guestworker over a U.S. worker is more than $6,000 per year. But that is not the only saving. The employer does not have to pay FICA and FUTA taxes on the H-2C worker. This results in an additional savings of $2,500. When the cost differential between a U.S. worker and a guestworker is nearly $9,000 a year, we have set the stage for a massive displacement of U.S. workers.

For months, we have heard that E-Verify is a jobs bill for American workers. But for the poorest workers in America, it turns out to be just another jobs giveaway.

Thank you.

[The prepared statement of Mr. Williams follows:]

WRITTEN TESTIMONY OF ROBERT A. WILLIAMS

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

September 8, 2011

Chairman Gallegly, Ranking Member Lofgren and members of the Subcommittee, thank you for the opportunity to testify at today's hearing on Chairman Smith's proposed new guest worker program for the agricultural sector, the American Specialty Agriculture Act.

I am here today as the Director of Florida Legal Services' Migrant Farmworker Justice Project. I have been involved in this issue for over three decades during which time I have represented U.S. citizen farmworkers, H-2A guest workers, and farmworkers without employment authorization. I also, for many years, have represented the United Farm Workers union with respect to the AgJOBS legislation.

We are told that a new guest worker program is needed because without it, American agriculture will be in jeopardy if agricultural employers are required to participate in the E-Verify program. I agree that it is not possible to replace the million unauthorized workers who currently work in agriculture with legal US workers; however, I believe a new guest worker program will not solve the problem of agriculture's chronic labor market instability and will, in fact, only make matters worse.

The Facts:

– The United States agricultural industry is dependent on immigrant labor – more than two-thirds of all crop workers in the United States were born outside the United States.[1]

– About three-fourths of the foreign-born farmworkers have been in the United States more than four years.[2]

– At least 50% of the agricultural workers in the United States are not legally present in the

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[1]Carroll, D., Georges, A., and R. Saltz. *Changing Characteristics of U.S. Farm Workers: 21 Years of Findings from the National Agricultural Workers Survey*, paper presented at the Immigration Reform and Agriculture Conference, University of California D.C. Campus, May 12, 2011. Available at http://migration.ucdavis.edu/cf/files/2011-may/carroll-changing-characteristic.pdf.

[2]*Id.*

United States and do not have work authorization.[3] Other estimates suggest the percentage of unauthorized workers might be as high as 70%.

– There are at least 1.8 million agricultural workers in the United States.[4]

– If two-thirds of the estimated 1.4 million workers employed on crop farms sometime during the year are unauthorized and a third of the estimated 429,000 livestock workers are unauthorized, American agriculture employs about 1.1 million unauthorized workers.[5]

– The unauthorized agricultural workers have at least 500,000 children under the age of 18; over 70% of these children are U.S. citizens.[6]

– Farmworker unemployment rates are double those of all wage and salary workers.[7]

– Hired farmworkers earn less than other workers. Median weekly earnings of full-time farmworkers are 59 % of those for all wage and salary workers. Poverty among farmworkers is more than double that of all wage and salary employees.[8]

– Housing conditions of farmworkers have historically been substandard because of crowding, poor sanitation, poor housing quality, proximity to pesticides, and lax inspection and enforcement of housing regulations.[9]

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[3] *Id.*

[4] Martin, P. *Conference Report, Immigration Reform: Implications for Farmers, Farm Workers, and Communities*, University of California D.C. Campus, May 12-13, 2011. Available at http://migration.ucdavis.edu/cf/files/2011-may/conference-report.pdf. Other estimates range from 2.0 to 2.5 million individuals working as hired farmworkers over the course of the year. 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/.

[5] Martin P., *supra* at p. 7.

[6] Based on the National Agricultural Worker Survey data for fiscal years 2007-2009, there were an estimated 399,244 children less than 18 years of age of unauthorized crop worker parents; 73% of these children were U.S. citizens. These estimates are only for crop workers; they do not include livestock workers.

[7] Kandel, *supra* at p. 17.

[8] Kandel, *supra*. Report Summary.

[9] *Id.*

– Agricultural work is among the most hazardous occupations in the United States, and farmworker health remains a considerable occupational concern. Farmworkers face exposure to pesticides, risk of heat exhaustion and heat stroke, inadequate sanitary facilities, and obstacles to obtaining health care due to high costs and language barriers.[10]

None of these facts are seriously disputed.

Framing the Issue

The underlying problem is that the U.S. has an unstable agricultural labor market that requires constant replenishment with new workers from abroad. The reasons for this chronic labor market instability were accurately described in a 1994 study by the United States Department of Labor:

> "The constant outflow of workers is a consequence of the difficulties of making a living from U.S. farm work. Most migrant farmworkers live a marginal existence, even after they stop migrating and settle in one location. The majority of migrants and former migrants live in poverty, endure poor working conditions, and receive no government assistance. Thus, only those migrants with few alternatives stay in farm work. This leads to a maturing labor force composed mostly of workers with low levels of education and lacking English skills, whose improvements in working standards are continually undermined by new workers willing to work for less.
>
> The poor living and working conditions of migrant and formerly migrant farmworkers are the result of labor practices that shift production costs to workers. In particular, the farm labor system relies heavily on temporary jobs, often uses the highly competitive subcontracting market for labor management, and frequently recruits workers in a way that results in a chronic oversupply of labor. Each of these practices reduces employee costs at the expense of worker earnings. As a result, migrant workers, their families and communities, rather than producers, tax-payers and consumers bear the high costs of agriculture's endemic labor market instability.
>
> The high outflow of farmworkers to non-farm work in the United States and the constant replenishment from abroad means the agricultural labor market serves as an entry point for low-wage, low-skilled immigrants for the entire U.S. economy. To slow this influx of new entrants and stabilize the farm labor market requires diverting the costs of instability from the migrants back to the employers, taxpayers, and consumers who benefit from their

[10] *Id.*

labor." (Emphasis added)[11]

This analysis is not new. Twenty years ago, the last blue-ribbon commission established by Congress to study the question reached the same conclusion. We find ourselves in the current situation because, unfortunately, the recommendations of that commission were never implemented.

The Commission on Agricultural Workers

In 1986 when Congress passed the Immigration Reform and Control Act ("IRCA") it authorized a Commission on Agricultural Workers to study the effects of the Act on the agricultural industry and make recommendations for the future. The Commission could not be accused of being a bunch of liberals or labor activists; eight out of the eleven Commissioners were appointed by Ronald Reagan or Strom Thurmond. Only two of the Commissioners, Dolores Huerta and Cardinal Mahoney, could be described as representing the interests of the farmworkers. Its recommendations, therefore, should be taken seriously by Republicans as well as Democrats.

The Commission noted that while IRCA was successful in legalizing large numbers of agricultural workers, "ineffective enforcement of employer sanctions and inadequate border controls have curbed neither illegal immigration nor the employment of unauthorized workers in agriculture." What agriculture needed most was a more stable labor market – " the goal of controlling illegal immigration would be best served by the development of a more structured and stable domestic agricultural labor market with increasingly productive workers:

> "Such a system would be characterized by more effective recruiting and job matching, reduced worker turnover and higher retention rates, a more dependable labor supply, institutionalized opportunities for training and advancement, and a better balance between labor supply and demand. Such a system would further address the needs of seasonal farmworkers through higher earnings, and the needs of agricultural employers through increased productivity and decreased uncertainty over labor supply. Market mechanisms would provide the incentives that would ultimately lead to and maintain this stabilization."[12]

"A stable and reliable workforce is critical to the long-term health of the industry and would thus

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[11] *Migrant Farmworkers: Pursuing Security in an Unstable Labor Market*, Research Report No.5, U.S. Department of Labor Office of Program Economics, May 1994.

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

provide clear benefits to both workers and employers."[13]

However, none of the Commission's specific recommendations to stabilize the labor force, improve productivity, and increase earnings for farmworkers through longer periods of employment were ever implemented:

– Recommendation: "Illegal immigration must be curtailed." Not done

– Recommendation: "The Department of Labor's U.S. Employment Service should develop a new and/or alternative system for recruiting qualified farm labor to meet agriculture's constantly changing labor needs." Not done

– Recommendation: "The U.S. Department of Agriculture's Extension Service, the U.S. Department of Labor's Employment Service, and state agencies and universities should undertake a major effort to educate growers, packing house operators, farm labor contractors, workers, and worker organizations in the need for and benefits of improving labor management practices in agriculture." Not done

– Recommendation: "Agricultural employees should be provided with federal/state unemployment insurance coverage that provides them with protection against unemployment comparable to that of other workers in the United States." Not done

– Recommendation: "Congress should encourage all states to provide Workers' Compensation Insurance coverage comparable to that of other workers in the United States." Not done

– Recommendation: "Farmworkers should be afforded the right to organize and bargain collectively, with appropriate protections provided to all parties." Not done

– Recommendation: "The enforcement of protective statutes for farmworkers should be made more effective..All laws relating to farm labor should be uniformly enforced by the agencies concerned so that employers not in compliance do not gain an unfair competitive advantage over those employers in full compliance with the various laws and regulations." Not done

The Commission concluded that "to the extent that job opportunities are secured by legal workers in a more stable labor market, the pull factor for illegal immigration is reduced."[14] That is just as true now as it was twenty years ago. We need a stable, legal workforce for agriculture. Enacting mandatory E-Verify with or without an expanded guest worker program will not address the underlying problem. In fact, the proposals under consideration are likely to have just the opposite effect – they will greatly disrupt and destabilize the farm labor market:

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[13] *Id.*

[14] *Id.* p. xxxi.

The Phase-in and Deferral Approach

The E-Verify program contained in H.R. 2164 would exempt agriculture (as defined for purposes of the H-2A program) from the E-Verify requirements for three years while E-Verify is gradually phased in for the non-agricultural workers. This will result in a tidal wave of new entrants into the agricultural workplace as unauthorized workers find it impossible to work in the non-agricultural sector and turn to agriculture as the employer of last resort. In the interim, farm labor contractors can continue to recruit new entrants from Mexico with impunity.

Even when the three-year deferral period ends, seasonal agricultural employers can continue to hire former workers without verifying their employment authorization.[15] There will be a huge pool of unauthorized workers who can be hired in perpetuity without going through E-Verify. Because of very high turnover in most seasonal agricultural work, it is not uncommon for an employer who at peak employs 500 to 1000 workers to employ 3,000 to 6,000 individuals during the course of the year. All of these workers could be rehired by that employer in the future without verification.

The other obvious way that the E-Verify requirement will be evaded is through the use of farm labor contractors. "Labor intensive agricultural firms, faced with potentially large fines for violations of immigration and labor law, increasingly modify the organization of their firms by shifting management of routine seasonal labor jobs to independent farm labor contractors."[16] That is exactly what happened following enactment of IRCA's limited employer sanction and enactment of H.R. 2164 will in all likelihood lead growers to turn all of the hiring function over to the contractors by the time the three-year deferral for agriculture ends. This is not good news for U.S. farmworkers since farm labor contractors generally provide lower wages and working conditions to their employees.

It seems very unlikely that enactment of H.R. 2164 will result in a legal agricultural workforce in the United States.

The Guest Worker Solution

Employer interests have used the fears generated by the threat of E-Verify to push for a new guest worker progam for agriculture with minimal labor protections. Obviously such programs will not improve the wages and working conditions of U.S. workers. While the

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[15]Section 2(b)(1)(D) of H.R. 2164 provides that "an individual shall not be considered a new hire subject to verification under this paragraph if the individual is engaged in seasonal agricultural employment and is returning to work for an employer that previously employed the individual."

[16]Polopolus, L. and R.D. Emerson, *Entrepreneurship, Sanctions and Labor Contracting*, Southern Journal of Economics, July, 1991.

proponents of these plans often give the impression that we would simply be substituting a legal guest worker for an illegal current worker, that is not what would happen in practice. First, as discussed above, there is nothing that will guarantee that the current unauthorized will simultaneously exit the country as the new guest workers enter. Given the fact that so many unauthorized farmworkers have U.S.-citizen children, it is highly unlikely that they will leave because of E-verify; they will go underground, working for unscrupulous labor contractors off the books. Growers have no problems employing both unauthorized workers and guest workers.[17] They often set up separate corporations to do just that and can always use contractors to insulate themselves from liability. It is far more likely that the workers who will be replaced by guest workers are the very U.S.workers the immigration restrictionists say they are so worried about. The current H-2A program already contains significant economic incentives to discriminate against U.S. workers. Employers of H-2A workers do not have to pay FICA or FUTA taxes on their H-2A workers wages resulting in cost savings of about 10% over an American worker. H-2A workers are excluded from the protections of the Migrant and Seasonal Agricultural Worker Protection which provides U.S. workers with a way to enforce their working arrangements with their employer. And H-2A employers are largely beyond the reach of U.S. civil rights laws; they can and do discriminate based on age, sex, disability, and race in their recruitment of foreign workers. Finally, guest workers are more attractive to employers than U.S. workers because they are not free to quit and look for a better job.

A new report to be released this week by the Farmworker Justice Fund finds that violations of the rights of U.S. workers and guest workers by H-2A employers under the current program are rampant and systemic.[18] The H-2A program certainly is need of reform, but it needs worker protections to be strengthened, not weakened.

The American Specialty Agriculture Act proposed by Chairman Smith will take a bad situation and make it much worse. The centerpiece of the bill is a wage methodology which will significantly lower wages for farmworkers in the United States. Up to 500,000 workers or one quarter of the entire farm labor workforce would be admitted to the U.S. for short-term employment at wages below those currently paid U.S. workers.

For the first time, the wage standard under an agricultural guest worker program no longer

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[17]See e.g. Martin, P. and M. Teitelbaum, *The Mirage of Mexican Guest Workers*, Foreign Affairs, Nov./Dec. 2001: "During the so-called *bracero* ("strong-armed one") program from 1942-1964, the number of unauthorized Mexicans slipping across the border actually expanded in parallel with the number of authorized temporary workers."

[18]*No Way to Treat a Guest: Why the H-2A Agricultural Visa program Fails U.S. and Foreign Workers*, Farmworker Justice Fund, Inc. Washington D.C. September, 2011.

would include compliance with the federal minimum wage.[19] Employers would only have to offer the "prevailing wage or the state minimum wage. Of course many states do not have a state minimum wage or exclude farmworkers from coverage.[20]

Most people associate the words "prevailing wage" with the "average wage" or the wages generally paid workers in an area but that is not how the prevailing wage is defined in the Smith bill. Under his approach the prevailing wage is defined as the "first level" in a four level wage system. The first level is actually the median wage for the lowest third of workers in an occupation while the level four wage is the median for the top two thirds of the wage distribution. The mean wage or the average wage for workers in the occupation is actually the level three wage. In practice, 80 to 85% of the workers surveyed are paid more than the first level wage– it is by definition a substandard wage. In many areas of the country, the level one wage is a dollar or more less than the average wage paid crop workers. If large numbers of workers are admitted to the United States at this wage rate, the average wages paid agricultural workers will fall to even lower levels than they are today, hastening the exodus of the remaining U.S. workers from agriculture.

In fact, the incentive to displace U.S. workers, as opposed to unauthorized workers, is greater precisely because U.S. workers are generally paid more than unauthorized workers.[21] The incentives to replace U.S. workers with the new H-2C workers are further enhanced when one considers that the employer will not have to pay FICA or FUTA taxes on the H-2C workers' wages. This will make it roughly 10% cheaper to employ an H-2C worker than to employ an American worker, even without the considerable wage differential established by the new wage methodology.

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[19]A summary of the American Speciality Agriculture Act posted on the website of the North Carolina Growers Association alludes to the fact that "when H-2A growers have to compete against growers employing illegal immigrants who might make the minimum wage or less, they are put at an unfair competitive advantage." The American Speciality Agriculture Act apparently is intended to remedy this situation not by raising wages to what American workers receive but by lowering the wages of the guest workers to what unauthorized workers are paid even if it is below the federal minimum wage.

[20]Five states (AL, LA, MS, TN, SC) have no minimum wage laws; four states (GA, AR, MN, WY) have minimum wages lower than the federal minimum wage law; many states either exempt agricultural employers, e.g. Georgia, or exclude agricultural workers from coverage, e.g North Carolina.

[21]Authorized workers in Florida report substantially higher wage rates than unauthorized workers. The real hourly wage for unauthorized Florida workers in 2002 - 2004 was $2.74 lower than for authorized workers. See Emerson, R.D., Walters, L., Nobuyuki, I.,Van Sickle, J.J. and F. Roka, *Florida Farm Labor*, Paper prepared for the Conference on Immigration and Agriculture, UC-DC Center, Washington DC, June 14-15, 2006.

A concrete example will show just how large the economic incentive to discriminate against U.S. workers would be under the proposed legislation..The most recent information available from DOL's Online Wage Library for Foreign Labor Certification shows that livestock workers in Ventura County, California are paid an average of $12.00 per hour. For a year-round employee that adds up to an annual income of $24,960. Under the Smith bill, an employer seeking to hire a livestock worker under the H-2C program would only have to advertise the job at $8.93 per hour. US workers would either have to accept a rate more than three dollars under the going rate or see the job go to a guest worker. For the employer, hiring an H-2C worker instead of an American will save $6,386 per year in wages. However, that is not the only savings; the employer doesn't have to pay employment taxes on the wages of the H-2C worker resulting in an additional saving of about $2,500 per year. The total savings to the employer is nearly $9,000 per year.

The short-term impact of the Smith bill in reinstating the level one wage under the H-2A program would be to transfer approximately $150 million per year from U.S. workers and guest workers to the current H-2A employers. The long-term impact, should the program expand to the 500,000 worker cap, would be to reduce the earnings of the poorest group of workers in America by at least a billion dollars per year.

In addition to the lower wage standard, the Smith bill eliminates or weakens labor protections which have been in effect for decades:

– Instead of providing workers with free housing that has been inspected and meets federal standards as the current law requires, the employer can provide a voucher unless the governor certifies there is not adequate housing available; workers who live on the border do not have to provided with any housing.

– The guarantee of employment for three-fourths of the hours worked in the contract is reduced to an almost meaningless guarantee of 50% of hours offered; the guarantee is the principle protection against over-recruitment.

– The transportation reimbursement is no longer from the place from which the worker traveled to come to the employer's job site but only from place where the worker was approved to enter the U.S., i.e,. a consulate which could be hundreds of miles from the worker's home.

– The bill also contains language which would eviscerate worker protections under the holding of Eleventh Circuit Court of Appeals in *Arriaga v. Florida-Pacific Farms*[22] and thereby allow their employers to reduce their wages below the minimum by imposing on the worker the obligation to absorb visa, transportation, and other costs relating to their entry into the U.S.

– The bill contains a number of provisions relating to legal services, access to labor camps, and compulsory arbitration and mediation which are transparently designed to make it as difficult as

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[22]305 F.3d 1228 (11th Cir. 2002).

possible for the guest workers to enforce their contract rights against their employers.

Protections for U.S. workers in the recruitment process have also been weakened. Instead of requiring the employer to petition DOL for certification of a labor shortage, the proposed H-2C program would only ask an employer seeking H-2C workers to include labor attestations in his application to the Department of Agriculture, an agency with no experience in the guest worker area. An unscrupulous employer can claim that no American workers are available (or at least none willing to work for a wage lower than the wage paid 80% of the workers in comparable employment) whether or not any efforts were made to recruit workers.

The most important protection for U.S. workers – the 50% rule has been eliminated. The 50% rule requires that the employer hire US workers who apply for the first 50% of the contract period. The 50% rule is virtually the only way an American worker can be hired under the existing program since American workers very rarely find out about the job opportunities before the work actually starts.

The elimination of the 50% rule, the substitution of an attestation procedure for labor certification, and the transfer of program responsibilities from the Department of Labor to the Department of Agriculture without any authorization of appropriations for monitoring and enforcement all send a clear signal that guaranteeing employers access to cheap foreign labor is more important than protecting the wages and working conditions of U.S. workers.

An E-Verify program which leaves the growers free to continue employing a million unauthorized workers (swelled by hundreds of thousands of other unauthorized workers who will no longer be able to find work in the non-agricultural sector) combined with a massive new guest worker program with essentially no labor protections will be a catastrophe for agricultural workers and their families. As the remaining U.S. workers are forced out of agriculture, the U.S. will be more dependent than ever on foreign workers.

The combination of the E-Verify bill with the American Speciality Agricultural Act will not result in more jobs or improved working conditions for American farmworkers nor will it end the United States' dependence on an immigrant farm labor force which must be continually replenished with new entrants. Instead, it will irreparably destroy any market mechanism that could provide the incentive for a more stable domestic labor market.

A Real Solution

Stabilize the Workforce

No real solution to the farm labor problem can ignore the one million current, unauthorized farmworkers. They and their half million children are simply not going to disappear because of the passage of E-Verify. Mandatory E-Verify will reduce their incomes pushing them to the brink of subsistence. Many will be driven further into document fraud and exploitive

employment situations. Some may self-deport as the restrictionists hope but one wonders, given the opportunities available in Mexico, how bad would conditions have to be before this would happen. Inflicting hardship and deprivation on hundreds of thousands of innocent children, most of whom are U.S. citizens, does not seem consistent with the values of most Americans.

The immigration restrictionists believe that E-Verify will enhance employment opportunities for U.S. workers and that a tight labor market would result in higher wages and better working conditions. Without a phase-in period, E-Verify might lead to economic dislocations in agriculture which will actually cost the jobs of U.S. workers, as the result of employers shifting production to Mexico and other countries. However, even in the long-term, U.S. workers would only benefit if the current unauthorized workers leave and are not replaced by other new entrants. E-Verify combined with the American Speciality Agriculture Act will result in just the opposite – more workers entering the farm labor market, both unauthorized workers from the non-agricultural sector who will gravitate to agriculture as one area where they still can find employment and the new H-2C guest workers with minimal labor protections. U.S. farmworkers are the losers in this scenario.

A final consideration is the very significant cost of driving out the current workforce and replacing it with new foreign workers. The human costs already alluded to will be very high. Some will come back to the taxpayers. No matter what is the fate of their parents, the hundreds of thousands of U.S. citizen children are and will be part of American society. Whether they grow up to be productive members of our society or a burden on the taxpayer depends in part on how we as a society treat them (and their parents) during their formative years. We can treat them with compassion or we can insist on harshly punitive measures which will have repercussions decades from now.

There is also an enormous loss of human capital involved in replacing the current workforce with a new inexperienced workforce. Recruiting and training one million replacement workers is costly. New workers, as a number of H-2A employers have found, are not as likely to be as productive as experienced farmworkers.

There is only one realistic way around all of these problems. The solution that will stabilize the agricultural labor market with the least societal cost is to allow the current unauthorized workers to pay a fine to adjust their status and provide them with a path to permanent resident status conditioned on their continuing to work in agriculture from three to five years. During this period, E-verify would be fully implemented, beginning with farm labor contractors six months after enactment, cutting off the flow of new unauthorized entrants. There would be an unprecedented enforcement of labor standards in agriculture which would both be a deterrent to further employment of illegal workers and an inducement for U.S. workers (including the newly legalized workers) to remain in the agricultural sector. The H-2A program would be reformed by removing the incentives which make it cheaper to employ H-2A workers than U.S. workers; there should be no need for the expansion of this program in the immediate future.

Unauthorized farmworkers would be eligible for legalization under a "blue card" program similar to the one proposed in the AgJOBS legislation if they worked at least 863 hours or 150 days or earned $7,500 over a two year period. NAWS data suggest that 80% of the crop workers were employed more than 74 days during the year. Using the 2/3 crop and 1/3 livestock unauthorized shares, and assuming that 80% of the 923,000 unauthorized crop workers qualified and all of the 142,000 unauthorized livestock workers qualified yields 880,000 eligible unauthorized farmworkers.

This legal workforce will be sufficient to meet the needs of American agriculture for at least a decade. Over twenty years after IRCA, the farmworkers who were legalized under the Seasonal Agricultural Worker ("SAW") program still comprise 15% of the crop workers in the United States. The SAW program was a success – the failure came from not taking the steps recommended by the Commission which would have allowed a transition to more structured and stable labor market.

Close the Door to New Entrants

A comprehensive approach requires that at the same time the blue card program is implemented, effective steps need to be taken to bar further illegal entry. The single most cost effective measure that the government can take to prevent illegal immigration is to require all farm labor contractors who hire workers to participate in the E-Verify program immediately. There is no reason to give the worst violators of our immigration laws an additional three years of immunity

Farm labor contractors (FLCs) are the intermediaries who, for a fee, recruit, transport, and supervise farmwworkers. Since IRCA was enacted in 1986, the share of all seasonal job matches made by FLCs has increased. Today it exceeds 50 % in many harvest labor markets. Worker, farmer, and agency testimony as well as research suggest that FLCs are practically a proxy for the employment of undocumented workers and egregious or subtle violations of labor laws.

IRCA's employer sanctions increased the potential cost of hiring illegal alien workers so growers rationally tried to shift those risks to FLCs, since under IRCA they can be employers in their own right. Given the highly competitive farm labor contracting market with very low entry costs, employers could shift any IRCA-related documentation and sanctions costs to FLCs *at no additional cost*, since a new influx of workers and competition between FLCs kept the commissions or overheads paid to FLCs low even as the minimum wage rose and payroll taxes increased.

Professor Philip Martin at the University of California at Davis, one of the members of the Commission on Agricultural Workers noted in the Commission's Report that "the expansion of FLC activities in the wake of IRCA has helped to lower wages and incomes in rural America. FLCs are perhaps the most important dynamic actors in bringing the new-new immigrants to the United States. As they play the role of 19th Century ship captains in recruiting, transporting, and

employing new arrivals, their activities promise to bring into rural communities some of the neediest immigrants – relative to the average American – that have ever arrived in the United States."

If we are serious about stopping the use of unauthorized workers in agriculture shouldn't we start with the source of the problem – the farm labor contractors, many of whom have direct contact with the coyotes and other human traffickers who bring people across the border?

Farm labor contractors are regulated by the United States Department of Labor under the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801 et seq.). About 12,000 contractors register each year with the Department. However, many farm labor contractors are not the actual employer, but recruit, transport or supervise for someone else, either another contractor or grower. The number of farm labor contractors who would be required to participate in E-Verify because they hire workers in their own right is probably less than 8,000.

A sustained, targeted approach directed at a relatively small number of employers who are known to be directly involved in the trafficking networks is more likely to yield real results than casting a wide net which would require over a hundred thousand agricultural employers, many of which only hire one or two workers a year to participate in the E-Verify system.

The Migrant and Seasonal Agricultural Worker Protection Act should also be amended to make it a violation for a farm labor contractor to hire an authorized worker. Thus, DOL as well as DHS could enforce compliance with the E-Verify requirement. Moreover, U.S. workers who were the victims of discrimination in favor of unauthorized workers could also go to court under the Act to enforce this requirement.

Remove the Incentives in the H-2A Program to Discriminate Against U.S. Workers

If a blue card program were enacted, there should be no need for a new guest worker program. Agricultural employers will have, in addition to hundreds of thousands of U.S. citizen and permanent resident farmworkers, a labor pool of approximately 900,000+ blue card workers who will be eager to meet the requirements for permanent residency by working as many days in agriculture as possible. Employers should be required to hire these workers first before turning to the H-2A program to bring in new workers. However, the existing H-2A program contains incentives to prefer H-2A workers over U.S. workers. Current indications suggest that farm employers might invest in housing and the recruitment of H-2A workers rather than raise wages and benefits to retain newly legalized farm workers.

Two simple reforms are necessary to remove two of the most significant incentives in the current program for preferring to hire H-2A workers over U.S. workers. First, at present, wages paid H-2A workers are not considered taxable wages for purposes of the FICA and FUTA employment taxes. This results in H-2A workers being about 10% cheaper than US workers. Companies which supply growers with H-2A workers openly advertise this tax saving as one of

the main reasons to get into the H-2A program. The other H-visa programs, e.g., H-2B, H-1-B, etc., do not contain this tax break for employers. Eliminating the exception for foreign agricultural workers will put U.S. workers and H-2A workers on a level playing field. The Advisory Council on Unemployment Compensation recommended that the wages of H-2A be subject to FUTA taxes in 1994[23]

The other reform is to provide H-2A workers with the same legal protections as U.S. workers by eliminating the exclusion from coverage under the Migrant and Seasonal Agricultural Worker Protection Act. U.S. workers have a cause of action in federal court to enforce the terms of their working arrangements with their employers. Not surprisingly, growers would rather hire workers who don't have this right. Not only does the exclusion lead to discrimination against U.S. workers, it is also a clear violation of the NAFTA Labor Side Accords in which the United States promised to provide its guest workers with the same labor rights as it provides its nationals.[24]

Effectively Enforce Labor Standards in Agriculture

The Commission on Agricultural Workers found that "a sustained commitment to enforce protective legislation for farmworkers is also essential" to stabilize the farm labor market. One reason American workers shun agricultural jobs is the practically ubiquitous violations of labor laws throughout the agricultural sector. The blue-ribbon, national, non-partisan Commission on Immigration Reform, also called in 1994 for "enhanced enforcement efforts targeted at farm labor and other contractors who hire unauthorized workers on behalf of agricultural growers and other businesses." It seems obvious that we should only expect a legal workforce in agricultural when legal working conditions are the norm and not the exception. Uniform and effective enforcement of labor standards takes away a major incentive to backslide into once again employing unauthorized workers.

As part of a blue card program, the fines paid by the blue card workers could go to a trust fund to be divided equally between the Department of Labor and the Department of Agriculture. The trust fund would provide around $50 million per year for five years for additional labor standards enforcement in agriculture including outreach to farmworkers to inform them of their rights in the workplace.

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[23] The Commission found that "[u]nder the current exemption, alien agricultural workers are less costly to hire than domestic workers, on whom FUTA taxes must be paid. This cost differential may create an incentive for the substitution of foreign workers for U.S. workers, which argues in favor of repeal of the exemption." Report and Recommendations to the President and Congress, pp. 13-14, February 1994, Washington, D.C.

[24] The North American Agreement of Labor Cooperation ("NAALC") obligates each nation to provide migrant workers with the same labor law rights as other workers in the country. The Smith bill would also deny the new H-2C workers the same labor rights as U.S. workers by continuing the exclusion from coverage under the Act.

Promote Better Labor-Management Practices in Agriculture

We need a stable labor market in which labor standards are observed; we also need an efficient labor market which fully utilizes the services of the available workforce. The most effective strategy to meet future labor demands post-legalization is to concentrate on the retention and effective utilization of the existing labor pool.

Many labor-intensive farm operations continue to be characterized by organizational inefficiency. Worker dissatisfaction and turnover increase employer costs and reduce farmworker earnings. Mutual employer-worker benefits are possible through the adoption of modern labor management techniques.

Farmworkers experience extensive underemployment even during the peak harvest season in addition to chronic seasonal unemployment. A key issue in stabilizing the post-legalization workforce is to use the existing farm workforce more efficiently since underemployment decreases current farmworkers' attachment to the farm labor force and increases the need for more workers. There are effective strategies which would allow agricultural employers to improve the balance of of farm labor and supply. These include the production of complementary crops to "fill in" work during labor demand troughs for labor in major crops; reorganizing farm labor tasks such as pruning and thinning to provide steady work for a smaller crew over a longer period of time; regular over-winter contracts with migrant workers and development of firm pre-season contracts with workers; and creation of multi-employer pools to facilitate workers' movement from one crop to another.

The trust fund monies received by the Department of Agriculture would be used to fund research and demonstration projects on these labor practices and promote and disseminate the results through the extension service system. An advisory committee with both farmworker and employer representation would be established to advise the Secretary on the use of the funds and identify the most promising measures for meeting future labor demand.

The Long-Term Future of Agricultural Labor in the United States

Agricultural employers in general support legalizing the current workforce, but they argue that we need to provide for a future flow of new workers because it is inevitable that the blue card workers will eventually leave agriculture for the non–agricultural sector. They also strenuously argue that any future program must be uncapped, i.e., it must allow an unlimited number of new entrants. This argument is circular. As long as there is no significant improvement in farm worker wages and working conditions, U.S. workers will not be interested in working in agriculture and retention of existing workers will be a problem. New entrants from abroad will continue to be necessary. As long as the goal of the policy is the maintenance of the status quo, we will be dependent on immigrant farmworkers. Admitting as many new entrants as is necessary to maintain the status quo guarantees it.

We do not have to accept the status quo. We can have a stable farm labor market which serves the interests of both employers and workers. But this labor market cannot be created by simply passing E-verify and replacing an exploitive system of illegal migration with an exploitive guest worker program. Unless we change the policies which lead employers to favor temporary foreign workers over U.S. workers, "employers will learn to exploit the rules of any guest worker program just as they have exploited the supply of unauthorized migrants and they will cease to look for alternatives involving domestic recruitment or investment in more efficient production."[25]

We can also have a "free" labor market in agriculture where workers are free to choose their employers and free to quit and look for a better job, in or out of agriculture. This would almost be an untried experiment – during the long history of agricultural labor from colonial times to the present, it is difficult to identify a period in which all agricultural workers in the United States had this freedom. The Smith guest worker program with its government-dictated below-market wage and captive employees would be the antithesis of a free labor market. The blue card workers by contrast would be free to choose their employer and could work outside of agriculture as long as they completed the prospective work requirements. Inevitably, some of the blue card workers will leave agriculture for better paying opportunities in the non-agricultural sector; however, the exodus of the blue card workers from agriculture will not happen overnight. To the extent that labor laws are effectively enforced in agriculture and modern labor management practices are adopted, it may be further slowed. Adoption of other legislative reforms providing unemployment benefits, workers compensation, and collective bargaining rights for farmworkers equivalent to those provided in the non-agricultural sector will further level the playing field. It is not a bad thing if the blue card workers eventually move on to better paying jobs where they presumably are more productive. A tightening labor market will lead to improvements in wages and working conditions for the farmworkers who remain.

Some growers view legalization as a necessary transition to a permanent guest worker program. However, legalization can also be a transition to a free agricultural labor market which is not dependent on a constant influx of new workers from abroad. Such a labor market would lead to real improvements in wages and working conditions as agricultural employers would finally have to compete in the marketplace for workers. Inevitably, allowing agricultural wages to rise will lead growers to consider the use of labor-saving technologies. But that is also a gradual process. Those who think that mechanically harvesting machines are a panacea do not seem to understand that even if feasible, the wide-scale adoption of such new technologies requires very large capital outlays and may not be worth the risk. Mechanization is not a short-run solution; however, if Congress gives a clear signal that neither illegal migration nor expanded guest worker programs will be available in the future to meet agriculture's labor needs, employers will begin to make the necessary long-run investments in labor saving technology.

The Commission on Agricultural Workers concluded its Report with the following words:

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[25] Martin, P. and M.Titelbaum, *supra* at p.130.

> "The response of the United States to competition from countries that pay even lower wages should be the development of a more structured and stable domestic agricultural labor market with increasingly productive workers. Industries must modernize to remain successful in the increasingly competitive international market place. Agriculture is no exception."

The American Speciality Agriculture Act would be a tragic step backward, not progress toward a stable domestic agricultural labor market.

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

Quickly, if I might go back to Mr. Fazio, just as a point of interest, you mentioned an employer that recently was contacted by ICE. And I don't remember exactly what the numbers were, but he was told that he had to get rid of 50 or 60 employees out of how many?

Mr. FAZIO. Yes, he had 62 full-time workers, and his ICE Notice of Suspect Documents had 34 names on it. Some of those workers

may appeal, one or two, but it is over 50 percent, and this is full-time.

Mr. GALLEGLY. Okay, just as a point interest, this is a Federal enforcement agency that came out and said that you are going to have to let these folks go, because they are illegally in the country?

Mr. FAZIO. What they said was that the documents that they presented when they were hired in the attestation that the workers gave was incorrect, and the documents were, in their opinion, fraudulent documents. And so unless they could provide a different document, that the employer had to let them go. That is correct.

Mr. GALLEGLY. Does that mean letting them go down the street and go to work somewhere else?

Mr. FAZIO. That is exactly what happens. Yes.

Mr. GALLEGLY. And did that mean that you were going to be fined for having these folks? Or is it just like our job is to stick our head in the sand, and when we have something laid in front of us that is blatantly against the law, we have to do something about it, and that is to shift it from point A to point B without any real enforcement; is that a fair assessment?

Mr. FAZIO. What will happen is if the farmer made some paperwork violations in their I-9, if they didn't cross the t's or dot the i's correctly, they will receive a fine for incorrectly filling out the I-9. But in the case of the employees, the employees are going to go down the street.

As a matter fact, they will go to other shellfish farms——

Mr. GALLEGLY. But this enforcement agency, when they have are convinced that these people have no legal right to be in the United States, instead of dealing with them, they tell the employer to get them out of here, until it comes up again. That is a rhetorical question.

Mr. Williams, isn't it true that the general rule for temporary worker programs is that guestworkers are paid prevailing wage for their occupation, just like the H-2C program?

Mr. WILLIAMS. Yes, the prevailing wage, historically, in our guestworker programs has been an average wage. That was the concept of the prevailing wage all along. And it makes sense, because if you want to protect the wages of U.S. workers, obviously, admitting a bunch of people at a wage under the average is going to pull down the average and depress the wage. So the wage is an average wage.

And the current wage, the dreaded adverse effect wage rate, is simply an average wage paid field and livestock workers. And it is a much more accurate wage level than the one that they want to use, because it is based on a very sound survey by the Department of Agriculture that is methodologically sound.

And the accuracy rate, the national figure that I just quoted, the sampling error there is only .7 percent. It is a very accurate statistic. It is not an artificial statistic or a made-up number. It is what workers are being paid on average.

Mr. GALLEGLY. Which is obviously, at least minimally, and in all cases, more than what minimum wage would be?

Mr. WILLIAMS. Yes, and I think it is also really important to note about those statistics, they include the wages of hundreds of thousands of unauthorized workers. If somehow we could pull out the

wages of unauthorized workers who are being paid on the bottom of the wage scale, you would see that the wages paid American farmworkers are considerably higher than the wages that we are asking to pay—growers are asking to pay now under the——

Mr. GALLEGLY. I think that that is one of the objectives of having a guestworker program, that you would have people legally here. And I don't mean to be combative, but it appears to me that you are arguing against your case.

Mr. WILLIAMS. No, I am arguing for protecting the wages of the 600,000 to 800,000 American farmworkers.

Mr. GALLEGLY. You appear to believe that the guestworker program represents indentured servitude. Is that correct?

Mr. WILLIAMS. The guestworker program is not indentured servitude quite. But on the other hand, it is also not free labor. It is a situation where you can only work for one employer. You don't have the freedom to walk across the street and work for someone else who pays you better or treats you better. And so in that sense, it is a captive program. It is not a free labor market.

Mr. GALLEGLY. One final question before my red light comes on, you have been on record as a supporter of AgJOBS Amnesty; is that not correct?

Mr. WILLIAMS. That is certainly accurate.

Mr. GALLEGLY. Doesn't AgJOBS also include a guestworker program?

Mr. WILLIAMS. It does. And AgJOBS is a compromise.

Mr. GALLEGLY. And isn't that basically what we are dealing with here? You oppose it if it comes under AgJOBS, but you oppose it if it comes under this category?

Mr. WILLIAMS. No, because AgJOBS, the H2 program, the reform contained in AgJOBS, is providing some significant protections for workers that aren't in the current H-2A program and certainly aren't in this bill.

This bill goes the other way. Rather than strengthening the H-2A program's protections for workers, this bill greatly lowers them.

Mr. GALLEGLY. Well, I think we disagree on that a little bit, because one of the benefits of this program is that it takes folks out of the shadows, gives them legal authority, and protects them openly by all the labor laws in the country. And I would certainly think that is better than the status quo.

Mr. WILLIAMS. Well, this doesn't take anybody out of the shadows. The current million people who are unauthorized are ineligible for this new H-2C program. They remain in the shadows. They are not going anywhere. They are staying here. They are going to be in the shadows. That is one of the biggest problems.

Any attempted solution to the problem that neglects the million workers that are here, and their 500,000 children, is not a solution.

Mr. GALLEGLY. I would love to have a little more time on this, but out of respect for my colleagues, I would yield to the gentlelady from California, the Ranking Member of the Subcommittee, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

I would just note, Mr. Fazio, your comment about the 34 farmworkers who are going to be fired, under this bill they would also

be fired, because they would not be eligible to get the temporary visa.

Just as an aside, Mr. Williams, I think it is important to understand how this bill undercuts wages, because of the tier one issue. We took a look at some of the data. And just for example in North Carolina, the adverse wage rate is $9.30 an hour. Taking Sampson County, the Bureau of Labor Statistics average wage for crop workers was $9.59 an hour. But level one wage for that same country was $7.61 an hour. And the way, as I understand it, you advertise as if it is a level one status, because nobody is exploring that, and you lower the wage by a couple bucks an hour, which is significant, I would think, especially given farmers are working on very low margins. I mean, it is a hard business to be in.

In addition to that, you don't have to pay unemployment insurance or Social Security for the H program. I mean, in the ag sector you do, and some other temporary programs.

So what amount—that is about 10 percent, isn't it?

Mr. WILLIAMS. That is correct.

Ms. LOFGREN. So really, it is a substantial incentive to replace American workers with temporary workers on a wage basis, isn't it?

Mr. WILLIAMS. And that is the entire problem. If we want to solve——

Ms. LOFGREN. Pull the microphone, so I can hear, a little bit closer.

Mr. WILLIAMS. That is the entire problem. If we want to solve this problem, we have to get the incentives right.

Right now, yes, we use a lot more undocumented workers than we do H-2C workers—H-2A workers, and that is because it is cheaper to employ undocumented workers. We can say, well, we can replace them. We can replace the undocumented workers with H-2C workers, if we made it as cheap to employ them as it is to employ illegal aliens, maybe.

I think, though, the more likely consequence is you would replace American workers, because by replacing an American worker, you save even more money, because the American workers are paid more.

If we really want to solve the problem, we have to turn it around to a point where it is cheapest to employ an American worker.

Ms. LOFGREN. Let me ask you this, in terms of farmworkers who are here in violation of the immigration laws, they are here working without their papers, there has been speculation, I think it is correct, I mean these are people in many cases who have been here many years, they have family, kids, the like, they are not going anywhere voluntarily, because they live here.

How are they going to, if we do this E-Verify bill, how are they going to ever get employed again? I mean, in your testimony, you talked about the role of labor contractors and how that folds in. Can you explain that?

Mr. WILLIAMS. Right. Whenever we talk about doing anything regulatory with agriculture, the one gigantic loophole that exists in all our labor laws and frustrates all our efforts to improve things are the farm labor contractors.

And what will happen, I am quite confident, as a result of the passage of the E-Verify law, will be a further progression toward growers turning over the total hiring function to labor contractors to insulate themselves from liability.

That started, roughly, with the passage of IRCA. After IRCA passed, with its modest employer sanctions, one of the first things that happened was the percentage of workers that were hired through farm labor contractors started growing. It has been growing ever since. And this E-Verify thing will be the last straw, because they will all be hired in the future through labor contractors.

And labor contractors are very difficult to regulate. There are only about 12,000 of them, but entry and exit is easy. They are undercapitalized. They are really not responsible players. You can do things to them, you can penalize them, you take their license away, another one will spring up the next day.

Ms. LOFGREN. Well, if I may on that point, one of the concepts that we have explored—and California actually regulates the farm labor contractors, is that if you were to use a contractor who wasn't subject to regulation, that you would also be in violation. Isn't that something we ought to look at?

Mr. WILLIAMS. Well, I think, and I suggested in my testimony, that one very effective way to get at the problem of unauthorized employment in agriculture is to go after the farm labor contractors and require them to E-Verify.

Why wait 3 years? Why give the worst violators in the United States a 3-year pass?

I mean, when you think about it, the 12,000 farm labor contractors in the United States have a huge role in bringing in the entire unauthorized population, because agriculture is often the gateway job. It is the contractors who deal directly with the traffickers, the coyotes, the smugglers. They are the first job for so many people coming to the United States. If we were serious about doing something about the problem, I would say that they would be very good people to go after.

They are also people with an unparalleled record of labor abuse. They are exploitative employers. Why not look at them first?

And I think it would be much better to focus and really enforce the law against a small group of employers and actually follow through with it for once then to cast a wide net—for example, all of agriculture, a 100,000 employers, many of whom only employ a few workers. And all those guys in the Midwest, they don't employ any undocumented workers. Why not focus on the heart of the problem?

And that is why I have also recommended that we go back and make it a violation of the Migrant and Seasonal Agricultural Worker Protection Act for contractors to employ unauthorized workers and, thereby, give workers the right to sue.

We run across cases all the time where U.S. workers complain that they have been discriminated against. Give them the right to enforce the law, too. And I think we would go a long way toward getting at the problem.

Ms. LOFGREN. Mr. Chairman, I know that my time has expired, but I would like to ask unanimous consent to place in the record a statement from Richard Trumka, the president of the AFL-CIO;

testimony from Eliseo Medina, the secretary-treasurer of SEIU; a statement of Mark Ayers, the president of the Building and Construction Trades; and a letter from Bruce Goldstein, the president of Farmworker Justice—all in opposition to the bill—as well as a letter to Chairman Smith from 68 organizations in opposition.

Mr. GALLEGLY. Without objection.

[The information referred to follows:]

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Roberta Reardon
James Boland
Lee A. Saunders
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Lorretta Johnson

For Immediate Release **Contact: Amaya Tune 202-637-5083**

Statement by AFL-CIO President Richard Trumka
On The American Specialty Agriculture Act
September 8, 2011

The AFL-CIO strongly opposes the American Specialty Agriculture Act, a bill that will hurt both immigrant and U.S.-born workers alike. The bill shows once again that Lamar Smith will go to any extreme to cater to the interest of corporations at the painful expense of workers, and that he is not serious about real fixes to our nation's broken immigration system

The bill is modeled after harmful Bush Administration regulations President Obama reversed. It removes necessary wage protections, undermines other essential worker protections, and erodes government oversight in the current H-2A program and creates a harmful new guest worker program.

In short, the American Specialty Agriculture Act will do nothing to solve the problem at hand – the need for a fair immigration policy that protects all workers—and instead will ensure a deterioration of working conditions in the agricultural sector and make our nation's employers even more reliant on the importation and exploitation of foreign workers.
Rather than introducing another bill that harms American workers, Lamar Smith should put forth a worker-friendly solution to our broken immigration system.

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Stronger Together

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ELISEO MEDINA
International Secretary-Treasurer

MITCH ACKERMAN
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Testimony of Eliseo Medina
Secretary-Treasurer, Service Employees International Union
Subcommittee on Immigration Policy and Enforcement of the House Judiciary Committee

September 8, 2011

On behalf of the Service Employees International Union (SEIU), I write to express opposition to the American Specialty Agriculture Act. SEIU represents more than 2 million home care, janitors, security officers and other SEIU members who live and work throughout the United States, many of them are immigrants who came to this country from all over the world.

I, too, am a very proud immigrant and once worked as farmworker. My family and I came to this country in the 1950s. My parents, brothers and sisters and I worked in the fields harvesting grapes, oranges and other crops. My father was a Bracero guestworker at one time, and the rest of us worked alongside Bracero workers and saw first-hand the problems that infamous program caused both for the Bracero workers and the rest of us. We worked long days, without breaks, for very low wages and terrible working conditions. To ask for better treatment was asking to be fired on the spot. That is why I never complained about a knee injury I suffered as a teenager. Decades later, I had to undergo knee replacement surgery. Because of my history, the issue of farmworker guestworker programs is very personal to me.

The American Specialty Agriculture Act would create a new guestworker program for farmworkers, which would allow growers to recruit up to 500,000 foreign workers each year by merely attesting, without further proof, that they meet the basic requirements such as that their workers are not on strike (even that requirement has been watered down). Once here, the workers would toil under conditions more conducive to chattel than free workers. This proposal has almost no labor protections that have been recognized for decades as necessary to prevent economic harm to U.S. workers and exploitation of foreign workers. Besides adding a new tier of exploitable workers, the Act would increase undocumented immigration and would do nothing to resolve the status of currently undocumented farmworkers or to fix our tragically broken immigration system.

Guestworkers treated like chattel

The new program would include even fewer worker protections than exist under the current H-2A program which itself fails US and immigrant workers.[1]

[1] See, "No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers", Farmworker Justice, September 2011, available at http://farmworkerjustice.org/images/stories/eBook/pages/fwj.pdf. See also, "Litany of Abuses; More - Not Fewer - Labor Protections Needed in the H-2A Guestworker Program" Farmworker Justice, December 2009, available at http://www.fwjustice.org/files/press_releases/LitanyofAbuseReport12-09-08.pdf

Under the Act, wages would be lower than under the H-2A program, the housing requirement would be weakened, and it would be easier for growers to cheat farmworkers out of their meager promised transportation reimbursement. Growers would also be able to employ the guestworkers as few as half of the days promised in their contract, and would have the option to "transfer" their guestworkers from one employer to another (but the Act does not provide workers with any similar right to change employers on their own).

The Act is designed to trample the rights of guestworkers while giving them little or no legal recourse. The employer would be permitted to require workers to submit to a grower-designed binding arbitration process and to bear half of the cost of such arbitration. The requirement to share half the costs of arbitration with the grower is reminiscent of Anatole France's observation, that "The law, in its majestic equality, forbids the rich and the poor alike to sleep under bridges, to beg in the streets, and to steal bread."

Before any Legal Services Corporation funded entity could represent a guestworker on any violation, the worker would first have to attempt federal mediation services for at least 90 days, and LSC representation would have to cease the moment the guestworker leaves the U.S., which the Act requires to be within 10 months of initial entry. Given the pace of normal litigation, precluding a guestworker from obtaining LSC representation after leaving U.S. would generally require their LSC attorney to drop out of the case before it is resolved.

Increased undocumented immigration

It is ironic that this bill would be sponsored by a Member of Congress who claims to be a bitter opponent of undocumented immigration, given that the Act will probably lead to its increase.

Two features of the legislation in particular lead to that conclusion. One of the more cruel provisions of the Act prohibits the admission of a guestworkers' spouse and children, which as a practical matter mandates the separation of nuclear families for the entire time in the U.S. With black humor, the Committee's helpful summary of the Act points out that that the guestworkers "can freely visit their families in their home countries as frequently as they wish" as though such visits would be at all feasible given the pay and conditions under which farmworkers toil. Realistically, many spouses and children will come to the U.S. regardless of legal niceties, which will lead to increased undocumented immigration.

Another feature of the Act that will likely increase undocumented immigration is the failure to include any provision to allow guestworkers to remain legally. Workers who set down roots here – establishing friendships, perhaps falling in love with a future spouse or with our beautiful nation – should be able to remain lawfully. If they are not given that option, many will nevertheless overstay their visas and continue their lives here as undocumented workers. In truth, workers who produce the food on our tables should be given a fair chance at becoming immigrants with legal status and full members of their communities. A proposal that never lets them become eligible to earn the right to permanent-resident status or citizenship is not a model befitting our great nation.

No solution

An even greater flaw of the Act is that it would do nothing to resolve the status of those who are already here and working in the fields without lawful immigration status. By their sweat, these workers have given us our bread, fruits, and vegetables, sacrificing their health, and working for low pay in some of the most difficult jobs in America. Realistically, these workers – many of whom have lived here for years and have families here that include U.S. citizen children – aren't going anywhere regardless of whether this bill becomes law. They will remain in undocumented limbo. The only thing that would change under this proposal is worsened work conditions, as they would be forced to rely more heavily on the most unscrupulous employers. It is important to remember that there are hundreds of thousands of farmworkers who are U.S. citizens or authorized to work whose wages and working conditions would deteriorate along with those of undocumented workers.

Our great nation can and should do better. Instead of this gift to growers and nightmare for workers, we should pass the AgJOBS bill which is the product of a compromise between both sides. Unlike the American Specialty Agriculture Act, AgJOBS is a balanced solution that resolves the status of today's farmworkers while also providing for the future needs of farmers and the dignity of workers.

Even more broadly, it is deeply disappointing that the current Republican House majority has made no effort whatsoever to find real solutions to our immigration woes which are contributing to our current economic troubles. Where are the voices in the Republican party that once called for comprehensive immigration reform, including border security, employer accountability, resolution of the status of undocumented workers and their families, and reform of the legal immigration system to keep families together and provide a better match between the number of workers admitted and our nations needs?

SEIU urges the Subcommittee to drop proposals such as the American Specialty Agriculture Act and get to work on real solutions.

September 8, 2011
FOR IMMEDIATE RELEASE

Contact:
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Statement of Building and Construction Trades Department President Mark H. Ayers on Proposed New Guest Worker Program

WASHINGTON, DC -- I have long been skeptical of the creation of a new guest worker program because of the long history of employer abuse, worker exploitation and the erosion of U.S. worker workplace standards. The American Specialty Agriculture Act does nothing to solve the flaws in our broken immigration system, but this misguided bill would create a new guest worker program (H-2C) that either eliminates or weakens fundamental worker protections for workers and sets a troubling standard for future immigration reform efforts.

# # #

The Building and Construction Trades Department is an alliance of 13 national and international unions that collectively represent over 2 million skilled craft professionals in the United States and Canada

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September 8, 2011

The Honorable Elton Gallegly, Chairman
The Honorable Zoe Lofgren, Ranking Member
House Judiciary Subcommittee on Immigration Policy and Enforcement

Re: "The American Specialty Agriculture Act"

Dear Chairman Gallegly and Ranking Member Lofgren,

Farmworker Justice welcomes the opportunity to submit this statement for the hearing on "The American Specialty Agriculture Act." For three decades, Farmworker Justice has been advocating for farmworkers and helping farmworkers improve their living and working conditions. Throughout this time, Farmworker Justice has worked with Congress and the Department of Labor to protect U.S. workers' jobs and labor standards and prevent exploitation of vulnerable guestworkers in the H-2A agricultural guest worker program.

Chairman Lamar Smith's "Legal Workforce Act," which would require all employers in the U.S. to use the flawed E-Verify program to check the work eligibility of new hires, would harm agriculture, where more than one-half of the labor force is undocumented. Many farm operators would lose access to highly productive workers because they are undocumented, threatening their businesses' viability and the jobs of U.S. workers they employ as well. Though the bill includes special exemptions and rules for agriculture, these would only exacerbate problems for farmworkers. For example, agricultural employers would not be required to verify workers who had worked for them in the past. This would disrupt the workings of the free labor market by creating huge pressure for workers to continue working for the same employer. A captive workforce would be reluctant to challenge illegal or unfair conduct by their employers, driving down wages and working conditions for all farmworkers. Many undocumented farmworkers would remain in the U.S. but would suffer at the hands of abusive farm labor contractors who would be hired as farmers seek to escape liability for violating immigration and labor laws.

Though it is clear that a solution is needed to address our farm labor needs, guest worker program "reforms" that slash the protections for U.S. and guest workers are not the answer. The H-2A program allows agricultural employers to bring in temporary foreign workers as long as the U.S. workers do not suffer job loss or negative impacts on their wages and working conditions. The program contains modest worker protections, most of which existed in the notoriously abusive Bracero program. Despite these protections, the H-2A program today is rife with abuse of both U.S. and foreign workers.

Farmworker Justice this week released a report entitled, "No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers."[1] The report includes the stories of U.S. citizens and legal permanent residents who were denied work or mistreated because their employers

[1] Available at http://farmworkerjustice.org/images/stories/eBook/pages/fwj.pdf.

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preferred to hire vulnerable guest workers. The report also exposes the rampant abuse resulting from the recruitment of foreign workers abroad. Many guest workers must pay recruiters for H-2A jobs and enter the U.S. indebted, desperate to work, and fearful that the loss of their job will lead to financial ruin. Bound to their employer and fearful of being deported or denied a visa in the next season, guestworkers routinely accept onerous conditions that U.S. workers are more likely to reject. One former H-2A sheepherder quoted in the report referred to his status as "a form of modern day slavery."

The "American Specialty Agriculture Act" would result in job loss for hundreds of thousands of U.S. workers, lower the wages and benefits that U.S. workers would be offered by employers who claim they can't find enough workers, and facilitate the exploitation of hundreds of thousands of foreign citizens from poor nations. The proposal would create a new visa, the "H-2C" visa, which would replace the H-2A program after two years. In the two-year interim, the H-2A program would be changed based on the harsh wage cuts and elimination of labor protections that the Bush-Chao Administration imposed and that the Obama-Solis Administration reversed. The Bush H-2A regulations were devastating for US and foreign workers. The H-2C program would eliminate or substantially weaken longstanding protections that evolved to address decades of guestworker program abuses. Growers would have even wider latitude to invent unfair job terms that guestworkers have no choice but to accept to discourage U.S. workers from applying. The H-2C program, for example, would allow employers to "attest" that they will protect U.S. workers and otherwise comply with the law while depriving the government agencies, workers, attorneys and the courts of the means to ensure that those attestations are fulfilled.

The American Specialty Agriculture Act's approach of slashing wages and working conditions to facilitate the hiring of hundreds of thousands of guestworkers would not fix our broken immigration system nor would it create a stable, legal agricultural workforce. The proposal does nothing to address the presence of roughly one million productive agricultural workers in the U.S. who lack authorized immigration status. In fact, by authorizing a massive influx of guestworkers, the bill would further destabilize the farm labor market, resulting in higher unemployment and a spiraling down of wages and working conditions.

The American Specialty Agriculture Act would guarantee agribusiness easy access to hundreds of thousands of additional foreign workers at low wages with minimal government oversight. The result of this new guestworker program would be the displacement of hundreds of thousands of American farmworkers and sharp wage drops and reduced labor protections for those workers fortunate enough to keep their jobs. Congress should reject this disastrous approach and instead provide undocumented farmworkers with the opportunity to earn legal immigration status with a path to citizenship and strengthen US worker protections in the H-2A program. Rather than replace one vulnerable farm workforce with another, Congress should search for ways to help hard-working farmworkers to improve their wages, working conditions, health, and communities.

Thank you for the opportunity to submit these comments.

Sincerely,

Bruce Goldstein
President
Farmworker Justice

September 6, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

We write to express our grave concern regarding the Legal Workforce Act and the devastating impact it will have on the agricultural industry, farmworkers and their families, and rural communities. Our concern is heightened at the prospect of legislation that would "reform" the H-2A agricultural guestworker program or create an entirely new temporary foreign agricultural worker program as a response to the Legal Workforce Act's harmful consequences.

Because at least one-half of the farm labor force is undocumented, the agricultural sector would experience severe disruption due to the Legal Workforce Act's immigration verification requirements. The Act's likely consequences to agriculture are evident in Georgia, where the Governor recently signed into law an immigration enforcement mandate aimed at reducing the presence of undocumented workers. According to media reports, Georgia's growers, many of whom are dependent on undocumented labor, are experiencing difficulties hiring migrant workers. Upon passage of the Legal Workforce Act, growers and workers across the country would experience similar hardships.

For the nation's approximately 2 million farmworkers and their families, the impact of the bill would be grievous even as growers continue to demand their labor. Farmworkers, including their spouses and many U.S. citizen children, would experience an increase in vulnerability and poverty as they are pushed further and further into the margins of society. And the hundreds of thousands of U.S. farmworkers – citizens and lawful permanent residents – will experience the wage depression that occurs when employers can take advantage of so many vulnerable workers.

The Legal Workforce Act's special exceptions for agriculture reflect the importance of undocumented farmworkers to agricultural production, but do nothing to help farmworkers. By allowing growers to continue to hire their returning workers without needing to verify their employment eligibility, the Act essentially ties workers to their employers, limiting their ability to protect themselves from unfair or illegal workplace conduct. And by allowing one industry to evade the law, the Act encourages displaced undocumented workers from other industries to come to agriculture, where such an influx of workers would depress wages for all workers, including U.S. workers.

There are reasonable solutions to ensure a stable, legal farm labor force that benefits farmworkers, growers and the nation. Unfortunately, some legislators have announced plans to introduce bills that would return us to failed policies of the past in the form of a massive new agricultural guestworker program with no meaningful worker protections or drastic, anti-labor changes to the current H-2A agricultural guestworker program. These proposals would senselessly bring in hundreds of thousands of additional workers without addressing the status of the many productive

undocumented workers already here harvesting our crops; and would lead to even greater abuses of farmworkers.

Ironically, although the Legal Workforce Act has been promoted as a "jobs" bill for U.S. workers, its special favors for agriculture and a possible guestworker proposal as a response to the Act's impact on agriculture would have the exact opposite effect. The presence of so many exploitable guestworkers and undocumented workers with no ability to protect themselves or bargain for better job terms would drive down wages and working conditions for everyone, including the hundreds of thousands of U.S. workers.

The answer is clear: to ensure a prosperous agricultural sector that treats farmworkers with respect and dignity, our nation deserves a real solution that combines immigration enforcement with an opportunity for undocumented workers to earn legal immigration status.

Cc: Rep. Conyers, Ranking Member, Judiciary Committee
Rep. Lofgren, Ranking Member, Immigration Subcommittee
Rep. Gallegly, Chair, Immigration Subcommittee

Sincerely,

United Farm Workers
Farmworker Justice

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
America's Voice Education Fund
Asian American Justice Center, member of the Asian American Center for Advancing Justice
Association of Farmworker Opportunity Programs
Brokaw Nursery, Inc.
California Rural Legal Assistance Foundation
Castañares Consulting
CAUSA
Center for American Progress Action Fund
Centro Independiente de Trabajadores Agricolas (CITA)
Church of the Brethren, Global Mission Partnerships
Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)
El Comité de Apoyo a los Trabajadores Agricolas (CATA)
Community Council of Idaho, Inc.
Community Service Network, Inc.
Disciples Justice Action Network
Equal Justice Center
Farmworker Legal Services of NY, Inc.
Florida Equal Justice Center Inc.
Florida Immigrant Advocacy Center
Global Workers Justice Alliance
Greater Rochester Coalition for Immigration Justice
Holy Redeemer Lutheran Church, San Jose, CA
Immigrant Worker Project, Ohio
Interfaith Committee for Worker Justice of San Diego County

Interfaith Council on Economics and Justice
Interfaith Worker Justice
La Unión del Pueblo Entero (LUPE)
The Leadership Conference on Civil and Human Rights (LCCR)
Legal Aid Justice Center, Immigrant Advocacy Program
Lutheran Immigration and Refugee Service
MAFO
Mennonite Central Committee U.S. Washington Office
Mexican American Legal Defense and Educational Fund (MALDEF)
Migrant Clinicians Network, Inc.
Migrant Support Services of Wayne County
Mississippi Opportunities Work, Inc.
National Advocacy Center of the Sisters of the Good Shepherd
National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund
National Center for Farmworker Health, Inc.
National Council of La Raza (NCLR)
National Employment Law Project
National Farm Worker Ministry
National Immigration Law Center
National Immigration Forum
NETWORK, A Catholic National Social Justice Lobby
New Mexico Center on Law and Poverty
Orange County Interfaith Committee to Aid Farm Workers (OCICAFW)
Oregon Human Development Corporation
Oxfam America
Pineros y Campesinos Unidos del Noroeste (PCUN)
Rural Housing, Inc.
Service Employees International Union (SEIU)
Sisters of Charity, BVM Leadership Team
Sisters of Charity of Nazareth Congregational Leadership
Sisters of St. Francis of Assisi
Southern Poverty Law Center
Student Action with Farmworkers
Telamon Corporation
UFW Foundation
UMOS
UNITE HERE INTERNATIONAL UNION
United Food and Commercial Workers (UFCW)
United States Conference of Catholic Bishops
Unitarian Universalist Association of Congregations
United Church of Christ Justice and Witness Ministries
United Methodist Church, General Board of Church and Society
UNITED SIKHS
Wayne Action for Racial Equality

Mr. GALLEGLY. Now the Chair recognizes the Chair of the full Committee and the sponsor of this legislation, the gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Wicker, thank you for your statement today. In your written statement, you mention that the H-2C program could well improve wages and conditions today in the ag industry. Tell me why you believe that to be the case?

Mr. WICKER. Well, first of all, the current H-2A program wage source comes from the United States Department of Agriculture National Ag Statistics Service Farm Labor Survey, and they do it quarterly. And they average together wages. And they don't tell farmers what this survey is about.

And to the extent that farmers fill out these wage surveys, I think that they want to look good to the government. And so they send in these surveys and they pick out the wages that they are paying their workers, probably on piece rate, on their best day at the peak of harvest when they have the most workers. And so it seems to me that that is inflating the wages under this survey system. Growers don't know what the survey data represents.

And so the H-2C proposal, if the more growers would use a legal program, that means less workers will be working for farm labor contractors that Mr. Williams talks about, and we don't know what those workers are earning. The illegal workers that work under the auspices of farm labor contractors, registered or not, most of the time on most of these farms, the grower writes one check to the crew leader. It might be eight bucks an hour for all of the workers they provide. But we don't know what they pay the workers. It is not eight bucks an hour.

So it is our view that when workers come in under a structured program like H-2C, with oversight and transparency, and the grower is the employer and they are writing a check to the worker, everybody knows what the deal is upfront. Workers have assurances that they are not going to be cheated.

This is going to raise wage rates for all of these workers who are on these farms illegally that come in under the H-2C program.

Mr. SMITH. Thank you, Mr. Wicker.

Mr. Carr, by the way, you are—if he is still here—represented by a particularly able Member of Congress, Mr. Gowdy, who is an outstanding Member of this Committee.

Mr. Carr, my question to you is, you say in your testimony that under the current H-2A program, the ag industry who is trying to do the right thing is at a competitive disadvantage with those who hire illegal immigrants. Why is that? Can you explain that?

Mr. CARR. Yes, I can. It goes to wages. It goes to the bureaucracy of the program and the cost of participating in the program.

As I stated, I have worked in this program for 13 years, and I have seen wage fluctuations from one Administration to the next.

Currently, this year, my company received a 28 percent wage increase mandated by the current Administration. Those changes are very hard to absorb.

Congresswoman Lofgren talked about wages and having predictability in wages and how they need to be streamlined. But what we saw this year is an agency put a 28 percent increase on us, and we have to absorb that.

Last year, we paid the OES wage that was talked about earlier, the prevailing wage, and it was $7.25 an hour, and that was the prevailing wage of all fruit harvesters in my geographic area. This year, I had to go to $9.11.

I am competing against the California peach industry as my number one competitor. They pay $8.25 an hour. Now, I pay $9.11 an hour plus free housing, free transportation to and from, and all

the fees associated with it, just to be legal. We need to level the playing field.

Mr. SMITH. Thank you, Mr. Carr.

Mr. Fazio, I was going to ask you what you thought about the H-2A program, the current program, but used every word but dysfunctional. If you want to use that, you are welcome to use that, too.

But let me ask you this, as far as the proposed H-2C program, what do you think is its main advantage over the H-2A current program?

Mr. FAZIO. Well, first of all, I will tell you, Chairman Smith, on the West Coast, there is very little use of the H-2A program. In Washington State, it is about 5 percent of the seasonal workers. In California and Oregon, it is less than 1 percent. It is like a half of a percent. And we have got—I can't come here—we produce more peaches in Washington and California than they do in South Carolina and Georgia. And I can't legitimately come here and tell this person we are going to out-produce you because we can hire workers and pay less, because we are hiring illegal workers. We have got to, as leaders in our industry, we have got to do something about this issue.

It is the number one issue in Washington State, the workforce. We need a legal and stable workforce. How the H-2C program works is it makes the program able to be used, I think, the housing program is a very, very big—the housing issue is a very, very big problem.

Let me give you an example. Under the H-2A program, the current H-2A program, you have to provide housing for all the workers that you bring up here, but you also have to provide extra housing. And we are talking about—in California and Washington, housing is extremely scarce. You have to provide extra housing because at any time a person—or, excuse me, in the first 50 percent of the contract, a person can come and say, "I want that bed." And it has happened to us.

I can tell you the stories of people who say that—that come and said: I want that bed, and you have 24 hours to get that H-2A worker out of there and make the bed available for the domestic worker.

So housing is a huge area of concern for us.

And I'll stop there, because there are many, many other areas of concern. But we have got to make the program work on the West Coast, where there is about 35 percent of the seasonal——

Mr. SMITH. Okay, thank you, Mr. Fazio.

Thank you, Mr. Chairman.

Mr. GALLEGLY. The gentleman from South Carolina would like to speak about how sweet the peaches from California are, right?

Mr. GOWDY. I don't think I have enough time to get to that, Mr. Chairman. If I had more than 5 minutes, I would, probably.

I want to thank you for holding this hearing and thank Mr. Smith for his leadership on this.

Mr. CARR, MR. Williams testified about the animus he believes that you hold toward American workers, so I want to give him the benefit of going back through the numbers that you testified to. If I wrote this down correctly, there were 285 domestic applicants?

Mr. CARR. That is correct.

Mr. GOWDY. Sixty never showed up for work?

Mr. CARR. Correct.

Mr. GOWDY. One-hundred-ninety were gone before the second day?

Mr. CARR. Just about second day, yes, sir.

Mr. GOWDY. Twenty were dismissed for cause?

Mr. CARR. Correct.

Mr. GOWDY. And 15 made it?

Mr. CARR. That is correct.

Mr. GOWDY. So I want you to forgive my former high school math, but an attrition from 285 to 15 means you would have to go through that process almost 20 times to get the workforce that you were looking for?

Mr. CARR. That is correct.

Mr. GOWDY. Is your crop likely to survive that process?

Mr. CARR. No, sir, it could not.

Mr. GOWDY. He was very thinly veiled with his belief that you hold an animus toward American workers, and I am struggling to figure out what that could be, because you don't have to pay transportation costs for American workers, do you?

Mr. CARR. That is correct.

Mr. GOWDY. But you do for visa workers?

Mr. CARR. Yes.

Mr. GOWDY. Do you have to provide American workers with housing vouchers?

Mr. CARR. No, we do not.

Mr. GOWDY. So why would you not be better off hiring American workers?

Mr. CARR. I would be better off hiring American workers, if there were——

Mr. GOWDY. So what is the source of his belief that you hold some animus toward American workers?

Mr. CARR. I cannot answer that question, sir.

Mr. GOWDY. Well, let me see if I can ask one that you can answer.

Litigation abuses. Have you experienced any of those? Have you experienced any overzealous taxpayer-funded investigators that come and look for split screens that may have been split 30 seconds before the investigator got there? Do you have any horror stories with respect to that?

Mr. CARR. I don't have particular horror stories like the rest of the industry that I have heard from my neighbors and colleagues. But, yes, just last year, we were written a letter on behalf of the worker who was claiming wrongful dismissal even though he was caught on surveillance tape fraudulently documenting his entry and exit time for work. And we ended up having to settle that case to get that worker money to return back home to Mexico. And we settled that case out of the benefit of the fact that it was going to be a whole lot cheaper to do that than it was to go through the court system.

But that is the only case that has ever been brought against my company in terms of workers. But frivolous lawsuits in the Southeast have decimated the H-2A program over the last 7 to 10 years.

Growers get in for 1 or 2 years and have been litigated right out of the program.

Mr. GOWDY. All right, I want to ask you about two specific provisions, one with respect to our friends in the dairy business. Is 10 months adequate? And if you were to suggest a tweak to this Committee, what would that tweak or fix be?

Mr. CARR. We have to understand in a lot of things that we talk about today, there are regional differences within this country, and it is hard to talk about a program and even differences among ourselves based on Western philosophies and Eastern philosophies.

But when it comes to year-round employment such as the dairy industry, I can understand that if I was a dairy producer that it would be difficult for me to know that every 9 months or 10 months, I would have to change the workforce.

But I think having the opportunity to participate in a program where they would have access to legal workers, they could make those adjustments.

A tweak to that would be for year-round operations, especially operations such as livestock, to make it on an annual or 12-month process, where they would have to re-advertise that job every 12 months instead of every 10 months.

But the bottom line to the Chairman's bill is, by including all of agricultural into this program, you are going to help transition agriculture into a guestworker program, which they currently can't use right now.

Mr. GOWDY. You wrote in your testimony that on-farm processors should be allowed to use the guestworker program. Can you expand on that?

Mr. CARR. It is not clear in the Chairman's bill whether processors that further processor their products—and let's understand that the growing trend, especially crop agriculture right now today, is to further process your products anyway you can by adding value to them. So we want to be sure that any guestworker bill clarifies that a producer that processes 50 percent or more of his own product could use the H2 or H-2C program.

Mr. GOWDY. Mr. Carr, I want to thank you for coming. I want to thank you for your advocacy on behalf of farming. We have met several times. We have scores and scores of mutual friends in South Carolina. And I think the American farmer is a patriot. And I thank you for your willingness to put up with a labyrinthal Federal system, to try to preserve that American journey.

Mr. CARR. Congressman, I want to thank you for your leadership within our State for holding some of the hearings that you have held and the conversations you have held on the subject, because it is near and dear to our State, as well as it is to all of agriculture.

Mr. GOWDY. Thank you.

Mr. GALLEGLY. I thank the gentleman from South Carolina.

The gentleman from Florida, Mr. Ross?

Mr. ROSS. Thank you, Mr. Chairman.

Mr. Carr, I have to comment as well on your testimony, just because I come from a strong agricultural district I think Mr. Williams may be familiar with. It is in between Tampa and Orlando. We consider ourselves the citrus capital of the world. Of course, my Chairman might disagree with that.

But last year we had acres of citrus, strawberries, blueberries, and tomatoes die on the vine for lack of labor. And I have a good friend of mine, Bo Bentley of Bentley Brothers Harvesting, who, like you, employs through the H-2A program. But unfortunately, by playing by the rules, they have an unfair—or competitive advantage that some of their competitors have because they don't.

And unfortunately, the H-2A program has led to a black market of illegal workers who have come over here and has been the morass that we now have today.

And I have to give Chairman Smith a great deal of credit for bringing this forward. I think it is a step in the right direction.

Mr. Fazio, I want to ask you a question really quickly about the 50 rule. Why is it important that this be eliminated in this bill?

Mr. FAZIO. Well, the 50 percent rule says that you are forced to hire all domestic workers that show up for the first 50 percent of the contract period. And the current interpretation by the Department of Labor is that if you have one guestworker on your property, you are liable to hire an infinite number of domestic workers.

We have small farmers who have maybe 20 workers on there that they are going to use in the H-2A program, and they are hiring the domestic workers as they come on board, but they are scared to use the program because they said, you know, someone could put me out of business who doesn't like this program by just sending 100 domestic workers.

Mr. ROSS. And they have to keep the job open for them, don't they?

Mr. FAZIO. Yes.

Mr. ROSS. And they could be sued if they don't, can't they?

Mr. FAZIO. That is correct, sir.

Mr. ROSS. And they have been, in fact, which leads me to my next question now.

In this particular bill, there is binding arbitration. What has been your experience in terms of lawsuits and the effect that binding arbitration would have?

Mr. FAZIO. We clearly need something. I think that the legal services community are zealous advocates and they are excellent lawyers. And we try to work as hard as we can with them. I have talked—there are two legal services in just about every State now. The State and Federal grantee, and then another legal services component that is privately funded or funded by the IOLTA, the Interest on Lawyers Trust Account, which I won't get into.

But I am working right now on a system where the legal services opposes the regulation, and they are going to sue the farmer.

What happened was, I got a demand letter from legal services, and I called her right up. And I said, what is the nature of the demand? And she said, we want $500 per worker for extra expenses that the worker made in the regulation. I said, well, what were they? And she gave them to me. I said, none of those regulations—none of those expenses are required under the regulation. And she said, well, we don't agree with the regulation, and we don't believe that the regulation complies with the Fair Labor Standards Act, so we are going to sue you unless you pay us $500 per worker.

Mr. ROSS. And that problem is transcontinental, because it is happening in Florida as well.

Mr. FAZIO. And I said, you know, with all due respect, why don't you sue the Department of Labor or the government that put this regulation in place, because we are just following the regulation?

And of course, it is a problem in the legal system. I am an attorney, and I know it is a problem in the legal system, when one person has their legal fees paid for by someone else, and another person has not got——

Mr. ROSS. There are incentives there.

Mr. FAZIO [continuing]. Their legal fees paid.

And I am not suggesting any great change, but I am saying that is the reality. We wrote a check—we are going to write a check for what they ask, because we can't take that to litigation. It will cost us $100,000.

Mr. ROSS. Exactly. The cost of defense.

Mr. Williams, well, let me do this.

In the interest of time, I would like to yield the remaining of my time to Chairman Smith.

Mr. SMITH. Thank you, Mr. Ross.

Mr. Williams, I wanted to address a couple questions to you, and this is based upon your written testimony where you say, "It is not a bad thing if the recipients of the bill called AgJOBS eventually move on to better paying jobs."

I assume those better paying jobs are not in the ag field; is that correct? Or in the ag industry?

Mr. WILLIAMS. Not necessarily.

Mr. SMITH. Okay, this is my question. If that is the case, and that is what you believe, why wouldn't that leave ag employers empty-handed, if you are allowing their workers to go leave where they are currently working and seek jobs elsewhere, particularly jobs that aren't in the ag industry?

Mr. WILLIAMS. Because I believe the best reform, we could make in the agricultural area is to have a free labor market where ag has to compete with non-ag employers, and it has to raise its wages and benefits——

Mr. SMITH. Right. But now you are allowing foreign workers to compete with American workers, which, I think, puts our American workers at a disadvantage.

Mr. WILLIAMS. I am talking about——

Mr. SMITH. Let me just finish real quick.

If you do that, and allow these ag workers to seek jobs other than in the ag industry, number one, you are making them compete with American workers for their jobs. But second of all, you are inevitably leading to sort of this endless flood of immigrant labor coming into the country, are you not?

Mr. WILLIAMS. I think I was referring to after the period of which under, say, in the AgJOB situation, workers became permanent residents. Then obviously, they no longer have to do the perspective work requirements, and they are free as any other person.

Mr. SMITH. But my point is still valid, I think, where now you are saying they can compete with American workers for other jobs, even jobs not in the ag industry; is that correct?

Mr. WILLIAMS. I am saying that initially workers would be tied to the ag industry——

Mr. SMITH. But then they could leave and compete——

Mr. WILLIAMS. But eventually, they would have the same freedom, the same right to choose their——

Mr. SMITH. I understand that, but the result is the same. They are competing with American workers for jobs.

Mr. WILLIAMS. And American employers, agricultural employers, would be competing with other employers, nonagricultural employers, to hire those workers.

That is the competition I would like to see.

Mr. SMITH. Well, I am more concerned about American workers than I am foreign workers, and that is a big difference we have, I think.

Thank you, Mr. Chairman. I yield back.

Mr. GALLEGLY. Thank you, Mr. Smith.

The Chair will yield to the gentlelady from Texas.

Ms. JACKSON LEE. I thank the gentleman and the Ranking Member, and I am hoping the Ranking Member is going to get her time.

Let me thank you. I recall, I think the Ranking Member and myself have been on the Committee for such a long period of time, I remember correcting the issue of housing and transportation and providing a better quality of housing for migrant workers. It seems like we did this through this Committee. And to my recollection, we might have even had something passed on that order.

When I look at this, which I think is H-2C, it is almost as if I am leaning, I am going backwards.

And I am very empathetic to my growers. I am from Texas, and we are all for talking about jobs, we are all for protecting American product and industry, and we want you to have as many workers as possible.

In fact, I guess she can speak for herself, but a lot of Members on this side of the aisle have been supporting comprehensive immigration reform. And in agricultural, I think many of you know the Senator Feinstein was working on the ag. We were supporting that. Mr. Berman was working on it. We were supporting that.

We really want to be supportive. But this is a little shocking.

And I want to pose a question to Mr. Williams, I think it is, who is representing farmworkers. And 500,000 sounds like a great number. This reminds me of the Chinese workers on the railroad. I am not even sure whether they had housing or anything, but I know the conditions under which they were working were dire. Certainly, those who were slaves, meaning African-Americans, were not in the same category, who were slaves and indentured servants.

But this looks along that line. And the reason why I say that, and maybe they were in better condition. I am not sure of the conditions for indentured servants; let me qualify that.

Somebody had to put a roof over their head, and I don't know what kind a roof, can't document the devastating roofs that slaves had, but there was some kind a roof. I know it was devastating.

It seems that H-2C deletes the requirements for housing, transportation, and some other benefits. If we had U.S. workers that are getting these benefits now, it seems that they would be the first in line to be fired, because you are pitting these workers coming against maybe workers that are already there.

So, Mr. Williams, help me understand, is there an advantage to H-2C? Does it make sense not to provide basic benefits? And as

well, not to allow some of these individuals that come with their families? Do you get a better work output from individuals that you don't provide housing to or transportation?

Mr. WILLIAMS. I think, Congresswoman, the reason the protections are in the current law is that——

Ms. JACKSON LEE. Not this bill. Please be clear. You are talking about the current law.

Mr. WILLIAMS. The H-2A. When they are in the current law——

Ms. JACKSON LEE. Yes, and this changes the current law.

Mr. WILLIAMS. Yes, it does. It doesn't eliminate all of those protections, but it weakens and modifies them. It reduces the transportation expense.

For example, right now, a worker who comes from Mexico, he may come all the way from southern Mexico as an H-2A worker. Right now, his transportation is paid from his home to the place of employment, and return.

Under the H-2C bill, his transportation would only be paid probably from the consulate, probably a consulate on the border. So the employer would no longer be paying for what might be a 500-mile trip within Mexico. So that is one of the changes.

The housing provision still requires that the employer pay for it, but it allows the employer to pay for it through a voucher, and probably changes the regs for the housing a little bit. I mean, I guess the intent——

Ms. JACKSON LEE. And the quality of the housing that they might be——

Mr. WILLIAMS. The Department of Agriculture would write new——

Ms. JACKSON LEE. Let me interrupt you, because I need you to quickly respond.

This also puts this scheme, if you will, under the Ag Department. It doesn't have the infrastructure for this, versus the Department of Justice. Comment very quickly on that.

And comment on the fact that in many States, the new immigration rules—no driver's license, you can't rent here. These bills are now in place in several States. What does this kind of new structure do to heap on top of those individuals that you want to have come work here?

Mr. WILLIAMS. Well, clearly, these programs belong under the Department of Labor. The Department of Labor has years of enforcement expertise in this area. It has wage and hour investigators. The Department of Agriculture has none of that.

And we have heard about how the Department of Agriculture is more knowledgeable, or whatever. Well, I think what is meant, maybe that is just code for saying the Department of Agriculture is grower-friendly, and the Department of Labor is worker-friendly.

If you want to protect the worker's rights, you will have this program under the direction of the Department of Labor, not the Department of Agriculture.

Mr. GALLEGLY. The time of the gentlelady has expired. And I would——

Ms. JACKSON LEE. Mr. Chairman, I would close by saying, I would like to be grower-friendly and worker-friendly. And I do be-

lieve we need comprehensive immigration reform to make all of this work.

I yield back.

Mr. GALLEGLY. The gentlelady's time has expired.

Would the Ranking Member like that additional 1 minute?

Ms. LOFGREN. Thank you, Mr. Chairman. I appreciate that.

I just wanted to make a couple of closing comments.

First, the arbitration provision in this bill is, I think, particularly objectionable, because to say that the farmworker who is going to be paid under the bill $7.60 an hour is going to pay half the cost of the arbiter's salary, which is usually hundreds of dollars an hour, means that basically there is going to be no recourse.

And I am not saying that any one of you as employers would do something wrong, but there are instances, unfortunately more than we would like, where people are cheated, not paid. And there has to be some recourse to justice.

So I just think that is a very serious problem.

And I object to the bill overall, but surely, we would not expect somebody who is so poor and works so hard to be unpaid and have no recourse to justice. That just cannot be the America that we believe in.

I would just like to note that our former colleague, Adam Putnam, was certainly very instrumental in putting together the ag labor bill that had broad consensus across the aisle when it was introduced. I really think we would be much better off enacting that bill as it was written by Republicans and Democrats to serve both the ag industry but also the people who work so hard to pick our crops.

And with that, Mr. Chairman, I appreciate the additional minute. And I yield back the balance.

Mr. GALLEGLY. I thank the gentlelady.

And I would also like to thank our witnesses for being here today.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which will be forwarded, and ask the witnesses to make an attempt to respond as promptly as possible, so their answers can be made a part of the record of this hearing.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion into the record.

And with that, thank you very much, gentlemen, and the Subcommittee stands adjourned.

[Whereupon, at 3:35 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

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September 15, 2011

Lamar S. Smith, Chairman
House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington D.C. 20515-6216

Re: American Specialty Agriculture Act

Dear Chairman Smith:

In written testimony submitted to Congress this past Thursday, Dan Fazio from the Washington Farm Labor Association represented that the legal services provider in Washington threatened legal action unless a farmer reimbursed workers for certain costs that the farmer was not required to reimburse pursuant to the H-2A regulations, with the ulterior motive of attacking the H2-A regulation.

Northwest Justice Project (NJP) is the statewide legal provider in Washington State. We would like the opportunity to correct the record. NJP advocates have not engaged in any attempts to challenge the existing H-2A regulations, and most definitely have not done so by threatening legal action against employers. Mr. Fazio may be referring to a case in which H2-A workers sent a letter to a grower requesting reimbursement for pre-employment costs that had resulted in violations of the obligation to pay minimum wage under the Fair Labor Standards Act. The claims were made under FLSA, and not the H-2A regulations. The matter has been the subject of amicable negotiation. To my knowledge no affirmative litigation has been brought against growers in Washington challenging the reimbursement provisions of the H-2A regulations.

I request that this letter be made part of the hearing record.

Sincerely,

Michele Besso

Michele Besso
Attorney at Law

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DANIEL THOMPSON
PRESIDENT

KENT R. SPUHLER
DIRECTOR

September 14, 2011

Lamar S. Smith, Chairman
House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington D.C. 20515-6216

Re: American Speciality Agriculture Act

Dear Chairman Smith:

I would like to furnish the Subcommittee with some additional information referred to in my testimony last week with respect to the wages paid agricultural workers in the United States. I ask that this letter be made part of the hearing record.

There are two main sources of such data – the Farm Labor Survey which is carried out by the Department of Agriculture's National Agricultural Statistical Service and the Occupational Employment Statistics which are generated by the Department of Labor's Bureau of Labor Statistics.

The Farm Labor Survey which provides the data for the adverse effect wage rate under the current H-2A program is a quarterly survey of approximately 12,000 farmers and ranchers across the United States to obtain data on the number of agricultural workers, numbers of hours worked, and wage rates at the national and regional levels. The data is aggregated in order to meet the Department of Agriculture's standards of accuracy for its agricultural statistics. This is both an advantage and disadvantage – the statistics are accurate but not as specific as to occupation and geographical area as might be desired. The Bureau of Labor Statistic's OES data has the opposite problem – although it is available at the county level and by occupation, the sample sizes are much smaller, and the estimates are not as accurate as the Farm Labor Survey. A further drawback of the OES surveys is that farms are *not* surveyed by the Bureau of Labor Statistics. Since farms are the main employers of farmworkers in the United States, the OES survey is sampling a much smaller universe, i.e., businesses which are not farms, but which employ farmworkers.

The most recent report of the Farm Labor Survey was released on August 18, 2011. (See Attachment 1). This survey covered an estimated 1,186,000 hired workers on the Nation's farms and ranches during the week of July 10-16, 2011. Farm operators paid their hired workers an average of $10.90 per hour during the July 2011 reference week. Field workers received an average of $10.24 per hour while livestock workers earned $10.28 per hour. The field and livestock combined rate (which is used to calculate the AEWRs) was $10.25 per hour. The field and livestock combined rate includes wages paid agricultural equipment operators but not wages paid supervisors. Admitting a large number of guest workers at wage lower than $10.25 per hour cannot help but have an adverse impact on the wages of U.S. farmworkers.

We can see what the wage differential will be under the methodology set forth in the American Specialty Agriculture Act by looking at DOL's Online Wage Library for specific locations and occupations. It should be noted that the although the bill's title refers to "Speciality Agriculture" H-2C workers could be admitted to perform any agricultural job in the United States including the supervisory and agricultural equipment operator occupations which employ many U.S. workers.

I am attaching the FLC wage results for the agricultural occupations in the Oxnard-Thousand Oaks-Ventura CA MSA (See Attachment 2). If the American Specialty Agriculture Act were passed, employers in Ventura County would be able to bring in guest workers at wages from $1.00 to $6.00 less than the average wage currently paid in Ventura County depending on the occupation:

Occupation	Average Wage Ventura County California	Proposed H-2C Wage (Level 1 Wage)	Difference
Frontline Supervisors	$17.98 per hour	$11.44 per hour	- $6.58 per hour
Agricultural Equipment Operators	$13.94 per hour	$9.89 per hour	- $4.06 per hour
Farmworkers Farm, Ranch, and Aquaculture Animals	$12.00 per hour	$8.93 per hour	- $3.07 per hour
Agricultural Workers, All Other	$9.48 per hour	$8.93 per hour	- $1.05 per hour
Farmworkers, Laborers, Crop, Nursery, and Greenhouse	$9.53 per hour	$8.66 hour	- $.87 per hour
Graders and Sorters, Agricultural Products	$8.93 per hour	$8.73 per hour	- $.20 per hour

As I pointed out in my testimony, the employers would not have to pay employment taxes on the H-2C workers further increasing the incentive to prefer guest workers over U.S. workers.

The results are similar throughout the United States. Although the Bureau of Labor Statistics does not publish the Level 1 wage on a national level, it does provide the 25th percentile wage by occupation. The 25th percentile wage is actually higher than the Level 1 wage but it does provide a basis for estimating the magnitude of the wage cut for farm workers under the American Specialty Agriculture Act on a national basis:

Occupation	Mean (Average) Hourly Wage BLS National Employment Statistics	25% Percentile Wage	Difference
Frontline Supervisors	$21.65 per hour	$14.94 per hour	- $6.71 per hour
Agricultural Equipment Operators	$12.49 per hour	$9.22 per hour	- $3.27 per hour
Farmworkers Farm, Ranch, and Aquaculture Animals	$11.56 per hour	$8.77 per hour	- $2.79 per hour
Farmworkers, Laborers, Crop, Nursery, and Greenhouse	$9.64 per hour	$8.46 per hour	- $1.18 per hour
Graders and Sorters, Agricultural Products	$10.18 per hour	$8.57 per hour	- $1.61 per hour
Agricultural Workers, All Other	$13.35 per hour	$9.39 per hour	- $3.96 per hour

I am attaching the National OES estimates for the occupations listed (Attachment 3).

I understand the intent of the E-Verify legislation is to protect the wages, working conditions, and job opportunities of American workers from being undermined by the continued employment of unauthorized aliens. Admitting additional 500,000 guest workers at a wage rate which is lower than the wage paid 80 to 85% of the current workforce will also undermine American job opportunities and wages. If the goal is a stable, legal workforce for agriculture, I believe the best solution is to provide the current unauthorized workforce with legal status, end illegal migration, and curtail the use of guest worker programs in agriculture. Such a policy would allow the industry to transition to a more productive, better paid workforce and over time would end our dependence on foreign agricultural workers. I believe that outcome is totally feasible, realistic and in our national interest.

Thank you again for the opportunity to testify before the Subcommittee.

Sincerely,

Robert A. Williams
Attorney at Law

cc: Members of the Committee

Attachments

Farm Labor

ISSN: 1949-0909

Released August 18, 2011, by the National Agricultural Statistics Service (NASS), Agricultural Statistics Board, United States Department of Agriculture (USDA).

Hired Workers Down 5 Percent, Wage Rates Up 1 Percent From a Year Ago

There were 1,186,000 hired workers on the Nation's farms and ranches during the week of July 10-16, 2011, down 5 percent from a year ago. Of these hired workers, 836,000 were hired directly by farm operators. Agricultural service employees on farms and ranches made up the remaining 350,000 workers.

Farm operators paid their hired workers an average wage of $10.90 per hour during the July 2011 reference week, up 11 cents from a year earlier. Field workers received an average of $10.24 per hour, up 15 cents from last July, while livestock workers earned $10.28 per hour compared with $10.15 a year earlier. The field and livestock worker combined wage rate, at $10.25 per hour, was up 14 cents from last year. The number of hours worked averaged 41.3 for hired workers during the survey week, up 1 percent from a year ago.

The largest decreases in the number of hired workers from last year occurred in California and in the Pacific (Oregon and Washington), Northern Plains (Kansas, Nebraska, North Dakota, and South Dakota), and Corn Belt I (Illinois, Indiana, and Ohio) regions. In California and in the Pacific region, the wet spring and cooler than normal summer temperatures delayed crop development, reducing the demand for hired workers. Above normal temperatures, heavy rains, and high winds in the Northern Plains and Corn Belt I regions discouraged crop progress and slowed field activity. Therefore, fewer hired workers were needed.

The largest increases in the number of hired workers from last year occurred in the Lake (Michigan, Minnesota, and Wisconsin) and Appalachian II (Kentucky, Tennessee, and West Virginia) regions and in Florida. In the Lake and Appalachian II regions, the wet conditions during last year's reference week slowed field activity for two days. Drier conditions this year allowed fieldwork to progress rapidly, increasing the demand for hired workers. Recent rains in Florida improved crop growth which led to heightened activity on farms causing more hired workers to be necessary.

Hired worker wage rates were generally above a year ago in most regions. The largest increases occurred in Florida and in the Corn Belt II (Iowa and Missouri), Appalachian II, and Southern Plains (Oklahoma and Texas) regions. The higher wages in Florida were due to strong demand from the nursery and greenhouse industry. In the Corn Belt II region, the higher wages were due to a lower proportion of part time workers. There was also a larger percentage of more highly skilled machine operators on grain farms. Fewer hours worked combined with fewer part time workers in the Appalachian II region led to the increase in wages. In the Southern Plains region, there were more salaried workers working fewer hours which pushed the average wage up.

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Hired Workers and Wage Rates - United States

[Excludes Alaska]

Farm employment	July 11-17, 2010	April 10-16, 2011 [1]	July 10-16, 2011
	(1,000)	(1,000)	(1,000)
Hired workers			
150 days or more	627		606
149 days or less	258		230
Total	885		836
Agricultural services			
Workers working on farms	360		350
Hired farm and service workers	1,245		1,186
	(hours per week)	(hours per week)	(hours per week)
Hours worked by hired workers	40.7		41.3
	(dollars per hour)	(dollars per hour)	(dollars per hour)
Wage rate			
Field and livestock combined	10.11		10.25
Field	10.09		10.24
Livestock	10.15		10.28
All hired workers [2] [3]	10.79		10.90

[1] The April 2011 Farm Labor Survey was not conducted.
[2] Benefits, such as housing and meals, are provided some workers but the values are not included in the wage rates.
[3] Excludes agricultural service workers.

Number of Workers and Hours Worked - Regions and United States: July 10-16, 2011

[Excludes agricultural service workers]

United States and region [1]	Hired			
	Number of workers	Expected to be employed		Number of hours worked
		150 days or more	149 days or less	
	(1,000)	(1,000)	(1,000)	(hours per week)
Northeast I	38	28	10	41.3
Northeast II	33	21	12	39.2
Appalachian I	41	31	10	42.8
Appalachian II	32	19	13	34.0
Southeast	31	22	9	39.4
Florida	40	37	3	40.3
Lake	74	50	24	36.7
Cornbelt I	41	29	12	34.4
Cornbelt II	33	25	8	37.1
Delta	25	18	7	39.5
Northern Plains	37	27	10	45.2
Southern Plains	51	40	11	40.0
Mountain I	28	21	7	44.5
Mountain II	19	16	3	46.0
Mountain III	16	15	1	46.8
Pacific	111	56	55	42.5
California	179	145	34	44.7
Hawaii	7	6	1	38.0
United States [2]	836	606	230	41.3

[1] Region map on page 14.
[2] Excludes Alaska.

Wage Rates by Type of Worker - Regions and United States: July 10-16, 2011

[Excludes agricultural service workers]

United States and region [1]	Type of worker			Wage rates for all hired workers
	Field	Livestock	Field and livestock combined	
	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)
Northeast I	10.63	9.83	10.35	11.00
Northeast II	9.93	10.46	10.05	10.95
Appalachian I	9.20	9.89	9.35	9.85
Appalachian II	9.49	9.51	9.50	10.50
Southeast	9.18	8.72	9.05	9.70
Florida	9.90	10.20	9.95	12.15
Lake	10.33	10.24	10.30	10.75
Cornbelt I	10.66	10.63	10.65	11.15
Cornbelt II	12.25	11.43	12.00	12.15
Delta	9.24	10.27	9.50	9.85
Northern Plains	11.04	10.96	11.00	11.20
Southern Plains	10.14	10.25	10.20	10.60
Mountain I	10.18	9.91	10.05	10.25
Mountain II	9.77	9.19	9.55	10.55
Mountain III	9.89	10.65	10.20	11.10
Pacific	10.82	10.56	10.80	11.28
California	10.00	10.80	10.10	10.80
Hawaii	12.70	13.25	12.76	14.91
United States [2]	10.24	10.28	10.25	10.90

[1] Region map on page 14.
[2] Excludes Alaska.

Number of Workers and Hours Worked - Regions and United States: July 11-17, 2010
[Excludes agricultural service workers]

United States and region [1]	Hired			
	Number of workers	Expected to be employed		Number of hours worked
		150 days or more	149 days or less	
	(1,000)	(1,000)	(1,000)	(hours per week)
Northeast I	38	25	13	43.7
Northeast II	37	25	12	39.2
Appalachian I	44	27	17	39.9
Appalachian II	24	13	11	35.4
Southeast	36	27	9	38.9
Florida	35	28	7	37.7
Lake	64	42	22	34.4
Cornbelt I	50	34	16	37.4
Cornbelt II	33	21	12	31.9
Delta	29	18	11	38.3
Northern Plains	46	36	10	43.7
Southern Plains	53	44	9	44.0
Mountain I	27	19	8	42.3
Mountain II	24	18	6	44.1
Mountain III	19	16	3	44.6
Pacific	120	65	55	42.5
California	200	164	36	43.4
Hawaii	6	5	1	37.8
United States [2]	885	627	258	40.7

[1] Region map on page 14.
[2] Excludes Alaska.

Wage Rates by Type of Worker - Regions and United States: July 11-17, 2010

[Excludes agricultural service workers]

United States and region [1]	Type of worker			Wage rates for all hired workers
	Field	Livestock	Field and livestock combined	
	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)
Northeast I	9.81	9.59	9.73	10.35
Northeast II	10.55	9.09	10.26	11.10
Appalachian I	8.77	9.07	8.82	9.40
Appalachian II	8.23	9.82	8.85	9.62
Southeast	9.12	9.69	9.30	9.97
Florida	9.40	9.40	9.40	10.68
Lake	11.09	9.47	10.45	11.10
Cornbelt I	10.57	11.17	10.75	11.20
Cornbelt II	10.51	11.45	10.95	11.20
Delta	9.02	8.96	9.00	9.34
Northern Plains	11.74	11.20	11.50	11.80
Southern Plains	8.98	9.54	9.20	9.90
Mountain I	9.95	9.39	9.70	10.32
Mountain II	9.61	8.99	9.40	10.05
Mountain III	9.70	9.69	9.70	10.50
Pacific	10.65	11.89	10.75	11.27
California	10.10	11.10	10.23	11.12
Hawaii	12.00	14.20	12.19	14.41
United States [2]	10.09	10.15	10.11	10.79

[1] Region map on page 14.
[2] Excludes Alaska.

Combined Field and Livestock Worker Wage Rates by Type of Farm - Regions and 48 States: July 11-17, 2010

[Excludes agricultural service workers]

Region [1]	Field crops	Other crops	Livestock and poultry	All farms
	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)
Northeast	9.82	9.75	10.41	9.97
Appalachian	8.37	8.86	9.65	8.83
Southeast	7.99	9.30	9.76	9.35
Lake	11.14	11.36	9.20	10.45
Cornbelt	11.06	10.00	11.20	10.82
Delta	9.06	9.94	8.71	9.00
Northern Plains	(D)	10.16	11.08	11.50
Southern Plains	8.86	8.86	9.58	9.20
Mountain	10.39	9.42	9.56	9.60
Pacific	12.17	10.30	11.46	10.49
48 States	10.17	10.05	10.28	10.14

(D) Withheld to avoid disclosing data for individual operations.

[1] Regions consist of the following States:
Northeast: Connecticut, Delaware, Maryland, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont.
Appalachian: Kentucky, North Carolina, Tennessee, Virginia, West Virginia.
Southeast: Alabama, Florida, Georgia, South Carolina.
Lake: Michigan, Minnesota, Wisconsin.
Cornbelt: Iowa, Illinois, Indiana, Missouri, Ohio.
Delta: Arkansas, Louisiana, Mississippi.
Northern Plains: Kansas, Nebraska, North Dakota, South Dakota.
Southern Plains: Oklahoma, Texas.
Mountain: Arizona, Colorado, Idaho, Montana, New Mexico, Nevada, Utah, Wyoming.
Pacific: California, Oregon, Washington.
48 States: All States, excluding Alaska and Hawaii.

Combined Field and Livestock Worker Wage Rates by Type of Farm - Regions and 48 States: July 10-16, 2011

[Excludes agricultural service workers]

Region [1]	Field crops	Other crops	Livestock and poultry	All farms
	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)
Northeast	9.42	10.38	10.09	10.21
Appalachian	9.14	9.48	9.54	9.41
Southeast	9.43	9.58	9.42	9.53
Lake	11.22	10.16	10.22	10.30
Cornbelt	12.25	10.24	11.35	11.29
Delta	8.99	9.91	10.33	9.50
Northern Plains	11.42	11.20	10.63	11.00
Southern Plains	(D)	9.20	10.32	10.20
Mountain	9.02	9.85	10.16	9.94
Pacific	11.58	10.30	10.31	10.36
48 States	10.68	10.14	10.24	10.25

(D) Withheld to avoid disclosing data for individual operations.

[1] Regions consist of the following States:
Northeast: Connecticut, Delaware, Maryland, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont.
Appalachian: Kentucky, North Carolina, Tennessee, Virginia, West Virginia.
Southeast: Alabama, Florida, Georgia, South Carolina.
Lake: Michigan, Minnesota, Wisconsin.
Cornbelt: Iowa, Illinois, Indiana, Missouri, Ohio.
Delta: Arkansas, Louisiana, Mississippi.
Northern Plains: Kansas, Nebraska, North Dakota, South Dakota.
Southern Plains: Oklahoma, Texas.
Mountain: Arizona, Colorado, Idaho, Montana, New Mexico, Nevada, Utah, Wyoming.
Pacific: California, Oregon, Washington.
48 States: All States, excluding Alaska and Hawaii.

All Hired Worker Wage Rates, by Economic Class of Farm - Regions and 48 States: July 11-17, 2010

[Excludes agricultural service workers]

Region [1]	Gross value sales-$1,000						All farms
	<50	50-99	100-249	250-499	500-999	1,000+	
	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)
Northeast	11.99	10.13	9.58	9.60	10.91	10.97	10.70
Appalachian	8.78	10.14	8.55	8.89	9.03	10.25	9.47
Southeast	9.94	9.37	9.76	10.40	10.21	10.53	10.31
Lake	10.54	(D)	9.40	9.91	11.98	11.26	11.10
Cornbelt	10.17	9.57	10.73	10.31	10.93	11.93	11.20
Delta	8.44	(D)	9.34	9.77	9.30	10.08	9.34
Northern Plains	10.46	9.53	10.54	12.29	12.32	12.01	11.80
Southern Plains	9.66	9.04	10.30	9.06	10.46	10.49	9.90
Mountain	10.23	9.39	9.44	10.19	11.27	10.31	10.28
Pacific	10.04	(D)	11.82	11.39	11.19	11.19	11.23
48 States	9.98	10.37	10.31	10.38	11.07	11.06	10.79

(D) Withheld to avoid disclosing data for individual operations.

[1] Regions consist of the following States:
Northeast: Connecticut, Delaware, Maryland, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont.
Appalachian: Kentucky, North Carolina, Tennessee, Virginia, West Virginia.
Southeast: Alabama, Florida, Georgia, South Carolina.
Lake: Michigan, Minnesota, Wisconsin.
Cornbelt: Iowa, Illinois, Indiana, Missouri, Ohio.
Delta: Arkansas, Louisiana, Mississippi.
Northern Plains: Kansas, Nebraska, North Dakota, South Dakota.
Southern Plains: Oklahoma, Texas.
Mountain: Arizona, Colorado, Idaho, Montana, New Mexico, Nevada, Utah, Wyoming.
Pacific: California, Oregon, Washington.
48 States: All States, excluding Alaska and Hawaii.

All Hired Worker Wage Rates, by Economic Class of Farm - Regions and 48 States: July 10-16, 2011

[Excludes agricultural service workers]

Region [1]	Gross value sales-$1,000						All farms
	<50	50-99	100-249	250-499	500-999	1,000+	
	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)
Northeast	11.11	9.65	8.82	10.06	11.30	11.62	10.98
Appalachian	9.30	9.50	9.45	10.96	10.24	10.45	10.10
Southeast	9.72	10.56	9.38	11.29	9.61	11.77	11.09
Lake	11.15	9.62	10.01	9.41	10.27	11.43	10.75
Cornbelt	11.15	8.58	(D)	10.98	11.75	12.30	11.61
Delta	9.86	11.23	9.73	9.69	10.47	9.62	9.85
Northern Plains	8.49	10.55	9.75	9.58	11.75	11.82	11.20
Southern Plains	9.79	10.29	10.45	11.80	11.27	10.38	10.60
Mountain	8.59	(D)	(D)	9.92	10.06	11.10	10.56
Pacific	10.69	11.07	11.13	11.52	10.65	11.00	10.98
48 States	10.23	9.78	10.51	10.78	10.78	11.22	10.87

(D) Withheld to avoid disclosing data for individual operations.

[1] Regions consist of the following States:
Northeast: Connecticut, Delaware, Maryland, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont.
Appalachian: Kentucky, North Carolina, Tennessee, Virginia, West Virginia.
Southeast: Alabama, Florida, Georgia, South Carolina.
Lake: Michigan, Minnesota, Wisconsin.
Cornbelt: Iowa, Illinois, Indiana, Missouri, Ohio.
Delta: Arkansas, Louisiana, Mississippi.
Northern Plains: Kansas, Nebraska, North Dakota, South Dakota.
Southern Plains: Oklahoma, Texas.
Mountain: Arizona, Colorado, Idaho, Montana, New Mexico, Nevada, Utah, Wyoming.
Pacific: California, Oregon, Washington.
48 States: All States, excluding Alaska and Hawaii.

Field and Livestock Workers by Type of Farm

[Excluding Alaska and Hawaii. Excludes agricultural service workers]

Type of farm	July 11-17, 2010	April 10-16, 2011 [1]	July 10-16, 2011
	(percent)	(percent)	(percent)
Field crops	13		13
Other crops	58		58
Livestock, dairy, and poultry	29		29

[1] The April 2011 Farm Labor Survey was not conducted.

Hired Workers by Economic Class of Farm

[Excluding Alaska and Hawaii. Excludes agricultural service workers]

Gross value of sales	July 11-17, 2010	April 10-16, 2011 [1]	July 10-16, 2011
	(percent)	(percent)	(percent)
Less than $50,000	11		12
$50,000-$99,999	5		5
$100,000-$249,999	9		10
$250,000-$499,999	12		10
$500,000-$999,999	13		13
$1,000,000 and over	50		50

[1] The April 2011 Farm Labor Survey was not conducted.

Hired Workers by Number of Workers on Farm

[Excluding Alaska. Excludes agricultural service workers]

Number of workers on farm	July 11-17, 2010	April 10-16, 2011 [1]	July 10-16, 2011
	(percent)	(percent)	(percent)
Employed on farms hiring			
1 worker	9		9
2 workers	8		9
3-6 workers	16		19
7-10 workers	7		8
11-20 workers	12		11
21-50 workers	13		14
51 or more workers	35		30

[1] The April 2011 Farm Labor Survey was not conducted.

Agricultural Services

Agricultural service operations provided 350,000 workers for the Nation's farms and ranches during the week of July 10-16, 2011. Agricultural service workers in California numbered 148,000 this July, up 6 percent from last year. Florida's number of agricultural service workers was 3,000, up 50 percent from last year.

The average wages received by agricultural service workers in California and Florida were $10.75 and $12.45 per hour, respectively. Comparable wages in July 2010 were $10.75 per hour in California and $11.95 per hour in Florida.

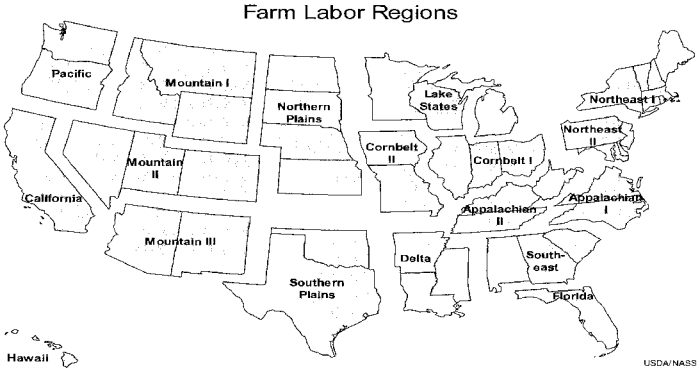
Number of Agricultural Service Workers, Hours Worked, and Wage Rates - California, Florida, and United States

[Data are for agricultural services performed on the farm by custom service units. These statistics are not included in the State-Regional tables]

State	Number of workers working on farms			Hours worked			Wage rates [1]		
	July 2010	April 2011 [2]	July 2011	July 2010	April 2011 [2]	July 2011	July 2010	April 2011 [2]	July 2011
	(1,000)	(1,000)	(1,000)	(hours)	(hours)	(hours)	(dollars per hour)	(dollars per hour)	(dollars per hour)
California	140.0		148.0	34.5		36.9	10.75		10.75
Florida	2.0		3.0	46.0		49.7	11.95		12.45
United States	360.0		350.0	(NA)	(NA)	(NA)	(NA)	(NA)	(NA)

(NA) Not available.
[1] Benefits, such as housing and meals, are provided to some workers but the values are not included in the wage rates.
[2] The April 2011 Farm Labor Survey was not conducted.

Farm Labor Regions



Region	States
Northeast I	Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont.
Northeast II	Delaware, Maryland, New Jersey, Pennsylvania.
Appalachian I	North Carolina, Virginia.
Appalachian II	Kentucky, Tennessee, West Virginia.
Southeast	Alabama, Georgia, South Carolina.
Lake	Michigan, Minnesota, Wisconsin.
Cornbelt I	Illinois, Indiana, Ohio.
Cornbelt II	Iowa, Missouri.
Delta	Arkansas, Louisiana, Mississippi.
Northern Plains	Kansas, Nebraska, North Dakota, South Dakota.
Southern Plains	Oklahoma, Texas.
Mountain I	Idaho, Montana, Wyoming.
Mountain II	Colorado, Nevada, Utah.
Mountain III	Arizona, New Mexico.
Pacific	Oregon, Washington.

Farm Labor Definitions

The following definitions are provided to assist in interpreting statistics published in quarterly Farm Labor reports. To ensure consistency in data collection, the questionnaires and instruction manual used by the interviewers provide more in-depth explanations of these terms.

Farm or Ranch: A place that sells, or would normally sell, at least $1,000 worth of agricultural products during the year.

Agricultural Work: Work done on a farm or ranch in connection with the production of agricultural products, including nursery and greenhouse products and animal specialties such as fur farms or apiaries. Also included is work done off the farm to handle farm related business, such as trips to buy feed or deliver products to local market.

Hired Worker: Anyone, other than an agricultural service worker, who was paid for at least one hour of agricultural work on a farm or ranch. Worker type is determined by what the employee was primarily hired to do, not necessarily what work was done during the survey week. Type of workers include:

> **Field Workers**: Employees engaged in planting, tending and harvesting crops including operation of farm machinery on crop farms.
>
> **Livestock Workers**: Employees tending livestock, milking cows or caring for poultry, including operation of farm machinery on livestock or poultry operations.
>
> **Supervisors**: Hired managers, range foremen, crew leaders, etc.
>
> **Other Workers**: Employees engaged in agricultural work not included in the other three categories. Bookkeepers and pilots are examples.

Methods of Pay: All wage rates are calculated based on total wages paid and total hours worked during the survey reference week. Wages paid other than hourly (bi-weekly, monthly, etc.) are converted to an hourly basis prior to summarization. Wages paid by piece rate (per quantity of produce picked, etc.) are also converted to an hourly basis.

Perquisites: Benefits, such as cash bonuses, housing, or meals, provided to an employee in addition to pay are included in perquisites. Wage rates published in this release do not include the value of these benefits.

Term of Employment: The length of time during the year the farm operator expects to employ those workers who were on the payroll during the survey week.

Agricultural Service: Any farm-related service performed on a farm or ranch on a contract or fee basis. This primarily includes activities performed by contract workers on fruit, vegetable, or berry operations. It also includes custom work (see below), veterinarian work, artificial insemination, sheep shearing, milk testing, or any other farm-related activity performed on a farm or ranch on a "fee per service" basis rather than hourly.

Contract Labor: Contract workers are paid by a crew leader, contractor, buyer, processor, cooperative, or other person who has an oral or written agreement with a farmer/rancher. Pruning, thinning, weeding or harvesting of fruit, vegetable or berry crops are examples. A machine is not a part of the service activity provided by the contractor.

Custom Work: Work performed by machines and labor hired as a unit. Hay baling, combining, corn or cotton picking, spraying, fertilizing, and laser leveling are examples of custom work when the equipment is included in the service activity.

Type of Farm (or Ranch): An operation is classified in the farm type which accounts for the largest portion of the total gross value of sales for its agricultural production.

Types of farms broken out in this publication are:

Field Crops: A farm producing wheat, rice, corn, soybeans, barley, dry beans, rye, sorghum, cotton, popcorn, tobacco, or other such crops.

Other Crops: A farm producing vegetables, melons, berry crops, grapes, tree nuts, citrus fruits, deciduous tree fruits, avocados, dates, figs, olives, nursery, or greenhouse crops. This category also includes farms producing potatoes, sugar crops, hay, peanuts, hops, mint, and maple syrup.

Livestock or Poultry: A farm producing cattle, hogs, sheep, goats, milk, chickens, eggs, turkeys, or animal specialties such as furs, fish, honey, etc.

Gross Value of Sales: This includes all income during a year from the sale of crops, livestock, dairy, poultry, or other related agricultural products, including the landlord's share and the value of products produced under contract. When commodities are placed under CCC loan, they are considered as sold.

Survey Methodology

Survey Procedures: These data were collected by the National Agricultural Statistics Service (NASS) during the last two weeks of July using sampling procedures to ensure every employer of agricultural workers had a chance of being selected.

Two samples of farm operators are selected. First, NASS maintains a list of farms that hire farm workers. Farms on this list are classified by size and type. Those expected to employ large numbers of workers are selected with greater frequency than those hiring few or no workers. A second sample consists of segments of land scientifically selected from an area sampling frame. Each June, highly trained interviewers locate each selected land segment and identify every farm operating land within the sample segment's boundaries. The names of farms found in these area segments are matched against the NASS list of farms; those not found on the list are included in the Labor survey sample to represent all farms. This methodology is known as multiple frame sampling, with an area sample used to measure the incompleteness of the list. Additionally, a list of agricultural service firms was sampled in California and Florida. The survey reference week was July 10-16, 2011.

Reliability: Two types of errors, sampling and non-sampling, are always present in an estimate based on a sample survey. Both types affect the "accuracy" of the estimates.

Sampling error occurs because a complete census is not taken. The sampling error measures the variation in estimates from the average of all possible samples. An estimate of 100 with a sampling error of 1 would mean that chances are 19 out of 20 that the estimates from all possible samples averaged together would be between 98 and 102; which is the survey estimate, plus or minus two times the sampling error. The sampling error expressed as a percent of the estimate is called the relative sampling error. The relative sampling error for number of hired workers at the U.S. level is normally less than 5 percent. The relative sampling error for the number of hired workers generally ranged between 10 and 20 percent at the regional level. The U.S. all hired farm worker wage rate had a relative sampling error of 0.7 percent. The relative sampling error was 0.7 percent for the combined field and livestock worker wage rate. Relative sampling errors for the all hired farm worker wage rate generally ranged between 2 and 5 percent at the regional levels. Relative sampling errors for wage rates published by type of farm and economic class of farm generally ranged between 2 and 19 percent at the regional level.

Non-sampling errors can occur in a complete census as well as in sample surveys. They are caused by the inability to obtain correct information from each operation sampled, differences in interpreting questions or definitions, and mistakes in editing, coding or processing the data. Special efforts are taken at each step of the survey to minimize non-sampling errors.

Revision Policy: Farm labor information is subject to revision the following quarter that the information is published and the year after the original publication date. The basis for revision must be supported by additional data that directly affect the level of the estimate. Worker numbers and wage rates for July 2010 were subject to revision with this report.

Information Contacts

Listed below are the commodity statisticians in the Environmental and Demographics Section of the Environmental, Economics, and Demographics Branch of the National Agricultural Statistics Service to contact for additional information. E-mail inquiries may be sent to nass@nass.usda.gov.

Kevin Barnes, Chief, Environmental, Economics, and Demographics Branch ..... (202) 720-6146

Dale P. Hawks, Head, Environmental and Demographics Section ..... (202) 720-0684
- Mark Aitken – Farm Labor ..... (202) 720-9525
- Jerry Campbell – Energy, Census of Agriculture ..... (202) 720-5581
- Liana Cuffman – Livestock Chemical Usage, Postharvest Chemical Usage ..... (202) 690-0392
- Vincent Davis – Census of Agriculture ..... (202) 690-3228
- Doug Farmer – Fruit Chemical Usage, Vegetable Chemical Usage ..... (202) 720-7492
- Theresa Varner – Field Crops Chemical Usage ..... (202) 690-2284

Access to NASS Reports

For your convenience, you may access NASS reports and products the following ways:

- All reports are available electronically, at no cost, on the NASS web site: http://www.nass.usda.gov
- Both national and state specific reports are available via a free e-mail subscription. To set-up this free subscription, visit http://www.nass.usda.gov and in the "Receive NASS Updates" box under "Receive reports by Email," click on "National" or "State" to select the reports you would like to receive.
- Printed reports may be purchased from the National Technical Information Service (NTIS) by calling toll-free (800) 999-6779, or (703) 605-6220 if calling from outside the United States or Canada. Accepted methods of payment are Visa, MasterCard, check, or money order.

For more information on NASS surveys and reports, call the NASS Agricultural Statistics Hotline at (800) 727-9540, 7:30 a.m. to 4:00 p.m. ET, or e-mail: nass@nass.usda.gov.

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To file a complaint of discrimination, write to USDA, Assistant Secretary for Civil Rights, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue, S.W., Stop 9410, Washington, DC 20250-9410, or call toll-free at (866) 632-9992 (English) or (800) 877-8339 (TDD) or (866) 377-8642 (English Federal-relay) or (800) 845-6136 (Spanish Federal-relay). USDA is an equal opportunity provider and employer.

Foreign Labor Certification Data Center
Online Wage Library www.flcdatacenter.com

Quick Search
Search Wizard

H1B Data
H2A Data
H2B Data
Perm Data

File Archive

Skill Level Explanation

SVP Explanation

change history

FAQ

FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2011 - 6/2012.

Your search returned the following: Print Format

Area Code:	37100
Area Title:	Oxnard-Thousand Oaks-Ventura, CA MSA
OES/SOC Code:	45-2091
OES/SOC Title:	Agricultural Equipment Operators
GeoLevel:	1
Level 1 Wage:	$9.89 hour - $20,571 year
Level 2 Wage:	$11.91 hour - $24,773 year
Level 3 Wage:	$13.94 hour - $28,995 year
Level 4 Wage:	$15.96 hour - $33,197 year
Mean Wage (H-2B):	$13.94 hour - $28,995 year

This wage applies to the following O*Net occupations:

45-2091.00 Agricultural Equipment Operators

Drive and control farm equipment to till soil and to plant, cultivate, and harvest crops. May perform tasks, such as crop baling or hay bucking. May operate stationary equipment to perform post-harvest tasks, such as husking, shelling, threshing, and ginning.
O*Net™ JobZone: 2
Education & Training Code: No Level Set.

For information on determining the proper occupation and wage level see the new Prevailing Wage Guidance on the Skill Level page.

The prevailing wage must be at, or above the federal or state or local minimum wage, whichever is higher. The federal minimum wage is $7.25/hr effective July 24, 2009.

The Foreign Labor Certification Data Center is developed and maintained by the State of Utah under contract with the US Department of Labor, Office of Foreign Labor Certification.

ATTACHMENT 2

Foreign Labor Certification Data Center
Online Wage Library www.flcdatacenter.com

Quick Search
Search Wizard

H1B Data
H2A Data
H2B Data
Perm Data

File Archive

Skill Level Explanation

SVP Explanation

change history

FAQ

FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2011 - 6/2012:

Your search returned the following: Print Format

Area Code:	37100
Area Title:	Oxnard-Thousand Oaks-Ventura, CA MSA
OES/SOC Code:	45-1011
OES/SOC Title:	First-Line Supervisors of Farming, Fishing, and Forestry Workers
GeoLevel:	1
Level 1 Wage:	$11.44 hour - $23,795 year
Level 2 Wage:	$14.71 hour - $30,597 year
Level 3 Wage:	$17.99 hour - $37,419 year
Level 4 Wage:	$21.26 hour - $44,221 year
Mean Wage (H-2B):	$17.98 hour - $37,398 year

This wage applies to the following O*Net occupations:

45-1011.00 First-Line Supervisors/Managers of Farming, Fishing, and Forestry Workers

Directly supervise and coordinate the activities of agricultural, forestry, aquacultural, and related workers.
O*Net™ JobZone: NA
Education & Training Code: No Level Set

45-1011.01 First-Line Supervisors and Manager/Supervisors - Agricultural Crop Workers

Directly supervise and coordinate activities of agricultural crop workers. Manager/Supervisors are generally found in smaller establishments where they perform both supervisory and management functions, such as accounting, marketing, and personnel work, and may also engage in the same agricultural work as the workers they supervise.
O*Net™ JobZone: 3
Education & Training Code: No Level Set

45-1011.02 First-Line Supervisors and Manager/Supervisors - Animal Husbandry Workers

Directly supervise and coordinate activities of animal husbandry workers. Manager/Supervisors are generally found in smaller establishments where they perform both supervisory and management functions, such as accounting, marketing, and personnel work, and may also engage in the same animal husbandry work as the workers they supervise.
O*Net™ JobZone: 3
Education & Training Code: No Level Set

45-1011.03 First-Line Supervisors and Manager/Supervisors - Animal Care Workers, Except Livestock

Directly supervise and coordinate activities of animal care workers. Manager/Supervisors are generally found in smaller establishments where they perform both supervisory and management functions, such as accounting, marketing, and personnel work, and may also engage in the same animal care work as the workers they supervise.
O*Net™ JobZone: 3
Education & Training Code: No Level Set

45-1011.04 First-Line Supervisors and Manager/Supervisors - Horticultural Workers

Directly supervise and coordinate activities of horticultural workers. Manager/Supervisors are generally found in smaller establishments where they perform both supervisory and management functions, such as accounting, marketing, and personnel work, and may also engage in the same horticultural work as the workers they supervise.
O*Net™ JobZone: 3
Education & Training Code: No Level Set

45-1011.05 First-Line Supervisors and Manager/Supervisors - Logging Workers

Directly supervise and coordinate activities of logging workers. Manager/Supervisors are generally found in smaller establishments where they perform both supervisory and management functions, such as accounting, marketing, and personnel work, and may also engage in the same logging work as the workers they supervise.
O*Net™ JobZone: 2
Education & Training Code: No Level Set

45-1011.06 First-Line Supervisors and Manager/Supervisors - Fishery Workers

Directly supervise and coordinate activities of fishery workers. Manager/Supervisors are generally found in smaller establishments where they perform both supervisory and management functions, such as accounting, marketing, and personnel work, and may also engage in the same fishery work as the workers they supervise.
O*Net™ JobZone: 4
Education & Training Code: No Level Set

45-1011.07 First-Line Supervisors/Managers of Agricultural Crop and Horticultural Workers

Directly supervise and coordinate activities of agricultural crop or horticultural workers.
O*Net™ JobZone: 2
Education & Training Code: No Level Set

45-1011.08 First-Line Supervisors/Managers of Animal Husbandry and Animal Care Workers

Directly supervise and coordinate activities of animal husbandry or animal care workers.
O*Net™ JobZone: 3
Education & Training Code: No Level Set

For information on determining the proper occupation and wage level see the new Prevailing Wage Guidance on the Skill Level page.

The prevailing wage must be at, or above the federal or state or local minimum wage, whichever is higher. The federal minimum wage is $7.25/hr effective July 24, 2009.

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FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2011 - 6/2012.

Your search returned the following: Print Format

Area Code:	37100
Area Title:	Oxnard-Thousand Oaks-Ventura, CA MSA
OES/SOC Code:	45-2093
OES/SOC Title:	Farmworkers, Farm, Ranch, and Aquacultural Animals
GeoLevel:	1
Level 1 Wage:	$8.93 hour - $18,574 year
Level 2 Wage:	$10.47 hour - $21,778 year
Level 3 Wage:	$12.00 hour - $24,960 year
Level 4 Wage:	$13.54 hour - $28,163 year
Mean Wage (H-2B):	$12.00 hour - $24,960 year

This wage applies to the following O*Net occupations:

45-2093.00 Farmworkers, Farm and Ranch Animals

Attend to live farm, ranch, or aquacultural animals that may include cattle, sheep, swine, goats, horses and other equines, poultry, finfish, shellfish, and bees. Attend to animals produced for animal products, such as meat, fur, skins, feathers, eggs, milk, and honey. Duties may include feeding, watering, herding, grazing, castrating, branding, de-beaking, weighing, catching, and loading animals. May maintain records on animals; examine animals to detect diseases and injuries; assist in birth deliveries; and administer medications, vaccinations, or insecticides as appropriate. May clean and maintain animal housing areas.
O*Net™ JobZone: 1
Education & Training Code: No Level Set

For information on determining the proper occupation and wage level see the new Prevailing Wage Guidance on the Skill Level page.

The prevailing wage must be at, or above the federal or state or local minimum wage, whichever is higher. The federal minimum wage is $7.25/hr effective July 24, 2009.

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FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2011 - 6/2012.

Your search returned the following: Print Format

Area Code:	37100
Area Title:	Oxnard-Thousand Oaks-Ventura, CA MSA
OES/SOC Code:	45-2092
OES/SOC Title:	Farmworkers and Laborers, Crop, Nursery, and Greenhouse
GeoLevel:	1
Level 1 Wage:	$8.66 hour - $18,013 year
Level 2 Wage:	$9.10 hour - $18,928 year
Level 3 Wage:	$9.53 hour - $19,822 year
Level 4 Wage:	$9.97 hour - $20,738 year
Mean Wage (H-2B):	$9.53 hour - $19,822 year

This wage applies to the following O*Net occupations:

45-2092.00 Farmworkers and Laborers, Crop, Nursery, and Greenhouse

Manually plant, cultivate, and harvest vegetables, fruits, nuts, horticultural specialties, and field crops. Use hand tools, such as shovels, trowels, hoes, tampers, pruning hooks, shears, and knives. Duties may include tilling soil and applying fertilizers; transplanting, weeding, thinning, or pruning crops; applying pesticides; cleaning, grading, sorting, packing and loading harvested products. May construct trellises, repair fences and farm buildings, or participate in irrigation activities.
O*Net™ JobZone: NA
Education & Training Code: No Level Set

45-2092.01 Nursery Workers

Work in nursery facilities or at customer location planting, cultivating, harvesting, and transplanting trees, shrubs, or plants.
O*Net™ JobZone: 1
Education & Training Code: No Level Set

45-2092.02 General Farmworkers

Apply pesticides, herbicides, and fertilizer to crops and livestock; plant, maintain, and harvest food crops; and tend livestock and poultry. Repair farm buildings and fences. Duties may include: operating milking machines and other dairy processing equipment; supervising seasonal help; irrigating crops; and hauling livestock products to market.
O*Net™ JobZone: 1
Education & Training Code: No Level Set

For information on determining the proper occupation and wage level see the new Prevailing Wage Guidance on the Skill Level page.

The prevailing wage must be at, or above the federal or state or local minimum wage; whichever is higher. The federal minimum wage is $7.25/hr effective July 24, 2009.

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You selected the All Industries database for 7/2011 - 6/2012.

Your search returned the following: Print Format

Area Code:	37100
Area Title:	Oxnard-Thousand Oaks-Ventura, CA MSA
OES/SOC Code:	45-2099
OES/SOC Title:	Agricultural Workers, All Other
GeoLevel:	1
Level 1 Wage:	$8.43 hour - $17,534 year
Level 2 Wage:	$8.96 hour - $18,637 year
Level 3 Wage:	$9.48 hour - $19,718 year
Level 4 Wage:	$10.01 hour - $20,821 year
Mean Wage (H-2B):	$9.48 hour - $19,718 year

This wage applies to the following O*Net occupations:

45-2099.99 Agricultural Workers, All Other

All agricultural workers not listed separately.
O*Net™ JobZone: NA
Education & Training Code: No Level Set

For information on determining the proper occupation and wage level see the new Prevailing Wage Guidance on the Skill Level page.

The prevailing wage must be at, or above the federal or state or local minimum wage, whichever is higher. The federal minimum wage is $7.25/hr effective July 24, 2009.

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You selected the All Industries database for 7/2011 - 6/2012.

Your search returned the following: Print Format

Area Code:	37100
Area Title:	Oxnard-Thousand Oaks-Ventura, CA MSA
OES/SOC Code:	45-2041
OES/SOC Title:	Graders and Sorters, Agricultural Products
GeoLevel:	1
Level 1 Wage:	$8.73 hour - $18,158 year
Level 2 Wage:	$8.83 hour - $18,366 year
Level 3 Wage:	$8.93 hour - $18,574 year
Level 4 Wage:	$9.03 hour - $18,782 year
Mean Wage (H-2B):	$8.93 hour - $18,574 year

This wage applies to the following O*Net occupations:

45-2041.00 Graders and Sorters, Agricultural Products

Grade, sort, or classify unprocessed food and other agricultural products by size, weight, color, or condition.
O*Net™ JobZone: 1
Education & Training Code: No Level Set

For information on determining the proper occupation and wage level see the new Prevailing Wage Guidance on the Skill Level page.

The prevailing wage must be at, or above the federal or state or local minimum wage, whichever is higher. The federal minimum wage is $7.25/hr effective July 24, 2009.

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Occupational Employment and Wages, May 2010

45-1011 First-Line Supervisors of Farming, Fishing, and Forestry Workers

Directly supervise and coordinate the activities of agricultural, forestry, aquacultural, and related workers. Excludes "First-Line Supervisors of Landscaping, Lawn Service, and Groundskeeping Workers" (37-1012).

National estimates for this occupation
Industry profile for this occupation
Geographic profile for this occupation

National estimates for this occupation: Top

Employment estimate and mean wage estimates for this occupation:

Employment (1)	Employment RSE (3)	Mean hourly wage	Mean annual wage (2)	Wage RSE (3)
19,540	2.4 %	$21.65	$45,040	0.8 %

Percentile wage estimates for this occupation:

Percentile	10%	25%	50% (Median)	75%	90%
Hourly Wage	$11.42	$14.94	$20.10	$26.99	$33.85
Annual Wage (2)	$23,760	$31,070	$41,800	$56,140	$70,420

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Occupational Employment and Wages, May 2010

45-2091 Agricultural Equipment Operators

Drive and control farm equipment to till soil and to plant, cultivate, and harvest crops. May perform tasks, such as crop baling or hay bucking. May operate stationary equipment to perform post-harvest tasks, such as husking, shelling, threshing, and ginning.

National estimates for this occupation
Industry profile for this occupation
Geographic profile for this occupation

National estimates for this occupation: Top

Employment estimate and mean wage estimates for this occupation:

Employment (1)	Employment RSE (3)	Mean hourly wage	Mean annual wage (2)	Wage RSE (3)
24,110	4.0 %	$12.49	$25,970	1.3 %

Percentile wage estimates for this occupation:

Percentile	10%	25%	50% (Median)	75%	90%
Hourly Wage	$8.16	$9.22	$11.71	$14.77	$18.07
Annual Wage (2)	$16,970	$19,180	$24,360	$30,720	$37,580

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Occupational Employment and Wages, May 2010

45-2093 Farmworkers, Farm, Ranch, and Aquacultural Animals

Attend to live farm, ranch, or aquacultural animals that may include cattle, sheep, swine, goats, horses and other equines, poultry, finfish, shellfish, and bees. Attend to animals produced for animal products, such as meat, fur, skins, feathers, eggs, milk, and honey. Duties may include feeding, watering, herding, grazing, castrating, branding, de-beaking, weighing, catching, and loading animals. May maintain records on animals; examine animals to detect diseases and injuries; assist in birth deliveries; and administer medications, vaccinations, or insecticides as appropriate. May clean and maintain animal housing areas. Includes workers who shear wool from sheep, and collect eggs in hatcheries.

National estimates for this occupation
Industry profile for this occupation
Geographic profile for this occupation

National estimates for this occupation: Top

Employment estimate and mean wage estimates for this occupation:

Employment (1)	Employment RSE (3)	Mean hourly wage	Mean annual wage (2)	Wage RSE (3)
31,880	3.4 %	$11.56	$24,040	1.2 %

Percentile wage estimates for this occupation:

Percentile	10%	25%	50% (Median)	75%	90%
Hourly Wage	$7.83	$8.77	$10.56	$13.39	$16.71
Annual Wage (2)	$16,280	$18,240	$21,970	$27,840	$34,750

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Occupational Employment and Wages, May 2010

45-2092 Farmworkers and Laborers, Crop, Nursery, and Greenhouse

Manually plant, cultivate, and harvest vegetables, fruits, nuts, horticultural specialties, and field crops. Use hand tools, such as shovels, trowels, hoes, tampers, pruning hooks, shears, and knives. Duties may include tilling soil and applying fertilizers; transplanting, weeding, thinning, or pruning crops; applying pesticides; or cleaning, grading, sorting, packing, and loading harvested products. May construct trellises, repair fences and farm buildings, or participate in irrigation activities. Excludes "Graders and Sorters, Agricultural Products" (45-2041) and "Forest, Conservation, and Logging Workers" (45-4011 through 45-4029).

National estimates for this occupation
Industry profile for this occupation
Geographic profile for this occupation

National estimates for this occupation: Top

Employment estimate and mean wage estimates for this occupation:

Employment (1)	Employment RSE (3)	Mean hourly wage	Mean annual wage (2)	Wage RSE (3)
228,600	1.4 %	$9.64	$20,040	0.5 %

Percentile wage estimates for this occupation:

Percentile	10%	25%	50% (Median)	75%	90%
Hourly Wage	$8.10	$8.46	$8.98	$9.80	$12.41
Annual Wage (2)	$16,850	$17,600	$18,690	$20,390	$25,820

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Occupational Employment and Wages, May 2010

45-2041 Graders and Sorters, Agricultural Products

Grade, sort, or classify unprocessed food and other agricultural products by size, weight, color, or condition. Excludes "Agricultural Inspectors" (45-2011).

National estimates for this occupation
Industry profile for this occupation
Geographic profile for this occupation

National estimates for this occupation: Top

Employment estimate and mean wage estimates for this occupation:

Employment (1)	Employment RSE (3)	Mean hourly wage	Mean annual wage (2)	Wage RSE (3)
38,950	3.5 %	$10.18	$21,180	1.1 %

Percentile wage estimates for this occupation:

Percentile	10%	25%	50% (Median)	75%	90%
Hourly Wage	$7.92	$8.57	$9.22	$10.98	$13.46
Annual Wage (2)	$16,470	$17,830	$19,180	$22,850	$27,990

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Occupational Employment and Wages, May 2010

45-2099 Agricultural Workers, All Other

All agricultural workers not listed separately.

National estimates for this occupation
Industry profile for this occupation
Geographic profile for this occupation

National estimates for this occupation: Top

Employment estimate and mean wage estimates for this occupation:

Employment (1)	Employment RSE (3)	Mean hourly wage	Mean annual wage (2)	Wage RSE (3)
7,490	6.1 %	$13.35	$27,780	1.8 %

Percentile wage estimates for this occupation:

Percentile	10%	25%	50% (Median)	75%	90%
Hourly Wage	$8.19	$9.39	$11.65	$16.20	$21.15
Annual Wage (2)	$17,030	$19,540	$24,230	$33,690	$43,990

Statement of the National Immigration Law Center

Tyler Moran, Policy Director

Maura Ooi, Legal Intern

House Committee on the Judiciary
Subcommittee on Immigration Policy and Enforcement

Hearing on the American Specialty Agriculture Act
September 8, 2011

Members of the Committee, thank you for the opportunity to submit this statement regarding the September 8th hearing on the American Specialty Agriculture Act (HR 2847).

NILC is a nonpartisan national legal advocacy organization that works to advance and promote the rights of low-income immigrants and their family members. Since its inception in 1979, NILC has earned a national reputation as a leading expert on the intersection of immigration law and the employment rights of low-income immigrants. NILC's extensive knowledge of the complex interplay between immigrants' legal status and their rights under U.S. employment laws is an important resource for immigrant rights coalitions and community groups, as well as policymakers, attorneys, workers' rights advocates, labor unions, government agencies, and the media.

Overview

The American Specialty Agriculture Act (HR 2847) was introduced as a direct response to the concerns raised by the agricultural industry about the Legal Workforce Act (HR 2885), and the fact that it will destroy American farming. Making E-Verify mandatory *will* cripple agriculture, but this legislation provides no real solutions. Instead of legalizing the one million undocumented agricultural workers currently on our farms, the bill replaces the already problematic H-2A guest worker program with an even-worse guestworker "solution."

Mandatory E-Verify and its impact on agriculture.

Because the American Specialty Agriculture Act was introduced as a direct response to criticism of the Legal Workforce Act, it is important to highlight the impact of the Legal Workforce Act on the agricultural industry and its workers. Requiring all employers in the U.S. to use E-Verify will impose an immense cost burden on the agricultural industry, lead to huge job losses, force workers to move into more exploitative working conditions, and result in lost tax revenue for federal and state governments.

Because up to 75 percent of agricultural workers are unauthorized immigrants,[1] the Legal Workforce Act attempts to treat agriculture workers and employers differently through carve-outs that extend the time for implementation and exempt farm workers from verification if they

[1] Dan Zak, "Stephen Colbert, in GOP Pundit Character, Testifies on Immigration in D.C.," *The Washington Post*, Sept. 25, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/09/24/AR2010092402734.html.

return to an employer with whom they have worked in the past. But this is just a facade. Other provisions in the bill require employers to reverify the current workforce over time—which simply delays the devastating impact on agriculture.

The bill's carve-out acknowledges how a mandatory E-Verify regime will wreak havoc on American agriculture but fails to provide tangible solutions that produce reform. Instead, the bill puts forth half-solutions that put family farms, American jobs, and workers at risk and create a regime in which workers will be vulnerable to increased labor exploitation. For example, the U.S. Department of Agriculture reports that for every on-farm job there are about 3.1 "upstream" and "downstream" jobs in America—jobs that support and are created by the growing of agricultural products.[2] Given current levels of unemployment, these jobs are vital for American workers—but they also ensure that small family farms can produce commodities that are economically viable. The bill threatens to reduce or eliminate these while simultaneously creating an even larger pool of pliable, easily exploited workers. The bill exempts from verification agricultural workers who return to an employer for whom they worked previously, creating an incentive for workers to return to jobs for which, in the past, they may have been paid illegally low wages or where they may have had to endure other abusive working conditions. Similarly, this carve-out ensures that unauthorized workers will stay in the agricultural industry, ensuring that it remains low-wage and that American workers will continue to have extremely low incentive to apply for these jobs.

Additionally, the Legal Workforce Act requires most employers of agricultural workers assigned to federal contractors to have their employment eligibility verified through the EEVS. But because the bill provides does not make contractors or subcontractors legally liable for knowingly hiring unauthorized workers, the bill will result in growers' continued and expanded use of labor contractors to hire agricultural workers. U.S. agriculture relies heavily on workers recruited and supplied by often unscrupulous labor contractors, which practice ensures that wages are kept low and working conditions barely tolerable for the workers who harvest the fruits and vegetables we eat. The Legal Workforce Act does nothing to stop or even counteract this. At best, the bill perpetuates the abysmal status quo; at worst, it incentivizes the expanded use of labor contractors, making already vulnerable workers more vulnerable. The treatment of agriculture in the bill acknowledges the problem farmers face in getting authorized workers, but the bill offers no realistic solution. Instead, it creates a system that works neither for agricultural workers, for employers, or for Americans who want and need the agricultural products our nation produces.

The bill will also hurt U.S. citizen and legal immigrants, who represent 25 to 50 percent of all farmworkers. Nationally, if use of E-Verify were to become mandatory, between 1.2 million and 3.5 million workers would have to contact a government agency to fix their records or risk losing their jobs.[3] With approximately 2.6 million agricultural workers in the U.S., this translates to

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[2] Dan Griswold, *ICE Worksite Enforcement – Up to the Job?: Testimony Before the Subcommittee on Immigration Policy and Enforcement, Committee on the Judiciary, U.S. House of Representatives* (Cato Institute, Jan. 26, 2011), www.cato.org/pub_display.php?pub_id=12730.

[3] According to Westat 0.8 percent of workers receive an *erroneous* tentative nonconfirmation, or "TNC." *Findings of the Web-Based E-Verify Program Evaluation* (Westat, Dec. 2009), www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf., p. 117. There are currently about 154,287,000 million workers in the U.S. The 1.2 million figure was arrived at by multiplying these two numbers. LA County, however, has reported an error rate of 2.3 percent. The 3.5 million figure was arrived at by multiplying the number

between 10,040 and 29,900 U.S. citizens and other authorized workers.[4] According to the Government Accountability office, the process of fixing government records is "formidable." Workers must take unpaid time off from work to visit a local Social Security Administration office to check and correct their records, which often requires multiple trips and long wait times, leading workers to lose wages, time, and money spent on travel and daycare. For agricultural workers, during the growing and harvesting season, time quite literally is money. During the peak of the season, hours of work lost to correcting these errors could dramatically affect workers' income.

The American Specialty Agriculture Act does not fix the problems of mandatory E-Verify.

In an attempt to respond to concerns that mandatory E-Verify will devastate the agricultural industry, Representative Smith has introduced the American Specialty Agriculture Act, which creates a new temporary agricultural guest worker program, modeled on the existing H-2A guest worker program. Yet this new legislation entirely fails to address the problems of mandatory E-Verify.

It disregards the undocumented agricultural workers already in the U.S.

Current estimates place the number of undocumented workers in the agricultural industry at one million. The American Specialty Agriculture Act does nothing to address these productive workers who are already here with families and who have established ties to the community and their employers. Instead, the program will bring in 500,000 new guest workers each year, while simply ignoring the significant population that is already here and experienced.

It creates a problematic new temporary guest worker program with no basic labor protections.

Instead of considering the trained undocumented workforce already here, the Act creates the H-2C guest worker program, similar to the existing H-2A program, but stripped of all worker protections and any meaningful oversight. By shifting administration of the agricultural guest worker program from the Department of Labor to the Department of Agriculture, the Act gives oversight authority to an agency already seen as favorable to the agricultural industry and with no experience administering a guest worker program.

The H-2C program is even worse than the current H-2A program. By reducing the employment guarantee from three-quarters under the H-2A program to one half under the H-2C program, the Act weakens worker assurances of employment. Additionally, the limitation on access to legal assistance only for matters relating to wages, housing,

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of workers in the U.S. by 2.3 percent. See Marc Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform* (Migration Policy Institute, Feb. 2011), http://www.migrationpolicy.org/pubs/E-Verify-Insight.pdf.

[4] According to the 2007 Census of Agriculture, there are an estimated 2.6 million agricultural workers in the U.S. *See* U.S. Dep't of Agriculture, National Agricultural Statistics Service, "2007 Census of Agriculture," *available at* http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/farm_labor.pdf. Using the estimate that 50% of agricultural workers are documented or U.S. citizens, the 10,040 figure was reached by multiplying the estimated number of documented or U.S. citizen agricultural workers (1.3 million) by the .8 percent Westat error rate. The 29,900 figure was reached by multiplying the estimated number of documented or U.S. citizen agricultural workers by the 2.3 percent error rate reported by LA County.

transportation, and other employment rights as provided in the job offer leaves an already vulnerable population without the benefit of legal assistance and open to abuse and exploitation by employers who do not provide for worker safety and sanitation in the job offer. Further, by limiting the provision of legal assistance to workers present in the U.S. at the time of service, the Act ensures that many workers will never be compensated for labor violations. The ten-month admittance limit means that most workers will have to return to their countries well before their claims are resolved. By allowing employers to exclude legal aid attorneys and representatives from their property unless the legal representative has a pre-arranged appointment with a specific worker, the Act ensures that workers unaware of their labor rights remain uninformed. The prohibition on H-2C workers or their representatives bringing a lawsuit against their employer to recover damages unless they have first attempted mediation further limits access to justice for workers. By allowing employers to impose mandatory binding arbitration and mediation on H-2C workers as a condition of employment, the Act further limits the ability of workers to seek redress for their legal claims. Additionally, the requirement that workers split the costs of this mandatory arbitration or mediation with the employer will serve to discourage low-income workers from reporting labor violations.

Legalization of farmworkers is the only solution.

Implementation of mandatory E-Verify will destroy agriculture, and the creation of a new guestworker program will simply exacerbate existing challenges in the industry and workforce. A better solution is to legalize undocumented farmworkers and ensure that all workers have the same access to labor protections. Without legalization, requiring all agricultural employers to use E-Verify while adding a new guestworker program that encourages worker exploitation will hurt the economy and workers, and while doing nothing to create new jobs.

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