S. HRG. 106–530

MEETING THE WORKFORCE NEEDS OF AMERICAN AGRICULTURE, FARM WORKERS, AND THE U.S. ECONOMY

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

EXAMINING THE WORKFORCE NEEDS OF AMERICAN AGRICULTURE, FARM WORKERS, AND THE UNITED STATES ECONOMY, FOCUSING ON ILLEGAL MIGRANT FARM WORKERS, H-2A REFORM, AGJOBS, COLLECTIVE BARGAINING AGREEMENTS, SANITATION, AND FARM WORKER UNEMPLOYMENT AND WAGES

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MEETING THE WORKFORCE NEEDS OF AMERICAN AGRICULTURE, FARM WORKERS, AND THE U.S. ECONOMY

WEDNESDAY, MAY 12, 1999

U.S. SENATE,
SUBCOMMITTEE ON IMMIGRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:06 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Spencer Abraham (chairman of the subcommittee) presiding.

Also present: Senators Kennedy, and Feinstein.

OPENING STATEMENT OF HON. SPENCER ABRAHAM, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator ABRAHAM. We will call the hearing to order, and I want to welcome all of you to this hearing on Meeting the Workforce Needs of American Agriculture, Farm Workers, and the U.S. Economy.

Last June, the Senate Immigration Subcommittee held a hearing entitled "The H-2A Program: Is It Working?" The strong feeling that emerged was that the current H-2A system is quite cumbersome and does not work very well for farmers, potential workers, or American agriculture. One of the goals of that hearing and of the process that hearing helped to accelerate was to bring together individuals on a bipartisan basis. Therefore, I am pleased to again see a bipartisan group of legislators here today to testify.

I should note that no legislation has been introduced in this Congress on the subject before us today as of yet. However, it is hoped that this hearing will be helpful in providing information on all sides of this issue in a way that will aid the drafting of any legislation that might be developed.

Although there is still not unanimity of opinion on the topic of today's hearing, and while certainly a number of differences remain on several issues, I think there is general agreement on a large number of facts.

First, we as Americans would like to see our farmers competitive in global markets and believe it is important to have agricultural products produced in this country. Second, migrant farm workers have hard lives and we can all admire them for the difficult but important jobs which they perform on a daily basis.

Third, it is far safer for farm workers born in other countries to enter America legally rather than be faced with unscrupulous

smugglers who show little concern for their safety. Finally, a farm worker who enters the United States to work legally will have greater legal recourse than an individual who is an illegal immigrant.

I make these points in the spirit of hoping that we can forge more common ground here today. In my home State of Michigan, I have heard from many farmers on the difficulty of finding agricultural workers, particularly on a timely basis. Today, there are over 45,000 farms in Michigan, and each year the food and agriculture industry contributes more than $40 billion to the Michigan economy. I am pleased that a representative of the Michigan Farm Bureau will be with us today to give us the views of Michigan farmers.

In Washington, reflecting the views of their constituents, Senators of both parties have approached me interested in exploring more options and legislative solutions to improve on the current system for hiring and protecting the working conditions of agricultural workers. Many of those Senators are here today to testify on this subject.

As I noted, last year's hearing, I believe, was successful in helping to forge a good degree of bipartisan, though not uniform, consensus. It was my view at that time and it remains so today that for legislation to move forward on this issue, it will need to be on a bipartisan basis. This year, at this hearing, I hope we can extend that cooperative spirit beyond the Congress and bring together those who have been on opposite sides on this issue to see if we can find common solutions that can benefit the entire Nation.

I think the witnesses we have assembled, working with Senator Kennedy and his office, share an interest in pursuing the type of common solutions that will benefit our country, and I look forward to hearing their testimony today.

That said, let us begin with our first panel, which is made up of members of the U.S. Senate. We will hear today from Senator Bob Graham, of Florida; Senator Mitch McConnell, of Kentucky; and Senator Gordon Smith, of Oregon. I believe maybe one or two others will join us based on floor activity and commitments they have.

So with that in mind, Senator Graham, would you like to begin? We welcome you.

STATEMENT OF HON. BOB GRAHAM, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator GRAHAM. Senator Abraham, I want to thank you for holding this hearing today and for your leadership on this issue. I appreciate the opportunity that you are going to afford each of us to address the subcommittee on the workforce needs of American agriculture and farm workers. We have joined you before to share our thoughts and concerns on agricultural labor and farm worker issues.

Mr. Chairman, from my experience in Florida over the past year, I can report that the need for a legal, stable workforce with rights and benefits is more critical today than it was when we held that first hearing in 1998. Conditions such as the historically low unemployment levels, the fact that farmers in my State and across the Nation found unusual difficulty in securing an adequate workforce

for their harvest in 1998 and in the 1998–99 winter season, the crisis conditions in much of Central America which have the potential of creating another wave of illegal immigrants into the United States and into the agricultural workforce, have all exacerbated the circumstances over the last 12 months.

Over the past several years, many of us have tried to reach out to all organizations involved with farm workers—Hispanic groups, labor coalitions, legal aid foundations, and others. We continue to welcome any and all suggestions for improving the lives of farm workers in the United States.

I am pleased to say that this outreach effort has produced a number of good ideas. These include ideas that I think the subcommittee should consider as it examines legislative proposals. These would include allowing current farm workers who do not have a valid status in the United States to gain employment authorization, thus freeing them from the fear of deportation; providing expanded educational opportunities for children of legal domestic workers; and increasing wages and housing benefits for legal domestic workers.

This past Sunday, the Florida Times Union, published in Jacksonville, FL, ran a front-page story entitled "The Migrant's Pain," and it was about the conditions of farm workers in Florida. Mr. Chairman, I would like to ask that a copy of a portion of that article be submitted for the record.

Senator ABRAHAM. Without objection, it will be.

[The article referred to follows:]

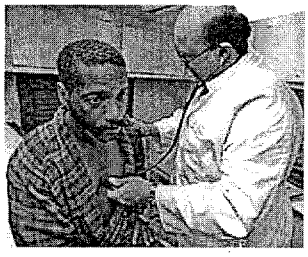
THE FLORIDA TIMES-UNION
Metro
BILL FOLEY
Sunday, May 9, 1999

Story last updated at 1:34 p.m. on Saturday, May 8, 1999

The migrants' pain

They are 'the people who put affordable food on our tables'

- Spotlight on Florida's farmworkers



Greg Stamper, medical director for the Putnam County Health Department examines Ray Gates, a migrant worker.
- Don Burk/staff

By Marcia Mattson
Times-Union staff writer

For five years, Maria Espinoza stooped over plants in the black-tarped fern sheds of Putnam and Volusia counties, cutting leaves for the florist industry.

On good weeks, the ones before flower-giving holidays like Mother's Day, Espinoza made $300. In slow times, she got by on $150 to $200 a week.

But Espinoza, 38, hasn't worked in eight months. As she moved from plant to plant on Aug. 24 she stepped into a hole in the shed's dirt floor and wrenched her back.

"She can't work because her back is in real pain," says a translator provided by the Farmworker Association of Florida, sitting with Espinoza in "the barrio," a Mexican neighborhood of trailers just outside Crescent City.

"She says the doctors say maybe she can work no more."

Espinoza is one of 7,000 or 8,000 migrant or seasonal farmworkers and their families who live in St. Johns, Putnam and Volusia counties at least part of the year.

They are the backbone of Florida's No. 2 industry: agriculture.

Yet they are virtually invisible to society as they move from state to state, following the crops, or as they work seasonally in one area.

They get low pay and few orno benefits.

The cheap labor force holds down food and plant costs, but at a terrible price: the workers' health.

Nationally, studies over the past 20 years show farmworkers have more health problems, such as tuberculosis and HIV infection, than the average American.

Locally, they face problems from snake bites, to broken bones that were set incorrectly or never set, to gangrene.

Migrant worker Maria Espinoza injured her back and hasn't worked in eight months. Her sister helps her make ends meet.
- James Crichlow/staff

Most in Northeast Florida get no health insurance through their employer and don't qualify for government insurance designed to help poor children and the disabled.

More than 90 percent of the migrant workers in the Hastings and Palatka area are U.S. born, but officials estimate about 40 percent of Northeast Florida's fern workers don't have legal authorization to work in the United States.

Farm owners are supposed to provide workers' compensation whether workers are documented or not, but the Farmworker Association finds some companies do not comply.

And with three-quarters of Florida farmworker families making less than $12,500 a year, they can't pay for care out of their pockets.

While medical care for farmworkers might seem removed from urban Duval County, their health can affect the health of consumers.

Farmworkers handle, and potentially could contaminate, the food supply, as happened with a hepatitis A outbreak a couple years ago that sickened Michigan schoolchildren and led to a multistate food recall.

And farmworkers are "the people who put affordable food on our tables," says Gil Walter, director of corporate development for Family Medical Medical and Dental Centers, a nonprofit organization that receives $1.4 million in federal money to treat farmworkers. It runs five health clinics in Northeast Florida.

Indentured servitude

The life of farmworkers is alien to many in the working world and

challenging to the health profession.

Those who travel in crews, mainly African-American men in this area, work basically as indentured servants. They owe food and rent money to their crew bosses whether the weather, crop conditions, and their health allow them to work or not.

"A lot of it is they have to work, and have to work so hard, they neglect to take advantage of some of the [health] services available," said Archie Williams, director of St. Francis House, a St. Augustine shelter that gives free lunches and clothing to migrants.

"If it's not some agonizing pain, they'll just go on and work."

Charlotte Willis, 35, for instance, was away from the fields one March day, hobbling on an injured knee in her parents' trailer.

Outreach worker Cheryl Hampton, talking with migrant worker Theodore Harris, helps get a health van to the work camps.
- Don Burk/staff

"I twisted it real bad when I was working and I kept working on it and made it worse than it was," said Willis.

She is part of an Armstrong family that moves each year with the cabbage and potato crop work - St. Johns County in the spring, then up to North Carolina and Delaware.

When seeking treatment, many farmworkers face communications barriers.

Three-quarters of Florida farmworkers, including many seasonal workers in Putnam County, are from Mexico and speak Spanish. Area clinics are starting to add more bilingual staff and provide pamphlets in Spanish, "but it's been a struggle," said Alfredo Bahena, who works for the Farmworker Association, an advocacy group.

Many who speak English cannot read. The average Florida farmworker has had just six years of education.

So Perry Floyd, a retired outreach worker and former farmworker, drove the dusty roads around Hastings recently to tell people the St. Augustine Sunrise Rotary Club had organized a couple events to provide migrant children some medical services and clothing. Putnam schools taught 829 farmworker students last year, and St. Johns schools expect about 100 students each year.

At work, farm laborers can face health problems from onthe-job injuries, lack of sanitation, and pesticide exposure.

Last year, Bahena said, five people were bitten by rattlesnakes in the fern sheds. No one died, but Bahena has photos of a 22-year-old woman's swollen, bloody arm that nearly had to be amputated. And on just one day in March, Bahena received six new reports of onthe-job injuries.

Most area fields added portable toilets after the association reported violations among the largest companies in 1993, Bahena said. But sometimes the toilets are not cleaned for two or three weeks, making some farmworkers unwilling to use them.

That could pose a problem for food consumers as well as farmworkers.

Frozen strawberries grown and contaminated with hepatitis A in Mexico made 151 Michigan schoolchildren sick in 1997 and led to recalls in Georgia and five other states. Michigan health officials afterward said the incident showed the need for better sanitation in farm fields, since hepatitis A is spread through contact with the feces of an infected person.

And though Bahena said most area farms supply running water in the field, many don't supply paper cups. So farmworkers share drinking glasses, a practice that can spread communicable diseases. Many farms don't have soap or towels. Bahena believes workers are eating without washing pesticide-contaminated hands.

When they aren't working, some farmworkers live in close quarters in run-down camps.

Such conditions can be a breeding ground for illness.

"Between the crowding of facilities and the hard physical labor they do, it's hard to keep good physical hygiene," said Greg Stamper, medical director for the Putnam County Health Department. Workers may not have the opportunity to shower every day.

When North Carolina officials warned the St. Johns County Health Department that three workers returning to camps this year had TB, local workers knew the disease could spread in the camps.

They tested about 50 other camp workers, and found nine had positive skin tests for the disease, indicating they were exposed to TB.

The department placed them on preventative antibiotics, said Colleen Boccassini, nurse program specialist.

Some workers don't live in camps, but rent or own houses or trailers with their own sanitation problems.

Bahena pulls out photos of a one-room rental in the Pierson area of Volusia County. Plastic and plywood cover holes in the walls. The sink and shower are rusted. A punctured food can is the shower head. With housing scarce for farmworkers, the tenants continue to pay the $368 monthly rent.

"Sometimes we don't know what to do because if we complained, the health department would close that place," said Bahena.

Outside the system

A state-funded report last year crunched several years of federal data about Florida farmworkers, and showed more employers are paying for their workers' health costs and making workers' compensation available.

Still, most farmworkers remain outsiders to the medical system.

Family Medical and Dental Center in Hastings expects 400 visits from farmworkers by the end of cabbage and potato season this month. But visits should be higher, said Carla Bell, a licensed practical nurse and clinic manager.

"Despite the numbers we're seeing, there's many more migrants that need health care," Bell said.

A new coalition that started last year is re-emphasizing health care for local farmworkers. It has done things like create a paper medical record workers can carry with them.

But Brenda Luna, Putnam County health department director of nursing and a coalition member, is frustrated that no hands-on care has come of the effort yet.

"Right now, the only ones I see contributing anything financially [to improve care] are the Putnam County Health Department and Baptist/St. Vincent's," Luna said.

The health department and hospital system together operate a 42-foot van equipped with an exam room that travels to migrant camps weekly.

St. Vincent's funds the van and provides some staff. The health department provides Stamper, Luna and outreach worker Cheryl Hampton.

Hampton, a former farmworker, gets permission for the van to visit the camps from the crew bosses, the people who manage the workers and run the camps.

"Without someone like Cheryl, we can't get access [to workers],"

Stamper said.

Family Medical contributes some medications, with St. Vincent's paying the required copay.

Recently, the van treated more than a dozen men at one St. Johns County camp in a little more than an hour. Three received antibiotics and pain medication for dental abscesses. One man had accidentally injured his hand a week earlier, hitting a steel conveyor belt as he loaded cabbage. He was treated for what was likely a fracture.

The Putnam health department had the money to keep late hours, drive people to its clinic and visit workers to ensure they took their medications while it received a private grant from 1994-98 to test how TB could be better controlled among farmworkers.

Yet area clinics for the most part don't do those things. Only one Family Medical clinic, the one in Hastings, stays open late (until 7 p.m. two nights a week). Farmworkers, however, typically don't get off work until 7 p.m. or later. Its Palatka clinic is open Saturdays.

Family Medical is considering providing doctors if St. Vincent's will bring its van to more locations in Putnam County, Walter said.

"I don't know what we would do without [the van]," said Deborah Kellogg, 44, of South Carolina, who is staying at a Hastings-area migrant camp.

"If it wasn't for them bringing it [care] to us, there's no way to get it," Kellogg said.

Hampton delivers medications for high blood pressure and allergies to Kellogg when she is about to run out. And Hampton drove her twice to St. Vincent's Hospital for tests.

As she travels among camps, Hampton also sees farmworkers unable to support themselves because of age or disability. She tries to find places for them to live and helps them apply for government aid if they qualify.

Maria Espinoza may find herself in a similar situation.

Her employer has been paying for doctors' care through workers compensation, but in January stopped sending checks to help cover her rent and other bills.

So how are Espinoza and her two kids making ends meet?

"Her sister gave some money to her," the translator says.

What if Espinoza can never return to the fern sheds?

"She thinks about it. She doesn't know what to do."

http://www.jacksonville.com/tu-online/stories/050999/met_chart.html

THE FLORIDA TIMES-UNION
Metro
JACKSONVILLE.COM
BILL FOLEY • DAVE ROMAN

Sunday, May 9, 1999

Story last updated at 1:34 p.m. on Saturday, May 8, 1999

Spotlight on Florida's farmworkers

HITTING HOME Last year the state paid the National Agriculture Workers Survey to break out several years of information collected from interviews with Florida's migrant workers.

	Period 1 (Fall 1988-Summer 1992)	Period 2 (Fall 1992-Summer 1997)
Average age	32.2	33.0
Women	29%	21%
Married	53%	47%
Live with no family members	38%	62%
Migrant	38%	46%
Employer-paid health care	29%	57%
Workers' comp available	20%	33%

Average Education	Average hourly wage	Median personal income	Median family income
6 years	$5.36	$5,000 to $7,500	$7,500 to $9,999

■ Three-quarters were born outside the United States; three-quarters said Spanish was their native language. Overall, one-third were undocumented.
■ Three-quarters of all the workers had family incomes below $12,500 per year.
■ Twenty-two percent said they go to an emergency room for care; 22 percent go to a public or community health center; 18 percent go to a private doctor; 9 percent go to a migrant clinic; and 11 percent do not seek care.

Senator GRAHAM. The article touched on many of the challenges facing us in dealing with this issue. For example, it mentions that farm workers can be very reluctant to seek basic health care. It indicated that, statewide, one-third of the farm workers in Florida, based on a survey conducted by the National Agricultural Workers Survey of the U.S. Department of Agriculture, volunteered that they were undocumented. And in the area of northeast Florida, around Jacksonville, 40 percent of the workforce volunteered that they were undocumented.

As such, among other things, they are afraid to seek medical attention. Serious communicable illnesses like tuberculosis and hepatitis go untreated because we have created this underground, almost unseen category of workers. I recall vividly after Hurricane Andrew when there were efforts to inoculate the population against potential communicable diseases after that disaster that it was extremely difficult to get the migrant farm workers to come in and be inoculated, out of fear that they would be deported.

Housing is another issue raised by the article. Crowded living conditions and sparse housing in extremely rural areas have made it difficult to provide safe and adequate housing. The absence of that housing leads to many other problems. Crowded housing exacerbates health problems, where disease spreads more quickly. We should address this issue, and I am pleased to say that with the leadership of Governor Jeb Bush and my colleague, Senator Mack, that we are hopeful of expanding the farm worker housing programs in Florida.

Mr. Chairman, I suggest that any plan for addressing this problem have as its basis the improvement of the lives of legal domestic workers, better and more certain benefits for legal domestic workers, adjustment of status of current undocumented farm workers, and the streamlining of the current H-2A program. It is a complicated issue and one that has and will continue to generate much controversy.

I think what we have failed to focus on is the consequences of inaction. What is the result of a continuation of the status quo? By not taking action, we assure that the illegal alien smugglers, the unscrupulous labor contractors and those who would profit from this most vulnerable population will continue to have a steady stream of business.

By not taking action, we assure that legal domestic workers are left without benefits, such as transportation reimbursement or assistance with housing needs. Without taking action, we assure that farmers continue to be placed in a situation of either seeing their crops rot in the field or having to employ undocumented aliens.

Let's take this opportunity to make our system more efficient, more rational, and to put out of work those who would pander to the current status quo, the smugglers and others who traffic in human misery. Farm workers deserve an improved life. Farmers deserve our attention on one of their most pressing needs.

Again, Mr. Chairman, I appreciate your focus on this issue and look forward to working with you to develop an effective response during this Congress.

Senator ABRAHAM. Thank you, Senator Graham.

We will turn to Senator McConnell. We welcome you. Thank you for being here.

STATEMENT OF HON. MITCH McCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator MCCONNELL. Thank you, Mr. Chairman. I want to lead off by commending you, Mr. Chairman, for your leadership in this whole area of meeting the labor needs in our country, whether it was the H-1B program which you were clearly a leader in trying to make better in the past Congress, to now your willingness to listen to us on the H-2A program. I also want to acknowledge the outstanding work of my colleague, Senator Smith, from Oregon, who was the principal author of the bill in the last session.

To give you an idea, Mr. Chairman, of how serious this issue is in my State, we grow a very controversial commodity in our State called tobacco. And at the height of the big tobacco battle last summer when the Federal Government was proposing a $600 billion tax increase on that product, which almost everyone expected would be the end of tobacco as a legal activity in this country, I had a series of 21 meetings across my State with tobacco growers. And what was the number one concern they had? This problem, even with a $600 billion tax increase having just been defeated on the floor of the Senate. Farmer after farmer in my State, in those 21 meetings, told me that the most pressing issue facing Kentucky farmers is finding and hiring legal temporary migrant farm workers.

Just last month, down in my State, as a member of the Agriculture Committee, I had a field hearing in Bowling Green. I decided to give those farmers an opportunity to actually testify before the Senate Agriculture Committee up close. We heard from those who administer the program, as well as some people who oppose the program.

I told the people of Kentucky that I would take their perspectives back to Capitol Hill because the opinions and real-life stories of farmers and migrants—we also heard from a migrant worker, by the way—would be very important to my colleagues in the Senate as we examined the future of H-2A, which is what we are doing today.

So, Mr. Chairman, I would like to ask that the transcript of that appear in your transcript as well because it was entirely on this subject.

Senator ABRAHAM. Without objection, it will be included. Thank you.

[EDITOR'S NOTE: The transcript of the hearing referred to: H-2A Temporary AgriWorker Program, Senate Committee on Agriculture, Nutrition and Forestry held in Bowling Green, KY has not been printed.]

Senator MCCONNELL. The H-2A temporary agricultural worker program was designed in part to help solve labor problems facing our farmers. Its purpose is to create a system whereby farmers could secure legal temporary seasonal workers, while at the same time assuring the workers transportation costs, housing, a decent wage and, as Senator Graham pointed out, legal status.

During the hearing, every farmer told me of the program's burdens and costs. I heard about the tremendous complexity of the program. I also heard stories from farmers who had crops left in the field while the foreign workers whom they had contracted with were waiting at the border for Government agencies to process their paperwork.

In short, the H-2A program has become a bureaucratic nightmare of Government agencies and their rules and regulations. Even the General Accounting Office has called the program a bureaucratic maze. It takes a 5-pound, 325-page manual—and here it is, Mr. Chairman—to even attempt to explain how to grind your way through this complicated H-2A program.

Mr. Chairman, I am sure you share my view that a farmer ought not to have to hire a lawyer to get a worker, and that is today's situation. Imagine, you are trying to get your crops in and you discover you have got to master this complicated manual before you can even get the help that you have to have in order to get the job done.

There are still, however, many different perspectives on the current state of the H-2A program. Many believe, as I do, that the system has become too bureaucratic and expensive for farmers to use it effectively. Others who spoke at the hearing that I had have concerns that the program leads to inadequate protection of the workers and to interference in the local labor market.

I believe, whatever our opinions, we need to give all sides the opportunity to express their views, as you are doing today, Mr. Chairman. Hopefully, we can all work toward a solution equitable to both the farmer and the worker.

Let me just say in conclusion, before handing it off to Senator Smith, we had at our hearing a person who administers the program in Kentucky. As part of the H-2A procedure, you advertise first to see if there are any domestic workers available. There aren't any, essentially. After one big advertising effort, there were three people who said they might be interested, none of whom ever showed up.

In short, in my State, Mr. Chairman, there aren't any Americans available to do this work. They are not there. We can speculate as to the reason for that. I am sure the booming economy is part of it, but if you are a farmer in the Commonwealth of Kentucky trying to get your crop both planted and subsequently harvested, without this program you are out of luck.

So I want to commend you very much, Mr. Chairman, for your willingness to consider this issue and for giving us a chance today to testify.

Senator ABRAHAM. Thank you, Senator McConnell.

Now, we will turn to Senator Smith. Welcome.

STATEMENT OF HON. GORDON SMITH, A U.S. SENATOR FROM THE STATE OF OREGON

Senator SMITH. Thank you, Mr. Chairman, Senator Feinstein. It is a pleasure to appear before your committee again. I thank my colleagues for their remarks, and wish to associate myself with them.

I have a prepared statement that I wish to have included in the record, Mr. Chairman, and would like to speak from the heart.

Senator ABRAHAM. It will be included.

Senator SMITH. Senator McConnell showed you this manual—it is 325 pages; they are unnumbered pages, by the way—to tell a farmer how to hire a farm worker. Most of the applications end up being between 6 and 20 pages long before it is filed with the Labor Department.

As a contrast to that, this is the form I filled out to apply for candidacy to the U.S. Senate. It takes about 5 minutes to fill out, front and back, and then you get to run. I am almost thinking it is easier to get here than to get a farm worker employed who is legal.

Last year, with Senator Graham, Senator Wyden from my State, my counterpart, who is a Democrat—the three of us began this trek, and I think while I don't speak for Senator Wyden, I know how he feels. I think it is fair to say that he began this debate from the standpoint of labor. I began this discussion from the standpoint of the farmer. Both of us, everywhere we went, as my colleagues have indicated in their States—and I think it is interesting to note, Mr. Chairman, that in every corner of this country this is the same problem.

When we began this effort to fix a problem, we were overwhelmed with the bureaucracy of it and the unworkability of the current system and the increasing problems with consistent labor supply as the Government gets more efficient, between Social Security and the INS, at identifying those who are illegal.

Senator Wyden and I do not propose to bring one additional worker to this country. What we do propose, however, is to provide a basis for those who are here to be here legally. The farmers have the employment. The farm workers wish to do the work and we owe them a legal system.

I suggest to you that the surest way to keep the farm worker down is to keep him illegal so that he cannot bargain for his conditions or rights. So those who will come and present themselves as representing farm workers but also would like to preserve an illegal system, I suggest they have another agenda.

Despite Senator Wyden and my efforts to find a legal basis, because we have done this, we have been characterized in the most unflattering of terms. But that goes with the territory. Frankly, though, what we did try to do was to lean hard on the farmer community to provide an increased wage, a housing allowance, a transportation allowance, and even priority for ultimate legal status in this country, and establish a national registry to which farmers and farm workers could have recourse so there could be some order to this, so that people no longer have to ride around in U-Hauls or in the back of cars. I think we owe this country, the consumers, the farmers and the farm workers, a system that is legal so that farmers no longer need to conduct themselves as felons and farm workers as fugitives.

Mr. Chairman, I thank you for this time and this hearing.

[The prepared statement of Senator Smith follows:]

PREPARED STATEMENT OF SENATOR GORDON H. SMITH

Thank you Mr. Chairman and fellow colleagues of the Immigration Committee for your leadership in holding a hearing on the serious problems surrounding the work force needs of American agriculture, farm workers, and the U.S. economy. I am proud of the bipartisan effort shown by the Senators here today to continue to develop a workable system to recruit workers domestically and prevent crops from rotting in the fields.

I would also like to commend my colleague from Oregon, Senator Wyden, who is unable to testify before you today. Senator Wyden continues to play a key role in our Senate working group to develop a compromise that would be acceptable to growers and farm workers.

Mr. Chairman, I am sure you are aware of the problems that have arisen within American agriculture. For many years, farmers and nurserymen have struggled to hire enough legal agricultural workers to harvest their produce and plants. The labor pool is extremely competitive, especially in my state of Oregon, where jobs are many and domestic workers willing to do farm work are scarce.

As one of the most rapidly growing industries in this country, we can only expect the demand for agricultural labor jobs to continue to rise. When coupled with the lowest unemployment rates in decades and a crackdown on illegal immigration, the agriculture industry—and ultimately its consumers—faces a crisis.

Contrary to some media accounts, these labor shortages and the need for a guest worker program exist around the country. Mr. Chairman, the members before you today all agree with the General Accounting Office's (GAO) statement that while the labor shortage is not caused by one single problem, regional shortages stemming from region-specific problems do exist.

One problem that does affect nearly every area of this country is the astronomical number of *illegal* workers in agriculture jobs. The GAO reports that a significant portion of the farm labor force is not legally authorized for employment, leaving many agricultural employers vulnerable to potential labor shortfalls in the event of a concentrated or targeted Immigration and Naturalization Service (INS) enforcement effort.

The immigrants themselves are also negatively impacted when they must work as undocumented workers. These foreign workers risk their lives paying human "coyotes" $1,200 to be smuggled across the border in the trunk of a car to work in this country without any guarantee of housing or transportation benefits, or even a minimum wage. Because of the risks these foreign workers face in coming here and the difficulty of returning if they leave for a visit home, many go for years without seeing their spouses and children; some never return home. Illegal workers don't enjoy simple worker protections, such as workman's compensation insurance and the right to take breaks during the day. Job security or stability is non-existent, replaced instead by the fear that they will be caught by the INS and deported.

GAO estimates that there are 600,000 *illegal* aliens currently employed in U.S. agriculture. Further, U.S. Department of Labor survey data shows that more than 70 percent (or about 1 million) of those new to the U.S. and hired to work on farms are here illegally.

Both INS and the agricultural employers agree that high quality fraudulent documents are readily obtainable, making it virtually impossible for employers to be certain that they have not hired illegally documented workers.

This issue is not new to Congress. Our government's H-2A agricultural guest worker program was designed in part to help solve the labor problems facing our farmers. Instead of helping, the H-2A program—the *only* legal temporary foreign agricultural worker program in the United States—merely adds bureaucratic red tape and burdensome regulations to the growing crisis. And it is failing those who use it.

The H-2A program is not practicable for the agriculture and horticulture industry because it is loaded with burdensome regulations, excessive paperwork, a bureaucratic certification process and untimely and inconsistent decision-making by the U.S. Department of Labor.

To illustrate, Mr. Chairman, this is the application I filled out to run for the United States Senate. It is one page, front and back.

This is the Department of Labor's 325-page handbook, from January 1988, which attempts to guide employers through the H-2A program's confusing application process. The GAO itself found that this handbook is outdated, incomplete, and very confusing to the user.

I draw your attention to the following chart from the December 1997 General Accounting Office (GAO) report illustrating the burdensome H-2A process that employers must go through to bring in legal, foreign workers. A grower must apply to mul-

tiple agencies to obtain just one H-2A worker. This process is further complicated by the multiple levels of government, redundant levels of oversight and conflicting administrative procedures and regulations. Also, as reported by the recent Department of Labor Inspector General, the H-2A program does not meet the interests of domestic workers because it does a poor job of placing domestic workers in agricultural jobs.

Mr. Chairman, we are looking for solutions to not only make it easier for employers to hire legal workers to harvest their crops, but also to ensure that workers are treated fairly in the process.

Any legal U.S. resident who wants to work in agriculture should get an absolute right of first refusal for any and all jobs that become available. There needs to be a system or registry where our unemployed U.S. workers can go to find out about job openings on our U.S. farms.

We also need to improve the conditions of the farm workers' lives and provide them the dignity they deserve. These needed benefits include providing a premium wage, providing housing and transportation benefits, guaranteeing basic workplace protections, and extending the Migrant and Seasonal Workers Protection Act to all workers.

I'm very concerned that workers are protected, but let's not forget that growers have been victimized by this process too. In order to feed their families—and yours—the growers need to harvest their crops on time, meet payroll, and ultimately maintain their bottom line. Without achieving those things, farms go out of business and the jobs they create are lost along with them. So it is in all of our best interests—workers, growers, and consumers alike—that growers have the means by which to hire needed workers.

While I don't have a crystal ball to predict the future of the H-2A program, I can tell you that we will have a major economic and social crisis on our U.S. farmlands if there is not an improvement over the current process.

Finally, I would like to applaud the members here today for addressing this issue on a bipartisan basis. This is not a Republican or Democrat issue. This is about developing a workable solution for our growers and workers alike.

Let's not make fugitives out of farm workers and felons out of farmers. Let's work together to find a solution.

Thank you Mr. Chairman for allowing me to testify before the subcommittee today.

Senator ABRAHAM. Thank you all. I know several of you, maybe all of you, have to get on to other commitments. We appreciate your being here. If anybody wants to stay and listen to the remaining panels, we would be happy to have you join us up here. Thank you all.

As we wait for the second panel, we have been joined by two other members of the subcommittee and I am happy to have them here. We will turn to the ranking member, Senator Kennedy, if he would like to make an opening statement.

Senator KENNEDY. Can I yield to Senator Feinstein?

Senator ABRAHAM. Please, Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I very much appreciate your holding this hearing. I am delighted that Senator Smith is here. He and Senator Wyden have certainly worked on this issue. I voted against their bill in the last session.

This matter is of tremendous import to California because 50 percent of any worker program is going to be in California, and let me give you an example. And I note that Manuel Cunha, of the Nisei Farmers League, who knows as much about this as anybody does, is on the calendar today. He tells me that just in four counties in California alone, on table grapes, it is 40,000 workers just to harvest the table grapes. So the numbers are very, very great.

I believe the program should be bifurcated in this way: set up the registry first and attach to it a premium wage; get a commitment from people to work in this endeavor for a period of time, whatever that period is; and if necessary, provide green cards to those who are in this country now who have done this work for years and can document that in some acceptable manner, but create a kind of registry of available agricultural workers to work specific crops in specific States.

In last year's bill, the registry started out being 6 months, and then there would be workers brought in from outside. There wouldn't be homes for them. There would be a huge problem with communities. Many people believe that wage rates are key in this thing, and if you had a registry of people that provided that premium pay, obviously based on crop and however it is done, you could, in fact, develop that registry from the present American workforce.

Now, you get into this legal undocumented area and that is something we have to work out, but my view is—and I have talked to the American Farm Bureau, I have talked to the California Farm Bureau. They all know my views, and I believe that they are attempting to put a program together which might meet some of these concerns.

I am sorry that the Labor Department isn't involved in this hearing because this plays an important role—I should say the pay issues play an important role. In California, where there is 10 to 20 percent employment in these counties, some of the people involved, the employers, have actually gone to welfare departments and said can you provide us with people to work the fields during harvest season, and what they have found is that no one was provided. And I ask that this be done in California. I hope Mr. Cunha, who is here, I think, today, will testify to that.

So whether it is the level of pay or the type of work, I am not willing to say at this stage, but there is really a problem. I think this is a very big issue. It is a very important issue. I look forward to hearing the testimony and I thank you very much, Senator Abraham, for holding the hearing.

Senator ABRAHAM. Thank you, Senator.

Senator Kennedy.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Just briefly, Mr. Chairman, I thank you for holding the hearing and our colleagues for being here. I was here during the full height of the bracero program, Mr. Chairman, and saw some of the greatest kinds of exploitation of human beings that I have seen, certainly in this country. It really matched the kinds of conditions and treatment of people in Third World countries, and I have some real concerns about going back to anything that would repeat that tragic aspect of our whole workforce policy.

I do think that a number of suggestions have been made. Ideas in terms of how we are going to make some adjustment in terms of the status of these workers so that there will be a permanent workforce is something that we ought to take a look at. But I also would want to see that we are going to treat people decently and

fairly that are going to be a part of this process, whether it is covering in terms of the minimum wage or that their children are going to be treated fairly and they are not going to have the sense of exploitation, which has been so much a part of this whole kind of program.

The fact remains is that we have high unemployment in a number of the agricultural counties, and the fact is we have absolutly abysmal wages that are out there and abysmal working conditions and extraordinary profits in agribusiness. I mean, you can't get away from it. That is the record. So I hope that those who are going to be coming here and talking to us in terms of what we are going to be doing are going to be people that have treated their workers fairly and decently.

I understand the administration is interested in a program in terms of some form of registry, and I am willing to support that and fund that and try that. I think that it may be a useful suggestion and idea, although we can understand the complexities that happen with the workers themselves not having access to phones or computers and other kinds of ways of being able to access the newer technologies. But maybe there are ways of trying to sort of deal with that. I am not opposed to trying to give consideration to this.

I think we should try and have a dependable, reliable workforce, and I am all for it, but I want to make sure that we are going to treat that workforce in a fair, decent, respectable way. And I think if the ideas are for those that have worked and toiled long and hard in terms of the program, some adjustment in status so that these people can be respected, then we should certainly take a look at that.

But I think we ought to also look at what the conditions and what the wages are for these people who are working in the industry itself, and I think we ought to make sure that they are going to be fairly treated. That, I am sure, is something all of us want to see. We look forward to hearing from the witnesses.

I thank the Chair.

Senator ABRAHAM. Thank you, Senator.

I understand that there may be a vote taking place right now in the House, and the second panel we were supposed to have today was of two members of the House of Representatives. I am going to, I think, pass on that panel, in light of their absence, at least temporarily. I think what we will do is attempt to get word to them that we are moving ahead to the next panel, and then hopefully they can join us later or, alternatively, we certainly will take their written testimony.

So with that in mind, we will ask the third panel, if you would, to please join us. We will at least get your opening statements and sort of see where we stand with respect to possible inclusion of House witnesses at a later point today.

I want to thank this panel for being here. We have a significant number of people on it, and so we will remind everyone we have this clock here and I am going to ask our staff to use it here just because we have votes in the Senate coming up probably around 4:00 p.m. or perhaps a little before. And so, basically, it works pretty simply. At 4 minutes the orange light will go on, and at 5 min-

utes the red light will go on, which should be the end of your testimony, although we will take longer statements in writing and we will usually exercise a fair amount of discretion in letting people finish a thought or a sentence or whatever is appropriate.

We are joined on this panel by six witnesses. We begin with Mr. Joshua Wunsch, who is representing the Michigan Farm Bureau, as well as the American Farm Bureau; Dr. James Holt, who is a senior economist representing the National Council of Agricultural Employers.

We then will hear from Mr. Demetrios Papademetriou, who is from the Carnegie Endowment for International Peace; then from Cecilia Munoz, representing La Raza; then from Ms. Dolores Huerta, who is with the United Farm Workers of America; and then Mr. Manuel Cunha, who is representing the Nisei Farmers League, and I think referenced by Senator Feinstein.

Again, we welcome all of you. I know this will be a very diverse set of views here and we are anxious to hear all perspectives.

We will begin with you, Mr. Wunsch. Thank you for being here.

PANEL CONSISTING OF JOSHUA WUNSCH, MEMBER, BOARD OF DIRECTORS, MICHIGAN FARM BUREAU, TRAVERSE CITY, MI, ON BEHALF OF THE AMERICAN FARM BUREAU; JAMES S. HOLT, SENIOR ECONOMIST, McGUINNESS AND WILLIAMS, ON BEHALF OF THE NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS, WASHINGTON, DC; DEMETRIOS G. PAPADEMETRIOU, SENIOR ASSOCIATE AND CO-DIRECTOR, INTERNATIONAL MIGRATION POLICY PROGRAM, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, WASHINGTON, DC; CECILIA MUNOZ, VICE PRESIDENT, OFFICE OF RESEARCH ADVOCACY AND LEGISLATION, NATIONAL COUNCIL OF LA RAZA, WASHINGTON, DC; DOLORES HUERTA, SECRETARY-TREASURER, UNITED FARM WORKERS OF AMERICA, AFL-CIO, KEENE, CA; AND MANUEL CUNHA, JR., PRESIDENT, NISEI FARMERS LEAGUE, FRESNO, CA

STATEMENT OF JOSHUA WUNSCH

Mr. WUNSCH. Thank you, Senator, for the opportunity to appear today. I am Josh Wunsch, a member of the Board of Directors of the Michigan Farm Bureau, a fruit grower from northern Michigan, and an employer.

High-quality, diversified production is worthless if it cannot be harvested, processed or packed for the market in a timely manner. Farmers in Michigan and across the United States have experienced similar problems with tight labor supplies and lost crops in recent years. At Farm Bureau, we believe this labor supply problem stems from two distinct developments that have worked together to reduce the supply of labor for farmers.

First, the Federal Government, working with State and local governments, has been working more effectively than in the past to enforce U.S. laws to discourage illegal immigration. It has been illegal for unauthorized persons to seek employment in the United States and for U.S. employers to employ these people since 1986, and more resources have been devoted to enforcement.

Second, the Social Security Administration has begun to more vigorously implement its enumeration verification system designed

to select, name and number mismatches out of the database. All of these stepped-up enforcement activities have diminished the labor supply for farm employers and increased their proportion of insufficiently documented workers in agriculture.

Additionally, the thriving U.S. economy has put farm employers in competition for a limited pool of legally documented labor with employers in other industries who can offer longer-term, year-round employment and better compensation and benefits. Often, these workers are lost to other States in the migration stream between Texas and Michigan.

The situation is real and growing worse in Michigan. In recent years, the labor shortage has led to a real problem in my State, such as a Kent County fruit grower was informed in 1998 by the Social Security Administration that 115 of the names and taxpayer identification numbers provided by workers applying to work that spring did not match. The majority of these workers had been recruited through the Michigan Employment Security Agency. In effect, the government referred workers to this grower who were ineligible to work.

The level of concern and interest by our farmers in H-2A reform is very high. Today, the H-2A program is not a major source of workers for farm employers. Only one farm in Michigan has been able to effectively use the program. We think program usage is low because the vast majority of growers feel they cannot navigate the bureaucratic process associated with labor certification, and they cannot afford to meet the adverse effect wage statements mandated by the program.

The H-2A labor certification process has been burdensome to growers because of its ineffectiveness. This process places the farmer in the absurd position of being forced by the U.S. Government to employ a worker who is illegal in favor of a worker legally admitted under the H-2A program.

Another flaw in using the H-2A program is housing. Michigan is known to have some of the best farm labor housing in the country. There is, however, a fundamental problem with section 514 of the USDA Rural Developmental Housing Program. In the eligibility of occupants, H-2A workers are precluded from using the housing. So we have an additional example of one Government program prohibiting the effectiveness of another.

The Farm Bureau and the coalition we have worked with on H-2A reform has proposed several key reforms to the H-2A program that we believe will alleviate a number of the program's problems.

First, we propose to replace the current unproductive and expensive recruitment requirements with an entirely new method of testing the local labor market to ensure that U.S. workers are not displaced.

Second, we propose reform of the adverse effect wage rate. We recommend that the national standard minimum wage for H-2A program participants be based upon the prevailing wage for workers in a particular area. Good wages are easy to pay when profitability is the end result.

In conclusion, the Farm Bureau looks forward to working with interested members of Congress to ensure that 1999 is the year when meaningful H-2A reform takes place. We have worked with

the administration and opponents of the H-2A reform to see if we can reach a mutually agreeable solution to this problem.

We hope to soon engage in substantial discussions of reforms of rural housing programs that will create more housing for farm workers. We believe this is beneficial both to farmers who will need to use the H-2A program in the future but do not have housing available to them, as well as to those who will not need the program. Our experience in Michigan would indicate that good-quality housing will benefit migrant farm workers and their families, and is an extraordinary asset in attracting a reliable workforce.

Thank you for the opportunity to appear today. I would be happy to answer any questions you may have.

Senator ABRAHAM. Mr. Wunsch, thank you very much.

[The prepared statement of Mr. Wunsch follows:]

PREPARED STATEMENT OF JOSH WUNSCH

Members of the Subcommittee on Immigration of the Senate Committee on the Judiciary, thank you for the opportunity to appear today on behalf of the Michigan Farm Bureau and the American Farm Bureau to discuss the need for reform of the H-2A temporary foreign agricultural worker program.

I am Josh Wunsch, member of the Board of Directors of the Michigan Farm Bureau. I am a farmer and partner in Wunsch Farms, located on the Old Mission Peninsula in the Grand Traverse area of Michigan. We grow red tart cherries, sweet cherries and apples on our 360-acre farm. I employ 50 workers during the peak harvest season, and members of my family have employed migrant and seasonal labor for three generations. I currently serve on the American Farm Bureau Labor Advisory Committee, the Michigan Farm Bureau Labor Advisory Committee, the Michigan Farm Bureau Fruit and Vegetable Advisory Committee, and the Michigan Farm Bureau Legislative Committee.

For the last five years, Farm Bureau has worked to demonstrate to Congress and the Administration the critical need for reform of the H-2A program. Farm Bureau is Michigan's largest and the nation's largest membership organization for farmers and ranchers. Many of these farmers grow fruits, vegetables, and livestock that requires the efforts of hired labor for their successful cultivation and husbandry. Agriculture today is far more capital-intensive than it has been in the past, but for some crops the trends that have brought us fewer farmers, farming more acres, have created the need to employ more people than just a farmer, his family members and neighbors and friends.

Farmers in Michigan and across the United States have experienced similar problems from tight labor supplies and lost crops in recent years. At Farm Bureau we believe this labor supply problem stems from two distinct developments that have worked together to reduce the available supply of labor for farmers. First, there has been a developing consensus among public policymakers that the federal government, working with state and local governments, should work more effectively to enforce U.S. laws to discourage illegal immigration. Though it has been illegal for non-authorized persons to seek employment in the United States, and for U.S. employers to employ non-authorized persons since 1986, relatively few resources were devoted to enforcement of this prohibition. The Immigration and Naturalization Service (INS) and the Border Patrol have in the last few years employed greater resources for border interdiction, interior enforcement, and workplace enforcement.

More recently, the Social Security Administration (SSA) has begun to more vigorously implement its Enumeration Verification System, which is designed to weed name-and-number mismatches out of the SSA database. It is our understanding that billions of dollars in the Social Security Trust Fund may be credited to names and Social Security numbers that may be false. When SSA detects a name and number mismatch, the agency sends a letter to the farm employer advising of the mismatch and telling the employer that correct information must be furnished, threatening fines and Internal Revenue Service action if correct information is not forthcoming. Of course, when filing to pay the employer's share of Social Security taxes, the employer furnishes the information provided to him by the employee in question. In the case of farmers, when they ask farmworkers to furnish correct information for SSA, those employees often do not return to work the following day. The clear implication is that the workers provided fraudulent Social Security cards, among the most common of employment authorization documents.

All of these stepped-up enforcement activities have diminished the labor supply for farm employers. It is important to emphasize that this is not because farm employers seek to employ undocumented workers. Due to intensive industry educational efforts, we believe farm employers probably have a high degree of compliance with pre-employment verification requirements. However, it is very easy for persons in the United States to illegally obtain fraudulent identification documents that appear to be genuine. And when these documents are presented to an employer, they must be accepted as genuine unless they are clearly fraudulent. Farm employers are obligated to accept documents that appear on their face to be genuine because, under federal law, failure to do so could result in document discrimination charges. Farmers are in a Catch-22 situation. As citizens they wish to uphold the law and would thus prefer to avoid hiring illegal aliens. As business people, they realize they must hire an adequate workforce to plant, cultivate, and harvest the crops they depend on for their livelihood. And, if they are too quick to decline to hire someone they suspect is fraudulently documented, they may run afoul of the discrimination protections of the law.

Additionally, the thriving U.S. economy has put farm employers in competition for a limited pool of labor with employers in other industries who can offer longer-term, often year-round employment and better compensation and benefits. In Utah, tree fruit farmers in the Front Range of the Wasatch Mountains are finding themselves bidding against food processing companies in and around Salt Lake City for workers. In Mississippi and Tennessee, cantaloupe and tobacco producers must compete with casino operators along the Mississippi River at Natchez for the same workforce. In Florida, citrus and winter vegetable producers often find that construction contractors and the resort industry can offer higher pay and year-round work.

But even where changing public policy and economic conditions have not contributed to new shortages of workers, chronic shortages prevail and are unlikely to dissipate. In the Lake Champlain valley in upstate New York, it continues to be difficult to find enough people to harvest hundreds or thousands of acres of apple orchards in counties that have only a few thousand residents. Where irrigation is available, onion production in the Nevada desert can be a viable agricultural enterprise, but there is very little labor available in the area.

Many of the prime apple growing counties in Washington state are very rural and sparsely populated, as are many of the prime Christmas tree growing counties in the mountains of western North Carolina. Growers in these areas have found that the H-2A program, with its many flaws, is the only workable source of an adequate labor supply to harvest their crops.

Recently, the Associated Press reported from Kennewick, Washington, that growers are concerned that INS enforcement efforts in their area will leave them short of workers for the current asparagus harvest. That crop employs about 6,500 workers harvesting 22,000 acres of asparagus over a six-week period. These raids follow closely vigorous enforcement activities in fruit packing houses in Yakima, which resulted in packing house operators being forced to fire nearly 1,600 workers who could not produce genuine documentation.

Michigan is very dependent on a steady supply of labor to hand-harvest a number of specialty crops. Workers pick specialty crops including apples, peaches, pears, strawberries, blueberries, cantaloupes and sweet cherries, as well as vegetables including pickles, cucumbers, tomatoes, peppers, asparagus and onions. Often these workers are lost to other states in the migration stream from Texas to Michigan.

The situation is real and growing worse in Michigan. In recent years, the labor shortage has lead to the following problems in my state:

- A Monroe County apple grower and packer operation was unsuccessful in getting enough labor. He lost his juice apple harvest altogether; the quality of his fresh harvested apples also suffered.
- A large greenhouse in eastern Michigan has provided employee benefit packages including 401(k) and medical coverage. Four years ago they began recruiting migrant workers because of a shortage of local workers. As a result, the producer was unable to ship and deliver products that had already been purchased, because there was not enough labor to load the trucks. The greenhouse owner has received notices from the Social Security Administration notifying him that a number of his workers have presented names and taxpayer identification which do not match correctly in the SSA database. These mismatches are causing him to question if he can rehire these workers.
- A raspberry grower in Ingham County needed 12 workers but could find only three workers; this caused him to lose 75 percent of his raspberry crop. He closed his second business location in 1998 due to a complete lack of labor.
- The owner of a cider and retail farm market in Clinton County had to take harvest workers out of the field to staff his retail market. This caused the loss of

the crops those workers had been harvesting, requiring him to purchase commodities from other farms. In 1998, he did not have enough workers to plant, stake, and hoe more than 50 percent of the tomato crop he would normally plant, causing him to cut production.

- A Kent County fruit grower was informed in 1998 by the Social Security Administration that 78 of the names and taxpayer identification numbers provided by workers applying to work that spring matched and 115 did not. The majority of these workers had been recruited through the Michigan Employment Security Agency. In effect the government referred workers to this grower who were ineligible to work.

These examples are representative of those we often hear in Michigan and from Farm Bureau members around the nation.

Michigan is known to have some of the best farm labor housing in the country. There is, however, a fundamental problem with Section 514 of the USDA Rural Development Housing program. In determining the eligibility of occupants, H-2A workers are precluded from using the housing. So we have an additional example of a government program prohibiting the effectiveness of another.

For the last two years, the industry has felt the effects of the efforts of Congress to control persons who work illegally in the United States. We cannot provide you with enforcement statistics—perhaps INS can give you that data. We cannot quantify exactly how many workers have been apprehended, nor can we tell you the total dollar value of crops lost as a result of this enforcement activity. We measure the seriousness of a problem just like members of Congress do—by the number of phone calls and letters we receive. I can tell you the level of concern and interest in H-2A reform has been very high for the past two years.

For the last five years, Farm Bureau has been engaged in an effort with state Farm Bureaus and other state and regional farmers' associations to develop reforms of the H-2A program and work to secure legislation to accomplish those reforms. Our goal has been to unify agriculture from the East, the West, and all points in between, and to unify H-2A program users and non-users to support a reform package that will help everyone. The Seasonal Agricultural Worker program legalized a great many "farm workers" who ultimately sought employment in other industries. Concurrent reforms of the H-2A program proved ineffective. And, the unintended consequence of the 1986 requirement to obtain documentation from workers encouraged a market in fraudulent employment documents that still thrives today. Neither "solution" provided a lasting solution to agriculture's labor problems.

It is worthwhile to consider just how useful the H-2A program is to farm employers now, and how we might go about reforming it. Both farmers who have successfully used the program, as well as farmers who have considered and rejected the idea of using the program have told us that a number of reforms could be made that would make the program less burdensome and less expensive for growers to use. Farmers have, in particular, complained about the labor certification procedure they are required to complete to demonstrate that no domestic workers will be displaced by the admission of foreign workers, as well as the excessively high Adverse Effect Wage Rate standard.

In terms of program usage, the H-2A program today is not a major source of workers for farm employers. USDA surveys indicate that about 1.6 million people work seasonally in agriculture every year. Only about 30,000 workers were admitted under the H-2A program in 1998. Only 1 farm in Michigan has been able to effectively use the program. While program usage has been growing in recent years, only a few years ago the H-2A program admitted only about 15,000 workers annually. We think program usage is this low because the vast majority of growers feel they cannot navigate the bureaucratic process associated with labor certification, and even if they could they could not afford to meet the adverse effect wage standards mandated by the program.

The market test requirements of the labor certification process has been particularly burdensome to growers because of their ineffectiveness. Farmers are required to file job orders with the Job Service agency in their state, which in turn files interstate clearance orders with the Job Services in other states where workers might be available to fill farm jobs. Often, workers referred to farmers by these activities are in fact illegally documented "domestic" workers to whom a farmer must offer work before being allowed to bring in legal foreign labor. This places a farmer in the absurd position of being forced by the United States government to employ a worker who is illegal in favor of a worker legally admitted under the H-2A program.

In other instances, farm employers have been forced to advertise in metro-area newspapers for farmworkers, or to advertise on Spanish-language radio stations in areas where migrant farmworkers have traditionally resided during the winter months. These efforts have usually proven to be futile and expensive.

H-2A program wage standards have also been problematic. Under the current H-2A program, a participating grower must pay all H-2A workers (and any domestic workers they employ in the same occupation) the greater of the Adverse Effect Wage Rate (AEWR), the prevailing wage in the area of intended employment (as determined by Department of Labor farm employer surveys), or the statutory minimum wage. Under current regulations, the AEWR is set at the average wage paid to field and livestock workers in a given state. Obviously, application of the AEWR will have an undesirable inflationary impact for about half of all farm employers in a given state, causing unnecessary inflation of the wages they must pay simply to ensure an adequate labor supply. For almost all farm employment, the AEWR set wage standard is uneconomic in a globally competitive labor market. In all cases we are aware of, both the prevailing wage and the AEWR exceed the statutory minimum wage in every state. For Michigan, the Adverse Effect Wage Rate in 1999 is $7.34 per hour. This is the third-highest AEWR in the nation, after Hawaii ($8.97 per hour) and Indiana, Illinois, and Ohio ($7.53 per hour). It is important for you to remember that the H-2A minimum wage standard is paid to workers over and above other expenses not incurred by non-H-2A employers, like inbound and outbound transportation, housing and program administration expenses.

We believe the AEWR should be replaced with the prevailing wage standard applicable to other non-immigrant worker programs. We also proposed adding to that a ten-percent premium, to help ensure that domestic workers are not displaced. This eliminates the major flaw of the AEWR now, the grouping together of unlike occupations in dissimilar labor markets to create an AEWR that doesn't reflect the local labor market.

Farm Bureau, and the coalition we have worked with on H-2A reform, has proposed several key reforms to the H-2A program that we believe will alleviate a number of the program's problems. First, we have proposed to replace the current unproductive and expensive positive recruitment requirements with an entirely new method of testing the local labor market to ensure that U.S. workers are not displaced. Rather than using the combination of job orders and interstate clearance orders and ineffective employer recruitment required by the current program, we have proposed to use information technology to create a more effective conduit of labor market information for farmers and farmworkers. We have proposed that the Department of Labor and the state Job Service agencies should create Agricultural Worker Registries in states or regions that correspond to natural farm labor markets. These registries would be repositories of employment information provided by farmers and farmworkers seeking to find one another. In order to participate in the registry, a worker would have to demonstrate that he or she is legally eligible to work in the United States, and the Job Service could not place a worker in the registry who has not provided documentation that can be verified by government. Farm employers listing jobs with the registry would be obliged to first meet terms and conditions of the H-2A program. Farm workers wishing to seek work on farms in a given state would provide necessary information, like name and current address to the registry.

In 1998, we came very close to success in our efforts to reform the H-2A program. The Senate passed a proposal to accomplish the reforms I have discussed in a bipartisan 68-31 vote in July of last year. That legislation was later combined with a number of other measures to create the omnibus appropriations bill that funded the operations of the federal government for fiscal year 1999. In that process, our H-2A reform was dropped in favor of other provisions. We have worked with the Administration and opponents of the H-2A reform to see if we can reach a mutually agreeable solution to this problem. For example, we hope soon to engage in substantial discussions of reforms of rural housing programs that will create more housing stock for farm workers. We believe this is beneficial to farmers who will need to use the H-2A program in the future but who do not now have housing available to them. It will also be beneficial to farmers who will not use the H-2A program. And of course, more and better housing stock will benefit migrant farm workers and their families.

The Farm Bureau looks forward to working with interested members of Congress to ensure that 1999 is the year when meaningful H-2A reform takes place. Thank you for the opportunity to appear today. I'd be happy to answer any questions you may have.

Senator ABRAHAM. We have been joined by two House members who I know have additional votes coming, and I am going to beg the indulgence of this panel and ask if you would just take your seats back in the seating area while we hear from both of them.

I know they have got to meet some other obligations, and so we will bring this panel back as soon as they have each testified. I ask them to join us.

We are joined by Representative Howard Berman and Representative Sanford Bishop. We appreciate your both being here. I know you both are on a fairly fast track. We weren't quite sure when your arrival would take place, so we apologize that we got sort of a little bit out of sequence.

Congressman Berman, do you want to start?

STATEMENT OF HON. HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative BERMAN. Thank you very much, Mr. Chairman, both for letting us testify and for accommodating the craziness of the schedule. We had a couple of votes and that is why we were late, and we are very grateful to have a chance to talk now.

I am convinced that the proposals to make it easier for agricultural employers to bring in foreign guest workers would accomplish the opposite of my longstanding goal of trying to improve the wages and working conditions of American farm workers.

The legislation that passed last year as a rider to the C-J-S appropriations bill, as well as some of the proposals that are being floated now in the name of compromise, I think would deprive American farm workers of job opportunities they badly want and exacerbate the problem of an over-supply of farm labor. The result can only be to further drive down the wages and working conditions of American farm workers. I do see a way out of the problem that creates the dynamic for the push for this legislation, though, and I would like just in a couple of minutes to throw that idea out to you.

First, I believe there is not an overall farm labor shortage in this country. In the 104th Congress, in the wake of the resounding defeat of the Pombo guest worker amendment in the House, proponents of a new guest worker program backed off and sought a GAO study to determine whether there was a shortage of farm labor.

The GAO released its report in December 1997, finding that, "A widespread farm labor shortage does not appear to exist now and is unlikely in the near future." The ink was hardly dry when efforts commenced to disparage the report by the very interests that had sought it.

In my own State of California, the most significant agricultural producing region in the country, the unemployment figures in rural counties are staggering, double-digit virtually across the board. The same can be said in the agricultural areas of Texas and Florida as well. And while we can scarcely contemplate the difficulty of the migrant farm worker's existence, the fact is that migrant farm workers migrate to wherever the jobs are. American farm workers want those jobs that agricultural employers claim they cannot fill with American workers.

We at the government level can do a much better job of alerting farm workers to available jobs, employers to available workers, as my colleague, Senator Feinstein, has suggested. But that is a far

cry from saying we need to bring in more impoverished, low-skilled workers from foreign countries.

Now, one thing is clear. I do not deny—I don't think you can with a straight face deny the fact that an unacceptable percentage of the agricultural labor workforce is undocumented. And I don't condone that. A year-and-a-half ago, the GAO study estimated the percentage at 37 percent. Just a few months ago, a California study based on the DOL data put the figure at 42 percent.

But not for a second do I think that agricultural employers exactly have clean hands in lamenting this phenomenon. A witness you will be hearing from later, Dolores Huerta, can give you countless examples of American farm workers being turned away at job sites by agricultural employers who prefer the foreign undocumented workers.

Having lamented the increasing percentage of the workforce that is presently undocumented, the question is, is the solution to create an expanded guest worker program? I would like to observe the obvious here. The large number of undocumented farm workers are not going anywhere unless this committee wants to tell me that we are going to undertake in this country mass deportations on an unprecedented scale.

Create a new guest worker program, and mark my words, we will then have the present existing pool of undocumented workers plus a large number of new guest workers who, if experience is any guide, will overstay their visas and will exacerbate the problem of undocumented workers in this country.

No matter how large a percentage of their wages you might propose to withhold as an incentive to return to their home country, guest workers won't go back. They are invariably better off overstaying their guest worker visas and bleeding into our underground economy.

The Jordan Commission, in 1997, concluded that creating a new agricultural guest worker program would be a grievous mistake and would only serve to increase illegal migration instead of replacing an illegal workforce. In light of all the efforts by the U.S. Congress, and this subcommittee in particular, to combat illegal immigration, I urge you not to approve legislation which will only exacerbate the problem.

A few months ago, I had a most intriguing conversation with a Republican colleague of mine, one who has a reputation for not being, "soft" on illegal immigration. We rued the problem of undocumented workers in agriculture, and he said that that is why he supported an expanded guest worker program. I offered my observation that we would then have the present undocumented, plus new guest workers who would overstay. Maybe, he said—not me—he said we should legalize the present undocumented workforce.

Consider a program like this, not a program like we did in 1986. Jim Holt and some of the other witnesses you have here today—we were all involved in negotiating that, and the reformed H-2A; not that kind of a program, like the SAW program that simply legalizes workers based on their past work history, but rather a program like the RAW program, the Replenishment Agricultural Worker program, which was a contingent part of that legislation, never triggered into effect because of the huge over-supply of farm

workers, but it was contained in the 1986 law. We put that program on the books, should a shortage of workers ensue subsequent to the SAW legalization program.

What the RAW program offered prospectively to farm workers was permanent resident status upon the completion of 90 days of work in perishable agriculture for three successive years. I could support the implementation of a RAW-like program now, as I did in 1986, because it is fair to workers and growers alike, and because it is the only proposal which would not exacerbate the problem of undocumented workers in agriculture.

I understand why growers have a concern. This process has developed in a situation where documents are presented and the employer accepts it. He knows they are undocumented, and he watches Immigration and Border Patrol getting tougher and tougher and he is worried about where his supply of workers will come in the future. This alternative, the RAW-type program, is the way out of that.

And the concern that some growers have that they will all immediately go off to the cities and leave agriculture, I don't think is well-founded. It certainly wouldn't be well-founded if they offered good wages. But under this program, the expectation would be that in order to get permanent resident status, they would have to continue to work in agriculture for a reasonable period of time.

You have been very patient with me. There is a lot more I could say, but I don't want to wear out my welcome any more than I already have, so I will stop here.

Senator ABRAHAM. Well, thank you. We will include the full statement in the record.

Senator FEINSTEIN. Will the Representative be able to stay, because I would like to ask him some questions?

Mr. BERMAN. Yes.

[The prepared statement of Representative Berman follows:]

PREPARED STATEMENT OF REPRESENTATIVE HOWARD L. BERMAN

Thank you for this opportunity to testify today. For as long as I have served as an elected official, I have made it my business to try to improve the circumstances of American farmworkers, the most impoverished working people in the United States. I am convinced that proposals to make it easier for agricultural employers to bring in foreign guestworkers would accomplish exactly the opposite. Legislation that passed the Senate last year as a rider to the Commerce, Justice, State appropriations bill, as well as proposals now being circulated in the name of compromise, would deprive American farmworkers of job opportunities they badly want, and exacerbate the problem of an oversupply of farm labor. The result can only be to further drive down the wages and working conditions of American farmworkers. It is out of this concern that I am grateful for this opportunity to speak to this subcommittee today.

There is no shortage of farm labor in this country. In the 104th Congress, in the wake of the resounding defeat of the Pombo guestworker amendment in the House and questionable prospects for a similar amendment in the Senate, proponents of a new guestworker program relented and sought a GAO study to determine whether there is a shortage of farm labor. The GAO released its report in December, 1997, finding that "a widespread farm labor shortage does not appear to exist now and is unlikely in the near future." The ink was hardly dry when efforts commenced to disparage the report by the very interests that had sought it.

In my own state of California, the most significant agricultural producing region in the country, the unemployment figures in rural counties are staggering, double-digit virtually across the board. The same can be said in the agricultural areas of Texas and Florida as well. And while we can scarcely contemplate the difficulty of the migrant farmworker's existence, the fact is that migrant farmworkers *migrate*

to wherever the jobs are. American farmworkers *want* those jobs that agricultural employers claim they cannot fill with American workers. Certainly we can do a better job of alerting farmworkers to available jobs, and employers to available workers, as my colleague Senator Feinstein has suggested, but that is a far cry from saying we need to bring in more impoverished low skill workers from foreign countries.

Now I do at this juncture want to make one point very clear: I do not deny the fact that an unacceptable percentage of the agricultural labor workforce is undocumented, nor do I condone it. A year and a half ago, the GAO estimated the percentage at 37 percent; just a few months ago, a California study based on DOL data put the figure at 42 percent. But not for a second do I think that agricultural employers exactly have "clean hands" in lamenting this phenomenon. Dolores Huerta can give you countless examples of American farmworkers being turned away at job sites by agricultural employers who *prefer* foreign workers.

Having lamented the increasing percentage of the workforce that is presently undocumented, is the solution to create an expanded guestworker program? Let me observe the obvious: the large number of undocumented farmworkers are not going anywhere, unless this committee wants to tell me that we are going to undertake in this country deportations on an unprecedented scale. Create a new guestworker program and, mark my words, we will then have the present undocumented workers *PLUS* large numbers of guestworkers who, if experience is any guide, will overstay their visas and exacerbate the problem of undocumented workers in this country.

Make no mistake, no matter how large a percentage of their wages you might propose to withhold as an incentive to return to their home country, guestworkers won't go back. They are invariably better off overstaying their guestworker visas and bleeding into our underground economy. The U.S. Commission on Immigration Reform (or Jordan Commission) in 1997 concluded that creating a new agricultural guestworker program. would be a "grievous mistake", and that it would only serve to increase illegal migration instead of replacing an illegal workforce. In light of all the efforts by the U.S. Congress and this subcommittee in particular to combat illegal immigration, I urge you not to approve legislation which will only exacerbate the problem.

A few months ago, I had a most intriguing conversation with a Republican colleague of mine. We rued the problem of undocumented workers in agriculture, and he said that that is why he supported an expanded guestworker program. I offered my observation that we would then have the present undocumented plus new guestworkers who would overstay. Maybe, he said, we should legalize the present undocumented workforce. Consider that: not a program like the 1980's SAW program which legalized workers based on their past work history, but rather a program like the "replenishment agricultural workers" or RAW program which we legislated in IRCA but never implemented. We put that program on the books *should* a shortage of workers ensue subsequent to the SAW legalization program. What the RAW program offered *prospectively* to farmworkers was permanent resident status upon the completion of 90 days of work in perishable agriculture for three successive years.

I can support the implementation of a RAW-like program now as I did in 1986 because it is fair to workers and growers alike *and* because it is the only proposal which would not exacerbate the problem of undocumented workers in agriculture.

From the worker point of view, by not *adding* to the supply of workers, whether documented or undocumented, a RAW-like program would give farmworkers a chance of seeing an improvement in their deplorable wages and working conditions. I am convinced that what agricultural employers fear is not an impending shortage, but rather the possibility, should the border continue to tighten and employer sanctions be effectively enforced in agriculture, that they might be deprived of the gross *oversupply* of farm labor they presently enjoy. It is that oversupply which is the reason why the wages and working conditions of American farmworkers remain a national disgrace.

Underlying the argument for an agricultural guestworker program is the notion that farmworkers must be forever doomed to poverty and inequity. Why? Where is it written, in this free market economy, that agricultural employers need not improve wages and working conditions to attract and retain an adequate supply of work-authorized labor? Do not insulate these employers from the laws of supply and demand by enacting a new guestworker program. The American farmworkers who want these jobs have suffered enough. Let's not make it worse.

Senator ABRAHAM. Congressman Bishop, thank you for coming.

STATEMENT OF HON. SANFORD BISHOP, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Representative BISHOP. Thank you very much, Mr. Chairman. I have a somewhat different view from my colleague from the House. For a myriad of social and economic reasons, the current state of affairs is that thousands of aliens do seek entrance into the United States to find work annually, and it is no secret that a majority of the illegal influx is from just south of the border in Mexico.

Presently, an alien from Mexico without a valid work permit either risks the passage alone or must pay money to a smuggler, who often brings the alien into the country in a manner that puts him at great personal risk, whether it is in the back of a semi trailer which might reach up to 120 degrees or over high mountain passes where unexpected cold weather or snow can leave the alien stranded in the event of vehicle trouble.

These paid smuggling operations go awry. There have been numerous accounts of smuggled illegal aliens ending up in serious traffic accidents because of unsafe or overloaded vehicles, and we concede that. These hazards have resulted in a lot of hardship and senseless tragedy. But I am here today to make the point that there has to be a better way, and I commend the subcommittee in its wisdom for seeking a path to a better way by convening this hearing.

You will no doubt hear through the course of this debate that the General Accounting Office, in 1997, found that no national agricultural labor shortage appears to exist. The GAO concluded this because it made an estimate of some 600,000 undocumented or fraudulently documented farm workers being available to farmers.

While some might argue the premise of the GAO's inquiry when it included that estimate in its report, we all recognize that the GAO's job is to report factual and relevant estimates. The problem with that report was in a subcommittee hearing we had in the Agriculture Committee, we questioned the GAO individuals and they indicated that they did not question one single grower from the Southeast in concluding that there were adequate farm workers available.

Most of the people that they interviewed were out West, very close to the Mexican border. So the people who need this H-2A reform most are the growers in the Southeast, from Florida all the way up through Georgia and South Carolina and North Carolina.

I believe that the Congress should look at the issue in its totality to ask, are legal farm workers involved in a legal system that is above-board and provides legal certainty to all of the parties that are involved. The H-2A agricultural guest worker program was designed, and it seeks to provide, that legal certainty. Unfortunately, the way the program is currently drafted and implemented, it does not provide a farmer-friendly or a producer-friendly source of workers.

There are problems with the H-2A program which discourages the program's use by farmers in Georgia and throughout the country who seek to run their planting and their harvesting operations legally. I have personally visited farms and have seen the housing that has been constructed, the dormitory facilities, as well as the cafeterias that have been provided for these migrants workers who

have been brought in under the H-2A program, and I have found most of them to be commendable. I also have personal knowledge of migrant workers who come under that program who earn upwards of $500 per week, who live in pretty good conditions and who don't seem to be complaining at all.

The problem with the lack of a workable H-2A program and the assumptions that the GAO makes that there are plenty undocumented workers is that, as is the case in my area where there are perishable crops—produce, watermelons, peaches, corn—that is in need of harvesting, if INS representatives show up in the county at harvest time, all of the workers disappear. And as a consequence, that grower is left with an entire crop, and all of the investments attendant with that and all of the loans attendant with that, left to perish in the fields. That is simply a bad situation and one that ought not be allowed to exist.

All the workers want and all the producers want a legal system so that producers can plant and harvest their crops in a way that will not result in tremendous economic loss to them and that will comply with all of the health and safety standards and all of the humanitarian requirements of a good workforce.

I believe that a careful examination and reform of the H-2A program, pursuant to recommendations that I personally and my colleagues have made to the Secretary of Labor, pursuant to recommendations by growers which we will submit to this committee under separate cover, would go a long way toward helping to alleviate this problem.

While there may be an over-abundance of workers in some parts of the country, in southwest Georgia, particularly, and the southeastern United States, we have a problem, and the problem comes because we have perishable items that are grown and in need of those workers. And when suddenly they disappear, it really leaves a farmer in the lurch.

Thank you very much for your patience and your kindness and your consideration in allowing us to come and testify, and I certainly would try to be available for any questions that you might have.

Senator ABRAHAM. Thank you.

Senator Feinstein, do you want to start?

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Howard Berman, it is great to have you here, and welcome. In my informal opening remarks, I mentioned, similar to what you just said, that INS estimates that there are about 600,000 undocumented workers in this country, many of whom have been here for a long time. They do this work. We all know that our cities produce very good forged immigration credentials—Social Security cards, drivers' licenses, green cards. I couldn't tell a real one from a forgery.

Therefore, wouldn't it make some sense if we were able to provide a green card to those workers, provided they would agree to do certain things? And these are workers that would have worked in this industry for a period of time, whose work was good, and wanted to continue. And when you signed up for this kind of registry and availability to harvest a certain crop, there would be a certain premium pay that would be granted to the worker.

I wanted to ask you your view, because I think you know a great deal about this, about adverse wage rates. Given that average wage rates are used to determine the adverse wage rate, wouldn't the average be higher if we were to have a completely legalized workforce?

Representative BERMAN. There is no doubt in my mind. The average wage rate, and therefore the adverse effect wage rate, would be higher if the workforce were legal because it would raise the bottom.

Senator FEINSTEIN. So in terms of providing a decent wage, there would be some merit to the proposal to find a way to provide the ability to work legally to people who are already here and working illegally?

Representative BERMAN. I believe that very much. I believe that the only result of taking the other approach is those workers will continue to work. They will continue to work illegally. Growers will continue to be in—they call it a bind; some people think they enjoy the situation of having those workers coming in with the forged documents to the farm labor contractors or to the growers themselves and working. And then, in addition, you will have the new guest workers.

There are studies that show that the start of the real trail of undocumented immigration in the United States came with the bracero program. It was that flow in a legal guest worker program that created the migration patterns that led to that flow. So, to me, everything that Congressman Bishop just talked about—at the heart of it was the problem his farmers have in finding illegal workers. What happens if INS shows up? Everybody disappears.

How is the grower going to determine the fake card from the real card? He is not supposed to be able to do that. In 1986, we told the employers that wasn't their obligation; they aren't a little INS. It is this kind of proposal, I think, that you and I are both talking about now that can deal with that problem and substantially increase the legal workforce without undercutting the wages and continuing and exacerbating an over-supply that would come the other way.

Could I add one other thing here?

Representative BISHOP. May I respond to that, too?

Representative BERMAN. Congressman Bishop talked about housing that he saw. Yes, in the H-2A program there is an obligation for housing. In all of these proposals that we are talking about to establish a new guest worker program, all it means is taking some of the protections in the existing guest worker program and diluting them or eliminating them. The new guest worker program would eliminate the obligation to provide housing, the kind of housing that was seen.

Senator FEINSTEIN. Representative Bishop.

Representative BISHOP. I just wanted to point out that while there are many undocumented workers that have come in, particularly in the southeastern United States, in addition to agricultural needs, we also have poultry processing facilities that are now beginning to expand in south Georgia.

Many of the people that came in initially as agricultural workers, farm workers, are now working in the plant processing. So the

poultry processing plants have "damas" and "hombres" on the rest rooms, and these people who have been working in the fields harvesting crops are now working in an air-conditioned poultry processing plant and the farmers are still in need of workers out in the hot sun to harvest their crops. So we still will have a problem.

Even though these undocumented people may remain in the States, they are going to our cities or they are going to places where they can get more stable employment that is not seasonal, and so the need still remains for legal agricultural workers. Otherwise, the food and fiber that our farmers produce in this country, which now is the most economical, highest quality, most abundant and safest anywhere in the world, is going to be jeopardized, and the consumer will ultimately have to pay at the supermarket.

Senator FEINSTEIN. Thank you.

One quick question of Mr. Berman on the RAW program. This was before my time. Do you know how many people fell under it?

Representative BERMAN. We never had to activate it. What we created was a seasonal agricultural work program that we called SAW. That took people who had worked in agriculture and gave them legal status. Some people like to call them the "rodinos." But then the growers said, well, what if that isn't enough? So we said, all right, we will create a theoretical program that allows new people to come in, not tied to a grower specifically, but they have to work in agriculture.

But, you know, we don't want indentured servitude here, so after several years of working in agriculture they get their full legal status and they can stay in agriculture if the growers do what is necessary to keep them in agriculture or they can go into some other kind of a job. But that notion was never activated, so our notion is take the RAW concept, apply it to the undocumented workers now working in agriculture, tie them for several years into working in agriculture, not for a specific grower, because that I think is wrong, but proving that they have worked in agriculture in order for them to get the credits to allow them to go into permanent resident status and then on to citizenship.

Senator FEINSTEIN. Thank you very much. I mean, I think that is an idea that could be fleshed out and at least could be a proposal that perhaps those Senators that have worked so hard on this issue would take a look at, and I would be very interested in hearing Senator Smith's comments.

Senator ABRAHAM. I asked Senator Smith if he wanted to stay with us here today because we have tried to turn this hearing, since there isn't legislation yet drafted, an opportunity for some give-and-take here a little bit, and frankly I think we would like to hear your reaction both to these ideas and some of the comments that have been made already.

Senator SMITH. Thank you, Mr. Chairman. Senator Feinstein, I would love to work with you on your idea. I think it has some merit. And I thank both Congressmen for being here and the perspectives that you bring.

Congressman Bishop raised a point I was going to make, and that is the GAO report says there is no agricultural shortage because we already have all these illegals here. And, Congressman

Berman, it just seems to me that the surest way to keep a migrant worker down is to keep him illegal——

Representative BERMAN. I couldn't agree more.

Senator SMITH [continuing]. And make sure there is no process for them to exert their rights. And Senator Wyden and I worked very hard to try to find a legal basis for them to be here, recognizing the economics of the marketplace and of the farmer as well. When it comes to the wage rate, we are open to suggestions, but we need to get beyond this. When it comes to transportation, I think we had a good proposal.

When it comes to housing, our State of Oregon won't allow a farmer to build a structure on farm land. So when it comes to providing housing, it just isn't possible under State law. So we came up with a voucher program that they could utilize in other ways and help create a market that could develop within the boundaries of urban growth boundaries and what not. So we are open to your ideas, but we are also bounded by the realities of the marketplace that farmers have to live in.

Mr. BERMAN. I agree with——

Senator FEINSTEIN. Could I just——

Senator ABRAHAM. Let me just inject here. I don't want to confine us too much to the clock or to the sort of individual Senator's prerogatives here. So why don't we just go back and forth a little bit? Senator.

Senator FEINSTEIN. The last time the California Farm Bureau was in to see me, they brought in a delegation and among them was a young woman who owned a farm down, I think, in the Paso Robles-Santa Maria area, who had spent $1.5 million to build really good farm worker housing to use on her farm. And it was to have security, it was state-of-the-art, it was modern. And guess what? The city council turned it down—not in my backyard. And so that becomes an issue for all of us, I think, as we look at that issue. Really, how do we develop incentives for the kind of housing that would be necessary for any programs?

Senator SMITH. And, see, we weren't trying to dilute housing. We were trying to make it flexible enough to create a market that would work in California and Oregon.

Senator FEINSTEIN. It won't work in California because there is no housing. That is the problem.

Representative BERMAN. That is right.

Senator SMITH. Nor Oregon, but how do you create it if your State law won't allow it or a city council won't approve it?

Senator FEINSTEIN. I would be interested if either of the Representatives had a comment on the housing issue.

Representative BISHOP. Well, I think that it is going to be very difficult to have one cookie cutter in legislation that would apply to all situations. In southwest Georgia, from which I come, housing is not a problem. The problem is getting growers to build decent, affordable housing, and they do it because they realize that that is what is required under the existing H-2A program, and they do everything they can to comply with the law.

They don't have a problem with the county commission because many times they are in rural areas where they don't have an ordinance problem or a zoning problem. Even those workers who work

in cities—I have one constituent who actually contracts with growers to provide rental housing, and over the past 5 or 6 years she has been able to acquire some 60 or 70 properties because of, each growing season, being able to rent to more and more migrant workers.

She makes a good living, the workers are happy, the growers are happy, and they are complying to the extent that they can with the H-2A program. I think it should be a flexible enough program to provide either vouchers or to provide housing however the grower would like to within the parameters of the H-2A program.

Senator ABRAHAM. Congressman Berman.

Representative BERMAN. In the model that I am talking about—and hopefully this might be appealing to the Chairman and to Senator Smith as well—get the Government out of setting the exact wage rate, going through an elaborate determination of adverse effect wage rates or telling the grower what he has to provide. Let the marketplace—and then, hopefully, I would like to see a robust Federal program to deal with the problem of rural housing and farm worker housing as well.

But if the workers are legalized, then they are workers, like other workers, and we don't set the wage rates for other people in the private sector and we don't tell the employer how he has to house them. Part of how you attract workers is to do certain things. The marketplace becomes a forcing mechanism in this kind of a universe.

It is when you bring in foreign guest workers to work for a specific association or a specific grower, because you have no marketplace determination, that is when you need to set these standards. In the model that I am talking about, the legalization model, you get out of all of that.

I like the registry idea because I know that in Texas at certain times of the year, there are farm workers there that want to work in southeast Georgia. And if there was a better way of using the Federal Government to help the farmers in southwest Georgia—it is southwest Georgia—get the folks in the Rio Grande Valley to get there, there would be workers available. I believe that is also true in Oregon and Washington for a lot of the folks in California.

Senator ABRAHAM. Congressman Bishop, do you want to comment?

Representative BISHOP. I respectfully disagree. All of the workers who perhaps might be available in Texas are not interested in coming to Georgia to work. Many times, our growers go out recruiting. They get commitments to have the workers come, only to have them not show up or not follow through. It is a very, very difficult and arduous process, and it takes an extended period of time which often is inconsistent with the growing season.

The requirements of the existing H-2A program require that the application be placed for a certain time, at a certain date for harvest. And if there is a weather problem or a disaster problem, if there is rain, the expected time of harvest may be delayed by 2 or 3 weeks. The time of planting may have to be delayed, and as a result of that the time frame that is required to be on the H-2A application cannot be complied with.

Often, the people who have to pass on it are so backlogged and don't have enough staff that they can't get the paperwork done in time for the harvest and the permits to be issued in time for the workers to be transported, housed, and then go to work. I mean, you have got a real problem for our producers and it will threaten—I promise you, it is going to threaten the availability of our food and our fiber at the supermarket in our urban areas unless we find a way to legally allow these farm workers to help harvest and do the agricultural work in our rural agricultural-producing areas of the country.

Senator ABRAHAM. Senator Smith, any final comments here?

Senator SMITH. I was just going to tell Howard, you sounded like a Republican when it came to setting wage rates. [Laughter.]

I say that in fun, but Ron Wyden and I put in the prevailing wage because we frankly wanted to say that as it relates to current H-2A, nobody is frankly responding to or participating in it. For the overwhelming number of farm workers, this would be a pay increase.

Look, I would like to let the system work, but I would like to make those farmers you talked about who profit from an illegal system no longer profit, and require that they obey the law. In exchange for that, give the farmers some certitude that there will be some workers there.

And believe it or not, we are not trying to bring in guest workers. We are trying to say these people are here; they are already our guests. They just ride around in U-Hauls and the backs of people's trunks, and that is a tragedy. That is a shame upon this country.

Representative BERMAN. But the proposal itself last year wasn't limited to the people who were here. And, in fact, while it made a slight gesture for a way-down-the-road potential legalization, there were a bunch of House Republicans who were going crazy about that, and it ended up that you had to take even that little glimpse of a legalization program out of the proposal.

I asked the GAO to do a study in 1998 about the Georgia Vidalia onion growers. They did the study. I don't think that is in Sanford's district.

Representative BISHOP. No, it is not.

Representative BERMAN. It is in north Georgia.

Senator ABRAHAM. The last time we had a hearing, we heard from Senator Coverdell about it.

Representative BISHOP. No, no. That is in southeast Georgia.

Representative BERMAN. Southeast Georgia, all right.

Representative BISHOP. Yes. That is Republican Jack Kingston's district.

Representative BERMAN. Yes. [Laughter.]

In any event, here is what they found, that there were contractors right then offering to bring in documented workers from the Rio Grande Valley, but other farm labor contractors offered to bring in H-2A's at a cheaper rate. So the Georgia Vidalia onion growers said, we don't want the Rio Grande workers, we want to get those H-2A workers. Then they complained about all the rigamarole of going through H-2A.

Senator SMITH. See, Senator Wyden and I are caught between the Republicans in the House you identified that don't want a legal

system, and don't want any more immigrant workers, period, versus those on the labor side who say that they are in the labor shortage business and don't want any workers at all. And frankly, there are those of us who would say let's try a legal system. Frankly, too many people profit from an illegal system because they get payments from these human coyotes which is pretty good business for them. I want to put these coyotes out of business.

Representative BERMAN. But that Republican that I talked about that I was talking to was on that letter to the appropriators yelling about the legalization program. When people realize that a guest worker program will simply add eventually to the new number of illegals, all of a sudden people starting changing their view.

If the growers and the farm worker advocates could get together—we did it in 1986. We could do it again and we could do it in a way that would give agriculture what it needs, that is a workforce in agriculture, but with the workers having dignity, legalized status, a chance to participate fully.

Representative BISHOP. May I comment on this wage issue? They may very well have not wanted Rio Grande workers not because they were going to pay them less than the minimum wage, but I think that any businessman would like to keep his or her—business person would like to keep his or her labor costs down. But, certainly, we have set in this country civilized standards below which we cannot go.

But the dispute between these Rio Grande workers and the other workers was not substandard wages. They were just wages that were competitive, and I think that you have to really understand that. At the risk of sounding like a Republican, you can't ask business people to bid to pay the highest wages.

Senator SMITH. It is not that bad.

Representative BISHOP. You ask them to pay competitive wages so that everybody can make a decent living.

Representative BERMAN. But at the risk of sounding like a Republican——

Senator SMITH. It isn't that bad, you guys. [Laughter.]

Representative BERMAN. Scarcity is part of all of this. If you can always get an unlimited supply of foreign guest workers, then there is no marketplace.

Senator SMITH. But Senator Wyden and I were saying you can't even go to the guest workers until you can certify that the U.S. workers are not available under the registry.

Senator FEINSTEIN. No, no, no. You had a period of time in there, in the bill. It was a year. It started at 6 months and then it went to a year.

Senator SMITH. Well, you had to certify that the grower could not find sufficient legal domestic workers and then they could go and recruit H-2A workers.

Representative BERMAN. But they don't have to do any recruiting. All they have to do is look at the registry. We never tried the registry. The farm worker with the cellular phone waiting for the call from the Department of Labor because he is on the registry saying "go to work"—in other words, we didn't even establish the registry when all of this went into effect. It wouldn't have worked that way.

Senator SMITH. Well, then, please—I am here today because I am open to new ideas. We have a shameful status quo and we need to find a legal system. And if we had a flaw in our bill, then let's fix it.

Senator ABRAHAM. I want to thank this panel. We promise not to tell Senator Kennedy of your new-found views on prevailing and other wage-related matters. [Laughter.]

He was absent during the discussion, and I think probably it is better for all of us that he learn about it a little later in the day. [Laughter.]

Representative BISHOP. Mr. Chairman, I would like to request permission of the committee to supplement my testimony by offering suggestions that we offered on the House side and that we have been negotiating with the Secretary of Labor over the past couple of years. We have been trying to deal with this and work through it through provisions that don't require legislation, and some additional provisions that do require legislation, based upon recommendation and review by the Congressional Research Service that did a study of this for us.

Senator ABRAHAM. We will be glad to take that and any other submissions either of you would like to make. We appreciate very much you being here. I think it has been a very helpful part of the hearing today. Thank you both.

We have been joined by Senator Gorton who I know had wished to be part of the first panel, but due to an Appropriations Committee meeting was delayed in getting here.

We would be happy to turn to you at this time, if you would like to offer your testimony or just remain on the panel with Senator Smith. We are glad to have you here.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. Well, Mr. Chairman, I thank you. The conference committee on the supplemental appropriations is going on right now and I need to return as soon as possible. So I appreciate your allowing me to break in.

My colleagues and I appeared before you last year to talk about the need to reform our agricultural guest worker program. We are back again. The problem is still not addressed and, if anything, the need is more urgent. There is no way—and I will depart from my text here—that I can be as eloquent on this or as knowledgeable on this as my colleague from Oregon, Senator Smith, is. And I have been delighted to follow his leadership on the question, delighted particularly because our States are so similar that our problems are, for all practical purposes identical.

It is incredible to me that in this agriculture-dependent country we are so indifferent to the fact that so much of our workforce is illegal. In its report on the existing H-2A program, the General Accounting Office estimated that 37 percent of the agricultural workforce is illegal. Most farmers in my State think that this estimate is too low. The growers league in Washington State reports that recent evidence from Social Security letters to employers on INS enforcement actions indicate that 50 to 70 percent of agricultural sea-

sonal workers in Washington are illegal aliens using false documents to gain employment.

The percentage of illegal workers was not the only aspect of the GAO report that is contradicted by experiences in Washington. In its report, the GAO predicted that there would be no significant agricultural labor shortage essentially because the GAO did not expect the INS enforcement actions to be effective. Recent events in Washington State prove this wrong, and I will get to those and submit some of them.

But, Mr. Chairman, if 70 percent or 50 percent or 37 percent of our employment in a given area is illegal, and if, as we know from not 2 years or 5 years or 10 years, but 50 years of experience, we are not ever going to be able to enforce our border crossings sufficiently to keep that very significant number of illegal workers out of the country, obviously we need a change. Obviously, we need a change. All of the enforcement actions aren't going to work.

The attraction for these workers, who do so much better in the United States as illegals than they can do at home legally, is going to continue. So why not face reality and come up with a system that offers employment to people who are going to be employed in our agricultural industries anyway? We know it. They are employed now, they were employed last year, they were employed 20 years ago, they are going to be employed 20 years from now.

Why not create a way in which they can be here legally, get their wages above the table, go home when the seasons are over, return legally, not having to pay illegal smugglers to bring them here, let our employers be legal, deal with valid documents? For the life of me, I can't understand why there isn't an overwhelming surge to make an illegal reality into a legal reality. It will be better for the workers, it will be better for the employers, and it will be better for our economy. It is just as simple as that.

I may tell you I totally despaired of common sense ever infecting this issue until last year when Senator Smith was able to get together with his counterpart, Senator Wyden from Oregon, and with you and others and come up with a system that passed the Senate and moved us significantly in that direction. It was progress that was a great tribute to everyone who worked on it, and I hope we can build on the successes of last year and be successful this time around.

But I just simply need to repeat: this workforce is here and it is going to continue to be here. Let's find a way to make the conditions under which they work better, and the people who are involved in it, both employers and employees, honest. I think Senator Smith and his proposal will do just that and I commend it to you.

I have got lots of other stuff in this statement and if you will include it in the record as if read, I will save you time and I will be able to go back to the conference committee.

Senator ABRAHAM. Senator Gorton, thank you for being here. We will include your full statement in the record. We understand your need to return, so we excuse you at this time, but appreciate your participation and look forward to working with you further.

[The prepared statement of Senator Gorton follows:]

PREPARED STATEMENT OF SENATOR SLADE GORTON

Mr. Chairman, my colleagues and I appeared before you last year to talk about the need to reform our agricultural guest worker program. We're back again, the problem still is not addressed, and the need is more urgent.

It is somewhat incredible to me that in this agriculture-dependent country, we are so indifferent to the fact that so much of our agricultural workforce is illegal. In its report on the existing H-2A program, the General Accounting Office estimated that 37 percent of the agricultural workforce is illegal. Most farmers in my state think this estimate is too low. The Growers' League in Washington state reports that recent evidence from social security letters to employers and INS enforcement actions indicate that 50 to 70 percent, of agricultural seasonal workers in Washington are illegal aliens using false documents to gain employment.

The percentage of illegal workers was not the only aspect of the GAO report that is contradicted by experiences in Washington state. In its report, the GAO predicted that there would be no significant agricultural labor shortage, essentially because the GAO did not expect INS enforcement actions to be effective. Recent events in Washington state prove this wrong.

New INS enforcement strategies combined with improved record-checking by the Social Security Administration are far more efficient than GAO foresaw. We must recognize the consequences for agricultural employment, and act now to ensure a stable, and legal, workforce.

The information technology "noose" is tightening. As the Social Security Administration becomes more able quickly to verify matches between employees' names and social security numbers submitted to employers, it is likely that farmers, including fruit and vegetable growers, will lose a large portion of the current workforce as those employees using false documents are screened out. The Washington Growers League anticipates that the Social Security Administration will require electronic verification of names and social security numbers within the next few years.

If used throughout the growing season, the INS's new enforcement strategies, combined with improved technology, will severely disrupt seasonal employment in 1999.

Earlier this year, 13 fruit packers in the city of Yakima in central Washington were informed by the INS that between 30 and 70 percent of their employees were illegal and had to be fired. The employers complied, laying off over 700 workers. Even though the employers were able to replace the workers relatively easily because of seasonal high unemployment and the nature of the work (I should note that the workers, because they were employed in warehouses and not on farms, would not be covered by the H-2A program) the enforcement action significantly disrupted the community, the employers, and the displaced workers and their families. This is an experience no one wants repeated. And yet, as the INS continues to do its job, it is bound to be repeated, and with far more dire consequences: If this type of enforcement action was repeated on farms, where locations are more remote and the work is of shorter duration and more demanding, employers would not be able to find legal replacements.

In 1998, some growers, particularly asparagus growers, did not have enough workers to harvest their crops and the crops rotted in the ground. It is likely that they will face a shortage again this year. If the new INS enforcement strategy that was used recently in Yakima fruit packing houses and in some Puget Sound area horticultural businesses is employed in other crops, growers will face shortages during critical work periods in 1999.

Anticipating this, some growers in Washington state have turned in desperation to the existing guestworker program, though the cost and bureaucratic burden of the program is deterring most. I understand that Jim Holt, an economist who has been working on establishing a guestworker program in Washington and Oregon will testify on a later panel, and can provide you a first hand account of the problems they have encountered.

People who work in the orchards and farms in Washington state understand the meaning and value of hard work, and the illegal aliens who do this work are there because they believe in family and endeavor to provide better opportunities for themselves and their children. I respect the work that they do, and their labor provides value to everyone in Washington state and America. As a Senator I want to create a system that allows these workers to come on a seasonal basis and continue to contribute to their families and our farm economy, without undermining our efforts to stop illegal immigration.

Last year the Senate passed a bill reforming the H-2A program, but even this modest measure was opposed by the Administration and died in conference. We cannot let this rest. In Washington State, as in other states, the implications are too

dire. Unless we can ensure a sufficient and stable legal agricultural work workforce, we, as Senators, will continue to be in the untenable position of having to adopt measures to reduce illegal immigration, as we should, but with the knowledge that these measures will destroy our states' and the nations' most vital source of trade. Agricultural employers will continue to be dependent on illegal workers, though the supply appears to be shrinking, and forced to engage as long as possible in the morally and legally suspect practice of remaining as ignorant as the law allows, because not to do so means economic ruin. Workers here illegally will continue to live furtively and be victimized by "coyotes" as they make the dangerous trip across the border, or to endure extended absences from their families because they don't dare attempt to make the crossing more than once.

You will hear again today from some who oppose reforming the guest worker program, who ask why growers don't simply increase wages to secure a sufficient supply of domestic labor. As I asked last year, if growers were willing and able to pay an hourly rate of $20, could they attract able-bodied pickers from urban jobs? Perhaps, though many would be loath to forego more permanent positions for arduous seasonal work. Even if they could attract these workers, however, we cannot overlook the consequences of dramatically higher wages. Consumer prices inevitably would rise. More significantly, however, U.S. crops would become uncompetitive in the world market. Already we are fighting to maintain a foothold and compete against countries with lower production costs, significant subsidy programs, and discriminatory trade practices. We have seen the consequences of uncompetitive wage rates on other industries—the businesses leave the U.S. Agriculture is distinct. It's literally rooted and a farm or orchard cannot move overseas. The production, however, can, and will, if we do not address this most critical issue of agricultural labor.

The family farm is currently experiencing serious economic hardship and a seemingly impenetrable wall of regulation. In Washington state, growers face a myriad of environmental restrictions. They confront unfair trade practices, fear losing the ability to use chemicals they depend on, and are struggling from the crash of the Asian market. They find little recourse from lenders and in many cases face bankruptcy. And as I have explained today, they also face a very real threat of losing their workforce. This is one area in which this Committee can and should help them. I urge you to work with us to reform the guestworker program in a way that is fair to employer and worker alike.

Senator ABRAHAM. Now, the second panel, we will ask you all to come back as the third panel. Thank you again. Mr. Wunsch, I am sure you are happy you got your statement done already.

Mr. WUNSCH. Questions? [Laughter.]

I am your grower here today, apparently the only one.

Senator ABRAHAM. I think that is right. Well, we will give you a chance to comment further on some of the issues we have heard when we finish the other statements.

Mr. WUNSCH. The opportunity is yours, Senator.

Senator ABRAHAM. Right, thank you.

Mr. Holt, we will turn to you.

STATEMENT OF JAMES S. HOLT

Mr. HOLT. Thank you, Mr. Chairman. My name is Jim Holt. I am an agricultural economist and a consultant to the National Council of Agricultural Employers, on whose behalf I am testifying today on the need to reform the H-2A alien agricultural worker program.

As we have heard eloquently here today, the U.S. agricultural industry depends heavily on an alien workforce. Nationwide, more than one-third of the seasonal agricultural workforce, and even more importantly more than 70 percent of the new entrants into that workforce, self-identify—that is the important thing about that percentage—self-identify as not legally entitled to work in the United States. Yet, employers have to employ these workers or risk

penalties. Furthermore, employers don't have another viable source of labor.

Now, as a result of greatly stepped-up INS border and interior enforcement activities and the Social Security Administration's efforts to assure the accuracy of Social Security accounts, agricultural employers and the Nation are having to confront the illegal status of the U.S. agricultural workforce. This circumstance, coupled with the extremely tight domestic labor market, is making it impossible for agricultural employers to secure sufficient legal labor, and in some cases sufficient labor at all.

The H-2A program, the program Congress enacted to deal with precisely this situation, is unworkable and in a state of paralysis. It must be reformed. I would like to emphasize that we are not seeking a new and widely expanded guest worker program, but reform of the existing H-2A program to make it work as Congress intended.

Mr. Chairman, there are no other fixes to this problem. We cannot expect technology and mechanization to bail us out. Improved technology and mechanization have been adopted at a very rapid pace, even as the proportion of illegal workers in our agricultural workforce has grown. Nor can we expect welfare reform or the unemployed to pick up the slack. Most employable welfare recipients are already at work. Unemployment is at historic lows.

The relatively higher unemployment rates reported in some rural communities merely reflects the seasonality of agriculture and agriculturally-related employment. The residual unemployed during the agricultural season either cannot perform farm work or have choices which do not require them to do so. There is not an available workforce of unemployed workers in season.

The current H-2A program is administratively cumbersome and imposes uncompetitive requirements on employers. It must be reformed and brought into the 21st century. The slow, cumbersome paper process must be replaced by modern computer technology along the lines of America's Job Bank and America's Talent Bank. Also, the process must assure that the, "domestic workers" being referred are, in fact, legally entitled to work in the United States, as current law requires.

The terms of employment must be made realistic and competitive. The adverse effect wage rate, which sets an uneconomical wage standard for many jobs, must be replaced with a prevailing wage standard. Flexibility must be provided in the process for providing housing to migrant domestic and alien workers. And, finally, provisions must be added to allow the present agricultural workforce to participate in this program and to provide those who contribute to the American economy and abide by program requirements and wish to become permanent residents the opportunity to do so.

Mr. Chairman, no one can or should defend the status quo. An agricultural industry based on an almost entirely illegal workforce is bad for everybody—employers, domestic and alien farm workers, and the Nation. It is unsustainable. NCAE believes the national interest is best served by effective immigration control and a workable agricultural worker program that enables the United States to realize its full potential for the production of labor-intensive and

other agricultural commodities in a competitive global marketplace, and which supports a high level of employment for domestic workers in the upstream and downstream jobs related to agriculture, while at the same time protecting access to jobs and the wages and working conditions of domestic farm workers and providing legal status, dignity and labor force protections to alien farm workers who work in the United States.

We believe it is important to enact such a program now, but we do not believe that is the end of the job. We also believe there are other important public policy issues related to seasonal agricultural workers. Seasonal work alone is not sufficient to sustain a reasonable standard of living for most persons at any reasonable wage rate. There are problems of housing, medical care and child care for workers who migrate, especially with families, and for persons who engage in intermittent employment or work for many different employers. Many of these problems extend far beyond the workplace.

NCAE stands ready to work with domestic farm workers and immigrant groups, not only to develop a workable alien worker program, but to find a workable solution to the social and economic problems of those engaged in seasonal farm work. During the past several months, NCAE has reached out to workers, immigrants and church groups to explore solutions to these problems, along with our need for a stable legal workforce.

Agricultural employers and worker advocates should put their differences aside and jointly work to solve these problems. This hearing presents an opportunity to do that, and let's hope that we don't walk away from it. The economic and social costs are too high.

Thank you.

Senator ABRAHAM. Mr. Holt, thank you.

[The prepared statement of Mr. Holt follows:]

PREPARED STATEMENT OF DR. JAMES S. HOLT

Mr. Chairman and Members of the Subcommittee: I appreciate the opportunity to testify on behalf of the National Council of Agricultural Employers on public policy issues related to the need to reform the H-2A alien agricultural worker program.

The National Council of Agricultural Employers (NCAE) is a Washington, D.C. based national association representing growers and agricultural organizations on agricultural labor and employment issues. NCAE's membership includes agricultural employers in fifty states who employ approximately 75 percent of the nation's hired farm work force. Its members include growers, farm cooperatives, packers, processors and agricultural associations. NCAE was actively involved in the legislative process that resulted in the enactment of the Immigration Reform and Control Act (IRCA) of 1986. NCAE's representation of agricultural employers gives it the background and experience to provide meaningful comments and insights into issues concerning immigration policy and how it affects the employment practices of its members' businesses and the availability of an adequate agricultural labor supply.

My name is James S. Holt. I am Senior Economist with the management labor law firm of McGuiness & Williams and the Employment Policy Foundation in Washington D.C. I serve as a consultant on labor and immigration matters to the NCAE. I am an agricultural economist, and have spent my entire professional career dealing with labor, human resource and immigration issues, primarily with respect to agriculture. I served 16 years on the agricultural economics faculty of The Pennsylvania State University, and for the past 20 years have been a consultant here in Washington D.C. I also serve as a technical consultant to most of the current users of the H-2A program and to employers and associations who are attempting to access the program.

WHY IS A PROGRAM FOR THE LEGAL EMPLOYMENT OF ALIEN AGRICULTURAL WORKERS NEEDED?

While the United States agricultural industry is overwhelmingly an industry of family farms and small businesses, it is also heavily dependent on hired labor. More than 600,000 farms hire some labor during any given year. Hired labor accounts, on average, for about $1 of every $8 of farm production expenses. In the labor-intensive fruit, vegetable and horticultural sectors hired labor costs average 25 to 35 percent of total production costs, and in some individual commodities, the percentage is much higher.

Even in labor-intensive commodities, however, most of the production processes are mechanized. Typically, the farm family and perhaps a few hired workers do all the farm work most of the year. But large numbers of hired workers are needed for short periods to perform certain very labor-intensive tasks such as harvesting, thinning or pruning. In many crops these labor-intensive tasks, particularly harvesting, must be performed during very brief windows of opportunity, the timing of which can not be predicted with precision and which is beyond growers' control. The availability of sufficient labor at the right time to perform these labor-intensive functions can determine whether the farm produces a saleable product for that growing season.

The United States has some of the best climatic and natural resources in the world for agricultural production, and especially for the production of labor-intensive fruits, vegetables and horticultural crops. In a world economy where all resources, including labor, were mobile and there were no trade barriers so that all countries could specialize in those commodities in which they have a comparative advantage, the North American continent would be, as it in fact is, one of the world's major producers of agricultural commodities, including fruits, vegetables and horticultural specialties.

During the last several decades, markets for labor-intensive commodities have expanded dramatically in the United States and throughout the world. This dramatic expansion has resulted from a number of factors, including technological developments in transportation and storage, increasing incomes both in the United States and worldwide, and changes in consumers tastes and preferences which favor fruits and vegetables in the diet. National markets for labor-intensive commodities, once protected by trade barriers and the perishability of the commodities themselves, have now become global markets, due to technological improvements and the strong drive for freer trade that has occurred over the past two decades.

Although it has been little regarded in policy circles, U.S. farmers have participated fully in the dramatic growth in domestic and world markets for labor-intensive agricultural commodities. U.S. farm receipts from fruit and horticultural specialties have more than doubled, and from vegetables more than tripled, since 1980. Labor-intensive commodities are the fastest growing sector of U.S. agriculture. At the same time, agricultural labor productivity has also continued to improve. Therefore, while production of labor-intensive commodities has expanded dramatically over the past two decades, average hired farm employment has declined by about one quarter. But the expansion of labor-intensive agriculture has created tens of thousands of new non-farm jobs for U.S. workers in the upstream and downstream occupations that support the production and handling of farm products.

Aliens have always been a significant source of agricultural labor in the United States. In particular, labor from Mexico has supported the development of irrigated agriculture in the western states from the inception of the industry. As the U.S. economy has expanded, millions of new job opportunities have been generated. Domestic farmworkers have been freed from the necessity to migrate by the extension of unemployment insurance to agricultural workers in 1976. And, as the federal government has spent billions of dollars to settle domestic migratory farmworkers out of the migrant stream and train them for permanent jobs in their home communities, domestic farmworkers have moved out of the hired agricultural work force, especially the migrant work force. Alien workers, largely from Mexico, Central America and the Caribbean have replaced these domestic workers.

Consequently, the U.S. agricultural work force has become increasingly alien and increasingly undocumented. The U.S. Department of Labor's National Agricultural Worker Survey (NAWS) in 1997 reported that 36 percent of seasonal agricultural workers working in the United States self-identified as not authorized to work in the United States. This was an increase from only about 12 percent a decade earlier. More than 70 percent of the new seasonal agricultural labor force entrants in the 1997 NAWS report self identified as not authorized to work. We expect that the 1998 survey, due out shortly, will show significant increases in these percentages.

Throughout this period there has also been a legal alien agricultural worker admission program. This program was enacted as the H-2 program in the Immigration and Nationality Act of 1952. In 1956 Congress attempted to streamline the program and redesignated it H-2A. In recent years use of the H-2A program has declined to a low of approximately 15,000 workers annually, although in the past two years the number of admissions has increased substantially and will probably exceed 30,000 workers this year.

The H-2A program has been used principally on the East Coast in fruit, vegetables, tobacco and, until recently, sugar cane. The program's structure and requirements evolved from government-to-government treaty programs that preceded it. Over the years the program has become encrusted with regulations promulgated by the Department of Labor and adverse legal decisions generated by opponents of the program which have rendered it unworkable and uneconomic for many agricultural employers who face labor shortages. Now that government policy is eliminating the illegal alien work force, many growers are caught between an unworkable and uneconomical H-2A program and the prospect of insufficient labor to operate their businesses.

The illegal alien seasonal agricultural work force in the United States consists of two groups. Some are aliens who have permanently immigrated to the United States and have found employment in agriculture. Typically, these permanent immigrant illegal aliens move into non-agricultural industries after they become settled in the United States. The other component of the illegal alien seasonal agricultural work force is non-immigrant migrant farmworkers who have homes and families in Mexico. Many of them are small peasant farmers. The adult workers from these families, usually males, migrate seasonally to the United States during the summer months to do agricultural work. Anecdotal evidence suggests that until recently the number of such migrant illegal alien farmworkers working was substantial. Now, as a result of increasingly effective immigration control policies, some of these migrants are finding it necessary to remain in the United States during the off season for fear that they will not be able to get back in or because of the high cost of doing so, while many others are finding it impractical to continue their annual migration and are remaining in Mexico.

Congressional efforts to control illegal immigration began with the landmark Immigration Control and Reform Act (IRCA) of 1986. The theory of IRCA was to discourage illegal immigration by requiring employers to see documents evidencing a legal right to work in the United States, and thereby removing the "economic magnet" to illegal immigration. It did not work for at least three reasons. One was that one of the motives for illegal immigration to the U.S. was not simply to better one's welfare, but to survive, literally and figuratively. This survival drive overwhelmed any fear of apprehension and deportation. The second was that Congressional concern about invasion of privacy and 'big brotherism' resulted in an employment documentation process that was so compromised that it was easily evaded by document counterfeiting. The third was that a serious effort to enforce IRCA, including the provisions against document counterfeiting, was never mounted. The result was that IRCA had little impact on the volume of illegal immigration, and a perverse impact on the hiring process. Whereas previously an employer who suspected a prospective worker was illegal may have been willing to risk refusing to hire that worker, with the discrimination provision of IRCA an employer ran great risks in refusing to hire any worker who had genuine appearing documents, even if the employer suspected the worker was illegal.

With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, Congress recognized the failure of IRCA. In IIRlRA Congress decided to test the conventional wisdom that it was impossible to control illegal immigration at the border by vastly augmenting the resources and personnel of the Immigration and Naturalization Service (INS) for border enforcement. The resources for interior enforcement of employer sanctions provisions were also augmented. The result has clearly been to make the process of illegal border crossing more expensive and dangerous. The anecdotal evidence from farm labor contractors and agricultural employers across the United States is that many prospective border crossers, especially migrant farmworkers and prospective migrant farmworkers, have been unable to cross the border or have made the calculation that the cost of doing so is too high based on their prospective earnings in the U.S. We have received reports from all regions of the United States of reduced numbers of workers and short crews, and this has been one of the major factors leading to the labor shortages that were observed in the 1997 season and to an even greater degree in the 1998 season. As INS continues to ramp up its border enforcement personnel, these shortages appear to be becoming more and more severe, and we expect significant shortages and crop losses in some crops and some regions in the 1999 season.

Increased border enforcement has also had a perverse effect. It apparently has induced some alien farmworkers, who in the past crossed the border illegally on a seasonal basis to work in the United States during the agricultural season, to remain in the United States during the off season for fear that they would not be able to get back in the next year. Some of these workers eventually try to smuggle their families in to join them. Many of these workers would prefer to maintain their homes and families in Mexico and work seasonally in the United States, but current immigration policies make this an unattractive option.

IIRIRA also set in motion the testing of a process, which many believe, is the only way to effectively control the employment of illegal aliens. IIRIRA established a program of pilot projects for verification of the authenticity of employment authorization documents at the time of hire. These projects are about midway through a four-year pilot phase. Presumably, at the end of that time Congress will revisit the question of requiring mandatory document verification at the time of hire. If and when this happens, there will be a real crisis in agriculture, given the fact that upwards of 60 to 70 percent of the industry's seasonal work force apparently has fraudulent documents.

In addition to the increasing effectiveness of border enforcement activities, additional INS resources for enforcement of employer sanctions are increasing the frequency of audits of I-9 forms. The I-9 form is the document completed by an employer and employee at the time of hire on which the employer records the employment verification documents the employee offers to verify the legal right to work in the United States. Employers are required to accept the documents offered by the worker if they reasonably appear on their face to be genuine, a test which virtually all documents meet. However, when INS does an audit of the employer's I-9 forms, the INS checks the authenticity of the employment authorization documents against government data bases, something it is precluded by case law and INS policy from doing at the request of an employer. At the conclusion of the audit, the employer receives a list from the INS of the workers whose documents have been determined to be invalid. Frequently, INS audits of agricultural employers reveal that 60 to 70 percent of seasonal agricultural workers have provided fraudulent documents. The employer is then required to dismiss each employee on the list who cannot provide a valid employment authorization document, something few workers can do.

Independent of the effort to improve immigration control, other forces are also affecting the agricultural work place. The Social Security Administration (SSA) is under a congressional mandate to reduce the amount of wage reporting to non-existent social security accounts. Through its Enumeration Verification System (EVS), the Social Security Administration is now checking employers' tax filing electronically within a matter of days or weeks after they are filed to match names and social security numbers reported by employers with those in the SSA data base. Employers receive lists of mismatches with instructions to "correct the mistakes in reporting". Of course, in most cases the mismatch is not a result of a mistake in reporting, but a fraudulent number. When the employer engages the employee to "correct the mistake," the employee disappears.

It is not uncommon for employers to receive lists of mismatches from the SSA containing 50 percent or more of the names, which the employer reported to the SSA. Confronting the employees on these lists can have devastating effects on an employer's work force. On the other hand, employers are concerned about their future liability under the employer sanctions provisions if they do not act on the SSA lists. The existence of lists from the SSA that the employer had allegedly not acted upon was cited in a recent INS prosecution of an agricultural employer for knowingly employing illegal aliens.

While the incidence of INS I-9 audits is still relatively low, very large numbers of agricultural employers are receiving lists of mismatched numbers from the SSA. Thus, many agricultural employers have to confront for the first time the reality of the legal status of their work force. Both the I-9 audits and the SSA verification program are having a churning effect on the agricultural work force. Farmworkers with fraudulent documents are rarely picked up and removed. Instead, the employer is required to dismiss them. In effect, they are being chased from farmer to farmer as their employers receive SSA reports or are audited by the INS.

Increased border enforcement, increased interior enforcement and increased SSA verification activity have led to reductions in labor availability and destabilization of the agricultural work force. These trends will continue. The increase in border enforcement personnel authorized by IIRIRA will not be complete until fiscal year 2002. The SSA plans to continue lowering its threshold for rejection of employer tax returns due to name/number mismatches. These factors, coupled with the extraordinarily high levels of non-agricultural employment, have resulted in increasing fre-

quencies of farm labor shortages and crop losses. The problem is rapidly reaching crisis proportions, and could easily do so in the 1999 growing season.

Some opponents of an alien agricultural worker program argue that a program is not needed because employer sanctions cannot be effectively enforced no matter what the government tries to do. The implication of this argument is that employers should endure the uncertainties and potential economic catastrophe of losing a work force, and workers should continue to endure the uncertainties of being chased from job to job on a moment's notice. We find such reasoning unacceptable. It is arguments for the status quo, which all agree is unacceptable. Furthermore, it is unacceptable to refuse to address one public policy problem because another accepted and enacted public policy will be ineffective. We must honestly face the issues with which our policy of immigration control and employer sanctions confronts us. We believe that calls for a workable alien agricultural worker program.

ARE THERE VIABLE ALTERNATIVES TO AN ALIEN AGRICULTURAL WORKER PROGRAM?

Opponents of the employment of an alien agricultural worker program suggest there are ways to address the problem that would result in the removal of the illegal alien agricultural work force other than the legal admission of alien agricultural workers.

One approach that is suggested is that agricultural employers should be "left to compete in the labor market just like other employers have to." Under this scenario, there would be no alien guestworkers. To secure legal workers and remain in business, agricultural employers would attract sufficient workers away from competing non-agricultural employers by raising wages and benefits. Those who could not afford to compete would go out of business or move their production outside the United States. Meanwhile, according to this scenario, those domestic persons remaining in farm work would enjoy higher wages and improved working conditions.

There are several observations one must make about this "solution".

No informed person seriously contends that wages, benefits and working conditions in seasonal agricultural jobs can be raised sufficiently to attract workers away from their permanent, non-agricultural jobs in the numbers needed to replace the illegal alien agricultural work force and maintain the economic competitiveness of U.S. producers. Thus, this scenario predicates that U.S. agricultural production would decline. In fact, given that the U.S. hired agricultural work force is, by most estimates, about 70 percent illegal, it would decline dramatically.

Seasonal farm jobs have attributes that make them inherently non-competitive with non-farm work. First and foremost is that they are seasonal. Many workers who could do seasonal farm work accepted less than the average field and livestock worker earnings of $6.98 per hour in 1998 because they preferred the stability of a permanent job. Secondly, many seasonal farm jobs are located in rural areas away from centers of population. Furthermore, to extend the period of employment, workers must work at several such jobs in different areas. That is, they must become migrants. It is highly unlikely that many U.S. workers would be willing to become migrant farmworkers at any wage, or that, as a matter of public policy, we would want to encourage them to do so. In fact, the U.S. government has spent billions of dollars over the past several decades attempting to settle domestic workers out of the migratory stream. The success of these efforts is one of the factors that have led to the expansion in illegal alien employment. In addition to seasonality and migrancy, most farm jobs are subject to the viscissitudes of weather, both hot and cold, and require physical strength and stamina. Thus, it is highly unlikely that a significant domestic worker response would result even from substantial increases in wages and benefits for seasonal farm work.

However, substantial increases in current U.S. farmworker wages and benefits can not occur for economic reasons. U.S. growers are in competition in the markets for most agricultural commodities, including most labor-intensive commodities, with actual and potential growers around the globe. Since hired labor constitutes approximately 35 percent of total production costs of labor-intensive agricultural commodities, and 1 in 8 dollars of production costs for agricultural commodities generally, substantial increases in wage and/or benefit costs will have a substantial impact on growers' over-all production costs. U.S. growers are in an economically competitive equilibrium with foreign producers at approximately current production costs. Growers with substantially higher costs can not compete. If U.S. producers' production costs are forced up by, for example, restricting the supply of labor, U.S. production will become uncompetitive in world markets (including domestic markets in which foreign producers compete). U.S. producers will begin to be forced out of business. In fact, U.S. producers will continue to be forced out of business until the competition for domestic farmworkers has diminished to the point where the remaining U.S.

producers' production costs are approximately at current global equilibrium levels. The end result of this process will be that domestic farmworker wages and working conditions (and the production costs of surviving producers) are at approximately current levels and the volume of domestic production has declined sufficiently that there is no longer upward pressure on domestic worker wages.

These same global economic forces, of course, affect all businesses. But non-agricultural employers have some options for responding to domestic labor shortages that agricultural employers do not have. Many non-agricultural employers can "foreign-source" the labor-intensive components of their product or service without losing the good jobs. Since agricultural production is tied to the land, the labor-intensive functions of the agricultural production process cannot be foreign-sourced. We cannot, for example, send the harvesting process or the thinning process overseas. Either the entire product is grown, harvested, transported and in many cases initially processed in the United States, or all these functions are done somewhere else, although only one or two steps in the production process may be highly labor-intensive. When the product is grown, harvested, transported and processed somewhere else, *all* the jobs associated with these functions are exported, not just the seasonal field jobs. These are the so-called "upstream" and "downstream" jobs that support, and are created by, the growing of agricultural products. U.S. Department of Agriculture studies indicate that there are about 3.1 such upstream and downstream jobs for every on-farm job. Most of these upstream and downstream jobs are "good" jobs, i.e. permanent, average or better paying jobs held by citizens and permanent residents. Thus, we would be exporting about three times as many jobs of U.S. citizens and permanent residents as we would farm jobs if we shut off access to alien agricultural workers.

Another suggestion has been that recruitment of welfare recipients and the unemployed could replace the illegal aliens. Growers themselves, most notably the Nisei Farmers League in the San Joaquin Valley have tried to augment their labor supply by recruiting welfare recipients. While these efforts have resulted in some former welfare recipients moving into jobs on farms, the magnitude of this movement has been insignificant. In fact, welfare directors suggest that the long term impact of welfare reform is likely to exacerbate rather than reduce the shortage of domestic farm labor. Some seasonal farmworkers currently depend on the combination of farm work in-season and welfare assistance during the off-season. As limitations are set on persons' lifetime welfare entitlement, this pattern will no longer be viable. Seasonal farmworkers who supplement their earnings with welfare will be forced into permanent non-agricultural jobs. Other attributes of seasonal farm work are also deterrents. The preponderance of those now remaining on the welfare rolls are single mothers with young children. Many are not physically capable of doing farm work, do not have transportation into the rural areas and are occupied with the care of young children.

The unemployed also make, at best, a marginal contribution to the hired farm work force. Currently, the U.S. is enjoying historically low levels of unemployment and many labor markets are essentially at or above full employment. However, relatively high unemployment rates in some rural agricultural counties are often cited as evidence of an available labor supply or even of a farmworker surplus. First it should be noted that labor markets with a heavy presence of seasonal agriculture will always have higher unemployment rates than labor markets with a higher proportion of year round employment. By the very nature of the fact that farm work is seasonal, many seasonal farmworkers spend a portion of the year unemployed. Second, unemployed workers tend to share the same values as employed workers. They prefer permanent employment that is not physically demanding and takes place in an inside environment. They share an aversion to migrancy, and often have transportation and other limitations that restrict their access to jobs. The coexistence of unemployed workers and employers with labor shortages in the same labor markets means only that we have a system that enables workers to exercise choices.

Many welfare recipients and unemployed workers can not or will not do agricultural work. It is reasonable to expect an alien worker program to have a credible mechanism to assure that domestic workers who are willing and able to do farm work have first access to agricultural jobs, and that aliens do not displace U.S. workers. It is not reasonable to expect or insist that welfare and unemployment rolls fall to zero as a condition for the admission of alien workers.

A third alternative to alien workers often suggested is to replace labor with technology, including mechanization. This argument holds that if agricultural employers were denied access to alien labor they would have an incentive to develop mechanization to replace the alien labor. Alternatively, it is argued that the availability of alien labor retards mechanization and growth in worker productivity.

The argument that availability of alien labor creates a disincentive for mechanization is belied by the history of the past two decades. From 1980 to the present, the output of labor-intensive agricultural commodities has risen dramatically while hired agricultural employment has declined. The only way this could have happened is because of significant agricultural labor productivity increases. Yet, this was also the period of perhaps the greatest influx of illegal alien farmworkers in our history.

It does not appear that there has been a great deal of increase in agricultural mechanization in fruit and vegetable farming since a spasm of innovation and development in the 1960's and 1970's. Indeed, some of the mechanization developed during that period, specifically mechanical apple harvesters, has proven to be uneconomical in the long term because of tree damage as well as fruit damage. Agricultural engineers claim the reason for this is the withdrawal of support for agricultural mechanization research by the U.S. Department of Agriculture following protests and litigation by farmworkers in California that such research was taking away their jobs.

But productivity increases can result from many different factors, of which mechanization is only one. Smaller fruit trees, which require less ladder climbing, trellised trees, and changes in the way trees or vines are pruned are also technological developments which improve labor productivity. The switch from boxes and small containers to bulk bins and pallets in the field has significantly improved labor productivity of some harvesting activities. Use of production techniques and crop varieties that increase yields also improves field labor productivity by making harvesting and other operations more efficient. These appear to be the techniques that farmers have used to achieve the large productivity increases obtained in the 1980's and 1990's. The fact that there appears to have been a slowing in the pace of mechanization itself does not mean that growth in worker productivity has slowed.

The argument that alien employment retards productivity increases is also belied by logic. The incentive for the adoption of mechanization or any other productivity increasing innovation is to reduce unit production costs. If the innovation results in a net saving in production costs, it will be adopted. It doesn't matter whether the dollar saved is a dollar of domestic worker wages or a dollar of alien worker wages. On the other hand, if the innovation results in a net increase in production costs, it will not be adopted. The only way one can argue that a reduction in alien labor will increase the incentive to mechanize is to argue that the reduction in alien labor will first increase production costs. But if, as is argued elsewhere in this testimony, shifting domestic market share to foreign producers' offsets the tendency for domestic producers' costs to rise in response to a withdrawal of labor, the incentive for additional domestic mechanization will never occur. In a global market, the profitability of mechanization, just like the profitability of everything else, is determined by global production costs, not by domestic production costs.

A fourth alternative to the importation of alien farmworkers, which has been suggested, is the unionization of the farm work force. The implication of this scenario is that unionization would augment the supply of legal seasonal farmworkers and make alien farmworkers unnecessary. Alternatively, it is argued that an alien agricultural worker program will make it more difficult for domestic farmworkers to unionize and improve their economic welfare.

First, it should be noted that use of the H-2A program as a strike-breaking tool is expressly prohibited. H-2A workers may not be employed in any job opportunity that is vacant because the former occupant of the job is on strike or involved in a labor dispute. Secondly, there is no impediment to an H-2A worker becoming a union member. Indeed, the H-2A program has been used for decades in unionized citrus operations in Arizona. Recently, a farmworker union supported a grower's H-2A application as a means of providing legal status for its own members. If an employer seeking labor certification has a collective bargaining agreement and a union shop, the H-2A aliens, like all other employees, can be required to pay union dues and may become union members.

But there is no reason to believe that unionization will result in an increase in the availability of legal labor, nor, indeed, any reason to believe that the membership of farmworker unions is more legal than the rest of the agricultural work force. Farmworker unions and farm employers are fishing out of the same labor force pool. The argument that increased farmworker unionization will increase the supply of legal labor is based on the supposition that farmworker unions will be successful in negotiating higher wages and more attractive working conditions than in nonunion settings, and that this will attract more domestic legal labor. Yet wages and working conditions in union and nonunion settings are not (and in competitive global markets cannot be) significantly different. Furthermore, the same reasons described above why higher wages and benefits for seasonal agricultural work, even if they were economically feasible, would not attract significantly more legal workers

into seasonal agricultural work, are as applicable in a union setting as in a non-union setting.

The reality is that an alien agricultural worker program is probably union-neutral. Existence of such a program will probably not make it significantly more difficult or easier to organize farmworkers.

WHY DOES THE H-2A PROGRAM NEED TO BE REFORMED?

There are two broad reasons why the H-2A program needs to be reformed.

First, the program is administratively cumbersome and costly. Even at its present level of admission, fewer than 30,000 workers annually, the program is nearly paralyzed. Secondly, the program sets minimum wage and benefit standards for which many employers cannot qualify or cannot afford. Therefore, the program's "worker protections" are cosmetic. They "protect" only about 30,000 job opportunities in an agricultural work force estimated at more than 2 million. The vast majority of agricultural workers, legal and illegal, get little or no benefit from the H-2A "protections."

The first reason why the current H-2A program must be reformed is that it is administratively cumbersome and costly. The regulations governing the program cover 33 pages of the Code of Federal Regulations. ETA Handbook No. 398, the compendium of guidance on program operation, is more than 300 pages. Employers must apply for workers a minimum of 60 days in advance of the date workers are needed. Applications, which often run more than a dozen pages, are wordsmithed by employers, by the Labor Department and by legal services attorneys. Endless discussions and arguments occur over sentences, phrases and words. After all this fine tuning, workers see an abbreviated summary of the order if they see anything at all. In hearings in Oregon this spring workers often testified that they were referred to H-2A jobs without even being told the wage rate that was offered.

Each employer applicant goes through a prescribed recruitment and advertising procedure, regardless of whether the same process has been undertaken for the same occupation by another employer only days earlier. The required advertising is strictly controlled by the regulations and looks more like a legal notice than a help wanted ad. Increasingly, the Labor Department is requiring that advertising be placed in major metropolitan dailies, rather than the local newspapers that farm job seekers are most likely to read, if they look for farm work in help wanted ads at all. The advertisements rarely result in responses, yet they are repeated over and over again, year in and year out.

Certifications are required by law to be issued not less than 20 days before the date of need, but the GAO reported in 1997 that they were issued late more than 40 percent of the time.

Even after all this, the employer has no assurance that the "domestic" workers referred to it are, in fact, legal. Most state job services refuse even to request employment verification documents, much less verify that they are valid. It is the experience of H-2A employers that a substantial and increasing proportion of the "domestic" workers referred, and on the basis of which certification to employ legal alien workers is denied, are in fact illegal aliens themselves. State employment service officials have even been known to suggest to H-2A growers that they should go back to employing illegal aliens and save themselves and the employment service all the hassle.

Finally, a high proportion of the workers referred to H-2A employers and on the basis of which the employer is denied labor certification for a job opportunity, either fail to report for work or quit within a few hours or days. This then forces the employer to file with the Labor Department for a "redetermination of need". Even though redeterminations are usually processed within a few days, the petition and admission process after redetermination means that aliens will, at best, arrive about two weeks late.

The second reason why reform is needed is that the current H-2A program requires wage and benefit standards that are unreasonably rigid or not economically feasible in many agricultural jobs, and effectively exclude those jobs from participating in the H-2A program.

The so-called AEWR is one such standard. The AEWR is a minimum wage set on a state-by-state basis by regulation, and is applicable to workers employed in job opportunities for which an employer has received a labor certification. The AEWR standard is unique to the H-2A program and does not exist in any other immigration or labor certification program. It was established to create a minimum wage standard in jobs where foreign workers were employed, because the federal minimum wage law did not cover agriculture at that time. AEWR's were initially set at the level of the then non-agricultural federal minimum wage. Over time, AEWR's

were adjusted by a variety of methodologies. Since 1987, each state's AEWR is set at the average hourly earnings of field and livestock workers for the previous year in the state or a small region of contiguous states. For the 1999 season, AEWR's range from $6.21 per hour in Arkansas, Louisiana and Mississippi to $7.53 per hour in Indiana, Illinois and Ohio. The average AEWR is $6.98 per hour.

The AEWR sets a minimum wage standard that makes it uneconomical to use the H-2A program in many agricultural occupations. The AEWR standard, in effect, makes the average wage in one year the minimum wage in the ensuing year. Since the AEWR is set at the average of the wages for *all* agricultural workers in the state, it will be above the actual wages paid for about half of the agricultural employment in the state, and below the actual wage for about half of all agricultural employment in the state. Obviously, this standard will not be a deterrent in using the H-2A program in occupations in which the actual wage is above the average wage for all agricultural occupations. But it can be an uncompetitive and unrealistic standard for an occupation in which the actual wage is below the average of all agricultural wages in the state. Since, by definition, half of all employment will always have an actual wage below the average wage, this standard will always set an uncompetitive wage for some occupations, no matter how much agricultural wages rise.

Another example of an unreasonably rigid standard is the requirement to provide housing. The current H-2A program requires an employer to have housing for all the job opportunities for which an employer applies for labor certification except those job opportunities from which local workers will commute daily from their permanent residences, and to provide that housing at no charge to the workers. Agricultural employers are only required to provide housing to workers if they participate in the H-2A program or use the Department of Labor's interstate clearance system to recruit workers. Only a tiny fraction of U.S. agricultural employers do either.

The U.S. Department of Agriculture stopped reporting the percentage of hired agricultural employment that included employer-provided housing after 1995. But up to that time only about 15 percent of agricultural employment included employer-provided housing, either free or at a charge. Given that this percentage had remained relatively unchanged for many years, it probably reflects current practice reasonably accurately. Since many employers who provide housing do so only for year-round employees such as foremen and supervisors, it is likely that the proportion of seasonal workers provided housing is even lower. In other words, the vast majority of seasonal agricultural workers currently arrange their own housing. Employer-provided housing tends to be provided to seasonal workers only in those areas dependent on migrant workers that are so remote that community-based housing is unavailable.

The requirement for employer-provided housing is one of the greatest current obstacles to expanded use of the legal alien agricultural worker program. Providing housing is extremely expensive, and there are many other community obstacles to overcome as well. In areas where the housing stock is already adequate to accommodate the seasonal agricultural work force, agricultural employers are understandably reluctant to invest large sums to construct employer-provided housing. Even where the housing stock is not currently adequate, employers are reluctant to invest in housing unless there is assurance of a workable program for securing labor to live in the housing.

There certainly can be no disputing the proposition that there must be adequate housing for both domestic and alien seasonal agricultural workers. The policy question then is under what conditions this housing should be employer-provided, and in those circumstances how we get from where we are now to a situation where there is adequate employer-provided housing.

WHAT REFORMS ARE NEEDED?

The H-2A program must be reformed by modernizing and streamlining the administrative processes, especially the procedures for domestic worker recruitment and the labor market test, and eliminating those administrative requirements that add cost or inflexibility to the program without providing any corresponding benefits to domestic farmworkers.

Rather than the cumbersome and antiquated paper process of the interstate clearance system, and the expensive and unproductive advertising that are now used to disseminate information about available jobs and to recruit domestic workers, NCAE has suggested bringing this process into the 21st century. We have suggested a computerized farmworker registry system modeled after the Labor Department's America's Job Bank and America's Talent Bank systems. Domestic workers who were interested in seasonal farm work would list themselves and their interests and experience with the registry. They would indicate whether they were only interested

in working locally or whether they were also willing to consider work in other areas and/or, if they choose, specify specific areas. Growers who wanted to participate in the H-2A program would be required to list their jobs with the registry. Job offers listed with the registry would be examined to assure they included the required terms and conditions of employment, just as paper job orders are now scrutinized. If a job met the program requirements, the registry would be searched to identify qualified workers who might be interested in filling the job. Qualified workers would be provided with the information about the job and asked if they were interested in taking the job. Information about qualified domestic workers who had accepted the job would be provided to the employer. To the extent that sufficient qualified workers could not be located who were willing to accept the jobs, the employer would receive a "shortage report" authorizing the employment of sufficient aliens to fill the unmet need. Upon receipt of the shortage report the employer would be authorized to import sufficient aliens to fill the employer's need or to employ H-2A aliens already in the United States who were available for new assignments. In short, this process would work exactly as the current job service recruitment system now works in filling H-2A jobs, except that it would utilize 21st century technology rather than early 20th century technology.

Employers who used the registry and the Labor Department would be required to widely advertise the existence of the registry to potential farmworkers. To assure that workers who were referred through the registry were, in fact, legal workers, the registry would check the validity of work authorization documents through the INS and the Social Security Administration, before listing the worker on the registry. This check would not obligate the worker to do anything more than show valid work authorization documents, just as the law currently requires. The registry would also presumably be able to assist workers whose documents did not pass the validation check, but who were, in fact, authorized to work, to correct the problem with their documents.

Secondly, the program must be reformed to establish realistic wage and benefit standards that will assure the economic viability of the jobs as well as provide benefits to the workers. This essential balance must be struck. To claim that wage and benefit standards "protect" domestic workers when jobs at those wage and benefit levels do not exist and are not economically competitive, is deceptive and ultimately harmful to farmworkers.

The AEWR must be replaced with a wage standard that is related to the competitive market wage in the occupation. NCAE has suggested that the prevailing wage in the occupation and area of employment be set as the minimum wage for employers to qualify for legal alien agricultural labor. In the H-2A program, the prevailing wage is defined as the 51st percentile of wages of workers in the occupation and area of employment. This standard assures that employers who pay substandard wages are not permitted to employ aliens, but sets a standard that is viable in a competitive market. (Employers would still, of course, be subject to the federal, state or local minimum wage, if higher.)

The prevailing wage in the occupation and area of employment has widespread application and acceptance in other wage regulation programs. For example, it is the minimum wage for federal contractors under the Davis-Bacon and Service Contract Acts. It is difficult to understand how the prevailing wage standard could be good public policy in one setting and bad public policy in another.

A second reform that is needed is to provide flexibility in the provision of housing. Flexibility is needed both to enable employers to initially get into the program in order to provide legal status for their current illegal work force, and to accommodate circumstances where there is adequate housing in the community to accommodate the seasonal farm work force.

As noted above, only about 15 percent of agricultural employment currently includes employer-provided housing, and the percentage is probably lower for seasonal agricultural workers. For employers without housing, a transition period is needed to enable employers to meet housing requirements. If agricultural employers have a workable, functioning program for the legal employment of alien workers, they (and their lenders) will have the confidence to invest in additional housing. Such a transition period does not mean lessening farmworker benefits. Most farmworkers are not now provided housing, and any mechanism that increases the housing stock will benefit farmworkers.

In addition to a transition period, some assistance in financing farmworker housing will be needed. The U.S. Department of Agriculture's Farmers Home Administration (FmHA) has a program of low interest loans to assist farmers and community organizations to provide in-season migrant housing. However, the regulations governing the program preclude housing aliens in the housing and set unrealistically restrictive standards for employer borrowers. The FmHA rules for migrant

housing programs needs to be reformed, or some other mechanism for assisting in the funding of in-season migrant housing for domestic and alien farmworkers must be found.

Employers also face daunting community opposition when trying to construct migrant farmworker housing. Even employers who were willing and able to finance the housing have been prevented from constructing it by community opposition. While there is widespread agreement that there should be adequate housing for migrant workers, the not-in-my-backyard response quickly arises when actual projects are proposed. This opposition can take the form of restrictive zoning, unrealistic construction standards, or outright opposition to the presence of migrant farmworkers. Some mechanism is needed to assist farmers who want to construct migrant housing that meets federal migrant labor camp standards on their own property to preempt local restrictions.

Finally, flexibility should exist in the way housing is required to be provided. The vast majority of seasonal farmworkers are currently living off the farm. Some agricultural communities have adequate housing for seasonal farmworkers, and experience shows that many farmworkers prefer not to live on the farms. Some communities do not have adequate housing for seasonal farmworkers, and in those communities the housing stock must be increased. However, the current requirement that the employer maintain a housing unit for every migrant worker, whether or not the worker chooses to live in it, leads to the absurd situation where employers must maintain vacant housing merely to meet the standard to qualify for H-2A certification, while the workers live elsewhere. NCAE has proposed that in communities where the housing stock is adequate to accommodate the seasonal agricultural work force, that employers be allowed the option of providing a monetary housing allowance in lieu of employer-provided housing. This has been portrayed as reducing farmworker benefits. In fact, workers are now living in this housing without the benefit of housing allowances. Clearly, the provision of housing or a housing allowance will increase farmworker benefits.

A third reform that is needed is to amend the IIRIRA to assure that the current agricultural work force can obtain legal status under the program. NCAE would propose going even further and permitting aliens who have made a commitment to working in the United States and complying with the law, and who want to apply for permanent residency, to have a realistic opportunity to become permanent residents.

Under the current provisions of the IIRIRA, persons who have accumulated 365 days or more in illegal status in the United States after April 1998 are debarred from immigration benefits for a period of 10 years. Admission to the United States as an alien worker is one such immigration benefit. Thus, this provision would debar most aliens who are currently in the U.S. agricultural work force from participating in the H-2A program, reformed or otherwise. Employers who choose to use the program would have to recruit a whole new work force of persons who were not affected by the bar—persons who had not previously worked in the United States. This makes no sense whatsoever, and would cause chaos in the agricultural industry as well as in the immigrant community. Clearly, the logical solution is to provide a waiver of the IIRIRA bar to aliens who wish to continue working as legal seasonal agricultural workers.

NCAE also feels that aliens who participate in the U.S. seasonal agricultural work force, contribute to the U.S. economy, and abide by U.S. law, including the requirements of the H-2A program while they are H-2A workers, should have a realistic opportunity to move up into permanent agricultural work and greater responsibilities and earnings, or to move up and out of the agricultural work force if they so desire. For many participants in the seasonal agricultural work force, seasonal agricultural work is an entry-level occupation. They ultimately aspire to better jobs in or out of agriculture. We believe it is unjust to accept the work and dedication of alien farmworkers as seasonal agricultural workers, but deny them the reasonable aspirations that accompany dedication to this work. On the other hand, it is our belief, based on the close association of our members with their farmworkers, that many persons who do farm work for a period in the United States do not want to live here permanently, bring their families here, or become permanent residents. They want to maintain their homes and families in their native land. They look at employment in the United States as a way of sustaining their families or launching a better life in their native country. We believe that so long as the individuals are contributing, law-abiding members of our community, both options should be open to them.

WHAT WILL BE THE IMPACT OF A REFORMED H-2A PROGRAM ON FARMWORKERS?

For domestic farmworkers, the reformed program will assure them first access to all agricultural jobs before they are filled by legal alien labor. It will assure that this access is real, by assuring that there is widespread and easy assess to information about the available jobs. It will protect the wages in jobs approved for the employment of aliens by making the prevailing wage the minimum wage—in effect a Davis-Bacon Act for farmworkers. It will assure housing or housing allowance and transportation benefits to migrant farmworkers who have no such assurance at present. In short, it will raise the standards for domestic farmworkers in all H-2A-approved occupations.

It will also provide all of the above benefits for currently illegal alien farmworkers, the majority of the seasonal agricultural work force. In addition, it will free them from the fear, indignity and economic costs of apprehension and removal, or of being thrown out of work on a moment's notice. It will also free them from dependence on "coyotes" and the costs and physical dangers of illegal entry.

For domestic workers in the upstream and downstream jobs that are created and sustained by U.S. agricultural production, it will assure the continuation and growth in these employment opportunities.

For agricultural employers, it will assure them an adequate, legal work force if they are willing and able to meet the requirements of the program. It will give employers the certainty that will enable them to plan their businesses and make investments more effectively.

WHY IS A WORKABLE ALIEN AGRICULTURAL WORKER PROGRAM GOOD PUBLIC POLICY?

In the absence of effective control of illegal immigration and enforcement of employer sanctions, the status quo will continue—illegal alien migration, little use of the legal alien worker program, fewer protections for domestic and alien farmworkers, crop losses due to shortages of workers, and vulnerability to random INS enforcement action for employers. This will be true whether or not the legal guestworker program is reformed, because without effective immigration control and document verification, agricultural employers as well as all other employers will continue to be confronted by a work force with valid appearing documents and no practical way to know who is legal and who is not. No one can defend or advocate for continuation of the status quo. The current system of illegal immigration and an agricultural industry dependent on a fraudulently documented work force is bad for employers, workers and the nation.

If the nation achieves reasonably effective control of illegal immigration and enforcement of employer sanctions—which is the objective of current public policy—then agricultural production in the United States, particularly of the labor-intensive fruit, vegetables and horticultural commodities, will be radically reduced. This scenario will result with attendant displacement of domestic workers in upstream and downstream jobs, unless a workable agricultural guestworker program exists.

In conducting the public policy debate on creation of a workable alien agricultural worker program, it is important to be realistic about what the public policy options are and are not. The public policy options are not between greater and lesser economic benefits for domestic farmworkers. The level of wages and benefits that U.S. agriculture can sustain for all farmworkers, domestic and alien, are largely determined in the global market place. The public policy options we face are between a larger domestic agricultural industry employing domestic and legal alien farmworkers and providing greater employment opportunities for domestic off-farmworkers, and a significantly smaller domestic agricultural industry and drastically fewer employment opportunities for domestic off-farmworkers with a wholly domestic farm work force. In either case, the level of economic returns to farmworkers will be approximately the same, namely those economic returns that are sustainable in the competitive global marketplace.

The National Council of Agricultural Employers believes the national interest is best served by effective immigration control and a workable alien agricultural worker program that enables the United States to realize its full potential for the production of labor-intensive and other agricultural commodities in a competitive global marketplace, and which supports a high level of employment for domestic workers in upstream and downstream jobs while assuring reasonable protections for domestic and alien farmworkers. The Council believes an alien agricultural worker program that is workable and competitive for employers and that protects access to jobs and the wages and working conditions of domestic farmworkers, and that provides legal status, dignity and protections to alien farmworkers working in the United States, is important to accomplish *now*. We, however, do not believe it is the end of the job.

We also believe that there are other important public policy issues related to seasonal agricultural workers. Many individuals and families that perform seasonal agricultural work face serious economic and social problems that should be addressed. Seasonal farm work alone is not sufficient to sustain a reasonable standard of living for most persons who engage in farm work at any practicable wage rate. There are serious problems of housing, medical care and child care for workers who migrate, especially with families, and for persons who engage in intermittent employment or work for many different employers. Many of these problems extend far beyond the work place. In fact, for this component of our population, it is when they are not working that these problems are most severe.

CONCLUSION

The National Council of Agricultural Employers stands ready to work with domestic farmworker and immigrant groups not only to develop a workable alien agricultural worker program, but to find workable solutions to the social and economic problems of those employed in seasonal farm work. During the past several months, NCAE has reached out to worker, immigrant and church groups to explore solutions to these problems along with our need for a stable legal work force. These issues should be addressed now. Congress should not wait any longer to fix an indefensible status quo. Agricultural employers and worker advocates should put their differences aside and work jointly to solve these problems. This hearing presents an opportunity to do that. Let's hope that we don't walk away from it. The economic and social costs are too high.

Senator ABRAHAM. I probably should point out to Mr. Wunsch that actually you are not the only grower here today testifying because Senator Smith, in fact, I believe, did something along those lines before he came to the Senate.

Senator SMITH. I used to buy peas and corn.

Senator ABRAHAM. OK.

Mr. WUNSCH. Don't quit your day job, Senator. [Laughter.]

Senator SMITH. I had to suspend it anyway.

Senator ABRAHAM. Mr. Papademetriou, we appreciate you being here. We will turn to you now. Thank you.

STATEMENT OF DEMETRIOS G. PAPADEMETRIOU

Mr. PAPADEMETRIOU. Thank you, Senator and members of the subcommittee. Thank you for inviting me to the latest dialogue of the death of immigration. It has already been a bit interesting. What I am hoping to do in the next 4 minutes, if I can, is offer an awful lot of ideas, some of them old, I guess most of them old, some new, as to what kinds of things people who are interested in the topic and wish to resolve some of the issues that have bedeviled this topic might take up in their negotiations.

I think that it is not necessary for me to point out how important the agricultural industry is or how poor the conditions under which the people who work in that industry, who pick our vegetables and fruits, have to work under. What I will outline is a set of issues around which, as I said, representatives from both sides can have an organized conversation. Before I launch into them, I want to make three global observations.

First, whatever is agreed to must be explicitly experimental and must be understood to reflect a social partnership in the classic sense and must acknowledge both the economic importance of the industry and its responsibility and ours toward farm workers.

Second, in getting to an agreement, all of us must think hard about how to protect U.S. workers in low-wage, low-value-added, difficult seasonal, and thus undesirable labor market sectors in a global economy.

Finally, any serious discussion must engage the key individuals and institutions concerned with representing the interests of the affected parties because only they can negotiate the broad guidelines, rules, mutual rights and obligations and enforcement priorities under any agreement.

I have six general principles. The first one is that we must ensure balance between grower and worker interests. If we don't manage to do so, we are going to be doing the same thing 2 or 3 years from now, and unhappiness will be even higher.

Second, we must try to test the availability of U.S. workers to increase the job availability for U.S. workers. We already heard a lot of claims about availability of U.S. workers, et cetera, et cetera. I think that we ought to be imaginative in terms of tax incentives and other packages that, in a sense, will subsidize some employer costs to a significant degree for hiring and retaining U.S. workers. Similarly, we probably have already heard and we may hear in subsequent conversations here issues about mechanization. We may want to consider again using the tax code to subsidize and test the proposition as to how far mechanization can take us.

The next item is we must focus on improving the circumstances of the families of U.S. agricultural workers and the lives of farm communities. I think that we have heard a lot of ideas already here how important it is to intervene thoughtfully on education services, prenatal and early childhood health and nutrition programs, health services, et cetera, for all farm workers.

The next item is employing legal workers should become a critical priority in seasonal agriculture. I think both Senator Feinstein and you, Senator Smith, and I suspect most of us realize that you cannot start a conversation on this issue unless you acknowledge that the vast majority of the people who are employed in the sector that we are talking about are undocumented. In some industries, that increases all the way to 90 percent of the workforce, and we must first do something about that. You cannot improve the conditions for anyone unless you have legal workers.

The final item is employment of unauthorized workers. It seems to me that it is important for all of us to have enforcement policies that will basically have teeth, and I suspect you cannot have those unless you do some of the things that both Senators have mentioned so far, which is legalize people and balance the interests of growers with employers.

I have a series of selection, entry and employment conditions. Who would be eligible? In other words, how do you determine who should be admitted and stay, and under what conditions, if indeed the mechanism is not enough to secure the number of workers that employers may need at some time in the future? The RAW idea that we heard a few minutes ago, in a sense, can only kick in if you have a mechanism for determining that you don't have enough workers.

Second, we have to really think hard about testing the availability of U.S. workers by creating precisely the registered pool of all workers that may be available. This is going to do an awful lot of things if it is done the right way. It is going to test propositions about how many U.S. workers, American-born workers and others are available to do this work. And I may suggest here, with all due

respect, don't necessary look to the U.S. Government to do that. The private sector in most instances is likely to do a better job than the Federal Government. You are dealing with a particular agency in the Federal Government that has very little credibility as it is in the farm worker labor market, and I would hope that you would pay attention to that.

Program integrity and accountability are critical things in order to be able to have a system that actually we can look our opponents in the eye and say, well, you know, we have tried to do something that makes sense, wages and benefits. There is no doubt that, as Mrs. Feinstein suggested, we have to have some sort of a wage rate and some sort of a premium attached to it. I also think that the market mechanism and the analogy to the market is a bit off base in this regard and, in a sense, turns a lot of things on their head.

Program administration issues, mobility. You cannot tie people to an individual grower. When you do that, you are asking for trouble, but there is a way to handle this. You can basically ask an individual to work in a specific area or for a group of employers or a cooperative. This isn't really as much of a nuclear science as we have really turned it into. It is a bit simpler than that.

On housing, again, private sector and public sector will have to work together if indeed we are going to make a difference on this difficult issue of housing. Yes, Senator Smith, vouchers, but we have to think of something different or in addition to that if there is no housing to be had 100 miles of where the work is being done. Again, we have to be very imaginative.

OSHA kinds of regulations are extremely important. We have done very well the last few years; we have to do better in terms of how we enforce them. Travel cost reimbursement is a big, controlling element that employers often have over workers as to whether they are going to actually reimburse for their travel costs. Why not create an office of an ombudsman that will mediate those disputes, and perhaps some sort of a trust fund where an employer that plays by the rules and is a participant in the program can actually come up and pay, in advance, the travel costs, and then have that other office determine whether the employee has met the conditions for reimbursement.

Performance and compliance bonds. Business works entirely on the basis of bonds. It can bond everything from legal status, duration of stay, certain terms of conditions of work, et cetera, et cetera. You can also bond things that relate to workers themselves. It is a bonding issue when you say I will withhold part of your wages and you can't collect them until you go back to Mexico or Jamaica. So there is a lot of room there for thinking hard about what we might do.

And, of course, enforcement. You can't have a program that cannot be enforced, and you can't ask the Government, it seems to me—I used to work in the Department of Labor for 4 years. You can't ask the Department of Labor and the administration to continue to enforce a program in which all history says it has done very poorly on. All the incentives are against the market, and the primary role of the department is basically the punching bag for all interests at all times.

Thank you.

Senator ABRAHAM. Thank you very much.
[The prepared statement of Mr. Papademetriou follows:]

PREPARED STATEMENT OF DR. DEMETRIOS G. PAPADEMETRIOU

I. INTRODUCTION

Mr. Chairman, Members of the Subcommittee. My name is Demetrios Papademetriou, and I am the Co-Director of the International Migration Policy Program at the Carnegie Endowment for International Peace. Thank you for asking me to testify today regarding U.S. agriculture and its workers.

I am submitting this testimony on behalf of myself and my colleague, Monica Heppel, who is the Research Director of the Inter-American Institute on Migration and Labor. It outlines our best judgments about the state of work in the fields of U.S. perishable-crop agriculture and offers an extensive menu of options for an organized conversation between growers and workers.

Few policy issues seem more compelling or arouse stronger passions than the working conditions in our perishable crop fields—the fruit, vegetable and horticulture (FVH) agricultural sector. In that socially and economically important sector, the circumstances under which workers work and they and their families live have long been one of the starkest reminders of the human consequences of America's persistent failure to protect what is arguably its most vulnerable population. The fact that this population is overwhelmingly minority, *and foreign born* (see Section 11, below), exacerbates its vulnerability and complicates both the economics and the politics of the issue.

Public opinion about the presence—and role—of foreign workers in U.S. fields fluctuates with our discomfort and embarrassment over reports about the living and working conditions of those who pick our fruits and vegetables and tend to our horticulture. The discomfort often becomes pronounced ambivalence when these workers are foreign and in the United States under a variety of legal statuses, including illegally. Feelings toward foreign farmworkers, as a result, vary accordingly. They include *guilt* about the wages and conditions under which they work (and about the relationship of such conditions to our ability to maintain a "cheap food" policy); *anger* toward their employers because they benefit most directly from these conditions (little, if any, thought is given to the fact that consumers are also important beneficiaries of the status quo); and, at times and in some opinion sectors, *resentment* toward the domestic jobs "lost" to them and the foreign workers' probable effect in keeping wages and work standards lower for all farmworkers.

Arrayed along this complex set of attitudes about farmworkers, generally, and foreign farmworkers, specifically, are two determined lobbies: growers and farmworker advocates. With few exceptions,[1] the former has been politically powerful since the earliest days of governmental attempts to regulate some of the industry's employment practices in the second half of the last century, and has as a result gotten its way both in Washington and in state capitals. Farmworker advocates have been less successful politically but often make up for what they lack in raw political power with hard work and extraordinary zeal. The strength and rigidity of each side's position have typically meant that the "quality" of what passes as discourse on this issue moves from preaching to the converted to a dialogue of the deaf.[2]

The resulting dissonance and political impasse have typically led to the following policy pattern. On the one side, grower interests manage to obtain, directly or indirectly, the labor programs they say they "must have". On the other side, farmworker advocates use legal tools and popular guilt about and aversion to the conditions under which much farmwork takes place—and indirectly, the axiomatic, if putative, relationship between such programs and unauthorized immigration and employment—as the means for ensuring that growers will use such programs sparingly. As a result, when a program is authorized, farmworker advocates employ a barrage of legal and political actions typically directed at the U.S. Department of Labor

[1] These include the formal prohibition of the importation of temporary foreign workers (which lasted for nearly three-quarters of century—until the 1952 Amendments to our immigration laws), the repeated attempts to progressively tighten the conditions under which employers could gain access to foreign workers (the programs that replaced that prohibition), the gradual extension of most of the provisions of the 1938 Fair Labor Standard Act (FLSA) to agriculture in the 1960's, and special legislation regulating migrant and seasonal work in the 1960's, 1970's and 1980's. The legal protections embodied in these acts are widely thought to have had only limited impact in improving overall conditions—in large part because of continuing employer access to unauthorized foreign workers combined with a lack of enforcement of both labor and immigration law.

[2] In its extreme form, the result has been nothing short of mutual demonization.

(DOL). The unambiguous purpose of these actions is to "motivate" the Department to use rigorous regulation and vigorous enforcement to deter many growers from using the legislated programs, even in the face of *bona fide* shortages of qualified workers.

This strategy has been successful in defeating a series of recent attempts in the U.S. Congress to introduce new or, most recently, significantly different variants of the existing temporary foreign worker program for seasonal agriculture (H-2A).[3] The strategy has also helped to keep the size of the H-2A program on only a very slight upward trend over the past decade (at about 15,000 workers per year, see Chart 1) despite DOL projections after the 1986 Immigration Reform and Control Act (IRCA) that usage would increase ten- to fifteen-fold[4] and the very substantial growth of the FVH sector.

II. THE INDUSTRY AND ITS WORKERS

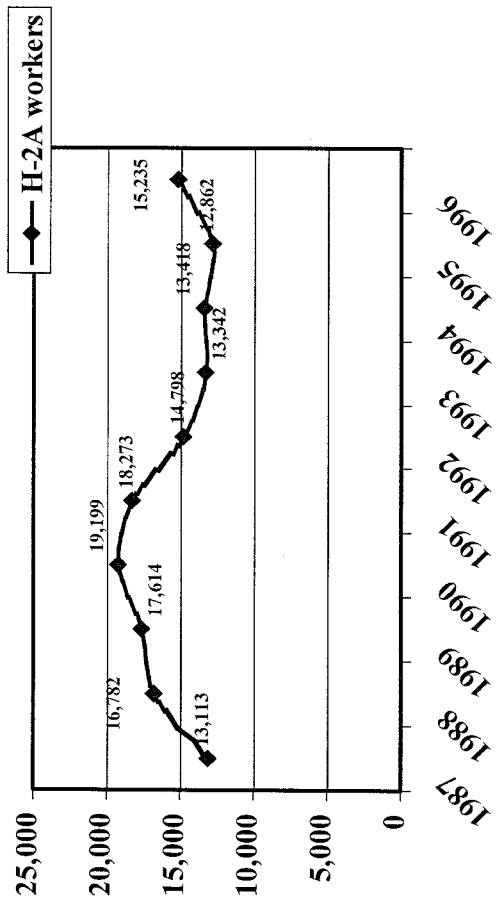
What follows are some relevant facts that might be helpful in contextualizing thinking about the issue. Without such a context, few of the judgments necessary for developing a tentative framework of a seasonal farmworker recruitment and employment agreement that improves upon the status quo in significant ways, and builds the road to a better rural America, are possible.

[3] The defeats have been the result of opposition by both the Administration (partly on the merits but in the largest part because of the Administration's closeness to organized labor and its "tactical warfare" with California's Governor Wilson, who supported such programs) and many in the anti-immigration wing of House Republicans, led by Immigration Subcommittee Chairman Lamar Smith.

[4] In developing this projection, DOL anticipated neither the widespread use of fraudulent documents nor the ineffectiveness of employer sanctions. A large and easily accessible supply of unauthorized workers dampens interest in the H-2A program—particularly in view of perceptions that the program is inflexible and intrusive.

Chart 1

H-2A Workers Entering the United States
1987-96



A. Six observations about the agricultural industry and agricultural policy

1. Agriculture is a critical U.S. industry. In 1992, the market value of agricultural products sold was $162 billion. That had increased to $197 billion by 1997.

2. The production of fruits, vegetables, and horticultural products is a healthy and expanding sector of the agricultural economy. The value of production for vegetables increased 14 percent between 1993 and 1997, while the value of fruits and nuts increased by 25 percent. The value of U.S. fruit and nut, vegetable and melon, and horticultural specialty production in 1997 was more than $35 billion. Floriculture and environmental horticulture (greenhouse, turfgrass, and nursery-related crops) is the fastest growing segment of U.S. agriculture. California accounts for approximately one-half of FVH production.

3. FVH crops have become an increasingly important element of U.S. export competitiveness. In 1997, FVH agricultural exports accounted for about thirty percent of its overall production—$10.5 billion. In that same year, total U.S. exports amounted to $643 billion while imports were $862, leading to a $208 billion trade deficit. In contrast, farm commodities registered a trade surplus of nearly $20 billion—with farm exports of $65 billion and imports of $46 billion.[5]

4. The concepts of the "family farm" and nostalgia about "farming as a way of life," i.e., of the self-sufficient farmer who makes a modest and uncertain living growing our foods, stand near the center of American nation-building ideology—yet have an increasingly tenuous economic relationship to present day realities. Nearly three-fourths of U.S. farms have sales of less than $50,000. Yet, in 1997, these farms accounted for only 10 percent of total farm sales. In contrast, just four percent of all farms accounted for one-half of total sales, while less than one percent of farms produced 25 percent of total U.S. output. This tendency toward concentration is more pronounced in California and other western states and less so in the tobacco-growing areas of the middle-Atlantic states where many workers hold H-2A contracts.

5. A "cheap food policy" is a key pillar of U.S. social policy—if not always a recognized or acknowledged one. Approximately 10 percent of disposable personal income is spent on food in the United States, down from 14 percent in 1970. *This is substantially lower than in any other developed country.*

6. U.S. growers always have been able to rely on inexpensive foreign labor, *with the full complicity of the U.S. government at all levels.*[6] Regardless of the political party that has controlled any particular branch or level of government, this complicity has held true and has led to similar policy outcomes.

B. Six observations about seasonal farm labor and the seasonal farm labor market

1. Approximately 21.6 million people are employed in the food and fiber sector of the U.S. economy. Agriculture employs approximately 3.5 million of them. Generally speaking, employment across agriculture has been declining while employment in agricultural *services* (e.g., packing, shipping, animal and management services, that is, the "better" jobs) has been growing. The 1997 Current Population Survey (CPS) reported an average of 900,000 hired farmworkers, with employment varying from 589,000 in January to 1.1 million in July. In July of 1998, the USDA reported that there were 1.45 million hired farmworkers. (The farmworker population is notoriously hard-to-count; the CAW observed that a good estimate may be about 2.5 million—1992:1).

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[5] As the Commission on Agricultural Workers noted in 1992, "[w]ith a largely immigrant labor force, capital and technology flowing across national boundaries, and global markets, FVH agriculture is increasingly an international operation" (CAW 1992:3). This fact affects both production and marketing strategies. Technological advances coupled with reduced trade barriers make "differing production costs between industrialized and developing countries critical in determining the financial viability of the FVH industry in the United States" (CAW 1992:3).

[6] A 1988 U.S. Department of Labor policy document noted that the Department recognized "U.S. agriculture's long-term dependence on 'temporary' foreign labor" and believes "that a sharp distinction should be made between the special labor problems experienced by agriculture and the temporary labor bottlenecks which other sectors may experience." In fact, governmental forbearance for inferior working conditions in the fields has been nothing less than remarkable. It was not until the 1960's, for instance, that agricultural employers became subject to federal legislation protecting workers and the government began to fund special programs in health, education, child care, job training and legal services for farmworkers (CAW 1992:9–10). Specifically, the 1938 Fair Labor Standards Act did not apply to agricultural workers until 1966, and then only some of its provisions (*for example, there are no requirements for overtime pay*) and only for some agricultural workers (CAW 1992:15). *State-level protection of farm labor has also been inconsistent.* For example, by the early 1990's, only five states—New York, Florida, Missouri, New Jersey, and Hawaii—and Puerto Rico had passed constitutional provisions guaranteeing agricultural workers the right to organize and bargain collectively (CAW 1992:15).

2. The perishable crop industry's labor supply challenge is extremely complex. In the absence of thoughtful blends of incentives and disincentives that are administered firmly, the industry has been reluctant to invest systematically in labor saving technologies, improve wages and labor standards in significant ways, alter its labor-management practices, or offer the associated services (such as the provision of acceptable housing) that might allow it to attract a more loyal and stable workforce.

3. The seasonality and arduousness of field work militates against a significant year-round and permanent workforce. According to the National Agricultural Worker Survey (NAWS), in 1990, farmworkers averaged only 29 weeks of farm employment per year. There is also a constant influx of new workers. Currently, more than one in five crop workers is working in U.S. agriculture for the first time.

4. Few U.S. young people enter the agricultural labor market. Most independent observers recognize that many agricultural jobs are simply not compatible with the expectations of U.S. workers—*at least absent extraordinary increases in compensation and benefits.* In 1997, the Current Population Survey reported median weekly farm worker earnings of $277—55 percent of the median for all workers. Currently, about three- fifths of all farmworkers live well below the poverty level with average annual earnings of less than $10,000.

5. The perishable crop seasonal agricultural labor market in the United States is dominated by foreign workers and, increasingly, by unauthorized workers. According to the 1995 NAWS, 70 percent of the farmworker population was foreign-born and 37 percent was unauthorized. By the early 1990's, nearly 90 percent of *new entrants* into the perishable crop labor force were foreign born and virtually all of the remaining ones were U.S.-born Hispanics. Depending on the area, unauthorized workers are thought to comprise up to 70 percent of the harvest workforce. (The INS estimates that the workforce in the Georgia vidalia onion fields in 1998 may have been more than 80 percent unauthorized.)

6. Farm labor contractors (FLC's)—the middlemen that are widely thought to contribute heavily to the systematic undermining of labor and immigration laws in perishable crop seasonal agriculture—are not subject to rigorous scrutiny and applicable regulations are not enforced vigorously.[7] In addition to farm labor contractors, the system of middlemen involved in recruiting and overseeing temporary contract workers includes growers associations, "super-contractors," and Mexico-based recruiters.

C. Six observations about the current temporary foreign worker program in U.S. FVH Agriculture (H-2A)[8]

1. In 1997, the DOL certified the need for 23,352 H-2A workers, up from 17,557 in 1996 and 12,173 in 1994. This accounts for only a tiny fraction of the seasonal agricultural workforce. These numbers have been rising steadily despite the fact that the sugar cane industry—historically the heaviest H-2A worker user—dropped out of the program in the early 1990's. The main reason for that growth is that H-2A workers are now being used in a number of new crops and areas. Most of the new workers are Mexicans, as has been the case since 1992 (see Chart 2.)

2. Current H-2A workers express a strong preference for working under an H-2A-like contract rather than being in an unauthorized status.

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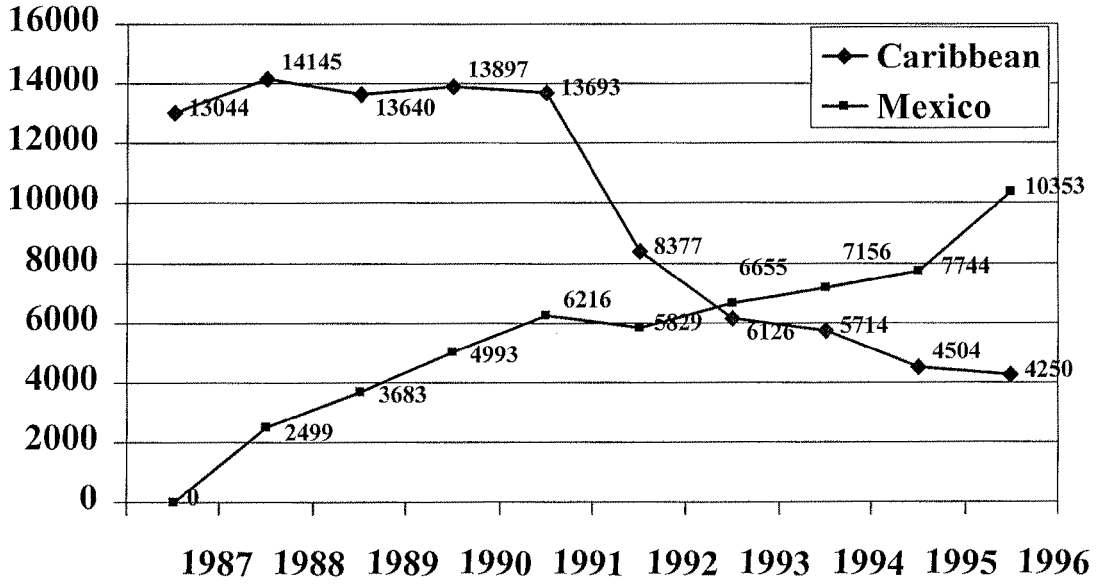
[7] Farmworker advocates typically argue that lack of enforcement—rather than inadequate regulation—is the more important problem. FLC's currently are less likely to be held accountable for labor or immigration law compliance than are fixed-site employers (CAW 1992:37) and are, therefore, used by some employers to evade compliance with laws.

[8] Much of the information about H-2A workers is preliminary data obtained from an ongoing survey of H-2A workers. The interviews are part of a two-year project, funded by the Ford Foundation and carried out by the Inter-American Institute on Migration and Labor in Washington, D.C. See Appendix A for a description of the project.

Chart 2

H-2A Workers by Country of Origin 1987-96



3. Most workers currently employed as H-2A workers report that they value the security provided by their contracts and the predictability of their seasonal earnings seemingly above all else. In view of these priorities, issues that relate to the high levels of control that are frequently demanded by recruiters and employers are apparently of secondary importance to the workers.

4. "Blacklisting" appears to be widespread, is highly organized, *and occurs at all stages of the recruitment and employment process.* Workers report that the period of blacklisting now lasts three years, up from one year earlier in the decade. Violations that typically lead to blacklisting include not completing the contract, involvement in a dispute over wages and working conditions, and misbehavior (e.g. alcoholism).

5. The use of H-2A workers, once initiated, tends to spread throughout a crop- and area-specific labor market.

6. The majority of H-2A workers do not appear to be using their H-2A visas as a stepping-stone for entry into the broader U.S. labor market nor do they appear to overstay their visas by a significant factor. The practice of working outside of one's contract during slack times, however, seems to be relatively common.

III. PERISHABLE CROP AGRICULTURE AND SEASONAL FOREIGNWORKERS

Perishable crop agriculture's involvement with foreign workers in a significant way spans the last one-and-one-half centuries.[9] More than a century ago, the Chinese Exclusion Act was expected to break up that era's large commercial farms into smaller family-sized specialty farms that could be operated by family labor. That expectation has never been met. This has been in large part due to the ready availability of ample supplies of foreign seasonal labor. Nor, apparently, has there been enough incentive for FVH agriculture to restructure, invest systematically in available labor saving technologies, or alter its labor-management practices. Thus, many of the basic features of the seasonal farm labor market of the 1880's remain the same today.

One of the most visible, and troublesome, parts of that legacy are the farm labor contractors (FLC's) who have come to control not only the livelihoods but the very lives of farmworkers. In 1963, Congress, in response to evidence that many FLC's were exploiting both farmers and laborers, sought to regulate the relationship between workers and FLC's by enacting the Farm Labor Contractor Registration Act. The Act was amended in 1974, twice in 1976, and again in 1978. The most significant amendments were those of 1974, which sought to strengthen the enforcement provisions of the Act. The 1974 Act regulated both intra- and inter-state activities and its coverage was extended to contracting activities without regard to the number of workers contracted out. The Act also increased penalties for violations and added a provision allowing for a "private right of action." Nonetheless, widespread unhappiness with the Act eventually led to its replacement by the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA) in 1983. The MSAWPA provided that while growers and fixed-site employers would no longer be required to register as farm labor contractors, employers and associations would be subject to certain worker protection requirements, such as disclosures and payroll practices. MSAWPA also adopted the "joint employee" doctrine under which, for purposes of the act, one farmworker may simultaneously have two or more employers (CAW 1992:23–24).

However, most analysts acknowledge that these efforts have neither improved farmworker conditions appreciatively nor dampened employer interest in using FLC's as critical middlemen in all aspects of farmwork recruitment and employment. The Commission on Agricultural Workers, mindful of the problem, recommended that FLC's be either more effectively regulated or eliminated in favor of *government or private-sector grower or worker associations that would match workers to jobs.* Such a system might include the following: (a) use of job itineraries or annual worker plans to facilitate the efficient movement of farmworkers from one job to the next; (b) improved outreach efforts to provide information on labor needs by crop and area, and on housing availability; (c) separating the job matching from the non-labor exchange functions; and (d) offering farmworkers the right to organize and bargain collectively. The Commission's recommendations have fallen on deaf ears.

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[9] It involved Mexicans and the Chinese during the Civil War, Chinese throughout much of the second half of the 19th century, Japanese closer to the turn or the century, Filipinos and Mexicans during and after WWI, and Mexicans since the 1930's. Currently, the workforce is overwhelmingly Mexican with increasing pockets of Central Americans, especially Guatemalans.

While the system of farm labor contracting has and continues to shape the structure of the farm labor market, the modal policy instrument to real or perceived seasonal labor shortages during this entire period in this sector—a sector that encompasses the production of fruits, vegetables, and horticulture [10] and is the industry's most labor intensive [11]—has been the enactment of a variety of temporary foreign labor programs. The most significant of them have been the "bracero" program that lasted from 1942 to 1964; [12] and the British West Indies (BWI) program, also begun in 1942, and that program's successor, the 1952 Immigration and Nationality Act's H-2 program-designated as H-2A since 1986. Together, these responses have led to the *de facto* formation of a binational labor market for FVH agriculture in which unauthorized Mexican workers have been the dominant group.

The programmatic responses to the FVH industry's concerns about labor shortages are an unambiguous attestation to the country's sensitivity and responsiveness to those who grow its food, and more directly, to the political power of agribusiness. Nowhere has that power been more evident than in California, the country's dominant producer of perishable crops.

Washington's political responsiveness to FVH grower demands for foreign workers—evident once again in the industry's preferential treatment under the Immigration Reform and Control Act of 1986 (IRCA) [13]—is thought by many to be the major contributor to the failure of the market mechanism in that part of the agricultural sector. As a result, one finds few market-led improvements either in wages and working conditions or (within the technological and capitalization limitations of each time period) in mechanization and other labor-saving technological advances. In fact, even when reliance on the large scale importation of foreign workers has been halted, as with the 1964 termination of the "bracero" program,[14] the flow of foreign workers into FVH agriculture has not been inhibited.

Considering this background, the question one needs to consider is as follows: Can a tentative outline of key issues be developed that allows the United States to pull itself out of the cycle of bad policies and divisive politics regarding work in seasonal perishable crop agriculture by addressing those issues in a fair, neutral and practical manner? At the core of such an endeavor would have to be meeting FVH agriculture's needs for a predictable access to an adequate labor force while offering

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[10] Between 1940 and 1945, the domestic agricultural workforce declined by 9.3 percent (with the 20.1 percent reduction in the male agricultural labor force being partly offset by the more than doubling of the number of women involved in agricultural work). While these facts do not address whether the critical labor-supply issue has been one of absolute shortages or one of a reduced willingness (some will say ability) on the part of growers to pay adequate wages, farm labor shortages have been indeed in evidence repeatedly since the 1940's (Griffith 1993:206–207).

[11] Labor costs play a major role in the FVH industry, accounting for between 20 and 35 percent—and sometimes as much as between 40 and 50 percent—of the sector's overall production costs. By comparison, labor costs for corn, soybean, and hogs represent 5.6 percent of all production costs while those for cattle, wheat and sorghum are even lower (CAW 1992:33). FVH growers have traditionally relied on cheap (and often illegal) foreign labor to control their labor costs and on farm labor contractors (FLC's) to supply such labor.

[12] The Bracero, program, based on bilateral agreements between the U.S. and Mexican governments, was instituted on August 4, 1942 and was terminated in January, 1964. It was interrupted for several years in the late 1940's and early 1950's but the flow continued nonetheless (CAW, 1992:5). During its 22-year duration, between four and five million Mexican agricultural workers may have entered the United States under that program. By 1956, "braceros" made up more than 33 percent of the seasonal workers in California, concentrating primarily in the California vegetable harvest. Despite claims that its termination would result in crop losses, business failures, and higher fruit and vegetable prices, the termination's modal effect was a gradual rise in unauthorized immigration from Mexico (CAW 1992:17–9; Griffith, 1993).

[13] FVH agriculture's treatment in IRCA included the following preferential provisions: (a) two special legalization programs for that sector's workers with very low documentation thresholds; (b) a worker "replenishment" program in the event of unanticipated shortages; (c) a delayed implementation date for employer sanctions (fully 18 months after all other industries became subject to it); (d) much less demanding evidentiary requirements for obtaining legal permanent residence (which, according to some estimates, may have led to several hundred thousand "fraudulent" legalization claims); and (e) generally lax enforcement standards for employer sanctions. In fact, the statutory requirement of obtaining a warrant prior to conducting open field searches has turned sanctions in FVH into a paperwork exercise for most agricultural employers. As a result, the number of unauthorized workers with fraudulent employment documents has grown. The U.S. Department of Labor estimated in its National Agricultural Worker Survey that 17 percent of migrant farmworkers were unauthorized in 1989. That proportion rose to 26 percent by 1992 and to 37 percent by 1995.

[14] The termination of the "bracero" program came about in large part due to the coalescence of political opposition by organized labor, civil rights groups and the church. In 1963, that coalition persuade then-Secretary of Labor Wirtz to appeal personally to President Kennedy to terminate the program.

farmworkers, regardless of nationality and legal status, appropriate working conditions, meaningful labor rights (including the right to organize), and guarantees of their human rights and dignity. In addition, any serious conversation about significant changes on how U.S. seasonal agriculture will be staffed in the future must recognize that the existence of the North American Free Trade Agreement (NAFTA) implies that both the Mexican and the U.S. governments have legitimate political interests in the context of that Agreement that must be addressed satisfactorily.

IV. ISSUES THAT WILL NEED TO BE RESOLVED IN CONSTRUCTING A FAIR BARGAIN ON SEASONAL WORK IN THE U.S. FVH IN INDUSTRY

The following are among the principal issues that would require resolution if a real experiment on changing the employment *status quo* in the in FVH agriculture is to be conducted.[15] The list is not all-inclusive; rather, it is intended to organize the discussion along several important categories and themes which, in turn, can generate additional issues and expose and discuss unexplored hard edges.

Before one launches into any specifics, however, it is important to make a few "global" observations about what might come out of such discussions. The initial steps must be *explicitly* "experimental" and their ultimate fate should be determined by the results of an independent evaluation. The first and foremost challenge in any such discussion will be the reconceptualization of the notion of "protections" for U.S. workers in low wage, low value-added, difficult, *seasonal,* and thus undesirable labor market sectors [16]—*while keeping any agreed-upon experiment simple and flexible enough to entice growers to participate in it in good faith.*

Furthermore, it is important to keep in mind that any outcomes may only have a chance of getting off the ground, both politically and in social justice terms, if they are the result of a "social partnership" in the classic sense. Accomplishing that objective would require that key individuals and institutions concerned with or representing the interests of the affected parties (such as worker advocacy groups, employers, relevant U.S. federal and state government agencies, the Mexican Government [eventually], *and those civil society institutions with mandates that make working conditions at the farm relevant to them in both countries*) must be able to agree on the broad guidelines, rules, mutual rights and obligations, and enforcement priorities under any agreements. Successfully engaging "stakeholders," therefore, will be one of the early tests of the viability of any serious conversation.

A. General principles

Ensuring balance between grower and worker interests. Every effort should be made to resist both the inevitable grower attempts to "tilt" resulting reforms toward directions that make few substantive improvements in farmwork and continue to place growers in a commanding position vis-a-vis foreign workers, and the equally inevitable efforts by farmworker advocates to actually "strengthen" the H-2A program (a program whose implementation they otherwise view with contempt) to the point of making its use impractical. Tilting too much toward the former would continue to produce unacceptable social and labor market policies and make any new or substantially altered H-2A program nonviable. Siding with the latter (in an attempt to produce what growers will surely tag as a "gold-plated" program for workers) would make it unviable in the Congress and would have the equally likely (and counterproductive) effect of growers avoiding the program. It would also continue to place the government in the untenable enforcement posture it has always occupied on this issue.[17] Hence the need for balance.

Increasing the job opportunities of U.S. workers. A successful program must devise significant, yet financially realistic, incentives for FVH growers *to hire and retain U.S. workers on a preferential basis.* These might take several forms.

- One of the most significant ones might be the offering of positive tax incentives to employers who hire *and retain* U.S. workers—in effect subsidizing some em-

[15] This paper is fundamentally agnostic as to whether the end result of such experimentation is more immigrant admissions, a radically altered H-2A program, or some new form of a temporary worker program.

[16] Protecting the terms and conditions of work in seasonal farming may have to become the paramount policy objective in any such "rethinking." Job opportunities, in that scenario, may have to become a lower priority, at least during a reform effort's initial years.

[17] The current H-2A program offers growers, primarily in the eastern half of the United States, the benefit of having the labor they need, when and where they need it. Because the foreign workers are tied to the employer, some employers are thought to be exploiting the foreign workers. Western growers have been reluctant to sign onto the H-2A program because of its housing requirements, because of the litigiousness associated with it, *and because they did not perceive access to unauthorized workers to be truly threatened until recently.*

ployer costs to a significant degree for the duration of the experiment.[18] Promoting the hiring and retaining of U.S. workers (initially perhaps only with a subset of employers so as to test the idea) through tax incentives would test in a fair and concrete way whether a workforce in perishable agriculture composed primarily of U.S. workers can be constructed and maintained.

- Any such experiment might also be accompanied by subsidized loans and special depreciation schedules for investments in labor-saving capital equipment. Such initiatives would facilitate mechanization in crops where it is practical and may entice growers to give their fullest consideration to creating a larger core of permanent full-time workers in return for a guaranteed supply of labor to meet their peak needs.

Improving the circumstances of the families of U.S. agricultural workers and the "lives" of farm communities. If a grand bargain on this issue becomes indeed possible, care, energy, and political capital from both sides must be committed to improving government-provided services for this underserved population. Among the areas that require close examination and thoughtful intervention are education services (particularly but not exclusively head-start and similar programs), pre-natal and early childhood health and nutrition programs, and health services—*all of which must be designed to respond to the unique circumstances of living as an (often itinerant) farmworker.*

- Ultimately, a society (and especially a wealthy society) that chooses not to invest in the protection of its most vulnerable members, has no right to be in the business of leading global efforts in human rights, labor standards, and related social goals.

Employing legal workers should become a critical priority in seasonal agriculture. This principle makes clear what must become the foremost shared priority by both sides. In any experiment's initial years, the priorities should be as follows:

- To change the legal status of most of the workers who now work in the fields without legal authorization.[19] These workers are typically experienced and hence highly valued by their employers, who are increasingly concerned about U.S. border controls and INS targeting of farmwork for sanctions enforcement. *These realities create a window of opportunity to advance the interests of all farmworkers by upgrading significantly the work and living conditions of the maximum number of field hands in our country's perishable crop agriculture.*
- To restore to all agricultural workers the benefits they lost under the 1996 welfare reforms. These "reforms" have made life on the farm even more tenuous than before.

Employment of unauthorized workers. For a new policy to be successful, it must put in place sharp disincentives for continuing to hire "non-program" (i.e., unauthorized) workers. A good faith effort in this regard must include the critical re-examination of the panoply of legal and institutional structures growers and their allies have created over the years in order to protect themselves from the reach of the intent of IRCA's prohibitions against the employment of unauthorized foreign workers and of a variety of labor and safety regulations. Among the items that must receive an early reconsideration are the following:

- The special procedures for conducting open field searches;
- The manner in which an employer is defined, which allows some growers to play cat-and-mouse games with regulators and is impeding targeted DOL enforcement; and
- The power of FLC's, whose involvement is widely thought to discourage the employment of U.S. workers, undermine efforts at collective bargaining, and lead to lower wages and inferior working conditions for all farmworkers.

Residency rights of temporary seasonal foreign workers. Any experiment will eventually have to come to terms with the issues of whether, when and how to convey rights to full legal U.S. permanent residence to program participants. There are likely to be two sharply contrasting views on this issue.

- On the one hand, denying such rights flies in the face of an historical aversion in the United States to separating the right to work from that of permanent

[18] There should be no loss to the U.S. Treasury because the new arrangement would likely encourage greater tax compliance by both employers and workers. Under today's practice, the absence of virtually any enforcement likely results in significant under-compliance in tax obligations by both parties.

[19] Unauthorized workers are vulnerable to exploitation by those employers, farm labor contractors, and recruiters who are unscrupulous and, arguably, contribute to the deterioration of the wages and working conditions for all agricultural workers in the FVH sector.

residence and eventual full societal membership. A related sentiment holds that the right to earn legal permanent resident status should naturally convey to those who have made sustained economic contributions to our nation.

- On the other hand, another view has emerged in recent years that is grounded more on political and economic *realpolitik.* It argues that "we" neither need nor can we absorb any more poorly-prepared workers (and their families) as permanent additions to our society. According to that latter view, appropriate compensation and working conditions, and properly administered programs that offer foreign workers a fair deal, should be all that should be expected of us now and in the future.

Arguably, *and considering the seasonal nature of the work,* the latter stance may also comport with the interests of some workers (as well as sending country interests) in programs that emphasize circularity and thus contribute most directly toward the improvement of the living conditions of the foreign workers and their families at *home.* In fact, some worker advocates express frequent concern about the home community consequences of long-term absences by young male workers.

- A natural compromise on this issue might be to adopt the latter view during the entire (or part of the) pilot period and postpone a decision on this matter until we have some experience with and more adequate data about the experiment's operation and the participants' interests.

B. Selection, entry and employment conditions for foreign workers

Eligibility. The following employer and employee eligibility criteria could be part of the negotiating mix.

- A pilot program could be constructed to last either three or five years (five years would be better from an evaluation perspective.)
- Participation in the program by individual employers or employer groups should be made subject to "playing by the rules". To encourage participation, employers would have to be *held harmless against their previous employment of unauthorized workers.*
- Initially, eligibility could be only made available to currently undocumented workers from Mexico and the Caribbean Basin who are already in the United States.[20] These workers would register with the program *without prejudice in regard to their prior illegal status.*[21]
- Preference should be given to those workers already employed in U.S. FVH agriculture, but other unauthorized workers from the same geographical catchment area could also be eligible *if the supply of workers proves inadequate.* (Later on, and assuming continuing undersubscription of needed workers, the program could be opened to new workers from the same region.)

Entry. If the decision is not to offer program participants U.S. permanent residency immediately, the ability of employers to hire and retain specific employees would have to be balanced against concerns about the level of employer control over workers that is endemic in the current program. In addition, the following ideas could be considered.

- Entry could be valid for the duration of each job contract and might not exceed the length of the agricultural "season," that is, not more than ten months.
- Farmworkers could be "nominated" by employers who wish to have them return for a subsequent season. Program participation would thus be renewable for several seasons.
- A process for mediating disagreements, *with no blacklisting of workers who voice legitimate complaints,* could be guaranteed. Considering the desperate economic conditions in many of the workers' home communities, their willingness to tolerate poor living and working conditions in the United States should not be the gauge as to whether the program is successful.

Testing the availability of U.S. workers and creating a legal pool of foreign workers. One of the most difficult issues surrounding the employment of foreign workers in any sector is the labor market test that is used to determine whether U.S. work-

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[20] An exemption would be required from certain provisions of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). That Act bars those who have been in the United States illegally for more than three or twelve months since April 1, 1997, from reentering the United States for three and ten years, respectively.

[21] Advocates on all sides would likely argue that this could be construed as another IRCA-like program. It could. However, a major difference between the two ideas can be constructed. The proposed program could choose not to confer U.S. permanent residence rights to its participants during a part or even the entire test period.

ers are available and willing to perform the required work.[22] If they are not, a process commences for recruiting and hiring foreign workers in the amount of the U.S. worker deficit. There are at least two ways to handle this issue.

- The first would rely on the U.S. Employment Service (USES) and its State Employment Service (SESA)[23] network. These agencies presumably have the capacity to handle the registration of both domestic and foreign workers. Thus, the concept of a "*worker registry,*" included in recent legislative proposals, may be a good starting point for shedding light on the issue of the availability of U.S. workers and should be within the technical and infrastructure means of USES/SESA to implement it. Recognizing that farmworker recruitment historically has not occurred through state agencies, an all-out effort that includes CBO's and private not-for-profit organizations, such as employment and training assistance groups, worker organizations, and groups offering legal services, should also be engaged in the registration process. Whatever the method agreed upon, any "new" or additional foreign farmworkers would have to be registered in specially-designated U.S. consulates prior to their first season in the United States. USES officials might be asked to assist consular officials with that task. *All initial expenses associated with this activity could be underwritten by the growers,* i.e., the party that stands to benefit most directly from such an initiative. The entire registration system would be fully automated and could include the worker's photograph, fingerprints, and any other relevant information. Re-registration, for a reasonable fee paid by the worker, could be required each time the farmworker "reenters" the United States for subsequent seasons.
- The alternative would be to rely on a newly created *Agricultural Worker Registration Center* that could be developed and run privately. Growers could again be asked to underwrite part of the Center's start up costs but would have no control over its operation. Such a Center would collect and maintain much the same data as the USES *without the baggage that weighs down this federal agency.*

In either scenario, once a worker is in the data bank, accessing the record and issuing work authorization cards to foreign workers should be on the basis of user fees. (Source country authorities might wish to register those of their nationals who express an interest in seasonal work in the United States independently but a person's failure to be part of that pool should not disqualify him or her from participation in the program. This way, the ability of the sending country authorities to corrupt the selection system through cronyism and related actions will be inhibited.) Once a worker is in the registry, his/her file would be transferred electronically to the relevant U.S. Consulate where a joint Consular Affairs and INS team would undertake the necessary investigations (to detect and deter, with the cooperation of source country authorities, the entry of otherwise ineligible workers) and issue the visa.

- This "Service Center" function must not lead to charging users unreasonable service fees. First time workers could have their fee paid by their prospective employer while repeat workers, as noted earlier, could be expected to be responsible for all associated fees.

Program integrity and accountability issues. Regardless of the registration scenario chosen, the relevant parts of the data collected should be accessible by federal and state departments of labor/employment and by the INS. Such access would facilitate the verification of the worker's status during compliance visits. (Foreign farmworkers would be required to carry their picture identification, issued by the agreed upon entity, on them at all times.) Furthermore, employers of foreign workers who violate any of the program rules in a substantive way should be decertified for a substantial period of time. (A minimum of two years, for instance, would establish the importance of playing by the rules.) For subsequent or more flagrant violations, permanent debarment could also be considered.

Wages and benefits. The following are among the conditions that will need to be negotiated among the principals.

- Employers should be expected to offer a base wage to all workers that can be anchored on some of the existing formulas worked out jointly between the De-

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[22] For an exposition on the complete failure of the relevant DOL labor market test (the "labor certification" process), see Demetrios G. Papademetriou and Stephen Yale-Loehr, *Balancing Interests: Rethinking U.S. Selection of Skilled Immigrants.* Washington, D.C.: Carnegie Endowment for International Peace and the Brookings Institution, 1996.

[23] Most observers view the U.S. Employment Service as irrelevant both in agriculture (where it is responsible for recruiting less than one percent of workers despite a statutory mandate to do so) and in other industries (where it "recruits" less than five percent of workers}.

partments of Labor and Agriculture. The principle that could guide these negotiations is that a wage premium should be paid to all farmworkers as an acknowledgment of the effect of the presence of large numbers of foreign farmworkers on keeping wages lower. (The late Barbara Jordan-led Commission of Immigration Reform proposed precisely such a premium for other temporary labor programs.)

- Among the additional conditions that could be negotiated are the so far intractable issues of "task" and "group" rates whereby the wages of the most productive workers are averaged out with those of the least productive ones to meet the mandated base compensation—a process that leads to paying some workers less than the agreed-upon (minimum) wage. The principle, again, should be one of reasonableness that allows growers to hold on to worker productivity gains made under the current system *without violating the spirit of any wage agreements through the backdoor.*
- In states that have inadequate protections for farmworkers, program-agreed conditions of work could supercede state requirements. Minimum health and accident insurance coverage might be offered to all workers—possibly through the creation of private insurance pools—with premiums divided unequally between growers and workers. (Canada requires its farmers to pay 80 percent of the costs of such insurance for its seasonal foreign farmworker program.)
- Employers could be required to pay to foreign workers *most if not all of the social insurance costs associated with employing U.S. workers.*[24] These funds could be deposited into a privately-run *Farmworker Trust Fund* managed by independent professionals in accordance with bilateral agreements that would allow a worker to be "vested" and draw benefits from abroad after a pre-agreed number of seasons of agricultural work in the United States. The principles here are also simple. There should be no incentive for hiring foreign workers based on their lower costs.[25] In addition, reserving these funds for those who return, increases the probability that workers will return while also becoming a means for the survival of the former worker and his or her family in later years.

C. Program administration issues

Duration of visas and mobility. As noted earlier, the duration of the temporary worker authorization visa should coincide with the growing and harvest season and probably should not exceed ten months. Even more important from a social and labor policy perspective may be that holders of these visas should be allowed *at least partial mobility* within FVH agriculture.[26] Arguably, no other provision of such an experiment is likely to be as much of a "deal breaker" for the supporters of farmworkers as the failure to empower foreign workers to walk out of bad employment situations without fear of such employer reprisals as the loss of privileges they have earned (such as transportation costs) or blacklisting by the system.

- One way for this issue to be approached might be through the appointment of an *Ombudsman*—an impartial "arbitrator" that can investigate and resolve conflicts between the two parties.

Housing. A great deal of hard thinking will have to be done on housing issues because, as noted earlier, this is an issue that is crucial in social policy terms yet is at the heart of the opposition to the current H-2A program by western grower interests. Two general ideas might form the basis for a conversation on this issue.

- First, both sides and their allies could expend as much political capital as may be necessary to impress upon the Farmers' Home Administration and other similar agencies the need to review current housing programs with the objective of facilitating and expanding funding for publicly and privately constructed and/or rehabilitated housing that meets appropriate, if modest, standards.[27]
- Second, and to the extent to which appropriate housing for farmworkers within a reasonable radius from the place of employment is available, *a voucher system that also includes transportation to and from work or a travel subsidy when the distance is greater than a negotiated maximum could replace grower provided-housing.* (Housing costs often equal 25 percent or more of farmworker income.)

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[24] This is also the path followed late last year by legislation that focused at the high skill end of the temporary foreign worker program continuum, the H-1B program for professionals.

[25] A reasoned way for reaching a balanced view on the cost issue would be to include the travelling and associated costs for recruiting foreign workers into the mix.

[26] Some will argue that more might be needed to reduce that power inequality since very few workers "vote with their feet" in objection to wages or working conditions.

[27] The idea here would be to create safe and sanitary living conditions that are consistent with the seasonality and nature of the need.

Such a solution would simply recognize that housing always has been provided in stable farm labor markets. Failure to provide housing makes some workers prey to unscrupulous "housing contractors," entices others to expose themselves to the elements by sleeping in the fields, imposes a burden to those workers who seek decent housing, and often creates inhumane burdens on family members of farmworkers.

Occupational safety and health administration (OSHA)-type protections. The hard-fought battle leading to improved regulations in field sanitation and other OSHA-type protections at agricultural work sites, as well as pesticide protections for farmworkers, should not be undermined by any new worker program. Instead, better enforcement of existing standards must be emphasized.

Travel costs reimbursement. The system of reimbursements for travel costs from a worker's home country cannot remain as it is in the current H-2A program if even minimum mobility is granted to program participants. The resolution of this dilemma could be found in new mechanisms that might *pool transportation contributions by employers from a designated area and allow a third party to disburse the funds.*

Performance and compliance bonds. A program's integrity demands that accountability by all parties be reinforced by viable and realistic compliance mechanisms. Bonding by individual employers or employer groups—even by workers, under certain circumstances (see the next discussion item)—can provide a disincentive for breaking the rules associated with the employment of foreign workers while making collecting fines easier.

- There are a number of choices on what to bond—legal status, duration of stay, certain terms and conditions of work, etc. Essentially, bonding would become another "tax" threat—and, therefore, an incentive for playing by the rules by all parties.
- Bonding by workers may also be considered. It may take the form of withholding an amount of a foreign worker's wages and depositing it in interest-bearing savings accounts accessible only by the workers and only from the country of origin. These accounts could be managed by a division of the Trust Fund discussed earlier but should be held separately from employer contributions. (An additional advantage of such withholdings would be to reinforce the entire Trust Fund concept.)

Monitoring by foreign governments. Foreign governments whose nationals participate in the program should have the right to work with relevant U.S. Government agencies and civil society institutions as "observers" on issues of work standards and civil and human rights complaints. The most efficient way for these governments to meet their responsibilities in this regard might be through a specialized cadre of "monitors" attached to their consulates in the United States.

D. Enforcement issues

A credible and even-handed enforcement effort is essential to the programmatic integrity and political viability of any contentious experiment. It also creates both an incentive and an opportunity for all parties to an agreement to become socialized into new norms and can assist civil society institutions with an interest on an issue to exercise due vigilance. For an enforcement policy to stand a chance to succeed, however, it—and the rules it enforces—must work *with,* rather than *against* the market. Hence the importance, once more, of balance. Considering recent, and increasing, evidence of public distaste for unacceptable conditions of work, getting the public more engaged on this issue improves both the prospects for a fair-minded deal and for a robust compliance effort. It may also be necessary to clarify here that by "compliance" we need not understand relying exclusively on governmental initiatives; instead, we should challenge ourselves to draw into the compliance equation advocates of all types (including legal services' representatives) and community-based organizations and to consider reaching out to such infrequently used mechanisms as audits, mediation/arbitration, and the like.

A never-before-seen commitment to labor and immigration law enforcement in FVH agriculture must be part of any bargain. This may require the formation of *dedicated units* both within the INS interior enforcement infrastructure and the DOL Employment Standards Administration (ESA) Wage and Hour Division and charge them with enforcing the terms of any initiative.[28]

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[28] There are only about 950 DOL Wage and Hour compliance officers with ever expanding responsibilities. It is thus no surprising that enforcement is lax across the board. *Hence, a serious effort must be made both to enhance DOL resources significantly and to target better its enforcement efforts.*

Program leakage issues. Creating a "fire-wall' between employment in agriculture and employment in other sectors will need to be resolved to the satisfaction of those concerned about unauthorized employment. The use of special work authorizing picture identification cards and vigorous enforcement would be essential elements of any such fire-wall.

Regulating the FLC's. The role of farm labor contractors (FLC's) must be thoroughly re-examined and radically reformed. At a minimum, any experimental program reforms—with or without FLC's[29]—must guarantee that, in the eyes of the law, the grower, as well as the farm labor contractor, is always the employer and thus the entity responsible for labor and immigration law compliance.

V. CONCLUSION: WHAT PRICE ARE WE WILLING TO PAY FOR A "CHEAP FOOD" AND INTERNATIONAL COMPETITIVENESS POLICY IN FVH AGRICULTURE?

At the end of the twentieth century, and in the midst of unprecedented prosperity, discussions about changes to the seasonal farmwork status quo may be even more complicated than they have been in the past. Not only are the politics of the issue as byzantine as they have ever been but they are complicated further by trade liberalization and associated competitiveness issues and the not yet fully understood changes that the new paradigm of regional integration is imposing already. Furthermore, Republican/Democratic antagonisms, though somewhat muted at the moment, will grow as presidential politics heat up, while the "war" on illegal immigration can be expected to continue to buffet the issue in all sorts of unpredictable ways. Finally, the White House is distracted again—this time by the Balkan war.

Yet, failure to take up the issue now will continue to condemn hundreds of thousands of farmworkers to conditions that range from poor to intolerable. Analysts can continue to report on how deplorable the conditions are in the industry and propose elegant but often irrelevant solutions. And advocates from both sides can continue to insist that an opportunity to negotiate from a position of strength is just around the corner. The ethical question, however, remains stark: what do we say to the farmworkers in the meantime? And, if we are willing to join forces and say that the status quo is no longer acceptable, what are some of the critical elements that a new bargain might entail? Two are critical.

First, it is unacceptable to have a significant portion of the U.S. farm labor force in an unauthorized status. As a result, our policies of controlling illegal immigration and of insisting—through thoughtful regulation, tax incentives, and smart enforcement—on proper working conditions *for all farmworkers* must reinforce each other. Those foreign workers who are working in U.S. fields without rights must be given the opportunity to regularize their status so that they can benefit from the protections that should be afforded to all workers employed in the United States. And any *new* foreign workers that may be required by the industry in the future must be given the right to leave unacceptable work situations without fear of reprisals, to choose whether they wish to participate in initiatives to organize and bargain collectively (and who it is that they want to have advocate on their behalf), and to defend themselves against exploitation through legal means.

Second, if at the end of the experiment we are proposing here we find that we have to open the immigration door to additional foreign agricultural workers, we must think hard about which door we should open and who should be allowed to come through it. Workers from Mexico and the Caribbean Basin have a long history of work in U.S. agriculture. They are part of mature migration streams. Providing such workers with the opportunity to work legally in U.S. agriculture is likely to rekindle interest in the cyclical migration that has been the historical pattern and that the current border enforcement effort is preventing. It is also likely to help form a more permanent, professional cohort of cyclical migrants who could count on the predictable employment and secure earnings that can support the further economic development of the sending countries—the only long-term solution to solving the problem of continuing large-scale illegal immigration.[30] Considering the special relationship the United States has constructed with the region (consolidated through such economic agreements as the Caribbean Basin Initiative and NAFTA)

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[29] The system of FLC's is almost as old as the specialty crop farms that emerged in California more than a century ago—when bilingual FLC's acted as middlemen for Chinese workers in the seasonal farm labor market. Gradually, FLC's assumed the responsibility for arranging a succession of seasonal harvest jobs for workers, as well as for worker housing, meals and transportation. Recently, they have also expanded into the realm of border crossings.

[30] The resulting improvements in the wages and working conditions of all agricultural workers is also likely to lead to improvements in the life of rural U.S. communities.

developing additional mechanisms that can tie regional economic policy to migration policy may be highly desirable.

Farming, for many, may still be a way of life; primarily, however, it is just a business. The status quo may or may not be sustainable; but it is clearly perverse both on substance and politics. On substance—on the merits, as it were—it condemns most farmworkers to unacceptable conditions while also denying domestic workers the prospects of making a living in agriculture. On politics, FVH agriculture successfully deploys its political resources to meet its needs for an adequate, cheap, and often undocumented labor supply which, in turn, reduces the industry's interest in capitalizing more aggressively and making the labor market adjustments that might attract more domestic workers. The losers are always the same: all farmworkers.

Absent changes that address and *resolve* many of the issues identified in this paper, we will not be able to test fairly the propositions whether (a) given appropriate *but reasonable* incentives, domestic workers will seek employment in *and stay committed to* employment in the immigrant dominated sectors of the agricultural industry and (b) conditions for farmworkers can indeed be improved substantially even absent the presence of large numbers of U.S. workers in the sector.

The critical element that separates agriculture from most other low-wage/low-skill jobs is seasonality. Under the *status quo,* seasonality translates into low annual earnings and guarantees that workers who live year-round in the United States will remain in poverty—even if they are the most diligent and motivated of workers. Unless we, as a nation, are willing to establish proper working conditions that include a commitment to making farmworker communities viable and that ensure that farmworkers will be able to rely, every year, on seasonal unemployment benefits, a large proportion of jobs in perishable crop agriculture will not become attractive to U.S. workers.

There is never a good time to have a serious conversation on an issue that has divided people for as long as farmwork has. If the issue must be engaged, however, some times are better than others. This may be such a time precisely because the conditions for farmworkers have deteriorated so deeply and the growers are feeling uncertain enough about their political power to be eager to commence a dialogue. The decision whether to view the opening as an opportunity and join the dialogue—and that dialogues' outcome—or simply choose to stand by the sidelines will have consequences for those who work the fields, for America's self-perception, and for America's ability to continue to vie for moral leadership in the world.

Senator ABRAHAM. Ms. Munoz, we welcome you here.

STATEMENT OF CECILIA MUNOZ

Ms. MUNOZ. Thank you, Mr. Chairman. As you know, I am Cecilia Munoz, and I am Vice President for the Office of Research Advocacy and Legislation at the National Council of La Raza.

I am happy to see that all the Senators who testified today have recognized the difficult conditions and situation in which farm workers live and work today. All have acknowledged that the status quo is unacceptable, which is a contention with which we would heartily agree. We have, in fact, been anxious to change the status quo with respect to farm workers for a very long time.

If, in fact, we are ready to talk about changing the situation in which farm workers live and work, we would be eager to engage in that conversation, and we would like it to start with the application of the same labor standards that apply to other workers to those who work in agriculture.

But let's be clear. The proposed H-2A expansion of last year would not have increased the protections afforded to workers under the program. It would have eroded them, and housing vouchers are one example. As several folks have already pointed out, housing vouchers aren't worth very much where there is no housing, and those are the individuals who end up sleeping in the fields, sleeping in caves. And you can understand our concern about a proposal where that would be the result, and there are other similar ero-

sions of the existing protections under the H-2A program that were proposed last year.

We are also concerned that last year there was a legislative proposal, which we understand is about to be reintroduced and cosponsors are being solicited for, which would erode the labor protections for farm workers under the Migrant and Seasonal Agricultural Worker Protection Act. So in an environment when we are talking about reducing protections, you may understand why we are not confident that this debate is going to really lead to a change in the status quo in terms of the wages and working conditions in which agricultural workers labor.

We have already talked a little bit about the contention that there are labor shortages in agriculture. Congressman Berman has referred you to the GAO report. There is some evidence as well, including a recent review of unemployment data in California, that shows that the unemployment rate for the 18 crop-producing counties in California is often double the unemployment rate for the entire State. The average unemployment rate for these counties is greater than the statewide average by as many as 6.5 percentage points even in peak harvest months.

Similarly, in Washington State, a State government report revealed that there were twice as many workers as jobs in agriculture. The State found 139,000 workers available to fill 67,000 jobs, and concluded that there was a plentiful supply of workers at relatively low wage rates.

It has also been argued today that the presence of undocumented workers, which is very real in the agricultural sector, suggests that there is a labor shortage. I would contend that the presence of undocumented workers—what it really reflects is the use of farm labor contractors, which is a system which has been expanding through which the growers work through crew leaders and the crew leaders recruit, hire and supervise farm workers. They insulate the growers from the enforcement of immigration laws and labor laws.

These crew leaders compete for the lowest-price possible workers, and therefore you are more likely to have undocumented workers in that labor pool and they are more likely to get exploited than other workers in this sector. So the presence of undocumented workers is not by itself necessarily an indication of a labor shortage, but it does indicate the increased use of farm labor contractors, which again encourages abuse.

As Congressman Berman pointed out, and I would agree, an expanded H-2A program does not necessarily do anything to reduce the undocumented worker stream. The undocumented workers who are here today are going to stay, and if history is our guide, we know that the creation of additional migrant streams means that those migrant streams continue whether or not there is a program to encourage it. That is what the bracero program did. That is how the existing migrant stream got created, even though the bracero program hasn't been with us for a long time. We believe the expansion of the H-2A program would lead to the same result, which I don't believe is the result that is intended.

I would like to talk a little bit about the working conditions that we see in agriculture because, again, one would expect that if there

is indeed a shortage of labor, wages would change. The simple law of economics would suggest that the wages go up in a time of shortage of workers and that working conditions shift.

In fact, the New York Times has documented that farm workers' real wages during the last 20 years have decreased by 20 percent or more. Time magazine has reported that California strawberry experienced a decline in real earnings from $9 per hour 10 years ago to $6 per hour in 1996. In some crops, piece rates have not increased in many, many years. We are talking about a situation where there is a decline in wages rather than an increase, which belies the notion that we have a labor shortage.

In addition, we have perhaps the most serious crisis in farm worker housing that many have seen in decades, and we are particularly concerned about the potential erosion in the requirements that housing be provided that was proposed in last year's proposed H-2A expansion.

I want to conclude by pointing out, Mr. Chairman, that my organization is not a farm worker organization. We are a Latino civil rights organization. We are here in part because so many farm workers are Latinos, but we are also here because our larger community is very concerned, and indeed outraged by the conditions in which many Latinos, particularly farm workers, are expected to live and work.

I think it is safe to say that we are the only group of Americans whose working conditions have either remained stagnant or deteriorated in recent years, and we are the only group of American workers who regularly have to fight over issues like sanitation in our workplace and the equal application of labor laws.

The agricultural industry has survived, and indeed thrived because of what amounts to a subsidy in the form of government-supported easy access to workers who are vulnerable and exploitable. And this has translated into the preservation of conditions which are simply intolerable in this day and age. When you take this picture as a whole, it is easy to conclude, as many Latinos do, that this debate is about greed.

We appreciate this opportunity to make these points today, and I want to say as clearly as I can that any proposal which undermines the already unacceptable conditions in which farm workers live and work will not be tolerated by my community. It is straight up, bottom line; it is something that we care very deeply about. We are very eager to have a debate about changing the status quo. We are concerned that this debate may not be getting us there. If we are indeed prepared to sit at the table and talk about wages and working conditions for farm workers, we would be very eager to have that debate. But the proposals that we have seen thus far—we haven't seen this year's proposal, but based on what we have seen in recent years, we don't have a lot of confidence that that is the direction that the debate is going.

Thank you.

Senator ABRAHAM. Thank you very much.

[The prepared statement of Ms. Munoz follows:]

PREPARED STATEMENT OF CECILIA MUNOZ

I. INTRODUCTION

My name is Cecilia Munoz. I am the vice-president for the Office of Research, Advocacy and Legislation of the National Council of La Raza (NCLR). NCLR is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR is the largest constituency-based national Hispanic organization, serving all Hispanic nationality groups in all regions of the country through our network of 230 affiliate community-based groups and regional offices. NCLR has supported fair and effective immigration and farmworker policies for over two decades, and has ensured a fact-based Latino perspective on the issue of immigration. NCLR approaches this issue as a civil rights organization, with an interest in protecting the rights of our constituency and promoting the values and principles of the nation as a whole.

I appreciate the opportunity to submit this statement before the Subcommittee today, especially when it concerns an issue that ultimately will affect the lives of perhaps the single most disadvantaged of all groups in the United States: the nation's farmworkers. These hard-working Americans toil in the fields for meager earnings and few benefits; they sustain multi-billion dollar industries, and literally put food on our tables. Yet, they remain largely invisible to the rest of the country. Under a century-old system of labor, farmworkers continue to be inadequately protected by federal laws and regulations, including worker protection standards that all other workers take for granted.

We have heard today from representatives of the agricultural industry which is again attempting to orchestrate the establishment of additional special privileges for itself, proclaiming the same unsubstantiated argument employed continuously since the mid-1800's: that there are labor shortages. Whether it was Chinese immigrants in the nineteenth century, the 4.5 million *braceros* brought in to toil in the fields between 1942 and 1964, or "guestworkers" under the current H-2A program, the agricultural industry has been dependent on foreign-labor and has been relentless in maintaining this dependency. They have spent the last decade soliciting Congressional support for a massive expansion of the H-2A program, claiming that recent governmental efforts to enhance border control and increase interior enforcement of immigration laws will drain them of their labor force.

II. PROPOSED EXPANSION OF GUESTWORKER PROGRAM

A. Overview

NCLR, like most Latino advocacy organizations, is concerned about current proposals to "reform" or expand current guestworker programs because the majority of farmworkers in the United States are Latino. About 70 percent of farmworkers are foreign-born; 94 percent of these are from Mexico.[1] As of 1995, an estimated 63 percent held citizen or lawful permanent resident status. Researchers estimate that there are 1.6 million migrant and seasonal farmworkers excluding livestock workers in the nation. Half of these are in California, competing for a shrinking number of jobs.[2] When you include family members and other dependents of farmworkers, the national farmworker community compromises as much as 4.1 million Americans.

For several years, certain agricultural employer interests have claimed that there is, or soon will be, a shortage of farmworkers authorized to work by our nation's immigration laws. Recently, this cry has reached a feverish pitch as agricultural employer groups have lobbied in favor of an expanded temporary "guestworker" program. Such programs were proposed in 1996 and 1998, and we expect yet another proposal to be introduced shortly.

B. No agricultural labor shortage

The House of Representatives resoundingly defeated two agricultural "guestworker" amendments to the Illegal Immigration Reform and Immigrant Re-

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[1] U.S. Department of Labor, *A Profile of U.S. Farm Workers: Demographics, Household Composition, Income and Use of Services,* Based on Data from the National Agricultural Workers Survey (NAWS), April 1997.

[2] U.S. Department of Labor, *Migrant Farmworkers: Pursuing Security in an Unstable Labor Market,* Based on Data from the National Agricultural Workers Survey (NAWS), 1994; Martin, Philip, "California's Farm Labor Market and Immigration Reform," in Lowell, Lindsey, ed., *Temporary Migrants in the United States.* U.S. Commission on Immigration Reform, 1996.

sponsibility Act in 1996.[3] Consequently, Congress requested that the Government Accounting Office (GAO) investigate claims of an agricultural labor shortage; presumably to shed much needed light on the notion and settle the argument.[4]

Contrary to the growers' claims in 1996, the GAO found that there is, and will be "in the foreseeable future" a *surplus* of agricultural labor in the United States. GAO found double-digit unemployment rates in the 20 major crop-producing counties—which feed the migrant labor stream. These counties—13 of which are in California—account for about half of the total national value of production in fruits, tree nuts, and vegetables. The GAO also found that farmworkers' real wages have declined during the last decade, a fact that contradicts labor shortage claims.[5]

Moreover, a review of unemployment data in California shows that the unemployment rate for the 18 crop-producing counties in California is often double the unemployment rate for the entire state [see chart A]. The average unemployment rate for these counties is greater than the statewide average by as many as 6.5 percentage points even in peak harvest months.[6]

Further, a recent Washington State government report revealed that there were twice as many workers as jobs in agriculture. The State found 139,000 workers were available to fill 67,100 jobs in 1995 and concluded that farmworkers average earnings are low because "there is normally a plentiful supply of workers at relatively low wage rates."[7]

Some have pointed to the recent INS audits of produce warehouses in Washington's Yakima valley as evidence that a new guestworker program is needed to overcome a shortage of authorized workers. The INS action resulted in the firing of 562 unauthorized workers. While NCLR is concerned about the disruption these firings have had on the Latino immigrant community, and about the potential for future hiring discrimination against Latinos, this case does not prove that there is a shortage of authorized workers. At the time, Yakima County had an unemployment rate of 13.9 percent and there were 1,400 agricultural workers receiving unemployment compensation—which requires verification of legal immigration status. The State Employment Security Department referred workers for all job listings submitted by the produce warehouse within hours. The growers themselves said that there was no shortage of applicants for job vacancies created the INS audits.[8]

Given these statistics, the claims of a labor shortage can take absurd dimensions. For instance, in September of 1998, the unemployment rates in the four-county Fresno region were as much as twice the statewide average, for a total of 99,200 unemployed legal U.S. workers.[9] At the same time, however, raisin growers in the area were calling on then-Governor Wilson to deploy the National Guard, delay school openings, and release prisoners to the fields to harvest grapes because they could not find enough workers.[10] The growers claimed they were short by 80,000 workers, yet the grapes were harvested.

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[3] Roll Call Vote No. 85 on amendment offered by Mr. Pombo, *Congressional Record,* March 21, 1996; Roll Call Vote No. 86 on amendment offered by Mr. Goodlatte, *Congressional Record,* March 21, 1996.

[4] Amendment No. 3741 to S. 1664, *Congressional Record,* April 25, 1996; U.S. House of Representatives, *Conference Report on the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996,* September 24, 1996.

[5] U.S. General Accounting Office, *H-2A Agricultural Guestworker Program,* December 1997.

[6] State of California, Employment Development Department, *Report 400C,* 1987–1998.

[7] Washington State Employment Security, *Agricultural Work Force in Washington State 1996,* June 1997.

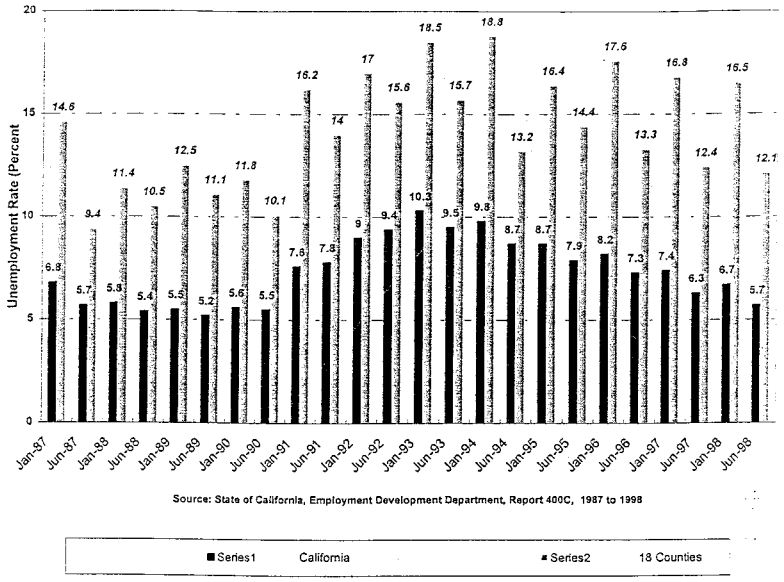
[8] Smith, Rebecca "Proposed Agricultural Guest Worker Program: Issues & Concerns" Columbia Legal Services, April 1999.

[9] State of California, Employment Development Department, *Report 400C,* 1987–1998.

[10] "Growers Face Worker Shortage," *San Francisco Chronicle,* September 11, 1998.

CHART A – OFFICIAL UNEMPLOYMENT STATISTICS

COMPARISON OF AVERAGE UNEMPLOYMENT RATES FOR CALIFORNIA AND THE 18 CROP-PRODUCING COUNTIES, FOR BOTH PEAK AND OFF-PEAK HARVEST MONTHS, 1987-1998



Source for chart: Schacht, M.S., et al, *The 1998 Central Valley Raisin Harvest: A Case Study of the Availability of Farm Workers During the Alleged Labor Shortage in the Four County Fresno Area.* Sacramento, CA: California Rural Legal Assistance Foundation, April 1999.

C. Recruitment of undocumented workers

The fact that a sizeable percentage of farmworkers is undocumented—37 percent according to the Department of Labor and the GAO—is not evidence that there is a shortage of authorized workers. More likely, it is evidence that the hiring practices used by growers have contributed to the size of the undocumented population in the United States. Increasingly, growers have turned to farm labor contractors (FLC's) or crewleaders to recruit, hire and supervise farmworkers, rather than directly recruiting workers. As of 1995, fifty percent of California's seasonal farm jobs were filled through FLC's.[11] Workers hired through crewleaders tend to experience lower wage rates, more unemployment, and higher turnover. Such workers are also more likely to be undocumented as the contractors compete for the cheaper workforce. Many growers deny that they directly employ any farmworkers and blame immigration and labor law violations on the FLC's, who are hard to prosecute, because they frequently cannot afford to pay a court judgment for the failure to pay wages or Social Security contributions.

The guestworker program being proposed by the growers would do nothing to decrease the number of undocumented workers in the United States, nor would it regularize or stop unauthorized migration across the nation's borders. To the contrary, it would likely increase the size of the flow as new social and employment networks are established across the United States and abroad. At the same time, workers entering under such a program would suffer the most intolerable working conditions not seen in this country since the demise of the *Bracero* program.

D. A shortage of decent wages and working conditions

In 1992 the Commission on Agricultural Workers, appointed by Congress, recommended that agricultural employers would better stabilize the workforce by improving labor practices. The agricultural interests requesting a new guestworker program have not followed these recommendations. Despite their repeated predictions of imminent labor shortages, these growers have not acted like an industry facing a labor shortage by improving jobs offered to workers. Instead, we are dealing with a century-old system of low-wage, high turnover jobs made possible through the use of labor contractors to attract desperate and exploitable undocumented workers.

This system has resulted in poor working conditions for all farmworkers. Real wages, in recent years, have declined and the poverty rate for farmworkers has escalated to well above one-half the population.[12] An ongoing study of migrant and seasonal farmworkers commissioned by the Department of Labor found that "median personal incomes have remained between $5,000 and $7,500 since 1988, which means that personal incomes, in inflated-adjusted dollars, likely fell during this period.[13]

The *New York Times* in 1997 reported economists' assessment that farmworkers' real wages during the last twenty years have decreased by 20 percent or more.[14] *Time Magazine* reported that California's strawberry workers experienced a decline in real earnings from $9.00 per hour a decade ago to $6.00 per hour in 1996.[15] In some crops, piece rates have not increased in many years. The decline in the real value of the federal minimum wage has also contributed to low agricultural wages.

Fruit and vegetable growers can afford to pay workers a living wage. The value of production of such labor-intensive crops grew by 52 percent between 1986 and 1995, netting $15.1 billion. A doubling in the value of exports of these products during the 1990's largely has fueled this growth. Productivity has also increased.

At the same time, Americans spend a smaller proportion of their income on food than consumers anywhere else in the world do. To compare, Americans spend 9 percent, on average, on food eaten at home, while the English spend 14 percent; the Japanese 20 percent; Indians 50 percent. The average American family spends only $400 per year—less than $10 a week—on fresh fruits and vegetables.[16] Still, growers often say they cannot raise wages because Americans will not pay more for their produce.

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[11] Martin, Philip and J. Edward Taylor, *Merchants of Labor: Farm Labor Contractors and Immigration Reform* (The Urban Institute, 1995) at 15.

[12] U.S. Department of Labor, *A Profile of U.S. Farm Workers: Demographics, Household Composition, Income and Use of Services,* Based on Data from the National Agricultural Workers Survey, April 1997.

[13] Ibid.

[14] U.S. Surveys Find Farm Worker Pay Down for 20 Years," *New York Times,* March 31, 1997.

[15] *Time,* November 25, 1996.

[16] Rothenberg, Daniel, *With These Hands: the Hidden World of Migrant Farmworkers Today,* Harcourt Brace & Company, 1998.

Growers currently have little incentive to pay higher wages. If a grower decides to compete for available work-authorized farmworkers by increasing the wage offer they may be undercut by competition by a less scrupulous employer hiring undocumented workers. The lack of wage standards enforcement gives a competitive edge to the employer who does not comply with the laws. Currently, the growers are seeking to level the playing field by lowering the standards for all employers, to the detriment of the worker. It would be more appropriate, and better for both the employer and the worker for Congress to improve standards and provide for more equitable enforcement.

Farm labor is consistently rated among the top three most dangerous jobs in the nation. The majority of farmworkers continue to be excluded from many federal and state regulations affecting worker health and safety. Our laws often discourage against farmworkers regarding child labor laws, minimum wage, overtime, unemployment insurance, disability coverage, or workers' compensation.

Workers often sleep in pesticide-laden fields or caves, along riverbanks and in other unsafe and dangerous locations. They work under substandard conditions, often with no access to toilets, handwashing facilities, or fresh drinking water. Housing for farmworkers is frequently non-existent or intolerably rundown and the wages are not adequate to stimulate housing development.

Unfortunately, the living and working conditions of the nation's farmworkers have not improved significantly since the early 1900's. A report by the California Commission on Immigration and Housing chronicled the brutal working and living conditions of migrant workers in 1915, and its recommendations led to state regulation of farm labor camps. In 1991, the *San Jose Mercury News* revealed that conditions in some of California's labor camps have not improved. In Washington State last year, the *Yakima Herald-Republic* published a series of articles that examined the shortage of livable housing for Washington's farmworkers. The reports found conditions in one housing camp to be "worse than anyone had expected" with over 300 health and safety code violations.[17]

Agricultural work is exempted from labor standards that most American workers take for granted. Nevertheless, the few protections that exist for America's farmworkers are often violated because enforcement of these minimal standards is severely lacking. In 1995, the Department of Labor found violations in 63 percent of the 2,300 worksites surveyed. In 1998, 30 percent of California grape growers were found to have violated farmworkers' minimum wage rights.[18]

Budget reductions for the federal agencies responsible for enforcing the minimal farm labor protections, including the Department of Labor's Wage and Hour Division and the Occupational Safety and Health Administration (OSHA), are likely to result in sporadic and ineffectual enforcement. The watchdog role traditionally played by legal service groups has also been eroded.

At the same time, the same growers asking Congress for an extended guestworker program are requesting that Congress further degrade the farmworker labor standards under the Migrant and Seasonal Agricultural Worker Protection Act.[19] While other industries are seeking to make their jobs more attractive in order to recruit and retain a stable workforce, these growers are seeking to make things worse, and demanding that Congress provide the forced labor.

E. The current guestworker program

NCLR believes that the existing temporary foreign worker program, known as "H-2A", is overly generous to the agricultural industry and insufficiently protective of the rights of both U.S. and foreign workers. Industry proposals to further "deregulate" the H-2A program will inevitably and inexorably undermine wages and working conditions for all of America's farmworkers. There is considerable evidence that the H-2A program—which brings in about 25,000 Mexican and Jamaican temporary workers each year—has been fraught with abuses. In its December 1997 study, the GAO found that workers who enter under the H-2A program are not receiving all of the protections required by the H-2A law. The "special requirements" of the H-2A program, which the growers decry, are there for a reason. These protections are intended to ensure that nonimmigrant guestworkers are hired only to fill actual labor shortages, that U.S. farmworkers' wages and working conditions are not affected adversely, and that foreign workers are not mistreated.

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[17] "Plumbing's a Luxury Here" *Yakima Herald-Republic,* April 19, 1998 and "Housing Camp Shut Down" *Yakima Herald-Republic,* April 23, 1998.

[18] Federal Survey of State Grape Industry Reveals Underpaid Workers," Press Release, U.S. Department of Labor, September 15, 1998.

[19] This effort was manifested in H.R. 2038 in the 105th Congress. The American Farm Bureau recently announced that it intends to push for passage of this legislation during the 106th Congress.

Nevertheless, the Department of Labor is acceding to growers' demands by offering for instance, administrative reform and quicker processing that will undermine some of the program's protections. The current program has resulted in lower wages for farmworkers in America. That is why the USDA's National Commission on Small Farms urged the repeal of the H-2A program after hearing testimony that "large farm operators and agribusiness have unfair advantages 'because employer costs have been reduced by partial or total exclusion of agricultural workers from coverage under key labor laws.' In addition, 'the authorized importation of foreign workers for agricultural work (H-2A program), by adding workers to the pool of available labor, has helped keep wages for agricultural workers * * * below what they would have been without such interventions.'"[20]

The current H-2A program approves 99 percent of the applications filed by agricultural employers despite the labor surplus. The H-2A program was streamlined for employers in 1986 and has operated to their advantage. The program is growing rapidly and spreading to new crops and new states. In Georgia, for example, the Department of Labor approved applications for more than 2,200 jobs in 1999, even in cases where the grower failed to file the application on time.[21] During the previous year, Georgia received fewer than 200 H-2A workers.

Still not satisfied, growers are demanding that Congress "reform" the guestworker program to lower wages, reduce recruitment of U.S. workers, eliminate the current program's housing obligations, authorize wage and other employment practices that are currently illegal, and reduce enforcement of labor standards. Guestworkers; are desirable because they lack the right to switch jobs or to remain in the country once their job ends. Guestworkers also lack economic or political power to improve their conditions.

F. The growers' proposal

There is no valid justification for enacting a new guestworker program. When one considers the proposal introduced last year, it becomes clear that the future the growers envision for farmworkers under such a program would be quite bleak. The guestworker legislation introduced during the 105th Congress, erroneously entitled the "Agricultural Job Opportunity Benefits and Security Act of 1998," is rife with injustices. Among other things, it would:

- *Permit employers to exploit foreign workers and ignore American laborers.* The guestworker proposal eliminates employers' obligations to privately recruit U.S. workers and therefore enables them to give preference to cheaper foreign labor. There is no justification for such a preference; large-scale growers and processors can well afford to hire domestic workers given the excellent economic outlook of the sector.
- Reduce wages for farm workers, circumventing state and federal minimum wage laws. It would only require employers to pay the higher of either the local prevailing wage or a newly defined adverse effect wage rate (5 percent above the prevailing wage rate). Worse yet, employers themselves could determine the "prevailing wage" or rely on state agencies' determinations rather than those of the Department of Labor. Certain types of abusive labor practices that are now illegal would be legalized.
- *Provide an illusory offer of green cards.* It would only permit foreign nationals to apply for permanent visas after completing four consecutive years of working in the program for at least 6 months per year. Few farm workers would satisfy that requirement due to the short nature of their jobs. In addition, the guestworkers' desire to obtain continued employment would render them vulnerable to unreasonable employer demands. Finally, the provision relied upon the "spill-down" of leftover visas from higher preference employment-based immigration categories which are unlikely to materialize; it is an illusory offer.
- Relieve agricultural growers and labor contractors of the obligation to provide housing and transportation. New "allowances" in the measure would place the burden on foreign workers to find housing in unfamiliar communities. As a result, some workers could end up homeless because their wages are too low for them to afford housing and because there is also a farmworker housing shortage. The legislation would also remove the employer's obligation to reimburse workers for in-bound travel costs at the half-season point and to pay the worker's cost of going home upon completing the entire season.

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[20] U.S. Department of Agriculture, *A Time to Act,* National Commission on Small Farms, Washington, D.C.: January 1998.

[21] Letter from Secretary Alexis Herman, U.S. Department of Labor, to Senator Paul Coverdell, April 16, 1999.

- *Provide no minimum work guarantees unlike the current program.* Without such guarantees, guestworkers have no way to estimate their potential earnings and employers could over-recruit to secure a labor surplus, driving down wages.

Last year's proposal is too complex and lengthy to analyze here. The extensive labor law aspects of the bill, combined with the guestworker component, would provide employers with extraordinary control over their workers and permit businesses to escape the economic law of supply and demand. Moreover, the costs associated with this program—including the impact on the local community—would be paid by U.S. taxpayers. Meanwhile, Social Security and unemployment insurance are not applicable to guestworker wages; essentially providing a tax-break for the employers using this program.

In short, the growers' proposal is anti-immigrant, anti-worker and anti-Latino.

III. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

NCLR strongly opposes any attempt to expand temporary foreign agricultural guestworker programs. NCLR opposes the effort to weaken the existing H-2A program by changing the labor certification process, which gives preference to the hiring U.S. farmworkers; by repealing the requirements for housing, transportation reimbursement, and the minimum work guarantee; by lowering wages required by the current law; and by authorizing certain employment practices that are currently illegal.

More importantly, there are no convincing arguments to support the growers' call for more temporary foreign agricultural workers. For far too long, the United States government has granted select growers a privilege to which few other industries are entitled. Rather than rely on market methods for recruiting workers, including offering adequate wages and favorable working conditions, growers have depended upon Congress for assistance in obtaining a workforce. In fact, since the inception of the H-2A program, users of the program have created their own perpetual "labor shortages" by making farm labor jobs as unattractive to U.S. workers as possible.*

B. Recommendations

Rather than grant the agricultural industry increased access to foreign labor, NCLR urges Congress and the Administration to consider the following recommendations:

- *Effectively Enforce Existing Protections and Labor Laws:* The Department of Labor (DOL) must prevent persisting employer abuses of the H-2A program, by enforcing existing protections in the program, including the "fifty percent rule," which gives U.S. farmworkers preference over an H-2A worker. Growers must also not be allowed to exploit foreign workers by underpaying them or denying them crucial benefits. DOL also must increase its vigilance over the H-2A program and resist attempts to reduce alleged administrative burdens.
- *Provide Adequate Resources for Enforcement of Labor Laws:* The Administration should request, and Congress should provide, sufficient funding to DOL's Wage and Hour Division and OSHA, among others, to assure effective monitoring and enforcement of labor standards for U.S. farmworkers and H-2A workers. Law abiding employers that wish to compete for workers must be protected from unfair competition by companies that violate the law. Congress should also revisit the budget restrictions and limitations on the Legal Services Corporation grantees that have traditionally served farmworkers.
- *Improve Existing Recruitment Methods:* The agricultural industry must improve its current recruitment methods to attract available, work-authorized U.S. workers, while recognizing that recruitment only succeeds when the job offer is decent. Surveys along the East Coast, where more growers are using the H-2A program, have shown that U.S. farmworkers are indeed available for work but need advance assistance with transportation; which is *rarely* provided to U.S. farmworkers. Growers also must assure that their written job advertisements are placed in locations where U.S. farmworkers will hear or see them. In addition, the Department of Labor's U.S. Employment Service must improve its outreach efforts to match U.S. farmworkers with available agricultural jobs, primarily since less than five percent of all U.S. farmworkers use this system to secure work. Further, failure of DOL's proposed AgNet or other similar job reg-

*Recruitment of U.S. workers is often done with mixed messages. While claiming a "shortage" of workers for the 1998 grape and raisin harvest, certain growers representatives discouraged job seekers by claiming that the jobs were too difficult for U.S. workers and that they should not complain about the low wages being offered.

istry systems to produce workers immediately should not trigger automatic certification of applications for guestworkers, as this system will probably take several years to become effective. Employers and DOL should improve coordination with labor unions and community-based organizations that are ready and willing to promote recruitment of U.S. farmworkers to meet the employers' needs.

- *Make Growers Who Use Farm Labor Contractors (FLC's) Responsible for Treatment of Their Workers:* Congress and enforcement agencies must assure that growers do not circumvent existing labor laws by increasingly relying on FLC's for workers. Since the enactment of the Immigration Reform and Control Act of 1986 (IRCA), growers have come to depend more heavily upon FLC's to produce a workforce. Essentially, contractors have become the "risk buffers" between growers and their immigrant workers, and now perform the regulatory duty imposed by IRCA on all employers. Furthermore, evidence has shown that workers hired by FLC's are more susceptible to exploitation in the form of lower wages, reduced benefits, lower retention rates, and inferior working conditions.

Please take these recommendations into account as you proceed with your consideration of these issues. The Subcommittee should recognize that the past is prologue—previous implementations of the growers' attempts to bring in foreign workers as "guestworkers" have not been effective in controlling undocumented immigration. In fact, immigration experts believe that the Bracero program—which supporters also claimed would end unlawful migration—established the networks by which unauthorized migrant workers continue to enter and work in the United States today.

The guestworker issue brings together a remarkably broad array of interests. Every blue ribbon panel that has ever studied the issue, from the Hesburgh Commission to the Jordan Commission has rejected the idea of an expanded guestworker program. The Latino community is united in opposing the growers' efforts. Defeat of the growers' proposal is a top priority for the National Council of La Raza. It is not often that such a consensus exists among both immigrant advocates and immigration restrictionists. Congress should follow this consensus and reject this proposal as unnecessary, dangerous and counterproductive.

Again, thank you Mr. Chairman and the Subcommittee for considering our views on this issue.

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Senator ABRAHAM. Ms. Huerta, welcome.

STATEMENT OF DOLORES C. HUERTA

Ms. HUERTA. Thank you very much for the hearing. My name is Dolores Huerta. I am the co-founder and the Secretary-Treasurer of the United Farm Workers. The United Farm Workers represents workers in California, Arizona, Washington State, Texas and Florida. We also work very closely with the other farm worker organi-

zations, Pacun, which is in the State of Oregon, and FLOC, which is in the Midwest in the United States.

We have offices in all of the areas that I have spoken about. In the San Joaquin Valley alone, which is the largest producing area of the United States, vegetable-producing area, we have five offices in that area. You know, it makes me feel kind of good to be able to come here. I have been testifying in the Congress since the 1960's, you know, for the last 30-some years, and always talking about the terrible conditions of farm workers.

Senator Kennedy has personally been out there to see the conditions of farm workers, and here we are 30 years later and we are still talking about the same things. But it makes me feel really good to be able to come here to say that there are solutions and to say that our United Farm Workers union has been able to solve some of these problems.

We have 27,000 farm workers under United Farm Worker contracts with agricultural employers, where farm workers have a full medical plan, which by the way is named after Robert Kennedy, who was a Senator in this House. We have a pension plan named after Juan de la Cruz, one of our farm worker martyrs who was killed in a grape strike in 1973.

We will be giving out $1,000 checks in the next 2 weeks to farm workers who have retired, who are given a pension check as a result of our collective bargaining agreements. And this makes us feel very good. In addition, we have also, through our non-profit arm, the National Farm Workers Service Center, been able to build housing for farm workers. We have built over 1,600 family units. Now, these are not barracks and they are not for single men; they are for families. We are now going into housing programs in Arizona and in Florida. And these, by the way, are all done through tax credits and working with the local municipalities. So, that makes us feel very good.

Also, where we do have our union contracts, we have very long waiting lists of farm workers that are waiting to go to work at our contracts because they are getting, number one, a livable wage. I think we have to talk about a livable wage, that farm workers need to be able to feed their families, to pay their rent.

By the way, Senator Feinstein, the rents in Watsonville for farm workers are as high as they are in San Francisco. That is how much they have to pay. Yet, at the same time, as was noted earlier, the wages of strawberry workers have fallen like 23 percent.

So it makes us feel very good that we are able to do this. And there is no bureaucracy here. The taxpayers don't have to support it. Our union contracts are only 30 pages long. It is not hundreds of pages. None of the employers that we have contracts with have any kind of a labor shortage. We have, as I say, long waiting lists of people that want to go to work, and we have been able to partner with some of the employers so that we can actually make the productivity better, the efficiency better.

In fact, one of the companies that we have a contract with which is based out of Medford, OR, Bear Creek Productions—this is a company that has 1,500 workers. We signed a contract with them 4 years ago, and with all of the improvements in wages and medical plans and pension plans, paid holidays, paid vacations—even

Cesar Chavez Day is a paid holiday—that company for the first time made $1.5 million in profit in 12 years.

So this is, I guess, what I want to say to the employer community that they have to kind of have a change—the attitude of the employers has got to be reformed. We have heard testimony today about Florida. We had a lock-out in Florida of 250 farm workers who protested because they were getting injured on the job. We recently negotiated an agreement with that company.

In Washington State, the apple campaign that we were doing together with the Teamsters Union met with a lot of hostility and resistance, so that the conditions of the apple workers in Washington State have not been improved. Pacun, in Oregon, has had a lot of resistance there in terms of unionization. There were many hundreds of farm workers that went on strike in Florida because they were not getting paid even the minimum wage.

There were investigations in California. Over 70 percent of the employers and labor contractors were found to be in violation of the labor laws, including the minimum wage laws. And this is California, where we have organization, where everything is supposed to be so much better than anywhere else. In terms of the sanitation, one of the strawberry companies, Driscoll Associates, did an internal audit and found all types of violations in terms of the sanitary conditions.

So, you know, how can we talk about bringing in guest workers for employers where they don't even want to improve the conditions for the workers that they now have? There is no shortage of farm workers. We are in every single one of these areas. There are lots of unemployed farm workers. The registry that you are talking about, we see that as a blacklist.

What we would recommend, I will go through this real fast, and this was the recommendation of the agricultural commission that I was on. We did hearings for 2 years and it came out of the whole commission, including the agricultural employers that were on that commission. We recommended that we enhance and develop farm labor services offices throughout the United States of America so that farm workers will have someplace where they can go to find a job. And employers should go to those farm labor services to look for workers, which they have testified that they do not do.

Farm workers have to go through labor contractors. They are exploited. They have to pay $5 to $10 a day for a ride to go to work. They have to buy the labor contractor's food, their beverages. They end up with not any money at all.

The Worker Investment Act that is now going into effect should be used to develop the farm worker force. Instead of taking farm workers out of agriculture, like we have been doing with the JTPA programs, let's put that money back into the farm worker community to help those farm workers stay in farm work. The farm workers that are getting pension checks worked their entire lives in farm work. Our members consider farm work their life's work. They want to stay in farm work. They don't want to be pushed out.

The U.S. Department of Transportation and Secretary Slater has a new program called Job Access. Let's make that available to farm workers so that they can get transportation to go to work and to have to go through the labor contractors.

Also, of course, the discriminatory against farm workers, as was mentioned earlier, should definitely be removed. The Farm Bureau Federation and many of the people here at the table on the growers' side oppose all of these types of improvements in the lives of farm workers. You know, we can't go on like this.

I mentioned the registry. I think that that would be a blacklist. People should go to the local employment office. That is where they should register for work. We do support the RAW program that Howard Berman was talking about, but it should not be any kind of anything in the future. It has got to be retroactive. If you say to farm workers, you can get amnesty, but you have got to stay with this employer for 3 years, you are talking about legalized slavery here just because they will be under that employer's—right now, farm workers are very afraid of job security. If a farm worker asks who am I working for, if he is working for a labor contractor, he can get fired just asking a question.

I mean, the biggest thing that the union offers is a seniority clause, that they have that job even after the season. They can come back to work at that particular employer. They have job security. This is something they do not have without a union contract.

One other thing I want to mention is the whole H-2A program. This is totally discriminatory against women farm workers. The H-2A program is strictly for single men, strictly for single men. It does not apply to families and it does not apply to women. The type of housing that people are talking about building, again, is barracks. Farm workers are not soldiers. These are people who have families. They do not need to live in barracks. They need to have family housing where they can be there with their families.

So, first of all, there is no worker shortage, there is no worker shortage. As Cecilia said earlier, the labor contractors will continue to bring workers in so they can exploit them, so they can steal from them. And the other thing, too, is that we lose a lot of revenues. Labor contractors do not pay unemployment insurance. They do not pay disability insurance in California. They do not pay income tax withholding, you know, so we are losing a lot of revenue.

But this doesn't have to be. The only reason we have all of these problems is because the employers refuse to deal with their farm workers directly. They want to abandon them, turn them over to farm labor contractors, and hope that the Government can continue to supply them with cheap labor.

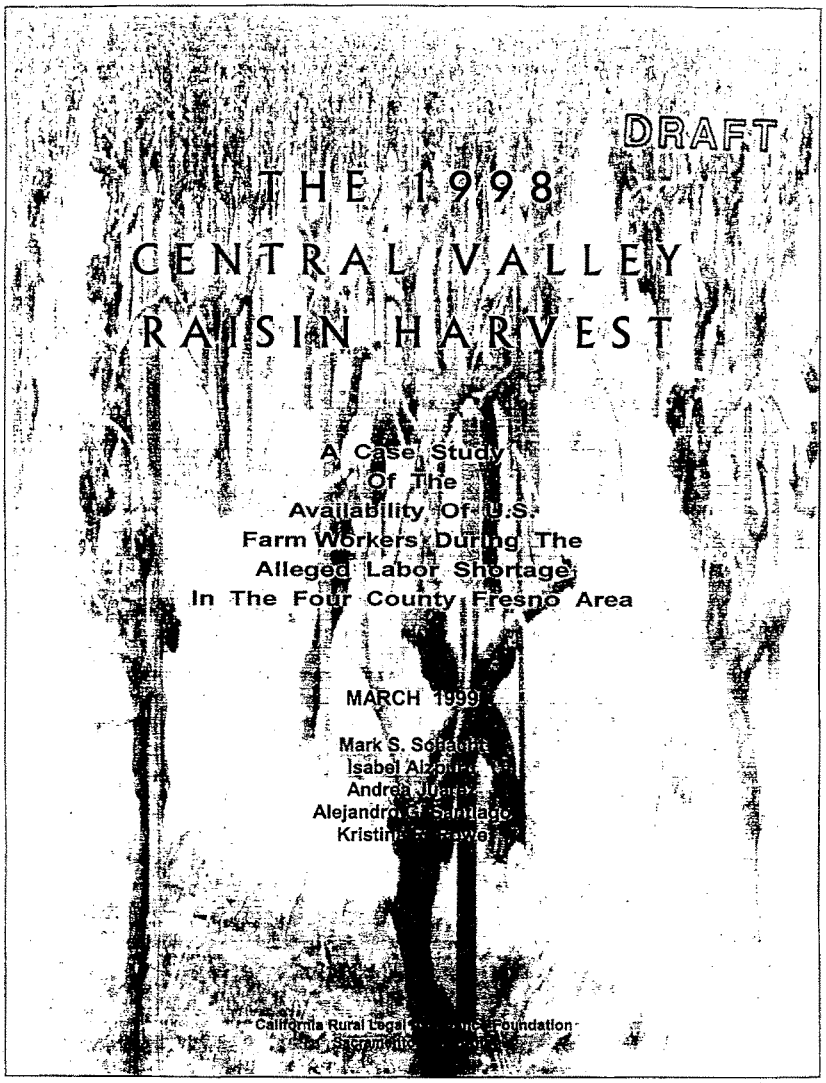
Senator ABRAHAM. All right.

Ms. HUERTA. I just want to—this is a very in-depth study about farm workers that were out of work during the peak harvest seasons. Please look at this very carefully. This is a very careful study that proves that there is more than an abundance of farm workers.

We had 14,000 farm workers, as Senator Feinstein knows, unemployed in Tulare County, 14,000 farm workers that will be employed up until June or July. If they need workers in Michigan, I think California is a better place to go to than to go to Oaxaca, Mexico.

Senator ABRAHAM. Ms. Huerta, thank you. We will put the report in the record; we will submit it with your testimony.

[The report referred to follows:]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IN THE 1998
CENTRAL VALLEY
RAISIN HARVEST
A Case Study
Of The
Availability Of U.S.
Farm Workers During The
Alleged Labor Shortage
In The Four County Fresno Area
MARCH 1999
Mark S. Schacht
Isabel Alzo
Andrea
Alejandro
Kristi
California Rural Legal
Sacramento

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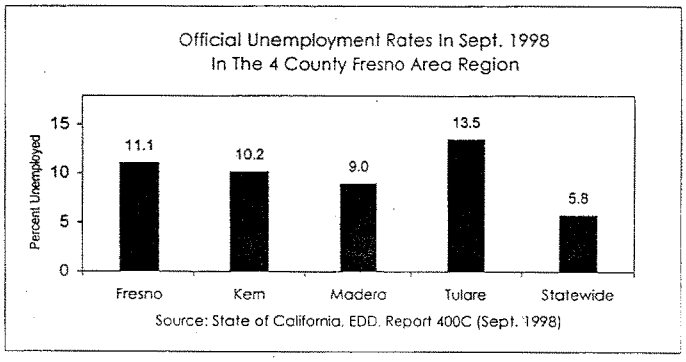
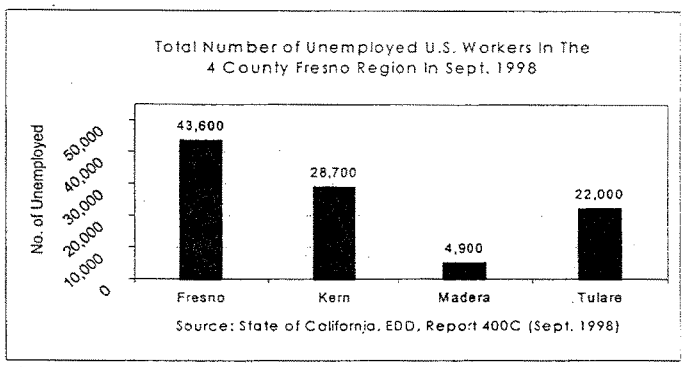
I. Introduction

In September 1998, Fresno county area raisin and grape growers claimed that serious labor shortages were threatening these important harvests.

Farm worker advocates countered that there was more than adequate labor available, if only growers would compete for it. Not only were unemployment rates in the four county Fresno region as much as twice the statewide average, but the number of unemployed totaled 99,200 legal U.S. workers, as these graphs show.





Grower groups have consistently downplayed the relevance of the rates or numbers of unemployed in these rural, agricultural counties; they did so again in September 1998, criticizing California's Employment Development Department for failing to provide much help.

But farm worker advocates and community-based organizations continued to assert that large numbers of farm workers were unemployed, or underemployed, and available during this time period in the very counties where much of the grape and raisin production occurs in the Central Valley.

CRLAF decided to conduct a survey of a large number of farm workers in the four county area in order to accomplish the following:

1. Determine whether individual farm workers were available for work for raisins and grapes in the four county area during the month of September 1998;
2. Determine whether farm workers knew of others who were available for such work in the four county area during the month of September 1998; and
3. Ask farm workers to provide their reasons why farmers did not hire, or were unable to attract, available farm workers for work in these harvests in the four county area during the month of September 1998.

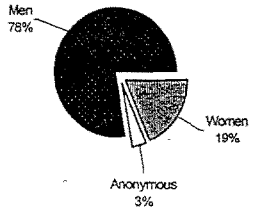
II. Survey Results

A. Demographic Information

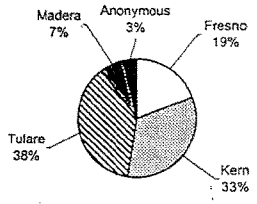
CRLAF hired and trained individuals from the farm worker community to conduct a simple interview designed to produce basic information about the farm worker respondents as well as provide the farm workers with an opportunity to speak out about unemployment conditions in the southern Central Valley.

The interviewers' training was set up during the last week of October 1998, and the interviews themselves were conducted during the first week of November 1998. A total of 343 farm workers were interviewed Some basic information about the respondents is provided in the graphs below.

Gender of the Farm Worker
Survey's 343 Respondents



Respondents' County of Residence

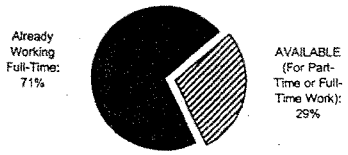


II. Survey Results

B. Farm Worker Availability

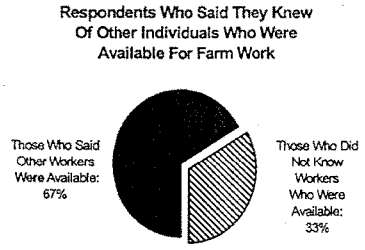
Respondents were asked whether they were available for work in any one of the four counties during the month of September 1998. For purposes of this survey, they were considered available if they were working less than full-time during any of those weeks. ("Full-time" was defined as the raisin industry peak of harvest standard workweek: 6 days, 10 hours per day.) While the results of the interviews showed that a very large number of farm workers were working full-time, they also revealed that 29% were available for work.

Respondents' Who Said They
Were Available For Work During
Sept. 1998 in the 4-County Area



Respondents were also asked whether they knew of other farm worker individuals who also were available for work in any one of the four counties during the month of September, 1998.

Interestingly, the results of the interviews showed that a very large number of farm workers (67%) said they knew of other individual farm workers who were available for work.



The survey's results suggest that --even during periods of peak of harvest-- there were very significant numbers of farm workers who were available for work in the raisin and grape harvests in the southern Central Valley in September 1998.

These results are consistent with:

--recent studies of farm workers by the U.S. Department of Labor (National Agricultural Worker Survey (NAWS));

--government designation of some of these counties as labor surplus areas (as reflected in the recent GAO report; see Appendix B);

--public comments made by community-based or legal organizations that serve farm workers in these areas;

--public comments of the United Farm Workers Union, which represents tens of thousands of workers in the state; and

--official unemployment statistics available for dozens of rural towns and cities in the four county area, which show substantially higher rates of unemployment than are reported for overall for their particular county. (Many of these towns are known, in fact, as "farm worker" towns.)

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II. Survey Results

C. Farm Workers Speak Out About Raisin Industry Jobs

Respondents were asked to provide a reason why farm employers did not hire them, or why they failed to attract them to the available farm work in the raisin or grape harvests in the four county area.

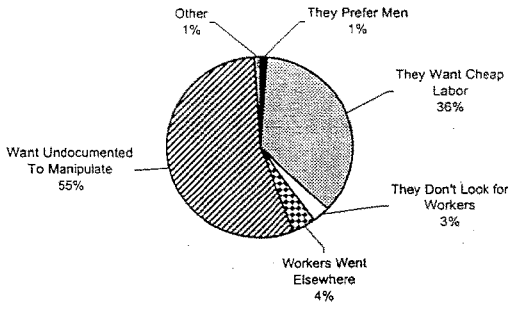
Interviewers were instructed to let the farm workers express themselves and to write down everything that they said.

Later, when interview forms were analyzed and answers were tabulated, a clear picture emerged of the kind of issues that agricultural employers would have to address if they were to be successful in attracting available workers in future harvests.

Farm worker respondents' general answers were grouped into logical categories for display in the graphic below.

Conclusions about the survey and recommendations about how referral, recruitment and retention of available U.S. farm workers can be improved are dealt with in the next section.

Reasons Given By Respondents Why Farm Employers Did Not Hire, Or Were Not Able to Attract, Available Farm Workers



III. Conclusions & Recommendations

Farm workers' responses to the survey suggest that some very troubling dynamics are at work in the labor market, which, taken as a whole, demonstrate growers themselves are responsible for their difficulties in attracting harvest labor. These include: wage gouging by farm labor contractors and growers; exploitation (and preference for) undocumented workers; discrimination against women farm workers (who make up at least 20% of the work force statewide); and payment of wages and benefits that are so low that some workers have an economic incentive to go elsewhere for farm work.

In this subsections below, we address in detail some of the changes that must be made in both the public and private sectors prior to the 1999 harvest if available U.S. farm workers (as well as others) are to be attracted to agricultural employment.. Specifically, we propose that:

- The state Employment Development Department take concrete steps to establish a true partnership with U.S. farm workers in these counties, one that creates structures that encourage employers to make genuine job offers in a more timely and effective manner.
- Agricultural employers end their over-reliance on farm labor contractors to recruit farm workers, and take steps to improve perceptions that lawless conduct (e.g., illegally low wages) is practiced in the industry by both growers and FLCs.
- An "employer code of good conduct" be developed within the industry, and be well-publicized to farm workers. It should offer meaningful protections to vulnerable workers, as well as better than average wages and working conditions. If adherence to the code was publicly verifiable, it could be a basis for successfully enlisting community based groups in referral of unemployed and underemployed workers to jobs.
- The "CalWORKS" programs in the four county Fresno area must be restructured to match workers with the available good long-term jobs in agriculture, but also to provide for referrals of individuals for short-term employment during periods of labor shortages (for those who are interested) as well as to develop "community service" work in the industry under conditions that guarantee to workers with good jobs at good wages.

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III. Conclusions & Recommendations

A. The Employment Development Department (EDD)

A review of unemployment rates in rural California for the last decade (see Appendix A) reveals that double-digit unemployment is persistent throughout California's 18 major crop production counties.

The Employment Development Department, which helps to operate the United States Employment Service system in California, should be a more central player in matching available farm workers (and others) in these counties with the open jobs in agriculture, and it should be far more sensitive and creative about meeting the specialized needs of agricultural workers.

Recent developments at the agency --toward consolidation of offices, reduction of staff in favor of telephone interviews, and computerization of job banks, etc.-- have done little to address farm workers' unique needs.

EDD needs to "reinvent" itself regarding farm workers, and it might do well to look at efforts it made decades ago to make its offices and services more "farm worker friendly."

Specifically, it should consider establishing a new kind of seasonal farm worker service office throughout rural locations within the multi-county region. In these offices, which would be located in known areas of high concentrations of underemployed farm workers, both workers and employers would have a location where genuine job offers could be made in a timely way, and made in a way which circumvents the farm labor contractor system.

Such offers would include concrete job terms (wage rates, benefits, start and stop dates, etc.) that are necessary to attract workers. EDD could supplement these efforts using the proper mix of in-person assistance, telephone referrals, or even on-site (at the job) farm worker assistance services (e.g., translation; explanation of new or confusing job terms; coordinating child care or transportation for the worker).

The United States Department of Labor should be asked to become a major partner in these efforts, and should, in fact, undertake a similar set of reforms within the U.S. Employment Service.

CRLAF believes that, working together, both agencies can put in place significant improvements in time for the 1999 harvest.

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III. Conclusions & Recommendations

B. Reduce Over-reliance on Farm Labor Contractors

Between 1985 and 1991, the use of farm labor contractors (FLCs) by growers to supply needed farm labor for California's raisin harvest rose from 35% to nearly 60%.[1]

This trend has remained steady throughout the past decade, with two important and profoundly negative consequences for the industy.

First, as growers have eliminated the direct recruitment function from their agricultural production activities, it has arguably reduced their ability to successfully recruit and hire farm workers directly themselves, even in times of great need. For example, one of the most prominent labor recruitment techniques used by growers during the September 1998 period was the mere advertisement that jobs in the raisin harvest were then available. Few workers, even those desperate for work, are likely to respond to such 'job offers,' since they do not identify a particular employer, a starting time and place, or the wages or benefits to be provided. FLCs succeed in recruitment of workers precisely because they can provide that information in a timely manner (although farm workers often find that FLCs have misled them about terms and conditions of employment).

Which is, indeed, the second problem with over-reliance on FLCs: the perception that the jobs are undesirable. Study after study has found that "cost" is a key reason why growers move to labor contractors, that "cut throat competition" between FLCs is endemic, and that the jobs subsequently offered by FLCs have the lowest pay and fewest benefits.[2]

In fact, in the very month of September 1998, when raisin and grape growers made claims of labor shortages in the four county Fresno area, the US Department of Labor published results of a just-concluded survey that found that 20% of the growers, and more than 50% of the FLCs, were violating minimum wage law.[3]

Farm worker respondents to the CRLAF survey reflected a "hands-on" knowledge of these practices: 36% said employers "want cheap labor," while 55% stated that employers "want undocumented to manipulate."

Until the underlying labor practices change, farm workers' perceptions will not either, and both will have an undeniable effect on recruitment of eligible US farm workers for the harvest.

1/ "The Labor Market in the Central California Raisin Industry: Five Years After IRCA," Employment Development Department , Labor Market Information Division, #92-4., p. 14.

2/ E.g., Suzanne Vaupel, "Growers' Decisions to Hire Farm Labor Contractors and Custom Harvesters," University of California, APMP, (Jan. 1992), p.12. See also, "Farm Labor Contractors in California," EDD, #92-2, p. 5: "This (study) found many abusive conditions associated with the worst of farm employment. Intense competition among contractors had led many to cut costs by paying subminimum wages...and by charging workers exorbitantly for housing, board, transportation and equipment."

3/ See Appendix C below: "Federal Survey of State Grape Industry Reveals Underpaid Workers".

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III. Conclusions & Recommendations

C. Creative Partnerships With Community Groups

In the last several years, the US Department of Labor has encouraged "model employer" codes of conduct in the garment industry both as a means of cleaning up sweatshop conditions, but also as a means of encouraging employer cooperation with community groups (including unions) over issues of mutual interest.

Certainly the record of success in the garment industry is less than many may have hoped, but there is no reason that the raisin industry should not be challenged to clean up its image, improve wages and working conditions, and seek all practicable ways of reaching out to what most observers agree is the large pool of underemployed and unemployed US farm workers in its midst.

Of course, it won't be easy to forge ties with the farm worker community and its service providers. There is a long history of industry abuse of workers; there is continuing exploitation; and there is a persistent clamor from the industry's spokespersons that 'conditions are brutal', that they don't 'want to hear about raising wages,' and that 'Americans won't do this work.'

However, a creative beginning could be made if leaders within the industry committed to a new code of behavior, and put pressure on others to follow suit. The first critical commitment must be that growers will abide by wage and working conditions laws, and keep accurate time records and provide detailed paystubs. They should also commit to take steps to insure that their FLCs will do the same.

Some other elements of the code might include:

--Agreeing to move to direct hiring of farm workers (eschewing the use of FLCs);

--Eliminating the piece rate (in favor of hourly rates), except where the piece rate operates as a bonus (over and above the hourly rate);

--Committing to hourly rates above the minimum wage;

--Offering an enforceable agreement that sets out all expected terms and conditions of employment (including start and stop dates);

--Providing child care and transportation at no cost where possible;

--Agreeing to publicizing and carrying out a non-discrimination policy that specifically includes women, as well as the right to organize;

--Agreeing to outside monitoring of compliance with the code of conduct; and

--Agreeing to a range of sanctions against employers found to have violated the code.

CRLAF believes that adoption of new code of conduct can be put in place in time for the 1999 harvest, and that it could have significant impacts in developing a new stream of farm worker referrals to growers who seriously implemented the code.

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III. Conclusions & Recommendations

D. CalWORKS Implementation Needs To Be Strengthened

In an earlier publication, "Welfare to Work in the California Heartland" (July 1998), CRLAF analyzed the 18 key crop production counties' welfare-to-work ("CalWORKS") plans (See Appendix D). We found that not a single county in 1998 had in place even a pilot program to refer individuals to agricultural employment in times of claimed labor shortages.

CRLAF recommends that pilot programs be created in each county to address the following: 1) Short-term jobs; and 2) Long-term jobs. While each category of jobs will necessarily involve different programmatic specifics, there are some obvious common elements: special training, assisted transportation, child care, and job flexibility. In addition, since these jobs will be created in an economic sector with a long and well-known history of employment abuses and anti-union hostility, the pilot programs must also necessarily have general provisions assuring basic worker protections (including a means of registering complaints about workplace problems), as well as effective prohibitions against use of CalWORKS participants in strikes, lockouts, or to replace highly paid (or union) workers.

- "Short-term" Jobs

CalWORKS participants can engage in short-term employment (such as seasonal harvest work) during the mandatory job search phase at the initiation of their CalWORKS program (which lasts up to four consecutive weeks). A pilot program that allows individuals to be recruited, trained and hired for work during this time period could involve thousands of workers in the 18 key agricultural counties of California.

- "Long-term" Jobs

The agricultural industry has thousands of jobs which are neither seasonal, nor low-paid, and that are integrally involved in the production of labor-intensive fruits and vegetables in the 18 key counties. These jobs (e.g., drivers of tractors, harvesters and other mechanized implements) are often higher paying and/or unionized. A pilot program that trains workers for these jobs, provided they are not utilized to displace unionized or highly paid current workforces, is feasible, and should be explored.

Finally, under California law, many CalWORKS participants eventually will continue to qualify for benefits only if the participant performs "community service activities." The agricultural industry may well seek a pilot program to require individuals to perform community service in general agricultural employment, especially during periods of claimed labor shortages. It is imperative that any such program must feature special worker protections to avoid the potentially coersive work environment. created by "mandatory" community service work in the industry.

CRLAF is willing to work with counties to implement these changes.

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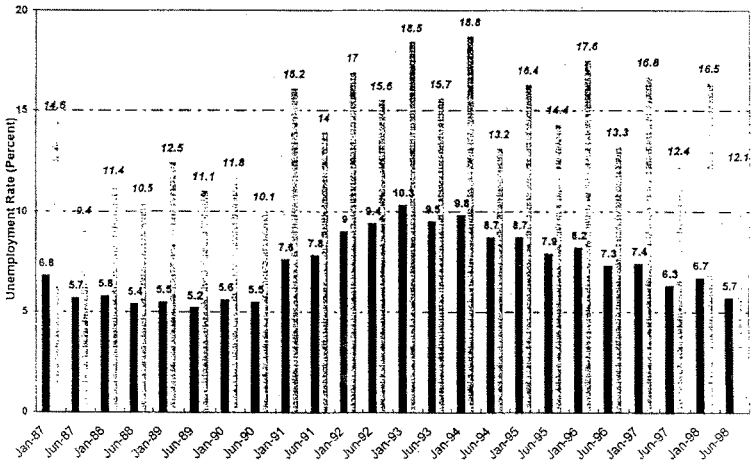
IV. Appendix A: Official Unemployment Statistics

COMPARISON OF AVERAGE UNEMPLOYMENT RATES FOR CALIFORNIA AND THE 18 CROP-PRODUCING COUNTIES, FOR BOTH PEAK AND OFF-PEAK HARVEST MONTHS, 1987-1998



IV. Appendix B: GAO Labor Surplus Area Designations

Table III.2: Food Stamp Waiver and Labor Surplus Area Designations for 20 Counties With Significant Production in Fruits, Tree Nuts, and Vegetables, 1997

County[a]	Scope of food stamp eligibility waiver[b]	Reason for USDA waiver[c]	Scope of labor surplus area designation,[d] fiscal year 1997
Fresno County, Calif.		Over 10 percent unemployment rate	Entire county
Imperial, County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Kern, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Madera County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Merced County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Monterey County, Calif.	Entire county	Over 10 percent unemployment rate	Excludes cities of Monterey and Salinas
Riverside County, Calif.	Entire county	Insufficient jobs	Excludes city of Palm Desert
San Diego County, Calif.	Cities of Chula Vista, El Cajon, Imperial Beach, Lemon Grove, National City, Oceanside, and Vista	Insufficient jobs	Not designated as labor surplus area
San Joaquin County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Santa Barbara County, Calif.	Lompoc City, Santa Maria	Insufficient jobs	Not designated as labor surplus area
Stanislaus County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Tulare County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Ventura County, Calif.	Entire county	Insufficient jobs	Excludes cities of Camarillo, Moorpark, Simi Valley, Thousand Oaks, and Ventura
Collier County, Fla.	Entire county	Insufficient jobs	Entire county

(continued)

IV. Appendix B: GAO Labor Surplus Area Designations, cont.

County[a]	Scope of food stamp eligibility waiver[b]	Reason for USDA waiver[c]	Scope of labor surplus area designation,[d] fiscal year 1997
		Insufficient jobs	Excludes entire county except for cities of North Miami, Hialeah, Homestead, Miami Beach, and Miami
Hendry County, Fla.	Entire county	Over 10 percent unemployment rate	Entire county
Palm Beach County, Fla.	Entire county	Insufficient jobs	Excludes cities of Boca Raton, Jupiter, and Palm Beach Gardens
St. Lucie County, Fla.	Entire county	Over 10 percent unemployment rate	Entire county
Yuma County, Ariz.	Entire county	Over 10 percent unemployment rate	Entire county
Yakima County, Wash.	Entire county	Over 10 percent unemployment rate	Entire county

[a]These 20 counties accounted for about half of the total national value of production in fruits, tree nuts, and vegetables in 1992, the latest year for which data were available.

[b]Section 6(o) of the Food Stamp Act, as amended by section 824 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, provides that, among other criteria, a person is ineligible for the program if he or she previously received benefits but did not work at least 20 hours per week for at least a 3-month period. However, the provisions also say that, on the request of a state agency, the Secretary of Agriculture may waive these provisions for specified persons in the state. USDA issued most of the waivers to the designated counties during early 1997.

[c]The Secretary of Agriculture may waive current food stamp eligibility provisions if he determines that the area in which the persons reside has an unemployment rate of over 10 percent or has an insufficient number of jobs to provide employment for program participants. Among other evidence, designation of an area by Labor as a labor surplus area can be considered by the Secretary that an insufficient number of jobs are available.

[d]Labor classifies a civil jurisdiction as a labor surplus area when that jurisdiction's average unemployment rate is at least 20 percent above the average national unemployment rates during the previous 2 calendar years. During periods of high unemployment, an area can be classified as a labor surplus area if it has unemployment rates of 10 percent or more during the previous 2 calendar years. Labor may also designate areas if an area had unemployment rates of at least 7.1 percent for each of the 3 most recent months or projected unemployment of at least 7.1 percent for each of the next 12 months or has documentation that this has already occurred. Labor designates labor surplus areas on a fiscal-year basis. Designated labor surplus areas are eligible for preference in bidding on federal procurement contracts.

Sources: USDA and Department of Labor.

IV. Appendix C: US DOL Report On Industry Violations

News Release

U.S. Department of Labor | Office of Public Affairs | San Francisco, CA 94105

Grape Survey Press Release

WAGE AND HOUR DIVISION — USDL-177/September 15, 1998

Contact: Tino Serrano at (415) 975-4742, or
Deanne Amaden at (415) 975-4741

For Immediate Release:

FEDERAL SURVEY OF STATE GRAPE INDUSTRY REVEALS UNDERPAID WORKERS
New Emphasis Program Will Aid Farm Workers

SAN FRANCISCO -- A recently completed survey of California grape growers by the U.S. Department of Labor's Wage and Hour Division revealed that while most growers comply with employee health and safety laws, not all pay their workers the minimum wage.

The survey took place throughout California between January and April while workers were pruning and tying vines. The inspections of 66 growers, and 23 farm labor contractors who provide contract workers for those growers, provided the Wage and Hour Division with a statistically valid measurement of compliance with federal workplace rules among the state's grape producers.

Federal investigators checked for compliance with the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The FLSA, among other things, guarantees covered workers a basic minimum hourly wage, and restricts the work hours and types of work which can be performed by minors. MSPA guarantees that housing and transportation provided by employers meet minimum health and safety standards.

The Labor Department determined that 369 workers who received hourly pay that was less than the $5.15 federal minimum wage are due $39,454 in back wages. Minimum wage violations were found in 14 of the 66 grower investigations (about 20 percent of the cases), and in 12 of the 23 investigations of farm labor contractors (over one-half of the cases). The minimum wage violations occurred more often when workers were paid piece rate wages rather than an hourly rate. In some cases, employers disguised the low wages by recording the work of several people on one employee's time sheet, paying wages only to the person named on the time sheet.

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IV. Appendix D: Contents Of Ag County CalWORKS Plans

	Does The Plan	Does The Plan	Are Child Care	Is Any	Is Job
	Create A	Set Up An	Arrangements	Transportation	Flexibility
	Specific Pro-	Emergency	Specifically	Specifically	Specifically
	gram For The	Plan For Labor	Provided	Provided For	Provided For
COUNTY	Ag Sector?	Shortages?	For Ag Work?	Ag Work?	Ag Work?
COLUSA	NO	NO	NO	NO	NO
FRESNO	NO	NO	NO	NO	NO
GLENN	NO	NO	NO	NO	NO
IMPERIAL	NO	NO	NO	NO	NO
KERN	NO	NO	NO	NO	NO
KINGS	NO	NO	YES	NO	NO
MADERA	NO	NO	NO	NO	NO
MERCED	NO	NO	NO	NO	NO
MONTEREY	NO	NO	NO	NO	NO
RIVERSIDE	NO	NO	NO	NO	NO
S. BENITO	NO	NO	NO	NO	NO
S. JOAQUIN	NO	NO	NO	NO	NO
STANISLAUS	NO	NO	NO	NO	NO
SUTTER	NO	NO	NO	NO	NO
TEHAMA	NO	NO	NO	NO	NO
TULARE	NO	NO	NO	NO	NO
YOLO	NO	NO	NO	NO	NO
YUBA	NO	NO	NO	NO	NO

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IV. Appendix D: Ag County CalWORKS Plans, cont.

	Are Specific	Is	Is	Have
	Wage Rates At	Housing Being	Health	Numerical Goals
	Or Above The	Offered	Insurance	Been Set For
	Minimum Wage	For	Being	Placements
COUNTY	Being Offered?	Ag Work?	Offered?	In Ag Work?
COLUSA	NO	NO	NO	NO
FRESNO	NO	NO	NO	NO
GLENN	NO	NO	NO	NO
IMPERIAL	NO	NO	NO	NO
KERN	NO	NO	NO	NO
KINGS	NO	NO	NO	NO
MADERA	NO	NO	NO	NO
MERCED	NO	NO	NO	NO
MONTEREY	NO	NO	NO	NO
RIVERSIDE	NO	NO	NO	NO
S. BENITO	NO	NO	NO	NO
S. JOAQUIN	NO	NO	NO	NO
STANISLAUS	NO	NO	NO	NO
SUTTER	NO	NO	NO	NO
TEHAMA	NO	NO	NO	NO
TULARE	NO	NO	NO	NO
YOLO	NO	NO	NO	NO
YUBA	NO	NO	NO	NO

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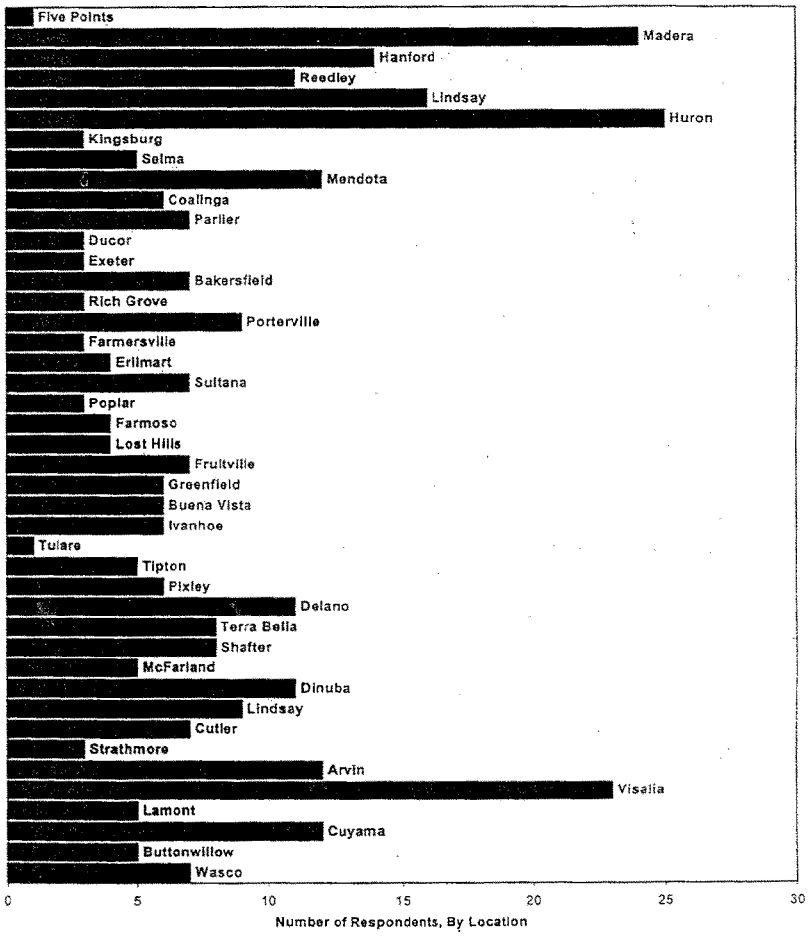
IV. Appendix E: Location of Respondents (Where Identifiable)



IV. Appendix F: Survey Methodology

Several weeks after the end of the 1998 raisin and grape harvests in the four county Fresno area, CRLAF hired and trained individuals from the farm worker community to conduct a simple interview designed to produce basic information about the farm worker respondents as well as provide the farm workers with an opportunity to speak out about unemployment conditions in the southern Central Valley.

The interviewers' training was set up during the last week of October 1998, and the interviews themselves were conducted during the first week of November 1998. A total of 343 farm workers were interviewed in the four county region.

Interviewers were instructed to go to labor camps, work sites, pick up points, and other locations where farm workers gather. They were instructed not to do more than a few interviews at each location, and to try to get as wide a distribution geographically as possible. (A chart showing the number of interviews at identifiable locations appears in Appendix E. Please note that in each city or town a number of locations may have been visited.)

Only persons who were active this year in farm work were questioned for the survey. After several questions regarding basic demographic information, respondents were asked whether they were available for work in any one of the four counties during the month of September 1998. (For purposes of this survey, they were considered available if they were working less than full-time during any of those weeks.) They were then asked whether they knew of other specific individuals who were also available in any of the four counties at that time.

Finally, respondents were asked to provide a reason why farm employers did not hire them, or why they failed to attract them to the available farm work in the raisin or grape harvests in the four county area. Interviewers were instructed to let the farm workers express themselves and to write down everything that they said.

Interview results were analyzed and answers were tabulated for presentation in this report. Where there was an opportunity for other than a short answer, the farm worker respondents' general answers were grouped into logical categories for display in the graphics in this report.

[The prepared statement of Ms. Huerta follows:]

PREPARED STATEMENT OF DOLORES HUERTA

The United Farm Workers has offices in California, Arizona, Washington State, Texas and Florida, the major states that produce fruits and vegetables for the World. In California, which produces over 50 percent of the fruits and vegetables and which hires the largest number of farm workers between 400 to 600,000 we have offices in every major agricultural area, the Imperial Valley, Riverside County, the South, Central and North Coasts. In the San Joaquin valley which is the largest agricultural area, we have five offices.

COLLECTIVE BARGAINING AGREEMENTS

Currently, we have collective bargaining agreements with agricultural employers covering 27,000 workers in California, Washington State and Florida. These contracts give workers job security with a livable wage, decent working conditions, medical and pension benefits. (The medical plan is named for a former member of this Senate Body, the Robert F. Kennedy Medical Plan). (In these next few weeks, the Juan de La Cruz joint Employer—Employee Pension plan, will be distributing checks of $1,000 to each of our farm worker pensioners, an extra check in addition to their monthly retirement check.)

With these agricultural employers, we have established a successful "partnership model" to make the work more efficient, productive and profitable. Bear Creek, a Rose grower in the San Joaquin Valley hires over 1,500 workers at peak. There are long waiting lists of workers that want to work at these ranches.

FARM LABOR CONTRACTORS, VIOLATIONS OF LABOR LAWS

Unfortunately, in other areas, the employers are not connected with the farm worker community except at the work site. Testimony by Agricultural employers during the two years of hearings held by the Congressionally appointed Commission for Agricultural Workers, on which I served as one of the Commissioners, testified that they do not use the farm placement service to recruit workers. In fact, the tendency to force workers to go through labor contractors to get their jobs has increased. By using labor contractors, employers no longer have any responsibility for the well being of their work force or the enforcement of labor laws. Investigations by the Department of Labor in Fresno County indicated that over 70 percent of employers were in violation of California labor laws.

FIELD SANITATION

An internal audit by the Driscoll Strawberry Associates in California, found numerous violations of the sanitation laws where field toilets had no water, soap, paper towels and some were so filthy the workers could not sit on the toilet seats.

OSHA investigations by the State of California found widespread violations of the sanitation laws by agricultural employees and only .003 percent of the growers have been checked 300 out of 17,000. At that rate it would take almost 300 years to check them all once. With the recent outbreaks of food contamination, this should be a major concern, not only for the health of farm workers but also for the health of consumers.

But the labor laws and sanitation are not the only laws that are violated. Contributions are not made to Social Security, Unemployment Insurance or workers Compensation (in those states that have full coverage for farm workers) or income tax withholding.

FARM WORKERS UNEMPLOYMENT

All of the rural farm worker areas throughout the country show double digit unemployment. The employers do not recruit or develop their worker base right in the areas where the work exists. Workers do not know where the jobs are located. To get a job, farm workers have to face gross exploitation having to pay for transportation $5 to $10 per day, buy food and beverages from the person who transports them. If they complain about any ill treatment, they will be stranded without transportation to work.

Enclosed is a paper by the California Rural Legal assistance that shows the Unemployment figures in California rural counties which range from 11 percent in Fresno County to 13.5 in Tulare County, both counties are in the San Joaquin Valley, figures are prior to the freeze.

In December of 1998 in California, we had a major freeze that left 14,000 farm workers unemployed. These citrus workers will still be unemployed into this summer as the navel orange crop was also damaged. Working together with the Secretaries of Agriculture in California and Washington, Citrus Mutual which represents the employers, Department of Labor and California agencies working together with the citrus employers to bring assistance to these workers. The California legislature passed an unemployment relief bill that made it possible for workers to earn up to $200 per week and still collect unemployment insurance benefits, as the employer needed their labor one or two days a week to clean the trees and fields.

FARMWORK WAGES

Real wages of farm workers have dropped, especially in California, while profit for agricultural employers have continued to climb. Making it easier for agricultural employers to bring in foreign labor without improving the wages and conditions will further deteriorate the lives for domestic farm workers. That our farm worker population is still living under the harshest poverty in the richest country on earth is unconscionable. There is no possible excuse to justify the horrible working and living conditions of farm workers today. The improvements that have been made have been under unionization or the pressure of unionization.

Employers have fought against improving the lives of farm workers, often using violence. Our union recently won an injunction against the Western Growers Association and other strawberry growers who orchestrated and formed an organization to fight unionization. This group physically assaulted pro-union farm workers in the fields while they were working.

I believe that the push for changing the recruitment and other protections in the current H2-A foreign worker agricultural program is to stop the unionization of farm workers and hereby stop further improvements in their working and living conditions, and is not in any way related to worker shortages. Employers on the west coast which have the largest number of workers in the Country have not suffered labor shortages. In Washington State where large numbers of undocumented workers were deported, the press reported that those workers were replaced and no shortages reported.

Agricultural employers in other parts of the United States where the work force is still unorganized should at least comply with the recruitment provisions, provide decent housing and prevailing wages before they are allowed to import foreign workers.

RECOMMENDATIONS TO DEVELOP THE DOMESTIC LABOR FORCE

The Agribusiness community has not responded to the recommendations of the Agricultural Commission which recommended full unemployment insurance for workers, workers compensation, and collective bargaining and encouraged workers to develop their local labor force using the services of the Employment offices through out the country.

1. The U.S. Department of Transportation's Job Access program should be implemented to provide transportation for farm workers to the jobs and these should be made public so workers can find the jobs.
2. The Worker Investment Act should be utilized to develop the farm labor force in the local areas.
3. Farm Labor Divisions of the Employment Services should be developed to make the agricultural jobs public and accessible to the work force.
4. Discriminatory laws that now exclude farm workers from social and labor legislation should be amended, such as Fair Labor Standards, etc.
5. Employers should allow their workers to organize into bona-fide unions.

All of the above need the cooperation of the Agricultural Employer community. Employers need to recruit and develop the local labor force before any laws are changed to allow them to import foreign workers. If they want to keep their undocumented workers that they have previously recruited they should be given full amnesty for the time they have worked, not a future promise of amnesty which would further enslave the workers.

Senator ABRAHAM. Mr. Cunha, we welcome you and appreciate your being here today as well.

STATEMENT OF MANUEL CUNHA, JR.

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

Senator Feinstein, I have worked a long time with you on many issues and I appreciate you being here, and your comments earlier today were very important to our industry in California and the Nation.

I am going to read a part of my statement, then I am going to go right into the issue that I think the Senator brought up, and that is welfare. I have a tendency sometimes to—rather than reading a statement, I would rather probably bring you some real hard points that we did in 1997 and 1998.

I am Manuel Cunha, President of the Nisei Farmers League, and a member of the Board of Directors of the National Council of Ag Employers here in Washington. I appreciate the opportunity to testify before this subcommittee regarding the difficulty my members have obtaining a legal workforce in California.

The Nisei Farmers League is an organization which was founded in 1970 by Japanese Americans, Nisei, second generation—many of those folks returned from location camps in a period of time—to assist small family farmers with regulations and requirements of the government agencies that are imposed upon our farming industry today.

The primary function of the League is to ensure that its membership has an adequate, legal, qualified workforce, and also makes certain that our membership is supplied with the accurate information necessary to conduct business in today's society, and the laws that confront our growers across the country. My average acreage is 64 acres for my growers.

I am a grower of citrus. I have gone through three bad years, in the 1990 freeze which devastated—we had zero-degree temperatures in California. In 1995, I was back here working on an air quality issue and we had one-inch hail that impounded most of the San Joaquin Valley, in which I lost all of my citrus. And just recently, we had again another freeze in the 1998 year. So it has been quite an interesting year as a grower. But, again, my average grower's age is 88 years old, as far as Japanese Americans that are in my organization.

I would like to get right into the issue of what the Nisei Farmers League and Valley agriculture did in 1997. Meeting with our congressional delegates, with Senators Feinstein and Boxer and other folks back here, you adopted a regulation on welfare reform in 1996 to deal with welfare. Our congressional people told us to try to see what we could do to use that mechanism of labor and type of activities that it could offer our industry.

So in 1997, we met in March with the eight county welfare directors, the employment development directors, and all of the ag groups that are involved in the San Joaquin Valley, as well as the State farm bureau. We had a meeting for a full day to talk about how can we use welfare reform, and put together several committees and had a strategy plan. So we worked all summer in 1997 and came up with a summit idea in August-September of 1997 to put together a State summit headed in Fresno, hosted by agriculture, the eight county welfare directors, the eight county employment development directors, and the State director and legislators, and all parties with even junior colleges to address many issues. The summit came off very well.

On December 5, we held a summit in Fresno. 350 people attended from all over, including as our guest speaker Deputy Secretary Richard Rominger, and some economists from outside of California attended the summit. That summit left that day with people going into work groups in the morning, coming up with ideas on how to deal with welfare reform in our industry, as well as in other industries.

The people left that afternoon with a document that gave strategy ideas of how to deal with health care, child care, how to deal with transportation, how to deal with training, how to deal with seasonal issues that our industry faces as an industry.

In our industry, in the San Joaquin Valley, we use a workforce of approximately 231,000 seasonal workers between July and the end of October, the largest single workforce in those eight counties—that is astronomical—to a total of 1.9 million in the United States, seasonal workers. So from that summit, we put a meeting together with subgroups in 1998 to actually start implementing the ideas that everybody came out of these groups with, points of how to deal with health care, transportation, child care.

The welfare department asked us to put together a thing called a crop calendar, which listed all of the 75 most intensive crops out of our 300 that are grown in the San Joaquin Valley, so that they could have that as a mechanism to show those people that are on welfare, as well as the employment department, of how we could move labor between our industries. So we did that, and from that crop calendar then we went ahead and started doing advertisement, with these welfare offices sending out flyers, doing news media through Radio Bilingual, the other non-bilingual stations that are in the Valley, so that employers as well as farm workers would be able to know where to go to get jobs.

And it was through the welfare office that sent out notices—as an example, Fresno County, 37,000 people on welfare; they sent out 560 letters in the month of August to recruit workers for us. They had a response of three. Of the three workers, none showed up.

The employment development department at the same time was going out trying to get workers. As a matter of fact, they went into two other counties, into Monterey and Salinas, to see what available workers were from the unemployment rolls. Our unemployment rolls at that same time, in September, was 44,000 unemployed in Fresno County.

From those results, we did have a massive amount of shortages for various commodities. For the first time in the history of the raisin industry—our last raisins were put down on October 15th. The crop insurance overlapped—and I am out of time and I apologize for that, but we tried these various things.

There is a document here, Mr. Chairman, that I have. It is a book that gives all the information. Also, the letters that Senator Feinstein has been very supportive in us getting and working and seeing that we can try to do things innovatively, and try to reach out. And we did, and welfare did send in letters from the eight county directors stating that they could not train farm workers in agriculture because of the seasonality issue; that their goal from the 1996 Welfare Reform Act was to deal with full-time training.

In Fresno County, 19,000 out of the 37,000 are single moms. The infrastructure is not there to even deal with the single moms.

I will stop there, and I apologize for going on, but we did do welfare. We put a lot of effort, and we went to the unemployment office and we all worked together. And this wasn't a facade of doing something. We actually tried to figure out how can we get workers longer. My size of a grower cannot hire workers full-time; he can't afford it. The average raisin grower has 37.9 acres. We have 5,400 of them. We grow 99 percent of the raisins in the United States.

That grower cannot keep workers full-time. They work maybe 9 days, at the maximum, harvesting and pruning. A contractor becomes a valuable tool because they can be moved from point A to point B and have a longer time of employment, maybe 9 months. Good contractors is an important issue, yes. Bad contractors we need to get rid of, but we did try these things for a full year-and-a-half. The welfare agencies were very honest. They tried hard. The unemployment offices tried very hard to do this.

Again, thank you very much, Mr. Chairman. I appreciate the opportunity.

[The prepared statement of Mr. Cunha follows:]

PREPARED STATEMENT OF MANUEL CUNHA, JR.

Mr. Chairman and Members of the Subcommittee: My name is Manuel Cunha, Jr., President of the Nisei Farmers League. I appreciate the opportunity to testify before the Subcommittee regarding the difficulty the members of our organization and others in California have had in obtaining an adequate legal workforce. The Nisei Farmers League is an organization that was formed in the early 1970's to assist its numerous small family farmers with the regulations and requirements of the many government agencies. The League represents the interests of approximately 1,000 various agricultural interests throughout Central California's San Joaquin Valley and Monterey County. The primary function of the League is to ensure that its membership has an adequate, legal and qualified workforce and also to make certain that its membership is supplied with accurate information necessary to conduct business within the confines of the law.

Periodically, throughout the course of each year, the League sponsors seminars for its members and guest speakers are invited from the governmental regulatory agencies to provide information to League members regarding legal compliance. Typical guest speakers include the State Labor Commissioner, the U.S. Department of Labor, Cal/OSHA, Employment Development Department (EDD), representatives from the Social Security Administration (SSA) and the Immigration and Naturalization Service (INS).

The California agricultural industry, of which the Nisei Farmers League is a part, annually generates $24.5 billion in gross farm revenue of which, the San Joaquin Valley contributes nearly $13.9 billion. Our Valley's labor demand in the peak of harvest reaches approximately 231,000 seasonal workers. As you can see, we generate a great deal of revenue and we require a large work force to make our harvest possible. To put the State's labor requirement in perspective, California's total agricultural labor demand is 540,000 seasonal workers, which represents about 25 percent of the field labor needs of the entire United States.

I would like to take this opportunity to inform the Subcommittee of the critical labor situation that is facing the agricultural industry throughout California. Locating an adequate and available labor force has become increasingly difficult and farmers are concerned that their crops may not be harvested on time. The Central San Joaquin Valley in California is the richest producing farmland in the World. The majority of the produce grown there is delicate and highly perishable and access to a legal, qualified and accessible workforce is imperative to its timely production and harvest.

Recently, Nisei members have experienced declines in available labor, and have become increasingly aware that the current labor force is dwindling and that many of those working in agriculture are not properly documented according to the INS and the Social Security Administration (SSA). Many of the local Valley agricultural associations reacted to this problem by seeking a variety of ways to obtain a legal

workforce. One of the ways has been to support legislative reform the current H-2A program intended to provide legal seasonal alien farmworkers. I understand that other witnesses will be focusing on the need to reform that program and I am not going to focus on that issue.

The Nisei Farmers League took the lead in California in getting a number of California agricultural groups to attempt to meet agriculture's labor needs by working with state employment development and welfare officials after the enactment of the 1996 welfare reform legislation. We were encouraged by a number of our congressional representatives to undertake such an effort to see if we could attract persons leaving public assistance to work in agriculture. We did so by reorganizing a group that was established several years ago called the Ag Labor Network (Network) that was previously used to develop a workable solution to farm labor shortages during peak harvest seasons in the San Joaquin Valley. Organizations participating in the Network include the Nisei Farmers League and several other agriculture groups from throughout California whose combined memberships represent over 10,000 farmers who rely heavily upon agricultural labor for the production and harvest of a wide range of specialty crops. The members of the Network believe that the demand for agricultural labor will continue to remain high while the supply of a readily available labor pool tightens.

On March 26, 1997, the members of the Ag Labor Network held a meeting to discuss using the then recently enacted welfare reform legislation as a means of addressing the agricultural labor situation. This meeting consisted of leaders from nearly every agricultural group in the central San Joaquin Valley, legislators and their representatives, and Directors from the Departments of Social Services and Employment Development from the eight counties in the San Joaquin Valley. Many issues relating to agricultural labor were discussed and at the close of the meeting, sub-committees were formed to address education, worker training, flow of labor, and interagency coordination. The sub-committees met and their results attracted the attention of our elected officials, the media, and the community.

In December of 1997, the Network organized a summit meeting to use welfare reform to meet agriculture's labor needs, in conjunction with the Directors from each of the eight county Social Services and Employment Development Departments. With support from the Director of the California Department of Social Services, the Secretary of the California Department of Food and Agriculture and many key legislative officials, the summit meeting took place with the goal of devising a feasible plan that would provide agricultural and non-agricultural employment to those individuals who were leaving public assistance.

The CAL/Work Summit provided an opportunity for industry/non-industry people, welfare recipients, general public and representatives from the government agencies to interact and discuss the strengths and weaknesses of the current processes for obtaining labor through government channels. Discussion items were predetermined and the topics that were discussed included: (1) Education/Diversified Job Training/ Worker's Compensation; (2) Welfare Reform Issues; (3) Coordination/Flow of Labor/ Use of Labor Contractors/ Standard Labor Practices; and (4) Demand for Labor and Unemployment. Sub-topics in each of these categories included; childcare, transportation and length of employment. These topics were selected after being identified as fundamental ingredients in obtaining, training, educating, and transporting a supposedly available yet inexperienced labor force.

The effort was successful in aligning the local Social Services Departments and the Employment Development Departments to work with agriculture in devising a plan to attempt to meet agriculture's labor needs. A "Request for Labor" process was established by agriculture and the agencies prior to peak harvest season. The "Request for Labor" process was the means the county agencies developed to attempt to fill agriculture's labor needs with persons on public assistance.

Early in the Spring of 1998, the State of California, Director of the Department of Social Services requested additional information that would help the agency understand the labor needs of the agriculture industry. Through contact with each of the Valley's County Agricultural Commissioners and EDD Directors, the Nisei Farmers League was able to obtain the information necessary to create a document that would reliably illustrate the requirements of the entire San Joaquin Valley harvest industry. The Network developed a commodity specific calendar (dealing with 75 of the highest labor-intensive crops of the 300 crops grown in the San Joaquin Valley) that outlined the labor requirements on a county by county basis. The finished document not only illustrated commodity specific harvest labor demands in agriculture, it also linked commodity group harvest seasons with different commodity harvest seasons. This association made it possible to provide longer-term employment through the use of "licensed" farm labor contractors and growers.

Throughout July and August of 1998, many of the County Departments of Social Services and Employment Development Departments began an advertising campaign to announce available jobs within the agriculture industry. Job opportunities were announced over the radio on primarily Spanish-speaking/bilingual stations and also on television stations with similar formats. Furthermore, the Fresno office of the Department of Social Services mailed approximately 560 letters announcing agricultural employment opportunities to individuals with previous experience in agricultural work. The Department received a total of 3 responses to the notification. Similar responses were experienced by growers who submitted "Labor Requests" through the Employment Development Department.

In 1998, the El Nino weather conditions affected much of the nation's agriculture. Agricultural harvest seasons were prolonged due to cooler weather conditions early in the season. Neighboring states were experiencing similar labor conditions and agricultural field labor became scarce in the central San Joaquin Valley. Many employers, desperate for labor, attempted to utilize the "Request for Labor" process, but neither the Social Services Department or the Employment Development Department could fulfill a fraction of the required laborers.

In September of 1998, the Nisei Farmers League conducted a labor survey of its membership to see if the shortage was as extensive as we were being told. The results of the survey confirmed what we had heard. The shortage was widespread and workers, notwithstanding the payment of higher piece rate compensation than had been offered prior to the shortage. Farm labor contractors were coming from out of state offering bonuses to workers to work in other states with labor shortages. The environment rapidly deteriorated and many farmers were fearful that their perishable commodities would not be harvested in time. Instances were reported where late variety tree fruit was left to rot on the ground and grapes were left to rot on the vine.

After the 1998-harvest season was finished the reporting functions of the CAL/Work program were utilized. Data were gathered from each of the Valley's 8-County Employment Development Departments and Department's of Social Services to measure the success of the effort to attract persons from public assistance to seasonal agricultural work. Following are conclusions, based on reports from the county agencies involved in the effort:

- Regulations require that county agencies address the career interest choices of participants and few chose agricultural work as a career goal. A large majority of the individuals who were leaving public assistance were simply unwilling to work in an agricultural environment.
- The federal five-year time limit for receipt of public assistance encourages farm laborers and agriculture workers to seek other employment that will provide year around work and earnings sufficient to keep a family from public assistance.
- In many counties, a majority of the able-bodied persons participating in the CalWorks program directed at taking persons from public assistance to work were females living in urban areas for whom child care and transportation presented major impediments.
- County social service agencies placed their emphasis and resources on efforts to train persons to obtain full-time employment, rather than agricultural employment, which is largely seasonal.
- Claims that high unemployment rates in the major rural counties of the San Joaquin County suggest an abundant supply of ready, able and willing farmworkers are absolutely wrong.

What conclusion can be drawn from the industry's efforts to use the welfare to work reform law to attract farmworkers to meet the San Joaquin Valley's large demand for seasonal workers? Unfortunately, none of the individual government agencies were able to fulfill a minute portion of the labor requests from agricultural employers that they processed. The participating Employment Development and Social Services Department Directors agreed that there was little interest on the part of individuals leaving public assistance to work in agriculture.

Agriculture invested substantial time, effort and resources to utilize the welfare to work reform law in 1996 to meet its labor needs. Unfortunately, it did not work. For the reasons listed above, there is little reason to hope that our efforts will be more productive in this or future years. While there is little reason for optimism, the Nisei Farmers League and other Ag-Labor Network members intend to continue to work with our local social service and employment development agencies to attempt meet our labor needs.

Mr. Chairman, a legal, qualified and accessible agricultural labor force is past due and many farmers cannot sustain financially another year of crop loss due to lack

of sufficient legal workers. Absent an available domestic workforce, the existing H-2A program is the only available means to obtain legal workers. Unfortunately, it does not work. We strongly support the efforts of agricultural groups throughout the U.S. in urging you to support H-2A reform. We also are willing to working with farmworkers in improving the economic and social conditions of the farmworkers who are our partners in producing America's bountiful food supply

Again, I would like to thank you for allowing me the opportunity to testify today.

Senator ABRAHAM. Thank you all.

Senator Feinstein, do you have any questions for the panel?

Senator FEINSTEIN. Let me, Manuel, make your point. The point is that you couldn't find the workforce.

Mr. CUNHA. Yes, correct, Senator, we could not. We even got it in writing.

Senator FEINSTEIN. And you made that point to me earlier, and I think it is helpful to make that point to the Senators because there is a question here whether there is an adequate workforce. There are people that believe there is. They use the unemployment figures steadily to say that there is an adequate workforce. But, in fact, there really isn't.

Now, let's talk about the issue of pay for a minute. What do your growers pay?

Mr. CUNHA. This year when the labor shortage occurred, the sad part about it is employment development won't have the statistics available until December of 1999 for us to know, but my growers in the San Joaquin Valley went from $.18 a tray, as high as $.29 a tray when the labor became so short. That is documented because of the payroll that is submitted to the Internal Revenue Service.

Senator FEINSTEIN. What does that translate into?

Mr. CUNHA. In dollars?

Senator FEINSTEIN. Yes.

Mr. CUNHA. Over the $.20 mark per tray will put you at about $6.20 an hour for that individual. So when it got up to $.28, $.27, $.25, you are talking about $7.50. And that is a normal person working at a steady pace and people make more than that. So it was above the minimum wage that the State of California has adopted.

Senator FEINSTEIN. Now, let me be honest, since we have talked many times and I know you very well. I have also talked to people in other aspects of agriculture. It is different, particularly in wine, where they pay like $14 an hour and where they have no problem finding people.

Mr. CUNHA. This year, the wine industry——

Senator FEINSTEIN. My point was going to be where do you believe the wage is a part of the absence of workforce?

Mr. CUNHA. As to what we saw this year in the wine industry, it is paid on a different basis, but they were very short with labor and had to increase dramatically to get workers from the raisins. They stole workers from the raisin industry. The raisins stole it from the tree fruit guys. Everybody was raising wages to just survive.

I think the issue is what can the farmers really endure. I know this year my farmers that had raisin crops couldn't harvest raisins and had to go for wine, which was very less in quality because of the mildew and all that. But I think the commodities—as you stated earlier today, the prevailing wage of those commodities is what

it needs to be based on. If the raisin industry is paying that and it is fair and above the minimum wage, whatever that is, then I think that industry has met its goal.

Senator FEINSTEIN. Well, I would like to work with Senator Smith, Senator Wyden, Senator Abraham and anybody else that wants to work on this to try to see if we can't come up with something. I have relayed that to you in various meetings, and the last I had heard the California Farm Bureau had retained a consultant to work with the communities and try to see what proposal would emerge. Can you give us any information on that?

Mr. CUNHA. Well, I know that the California Farm Bureau and the ag groups are working back here with various groups to try to come up with those issues, such as—I will give you some examples that we are even discussing even in Fresno with some of the other groups, to talk about transportation, to talk about housing, to get housing started to be built so we get rid of this "not in my backyard" issue, getting rid of the bureaucratic process that housing has to go through, through the four agencies.

We talked about health care, and I think you know I spoke with you about the project that we did in the San Joaquin Valley. The farmers bought a mobile clinic, paid for it, and are doing things to go to the farms, to go to the schools to give kids and their families health care because they don't have means to get there. We are looking at some type of health care for farm workers that will be paid for by farmers. We have talked about tax incentives to help these farmers to where workers can have a better, I think, relationship with both sides.

Senator FEINSTEIN. Now, let me get to the question that Mr. Papademetriou put forward and that I in my halting way tried to put forward, and that was the issue of we have a workforce out there, undocumented workforce—it is a big workforce; nobody knows how big—and providing a methodology that we could create the registry with this workforce based to an extent on past performance, in other words, so people show they have been doing this, that they are here, that they are obviously going to stay in this country and want to make a commitment to continue on, in exchange for legalization and a green card.

Would the growers of California be supportive of that?

Mr. CUNHA. I would be supportive of your registry concept of taking those existing people here that are undocumented with bad cards, because you help resolve that big mess. I believe your registry concept needs to be a separate system from the EDD because it is a failure in its own merits because of the double-dipping problems, et cetera. But I think your registry is the concept that will give everybody in all the States an opportunity to sign up through the systems and have our farmers access that.

But the EDD today, as we know it—the system is broken and to put it into that system will just bury another welfare system. My farmers would support a registry and to take what is currently here and get those people allowed with a card to work here for periods of time and go home and come back, and allow them those safety amenities that are required, and the housing and things that we can work together on. Our growers would be in favor of that all the way. Your concept is right.

Senator FEINSTEIN. Well, they wouldn't necessarily have to be required to go home. I mean, they are here. Their families are here.

Mr. CUNHA. But if they wished to, they could legally go for a month or two and come back.

Senator FEINSTEIN. That is correct. They would have the——

Mr. CUNHA. The ability to do so without having the coyotes.

Senator FEINSTEIN. Right, exactly.

I would like to get the comments of others on this very point. Anybody, Cecilia, Dolores, or the gentlemen?

Ms. MUNOZ. Yes. If I may, I think that there would need to be protections in place in such a program, and a promise of a green card would need to be a real promise, we think. Again, the proposal that was introduced last year provided what was really an illusory promise of a green card.

So I think, at a minimum, there would need to be protections in place for the workers that at least parallel with the H-2A program. There would need to be a reasonable time period where the individual would be expected to work in agriculture and a real promise of a green card. But at the same time, we would like to include in this discussion some increase in the labor standards applied to agriculture. What we are talking about is improving the status quo and that needs to be part of the debate.

Mr. HOLT. Senator, may I also add a thought here? Obviously, a registry system or any kind of system like that is predicated on the workers having some kind of legal status. It is very important, I think, in this discussion that the discussion tends to have assumed that the illegal workforce is all resident in the United States. Some of the people working in U.S. agriculture illegally are permanent residents of the United States, but a very large proportion of them are, in fact, migrants who have in the past tried to migrate back and forth and are continuing to try to migrate back and forth from Mexico.

They aren't necessarily interested in living here permanently. In fact, one of the things we find when the new H-2A program goes into effect is some of the people who have moved here out of necessity permanently reestablish residences in Mexico. So to make this work and to legalize the existing illegal workforce, it has to include a mechanism for people to go back and forth because many of them are, in fact, doing that. Even some of those who are not would prefer to do that.

Ms. HUERTA. Well, in terms of what Mr. Cunha said about the EDD, we do have a new governor in California. The whole EDD department is going to kind of be reformed and renovated, so that I think that any type of program that is done has got to be done through a governmental agency like the State EDD and not through any private employers, like the Farm Bureau or Western Growers or any other grower organization, because if you are going to give farm workers any type of an amnesty—and again I want to repeat it has got to be retroactive. You can't say to a worker, if you work for this employer or in agriculture for 3 years, then maybe you will get a green card, because that again will keep those workers in bondage.

Senator FEINSTEIN. You would have to give the green card up front.

Ms. HUERTA. Yes. We have been trying to get rid of slavery for 2,000 years now, you know, so we can't keep people in bondage. And the other thing is that, again, we have to repeat the wages that farm workers are getting. I mean, farm workers are earning $4,000 to $6,000 a year. This is disgraceful as we go into the 21st century that farm workers cannot even feed their families on the types of wages that they are now living on.

Also, to Mr. Cunha, we have not been involved—the United Farm Workers, which is the largest organization that represents farm workers in California and in the United States of America, has never been invited to any kind of a meeting. In fact, we heard that there was a meeting that the Farm Bureau was having down in Fresno. We sent one of our representatives and they were not allowed to go into the meeting.

So, you know, I think that any kind of dialogue or discussion, anything that is going to be contemplated, has got to have at the table the farm workers themselves because these are the people whose lives we are affecting by the laws that we pass.

One other thing, too. A lot of the laws that were passed by the Congress, like the welfare reform law, immigration reform law—I mean, it is very difficult for farm workers to bring in the rest of their families. The type of money that a farm worker has to earn—he will never be able to earn it at the current wages that he is being paid in order to be able to emigrate the rest of the people in his family. So all of these things really impact. Farm workers are suffering a lot because of the poverty that they now live in, and that has definitely got to be addressed.

Senator FEINSTEIN. Thank you.

Senator ABRAHAM. We actually are coming up on a vote, so I am going to ask anybody who would like to respond to that question that hasn't already done so, if you would do it in writing, we would appreciate it.

Senator ABRAHAM. Senator Smith, do you want to make a brief comment, because I want to——

Senator SMITH. Ms. Huerta, do you offer representation to undocumented workers?

Ms. HUERTA. Absolutely. When we organize a company under the California law especially, the workers that vote at that company are the ones that the employer hires. If the employer hired undocumented workers, they are the people that work there. We also do immigration services in every single one of our offices to help the farm workers legalize their status.

Senator SMITH. If we provide this amnesty, the green card, up front and they pursue the American dream and go to the H-2A program or some other program, another industry, how do you account for others who want to come in here?

Ms. HUERTA. Well, farm workers are locked out, Senator. You know, farm workers are not leaving agriculture, domestic farm workers, but they are locked out of jobs. I was in Georgia the other day. There were 500 workers working at this one plant. This was in Georgia. There was not one African American worker in that plant. All of the workers were from Mexico and Central America. Local black African American farm workers are locked out of that plant. The same thing happens in California.

Senator SMITH. Guest workers have got a bad name.

Ms. HUERTA. The workers want to stay in the fields.

Senator SMITH. What I am trying to get at is how do we account for employment mobility.

Ms. HUERTA. If the wages are good, Senator, and the farm workers get their medical plan, they get a retirement plan, they have no reason to want to move on. If they get decent treatment on the job, if they are treated with dignity, they have no reason to want to move on. Farm workers like the work that they do. They like being farm workers, but they want to be treated with respect, they want to get paid a livable wage, and they want to get medical benefits and pension benefits and representation.

Senator SMITH. At the Federal level, Senator Wyden and I tried to do a good-faith thing with the vouchers for housing to accommodate differences. And if you have got some ideas, I would like to know because I look at Joshua down here and I don't know how a guy with 40 acres of trees and a State law that prohibits him from building any structures—how he complies with the housing requirement?

Ms. HUERTA. Build family housing. Farm workers like to live in family housing. They don't like to live in barracks.

Senator SMITH. But who is going to——

Ms. HUERTA. Well, we could do it ourselves, Senator.

Senator SMITH. Who is going to pay for that?

Ms. HUERTA. We are doing that right now. We are building homes that are affordable that farm workers can live in, they can buy or they can rent. We have built many of them in Fresno County right there were the Nisei Farmers League is at. So it is doable.

Senator SMITH. I am just trying to connect the realities of agricultural economics with the things that you rightfully want for your people. And I want them, too. I am just trying to say how can I get these two sides together.

Ms. HUERTA. I think it is communication. I think the employers have to erase that hostility. This is what I talked about, reforming attitude. If they want to work together with the union, we will be glad to work with them, as we are doing with all the employers that we now have contracts with, to make it better for them and to make it better for the workers.

Senator SMITH. Cecilia, what bill is it that is trying to lower protections for workers?

Ms. MUNOZ. There were two proposals introduced in the last Congress. One was amendments to the Migrant Seasonal Agricultural Workers Protection Act which would change requirements with respect to housing, with respect to transportation, with respect to wages, and the H-2A expansion which you were an original cosponsor of which, in our view, would also reduce the protections under the H-2A program.

Senator SMITH. I hope you can see that we are trying to make a system workable. We are not trying to lower people's standards. We are trying to increase them, and we are trying to make it within the boundaries of agricultural economics that frankly are not really good-right now on American farms.

Ms. MUNOZ. I absolutely appreciate and sympathize with the concern. I think if there is to be a real discussion at which every-

body is at the table, it can't be in the environment where there are legislative proposals which make things worse. It makes it very difficult to base a discussion on the assumption that we all want to change the whole framework that we are talking about here. H-2A expansion does not change the framework in which farm workers live and work.

Senator SMITH. Mr. Chairman, I have never written or ever voted on a perfect bill, and so if you have any ideas that are perfect, we would love to have them.

Ms. MUNOZ. We would settle for better as opposed to perfect.

Senator SMITH. We are interested in that. Thank you.

Senator ABRAHAM. I do want to say that I feel like maybe Mr. Wunsch should get a chance, if he wants to, to comment on some of the statements that were made long after you got your opportunity here with respect to whether some of these issues that have been raised you feel are applicable to the Michigan situation. We have heard a lot about California here today, and I appreciate, given the magnitude of the agriculture industry there, the situations, as well as the worker situations.

Is it your perspective that in Michigan there are large numbers of unemployed people available that just are not being offered a sufficient inducement to work in agriculture?

Mr. WUNSCH. No, and let us be aware of the fact that this is a seasonal cycle and that we can make a statement that there is a surplus supply of labor in, for instance, the State of Florida during a time of year when there are no crops to be picked. But there may simultaneously be a shortage of workers in another State where those crops are ready to be picked.

But let's also make the observation that in Florida, if we have an extremely structured, high concentration of housing, readily identifiable labor camps and migrant labor communities, those become very easy targets for INS surveillance. So I was in Florida this winter and the Florida growers were asking me where are all our workers, and it occurred to me that an extraordinary number of workers had stayed behind in Michigan for the winter and were renting and working in processing plants or other non-agricultural areas because they were diffused. There was no easy target for INS enforcement, so there was a shortage of labor in Florida. But there was not necessarily a shortage of labor overall.

Let's also go back to the point that the shortage we are talking about, and I think we have drawn a very good focus on, is of legally documented people. And the points that are made as far as the vulnerability of not having a legally documented workforce are absolutely valid, and it is astonishing that workers are treated with dignity and paid the wages they are, given the vulnerability that they are exposed to under those circumstances. Establishing some kind of a legal status for those folks is of the utmost importance.

Now, wages. In a situation where there is a need, where growers—and please don't be offended when I say when you attribute to growers at this point a state of obscene, embarrassing or even adequate profits, you tend to undermine the credibility of many of your other statements which have a great deal of value. You have got to be sensitive to the fact that in American agriculture right

now, there is not an acceptable margin of profit for the family farmers.

Now, I will say that my first commitment in a situation of profitability during a time when my added value brings profit to my enterprise is to my workers because I know that is where it begins. I don't exploit those people. We work as a team to better ourselves. I depend on them. I am their hostage. If there is anybody who is vulnerable to exploitation in this situation, it is me, and with that group I am a willing hostage because together we can succeed. And if we can let that drive the wages, put those folks in the strongest position of negotiating a fair wage, then we have a solution. If we try to impose an artificial threshold or constraint, then we find ourselves tangled back up in the morass of bureaucratic constraints, artificially imposed, that we current face with the present H-2A.

Everybody is on the right page rhetorically. Tremendous progress has been made from the standpoint of one grower from where we were a year or so ago. We have something we can build on together here and we should proceed to do it, but let's stay on the practical course. We have got a great start.

Senator ABRAHAM. Thank you. I will close just with a final comment I want to make, and that is this. We are trying in this hearing, as we tried last year, to try to bring together in a very balanced sense here perspectives on these issues.

I don't think there is any Senator that I am aware of in the Senate who is more sincere about trying to come up with a productive piece of legislation than Senator Gordon Smith. And I appreciate that you have taken extra time to sit through all this. Lots of times, advocates of bills come in, make their speech, go out and do press conferences, and then do whatever they want. This Senator is absolutely sincere in his interest in hearing from all perspectives, and I think the other people who are working with you on it are the same. At least the expressions to me, in my judgment, from you, from Bob Graham, from Ron Wyden, Slade Gorton, have been very, very sincere. And I would urge all the different groups here to take advantage of what I think is a lot of receptivity.

Now, I would also say this. We aren't going to get a perfect bill from everybody's perspective, if we get any legislation. And so it would be fairly easy, I suspect, for anybody to throw up enough road blocks to prevent anything from happening. And that may well be the result; I realize that.

But it does seem to me that the absence of anything happening will absolutely ensure that more and more people will come to this country illegally to do work. It seems to me from every piece of evidence I have, those who are here illegally are exploited more than anybody else. And if we have any kind of serious commitment to trying to help people in that situation, then we ought to try to find, if we can, the kind of common ground that I know Senator Smith and Senator Feinstein and others are trying to achieve. So I look forward to working with everybody.

I want to thank the panel. If you have additional thoughts, please submit them to us. We want to make this as comprehensive a report as possible. I think that we shouldn't in any way fall into, I think, the kind of trap Mr. Wunsch is outlining of saying that everybody is bad on one side or on the other side.

We had a meeting in southwest Michigan that I went down and participated in with Congressman Upton from that area where there are a lot of growers, and there was nobody in that room making a lot of money. They may be in other parts of the country, but not in southwest Michigan. At least the ones who came to that meeting, I think, were very sincere in wanting to come up with a solution and in facing a very serious crisis. So for their benefit and for the benefit of the workers, I hope we can make some progress and I hope today's hearing was a step in the right direction.

Thank you all for participating.

[Whereupon, at 4:32 p.m., the subcommittee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

RESPONSES OF REPRESENTATIVE SANFORD D. BISHOP, JR. TO ADDITIONAL QUESTIONS FROM SENATOR KENNEDY

Question 1. The INS recently arrested a number of illegal immigrants working on the Vidalia onion harvest. Among those arrested were four juveniles. All were found to be living in squalid conditions. I know that many of these people fall victim to farm labor contractors who smuggle illegal workers into the country and then exploit them. The labor contractors, however, are hired by the growers. What ideas do you have to putting an end to the growers' use of unscrupulous farm labor contractors and ending this exploitation?

Answer. At the root of the behavior of unscrupulous farm labor contractors is the fact that the workers they hire are undocumented or fraudulently documented. Knowing this, farm labor contractors are more likely to ignore or shirk legal obligations, such as Fair Labor Standards Act minimum wage, work hour, and worker age standards.

An indirect way to reduce the demand for farm labor contractors is to put in place a viable and workable H-2A farm guestworker system which encourages farm workers to come to the United States in a legal manner, for a limited period of time, and which puts into place incentives for the workers to return to their home country in an orderly manner at the end of the seasonal activity. If a legal above-the-board guestworker program that is easily accessible by growers and workers is put into place, the need to hire the traditional (often unscrupulous) farm labor contractor will evaporate.

In fact, I submitted several proposals for administrative change supported by Georgia growers (which I have included as an attachment to my testimony to the Subcommittee) to the Secretary of Labor. One of those proposals sought relief from the U.S. Department of Labor certification requirement that H-2A employers utilize farm labor contractors as part of employers' positive recruitment efforts. It is my understanding that the Department of Labor agrees that this requirement is unwarranted, especially in light of the documented Fair Labor Standards Act Wage and Hour violations by many farm labor contractors. I applaud the Department's efforts to administratively alter this requirement.

Question 2. I understand that the price of a 40 lb. bag of Vidalia onions is $50.00, yet a farm worker earns 75 cents to 80 cents for picking 50 lbs. of these onions. Do you think that a modest increase in wages would still permit growers to obtain a profit? Do you think that if wages were increased, growers could find U.S. farm workers to harvest this crop?

Answer. With regard to the price of Vidalia onions, the relevant price when analyzing the gross return to producers of agricultural commodities is not the retail price. It is the price the grower actually receives, sometimes referred to as the "farmgate" price. From this farmgate price, the costs of production must then be subtracted to determine the net return to the grower.

A recent commodity price season average forecast published by the University of Georgia Center for Agribusiness and Economic Development (attached) states that Vidalia onion producers can expect to receive on average $13.00 for a 50 lb. box of onions in 1999. This amounts to a 26 cents per pound gross return to the grower.

From this gross amount, the costs of seed, fertilizer, land, irrigation, pesticides and herbicides must be subtracted. The University reports to me that these costs amount to 12 cents per pound. The *total* costs for labor according to the University

of Georgia (your question assumes only the worker piece rate) amount to 4 cents per pound, or about 25 percent of the grower's cost of production.

This results in a net return to the grower of about 10 cents per pound. So, the grower realizes net $4 for the $50 retail bag of onions you posit in your example.

In a globally competitive marketplace where a national supermarket chain produce buyer can just as easily call a U.S., European, Chilean, Mexican or Canadian produce supplier, any increase in any component of the costs of production can make fungible agricultural commodities uncompetitive. Therefore, an increase in the labor component beyond 25 percent of the current cost of producing Vidalia onions might well make the production of Vidalia onions in Georgia uncompetitive compared to the costs of producing a similar onion in another part of the world.

Certainly wages for any activity could be increased to the point where U.S. workers are compelled to seek those jobs. If the U.S. closed its borders to imports of all other onions, so as to ensure the that the only onions sold in the U.S. are grown exclusively by U.S. growers, harvested by U.S. workers who are paid highly enough to endure seasonal, hot, dirty and tiring hand-labor, then such wage increases are realistic. However, in the context of free trade in agricultural produce today where U.S. growers must compete against the labor costs of other countries and where a small profit margin is the only incentive for growers to risk their capital, wage increases of a magnitude that would provide sufficient incentives for enough legal U.S. workers to leave year-round stable indoor employment in other industries appears unrealistic.

The University of Georgia

College of Agricultural and Environmental Sciences

An Agricultural Commodity and World Economic Outlook for 1999 With Focus on Georgia

Jeffrey H. Dorfman, Bill Givan, John C. McKissick, William O. Mizelle, Jr., George A. Shumaker, Don Shurley, and William A. Thomas

Center Staff Report No.4
March 1999

An Agricultural Commodity and World Economic Outlook for 1999 With Focus on Georgia

This report was compiled by faculty associated with the Center for Agribusiness and Economic Development to assist agricultural producers, agribusiness, lenders, and others interested in the agribusiness sector in forming business plans for the unfolding year of 1999. Specific outlook discussions are included for cotton, soybeans, peanuts, corn, vegetables, wheat, beef cattle, hogs, poultry, dairy, inputs, and a selection of national economies that are important players in international agricultural trade. The Center for Agribusiness and Economic Development hopes you find this publication useful. For more information about Georgia agriculture, you can contact the Center for Agribusiness and Economic Development using the addresses on the back of the report. The Center's website contains not only information about the Center but also a variety of Center reports, factsheets, and graphs about Georgia's agribusiness sector.

Some Specific Commodity Price Forecasts for 1999

Commodity	Season Average Forecast	Season Price Range
broilers	$0.59/lb	$0.53-0.64/lb
cattle, calf	$77.00/cwt	$60-90/cwt
cattle, stocker	$66.00/cwt	$60-70/cwt
corn	$2.35/bu	$2.20-2.50/bu
cotton	$0.65/lb	$0.60-0.70/lb
hogs	$31.00/cwt	$20-45/cwt
milk	$13.25/cwt	$12-16/cwt
peanuts, additionals	$325/ton	$250-450/ton
pecans	$0.85/lb	$0.80-0.90/lb
soybeans	$5.35/bu	$5.00-5.50/bu
tobacco	$1.73/bu	$1.68-1.75/bu
Vidalia onion	$13.00/50lb	$12.00-14.00/50lb
watermelons	$5.00/cwt	$4.00-6.00/cwt

RESPONSES OF AMERICAN FARM BUREAU FEDERATION TO QUESTIONS FROM SENATOR KENNEDY

Question 1. I understand that 99 percent of H-2A applications filed by growers are approved. With approval rates so high, how can this program be unworkable?

Answer. To the knowledge of the American Farm Bureau Federation, the Department of Labor maintains no database to track applications, how many are received how many are approved, and how many are declined. Further, it is unknown how many potential program users are discouraged by the program's high costs and bureaucratic hurdles. Senator Kennedy cites figures from a December 1997 Government Accounting Office study to the effect that 99 percent of applications filed in a particular time period were certified. That figure does not reflect the many instances where the ultimate certification was late, where specific actions required by the Department for certification were late, or where farmer applicants for the program and the Department were unable to reach agreement on terms of employment for H-2A workers, causing no application to be filed. The American Farm Bureau is seeking legislation that will define the program's labor standards in law rather than through action (or inaction) in the instance of each use of the program, and to control program costs.

Question 2. I understand that perhaps 30 percent of grape growers were found to have violated the minimum wage laws last year during a study conducted by the U.S. Department of Labor. Is this an isolated incident or are these types of violations common? Doesn't that kind of employer conduct deter U.S. workers—citizens and legal immigrants—from applying or staying in agricultural jobs?

Answer. We are not aware of any "study" that purported to demonstrate that 30 percent of grape growers in any region are out of compliance with minimum wage laws. We are aware of a recent "survey" conducted by the Department of Labor of grape producers in California where farmers were questioned as to their employment practices, they were not advised of their legal rights, and were penalized when their conduct apparently resulted in a minor violation of the law. This "survey" has also had the negative effect of discouraging employer participation in the National Agricultural Workers' survey.

It is the sense of the American Farm Bureau that no employer in any industry could withstand a "white glove" inspection by DOL without any finding of any significant or *de minimus* violation of minimum wage laws.

The Farm Bureau shares the Senator's concern for compliance with the law and the welfare of workers. Obviously farmers who participate in the H-2A program are subject to much more stringent scrutiny than are non-participating farmers. Therefore, it is clear that greater farmer participation in the H-2A program will bring about a higher degree of assurance regarding the welfare of workers.

It is also worth noting during the hearing on H-2A reform, Dmitri Papademetriou of the Carnegie Endowment of International Peace reported preliminary results of the work of his colleagues with H-2A program participants that found 90 percent job satisfaction among H-2A workers. This, combined with H-2A farmer participant experience that H-2A workers participate in the program year after year seems to indicate that if the Senator believes that many non-H-2A farmers violate the law he should enthusiastically embrace the H-2A program as a means of improving worker welfare.

Question 3. Unemployment rates for California's major agricultural areas, as well as agricultural counties in Arizona, Washington, Texas, and Florida are extremely high, especially when compared to the low unemployment rates enjoyed nationally. With such high unemployment rates, how can Congress streamline the H-2A program to enable employers to bring in more foreign workers?

Answer. Unemployment will, by definition, be high during periods of slack demand for labor; thus there will be high unemployment during non-harvest periods. When annual unemployment rates are calculated, high non-harvest period unemployment rates will skew the unemployment rate upward even though the entire available local harvest workforce is employed during the harvest season. Further, neither employers nor the government can force unemployed individuals to make themselves available for work, particularly if collecting unemployment benefits appears to be a better option than working for a limited period of time, which is common in agriculture. It is our belief that about three jobs in agriculture-related industries like packing, processing, and transportation depend directly or indirectly on each job planting, cultivating and harvesting agricultural commodities. It is precisely these harvest jobs for which workers are in shortest supply for farm employers. Failure on the part of Congress to ensure that these field jobs are filled endangers many other jobs that depend on these jobs directly or indirectly.

Question 4. I understand that the value of fruits and vegetables produced in the United States has more than doubled in the last ten years, and that much of that expansion has occurred through increased exports. Given the significant growth of the agricultural sector, how can we continue to justify not offering farm workers the same rights enjoyed by other U.S. workers, such as higher wages, overtime pay, unemployment insurance, worker compensation, and health insurance?

Answer. The Senator's question appears to be based on several faulty premises. Citrus and non-citrus fruit production has not doubled in the last 10 years. Citrus and non-citrus fruit production increased 27 percent since 1987, from 28.006 million tons in 1987 to 35.64 million tons in 1997. Examining 20 years of data provides similar conclusions. In 1977, citrus and non-citrus fruit production totaled 27.84 million tons. Production since then has increased 28 percent.[1]

It is true that the value of citrus and non-citrus fruit, production has doubled in the last decade. In 1987, total cash receipts equaled $8.035 billion and increased to $12.76 billion in 1997, an increase of 59 percent. In 1987, the index of fruit prices received by growers equaled 93 (1990–92=0) and increased to 108 in 1997 for an increase of 16 percent.

The U.S. is a net exporter of fresh fruit. While the percent of U.S. production that is being exported is increasing, most of that increase is due to two commodities. Apple exports have increased from 295,000 tons in 1989 to 724,000 tons in 1997. Fresh grape exports have almost doubled over the same timeframe from 149,713 tons in 1989 to 296,532 tons in 1987.

U.S. fresh vegetable production has also not doubled in the last 10 years. In 1985, production totaled 33.706 million tons and increased to 49.388 million pounds in 1998, an increase of 47 percent. Since 1990, production has increased 27 percent.

U.S. fresh vegetable exports have not changed in the last 20 years. In 1980, the percent of the U.S. fresh vegetable supply that was exported totaled 7.0 percent. In 1997, that amount equaled 7.5 percent. Conversely, the amount of U.S. fresh vegetable imports has almost doubled since 1980, increasing from 7.9 percent of total utilization in 1980 to 14.1 percent in 1998.[2]

It does not logically follow that if the aggregate value of all horticultural crops grown in the United States has increased by a given amount over any given period of time, that farmers' income (and therefore their presumed ability to bear higher costs) has increased by a like proportion, as the Senator's question seems to imply. Rather, it is our sense that a larger number of farmers have chosen to produce horticultural crops given weak demand for more traditional agricultural commodities. Therefore, more aggregate income will be earned by a greater number of farmers, though each individual farmer may not experience a substantial increase in income. Thus, citing the greater aggregate value of horticultural commodities does not alone establish any ability on the part of farm operators to bear greater labor costs.

The Senator's question seems to assume that farm employers are somehow immune from the laws of supply and demand, and that they are not required to raise wages in response to short supplies of labor. In fact the opposite is true. The U.S. Department of Labor National Agricultural Statistics Service (NASS) reported on May 21 that in April 11–17, 1999 survey week, farmers paid farm workers 5 percent higher wages than during a similar period in 1998. Farmers were forced to raise wages even during a period of rather light demand in the spring. Wages were also up 5 percent in the February 21 report, which reported on the quarterly period with the lightest national labor demand NASS will survey in 1999, the week of January 10–16. In 1998, the survey period with the highest total employment (1.25 million workers) was reported by NASS on November 20 for the week of October 11–17. Wages in that period were up 4 percent over a similar period in the previous year.

It is important to remember that changes in federal law extended unemployment insurance to farm workers in 1976 and we believe the vast majority of workers are covered. Workers' compensation insurance coverage is a state issue, though most of the states where horticultural crops are grown require farm employers to furnish workers' comp. With regard to health insurance, if the Senator is advocating that farm employers should be required to furnish health insurance, it is worth remembering that no other industry is subject to such a mandate. Some farm employers and their associations have been notably successful in providing health insurance to farm workers, but this has been the exception rather than the rule. In general, it is very difficult if not impossible to complete health insurance underwriting for

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[1] Fruit and Tree Nuts Situation and Outlook Report Yearbook Issue U.S. Department of Agriculture, Economic Research Service, October 1998.

[2] Vegetables and Specialties Situation and Outlook Report, U.S. Department of Agriculture, Economic Research Service, November 1998.

a group of workers that may work for a single employer for as little as 2–3 weeks, but probably no longer that 8–10 weeks.

Lastly, the Senator apparently objects to the longstanding overtime exemption provided in the Fair Labor Standards Act with respect to farm fieldwork.

A manufacturing employer can make a rational economic decision to operate his factory an additional 8 hours in any given week in order to manufacture 10 additional widgets. If his operating costs, including labor, do exceed the profit he will earn selling the 10 widgets, operating the factory 8 additional hours makes economic sense. Farmers face a different economic situation, in that perishable crops must be harvested when they are ready to be harvested, or their economic value will decline or become zero. Due to factors beyond the farmer's control, harvest windows may arrive unexpectedly and can close with little or no warning. Imposing an overtime pay requirement with respect to farm field work will unfairly penalize farm employers attempting to harvest crops in situations they cannot control.

Question 5. I understand that more than 50 percent of the farm worker labor force may be illegal. A proposal that is under discussion would call for an immigration program that would grant legal status to undocumented workers already in the U.S. employed in the agriculture sector. Does the American Farm Bureau support a legalization program?

It is estimated that one-half or more of the agricultural workforce is employed using fraudulent documents to complete the I-9 employment eligibility verification process. Farmers make extensive efforts to live up to their legal obligation to complete the I-9 process, and we do not believe it is a widespread practice for farmers to employ undocumented workers as the Senator's question seems to imply.

Because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) bars certain aliens who have entered or remained in the United States illegally during certain times from enjoying any immigration benefit, the workers mentioned above cannot participate in the H-2A program. However, it is the view of the American Farm Bureau that provisions should be made to offer these workers an opportunity to participate in the workforce legally and to continue to play their important role in the production of perishable horticultural crops.

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF SENATOR LARRY E. CRAIG, A U.S. SENATOR FROM THE STATE OF IDAHO

Mr. Chairman, I appreciate you holding this hearing. I also want to acknowledge your leadership, as well as that of Senators Gordon Smith, Bob Graham, Slade Gorton, and Ron Wyden on this issue. I also know personally of the interest all the Subcommittee members have in this issue.

We are facing a problem today that will be a crisis tomorrow. This hearing is the first critical step the Senate can take to do what our federal government does all too rarely—fix a problem in a timely and common-sense fashion before it inflicts great hurt on millions of Americans.

WHAT WE NEED

Our agricultural growers want and need a stable, predictable, and *legal* work force, and they are happy to pay good, fair, market-based compensation for it.

Unemployed workers and those hoping to move from welfare to work want and need to be matched up with decent jobs. American citizens should have first claim on American jobs, but all workers would rather be working legally and hope for the protection of basic labor standards.

These goals are not being met today. In fact, current federal law, and its bureaucratic implementation, are hurting growers and workers.

WORKING ON A SOLUTION

Last year, the Senate took the first step toward meaningful H-2A reform, on a bipartisan vote of 68-31.

That vote was on the Smith-Wyden-Craig-Graham amendment—the "Agricultural Job Opportunity, Benefits, and Security Act—"*AgJOBS*".

We chose that name because, in short, that's why we need H-2A reform—to make sure we have enough safe, legal AgJOBS in America.

Unfortunately, our AgJOBS amendment was dropped in the final hours of the conference on last year's Omnibus Appropriations Act. But the sponsors of the original AgJOBS legislation remain firmly committed to pursuing and enacting H-2A reform this year.

We've refrained from reintroducing a new AgJOBS bill in this Congress, out of respect for the Administration and other stakeholders—some of whom are represented here today.

There is wide agreement that problems exist with the status quo. We hope and believe we can all work together to build an even broader consensus for H-2A reform, and to put together a new, improved AgJOBS proposal that can become law *this year*.

WORKERS NEED H-2A REFORM

There is *no* debate about whether many—or most—farm workers are immigrants. They are now, and they will be, for the foreseeable future.

The question is whether they will be legally authorized to work in America or not.

Immigrants *not* legally authorized to work in this country know they must work in hiding. They can not assert their rights, for fear that the U.S. government, the employer, or the labor contractor can ignore them or retaliate.

In contrast, *legal* workers have legal protections. They can assert wage and other legal protections. They can bargain openly and join unions. H-2A workers, in fact, are even guaranteed housing and transportation.

That's a far cry from the plight of those working here *illegally,* who have been known to pay $1,000 and more to be smuggled into the country.

In fact, the only group who has a stake in continuing the status quo are "coyotes"—a minority of labor contractors, who illegally smuggle workers into this country, often under dangerous and inhumane conditions. Meaningful H-2A reform means we start putting criminals who trade in human beings out of business.

THE H-2A STATUS QUO IS BROKEN

The current H-2A Agricultural Guest Worker Program is profoundly broken.

The failure to fix or replace this program means that the federal government is completely ignoring the growing needs of a significantly changed agricultural labor market.

The status quo is a lose-lose-lose situation. It is bad for growers, bad for workers, and bad for American citizens and taxpayers who expect to have secure borders.

The status quo is breeding an underground economy that makes some of its victims hide from the rest of society and threatens to bankrupt the others.

Unlike many other sectors, farm and ranch work is often temporary, seasonal, and itinerant. This is not a matter of choice on anyone's part, but a matter of necessity.

Many of these jobs are filled by unauthorized immigrants. This, too, emphatically is not the desire of any employer. But our current laws and their enforcement have created worse than a Catch-22—for growers *and* for workers.

The employer is required to make sure prospective workers fill out an I-9 form and present what *appears* to be legitimate identification. However, beyond that, any inquiry into legal status is suspect under civil rights laws.

Therefore, many employers who meet the minimum and maximum legal standards of diligence when they hire a worker, really have no idea if the next raid by the Immigration and Naturalization Service, three counties away, will scare half or more of their work force into disappearing.

In fact, last year's General Accounting Office study estimated that as many as 600,000 farm workers—or 37 percent of 1.6 million—are not legally authorized to work in the United States.

In contrast, this year H-2A is expected to place only 34,000 legal guest workers—*two percent* of the total agricultural work force.

I want to put that number of known unauthorized workers—600,000 or 37 percent—into a practical perspective.

When Census-takers go door-to-door, they reassure interviewees that the personal information they collect will not be used for any other purpose by any other government agency—including deportation of illegal immigrants. Yet we've all heard innumerable stories and studies about how the Census under-counts unauthorized immigrants, because they hide from the Census-takers—the least-threatening of any information-collecting government employees.

Amazingly, the GAO figure of a work force that is 37 percent illegal concurs with Department of Labor estimates and is based on *self-disclosure* by unauthorized immigrants in government surveys.

This more-than-implies that the true number of farm workers who come here illegally is much higher than 37 percent—a number that is already astronomically high.

The H-2A status quo is complicated and fraught with legalistic risks. For farmers and ranchers who already deal with an over-complicated tax code, environmental laws, complex labor laws, and government bureaucracies in all areas from trade to commodity regulation to farm programs—the status quo requires them to hire yet another lawyer to digest the 325-page H-2A handbook plus cope with additional, unpublished, agency practices.

The H-2A status quo is slow, bureaucratic, and inflexible. It does nothing to recognize and adapt to the uncertainties farmers face. It requires growers to predict with perfect precision their labor needs months in advance, despite the challenges of changing weather, international and domestic markets, and individual worker needs.

And the H-2A status quo imposes unrealistic costs in the form of permanent capital investments in housing needed only temporarily, transportation costs that can be applied inequitably, and the far-above-market "Adverse Effect Wage Rate".

Finally, even the grower who lines up all those ducks well in advance, still can't count on his or her government to do its job as promised. The GAO study found that, in more than 40 percent of the cases in which employers filed H-2A applications at least 60 days before the date of need, the Department of Labor missed statutory deadlines in processing them.

Those are some of the reasons why the H-2A program today supplies about 34,000 workers, instead of 600,000. Today's program doesn't work.

Which brings us to the point of why H-2A reform is becoming a more critical necessity almost daily.

THE CONSEQUENCES OF INACTION

If we do not reform H-2A, what will happen to the unauthorized 37 percent of the farm workforce as we do a better and better job of controlling our borders?

Hundreds of thousands of workers will be pulled out of the agricultural labor pool.

There will be no effective way to replace them with legal workers.

Thousands of growers, already operating on the brink because of international economic problems, will have to give up the farm or go bankrupt.

If we fail to fix or replace the status quo, poor, immigrant workers will resort to more desperate means to sneak into our country. The further underground they go means they will have less and less in the way of protection against exploitation from all sides. The "coyote" smuggling industry that already provides counterfeit documents and stealth transportation will escalate its illegal activities.

At the same time, as the number of legally available workers drops, crops will go unplanted or unharvested. We are already seeing spot shortages and localized crises because of these trends—from Washington State to Georgia, from California to New York.

Unless we fix the status quo, the domestic farm products that will no longer make it to the grocery store will be replaced by more and more imported food products.

I do not believe we, as a country, want to lose the ability to produce our own food supply. If we do, then the quality of the food we eat will be uncertain and the health and safety of our people will be put at risk.

The crisis may not appear this week or this month. But we should act before this situation becomes a crisis.

We will hear from those who think a little administrative tinkering will solve the problem. But Administrative band-aids will not help. In many cases, relying on administrative tinkering simply means asking the fox to reinvent the henhouse.

A 40 percent failure rate at DOL does not inspire confidence in the status quo. In fact, as a member of the Labor-HHS Appropriations Subcommittee, I think there's some additional oversight due in this area.

CONCLUSION—THE SOLUTION IS IN SIGHT

Reforming H-2A is the *most humane* alternative, for both workers and farmers.

We want and need a stable, predictable, legal work force in American agriculture.

Willing American workers deserve a system that puts them first in line for available jobs with fair, market wages.

American consumers deserve a safe, stable, domestic supply of food.

American citizens and taxpayers deserve secure borders and a government that works.

All of these essential needs can be met if we fix or replace the H-2A guest worker program with one that provides an effective job-match system that provides *legal temporary,* immigrant workers when the need cannot be met by the domestic labor force.

We need a national AgJOBS registry, linked with "America's Job Bank," currently run by DOL's, to match farmworkers with jobs. Domestic workers should be given preference. The job bank should verify the worker's legal status. If domestic workers are not available, using the job bank should qualify the farmer for expedited approval for hiring H-2A workers.

We need to make H-2A more flexible and economical, while maintaining basic worker protections. H-2A Workers should be guaranteed at least the prevailing wage. Our already strapped farmers should have economic and flexible options in providing for the housing and transportation needs of H-2A workers.

We need to make sure any new program prevents overstays and makes our borders more secure. For those guest workers who follow the law, come here to work legally, and return home on schedule, if they want to immigrate to the United States someday, they should have some degree of preference.

I look forward to working with my colleagues, and all interested parties, to these ends.

MEMORANDUM

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, July 16, 1997.

TO: Hon. Sanford D. Bishop,
Attention: Kenneth Keck
FROM: American Law Division
SUBJECT: Proposed Changes to the H-2A Program for Foreign Agriculture Workers

This memorandum is sent in response to your request for an analysis of your ten proposed changes to the H-2A program; specifically, the question of which way be made administratively and which must be made through legislative action. As part

of this analysis, you ask which statutory provisions, if any, specifically authorize particular regulations. It appears that the proposals numbered 1, 2, 4, and 9 could be changed administratively, i.e., by the Department's changing the requirements pursuant to an informal rule-making process. To the extent that current regulations reflect longstanding policies and, in some instances, compromises, such rulemaking could be lengthy. The proposals numbered 3, 5, 6, 7, 8, and 10 apparently would require some legislative action.

Under the H-2A program, employers submit petitions requesting H-2A visas for nonimmigrant foreign agricultural workers to the Immigration and Naturalization Service [INS]. Such workers are admitted on a temporary basis. The regulations for the H-2A petitions are found at 8 C.F.R. § 214.2(h)(5), promulgated pursuant to 8 U.S.C. § 1188, added to the Immigration and Nationality Act [INA], codified as amended at 8 U.S.C. §§ 1101 *et seq.,* by the Immigration Reform and Control Act of 1986, Pub. L. 99–603, 99th Cong., 2d Sess. [IRCA]. A condition for the grant of an H-2A visa is the issuance of a labor certification by the Department of Labor, certifying that there are no qualified, willing and able U.S. workers who are available to work at the time and place needed and that the importation of the foreign workers will have no adverse effect on the wages and working conditions of U.S. workers similarly employed. The regulations governing the certification process are set out in 20 C.F.R. part 655, subpart B, promulgated pursuant to 8 U.S.C. § 1188 and the Wagner-Peyser Act, codified as amended at 29 U.S.C. §§ 49 *et seq.* An effort to recruit U.S. workers is required as part of the certification process; an agricultural clearance order must be circulated within the U.S. Employment Service System. The regulations governing agricultural clearance order activities are set out in 20 C.F.R. part 653, subpart F. Part 653 was promulgated in 1977 pursuant to a court order, discussed below.

1. The requirement that an application must be filed at least sixty (60) days prior to the date of need should be reduced to thirty (30).

This requirement may be changed administratively. It is found at 20 C.F.R. § 655.101(c)(1). This is generally authorized by 8 U.S.C. if §§ 1101(a)(15)(H)(ii)(a) and 1184, establishing the H-2A category of nonimmigrants and the procedures for the admission of nonimmigrants, and by the Wagner-Peyser Act, codified as amended at 29 U.S.C. § 49 *et seq.,* establishing the U.S. Employment Service. It is specifically authorized by 8 U.S.C. § 1188(c)(1), which provides that the Secretary of Labor may not require that the application for labor certification required for approval of H-2A petitions be filed more than sixty days before the first date the employer needs the H-2A workers. Sixty days is the maximum interval which can be required as the deadline. The Secretary of Labor has the discretion to reduce the application deadline to thirty days before the first date of need. The legislative history emphasizes that "[r]ecognizing that future labor needs may sometimes be difficult to predict, the Committee bill specifies that growers may not be required to apply for certifications more than 60 days prior to the anticipated date of need." H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 81 (1986). The notice in the Federal Register, 52 Fed. Reg. 20496, 20498–99 (1987), notes that regulations adopt the maximum permitted deadline of sixty calendar days prior to need, which "permits time for review of the application, time for an employer to submit an amended application * * *, and adequate time for the recruitment of U.S. workers, with a certification determination no later than 20 calendar days before the employer's date of need for workers." Under 8 U.S.C. § 1188, the Department of Labor is required to review the application and notify the employer of any deficiencies within seven days, and to issue the labor certification not later than twenty days before the first date of need (provided the requirements for certification are met). These other requirements may make the thirty-day interval a tight deadline if amendments are needed. We note in passing that prior to the current 60-day statutory restriction on the deadline, the Department of Labor once contemplated extending the deadline for applications to 90 days prior to date of need, but decided that was too onerous and stayed with the 60-day deadline. 42 Fed. Reg. 4671 (1977); 43 Fed. Reg. 10307 (1978).

The regulations currently provide for a waiver of the 60-day time period for emergency situations, under 20 C.F.R. § 655.101(f)(2). This waiver is only available to an employer who either has not made use of H-2A workers during the previous year's agricultural season or who has other good and substantial cause, which may include unforeseen changes in market conditions. The waiver has the further proviso that the Regional Administrator from the Employment and Training Administration in the Department of Labor has an opportunity to obtain sufficient labor market information on an expedited basis to make the certification determinations.

2. Contract time should be amended to Include "or duration of crop activity," and market conditions an well as acts of God should be considered legitimate reasons for ending the contract.

It appears that the requirement concerning reasons for contract termination may be changed administratively. Under 20 C.F.R. § 655.102(b)(12), promulgated first in 1978, the job offer must provide that the employer may only terminate the work contract before the specified expiration date if an "Act of God," such as a fire or hurricane, renders the fulfillment of the contract impossible. None of the statutes which appear to be general authority for this regulatory provision—8 U.S.C. §§ 1101(a)(15)(H)(ii), 1184(c) and 1188, and 29 U.S.C. §§ 49 *et seq.*—specifies and mandates the conditions for contract impossibility and subsequent termination. The "Act of God" language appears in regulations that predate the enactment of the IRCA, which apparently led to an overhaul of the regulations at 52 Fed. Reg. 20496 (1987); before 1987, only fire was given as an example of an Act of God. Part 655 of title 20 C.F.R. was added in 1978 at 43 Fed. Reg. 10306 (1978). In 1978, the language concerning reasons for contract impossibility and termination was found at former 20 C.F.R. § 655.202(b)(12) and remained basically the same until 1987.[1]

It also appears that the requirement regarding the guaranteed contract period may be changed administratively, consistent with a 1974 court order. The requirements of 20 C.F.R. part 653 apply to seasonal agricultural job clearance orders. Under 20 C.F.R. § 653.501(d)(2)(ix), the job order must state the terms and conditions of employment, including, among others, any time for which work is guaranteed and, for each guaranteed week of work, the exclusive manner in which the guarantee may be abated due to "weather conditions or other acts of God beyond the employer's control." This regulation is authorized generally by the Wagner-Peyser Act, codified as amended at 29 U.S.C. § 49 *et seq.,* particularly by 29 U.S.C. § 49(k), which authorizes the Secretary of Labor to promulgate necessary regulations under the U.S. Employment Service program. It is also authorized by 29 U.S.C. §§ 1821(a)(4) and 1831(a)(1)(D), which concern required disclosure to migrant and seasonal agricultural workers and are part of the Migrant and Seasonal Agricultural Worker Protection Act [MASAWPA], codified at 29 U.S.C. §§ 1801 *et seq.* By its terms the MASAWPA does not apply to H-2A workers directly (29 U.S.C. § 1802(8)(B)(ii) and (10)(B)(iii)), but under the adverse effect criteria of the INA many of the protections in the MASAWPA apply to working conditions for H-2A workers set out in the regulations. However, neither of these statutes, the Wagner-Peyser Act and the MASAWPA, appears to contain any specific requirement or direction regarding the details of the guaranteed duration of the work under the job order.[2]

The 1977 implementation of part 653 paralleled a court order in *NAACP, Western Region* v. *Brennan,* 8 Empl. Prac. Dec. (CCH) P 9634 (D.D.C., Aug. 13, 1974). This court order required the Secretary of Labor to provide the full range of manpower services, authorized by law and required by Department of Labor regulations, to migrant and seasonal farmworkers on a non-discriminatory basis. Subparagraph I.D.1.c. of the court order required all job orders to include disclosure of the terms and conditions of employment including the "period and hours of employment, the anticipated starting date of employment and the number of days or weeks thereafter for which work is available." Subparagraph I.D.1.d. required that the job orders include the "starting date of employment and the number of days or weeks thereafter for which work is guaranteed, if any. For each guaranteed week of work, the job order must state the exclusive manner by which the guarantee is abated if the offered employment becomes unavailable due to unforeseeable weather conditions or other acts of God." Paragraph VII.D. states that nothing in the order shall preclude the adoption of new regulations and policies, or changes in regulations and policies, consistent with the terms of the order.

Under paragraph VII.D., it appears language concerning the guaranteed period of employment and the conditions for abatement of the guarantee may be changed as long as they are "consistent with the terms of this Order." The purpose of the order

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[1] The 1978 regulations in part 655 replaced prior regulatory provisions found at 20 C.F.R. §§ 602.10 *et seq.* These prior regulations contained a longer list of examples of Acts of God than do the current regulations, but essentially permitted early contract termination only for "reasons beyond the control of the employer (due to an Act of God * * *) * * *." These earlier regulations were implemented in 1967. 32 Fed. Reg. 4570 (1967). Before the promulgation of the 1967 provisions, the contents of job offers were not as detailed as they are now.

[2] The current language at 20 C.F.R. § 653.501(d)(2)(ix) was implemented in 1980 (45 Fed. Reg. 39466 (1980)) and appears in virtually the same form at former 20 C.F.R. § 653.108(c)(2)(viii) under the original implementation of part 653 in 1977 (42 Fed. Reg. 4727, 4729 (1977)). Prior to that time, the requirements for clearances and job orders, found under former 20 C.F.R. part 604, were not as detailed.

appears to be the establishment of procedures which would enable effective monitoring of and discourage discriminatory hiring practices and illegal job conditions which violate labor laws, *see NAACP, Western Region* v. *Brennan,* 360 F. Supp. 1006 (D.D.C. 1973). So a change in the description of the employment period would appear to be permissible if it did not undercut the policy behind the court order. A guaranteed period of employment is not required in the job order; the regulations simply refer to a required disclosure of "any" guaranteed period. Arguably, a change in the method of describing any guaranteed period would not necessarily undercut the court order's scheme to prevent labor violations. On the other hand, the overall scheme of the regulations arguably already takes into account the need for flexibility in the anticipated work period, while still enabling a degree of security to the farmworkers.

Current regulations at 20 C.F.R. §§ 653.501(d)(2)(v) and 653.502 provide for procedures to be followed by employers and state agencies when the anticipated date of need for workers changes due to crop activity and recruitment levels, and for the listing of alternative work to be done if the work guarantee is invoked. They also provide for placement by state agencies in alternative jobs where weather conditions, overrecruitment or other conditions have eliminated scheduled job opportunities.

> 3. Regulations should be modified to allow the federal minimum wage rather than the adverse effect wage rate [AEWR] to be used as a base "training wage" for inexperienced workers for the duration of the training period stipulated in the contract. Further, employers should be allowed to specify "agricultural experience" as a condition of hiring.

It appears that, due to statutory and judicial requirements, the Department of Labor cannot modify the regulations to permit the federal minimum wage rather than a higher AEWR to be used as a base "training wage" for inexperienced workers, both H-2A and U.S. workers, for the duration of the training period stipulated in the contract. Under 8 U.S.C. § 1188(a), a petition to import H-2A workers may not be approved unless the petitioner has applied to the Secretary of Labor for a certification that "there are not sufficient workers who are able, willing, and *qualified,* and who will be available at the time and place needed, to perform the labor or services involved in the petition"; and that "the employment of the alien in such labor or services *will not adversely affect* the wages and working conditions of workers in the United States similarly employed." [Emphases added.] The statute does not address whether inexperienced workers are considered "qualified" and makes no distinction between experienced and inexperienced workers when referring to the adverse effect on wages of workers similarly employed. The regulations of the Department of Labor likewise make no distinction between experienced and inexperienced workers in providing for the wage requirements necessary to avoid an adverse effect on U.S. workers when an employer hires H-2A workers.

Once the employer decides to seek H-2A workers, the statutory requirement prohibiting an adverse effect on similarly employed U.S. workers must be satisfied. If an employer hires only U.S. workers through an agricultural job clearance order in the U.S. Employment Service system, under 20 C.F.R. § 653.501(d)(4) and (e)(1), the job order must provide that the "wages and working conditions offered are not less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher." However, if insufficient numbers of qualified U.S. workers are available and the employer applies for a labor certification, a copy of the job offer which will be used by the employer to recruit U.S. and H-2A workers must be included with the certification application. This job offer must comply with regulations concerning wage rates which are intended to ensure that the wages offered to H-2A workers do not adversely affect the wages of similarly employed U.S. workers, as required by 8 U.S.C. § 1188(a). Under 20 C.F.R. § 655.102(a), the job offer must offer U.S. workers no less than the wages offered to H-2A workers, and must offer H-2A workers the same level of minimum benefits offered to U.S. workers consistent with the adverse effect criteria. Under 20 C.F.R. § 655.106(b)(1)(ii), the H-2A labor certification will not be granted if the employer has "adversely affected U.S. workers by offering to * * * H-2A workers better wages * * * than those offered to U.S. workers" after the certification application was accepted for consideration.

At the time of its promulgation of a final rule concerning AEWR methodology pursuant to the IRCA, the Department of Labor explained that the AEWR "is The minimum wage rate that agricultural employers seeking non-immigrant alien workers must offer and pay their U.S. and alien workers, if prevailing wages and any Federal or State minimum wage rates are below the AEWR. The AEWR is a wage floor,

and the existence of an AEWR does not prevent the worker from seeking a higher wage or the employer from paying a higher wage." 54 Fed. Reg. 28045 (1989).

Apparently, the AEWR was meant to be the minimum wage regardless of experience, since it appears that, in theory, experience may be specified as a job qualification on the labor certification application. In practice, such a qualification may not be acceptable. The regulations for the Department of Labor and the Immigration and Naturalization Service permit employers to specify qualifications required for H-2A workers. The regulations are not explicit about whether "agricultural experience" is permissible as a qualification. Under 8 U.S.C. § 1188(c)(3)(A), in considering whether a specific qualification is appropriate in a job offer, the Secretary of Labor is required to apply the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops. Under the related regulation, 20 C.F.R. § 655.102(c), an employer may specify bona fide occupational qualifications in the job offer attached to an H-2A certification application, but they must be consistent with the normal and accepted qualifications required by non-H-2A employers in the same occupations and crops. The regional administrator for the U.S. Employment Service will review the appropriateness of the qualifications. If a qualification is not normally required by non-H-2A employers, permitting such a qualification may artificially and abnormally reduce the pool of "qualified" U.S. workers who might be recruited before a certification that there were insufficient U.S. workers.

Employers also must show that the beneficiaries listed on a petition for H-2A visas have the minimum qualifications and experience specified on the labor certification for the job. Under 8 C.F.R. § 214.2(h)(5)(i)(D), an H-2A petitioner, the prospective employer, "must show that any named beneficiary qualifies for [the] employment." The "petition will be automatically denied if filed without [certification evidence] and, for each named beneficiary, the initial evidence required in paragraph (h)(5)(v) of this section." Under 8 C.F.R. § 214.2(h)(5)(v), an H-2A petitioner must show that any named beneficiary "met the stated minimum requirements and was fully able to perform the stated duties when the application for certification was filed" and that "any unnamed beneficiary either met these requirements when the certification was applied for or passed any certified aptitude test at any time prior to visa issuance or prior to admission if a visa is not required." The petition must be filed with evidence that the beneficiary meets the certification's minimum employment, job training, and any formal educational requirements. These regulations implement the policy expressed in the conditions for approval under 8 U.S.C. § 1188(a), that H-2A workers should not be imported unless "there are not sufficient workers who are able, willing, and *qualified,* and who will be available at the time and place needed, to perform the labor or services involved in the petition" and "the employment of the alien in such labor or services *will not adversely affect* the wages and working conditions of workers in the United States similarly employed." [Emphases added.] Not only must the specified qualification be normal and accepted by employers who employ only U.S. workers, but prospective H-2A employers must show that the foreign workers in fact have such qualifications.

Although "qualified" does not necessarily mean "experienced," it appears that experience can be specified as a qualification in the job offers for the labor certifications required for H-2A workers, if such a qualification is normal and accepted for non-H-2A employers. In *Elton Orchards, Inc.* v. *Brennan,* 508 F.2d 493 1st Cir. 1974), the court upheld the Department of Labor regulations and job clearance system, which required an employer to hire inexperienced American workers when other growers in the area were permitted to hire experienced foreign workers, as rationally related to the legislative purpose of reducing domestic unemployment. As noted above, the statute directs that, before any foreigners may be hired, there must not be any qualified domestic labor available. The employer-plaintiff had argued that "inexperienced workers were "unqualified." On the one hand, the court noted that "experience" was not specified on the certification application. This implies that experience *could* have been specified as a required qualification. On the other hand, the court observed that "qualified"—in the absence of any specified experience required as a qualification—did not normally mean "experienced" in the case of the apple picking before it. Apple picking was described as unskilled labor in the Dictionary of Occupational Titles published by the Department of Labor, and the plaintiff in the ease admitted to having hired inexperienced U.S. and foreign workers in the past. 508 F.2d at 499 fn. 7.

In the Employment and Training Administration Handbook [ETA Handbook] published at 53 Fed. Reg. 22076 (1988), the section on "Appropriateness of Required Occupational Qualifications" notes that most occupations for which H-2A certification is sought are "low skilled in nature, and normally would not require much, if anything, in the way of special skills, training, or experience on the part of the workers.

Where special skills, training, or experience are identified as requirements in a job order, the Regional Office must review them for their appropriateness." The Handbook notes that reference to the Dictionary of Occupational Titles is recommended. The non-acceptability of a required occupational qualification on a job order is sufficient justification for refusing to accept an H-2A certification application, and the burden of proving the acceptability of a qualification rests on the employer. So although experience theoretically could be specified as a qualification required by the employer, it also appears unlikely that the Department of Labor would accept this qualification for most H-2A occupations.

Finally, one should note that section 6 of the Fair Labor Standards Amendments of 1989, Pub. L. 101–157, 103 Stat. 938, 942, provides for a training wage to be paid to eligible employees in lieu of the federal minimum wage; however, "eligible employee" is defined as someone who is *not* a migrant or seasonal agricultural worker *nor* an H-2A worker. Therefore, it appears that Congress did not accept the concept of a "training wage" or significant "training period" for H-2A and U.S. migrant and seasonal agricultural workers. The legislative history discusses the need to train unskilled workers so that they may attain a productive level, H.R. Rep. No. 260, 101st Cong., 1st Sess. 20 (1989). As the court discussed in *Elton Orchards* and as the ETA Handbook noted, agricultural occupations generally are not considered skilled occupations requiring an extended training period.

> 4. Change the 50-percent rule so that once employers are certified and the foreign workers are employed, employers are obligated only to hire load (nonmigrants who reside within commuting distance) applicants. Also, the obligation to hire local workers should be for the duration (100 percent) of the H-2A certification period, that is, the duration of crop activity.

It appears that the 50-percent rule could be changed by the administrative action of the Department of Labor. Under 8 U.S.C. § 1188(c)(3)(B), for three years from June 1, 1987, employers were required, as a condition of certification, to hire any qualified U.S. job applicant from the time the H-2A worker departed for the place of employment until 50-percent of the period of the contract under which the H-2A worker was hired had elapsed. Six months before the end of the three-year period, the Secretary of Labor was required to consider the findings in the report of the President required by subsection 403(a)(4)(D) of the IRCA. These findings concerned the relative benefits to domestic workers and the burdens upon employers of requiring employers to continue to hire U.S. workers after the date the H-2A worker departed for the place of employment. In the absence of further legislation concerning this matter and the 50-percent rule, the Secretary of Labor was required to promulgate regulations based on the findings of the report, which were to take effect no later than the expiration of the three-year period.

There has been no further federal legislation on the subject; since June 1, 1990, the continuation of the 50-percent rule at 20 C.F.R. § 655.103(e), and of its exceptions and clarifications under 20 C.F.R. § 655.106(e–g), has been a matter of administrative discretion. Although subsection 403(b) of IRCA requires that the President's report be submitted every two years, there is no explicit requirement that the Secretary of Labor reconsider the fifty-percent rule and issue regulations in accordance with the findings of each report or in any way revisit the issue. Thus, it appears that the Secretary of Labor may reconsider the issue and promulgate new regulations in accordance with the overall policy of balancing the employer's need for foreign workers with the protection of U.S. workers. If the Secretary determines that the proposed regulatory scheme would improve the implementation of that policy, the Secretary may promulgate new regulations accordingly. Courts have recognized that the Secretary of Labor has been given broad discretion over the regulation of the H-2/H-2A program over the years and that, in the absence of explicit legislative direction, the Secretary may modify the regulatory scheme if he/she determines that such modifications would attain a better balance between the interests of employers and U.S. workers. *See AFL-CIO* v. *Dole,* 923 F.2d 182, 187 (D.C. Cir. 1991); *AFL-CIO* v. *Brock,* 835 F.2d 912,915 n. 5 (D.C. Cir. 1987).

One should note that the 50-percent rule has a long history, dating back nearly twenty years. It was proposed as 20 C.F.R. § 655.4(c)(2) at 42 Fed. Reg. 4672 (1977), originally implemented as 20 C.F.R. § 655.203(e), and explained at 43 Fed. Reg. 10308–9, 10316 (1978). The rule was a compromise measure prompted by concern for the adverse effects on U.S. workers and the sufficiency of U.S. recruiting efforts prior to labor certification. The U.S. workers wanted the obligation to hire until the end of the harvest. The employers wanted the obligation to hire U.S. workers to end upon the issuance of the labor certification. So the Department of Labor split the difference and took fifty-percent of the period from the time the foreign workers left

for the place of employment until the end of the work contract (basically, the end of the harvest for that employer).

Before 1978, it appears that the policy shifted between an obligation to hire U.S. workers which ended upon the issuance of certification to an obligation for absolute preference then back again. Under former 20 C.F.R. § 602.10(c)(3)(iv), promulgated at 29 Fed. Reg. 19102 (1964), employers had to give preference to domestic workers when they became available for jobs in which foreign workers were employed. Then, under amendments to 20 C.F.R. § 602.10, promulgated at 32 Fed. Reg. 4570 (1967), this obligation disappeared and a preference for U.S. workers after the labor certification was not made explicit in regulations until the promulgation of the 50-percent rule.

The language of the current 50-percent rule and its exceptions and clarifications remains as originally promulgated at 52 Fed. Reg. 20501, 20516, 20520 (1987), to implement section 218(c)(3) of the INA, added by IRCA, codified at 8 U.S.C. § 1188(c)(3). Under 8 U.S.C. § 1188(b)(4), the obligation of "positive" recruitment ends on the date H-2A workers depart for the place of employment. The U.S. workers who would be hired under the 50-percent rule generally are those referred through the U.S. Employment Service system. The 50-percent rule has been upheld as rationally related to the legislative goals of giving a hiring preference to U.S. workers while not unduly burdening the already certified foreign workers and employers, *Virginia Agricultural Growers Association, Inc.* v. *U.S. Department of Labor,* 756 F.2d 1025 (4th Cir. 1985).

> 5. Continue to require employer-provided housing, but allow reasonable charges (perhaps capped at $25 per week) to cover maintenance, repair, clean-up and utility costs.

It appears that the requirement that the employer provide housing free of charge is currently mandated by statute, and is long-standing by regulation and initially by international agreement. Under 8 U.S.C. § 1188(c)(4), housing must be "furnished," "provided," or "secured" by the employer for the H-2A worker. Although nothing in the MASAWPA appears to require free housing for U.S. migrant agricultural workers, under the adverse effect criteria of 8 U.S.C. § 1188(a), any benefit provided to the H-2A workers must be provided to the U.S. workers and, conversely, minimum benefits for U.S. workers must be provided to H-2A workers. Although the terms used with regard to housing in 8 U.S.C. § 1188(c)(4) do not necessarily indicate free housing, the legislative history of the statute, H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 82 (1986), indicates that the congressional understanding of those terms means free housing, and that congressional intent was to continue the free housing for workers, as well as for family where it was the prevailing practice, long required by regulation.[3] The main change made by the statute to existing regulatory policy was to the type of housing permitted to be furnished—public housing or temporary labor-camp type accommodations were to be permitted.

The requirement that housing be provided free of charge to H-2A workers apparently has its genesis in the agreements with Mexico during World War II. Paragraphs e and f of the "Wages and Employment" article of the Agreement on the Migration of Agricultural Workers, United States-Mexico, 56 Stat. 1759, 1767 (Aug. 4, 1942), refer to the rights of workers domiciled at migratory labor camps and to the standard for housing conditions but do not establish a requirement for the actual furnishing of housing. Article 14 of the subsequent Agreement on the Temporary Migration of Mexican Workers, United States-Mexico, 62 Stat. 3887, (Feb. 20, 21, 1948), provided that the "Mexican workers will be furnished, without cost to them, with hygienic lodgings * * *." This free-housing requirement was included in a more detailed form in Article 2 of the Standard Work Contract incorporated into the Agreement on Mexican Agricultural Workers, United States-Mexico, 2 U.S.T. 1940, 1987 (Aug. 11, 1951) [Migrant Labor Agreement of 1951 or 1951 Agreement], which, as amended, governed the Bracero program until its expiration in 1964. There was no explicit reference to free housing in Pub. L. No. 78, c. 233, 65, Stat. 119 (July 12, 1951), formerly set out at 7 U.S.C. §§ 1461–1468, which authorized the 1951 Agreement.

The current regulations regarding housing can be found at 20 C.F.R. § 655.102(b)(1) and at 20 C.F.R. § 653.501(d)(xv). The former requires job offers under the labor certification process to provide for housing without charge, in the

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[3] "Under current regulations, H-2 agricultural employers are required to provide workers with free housing. The Committee bill continues this basic policy, but with certain modifications [regarding types of housing which may be provided or secured] * * *. The bill also requires that free, family housing be provided to those who request it whenever it is the prevailing practice in the area and occupation of intended employment to provide family housing." H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 82 (1986).

form of rental or public housing, to those who cannot reasonably return to their residence within the same day. Where the use of public housing normally requires charges from migrant workers, the employer is to pay such charges directly to the manager of the public housing. The regulation also prohibits deposit charges but permits employers to charge workers for damages to housing, beyond normal wear and tear, for which they have been found responsible. Further, where it is the prevailing practice in the area of intended employment and occupation to provide family housing, it shall be provided upon the request of the worker. In 1964, the Department of Labor's post-Bracero program regulations indirectly provided for free housing of the worker under former 20 C.F.R. § 602.10(c)(2)(ii) and (c)(3)(ii), promulgated at 29 Fed. Reg. 19101 (1964), requiring domestic workers to be offered, as a minimum, the terms and conditions listed in the Migrant Labor Agreement of 1951. Family housing was required to be provided where feasible and necessary. Under former 20 C.F.R. § 602.10a(b), promulgated at 32 Fed. Reg. 4570 (1967), job offers were explicitly required to provide for housing without charge to workers and to provide family housing if it was the prevailing practice in the area of employment. Under proposed 20 C.F.R. § 655.3(a)(1 & 2), set out at 42 Fed. Reg. 4671 (1977), the job offer had to provide for housing without charge and for housing for women and for families. The final rule, former 20 C.F.R. § 655.202(b)(1), promulgated at 43 Fed. Reg. 10314 (1978) and reiterated at 45 Fed. Reg. 14185 (1980) (providing for housing standards), provided for housing without charge to the worker and for family housing where it was the prevailing practice in the intended area of employment. The current regulations were promulgated at 52 Fed. Reg. 20499, 20513–514 (1987).

Under 20 C.F.R. § 653.501(d)(xv), the current job order requirements provide for an assurance of the availability of no-cost or public housing for workers and, where applicable, for family members who are unable to return to their residence in the same day. Under former 20 C.F.R. § 653.108(c)(6) and (d)(2), promulgated at 42 Fed. Reg. 4730 (1977), the employer was required to provide housing which met certain standards for an interstate job order and to provide assurances that, if housing was to be provided to workers in an intrastate job order, it would meet certain standards. Although the regulations at former 20 C.F.R. part 653 in 1977 substantially followed the guidelines established in 1974, by court order in *NAACP, Western Region* v. *Brennan, supra* at 4, those guidelines merely require random field checks to ensure that housing conditions are as specified in the job order, but do not address the issue of whether employers are required to provide housing *without charge.* In 1980, proposed 20 C.F.R. § 653.501(d)(xv), set out at 45 Fed. Reg. 2499, 2508 (1980), would have required that job orders include an assurance of the availability of "no cost or nominal cost housing" for those workers unable to return home the same day. In the notice for the final rule at 45 Fed. Reg. 39455–6, 39467 (1980), the Department of Labor discusses comments questioning its authority to require free or nominal cost housing on job clearance orders. The Department does not cite any statutory or international agreement authority, but merely refers to long-standing regulations of the Department. However, the Department, agreeing with comments that the term "nominal cost housing" was confusing and open to many interpretations, changed the term to "public housing." Apparently, in some States, migrants were/are required to pay small charges. As noted above, currently, employers must cover this nominal cost. "Public housing," defined in 1980 at 20 C.F.R. § 651.7 and currently at 20 C.F.R. § 651.10, means "housing operated by or on behalf of any public agency." The final rules promulgated in 1980 also added the requirement that job orders assure the availability of family housing "when applicable."

6. Eliminate the Adverse Effect Wage Rate (AEWR) and use only the prevailing wage rate for the area in which employment occurs.

It appears that legislative action would be necessary in order to eliminate the AEWR in favor of the prevailing wage rate. As discussed above under the section for proposal number 3, the adverse effect wage rate is authorized by 8 U.S.C. § 1188(a), requiring that there be no adverse effect on the wages and working conditions of U.S. workers. Under the current regulations at 20 C.F.R. §§ 653.501(d)(4), 655.102(b)(9) 655.106(b)(1)(ii) and 655.107, the prevailing wage rate is to be used in lieu of the AEWR for a state only if the prevailing wage rate for an area is higher than the calculated AEWR and the federal or state minimum wage. Although the AEWR existed mainly as an administrative measure for many years before IRCA, it is now a creation of statute and could not be replaced by the prevailing wage without an amendment of the INA. Congress expressly incorporated the prior regulatory requirements of the AEWR into the immigration statutes, although it left the description and method of determination to the discretion of the Department of Labor. *AFL-CIO* v. *Dole,* 923 F.2d 182, 184 (D.C. Cir. 1991); *see also AFL-CIO* v. *Brock,* 835 F.2d 912, 914 (D.C. Cir. 1987). The court in *Brock* noted that the legisla-

tive history of IRCA confirms the general intent of Congress to protect U.S. workers against the adverse effect from imported workers. 835 F.2d at 915. It also stated that "Congress made absolutely no alteration in the statutory mandate that underlies AEWR's, the regulatory adverse effect prohibition promulgated pursuant to the INA was expressly retained in the IRCA." 835 F.2d at 918–919. In a case prior to the enactment of IRCA, the court noted that, under the INA, the authority of the Secretary of Labor concerning the basis of wage rates was limited to a determination of the "rate that will neutralize adverse effect" from the influx of foreign workers. *Williams* v. *Usery,* 531 F.2d 305, 306 (5th Cir. 1976). The case law thus reflects the view that although the adverse effect criteria protecting domestic workers were not explicit in the immigration statutes until IRCA, the AEWR was the regulatory response required by the underlying policy of the INA even before IRCA.

Neither the statutes nor the regulations, however, establish a formula for the AEWR; that formula is left to the discretion of the Secretary of Labor. *Florida Sugar Cane League* v. *Usery,* 531 F.2d 299, 301 (5th Cir. 1976); *see also Brock,* 835 F.2d at 914, noting the broad discretion of the Department of Labor in determining the AEWR. No substantive law guides the methodology of the AEWR. 531 F.2d at 303. Therefore, the Secretary and the Department of Labor have considerable latitude in the actual methodology for determining the wage necessary to "neutralize adverse effect," and one could argue that the prevailing wage could be sufficient to neutralize adverse effect. But in such a case, the prevailing wage for a particular area would simply have been determined to be, in effect, the AEWR. The adverse effect criteria would still be the standard by which wages for H-2A workers would be determined.

Moreover, as at least one court has noted, the experience of the Department of Labor has been that determining the prevailing wage rate is not always possible, for reasons that also would make it an unsuitable substitute for the AEWR. In *Williams* v. *Usry,* 531 F.2d at 307, which involved the Florida sugar cane industry, the court noted that the "prevailing wage rate" was defined by the Department of Labor, and stipulated by the plaintiffs, as "wages paid to domestic agricultural workers." Since nearly 100 percent of the Florida cane cutters were foreign, there was no way to determine the "prevailing wage rate." Prior to IRCA, the AEWR was not calculated for every state, but only for those states and occupations where the percentage of foreign workers was so high that the foreign workers effectively set the prevailing wage rate. Therefore, the Department of Labor could not rely on the prevailing wage rate as the wage rate necessary to neutralize any adverse effect on the wages of potential U.S. workers. The court in *Williams* noted that the piece-rate system used in certain agricultural industries, such as sugar cane cutting, did not lend itself to the calculation of a prevailing wage rate.

As discussed above, before IRCA, the adverse effect criteria were not explicit in the immigration statutes and had not been explicit in federal laws since the Bracero program was terminated at the end of 1964 by Pub. L. No. 88–203, 88th Cong., 1st Sess., 77. Stat. 363 (1963). Under former 7 U.S.C. § 1463, authorizing the Bracero program, no Mexican agricultural workers could be imported until the Secretary of Labor had certified that the employment of such workers would not adversely affect the wages and working conditions of domestic agricultural workers similarly employed. Under Article 15 of the Migrant Labor Agreement of 1951, the prevailing wage was the minimum wage to be offered the Mexican workers. The prevailing wage remained the minimum wage until the 1961 amendments to and extension of the 1951 Agreement, United States-Mexico, 13 U.S.T. 2022. Article 15 was then amended so that the minimum wage would be either the prevailing wage rate or "the rate specified in the individual work contract which shall be the rate determined by the Secretary of Labor as being necessary to permit him to certify in accordance with the provisions of Article 9(a) of the Agreement, whichever is higher." Article 9(a) provided that no Mexican workers should be imported where their employment would adversely affect the wages of domestic agricultural workers. The joint interpretation of the amended Article 15 described the alternative minimum wage rates as "the prevailing wages for domestic workers performing the same activity in the same area of employment" and "the wage rate determined by the Secretary of Labor as necessary to avoid adverse effect upon the wages and working conditions of domestic agricultural workers similarly employed." The corresponding Article 4 of the Standard Work Contract was amended in accordance with the amendments to Article 15. After the end of the Bracero program, the AEWR was no longer required by international agreement and statute.

Until IRCA's restructuring of the H-visa programs, which created the H-2A program, the admission of agricultural workers other than those from Mexico was authorized through the H-2 program established under the INA upon its enactment in 1952. This program used the prevailing wage rate as the minimum for H-2 work-

ers until 1963, when the H-2 program began using the AEWR for eleven H-2 user states. 54 Fed. Reg. 28037 (1989) (setting out the history of the AEWR). After the Bracero program ended in 1964, the admission of Mexican workers was also regulated under the H-2 program. The AEWR under the H-2 program was not explicitly established as it had been under the international agreements establishing the Bracero program. However, although it was continued, by administrative action in the Labor regulations for the H-2 certification, as noted above, courts have considered the AEWR to be mandated by the underlying policy of the INA. Currently, the courts have found that the IRCA establishes the explicit authority for the AEWR. Finally, the Department of Labor notes in its justification for the AEWR methodology used pursuant to IRCA, the "AEWR is the minimum wage rate that agricultural employers seeking nonimmigrant alien workers must offer to and pay their U.S. and alien workers, if prevailing wages and any federal or State minimum wage rates are below the AEWR. The AEWR is a wage floor * * *." 54 Fed. Reg. 28045 (1989).

> 7. Allow foreign workers to move from one H-2A certified employer to another at any time during the certified period of employment. Subsequent employers could amend their certifications and the final employer would be responsible for transportation costs back to the worker's country.

Restrictions on the transfer of H-2A workers among different employers appear to be based on statutory requirements which would have to be amended to permit a loosening of restrictions. The legislative history of IRCA indicates that Congress did not intend that H-2A workers should be permitted to move freely among employers who were not represented by the same association acting as the sole or joint employer. The provision for a separate program of "special agricultural workers" [SAW's], codified at 8 U.S.C. § 1160, was meant to address the need for workers who would move about freely from employer to employer.[4] Congressional understanding and intent was that the H-2A program would not permit such movement except among members of an association which was acting as a sole or joint employer, not as an agent. The legislative history also notes that the legislation "specifically authorizes the continuation of this practice [permitting associations to file applications for certification on behalf of their members] and sets forth several rules regarding the legal responsibility of each party involved when a violation, sufficient to cause a denial of certification, occurs." H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 82 (1986).

In certain circumstances, H-2A workers already are permitted to move among employers. Under 8 U.S.C. § 1188(d), multiple producers may join together in an agricultural association and file a single H-2A petition and the related labor certification. If the association is a joint or sole employer of H-2A workers, the certifications granted to it may be used for the certified job opportunities of any of the producers who are members of the association. Any H-2A workers on the petitions and certifications granted to the association may move among the association members to fill certified jobs. Under 8 C.F.R. § 214.2(h)(5)(i)(A), originally promulgated at 52 Fed. Reg. 205544, 20555 (1987), as 8 C.F.R. § 214.2(h)(3)(i)(A), implementing the IRCA provisions, agricultural associations which are sole or joint employers may file petitions for H-2A workers. Under 8 U.S.C. § 1188(c)(3)(B)(iv), any association, including one acting as an agent rather than as a joint or sole employer, is permitted to transfer or refer workers among its members for the purpose of complying with the 50-percent rule, but an association acting as an agent shall not be considered a joint employer because of such referrals and transfers. Except for the purpose of complying with the 50-percent rule, an association acting as an agent rather than as a sole or joint employer is not permitted to transfer H-2A workers among members.

The H-2 visa regulations prior to IRCA did not provide for the filing of petitions by associations and required new petitions for changes of employer while in the United States. Currently, under 8 C.F.R. § 214.2(h)(2)(i)(D), H-2A workers generally may change employers while in the United States if the new employer files a new, separate petition requesting classification and extension of the worker's stay in the United States.

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[4] "Regarding perishable commodities, the Committee recognizes that special situations exist that may render the H-2 program less than fully responsive to Western grower needs. Accordingly, the Committee bill establishes a mechanism by which 'special agricultural workers' may be admitted to perform field work in perishable crops. Because the Committee is fully cognizant, however, of the problems that occurred under the *Bracero* program of the 1940's and 1950's, the Committee believes that two essential elements must be included in any new program created. First, the workers must be free to move from employer to employer without risk of negative repercussions. And second, the workers must be fully protected under all federal, state and local labor laws." H.R. Rep. No. 68Z 99th Cong., 2d Sess., pt. 1, at 51 (1986).

Prior to IRCA, although the INS regulations did not provide for the use of associations in petitions, the Department of Labor regulations already provided for the filing of labor certification applications by associations, as noted by the legislative history of IRCA, discussed above. The MASAWPA defines and refers to "agricultural associations" (29 U.S.C. § 1802(1)) but does not provide any explicit criteria for job orders or labor certification or transfer of workers. By its terms it does not apply to H-2A workers directly (29 U.S.C. § 1802(8)(B)(ii) and (10)(B)(iii)), but under the adverse effect criteria of the INA, many of the protections in the MASAWPA apply to working conditions for H-2A workers under the regulations.

The statutory provisions under 29 U.S.C. § 49 *et seq.,* governing the U.S. Employment Service System, also do not provide explicit guidelines concerning the transfer of workers or the filing of certification applications by associations. However, under the broad authority given to the Secretary of Labor for such matters, over the years the regulations have established a policy permitting associations to file.[5] The current requirements for certification applications filed by agents and associations are found at 20 C.F.R. § 655.101(a)(2 & 3). The regulations concerning assurances do not refer specifically to associations that act as sole or joint employers, but they are understood to be included in the term "employer." Under current 20 C.F.R. § 655.106(c)(2), associations which are joint employers are no longer required, as they once were, to agree to liability in writing in order to transfer workers among the members, but the association must control the assignment of workers among its members and keep records of assignments. According to the notice at 52 Fed. Reg. 20502 (1987), the language of 20 C.F.R. § 655.106(c)(2)(i) was clarified to indicate that joint employer associations may transfer workers among members as long as central records are kept. For the purpose of complying with the 50-percent rule, any association, including those acting as agents, is permitted to transfer and refer workers among its members. Workers may not be transferred or referred to a member who is ineligible to obtain H-2A workers because of non-compliance with labor certifications.

As part of the issue of transferring workers among employers, you asked under what authority employers were required to transport workers back to their home country upon the termination of the work contract. There does not appear to be any statutory requirement for the return transportation of H-2A workers generally, although under 8 U.S.C. § 1184(c)(5)(A), employers of H-1B and H-2B workers are responsible for the reasonable costs of return transportation where the worker was dismissed before the end of the period of authorized admission. Under 20 C.F.R. § 655.102(b)(5), promulgated pursuant to the authority granted in the Wagner-Peyser Act and the INA, an employer is required to advance the cost of transportation "from the place from which the worker has come to work for the employer to the place of employment" when it is the prevailing practice of non-H-2A employers in the area and occupation to do so, or when such benefits are extended to H-2A workers. If such an advance has not been made and the worker has completed 50-percent of the contract period, the employer shall reimburse the worker for the cost of transportation. If the worker completes the contract period, the employer is required to pay the costs of return "to the place from which the worker, disregarding

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[5] Under former 20 C.F.R. § 602.10(b), promulgated at 32 Fed. Reg. 4570 (1967), "association employers" were permitted to file an application for labor certification for foreign workers. Under the proposed rules for 20 C.F.R. §§ 655.1, 655.2(a), at 42 Fed. Reg. 4670 (1977), "employer" was defined as not meaning an association, but an association was permitted to file a certification application as the agent for its members. The application had to include letters from the member-employers authorizing the agency and assuming responsibility for the application and requirements for the certification. The final rule regarding definitions at 20 C.F.R. § 665.200(b), promulgated at 43 Fed. Reg. 10307, 10313 (1978), changed the proposed definition of "employer" to include associations where the associations themselves had an employer-employee relationship with workers, and added a definition of "agent" which included associations which acted as agents rather than as employers or joint employers. Under former 20 C.F.R. §§ 655.201(a)(2 & 3) and 655.203(d)(5), promulgated at 43 Fed. Reg. 10314, 10316 (1978), agents and associations were permitted to file certification applications and were required to offer the same assurances concerning efforts to recruit U.S. workers. Under former 20 C.F.R. § 655.206(b)(2 & 3), promulgated at 43 Fed. Reg. 10317 (1978), certifications made to associations which were sole employers could be used for the job opportunities of all members and workers could be transferred among members. Certifications made to associations which were joint employers with their members could serve as the basis for transferring workers among members only if the members and the association agreed to be jointly and severally liable for compliance with the certification obligations.

With relatively minor amendments, these regulations were continued by the current regulations promulgated pursuant to IRCA at 52 Fed. Reg. 20496 (1987). The definition of "employer" continued to include associations under former 20 C.F.R. § 651.7, promulgated at 45 Fed. Reg. 39458 (1980), and under current 20 C.F.R. § 655.100(b). The current definition of agent is found at 20 C.F.R. § 655.100(b).

intervening employment, came to work for the employer," *i.e.,* the cost of return to the home country. The phrase, "disregarding intervening employment," originally promulgated at 52 Fed. Reg. 20500, 20514 (1987), is meant to clarify that the employer must provide or pay for the worker's transportation home or wherever the worker began the series of jobs culminating at the current place of employment. If the worker is going to work for a subsequent employer who has not agreed to pay the cost of transportation to that subsequent worksite, the prior employer is required to pay those costs. If the subsequent employer is covering such costs, the prior employer is not obligated to do so. The last employer of an H-2A worker covers the cost of return. Under current 20 C.F.R. § 653.501(d)(5), promulgated at 45 Fed. Reg. 39467 (1980), the employer must agree to provide or pay for transportation of the workers and their families "on at least the same terms as transportation is commonly provided by employers in the area of intended employment to agricultural workers and their families from the same area of supply."

Although the requirement to pay the cost of return transportation appears currently to be purely a regulatory requirement, the requirement apparently originated in the series of migrant agricultural worker agreements with Mexico, and the legislation authorizing and implementing them. Under the section of the 1942 Agreement concerning Transportation, the employer was responsible for transportation from the place of origin to the destination and back. Under Article 10 of the 1948 Agreement, the employer was responsible for the cost of transportation from the place of contract to the place of employment and the return. Under Article 6 of the original Migrant Labor Agreement of 1951, the Secretary of Labor, at the expense of the U.S. government, was responsible for the transportation of the worker between the migratory centers in Mexico and the reception centers in the United States. Under Article 17 of the original Migrant Labor Agreement of 1951 and Article 7 of the Standard Work Contract, an employer was responsible for the costs of transportation between the reception center and the place of employment. The Department of Justice was responsible under Article 31 of the Agreement for the return of a worker to Mexico through a reception center under conditions not covered by the Agreement or the Contract. Amendments to Article 17 of the 1951 Agreement, made in 1952 at 3 U.S.T. 4349, clarified that the employer was obligated to pay for transportation from the place of employment back to the reception center regardless of whether the worker left before the expiration of the contract and clarified the limited circumstances under which the employer was relieved of the obligation. Amendments to Article 7 of the Work Contract, made at 5 U.S.T. 399 (1954), provided that the employer was not obligated to pay for return transportation to the reception center if the worker failed to complete his contract for unjustified reasons except for an amount having the same proportion to the total transportation cost as the actual period worked to the total contract period.

The Migrant Labor Agreement of 1951 was authorized and implemented by Pub. L. 78, c. 223, 65 Stat. 119 (1951), codified formerly at 7 U.S.C. §§ 1461–1468, now omitted. Under this statute, the employer was obligated to pay the United States for the costs of return transportation for workers from the place of employment to the reception centers, unless he could establish that he had provided the worker with such transportation or its cost. The Secretary of Labor was authorized to provide transportation to the worker from recruitment centers outside the continental United States to the reception centers and back.

> 8. Strengthen the program of registering farm labor contractors (FLC's) by requiring both certification/licensing and bonding. At a minimum, allow employers to require bonding as a condition of employment.

It appears that the implementation of a bond requirement in the registration program would necessitate legislative action, although employers probably could contractually require a bond. Guidelines for the registration of FLC's are established in detail under title I of the MASAWPA, codified at 29 U.S.C. §§ 1811–1816 (this is the authority for the regulations in 29 C.F.R. §§ 500.40 to 500.50 concerning the registration of FLC's). A person cannot engage in FLC activities (recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker) without a certificate of registration, as required by 29 U.S.C. § 1811. Under the 29 U.S.C. § 1812, the Secretary of Labor "*shall* issue a certificate of registration * * * to any person who has filed * * * a written application" containing certain required documentation [emphasis added]. The Secretary *may* refuse to issue a certificate on grounds enumerated at 29 U.S.C. § 1813. These grounds do not include a failure to be bonded. Therefore, a bond requirement for registration probably would have to be added by legislative action; the Secretary apparently does not have the authority to deny a certificate because a prospective FLC is not bonded.

One should note that one of the requirements in the written application for registration is a statement listing vehicles to be used in transporting workers and documentation that the FLC is in compliance with the MASAWPA requirements for such vehicles, including insurance or a bond. It appears that a certificate would not be issued if a prospective FLC did not have vehicle insurance. The existence of this specific insurance/bond requirement and the contrasting absence of a general bond requirement seems to be a further indication that a general bond requirement would need to be legislatively authorized. Also, under 29 U.S.C. § 1854, there is a private right of action by persons injured by a violation of MASAWPA, but no provision concerning bonding of any co-defendants.

The Secretary is permitted to request, among the documents required for registration, "other relevant information" in the declaration of the applicant's residence and prospective FLC activities. The Secretary probably could request information about whether the FLC applicant is or will be bonded without specific statutory authority.

An employer probably could require a bond from the FLC as part of its contract with the FLC without any statutory or administrative authority to do so. There do not appear to be any restrictions or prohibitions on requiring a bond in the contract between the FLC and the employer or association in the INA, the MASAWPA or the statutes establishing the U.S. Employment Service system. Most of the statutory and regulatory conditions concern the work contracts with the agricultural workers, to protect them by ensuring a minimum standard of working conditions and wages. Only a few pertain to the relationship between the FLC and the employer or association. Under 29 U.S.C. §§ 1821(e) and 1831(d), for example, FLC's are required to furnish wage and work records of each worker to the employer or association. FLC's are prohibited by 29 U.S.C. § 1844 from violating, without justification, the terms of written agreements with employers or associations pertaining to any contracting activity or worker protections under the statute.

9. Eliminate the requirement that FLC's must be hired by employers who apply for H-2A certification if use of FLC's is the prevailing practice in the area.

It appears that this requirement, found at 20 C.F.R. § 655.103(f), can be changed administratively. None of the relevant statutes contains an explicit direction concerning the use of FLC's in recruitment efforts. However, the legislative history of 8 U.S.C. § 1188 and the statute itself indicate that the employer of H-2A workers must demonstrate a recruitment effort at the level of non-H-2A employers in the area in order to obtain a certification. Under 8 U.S.C. § 1188(a)(1)(A), the Secretary of Labor must certify that there are not sufficient workers who are able, willing, qualified, and available to work at the time and place where they are needed. Under 8 U.S.C. § 1188(b)(4), the Secretary may deny a certification if he determines that the employer has not made the required positive recruitment efforts where the Secretary finds there is a significant number of U.S. workers who, if recruited, would be able, willing, qualified and available to work at the time and place needed. According to the legislative history, "[o]n this last point [the adequacy of recruitment efforts where U.S. workers can be expected to be found], the Committee intends that the Department of Labor shall consider, among other things, the recruitment efforts for workers made by non-H-2A employers located in the area of intended employment and the efforts made by the employer to obtain H-2A workers." H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 80–81 (1986).

Apparently, the rationale behind 20 C.F.R. § 655.103(f) is that where the prevailing practice of employers in a locality and industry is to use FLC's, a failure by H-2A employers to use FLC's is equal to a failure to exert the same recruitment effort. Therefore, even if the Department of Labor eliminated the absolute requirement to use FLC's where it is the prevailing practice, it may still question whether a certification applicant had fulfilled the requirement of exerting the same recruitment effort, if such an applicant failed to use an FLC where the prevailing practice was to use one. Thus, although the elimination of the FLC requirement might allow more technical flexibility, in practice it might not result in any greater actual flexibility. The FLC requirement may be a recognition or codification of how Regional Administrators actually evaluate labor certification applications.

The evolution of the recruitment regulations indicates that a clearer, more specific standard for recruitment efforts was considered desirable. It also shows that the current FLC regulation resulted from the implementation of congressional intent expressed in the legislative history and perhaps partly from an attempt to specify the type of effort that would be adequate.[6]

[6] Originally, the regulatory requirements for recruitment efforts were vague. *See* 42 Fed. Reg. 4672 (1977), promulgating former 20 C.F.R. § 655.6, requiring "reasonable efforts." The Department of Labor discarded the "reasonable" standard for recruitment efforts with specified recruit-

10. Create a national verification system so the employers can check on the status of U.S. workers who are hired before and during the H-2A process.

Legislative authority would be necessary for such a system since Congress has power over immigration and naturalization under Article I, section 8, clause 4, of the Constitution and authority must be properly delegated to the President for executive branch actions regarding such a system. Also, it would require establishment of an extensive database involving the sharing of records between federal agencies such as INS and the Social Security Administration and the development of tamperproof identification and/or work authority documents, and would require appropriations to fund the development. Such legislative authority already exists to a degree, but although it provides for a procedure to evaluate and implement such a system, it does not provide final authority actually to implement an improved national system.

Section 274A(d) of the IRCA, codified at 8 U.S.C. § 1324a(d), which provides for the evaluation of and changes in the current employment verification system, established section 274A(b) of the IRCA. The President is required to report to Congress on any proposed changes to the system, which must satisfy certain requirements. Congress reviews the proposed changes and no major change can be implemented unless Congress specifically provides for funds for implementation of the change. The President has the authority to carry out demonstration projects/pilot programs for verification system changes. Section 101(d & e) of the IRCA provided for studies of a telephone verification system (TVS), a social-security-number validation system and a tamperproof social security card. Although authority has existed for some time for a procedure to develop an improved national verification system, and although a pilot program for a TVS has been in place since 1992, the actual implementation of a new, secure, computerized verification system has been not occurred.

Dissatisfaction with the current system led to active study and discussion of an improved system,[7] culminating in more detailed provisions for pilot programs in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, Division C, §§ 401–405, 110 Stat. 3009 [IIRAIRA]. Section 404 provides for the development of an employment eligibility confirmation system, including a toll-free telephone line and electronic media. Sections 401 to 403 in title IV set out the guidelines for establishing pilot programs, volunteering to participate in such programs, and the procedures for such volunteer participants. However, Representative Lamar Smith, noting that the effort to establish a strong verification system dates back at least to the time of the IRCA, cautioned in a hearing that the pilot programs in the IIRAIRA of 1996 should not "become an excuse for delay or inaction in establishing a reliable, nationwide verification system." *Verification of Benefit and Employment Eligibility. Hearing before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary,* 104th Cong., 1st Sess. (1995) (opening statement of Hon. Lamar Smith, Subcommittee Chairman).

If we may be of further assistance, please contact us.

MARGARET MIKYUNG LEE,
Legislative Attorney.

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ment requirements because of complaints voiced by both employers and workers that the type and level of recruitment efforts required were unclear and varied from year to year. *See* 43 Fed. Reg. 10307–308, 10316 (1978), promulgating former 20 C.F.R. §§ 665.203(f) and 655.205(a). Subsequently, the Regional Administrator for the U.S. Employment Service was required to notify the employer about the specific recruitment efforts necessary to satisfy the requirements of the certification process and to continue to offer the employer direction concerning these efforts. Pursuant to IRCA, the Department of Labor proposed new rules, including the current 20 C.F.R. § 655.103(f). It noted the new FLC requirement and the requirement to make recruitment efforts no less than non-H2A employers of comparable size in the same area, citing the legislative history to support the reasonableness and appropriateness of considering the efforts of non-H-2A employers. *See* 52 Fed. Reg. 16773, 16788 (1987), and 52 Fed. Reg. 20499–500, 20516 (1987).

[7] For a discussion of the demonstration/pilot programs pursuant to IRCA and the proposals and actual provisions of the 1996 Act, *see* H.R. Rep. No. 879, 104th Cong. 2d Sess. 109–111, 119–120, 123–124, 137; H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 233–237; H.R. Rep. No. 469, 104th Cong., 2d Sess., pt. 1, at 108, 126–130, 166–170, 248–250 (1996); *Verification of Benefit and Employment Eligibility. Hearing before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary,* 104th Cong., 1st Sess. (1995); Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary, *Options for an Improved Employment Verification System,* S. Prt. No. 114, 102d Cong., 2d Sess. (1992).

DEPARTMENT OF PUBLIC WELFARE,
Madera, CA, February 24, 1999.

TO: Manuel Cunha, Jr.
FROM: Lee Rhyne, Director of Welfare
SUBJECT: TANF Plans and Farm Labor for Madera County, 1999

This is in response to your phone call of last week regarding the status of our TANF caseload and our CalWORKS Program in Madera County. You are also concerned about our prospects for farm labor for the harvest season of 1999.

Our total TANF (CalWORKS) population is three thousand five hundred (3,500) cases. Of this number, two thousand (2,000) are actively enrolled in the TANF (CalWORKS) Self Sufficiency Program. The remaining fifteen hundred (1,500) cases are exempt for various reasons. The largest single reason is children living in the household of a non-needy adult or other needy relative. Also included in this number are three hundred twenty five (325) cases where the father and/or mother are undocumented aliens who have children born in this country. Most of these three hundred twenty five (325) cases have adults working in farm labor and are not included in the following numbers.

Of the two thousand (2,000) cases actively enrolled in the Self Sufficiency Program, three hundred thirty two (332) are either part-time or full-time employed in farm labor.

Madera County's TANF Program has no significant plans to recruit and prepare clients for work in farm labor who are not presently employed in that category. Our only activity will be to encourage clients to participate in farm mechanics and other classes related to upgrading their farm labor skills.

In regard to TANF recipients available for farm employment in the coming harvest season, I do not see any significant number of available clients. Those experienced in, and identified with farm labor will already be fully employed in the farm labor cycle and this will leave no significant available pool of workers.

One of the dynamics of the TANF Program is to have the TANF recipients engaged in either an employment activity or a pre-employment activity. Because of this, we simply do not have any groups of people sitting around waiting for a call to work in farm labor or any other industry. However, this certainly is not to say we will not give you our fullest cooperation in advertising and in exhorting our clients to be involved in farm labor. We have found in the past that almost without exception all of our farm labor potentials are already connected with a farm labor contractor and are routinely working when work is available.

In summary, I do not see any significant increase in the availability of farm labor nor do I anticipate we will be able to develop any larger pool than those already involved in the farm industry.

LEE RHYNE,
Director of Welfare.

HEALTH & HUMAN SERVICES AGENCY,
Tulare, CA, March 2, 1999.

MANUEL CUNHA, JR., *President,*
Nesei Farmers League,
5108 E. Clinton Way #115,
Fresno, CA.

DEAR MR. CUNHA: We appreciated the opportunity to talk to you last week about the CalWORKs program and the interests of the Nesei Farmers League. You have previously provided us with estimates of the number of fruit and vegetable acres in Tulare County and surrounding areas and the number of workers that are needed to harvest those crops during various times of the year.

The TulareWORKs program is charged with implementing, the provisions of Federal and State welfare reform. Those provisions require that persons applying for or receiving cash assistance, be required to participate in work activities with the goal of obtaining employment to achieving self-sufficiency. We work with many people who have been recipients of aid for extended periods of time and have difficulty transitioning to the world of work. Therefore, many of them are enrolled in vocational education and work experience programs to develop the skills needed to work. Consistent with the goals of welfare reform, we try to prepare the participants for full-time employment in work activities that reflect the jobs available in the labor market.

As you heard at the meetings convened in Kern and Fresno counties last year, we have difficulty recommending that participants engage in work associated with

the vegetable and fruit harvest because of several factors. These include the fact that generally the harvest laborers are employed by farm-labor contractors who direct their activities to specific farms and crops for limited periods of time. The farmers do not want to be the employer. There are a variety of skills associated with the different kinds of harvests and the degree of skill dictates the level of income for the worker. The work requires traveling to various sites and involves manual labor in difficult conditions—the high summer-time temperatures of the Greater San Joaquin Valley, very basic field amenities including access to food, water and toilet facilities. Finally, there is no on-going training and employment that a participant can rely on that results in full-time, year round work, with associated health or other benefits. Finally, it is highly unlikely that farmers will benefit from workers who are not well-prepared for the work and may have difficulty working effectively under the conditions associated with harvesting crops. We do offer training in other areas associated with the farming industry of our Valley and will continue to work in those areas.

The TulareWORKs program is willing to explore other options with you. As you know we are doing everything we can to assist workers in the orange harvesting and packing industry, who were impacted by the December 1998 freeze, including providing training in various employment areas and finding work for them. Please let us know if there is anything more we can do to work with you.

Sincerely,

DAVID CRAWFORD,
Division Manager, CalWORKs.

COMMUNITY SERVICE AGENCY,
Modesto, CA, February 23, 1999.

MANUEL CUNHA, JR., *President,*
Nesei Farmer's League,
5108 E. Clinton Way Suite 115,
Fresno, CA.

This is a follow up to your conversation with Ms. Caviness on Tuesday. Below, you will find information related to the number of families/individuals receiving Temporary Aid to Needy Families (TANF); data on clients currently engaged in seasonal work; and information about the types of jobs and training programs available to TANF recipients in Stanislaus County.

In Stanislaus County, we have approximately 10,400 families, consisting of 29,600 adults and children, receiving benefits from the TANF program. Eighty-six percent of these families are female, single parent, heads of households. As you know, this family structure has unique child care and transportation issues that must be considered when preparing individuals for work.

We estimate that approximately 450 TANF adults are currently engaged in some kind f seasonal employment. These families rely on TANF benefits for their income support, during the months they are not employed. However, since these families are facing time limits on receiving benefits, our goal is to work with these families to secure year-round employment.

The jobs most often obtained by our clientele are in the areas food service, personal and domestic services, sales, food processing, packaging/materials handling, clerical, construction, and health.

There are a number of training programs offered through the local Junior College and Adult Education/ROP Centers which are utilized to prepare clients for jobs in high demand occupations. There are no plans at the present time, to develop and offer field work training programs in fiscal year 99/00. On occasion, we will work with the College and/or Adult Education to develop specialized training programs where there is identified business need. In the past year, we offered a Culinary training program in partnership with the College and the local Restaurant Association. At the present time, we are offering a Landscape training program, in partnership with the College and the Sheriff's Department.

I hope this information is helpful to you. If you have any questions, please do not hesitate to give me a call.

JEFF JUE,
Director.

CALWORKS,
Stockton, CA, February 26, 1999.

RE: Employment Opportunities for CalWORKs Participants in Agricultural Jobs.

MR. MANUEL CUNHA, JR., *President,*
Nesei Farmer's League,
5108 E. Clinton Way Suite 115,
Fresno, CA.

DEAR MR. CUNHA: This letter is written in response to your request of February 19, 1999 concerning the above subject. Per our conversation, the following is provided:

1. San Joaquin County is an agriculturally based employment sector. However, the majority of agriculture jobs are seasonal and do not provide sufficient income to move welfare recipients into self-sufficiency.

2. The San Joaquin County CalWORKs population includes a significant number of individuals (particularly two-parent families) who already work in agriculture-related jobs which only provide seasonal employment and limited income during the year. Once the "season" ends and any unemployment insurance is exhausted, the workers re-apply for and receive public assistance benefits.

3.The federal five-year time limit for receipt of public assistance encourages farm laborers and agriculture workers to seek other employment which will provide year around work and earnings sufficient to keep a family from public assistance.

4. San Joaquin County is not providing training to our CalWORKs participants for jobs that are seasonal or agricultural based because it does not lead to full time employment and self-sufficiency as previously stated above.

I hope you find this information useful. If you have any questions, please do not hesitate to contact me.

Sincerely,

BOBBIE FASANO,
Deputy Director CalWORKs.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, May 22, 1997.

The Hon. ALEXIS HERMAN,
Secretary, Department of Labor,
200 Constitution Ave.,
Washington, DC.

DEAR ALEXIS: As you know, I represent the heaviest agricultural production area in Georgia. The area I represent is extremely reliant on an adequate supply of farm labor, especially during harvest.

I continually hear from producers in Georgia about the growing shortage of legal workers who are willing to take on the labor-intensive harvesting jobs commonly found in the fruit and vegetable industries.

Despite years of research devoted to the development of mechanical harvesting options, most fresh fruits and vegetables must still be harvested by hand. As you can imagine, without adequate hand labor during critical periods of harvest, producers of fruits and vegetables face a substantial risk to the value of their crops.

As you are aware, an attempt was made in the last Congress to create a new system for temporary agricultural workers through reform of the Department of Labor's H2-A Program, but that effort failed. After the failure, Georgia's agricultural leadership met with the U.S. Department of Labor staff to brief them on reforms that could make the H2-A program into a program agricultural employers could use. It is my understanding that the Republican Leadership in Congress is endorsing a legislative package of H2-A Program reforms. That bill is due to be introduced in the second week of June.

I am concerned, however, that the legislation may not be passed this year.

Therefore, I would request that you consider addressing these concerns administratively, if at all possible. To that end, I would request that you and appropriate Department of Labor Officials meet with several agricultural employers from my district, interested Members of Congress and me to discuss the enclosed proposals developed by Georgia agribusiness leaders. These changes are supported by Governor Miller, Georgia's Commissioner of Labor, Commissioner of Agriculture, and the General Assembly, as evidenced by the additional materials enclosed herewith.

If possible, I would like to arrange this meeting to take place sometime during the week of either June 2 or June 9.

Thank you for your attention to this request, and I look forward to a constructive dialogue with the Department of Labor on these proposed administrative changes.

HON. SANFORD D. BISHOP, JR.
U.S. House of Representatives.

U.S. DEPARTMENT OF LABOR,
EMPLOYMENT STANDARDS ADMINISTRATION,
WAGE AND HOUR DIVISION,
Washington, DC, January 8, 1998.

The Hon. SANFORD D. BISHOP, JR.,
U.S. House of Representatives,
Washington, DC.

DEAR CONGRESSMAN BISHOP: We appreciated the opportunity to meet with you on November 7 to discuss in detail several of the changes to the H-2A temporary nonimmigrant farm worker program proposed by your constituent Georgia growers. In addition, thank you for providing a copy of the Congressional Research Service's (CRS) analysis of the growers' proposals.

As you requested, this confirms information and views we provided in this meeting regarding the proposals for changes to the H-2A program the CRS believes do not require legislative change. We have identified each proposal by the number listed in the CRS analysis. Our comments are as follows:

1. The requirement that a prospective employer's H-2A application must be filed at least sixty (60) days prior to the date of need should be reduced to thirty (30) days.

The Department of Labor (Department) is required by law to issue H-2A labor certifications at least 20 days before the first date of need for H-2A workers. As a result, the Department believes that reducing the filing period from 60 to 30 days will not provide adequate time for potentially effective domestic recruitment. Ten days would not be adequate to perform meaningful domestic recruitment.

The Department does recognize the difficulty growers face in predicting the number of workers that will be needed 60 days before the date of need and, therefore, intends to reduce the lead time for filing applications for H-2A workers from 60 days to 45 days. In addition, the Department will discuss with the Immigration and Naturalization Service (INS) possible streamlining in the INS H-2A visa petition process.

2. H-2A employers should be allowed to end the contract period based on the "duration of crop" activity, including market conditions (as well as "acts of God").

Under current regulations, growers must specify the contract period for which they need workers (initially for recruitment purposes) and provide both domestic and foreign workers with a "three quarter guarantee" of the number of hours in the job offer contract period or pay for any shortfall. This requirement is an attempt to insure that both domestic and foreign workers who may travel long distances and/or forgo other employment opportunities to accept an H-2A job offer are treated fairly. Growers have the latitude to reduce the contract period by up to 25 percent without any justification. In addition, growers can further reduce the contract period based upon "acts of God", such as weather conditions, but not for market conditions. Growers also have the latitude to assign alternative work if it is incidental to the job described in the application and can seek the assistance of the State employment service in securing alternative jobs for domestic workers in the event the grower is not able to provide the 75 percent of the work which had been guaranteed.

The Department believes that the regulations afford growers a significant amount of flexibility, especially since it is the grower/applicant which unilaterally establishes the contract period in the first place. The Department also believes that it would be unfair for low-wage farmworkers—both domestic and foreign farmworkers—to assume an even greater portion of the grower-employer's business risk should the farmworker choose to take employment, and that this change would contribute to discouraging domestic farmworkers, from accepting such employment.

4. Change the "50 percent rule" so that, once certified, H-2A employers are obligated to hire only local workers (non-migrants who reside within commuting distance) for the duration (100 percent) of the H-2A work period (i.e., the duration of crop activity).

The current "50 percent rule" represents a compromise between domestic farmworkers who believe they should benefit from a hiring preference through the end of the contract period and growers who believe that any requirement to hire domestic workers should end with labor certification (i.e., well before the start of work). Migrant workers often travel significant distances for short term seasonal work and a change to the "50 percent rule" as proposed would further reduce seasonal work opportunities available for domestic farmworkers who often seek to link a series of short-term, possibly overlapping jobs.

9. Eliminate the requirement that farm labor contractors (FLC's) must be used by employers who apply for H-2A certification if use of FLC's is the prevailing practice in the area and crop.

One of the primary objectives of the H-2A program is that domestic farmworkers be given preference in agricultural employment and that every avenue is explored and utilized in recruiting domestic farmworkers prior to allowing foreign workers into the country. In some regions and crops FLC's are used as a matter of practice by growers for securing sufficient domestic farm labor during peak periods. It is in those regions and those crops that the Department of Labor requires use of the licensed FLC's by growers submitting H-2A applications. This requirement helps assure that every effort is made to secure a domestic workforce; failure to require the use of licensed FLC's would ignore a significant resource for domestic recruitment.

Nonetheless, the Department acknowledges and agrees that some FLC's are the cause of serious labor abuses. In this context, your staff inquired as to whether an exception to this requirement could be made in those areas where the FLC's have a history of relying on undocumented workers or labor abuses. We have asked our legal staff to examine this issue more closely and we will further advise when we have completed this review.

In our conversation with you and your staff, we also discussed two grower proposals that CRS had not identified as regulatory in nature:

7. Allow foreign workers to move from one H-2A certified employer to another at any time during the certified period of employment, with the final employer responsible for transportation costs back to the worker's country of origin.

The H-2A program does allow for movement of H-2A workers among certified employers and, in fact, it is a common practice in some areas and crops. We would be pleased to speak with Georgia growers interested in pursuing transfer of H-2A workers.

8. Strengthen the program of registering FLC's by requiring both certification/licensing and bonding. At a minimum, allow an employer to require bonding as a condition of employment of an FLC.

As we explained, the Administration did attempt to broker an agreement between growers and worker advocates for legislation on this issue a few years ago, although this initiative was not successful. The Department would be pleased to work with you in achieving such a requirement and would also note that some states already impose this requirement on FLC's operating in their jurisdictions.

Again, we appreciated the opportunity to meet with you and your staff to review the Georgia growers' proposed changes to the H-2A program. We understand your commitment to making the H-2A program more responsive for the growers and we look forward to further discussions on how we might be able to assist you.

Sincerely,

JOHN R. BEVERLY, III, *Director,*
U.S. Employment Services.

JOHN R. FRASER, *Acting Administrator,*
Wage and Hour Division.

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