

WRITTEN TESTIMONY OF LEON R. SEQUEIRA
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

April 13, 2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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