



Debra J. Bond

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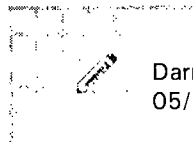
To: Irene Bueno/OPD/EOP

cc:

Subject: Highlights of Senate Subcommittee on Immigration Hearing on H2A

The attached was written by an OMB staffer that attended the hearing.

----- Forwarded by Debra J. Bond/OMB/EOP on 05/13/99 12:50 PM -----



Darrell Park
05/12/99 10:10:43 PM

Record Type: Record

To: Debra J. Bond/OMB/EOP@EOP, Larry R. Matlack/OMB/EOP@EOP

cc:

Subject: Highlights of Senate Subcommittee on Immigration Hearing on H2A

Larry and Debra,

Here are the highlights of the Subcommittee on Immigration's hearing on H2A which was held at 2 pm today in 226 Dirksen.

The formal title of this hearing was:

Meeting the Workforce Needs of American Agriculture, Farm Workers and the US Economy.

Four Sentence Summary

Witnesses and Subcommittee members expressed unhappiness with the status quo. Workers need more protections and better working conditions and growers need better access to workers. H2A is too burdensome to be useful in its current state. Most speakers agreed that all sides would have to work together if any real improvements are to be made.

Witnesses included:

Senators: Bob Graham (D-FL), Mitch McConnell (R-KY), Slade Gorton (R-WA), Gordon Smith (R-OR), Larry Craig (R-ID) (written statement but was not at the hearing),

Representatives: Howard Berman (D-CA), Sanford Bishop (D-GA).

Others : American Farm Bureau; National Council of Agricultural Workers; International Migration Policy Program, Carnegie Endowment for Int'l Peace, National Council of La Raza, United Farmworkers Union, Nisei Farmers League.

Some Subcommittee Members at the Hearing:

Chairman Abraham (R-MI), Feinstein D-CA, Kennedy (D-MA).

Opening Remarks by Chairman Abraham

The Senator noted that although no legislation has been introduced in this Congress on H2A, he wanted the hearing to be helpful in drafting any future legislation.

Some of the major points covered in the hearing were:

H2A in General

Many witnesses indicated that H2A was extremely bureaucratic and complex, but Senator Smith went one step further and showed the double sided one page form that he filled out to run for the Senate, while noting that it took between 6 and 20 pages for an average H2A application. There was general consensus that H2A in its current form is not workable.

Allowing Current Illegal Workers to Become Legal Workers

Senator Gram (D-FL) brought up the issue in his testimony, and the issue was also raised by Senator Feinstein and some witnesses as a solution. Senator Feinstein proposed this in conjunction with having a National Registry (for ag. workers), offering these workers a premium wage, and then providing a green card for workers who can prove they have been done this type of work for years. She indicated that if there were more legal workers then wages would be higher and workers would receive better treatment. Senator Smith stated that workers are kept down if they are illegal because they have no rights and no recourse. Senator Gram mentioned that illegal workers are afraid to seek health care so diseases spread, and their lives are made even more difficult.

Shortage of Workers

Witnesses who represented the opinions of the growers mentioned severe problems in finding a reliable supply of workers, due to among other things a strong economy, SSA database checks on names and SS numbers of workers, and increased crackdown at the US border. The two witnesses who represented worker interests indicated that there was no shortage of workers and cited a GAO study and another study she submitted for the record as proof of this. Other witnesses were quick to find fault with the GAO study's finding of no shortage.

Condition of Migrant Farm Workers

There was general agreement that Migrant Farm Workers have extremely difficult lives, and that more protections were needed to improve the quality of their lives and the lives of their children and families.

Registry of Workers

Senator Feinstein advocated having a National Registry, which was supported by several other witnesses. Criticism of this idea came from the representative of the United Farm Workers Union who indicated the system was viewed by her people as a black list, and that local employment offices should be the place that workers and growers go to find each other.

Smugglers

One of the concerns of several members of the Subcommittee was the issue of illegal immigrants having to rely on smugglers to get them across the border. It was generally agreed that these smugglers do not always have the safety of illegal immigrants in mind.

Contractors

The witnesses representing worker interests were quick to complain about the many contractors who "assist" migrant workers and provide transportation, etc. One witness representing grower interests indicated that bad contractors should be removed, but that good contractors provide an important service.

Guestworkers Overstay Their Visas

Representative Berman indicated that if we allow addition guest workers in to the country, they will overstay their visas and we will just increase the number of illegal workers we have in this country. Several other witnesses raised similar points.

Using Welfare and Unemployment Offices to Supply Workers

The President of the Nisei Farmers League related his organization's attempt to use welfare and unemployment offices to aid the supply of agricultural workers. Hundreds of letters were sent out by the Fresno office of the Department of Social Services and only 3 responses were received. Senator Feinstein backed up the idea that just because there is a high unemployment rate, it doesn't mean there is a surplus of agricultural workers.



U.S. SENATE SUBCOMMITTEE ON Immigration

Spencer Abraham, Chairman

For Immediate Release, May 12, 1999

Contact: Joe Davis 202-224-8849

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Senator Abraham Comments on the Workforce Needs of American Agriculture, Farm Workers and the U.S. Economy

(WASHINGTON) U.S. Senator Spencer Abraham (R-Michigan), Chairman of the Judiciary Subcommittee on Immigration, held a hearing entitled "Meeting the Workforce Needs of American Agriculture, Farm Workers, and the U.S. Economy." The following is Abraham's opening statement.

"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 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. 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 is 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 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. 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 is here today to give us the views of Michigan's 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 topic.

"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: 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 nation.

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

WITNESS LIST

Hearing Before the
Subcommittee on Immigration
Committee on the Judiciary
United States Senate
on

"Meeting the Workforce Needs of American Agriculture,
Farm Workers, and the U.S. Economy"

Wednesday, May 12, 1999
2 p.m., SD-226

PANEL I

✓ The Honorable Bob Graham
United States Senator

✓ The Honorable Mitch McConnell
United States Senator

The Honorable Slade Gorton *Slade* ✓
United States Senator

The Honorable Larry Craig
United States Senator

✓ The Honorable Gordon Smith
United States Senator

PANEL II

The Honorable Howard Berman
United States Representative

The Honorable Sanford Bishop
United States Representative

PANEL III

Joshua Wunsch
Farmer and Board Member
Michigan Farm Bureau
on behalf of
American Farm Bureau
Traverse City, MI

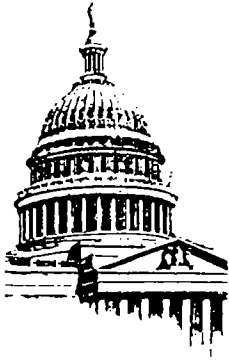
James S. Holt, PhD
Senior Economist
McGuiness & Williams
on behalf of
National Council of Agricultural Employers
Washington, DC

Demetri Papademetriou
Senior Associate and 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 C. Huerta
Co-Founder and Secretary Treasurer
United Farmworkers of America, AFL-CIO
Keene, CA

Manuel Cunha, Jr.
President
Nisei Farmers League
Fresno, CA



U.S. Senator for Kentucky

MITCH McCONNELL

For Immediate Release
May 12, 1999
99-126

STATEMENT OF U.S. SENATOR MITCH McCONNELL ON H-2A PROGRAM

McConnell testifies before the Senate Judiciary Subcommittee on Immigration

WASHINGTON, D.C. -- U.S. Senator Mitch McConnell (R-KY) today testified before the Senate Judiciary Subcommittee on Immigration. McConnell discussed the H-2A migrant worker program, and he submitted testimony from witnesses who participated in a field hearing McConnell held in Bowling Green, Kentucky on April 10, 1999.

McConnell's testimony follows:

Mr. Chairman, I would like to thank you for holding this hearing on the labor problems in agriculture in the United States.

Farmer after farmer in my state has told me that one of the most pressing issues facing Kentucky farmers is the problem of finding and hiring legal temporary migrant farm workers. In response to these concerns, last month I held a field hearing in Kentucky on the H-2A program. Since I couldn't bring Kentucky to Washington, I brought Washington to Kentucky. At the hearing, we heard directly from the people who are impacted most by the H-2A program: the farmers and the migrant workers. We also heard from those who administer the program and those who are opposed to 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 would be very important to my colleagues in the Senate as we examine the future of the H-2A program. I would therefore ask that the transcript of that hearing be inserted in the record of this hearing.

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 of transportation costs, housing, a decent wage, and 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 who they'd contracted with were waiting at the border for government agencies to process their paperwork.

-more-

In short, the H-2A program has become a bureaucratic nightmare of government agencies and their rules and regulations. Even the federal General Accounting Office has called the program a "bureaucratic maze." It takes a five-pound, 325-page manual to even attempt to explain how to grind your way through this complicated H-2A program. **A farmer shouldn't have to hire a lawyer just to hire a farm worker.**

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 have concerns that the program leads to inadequate protection for 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 in this hearing today. Hopefully, we can all work toward a solution equitable to both the farmer and the worker.

I want to thank you again Mr. Chairman for the opportunity to testify.

SENATE JUDICIARY COMMITTEE
Subcommittee on Immigration
"Meeting the Workforce needs of American Agriculture,
Farm Workers and the U.S. Economy

Testimony by
United Farm Workers of America AFL-CIO
Dolores Huerta, Secretary-Treasurer
May 12, 1999

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% 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 liveable 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 1500 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% 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% 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% 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 worker 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 allwed 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 be allow their workers 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.

DRAFT

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 Alzola
Andrea Juarez
Alejandro C. Santiago
Kristina Rowen

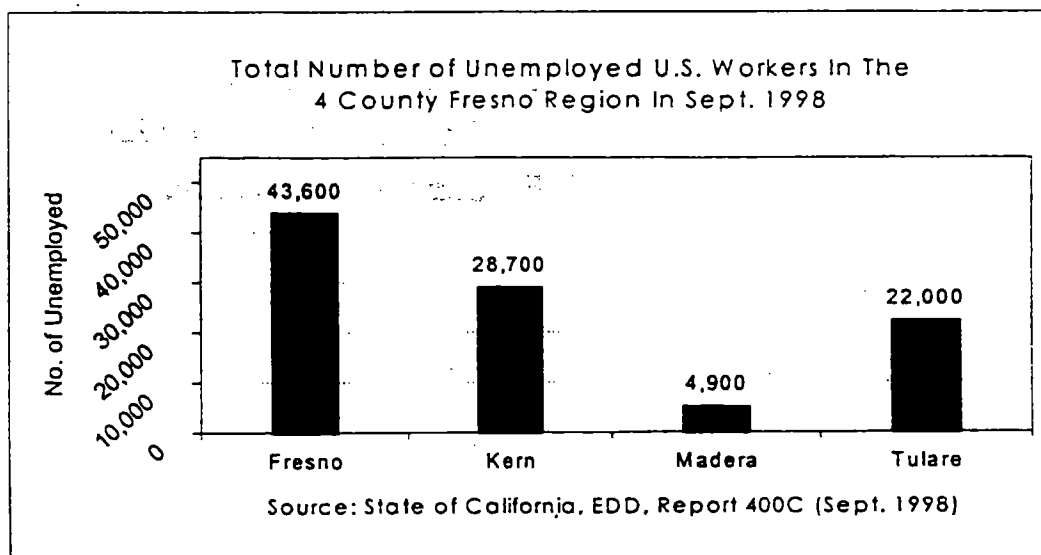
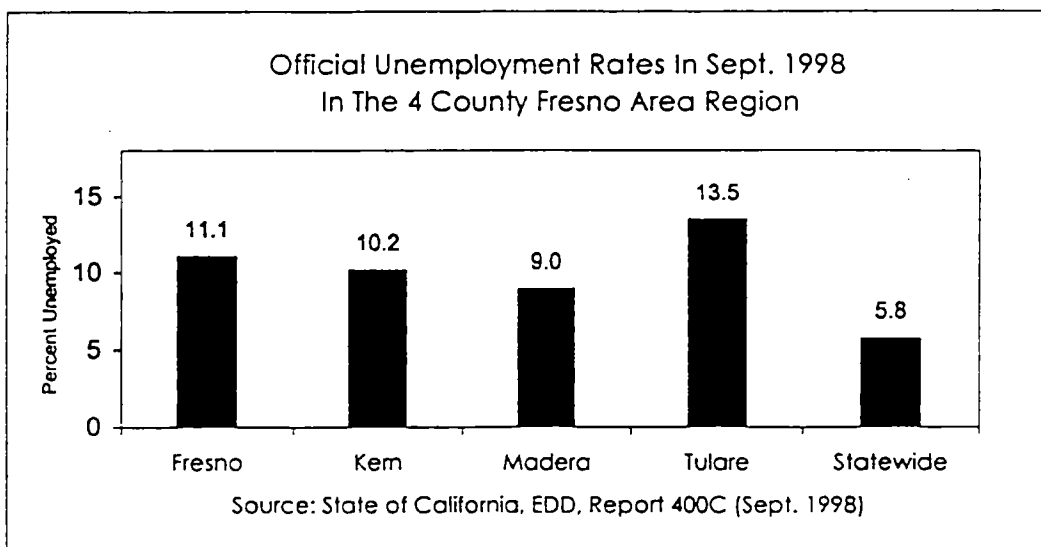
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I. Introduction

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 state-wide average, but the number of unemployed totaled 99,200 legal U.S. workers, as these graphs show.



I. Introduction, cont.

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

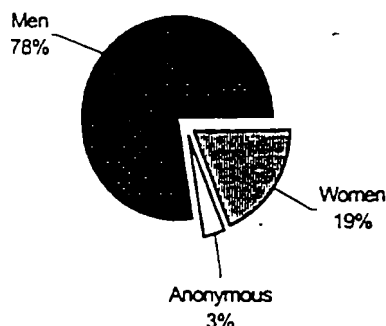
A. Demographic Information

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.

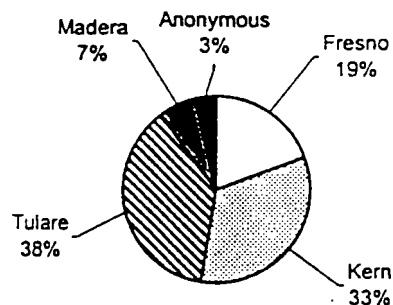
The interviewers' training was set up during the last week of October 1998, and the interviews themselves were conducted during the first week of November 1998. A total of 343 farm workers were interviewed. Some basic information about the respondents is provided in the graphs below.

II. Survey Results, A. Demographic

Gender of the Farm Worker
Survey's 343 Respondents



Respondents' County of Residence

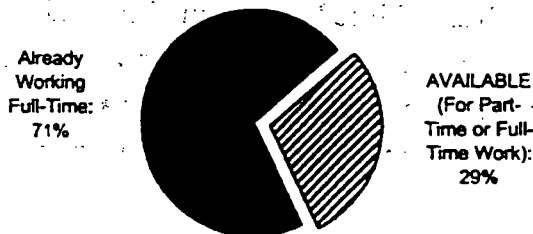


II. Survey Results

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.

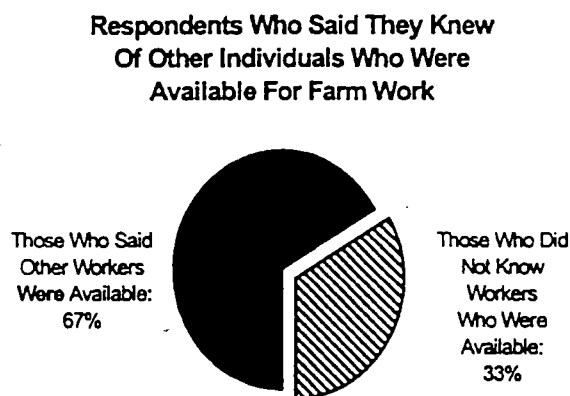
Respondents' Who Said They
Were Available For Work During
Sept. 1998 in the 4-County Area



II. Survey Results, B. Farm Worker Availability, cont.

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.)

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.

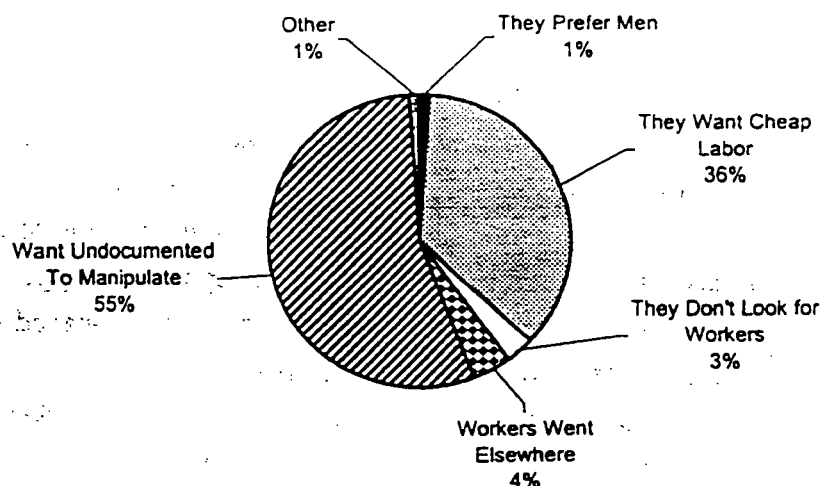
Interviewers were instructed to let the farm workers express themselves and to write down everything that they said.

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.

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.

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 industry.

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 sub-minimum 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".

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.

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

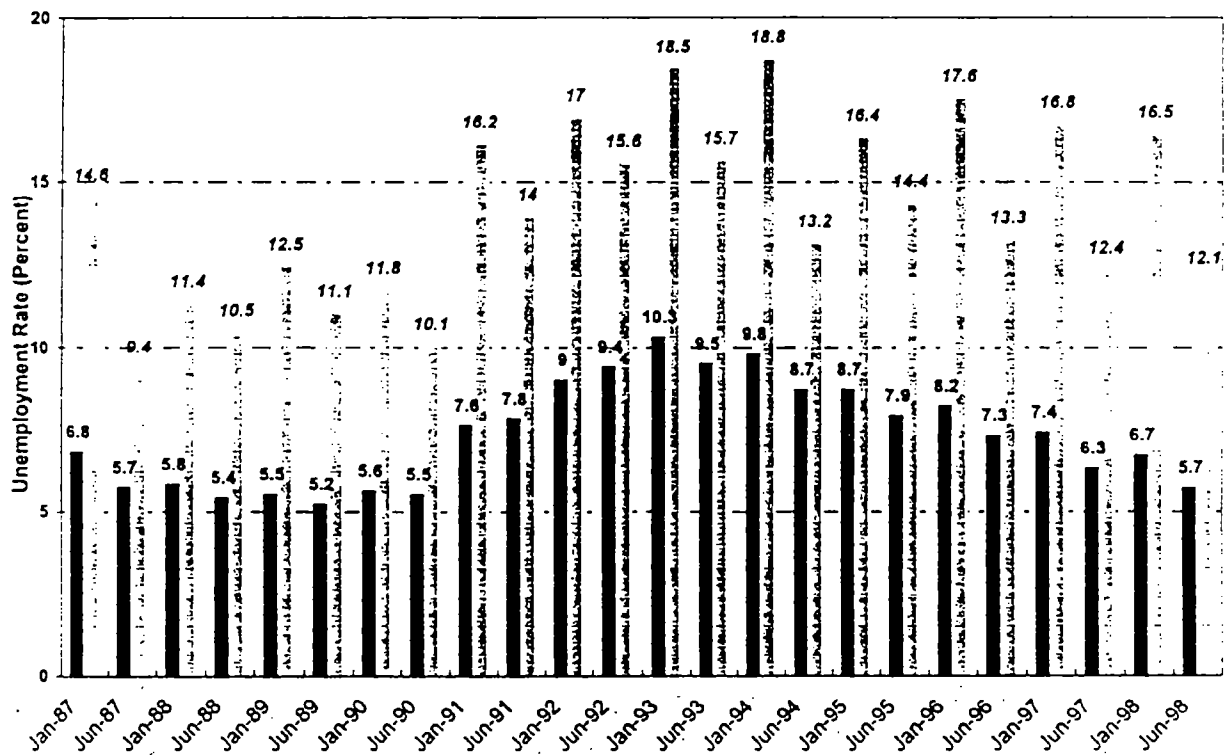
The agricultural industry has thousands of jobs which are neither seasonal, nor low-paid, and that are integrally involved in the production of labor-intensive fruits and vegetables in the 18 key counties. These jobs (e.g., drivers of tractors, harvesters and other mechanized implements) are often higher 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 coercive work environment created by "mandatory" community service work in the industry.

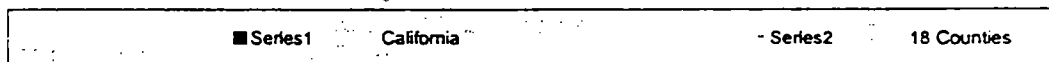
CRLAF is willing to work with counties to implement these changes.

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



Source: State of California, Employment Development Department, Report 400C, 1987 to 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

^aThese 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.

^bSection 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.

^cThe 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.

^dLabor 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.

DRAFT

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
15, 1998

USDL-177/September

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.

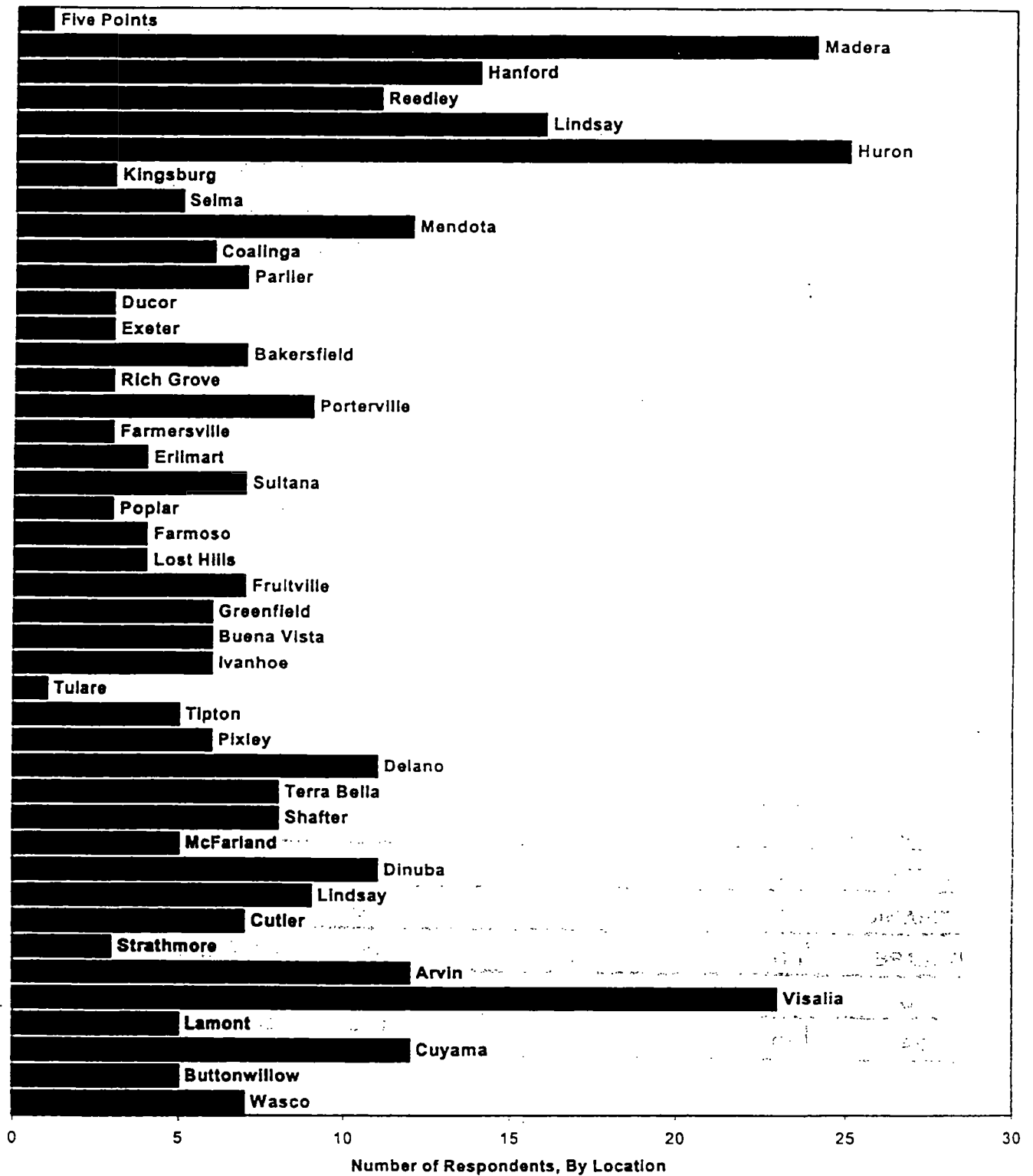
IV. Appendix D: Contents Of Ag County CalWORKS Plans

	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

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

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.



Statement of Manuel Cunha, Jr.
President of the Nisei Farmers League
Before the Subcommittee on Immigration
of the Senate Judiciary Committee
Washington, D.C.

May 12, 1999

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 1000 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% 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 that 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.

**STATEMENT ON PROPOSED AGRICULTURAL
"GUESTWORKER" PROGRAMS**

Presented by:

Cecilia Muñoz
Vice-President
Office of Research Advocacy and Legislation

NATIONAL COUNCIL OF LA RAZA
1111 19th Street NW, Suite 1000
Washington, D.C. 20036
(202) 785-1670

Before

The Subcommittee on Immigration
Committee on the Judiciary
United States Senate

May 12, 1999

**STATEMENT OF CECILIA MUÑOZ
VICE-PRESIDENT, OFFICE OF RESEARCH, ADVOCACY AND
LEGISLATION
NATIONAL COUNCIL OF LA RAZA**

**BEFORE THE IMMIGRATION SUBCOMMITTEE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
MAY 12, 1999**

I. INTRODUCTION

My name is Cecilia Muñoz. 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-1800s: 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% of farmworkers are foreign-born; 94% of these are from Mexico.¹ As of 1995, an estimated 63% 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 Responsibility 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% 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

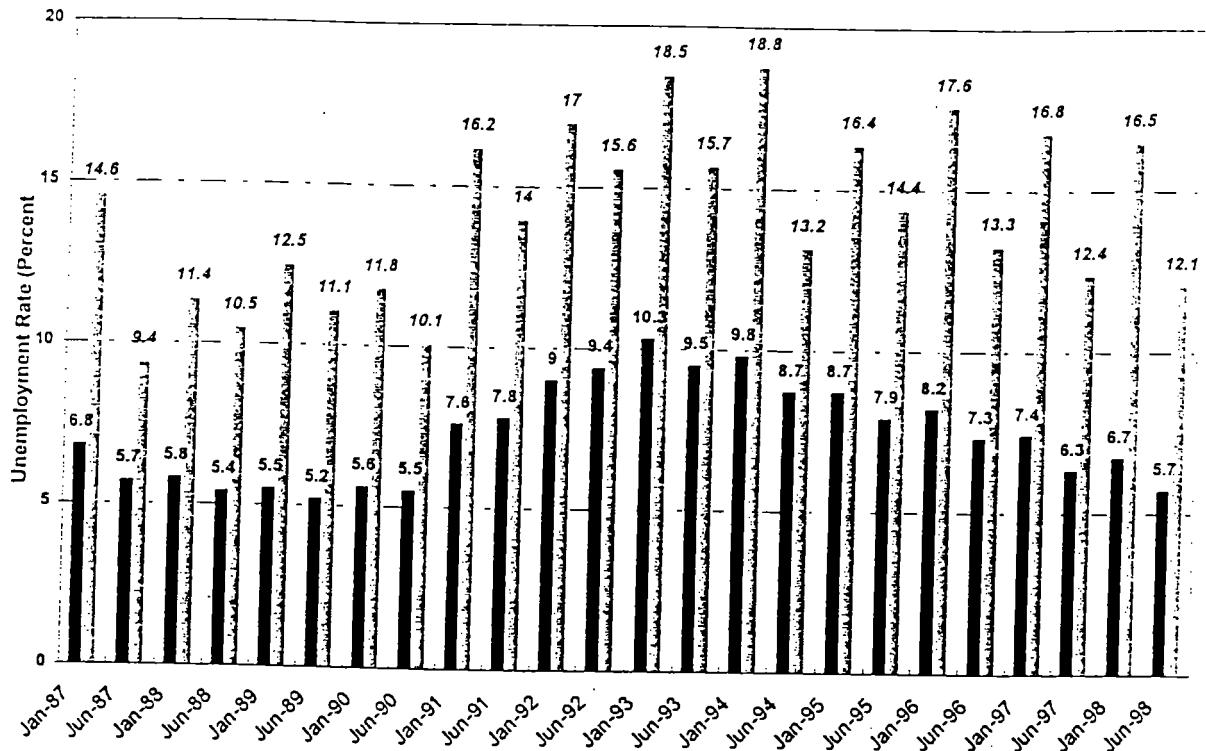
Given these statistics, the claims of a labor shortage can take absurd dimensions. For instance, in September of 1998, the unemployment rates in the four-county Fresno region were as much as twice the statewide average, for a total of 99,200 unemployed legal U.S. workers.⁹ At the same time, however, 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.

C. Recruitment of Undocumented Workers

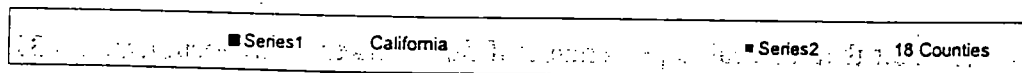
The fact that a sizeable percentage of farmworkers is undocumented – 37% according to the Department of Labor and the GAO – is not evidence that there is a shortage of authorized workers. More likely, it is evidence that the hiring practices used by growers have contributed to the size of the undocumented population in the United States. Increasingly, growers have turned to farm labor contractors (FLCs) 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 FLCs.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

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: State of California, Employment Development Department, Report 400C, 1987 to 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.

deny that they directly employ any farmworkers and blame immigration and labor law violations on the FLCs, 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% 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% between 1986 and 1995, netting \$15.1 billion. A doubling in the value of exports of these products during the 1990s 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%; the Japanese 20%; Indians 50%. 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.

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 1900s. 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% of the

2,300 worksites surveyed. In 1998, 30% 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.

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% 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% 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.
- **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,

* 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.

failure of DOL's proposed AgNet or other similar job registry 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 (FLCs) Responsible for Treatment of Their Workers:** Congress and enforcement agencies must assure that growers do not circumvent existing labor laws by increasingly relying on FLCs for workers. Since the enactment of the Immigration Reform and Control Act of 1986 (IRCA), growers have come to depend more heavily upon FLCs 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 FLCs 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.

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.

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.

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.

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.

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.

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Testimony on Proposed "Guestworker" Programs, presented by Raul Yzaguirre, National Council of La Raza, before the Subcommittee on Immigration and Claims, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C., December 7, 1995.

Testimony on Temporary Agricultural Work Visa Programs, presented by Bruce Goldstein, Farmworker Justice Fund, before the Subcommittee on Immigration and Claims, Judiciary Committee, U.S. House of Representatives, Washington, D.C., September 24, 1997.

Testimony on the H-2A Program and its Impact on Agriculture, presented by Raul Yzaguirre, National Council of La Raza, before the Committee on Agriculture and Subcommittee on Immigration and Claims, U.S. House of Representatives, Washington, D.C., December 14, 1995.

Statement of

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International Migration Policy Program
Carnegie Endowment for International Peace**

before the

**Immigration Subcommittee
of the
Committee on the Judiciary
United States Senate**

**Hearing on "Meeting the Workforce Needs of American Agriculture,
Farm Workers, and the U.S. Economy."**

May 12, 1999

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 II, 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

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

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 (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-fold⁴ and the very substantial growth of the FVH sector.

most of the provisions of the 1938 Fair Labor Standard Act (FLSA) to agriculture in the 1960s, and special legislation regulating migrant and seasonal work in the 1960s, 1970s and 1980s. 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.

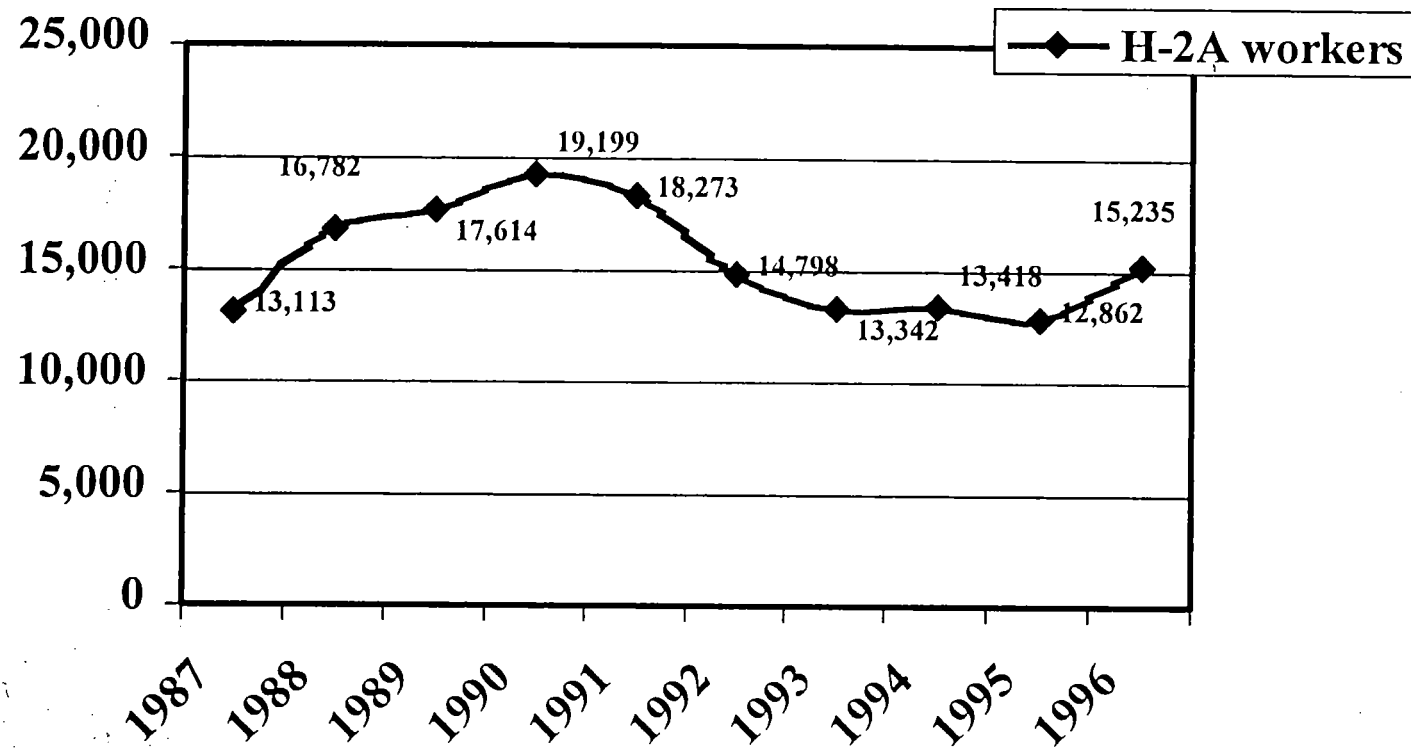
² In its extreme form, the result has been nothing short of mutual demonization.

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

Chart 1

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



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.

A. Six Observations About the Agricultural Industry and Agricultural Policy

1. Agriculture is a critical US 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

unauthorized workers dampens interest in the H-2A program—particularly in view of perceptions that the program is inflexible and intrusive.

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).

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

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 1960s, 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 1990s, 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).

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)

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 US 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 1990s, 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 (FLCs)—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

⁷ Farmworker advocates typically argue that lack of enforcement—rather than inadequate regulation—is the more important problem. FLCs currently are less likely to be held accountable for labor or immigration law compliance than are fixed-site employers (CAW 1992:37) and are,

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.

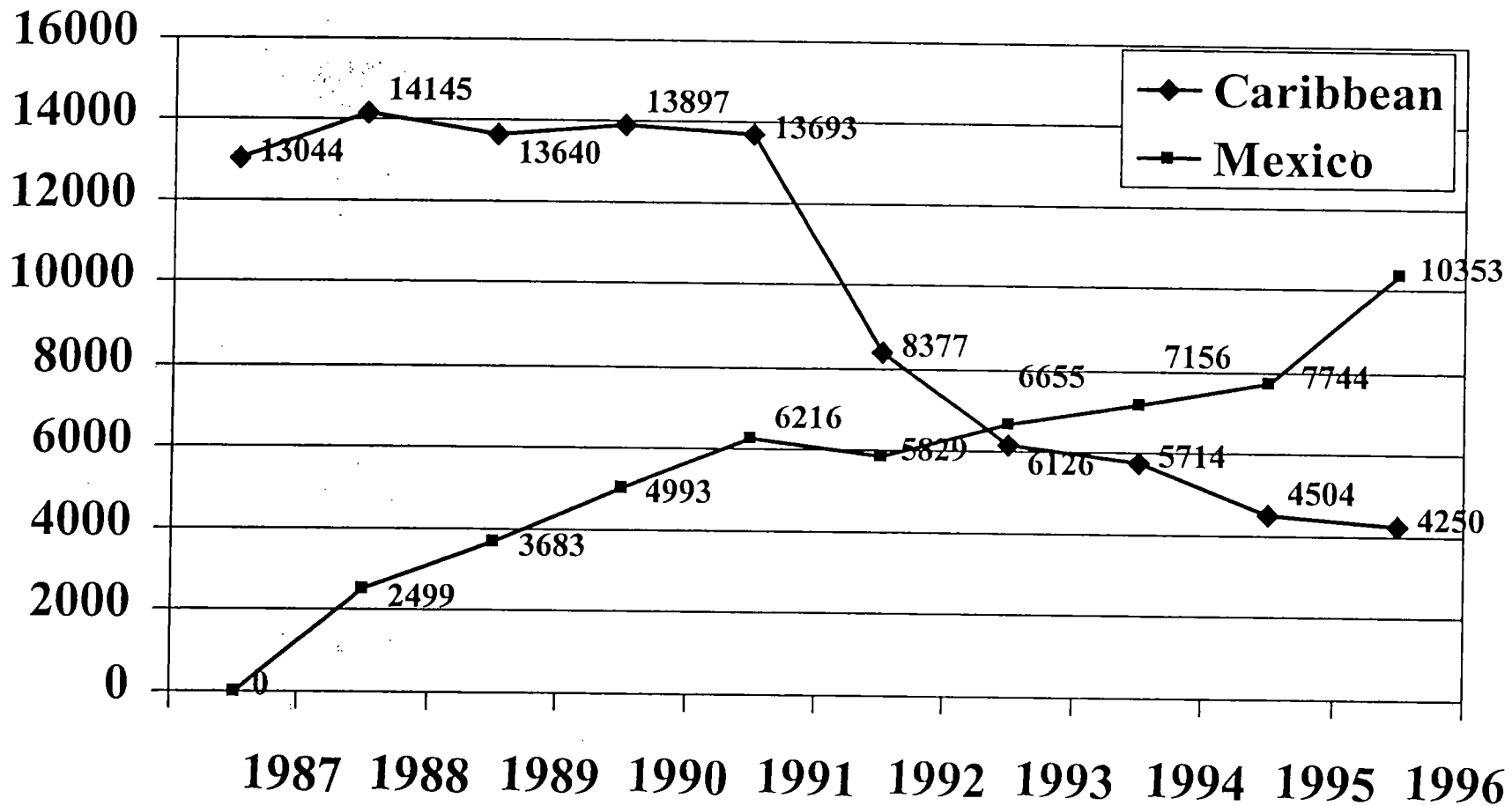
C. Six Observations About the Current Temporary Foreign Worker Program in U.S. FVH Agriculture (H-2A)⁸

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 1990s. 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.
 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
-
- 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



be relatively common.

III. PERISHABLE CROP AGRICULTURE AND SEASONAL FOREIGN WORKERS

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 1880s remain the same today.

One of the most visible, and troublesome, parts of that legacy are the farm labor contractors (FLCs) who have come to control not only the livelihoods but the very lives of farmworkers. In 1963, Congress, in response to evidence that many FLCs were exploiting both farmers and laborers, sought to regulate the relationship between workers and FLCs 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 employer" 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 FLCs as critical middlemen in all aspects of farmwork recruitment and employment. The Commission on Agricultural Workers, mindful of the problem, recommended that FLCs be either more effectively regulated or eliminated in favor of *government or private-sector grower or worker associations that would*

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 of the century, Filipinos and Mexicans during and after WWI, and Mexicans since the 1930s. Currently, the workforce is overwhelmingly Mexican with increasing pockets of Central Americans, especially Guatemalans.

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.

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 horticulture¹⁰ and is the industry's most labor intensive¹¹—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.

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 1940s (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 (FLCs) 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 1940s and early 1950s 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).

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 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

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 persuaded then-Secretary of Labor Wirtz to appeal personally to President Kennedy to terminate the program.

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 sectors¹⁶—*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-à-vis foreign workers, and the equally inevitable efforts by farmworker advocates to actually "strengthen"

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.

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 employer 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

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.

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.

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

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.

- The power of FLCs, 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 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

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.

U.S. workers 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 CBOs 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*

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).

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 Departments 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

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.

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.) 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.

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

- 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

²⁸ There are only about 950 DOL Wage and Hour compliance officers with ever expanding

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 FLCs. The role of farm labor contractors (FLCs) must be thoroughly re-examined and radically reformed. At a minimum, any experimental program reforms—with or without FLCs²⁹—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

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.*

²⁹ The system of FLCs is almost as old as the specialty crop farms that emerged in California more than a century ago—when bilingual FLCs acted as middlemen for Chinese workers in the seasonal farm labor market. Gradually, FLCs 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.

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) 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.

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.

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.



MICHIGAN FARM BUREAU

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**STATEMENT OF
THE MICHIGAN FARM BUREAU
TO THE
SUBCOMMITTEE ON IMMIGRATION
SENATE JUDICIARY COMMITTEE
REGARDING
"THE WORKFORCE NEEDS OF AMERICAN AGRICULTURE,
FARMWORKERS, AND THE U.S. ECONOMY"**

Presented by:

**Josh Wunsch
Michigan Farm Bureau Board of Directors
May 12, 1999**

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 led 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.

Statement of Senator Larry E. Craig
before the
Judiciary Subcommittee on Immigration
on
**Meeting the Workforce Needs of Agriculture,
Farm Workers, and the Economy**
May 12, 1999

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 **Ag JOBS** 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 **Ag JOBS** 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, 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.

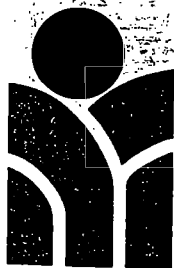
We need a national **AgJOBS** registry, linked with "America's Job Bank," currently run by DOL's, to match farmworkers with jobs. Domestic workers should be given preference. The job bank should verify the worker's legal status. If domestic workers are not available, using the job bank should qualify 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.

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NATIONAL
COUNCIL OF
AGRICULTURAL
EMPLOYERS

Statement of Dr. James S. Holt
on behalf of the
National Council of Agricultural Employers
before the
Immigration Subcommittee
of the
Senate Judiciary Committee

May 12, 1999

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 IIRIRA 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 FY 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 frequencies 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 vicissitudes 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 nonunion 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. AEWRs were initially set at the level of the then non-agricultural federal minimum wage. Over time, AEWRs 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, AEWRs 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 level 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 access 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.