

**Irene Bueno**

09/10/99 04:50:18 PM

Record Type: Record

To: H2A

cc: Eugenia Chough/OPD/EOP

Subject: Re: H2A Reform Proposals

As I mentioned earlier, please review the attached agenda and H2A reform ideas that will be discussed at the H2A Reform Proposal meeting on Tuesday, 9/14 at 10:30 am in 211 OEOB.

Thanks.

----- Forwarded by Irene Bueno/OPD/EOP on 09/10/99 04:50 PM -----



**Debra J. Bond**

09/10/99 03:21:57 PM

Record Type: Record

To: Irene Bueno/OPD/EOP@EOP

cc: Larry R. Matlack/OMB/EOP@EOP

bcc:

Subject: Re: H2A Reform Proposals

Attached is a draft agenda and a revised version of the H-2A reform ideas that were discussed last year. Please let me know if you need anything further on this.



agenda\_914.doH2a-ideaR.do

Irene Bueno

**Irene Bueno**

09/09/99 06:46:42 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Eugenia Chough/OPD/EOP@EOP

Subject: H2A Reform Proposals

You are invited to attend a meeting on Tuesday, 9/14 at 10:30 am in 211 OEOP to discuss H2A reform proposals that were developed last year and to brainstorm about other proposal ideas. I will be sending you background on these proposals on Friday.

Please e-mail me your info SSN and DOB to Genie Chough (Eugenia\_Chough@opd.eop.gov). Genie's phone number 456-5566.

Thanks.

Message Sent To:

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Barbara Chow/OMB/EOP@EOP  
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Deborah B. Mohile/WHO/EOP@EOP  
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## **H-2A Meeting Agenda**

9/14/99

- I. Legislative Update
- II. AgNet Update
- III. Discussion of H-2A reform ideas
- IV. Next Steps

## **H-2A Reform Ideas**

### **Recruitment**

#### **1. Employment Verification Pilots**

INS has indicated that its existing employer verification pilot program could be adapted to allow for effective participation by H-2A growers.

*Proposal:* Conduct more aggressive outreach to growers to encourage them to participate in the pilot program. Offer an incentive to growers as a trade for participation.

#### **2. Farm Labor Contractor Certification Program**

Frequently, farm labor contractors (FLCs) are inexperienced, poorly educated, not aware of applicable laws and regulations, and lacking in business know-how.

*Proposal:* Require FLCs to satisfactorily complete a Wage and Hour administered course to ensure minimum competency levels for FLCs knowledge of applicable laws and regulations. These courses could also serve to enhance the FLCs business skills. Successful completion of the course would be a prerequisite to initial issuance and/or renewal of a FLC registration card. The course would include instruction on how to properly comply with MSPA, FLSA, H-2A, OSHA field sanitation, FICA/FUTA, EPA pesticide worker protection standards, and other labor standards as appropriate.

DOL estimated the cost to be approximately \$500K per year. We could charge a fee to defray much of this cost.

#### **3. Farm Worker Harvesting Cooperatives**

*Proposal:* Conduct a feasibility study to research and design farm worker harvesting cooperatives. Cooperatives would be designed to match the job skills of farm workers with growers as an alternative to farm labor contractors. The cooperative would serve the functions of recruitment, employment, and transportation of farm workers. The cooperative could also provide job training for farm workers interested in learning skilled agricultural techniques.

### **Transportation and Housing**

#### **4. Pilot Programs -- Transportation and Housing**

Proposal: Conduct pilot programs on transportation subsidies and alternative housing programs. This would require legislation.

5. **Housing Regulation Reform**

The current housing standard used by DOL in administering the H-2A program is the OSHA temporary labor camp standard (used for housing built after 1980).

Proposal: Revise the current DOL housing standard to balance the protection of workers with the needs of the agricultural industry. Given that adoption of this standard was a regulatory decision not a statutory mandate, DOL has the discretion to revise the standard.

6. **HUD-funded Housing for Migrant Workers**

HUD does not currently have a specific program for migrant housing.

Proposal: Develop an initiative to increase migrant housing. Possible funding sources include the Community Development Block Grant, the HOME program, the Office of Rural Housing and Economic Development, and the Colonias initiative.

7. **USDA Farm Worker Housing Program**

USDA currently provides farm labor housing loans, grants, and rental assistance to farmers. However, according to USDA, H-2A workers are not eligible to reside in housing funded through this program.

Proposal: Develop a legislative change to allow immigrants to reside in this housing.

**FICA/FUTA**

8. **Growers to pay the equivalent FICA/FUTA taxes for H-2A workers**

Proposal: Require growers to pay the equivalent of FICA/FUTA taxes. Use these funds to pay for transportation and/or housing subsidies for migrant farm workers. (Approximately \$12-\$15 million per year.)

**Enforcement**

9. **Transfer from ETA to Wage & Hour**

Proposal: Finalize the transfer of H-2A program administration from the Employment and Training Administration (ETA) to the Wage & Hour Division.

#### 10. **DOL Enhanced Enforcement**

DOL had a number of initiatives in FY 1999 targeted at domestic child labor in the agriculture industry. The funds were targeted at increasing enforcement (specifically, the Salad Bowl initiative -- targeting lettuce, tomatoes, onions, cucumbers), improving data collection in the National Agricultural Worker Survey, and training migrant workers to be child care providers. The FY 2000 President's budget requested enhancements and continuation of these initiatives.

Proposal: Request a substantial increase for these initiatives (for example, to expand targeting into other crop/geographic areas); or an increase for general enforcement base funding.

#### 11. **Enhanced protections for U.S. workers**

Proposal: Develop legislative or regulatory changes to existing worker protection statutes that would better protect the rights of farm workers. The following are examples of gaps in existing laws.

##### FLSA exemption from minimum wage

The FLSA contains a number of specific agriculture exemptions from the minimum wage requirement. The primary exemption applies to growers who do not use at least 500 man-days of agricultural labor in any calendar year. There are no reliable figures on the number of workers affected by this exemption or the number of workers who, even if subject to the exemption, are paid less than the minimum wage. But it is not uncommon for growers to assert this exemption as a defense in minimum wage cases.

##### FLSA exemption from overtime

Most farm workers are completely exempt from the FLSA overtime provisions. It is very common for farm workers to work in excess of 40 hours during a workweek but they have no claim to overtime pay for those hours. Some states - such as California and Washington -- provide limited overtime coverage to farm workers.

##### National Labor Relations Act (NLRA) coverage

If the work is defined as agricultural labor under the FLSA, it is exempt from coverage under the NLRA. Therefore, virtually all non-processing tasks in agriculture are outside the protections of the NLRA. However, some states --

such as California -- have enacted protections for farm workers seeking to organize. These state protections may be more protective than the NLRA in some areas.

#### Workplace health and safety

OSHA protections for farm workers are less extensive than similar protections for other workers (for example, ladder work is much less regulated in agriculture than in other industries) and covers fewer employers.

- ◆ Since 1975, OSHA has been precluded from regulating health and safety on farms that employ fewer than 11 workers on any day during the year. Many farms are therefore beyond the reach of any OSHA standard, including field sanitation. However, under the Migrant and Seasonal Agriculture Worker Protection Act (MSPA) housing standards apply even if the OSHA standards do not apply because of the 10 or fewer employee exemption.
- ◆ Farm work is one of the few industries in which workers are not entitled to specific information about the use of toxic substances in the workplace. OSHA does not have statutory authority to require a hazardous communication standard for pesticides and the EPA -- which has the authority -- has failed to issue such a standard.

#### State Workers Compensation

Many major agriculture states -- such as North Carolina, Georgia, and Texas -- exclude farm workers from workers compensation coverage. The only recourse for an injured farm worker in these states is the slow, expensive, and uncertain tort law system. The consequence is that farm workers are unable to get the immediate medical and rehabilitative care and wage replacement available under the State-administered workers compensation system.

#### Unemployment Insurance

Some states either exclude farm workers from unemployment insurance coverage or impose such stringent requirements on coverage that farm workers are effectively excluded.

#### Protection against retaliation

Propose amending MSPA and the Pesticide Act to provide retaliation protection.

### **Wages**

#### **12. Wage reform**

Proposal: Consider alternative wage methods. For example, replace the

AEWR with 1XX% of the prevailing wage.

## **Research**

### **13. Mechanization Adjustment Assistance**

If the cost of employing H-2A workers or illegal workers rises (or even remains constant), growers will have increased incentive to adopt mechanized farm equipment or other labor saving technologies. The transition from a farm economy based on inexpensive, short-term labor to one based on greater use of mechanization (and higher paid, long-term labor) will increase grower costs in the short-term.

*Proposal:* Develop tax incentives for mechanization, mechanization training programs for farm workers, and mechanization training programs for growers. This would lessen the cost of this transition for a number of farm sector participants including small farmers, farms run by elderly operators, and farm workers.

## **Other**

### **14. Certification vs. Attestation**

*Proposal:* Replace the current H-2A certification model with an attestation model. This would need to be coupled with an increase in enforcement.

## Reform Ideas -- Growers and Farmworkers

### Program

✓ AgNet

(OMB) — provided for  
pass back \$10 million  
to DOL

Employment Verification Pilots

(INS) — not much

Farm Labor Contractor Certification Program

(DOL/USDA)

Farmworker Harvesting Cooperatives

(USDA) — 5 pilots  
test the idea Feasibility  
study

Pilot Programs -- Transportation

\$5 million (revolving  
fund)

(DOL/OMB)

(Pilot Programs -- Housing

\$5 million

(OMB)

✓ Housing Regulation Reform

(OMB) — put on table a  
commitment on DOL/USDA  
to review regs.

USDA Farmworker Housing Programs

(Julie/OMB)

Transportation Subsidies

(OMB)

Child Labor Protections

(Ceci) John F.

Mechanization Adjustment Assistance

(Ceci/CEA (Elise))

Childcare

OMB

✓ Enhanced Enforcement

\$4.25 million (enhance  
saled band)

\$130 million

total  
budget

20 to Ag =  
10-11

prior to  
increase this  
year

Barbara Shock - 4/21/99

- Proposed Rule - in INS

- As part of an operational level ~~mtg~~ <sup>mtg</sup> - Forms

- Comment period is closed

- Published 12/7/98

Comments due by 2/5/99

Final Rule -

- \$

- Data

1/14/99  
H2A

~~Comments~~

Wants to reform ~~H2A~~ H2A

- miss statutory deadlines
- too bureaucratic
- forms are complex

seek to simplify the program

① Process for determining need for foreign workers  
- quickly

use Job Registry  
as a key component of domestic recruitment  
instead of the current job recruitment requirements  
(labor certification)

modern technology to  
match workers to jobs

Ensure that workers referred by the govt. are  
authorized to work.

most imp (X) ② Dealing w/ the AEWR  
artificial / divorced from the market place  
(too high)  
(FICA tax: "adds insult to injury"  
b/c too expensive)

③ Housing  
Currently, they find housing?  
how to transition

④ Transportation (domestic and alien workers in and out)

⑤ Temporary resident status (they are open-minded)

1994 - became  
an  
issue

Folks on the Hill are not prepared to drop a bill right now.

Want to give "this process" 6 weeks.

Would support a legalization program tied to working in the industry but not a SAW program, b/c they lost all those workers

### ① Registry

current recruitment doesn't produce many workers

④ adds costs.

want to eliminate positive recruitment

### ② Wages

Peci to talk to their economist (Jim Holz)

### ③ Housing

3 vs. 4 a voucher system prior to assessment of whether housing is available.

Believes the market would respond.

If growers believe that the <sup>H2A</sup> program works, they will build housing.

Reg. problems; restrictions against use by H2A workers

local zoning (NIMBY)

open to pilots

what is the offer?

why don't they build housing now?



UNITED STATES

DEPARTMENT OF LABOR

FACSIMILE TRANSMISSION

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

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Washington, DC 20210

Confirmation:  
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December 16,  
1998/2:36pm

To: JULIE

DEPARTMENT/COMPANY:

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FROM: EARL GOHL

NUMBER OF PAGES INCLUDING COVER:

FACSIMILE REPLIES: CONGRESSIONAL AFFAIRS

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202/219-5288

MESSAGE: I dont know if you will be able to read this after it is faxed...but  
thought you would be interested in the standards for migrant housing.



## Migrant Housing Inspection Checklist

### A Handy Reference Guide to Self-Inspection

✓ the \_ if the answer is YES, leave \_ blank if the answer is NO, X if not applicable.

#### HOUSING SITE 654.404

- a. Is housing on a well-drained site, free from depressions in which water may stagnate?
- b. Is housing free of hazardous conditions such as offensive odors, flies, noise, traffic, etc.?
- c. Is the site free of debris, weeds, brush and poisonous plants?
- d. Does site provide adequate recreation space, reasonably related to size and occupancy?

#### WATER SUPPLY 654.405

- a. Has your water been tested this year?
- b. Is a cold water tap available within 100 feet of each living unit?
- c. Are common drinking cups used?

#### WASTE DISPOSAL 654.406

- a. Are facilities provided and maintained for effective disposal of excreta and liquid waste (E&LW)?
  - Is raw or treated LW discharged or permitted to accumulate on the ground surface?
- b. Are disposal facilities for E&LW connected to public sewer systems where available?
- c. Is septic tank or other LW treatment and disposal system, privies or portable toilets provided where no public sewer is available?
  - Are State Health requirements complied with?

#### HOUSING 654.407

- a. Is housing structurally sound, sanitary and in good repair?
- b. Is flooring smooth-finished, rigid, readily cleanable, located to prevent ground and surface water entry?
- c. Space Requirements:
  1. At least 50 square feet per person in single beds.
  2. At least 40 square feet per person using bunk beds.
- d. Is the sleeping area partitioned for families with

children six years of age or younger?

- Is the partition rigid and so installed as to provide reasonable privacy for husband and wife?
- e. Are separate sleeping accommodations provided for each sex and family member?
- f. Are adequate and separate arrangements provided for hanging clothing and storing personal effects for each person or family?
- g. Is there a minimum ceiling height of 7 feet for at least half of the floor area in each living unit?
- h. Does window or skylight area, including windows in doors, equal at least 10 percent of usable floor area?

#### SCREENING 654.408

- a. Are all outside openings protected with appropriate screening?
- b. Are all screen doors tight-fitting, in good repair and equipped with self-closing devices?

#### HEATING 654.409

- a. Are living quarters provided with properly installed operable heating equipment to maintain 68°F?
- b. Are stoves and other sources of heat using combustible fuel installed and so vented to prevent hazards and a dangerous connection of gases?
  - Are portable heaters other than electric provided?
  - Is there an 18-inch fireproof, protective base perimeter of metal or concrete slab provided under coal, wood or kerosene stoves?
- c. If within 18 inches of a coal, wood or kerosene stove, is the wall or ceiling fireproofed?
- d. Is there a fuel cutoff on automatically controlled heating systems when the flame or ignition is interrupted, or when a predetermined pressure or safe temperature is installed?

#### ELECTRICITY AND LIGHTING 654.410

- a. Is electricity provided in all housing sites?
- b. Does each room have a ceiling or wall light?
  - Does each room have a wall outlet?
- c. Does site have adequate outside lighting for yard area and pathways to common-use facilities?
- d. Are wiring and lighting fixtures installed and maintained in safe condition?

#### TOILETS 654.411

- a. Are toilets constructed, located and maintained so as to prevent any nuisance or public health hazard?
- b. Are water closets or privy seats for each sex in the ratio of at least one such unit for each 15 occupants?
  - Is there at least one unit for each sex in common use facilities?
- c. Are urinals, which may be substituted for men's toilets in the ratio of one urinal or 24 inches of trough-type urinal for one toilet seat up to a maximum of one-third requirements, constructed of nonabsorbent materials?
- d. Except for family units, are separate toilet accommodations provided for men and women?
  - If located in the same building, are toilet facilities for men and women separated by a solid wall from floor to roof or ceiling?
  - Are toilets distinctly marked "men" and "women" in

For a complete list of housing requirements see 20 CFR 654.400 et. Seq.

English and in the native language of the persons expected to occupy the building?

- c. Where common use toilet facilities are provided, is an adequate and accessible supply of toilet tissue, with holders, furnished?
- f. Are common use toilets and privies well lighted, ventilated, clean and sanitary?
- g. Are toilet facilities located within 200 feet from any living unit?
- h. Are privies located no closer than 50 feet from any living unit or food preparation and service facility?
- i. Are privy structures and pits fly tight?
- — Do privy pits have adequate capacity for the required seats?

#### BATHING, LAUNDRY AND HAND WASHING 654.412

- a. Are bathing and hand washing facilities with hot and cold water under pressure provided within 200 feet of each living unit?
- b. Is there a minimum of one showerhead per 15 persons?
- — Are showerheads spaced at least 3 feet apart?
- — Is there a minimum of 9 square feet of floor space per unit?
- — Is dry and adequate dressing space provided?
- — Are shower floors constructed of nonabsorbent, nonskid materials sloped to properly constructed floor drains?
- — Except for family units, are separate shower facilities provided for each sex?
- — When located in the same building, are shower facilities for both sexes separated by a nonabsorbent, solid, floor-to-ceiling wall?
- — Are showers plainly marked "men" or "women" in English and in the native language of the persons expected to occupy the housing?
- c. Are wash basins or equivalent units provided in a ratio of 1 per 15 persons?
- d. Are laundry facilities for all occupants supplied with hot and cold water under pressure?
- — Are laundry trays or tubs provided in the ratio of 1 per 25 persons?
- — In lieu of laundry trays, are mechanical washers provided in the ratio of 1 per 50 persons (although a minimum of 1 laundry tray per 100 persons shall be provided in addition to the mechanical washers)?

#### COOKING AND EATING FACILITIES 654.413

- a. When workers or their families are permitted or required to cook in their individual unit, is a space provided and equipped for cooking and eating?
- — Is such a place provided with:
  - 1. A cookstove or hot plate with a minimum of two burners?
  - 2. Adequate food storage shelves?
  - — A counter for food preparation?
  - 3. Mechanical refrigeration to at least 45°F?
  - 4. Adequate table and chairs?
  - 5. Adequate lighting and ventilation?
- b. When workers or their families are permitted or required to cook and eat in a common facility, is a room or building separate from the sleeping facility provided?
- — Is such a room provided with:
  - 1. Stoves or hot plates in a ratio of 2 burners to 10

persons, or two families?

- 2. Adequate food storage shelves?
- 3. Mechanical refrigeration to at least 45°F?
- 4. Adequate table and chairs?
- 5. Adequate sinks with hot and cold water under pressure?
- 6. Adequate lighting and ventilation?
- 7. Nonabsorbent, easily cleaned floor materials?
- c. When central mess facilities are provided, are kitchen and mess hall in proper condition to the housing capacity?
- — Are central mess facilities separate from the sleeping quarters?
- — Are central mess facilities, operation, etc., in accordance with applicable State codes?
- d. Is the wall surface adjacent to food preparation and cooking areas of nonabsorbent, easily-cleaned materials and fire resistant?

#### GARBAGE AND OTHER REFUSE 654.414

- a. Are durable, fly tight, clean containers in good condition and of a minimum of 20 gallons capacity provided adjacent to each housing unit?
- — Are such containers provided in a ratio of at least 1 per 15 persons?
- b. Is refuse collected at least twice a week?

#### INSECT AND RODENT CONTROL 654.415

- Are housing and facilities free of insects, rodents and other vermin?

#### SLEEPING FACILITIES 654.416

- a. Are sleeping facilities provided for each person, consisting of comfortable beds, cots or bunks, provided with clean mattresses?
- b. Is bedding clean and sanitary?
- c. Are triple deck bunks provided?
- d. Is there at least 17 inches between upper and lower bunks where double bunks are used?
- — Is there at least 36 inches between the upper bunk mattress and the ceiling?
- e. Are double occupancy beds provided only in family accommodations?

#### FIRE, SAFETY AND FIRST AID 654.417

- a. Are all buildings in which people eat or sleep constructed and maintained in accordance with applicable State or local fire and safety laws?
- b. In housing units for families of less than ten persons, and of one story construction, are there two means of fire escape provided?
- — If one of the two required escapes is a readily accessible window, does it open to a space of not less than 24 x 24 inches?
- c. In sleeping quarters intended for use by 10 or more persons, central dining facilities, and common assembly rooms, are there at least two doors remotely separated so as to provide alternate means of escape to the outside or an interior hall?
- d. Are sleeping quarters and common assembly rooms on the second story constructed with a stairway, and a permanent, affixed exterior ladder or a second stairway?

Any items left unchecked at the end of your inspection need immediate correction.

- e. Do sleeping and common assembly rooms located above the second story comply with State and local fire and building codes relative to multiple story dwellings?
- f. Are fire extinguishers readily accessible, within 100 feet of each housing unit?
- g. Are first aid facilities readily accessible at all times?
- h. Except for current household needs, are flammable or volatile liquids or materials stored in or adjacent to rooms used as living quarters?
- i. Are agricultural pesticides or toxic chemicals stored in the housing area?

OTHER COMMENTS:

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| To                   |                    |
|----------------------|--------------------|
| Julie Fernandez, DPE | John Fraser, DOL   |
| From                 |                    |
| ____ Keith Collins   | ____ Larry Salathe |
| ____ Joe Glauber     | ____ Adela Backiel |
| ____ Jim Schaub      | ____ Vacant        |
| ✓ Al French 720-4737 | ____ Ginny Taylor  |
| ____ Shirley Brown   | ____ Vacant        |

| MESSAGE                                                                                                          |
|------------------------------------------------------------------------------------------------------------------|
| Attached is the original "USDA Pilot" proposal<br>to be discussed at our conference call today.<br><br>Al French |

Number of Pages (including cover sheet) 3

## DISCUSSION OF USDA PROPOSAL TO WAIVE H-2A APPLICATION DEADLINE WHERE EMPLOYERS HAVE MET ALL OTHER H-2A REQUIREMENTS

Proposal:

waive H-2A application deadline where employer has timely met positive recruitment requirements without having filed an H-2A application, i.e., put the H-2A application process following the positive recruitment period rather than preceding it

What does this mean in practice?

What is the advantage to not being an H-2A employer? No 3/4 guarantee

This proposal would provide an incentive for employers to recruit U.S. workers under the enhanced compensation and employment guarantees required for H-2A workers. Successful recruitment would enable the employer to not be an H-2A employer and to avoid the risk of guaranteeing employment for three-fourths of the expected work period. However, if sufficient workers are unavailable or recruited workers fail to report, employers would be assured of timely access to the H-2A program to meet their labor needs.

U.S. workers would benefit under this proposal by the availability of additional jobs at superior compensation with employment guarantees and approved housing as provided by the Employment Service interstate clearance system. In addition, U.S. workers would benefit through direct employment through Job Service placement rather than relying on the services of, and incurring obligations to, a farm labor contractor. Further, if the employer was unable to obtain sufficient U.S. workers, the previously recruited U.S. workers would receive the additional benefit of the three-fourths guarantee and be associated with legal alien workers working under the same terms and conditions rather than competing with illegal alien workers.

How many days in advance?

Agricultural employers would benefit under this proposal by being assured of an adequate and legal labor force for the production and harvesting of their crops. Where U.S. workers are available, employers could avoid becoming an H-2A employer and avoid the potential cost of the three-fourths guarantee. If recruitment is not successful or recruited workers fail to report to the job, the employer may defer the commitment to H-2A status and the three-fourths guarantee until near the onset of the season when a better forecast of future labor needs can be made. Where the use of this program replaced the use of farm labor contractors, the additional cost of meeting H-2A criteria would be offset, in whole or in part, by eliminating the contractors' cost. If sufficient labor proved unavailable, employers who utilized this proposal could have an alternative to hiring illegal aliens or losing their crop. It is expected that the risk of litigation would be reduced, at least for those employers with successful recruitment efforts.

The Government would benefit by reduced unemployment through the opportunity for the Job Service to place unemployed farm workers in superior jobs. The administration of the H-2A program would be simplified because the approval of the H-2A application would be based on actual employer performance and a labor market test rather than conjecture regarding what might happen in the future. The Government would also benefit by reduced litigation.

## Program Operation

Under this proposal, an employer would place a job order identical to that of an H-2A applicant except that in lieu of the three-fourths guarantee there would be a statement that the three-fourths guarantee would apply if the employer subsequently became an H-2A employer. The period of the three-fourths guarantee would be established if and when the employer submitted an H-2A application, probably about ten days prior to the date of need. In order to maintain eligibility for submission of an H-2A application, the employer must engage in positive recruitment including remote recruiting where the Job Service finds that there are a significant number of qualified U.S. workers who would be willing to make themselves available at the time and place needed. This obligation would continue after the filing of an H-2A application until the foreign workers depart for the employers' job site. Since the adequacy of the job order will have been determined at the outset, a labor market test will have been made, and whether the employer has maintained eligibility will have been monitored throughout the positive recruitment period, both the employer and the Department of Labor will know in advance of an application whether H-2A certification is in order and the certification can be issued without delay.

## **SUPPLEMENTAL HOUSING PILOT PROPOSAL**

### **Proposal**

The Department of Agriculture would establish a targeted supplemental housing pilot. The goal of the pilot would be to determine the effect of supplemental Federal funding for building grower-provided housing. Growers participating in the pilot must be participants in the H-2A program.

### **Structure**

The pilot would be limited to 10 selected counties that allow the Federal government to test and evaluate supplemental funding accounting for regional and crop effects. The pilot would consist of supplemental Federal funding, to aid the grower in providing housing, and housing insurance, to help increase the availability of other non-grower housing by insuring against excessive damage.

*Supplemental Federal government funding:* Growers, or associations, could apply to the Department of Agriculture's Rural Housing Program for supplemental funding to help them build grower-provided farm worker housing.

*Housing Insurance:* In order to increase the availability of housing, the pilot would also test use of a Migrant Housing Insurance Fund which would be available for housing damages beyond normal wear and tear to grower and non-grower housing. The grower would pay \$10 per worker into this fund. Any entity that houses workers covered by the H-2A program could apply to the Department of Labor for reimbursement of excessive damages.

### **Evaluation**

The pilot would be evaluated three years after implementation to assess its impact on this industry, including but not limited to the effect on workers, growers, and the surrounding community.

### **Funding**

We estimate an additional \$5 million annually to the current Rural Housing Program to help growers build migrant housing. The additional funding would provide approximately 100 housing units (estimated 400-600 more workers housed depending on the type of unit -- family or single).

**DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT**

**PROPOSAL FOR CONFERENCE ON H.R. 4276**

**(Commerce, Justice, and State, and Judiciary Appropriations Bill, 1999)**

In lieu of title XI of the Senate amendment insert the following:

**1 SEC.\_\_\_. AGRICULTURAL WORKER**

**2 HOUSING PILOT.**

**3 (a) ESTABLISHMENT OF HOUSING PILOT.--**

**4 (1) IN GENERAL.—** The Secretary of  
**5 Agriculture, in consultation with the Secretary of**  
**6 Labor, is authorized to establish a housing pilot**  
**7 program which would target resources, as defined in**  
**8 paragraph 3, that help growers build farm worker**  
**9 housing.**

**10 (2) ELIGIBILITY.--**The pilot program is limited  
**11 to ten selected counties in the United States. The**  
**12 Secretary of Agriculture shall determine the counties**  
**13 selected based on established criteria, including but**  
**14 not limited to local housing occupancy rate and**  
**15 availability of adequate, low-cost, temporary**  
**16 housing located within a reasonable commuting**  
**17 distance. Growers, or grower associations, located**  
**18 in the selected counties would apply to the Secretary**  
**19 for participation in the pilot providing information**

1 required by the Secretary. Pilot participants must  
2 also be participants of the H-2A program established  
3 in Section 218 of the Immigration and Nationality  
4 Act (8 U.S.C. 1188).

5 (3) SUPPLEMENTAL HOUSING RESOURCES .-- \$5  
6 million in the Rural Housing Program shall be  
7 available to provide assistance to growers  
8 participating in this pilot.

9 (4) MIGRANT HOUSING INSURANCE FUND.--

10 (a) IN GENERAL.--The Secretary of Labor shall  
11 establish a fund to cover excessive housing damages  
12 by workers under this pilot. Housing damages  
13 beyond the normal wear and tear would be paid for  
14 out of this fund to growers who provide housing.

15 (b) FUNDING.--

16 (i) Growers, or grower associations,  
17 participating in the pilot shall pay \$10 per worker  
18 into the Migrant Housing Insurance Fund.

19 (ii) The Secretary of Labor shall provide \$5  
20 million as base funds for the Migrant Housing  
21 Insurance Fund.

22 (c) *REVOLVING FUND LANGUAGE*

23 (4) EVALUATION AND REPORT TO CONGRESS.--

24 Not later than three years after implementation of  
25 this section, the Secretary of Labor, in consultation  
26 with the Secretary of Agriculture and the Advisory

1 Board established in subsection (d), shall evaluate  
2 the efficiency and effectiveness of the registry pilot,  
3 including but not limited to the effect on workers,  
4 growers, and the surrounding community. In  
5 addition, the Secretary of Labor shall report the  
6 results of this evaluation to Congress.

7 (5) REGULATIONS.--The Secretary of Labor may  
8 prescribe such rules and regulations as may be  
9 necessary to carry out the provisions of this  
10 subsection.

11 (6) DURATION OF HOUSING PILOT.--This  
12 subsection shall expire three years after  
13 implementation.

Increased interior enforcement  
→ Mandatory verification

Mtg. This week

verification

growers to  
set something  
if possible

Refugee mtg

Scott B.

H2A

Problem ④ — INS says you can beat the basic pilot if you are not acting in good faith (w/ imposter documents)

⑤ — Growers claim they are victims of an ineffective system. we know that they inspire to get the workforce they have

Options: verification

① Verification provided by SESA > they are responsible for anyone they refer being auth. to work.  
AgNet

(Employers w/ continued obligation to recruit and determine whether employees are authorized to work)

② FLCs as agents of employers to prevent undercutting of protections.

(Q. would this include SESAs?)

③ Series of pilots w/ growers to assist them in obtaining a legal workforce. If not authorized to work, get H2A worker.

a — domestic recruitment

b — use of SESAs & AgNet

c — INS to examine files to establish a baseline (pilot technical ass't)

d — hold employers responsible for actions of agents.

~~No one will buy this (though support likely) tends to be a no argument presented~~

No one will likely buy this.

Is it credible?

— depends on whether <sup>are</sup> no-fault interacting

— companion to argument that growers are, in part, creating this problem (supply & demand); attacking demand side of the equation.

④ Verification pilot

need some more \$ — \$5 million — \$10 million

No legal impediment to expand to other sites.

(Though controversial to expand)

Lots of flack from groups (Becerra)

Leg: upon request / limited to resources

existing quid pro quo — good faith defense

④ stepped up enforcement. see who complies; enforce against others.

John F.  
Barbara  
Bob

## Verification

12/14/98

Reduce proportion of agricultural workforce that is illegal

Graham/Sen. Smith:

→ Reduce business vulnerability of growers.

Immunity to growers for participation? JF says no. Perhaps other incentives.

## INS

Has real problem w/ this approach.

Problem is not all immigration program.

→ They have no confidence in their verification system

INS — heavy INS enforcement in the fields

Congress has said no: true labor shortage

then they get a new guestworker program.

INS Pilot gets us:

"Certified" illegal workers (b/c of prevalence of fraudulent documents)

INS doesn't like the verification program — discrimination.

Contractors as agents of employers to prevent undercutting of protections

Including making SES responsible party for referrals  
(could build in a verification system)

You can beat the basic pilot if you are not acting in good faith.

→ Should SES and/or ~~SES~~ FLCs verify  
Should AgNet verify?

or — don't we also want growers to do recruitment?

H-2A employment conditions recruitment

Sub contracting to create employment units smaller than trigger for I-9.

INS can make certain violators participate in the pilots.  
(as part of settlement)

Bob does not have confidence in the pilot. Can be beaten w/ imposter documents.

---

➤ The more we enforce, we drive growers to Members of Congress to agitate for easier access to guestworkers

Pilot - Series of investigations that hold employers to hire legal workers

Q: What do we tell growers to hire differently

recruit domestically  
rely on public mechanisms  
if a shortage, H-2A

INS

➤ INS offers to examine files to establish baseline

(pilot technical asst.)  
Hold employers responsible for actions of agents.

They claim: They are victims of ineffective system  
We know: They conspire to get the workforce they have

Q: don't we want employees to have some responsibility for their own recruitment/verification.

not abdication to SESAs or AgNet to verify.

Growers could see a pilot ~~to~~ as a way to get them off the hook.

INS offer to pilot a monitoring of hiring  
do a baseline evaluation (who is legal/illegal)  
work w/ growers all the way through  
from recruitment to hiring.  
includes treating subcontractors as employees.  
Look @ recruitment plans

personal service  
limited (very)

Nobody will buy this - Q is: is this credible (?)

JF: Depends on whether these are no-fault interactions.

(+) @ some level we would have to make the argument that growers are creating this problem  
(supply & demand)

We must attack ~~the~~ side of the equation.

would we be willing to make this case? → Victims of a system ~~we~~ created.

3 ways to  
cut off illegal  
supply

Raids  
personal help  
verif. system

Dobbins

④ Mexico wants a larger guestworker program.  
Pressing hard behind the scenes for this.

We could ~~then~~ set up rules for Mexico to participate  
in H2A.

What would a ~~new~~ verification program look like

- could put some electronic verif. into employment service
- partnership w/ pilot employers  
including a series of enforcement checks that  
establishes the base of legal workers & periodic  
checks to help maintain a legal workforce.

To do verification

need \$ (depends on how many employers sign up  
& # of queries)

\$5 million — \$10 million

Now: 1300 MOUs for basic pilot.

No legal impediment to expand to other states.  
Controversial to expand.

upon  
request  
limited to  
resources

Lots of flock from groups (Becerra)

SES  
AgNet > verification (?)

existing  
good faith defense  
prognosis

Stepped up enforcement in agriculture.

(see who complies; then enforce against the  
others)

Pilot & enforcement

66226  
X 66226  
~~XXXXXXXXXX~~

Reha

H-2A

12/8/98

Asked Secy of Labor re: how to reduce # of illegal immigrants employed in agriculture.

~~kept~~ Asked what our plan is.

Secy promised to get back w/ them around the time of the Pres. S budget.

Dem: their proposal had this in it.  
(All 3 Sen's urged the Secy to urge the Pres. to consider an amnesty proposal in plan to buy-off Hispanic interest groups.  
(SAW program as a model).

but lots of fraud problems w/ this.

Put ball back in our Court.

AgNet — OK \$10 million

Emp. Verif. Pilot —

Don't like the idea of some form of immunity

If immunity, why bother to do I-9s.

⊕ ID check

etc.

Already an existing incentive to

participate in emp. verif. pilot  
(lower risk of disruption of workforce).

Participating in pilot does not make an employee a lower priority for enforcement.

[CA TX FL NY IL  
can sign up for basic pilot now.]

Farm Labor Contract  
Cent. Program

(Fri.)

(+)

Harvesting Loop → Copy of  
feasibility  
proposal

Debra  
w/USDA  
person

Pilots re: housing  
transportation

OMB (Jack)  
want to not include  
this in our package.  
would rather have this  
in our pocket for

John F.

→ w/out housing and/or verification  
we have nothing

Housing  
Illegal workers

Housing Reg Reform

Timeline (?)

Could announce a review of existing regs  
announcement alone may not be enough to  
set grooves of

→ Explore <sup>lifting</sup> statutory bar  
(Linda Delgado)

Transport subsidies

— could encourage grantees  
not need

### Child Care

HHS — \$6.6 billion

portion could be earmarked  
migrant workers

decisions pending

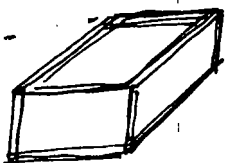
Tax incentives — \$478 million over 5 yrs.

(Some growers don't pay taxes)

→ \$166 million for migrant Head Start.

Small expansion

→ Earmark into block grant.



- ✓ AgNet
- ✓ Housing Reg Reform
- Enhanced Enforcement

EK to talk to Jack (Maybe transp. housing pilots)  
linked to AgNet (?)

AgNet

Housing Reg Reform

Enhanced Enforcement

USDA Farmworker Housing Programs

45 days

Way to expand pilot offer to Oregon (?)

More INS raids (?)

(more \$ for interior enforcement)  
was \$21 million last year

If you do recruitment

## TRANSPORTATION PILOT PROPOSAL

### Proposal

The Department of Labor would establish a targeted transportation pilot. The goal of the pilot would be to determine the effect of an advance travel voucher. To be eligible for the pilot, workers must be employed by a grower participating in the H-2A program and live more than 100 miles from the employment site.

### Structure

The pilot would be limited to Southern tier States. Targeting would allow the Federal government to test and evaluate the advance transportation system before deciding whether to implement such a system nationwide. Choosing this area would allow the Federal government to evaluate the impact in an area that represents movement by workers across the country to get into another migrant stream. Growers would benefit by enabling them to tap workers that had been unavailable previously due to travel barriers.

*Travel voucher:* Growers, or associations, could apply to the Department of Labor for an advance travel voucher for a specific worker. Growers would be required to submit specific information in the application as required by the Secretary.

### Evaluation

The pilot would be evaluated three years after implementation to assess its impact on this industry.

### Funding

The Federal government would establish a separate revolving fund in the Treasury of \$5 million to provide advance travel vouchers to workers. The fund would be a revolving fund where interest on the principal and receipts from the public would constitute the advances to the workers. After 50% of the employment contract is complete, a grower would be required to reimburse the Federal government 110% of the voucher to cover the cost of transportation, administration of the voucher, and risk of default by the worker who does not complete 50% of the employment contract.

**DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT**

**PROPOSAL FOR CONFERENCE ON H.R. 4276**

**(Commerce, Justice, and State, and Judiciary Appropriations Bill, 1999)**

In lieu of title XI of the Senate amendment insert the following:

**1 SEC.\_\_\_\_. AGRICULTURAL WORKER**

**2 TRANSPORTATION PILOT.**

**3 (a)ESTABLISHMENT OF TRANSPORTATION PILOT.--**

**4 (1) IN GENERAL.--** The Secretary of Labor is  
**5 authorized to establish a pilot program for the**  
**6 issuance of vouchers to United States and foreign**  
**7 workers who are employed by growers participating**  
**8 in the H-2A program, established under Section 218**  
**9 of the Immigration and Nationality Act (8 U.S.C.**  
**10 1188), for the purpose of enabling such workers to**  
**11 purchase common carrier transportation to the place**  
**12 of employment.**

**13 (2) LIMITATION.--**A voucher may only be  
**14 provided to a worker under paragraph (1) if the**  
**15 opportunity involved requires that the worker**  
**16 temporarily relocate to a place of employment that is**  
**17 more than 100 miles from the worker's permanent**  
**18 place of residence or last place of employment, and**  
**19 the worker attests that the worker cannot travel to**

1 the place of employment without such assistance  
2 from the Secretary.

3 (3) REIMBURSEMENT.--

4 (a) USE OF TRUST FUND.--Reimbursements for  
5 the costs of vouchers provided by the Secretary  
6 under this section for workers who complete at least  
7 50 percent of the period of employment of the job  
8 opportunity for which the worker was hired shall be  
9 considered to be administrative expenses for  
10 purposes of section 218A(b)(4) of the Immigration  
11 and Nationality Act, as added by this Act.

12 (b) OF SECRETARY.--A worker who receives a  
13 voucher under this section who fails to complete at  
14 least 50 percent of the period of employment of the  
15 job opportunity for which the worker was hired  
16 under the job opportunity involved shall reimburse  
17 the Secretary for the cost of the voucher.

18 (c) The Secretary of Labor shall provide \$5  
19 million as base funds for the Advance  
20 Transportation Fund.

21 (d) *REVOLVING FUND LANGUAGE*

22 (4) EVALUATION AND REPORT TO CONGRESS.--  
23 Not later than three years after implementation of  
24 this section, the Secretary of Labor, in consultation  
25 with the Secretary of Agriculture and the Advisory  
26 Board established in subsection (d), shall evaluate

1 the efficiency and effectiveness of the transportation  
2 pilot, including but not limited to the effect on  
3 workers, growers, and the surrounding community.  
4 In addition, the Secretary of Labor shall report the  
5 results of this evaluation to Congress.

6 (5) REGULATIONS.--The Secretary of Labor may  
7 prescribe such rules and regulations as may be  
8 necessary to carry out the provisions of this  
9 subsection.

10 (6) DURATION OF TRANSPORTATION PILOT.--This  
11 subsection shall expire three years after  
12 implementation.

# HOUSING PILOT PROPOSAL

## Proposal

The Department of Labor, in consultation with the Department of Agriculture, would establish a targeted housing pilot. The goal of the pilot would be to determine the effect of a housing voucher system. Growers participating in the pilot must be participants in the H-2A program.

## Structure

The pilot would be limited to 10 selected counties that allow the Federal government to test and evaluate a different housing alternative accounting for regional and crop effects. The pilot would consist of a housing voucher, to get the grower out of the housing business, and housing insurance, to help increase the availability of housing (grower and non-grower) by insuring against excessive damage.

*Housing voucher:* Growers, or associations, would be required to apply to the Department of Labor for participation in this part of the pilot. The Secretary will determine the type of information required to determine participation including but not limited to local housing occupancy rate and availability of adequate, low-cost, temporary housing located within a reasonable commuting distance.

Once in the pilot, the grower would be allowed to either provide a housing voucher or grower owned housing to the worker. The grower would be required to make a "good-faith" effort to help the worker secure the housing. The housing voucher would be redeemable once the worker decided on the housing being offered by the grower. Unused vouchers would not be redeemable for cash with the grower.

*Housing Insurance:* In order to increase the availability of housing, the pilot would also test use of a Migrant Housing Insurance Fund which would be available for housing damages beyond normal wear and tear to grower and non-grower housing. The grower would pay \$10 per worker into this fund. Any entity that houses workers covered by the H-2A program could apply to the Department of Labor for reimbursement of excessive damages.

## Evaluation

The pilot would be evaluated three years after implementation to assess its impact on this industry, including but not limited to the effect on workers, growers, and the surrounding community.

## Funding

We estimate that the Federal government would need to provide initial seed money of at least \$5 million into the Migrant Housing Insurance Fund. The fund would be a revolving fund where interest on the principal and receipts from the public would constitute the reimbursements to the housing entity.

**DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT**

**PROPOSAL FOR CONFERENCE ON H.R. 4276**

**(Commerce, Justice, and State, and Judiciary Appropriations Bill, 1999)**

In lieu of title XI of the Senate amendment insert the following:

**1 SEC.\_\_\_\_. AGRICULTURAL WORKER**

**2 HOUSING PILOT.**

3 Section 218 of the Immigration and Nationality Act  
4 (8 U.S.C. 1188) is amended by adding the following  
5 subsection:

6 “ (j)(1)ESTABLISHMENT OF HOUSING PILOT.--

7 (a) IN GENERAL.-- The Secretary of Labor, in  
8 consultation with the Secretary of Agriculture, is  
9 authorized to establish a housing pilot program  
10 which would establish an alternative housing  
11 payment mechanism.

12 (b) ELIGIBILITY.--The pilot program is limited to  
13 ten selected counties in the United States. The  
14 Secretary of Labor shall determine the counties  
15 selected based on established criteria, including but  
16 not limited to local housing occupancy rate and  
17 availability of adequate, low-cost, temporary  
18 housing located within a reasonable commuting  
19 distance. Growers, or grower associations, located

1 in the selected counties would apply to the Secretary  
2 for participation in the pilot providing information  
3 required by the Secretary.

4 (2) HOUSING VOUCHER AS AN ALTERNATIVE .--

5 (a) In General.--In lieu of offering housing  
6 pursuant to section 218(c)(4), the employer may on  
7 a case-by-case basis provide a housing voucher.  
8 Upon the request of a worker seeking assistance in  
9 locating housing, the employer shall make a good  
10 faith effort to assist the worker in identifying and  
11 locating housing in the area of intended  
12 employment. An employer who offers a housing  
13 voucher to a worker, or assists a worker in locating  
14 housing which the worker occupies, pursuant to this  
15 subparagraph shall not be deemed to be a housing  
16 provider under section 203 of the Migrant and  
17 Seasonal Agricultural Worker Protection Act (29  
18 U.S.C. 1823) solely by virtue of providing such  
19 housing voucher.

20 (b) AMOUNT OF HOUSING VOUCHER.--The  
21 amount of a housing voucher under this paragraph  
22 shall be equal to the statewide average fair market  
23 rental for existing housing for nonmetropolitan  
24 counties for the State in which the employment  
25 occurs, as established by the Secretary of Housing  
26 and Urban Development pursuant to section 8(c) of

1 the United States Housing Act of 1937 (42 U.S.C.  
2 1437f(c)), based on a 2-bedroom dwelling unit and  
3 an assumption of 2 persons per bedroom.

4 (3) MIGRANT HOUSING INSURANCE FUND.--

5 (a) IN GENERAL.--The Secretary of Labor shall  
6 establish a fund to cover excessive housing damages  
7 by workers under this pilot. Housing damages  
8 beyond the normal wear and tear would be paid for  
9 out of this fund to growers and non-growers who  
10 provided the housing.

11 (b) FUNDING.--

12 (i) Growers, or grower associations,  
13 participating in the pilot shall pay \$10 per worker  
14 into the Migrant Housing Insurance Fund.

15 (ii) The Secretary of Labor shall provide \$5  
16 million as base funds for the Migrant Housing  
17 Insurance Fund.

18 (c) *REVOLVING FUND LANGUAGE*

19 (4) EVALUATION AND REPORT TO CONGRESS.--

20 Not later than three years after implementation of  
21 this section, the Secretary of Labor, in consultation  
22 with the Secretary of Agriculture and the Advisory  
23 Board established in subsection (d), shall evaluate  
24 the efficiency and effectiveness of the registry pilot,  
25 including but not limited to the effect on workers,  
26 growers, and the surrounding community. In

1 addition, the Secretary of Labor shall report the  
2 results of this evaluation to Congress.

3 (5) REGULATIONS.--The Secretary of Labor may  
4 prescribe such rules and regulations as may be  
5 necessary to carry out the provisions of this  
6 subsection.

7 (6) DURATION OF HOUSING PILOT.--This  
8 subsection shall expire three years after  
9 implementation.

**Reform Ideas --Growers and Farmworkers**

November 25, 1998

**Recruitment****1. America's Agricultural Labor Network -- AgNet**

The majority of farm workers find employment through a kinship/friendship network. One problem with this method is that it spawns and reinforces illegal migration to the U.S.; another is that it is highly inefficient in a geographically diffuse labor market. The Department of Labor could serve as an information broker by developing a system that allows growers to find workers and workers to find employment opportunities that meet their needs (e.g., location, duration, type of crop, etc.). This would benefit growers and workers by having an efficient alternative mechanism to match workers with employment opportunities. AgNet would be based on America's Job Bank,, but would be a separate web site devoted to the agriculture industry.

**Debra to follow-up with cost estimates****2. Employment Verification Pilots**

INS has indicated that their existing employer verification pilot program could be adapted to allow for effective participation by H-2A growers. The INS could conduct more aggressive outreach to growers to encourage them to participate in the pilot program.

- Is there something that we can offer growers as a trade for participation in the pilot?

**Julie to follow-up with INS re: whether can trade participation in the H-2A pilot with a low placement on the "directed" inspections list****3. Farm Labor Contractor Certification Program**

Frequently, Farm Labor contractors (FLCs) are inexperienced, poorly educated, not aware of applicable laws and regulations, and lacking in business know-how.

We could require FLCs to satisfactorily complete a Wage and Hour administered course to ensure minimum competency levels for FLCs knowledge of applicable laws and regulations. These courses could also serve to enhance the FLCs's business skills. Successful completion of the course would be a prerequisite to initial issuance and/or renewal of a FLC registration card. The course would include instruction on how to properly comply with MSPA, FLSA, H-2A, OSHA filed sanitation, FICA/FUDA, EPA pesticide worker protection standards, and other labor standards as appropriate.

DOL has estimated the cost of the program to be approximately \$500K per year. We could, of course, charge a fee to each FLC to defray much of this cost.

Maybe. DOL/Rob to inquire into whether there are regulatory ways to provide incentives for people to become certified (thus obviating the need to open up MSPA to make this a requirement)

#### 4. Farmworker Harvesting Cooperatives

The Cooperative State Research, Education, and Extension Service and the Rural Business-Cooperative Service staff, along with the Farmworker Coordinator and farmworker organizations, could conduct a feasibility study to research and design "farmworker harvesting" cooperatives. Such a cooperative would be designed to match the job skills of agricultural workers with employers as an alternative to the system of farm labor contractors. The cooperative would serve the functions of recruitment, employment, and transportation of farmworkers. The cooperative could also provide job training for individuals interested in learning skilled agricultural techniques.

Yes. USDA to look into the details of how this would work. This was a recommendation from the Small Farm Commission at USDA

#### Transportation and Housing

#### 5. Pilot Programs -- Transportation and Housing

The Department of Labor could conduct pilot programs on transportation subsidies without any legislative change (i.e., creative ways to structure subsidizing transportation costs for migrant farmworkers, including H-2A workers).

However, there is limited latitude to conduct housing demonstrations without a statutory change. Under the H-2A statute, the employer must either furnish housing owned or controlled by him or, in the alternative, provide housing that the employer has secured on the open rental market. We could try to obtain legislative authorization for pilots in housing.

John F. to explore what kinds of transportation pilots we could offer (looking back to what we prepared at the end of the last Congress). Debra to look into what our options would be for housing pilots.

6. **Housing Regulation Reform**

no cost  
The current housing standard used by DOL in administering the Migrant and Seasonal Worker Protection Act is the OSHA "temporary labor camp" standard (used for housing built after 1980). DOL could revisit this standard and reevaluate whether it correctly balances the protection of workers with the needs of this industry. Given that adoption of this standard was a regulatory decision not a statutory mandate, DOL has the discretion to revise the standard.

**DOL and USDA to consult on what the regulatory barriers are and how they could be overcome.**

X.  
**HUD-funded Housing for Migrant Workers**

HUD does not currently have a specific program for migrant housing, nor did it request one as part of the FY 2000 agency request. However, there are a number of areas within HUD that could be evaluated as possible funding sources for additional migrant housing including the Community Development Block Grant, the HOME program, the Office of Rural Housing and Economic Development, and the Colonias initiative.

**No.**

8. **USDA Farmworker Housing Program**

Julie cost  
USDA currently provides farm labor housing loans, grants, and rental assistance to farmers. In the FY 2000 agency request, USDA essentially requested to double the funding levels for these programs. The requested increase would roughly equate to 570 more housing units (estimated between 2,280 and 3,420 more migrants housed depending on the type of unit -- family or single). However, according to USDA, H-2A workers are not eligible to reside in housing funded through this program. USDA is looking further into this issue.

**Work with USDA to explore whether there is a statutory prohibition against H-2A workers living in housing funded through the USDA program. Is there any room for flexibility?**

Yes

9. **Transportation Subsidies**

The Department of Transportation does not currently have a specific program for migrant transportation, nor did it request one as part of the FY 2000 agency request. Two programs that were previously evaluated for this purpose were Access to Jobs and the Formula Program for Other than Urban Areas. It may be possible to stretch Access to Jobs for use of transporting migrant workers. Localities could use funds from the

Formula Program for helping migrants with their transportation needs, but it is unlikely that the locality would chose to use their dollars for this purpose without an additional incentive.

If we are able to generate funds from FICA/FUDA equivalent payments by growers (see below), we could use that money to fund pilot programs that subsidize migrant worker transportation.

**Debra to explore if possible to use DOT program for inter-state (in addition to intra-state) transporation. (Other options??)**

### **FICA/FUDA**

#### **10. Growers to pay the equivalent FICA/FUDA taxes for H-2A workers**

We could require growers to pay the equivalent of FICA/FUDA taxes and put the amount in a fund to pay for transportation and/or housing subsidies for migrant farmworkers.

This would generate approximately \$12-\$15 million per year.

**No. Unless we can figure out what the growers will be paying for. EK is skeptical that a trade of this for a housing subsidy would sit well with the growers.**

### **Enforcement**

#### **11. Transfer from ETA to Wage & Hour**

*Cost to DOL (?)*  
The Department of Labor is in the process of transferring authority for administering the H-2A program from the Education and Training Administration (ETA) to the Wage & Hour Administration. We could give the completion of this change a date certain.

**Not as part of this package.**

#### **12. Department of Labor (DOL) Enhanced Enforcement**

*Debra - current increase cost to do more (?)*  
DOL has a number of initiatives in FY 1999 targeted at domestic child labor in the agriculture industry. The funds are targeted at increasing enforcement (specifically, the "Salad Bowl" initiative -- targeting lettuce, tomatoes, onions, cucumbers), improving data collection in the National Agricultural Worker Survey, and training migrant workers to be child care providers. In FY 2000, DOL requested to enhance and continue these enforcement initiatives.

We could consider a more substantial increase in these enforcement areas, a more general

increase in base funding for enforcement, or an increase in other crop or geographic specific areas.

**Yes. OMB to explore whether we would like to do more in FY 2000.**

**13. Enhanced protections for U.S. workers**

We could explore whether there are statutory or regulatory changes to existing worker protection statutes that could be implemented to better protect the rights of farmworkers. The following are examples of gaps in existing laws:

- **FSLA exemption from minimum wage**  
The FSLA contains a number of specific agriculture exemptions from the minimum wage requirement. The primary exemption applies to growers who do not use at least 500 man-days of agricultural labor in any calendar year. There are no reliable figures for the number of workers affected by this exemption or the number of workers who, even if subject to the exemption, are paid less than the minimum wage. But it is not uncommon for employers to assert this exemption as a defense in minimum wage cases.

**O.K. in the context of our general minimum wage package.**

- **FLSA exemption from overtime**  
Most farmworkers are completely exempt from the FLSA overtime provisions. It is very common for farmworkers to work in excess of 40 hours during a workweek but they have no claim to overtime for those hours. Some states -- such as California and Washington -- provide limited overtime coverage to farmworkers.

**No.**

- **FLSA exemption from child labor protections**  
Children who work on farms may work at younger ages, in more hazardous tasks, and for longer hours than children in other industries. For instance, children over 16 years old can work in any task in agriculture, whereas 16 and 17 year olds in other industries are prohibited from working in tasks deemed by DOL to be too dangerous.

**Talk to Sara Rosen -- Harkin legislation??**

Raise

- NLRA coverage

If the work is defined as “agricultural labor” under the FLSA, it is exempt from coverage under the NLRA. Therefore, virtually all non-processing tasks in agriculture are outside the protections of the NLRA. However, some states -- notably California -- have enacted protections for farmworkers seeking to organize. These state protections may, in some areas, be more protective than the NLRA.

**Berman would say no.**

- Workplace health and safety

OSHA protections for farmworkers are much less extensive than similar protections for other workers (for example, ladder work is much less regulated in agriculture than in other industries) and covers fewer employers.

-- Since 1975, OSHA has been precluded from regulating health and safety on farms that employ fewer than 11 workers on any day during the year. Many farms are therefore beyond the reach of any OSHA standard, including field sanitation. However, under the Migrant and Seasonal Agriculture Worker Protection Act (MSPA), temporary work camp housing standards -- that mirror OSHA standards -- apply even if the OSHA standards do not apply because of the 10 or fewer employees exemption.

-- Farm work is one of the few industries in which workers are not entitled to specific information about the use of toxic substances in the workplace. OSHA does not have statutory authority to require a hazardous communication standard for pesticides and the EPA -- which has the authority -- has failed to issue such a standard.

**USDA says that EPA has standards in this area. DOL to explore what the real deal is here.**

- State Worker's Compensation

Many major agriculture states -- such as North Carolina, Georgia, and Texas -- exclude farmworkers from workers' compensation coverage. The only recourse for an injured farmworker in these states is the slow, expensive, and uncertain tort law system. The consequence is that farmworkers are unable to get the immediate medical and rehabilitative care and wage replacement available under the State-administered workers compensation system.

- Unemployment Insurance

Some states either exclude farmworkers from unemployment insurance coverage or impose such stringent requirements on coverage that farmworkers are effectively excluded.

- Protection against retaliation

We could propose to amend ~~MSPA~~ and the Pesticide Act to provide protection against retaliation.

## Wages

### 14. **Wage reform**

After extensive study and consideration, there does not seem much that we could do on the wage front that would more accurately reflect our goals of requiring a fair wage (for both growers and farmworkers) and providing some compensation in the wage for the presence of undocumented farmworkers in the workforce. (See materials handed out by Ceci Rouse).

### Agree.

## Research

### 15. **Mechanization Adjustment Assistance**

cost (7) If the cost of employing H-2A workers or illegal workers rises (or even remains constant), growers will have increased incentive to adopt mechanized farm equipment or other labor saving technologies. The transition from a farm economy based on inexpensive short-term labor to one based on greater use of mechanization (and higher paid, longer-term labor) will not be costless. The government could play a valuable role in lessening the cost of this transition for a number of farm sector participants including small farmers, farms run by elderly operators, and farmworkers. Government assistance could include tax incentives for mechanization, mechanization training programs for farmworkers, and mechanization training programs for growers.

Elise and Ceci to keep working on this. What kind of assistance package could we come up with?

## Childcare

### 16. Access to childcare

One of the barriers to employment for U.S. farmworkers is the lack of child care. Lack of proper facilities is a big problem in rural areas, and most child care programs do not provide funds for capital expenditures (though block grant funds may be available for Head Start).

- Funds could be allocated for the construction and/or renovation of child care facilities in rural areas. Cost
- Also, tax incentives could be made available for farmers who provide child care for their workers.
- Possible creation of a set-aside within existing child care <sup>programs</sup> ~~centers~~ for the children of migrant workers.

We will propose, in FY 2000, a tax credit for employers generally who wish to set up child care centers (including after-school). Debra to ask Barbara who in OMB should be included in this discussion.

## ETC.

### 18. Certification v. Attestation

We could consider moving -- for some employers -- away from a certification model and to an attestation model as the gateway to H-2A participation. Thus, an employer who has demonstrated compliance with the program requirements in year X would only have to attest to the same conditions existing in year X+1 in order for that employer to have access to H-2A workers.

Julie and John F. and USDA to figure this one out. Al's idea to make the timing of the commitment closer to the date of need; DOL's idea to allow for attestation instead of certification for employers who have successfully participated in the program in previous years.

DEC 03 1998

**INFORMATIONAL MEMORANDUM FOR JULIE FERNANDEZ AND JOHN FRASER**

**FROM:** Al French



**SUBJECT:** Substitution of Attestation for H-2A Application and Recruitment Report

**DISCUSSION:**

I talked with Walter Kates, Manager of the Labor Division of the Florida Fruit and Vegetable Association in order to learn the industry's perspective on the substitution of an attestation for the H-2A application and recruitment report. Kates has prepared hundreds of H-2A applications and, as an Employment Service official, reviewed the applications of many others.

Kates advises me that the one-page H-2A application form can be completed in less than five minutes. In addition, it is a vital part of the process because, after it is stamped by the Department of Labor, it becomes the actual certification document.

Kates advises me that the recruitment report is simply a one or two paragraph statement summarizing recruitment efforts and results to which is affixed copies of the employer's detailed records of recruitment efforts and results. He says that it takes less than ten minutes to prepare this report.

Considering that the burden of the activities to be relieved is low and that substituting an attestation would cause concern for farm worker advocates, it does not appear that this proposal merits further consideration.

Kates did have other interesting suggestions for streamlining the certification process (which was the question I put to him in order to not reveal what was under consideration). These include:

- Permit applicants to use FAX or electronic transmission of documents rather than requiring regular and/or overnight mail.
- Use of a standard form for job offers would simplify examination by Federal and State reviewers. He says a suitable form approved by OMB was published in October, 1987 in the H-2A Program Employers Information Booklet.

## **INFORMATIONAL MEMORANDUM FOR JULIE FERNANDEZ AND JOHN FRASER**

- Use of a standard check list with boxes to be checked off as elements of the job offer are completed. This would simplify the process for both applicants and reviewers.

These suggestions seem reasonable and helpful to me.

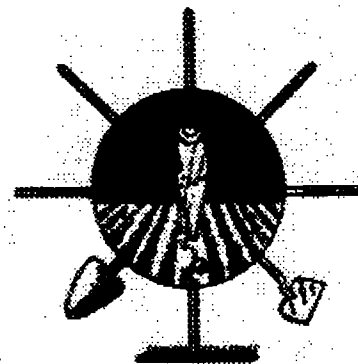
### **SUMMARY:**

The attestation proposal does not appear to have great merit. Some other suggestions are listed that may be worth consideration.

**Phone:** (202) 720-5955 (Collins)  
(202) 720-4164 (Collins)  
(202) 720-6185 (Glauber)  
**FAX:** (202) 690-4915

| MESSAGE |  |
|---------|--|
|         |  |

FARMWORKER JUSTICE FUND, INC.  
1111 19th Street, N.W., Suite 1000  
Washington, D.C. 20036  
(202) 776-1757  
Fax: (202) 776-1792  
e-mail: [fjf@nclr.org](mailto:fjf@nclr.org)



## FAX COVER SHEET

Please Deliver to:  
Julie Fernandez

Fax #: 456-5581  
Company: Domestic Policy Council

From: BRUCE GOLDSTEIN

Pages: 4

Message:

Thanks for your help on the guestworker legislation issue and for kind words you expressed to NCLR's Board members. As to H-2A regulatory reform, I thought you would be interested in the attached memo on the adverse effect wage rate.

This fax may contain confidential or privileged information. If you receive it in error, please contact the sender and do not distribute. Thank you.

### Farmworkers' Wages and The Inadequate H-2A "AEWR"

The H-2A statute as currently applied by the Department of Labor does not adequately protect farmworkers' wages, even though the program contains an "adverse effect wage rate" (AEWR) requirement. Generally, a guestworker program -- even with an AEWR requirement -- depresses farmworkers' wages, displaces U.S. workers and inhibits union organizing. The H-2A program's AEWR, in particular, has not achieved its goal of compensating for the wage depression caused by the presence of foreign workers (guestworkers and unauthorized immigrants). Farmworker advocates have requested that the Department of Labor revise the AEWR methodology through regulatory reform but no reform has occurred. The H-2A AEWR is inadequate for many reasons, including the following:

**First, the Reagan Administration changed the H-2A program's AEWR methodology for the worse and it is inadequate: it is merely the regional *average* hourly wage rate for field and livestock workers, as determined by the U.S. Department of Agriculture's surveys, and then issued for each state.** The AEWR methodology, to be meaningful, must be a premium wage. The U.S. Court of Appeals found that DOL has significant discretion in designing the AEWR. DOL should take action to achieve the purpose of this wage protection.

- a. The AEWR is inadequate because it is merely an average wage rate. By definition, some workers earn more than the average. An employer that claims difficulty finding workers inside the U.S. should be expected to improve its wage offer to at least meet the wage rates offered by its competitors, some of whom are paying more than the average. Such an employer should pay more than the industry's average.
- b. In addition, the AEWR is based on a survey of the *prior* year's wages, so it is always one year behind any increases that might occur.
- c. The AEWR -- i.e. the average wage rate -- is tainted by the presence of unauthorized immigrants and guestworkers, who will work for lower wages than will citizens and authorized immigrants. Indeed, with the decade-long oversupply of farmworkers following the 1986 immigration amnesty program, employers would not take the risk of violating the immigration law if there were not financial incentives in hiring unauthorized immigrants. The AEWR perpetuates a depression in wage rates caused by employers' hiring of exploitable foreign workers.

**Second, AEWR's do not automatically increase.** The AEWR formula does not contain a cost-of-living increase mechanism. Because they merely echo the average regional wage level, the AEWR's may increase, stagnate or decrease.

**Third, AEWR's in fact have decreased at times.** For example, the Oregon AEWR for 1994 was \$6.51 per hour but the 1995 AEWR was only \$6.41 per hour. (See the top table in the attached sheet.). AEWR's -- i.e., the regional average wage -- will certainly decrease again if, for example, the labor market is flooded with vulnerable temporary foreign workers.

**Fourth, the AEW R's have not kept pace with inflation during the last decade.**

Farmworkers earning the AEW R under the H-2A program have generally experienced a decline in wages in real economic terms. As the attached sheet shows (see second table), the AEW R in Oregon increased between 1988 and 1998 from \$5.26 per hour to \$7.08 per hour, an average annual change of 3.33 percent. Yet the cost of living has increased even more. The Bureau of Labor Statistics Consumer Price Index for All Urban Consumers (CPI-U) rose during that time period at the faster pace of 3.41%. Each year, when DOL publishes the new AEW R's, it also publishes the H-2A program's allowable meal charges, which utilizes the CPI-U for food prices. As the attached table shows, the CPI-U for food prices increased at 3.41% annually, again faster than the increase in the AEW R. The same pattern of relative economic decline occurred from 1993-1998, when the AEW R increased only by 77 cents per hour. Furthermore, *if* a labor shortage were developing, one would expect real wages to increase during the last few years, especially given the low wage rates in agriculture.

**Fifth, the Adverse Effect Wage Rate does not protect farmworkers against poverty; the AEW R establishes a below-poverty wage rate.** Where is it written that government should intervene in the market to assist agricultural employers when there is a risk that a tightening labor market may cause wage rates to increase above the poverty level? Consider a farmworker who manages to find 52 *weeks* of full-time farm work in a year, cobbling together one job after another to support a spouse and two young children. As the attached table shows, that household would earn, at the Oregon-Washington AEW R of \$7.08 per hour, only \$14,726 in that year. That family would fall below the poverty level (\$16,450 for a family of four in 1998) by \$1,723.60. Of course most farmworkers do not receive 52 weeks of work per year. Due to the backward labor system in agriculture, the average farmworker finds only 31 weeks of farm work and some find a few weeks of non-farm work. A more accurate scenario for that family would be that *both* adults would work intermittently and, at the AEW R wage level, their combined annual earnings would still not even reach as high as the poverty level. The adverse effect wage rates are too low.

**Sixth, the H-2A program suppresses wage-rate improvements because, by law, it permits employers to reject any job applicant who demands a wage rate higher than the rate approved by the government.** A job applicant who demands \$7.25 per hour at an H-2A employer offering the AEW R of \$7.08 per hour (where that is the prevailing wage) would be deemed to be "unavailable" and the employer could hire a guestworker to fill that slot. And there are always persons in foreign countries willing to accept such jobs at whatever wage is offered. By shielding employers from workers' demands for higher wages, the H-2A program's minimum standards often become the employer's maximum offer. In this setting, U.S. workers, foreign guestworkers and labor unions often cannot, and employers need not, improve wages.

**Finally, in practice, guestworker programs do not raise wages; rather, guestworker programs depress farmworkers' wages.** That was the experience under the Bracero program. That has been the experience under the H-2A program. While some growers entering the H-2A program initially might have to raise wages because they have been paying even less than the AEW R (regional average wage) or local prevailing wage, over the long term guestworker programs reduce farmworkers' wages below what they would have been. A telling example of the suppression of wage rates occurred in the Florida sugar cane industry. Small sugar-cane

growers who did *not* use the H-2A program paid their U.S. farmworkers 7 cents per foot to cut rows of "seed cane," which is chopped and re-planted to grow more cane. These workers generally earned \$8 to \$12 per hour. The larger growers, who hired Jamaican workers under the H-2A program, offered a different piece rate that was the equivalent of only 3 to 4 cents per foot. Litigation developed after the H-2A growers persuaded DOL not to issue a prevailing wage finding for seed cane, and again after the H-2A growers convinced DOL to illegally include the depressed wage rates of foreign workers in the survey of U.S. workers' wages. *Joseph v. Department of Labor*, 787 F. Supp. 245 (D.D.C. 1991) and 787 F. Supp. 247 (D.D.C. 1992). Several hundred thousand dollars in backpay was later paid to seed cane cutters through settlements with the United States Sugar Corporation and other H-2A sugar cane companies.

**Note:** This memo is focused on the methodology of the Adverse Effect Wage Rate. It does not address a number of the other serious problems with wage rates under the H-2A program. Such problems include, but are not limited to:

- the Department of Labor's regulatory revision that permitted depression in wage rates by employers that use piece-rates and productivity standards
- the failure to outlaw the use of so-called "task rates," which formed one of the principal abuses in the sugar cane industry
- inadequate prevailing wage surveys by state agencies under the H-2A program
- the fixing of identical wage rates by hundreds of employers under the H-2A programs in Virginia and North Carolina, among others
- the extraordinarily low wage rates allowed for sheepherders.

Bruce Goldstein  
Farmworker Justice Fund, Inc.  
5/21/98

Eileen Fitzgerald (Rural Housing Service @ USDA)

## Farm Labor housing

Currently : Farm Labor housing loan/grant  
year-round and migrant housing

costlier  
management costs  
(more difficult)

Highest conc. in CA/FL/TX

Starting to see some in OR/WA

prioritize migrant projects in "upstream" states  
(VA)

Community opposition

to farmworker housing  
real barrier

(Zoning barriers  
from communities)

Fund technical asst.

Contractors to work w/ CBOs

financing; hand-holding in zoning

|      |           |       |      |        |
|------|-----------|-------|------|--------|
| FY98 | \$15 mill | loans | 12.5 | grants |
| FY99 | \$20      |       | 13.5 | grants |

## Passback

F2000 \$25

asked for (35) loans

\$15  
(25) grants

## Subsidizing rents

Section 8 equivalent (helps subsidize operating costs)

\$12 million

Could use significantly more \$

Must be a citizen or LPR to live in housing  
in statute (~~is~~ unpopular w/ advocates)

~~by statute~~ Non-profit or public body can use the \$ (PHAs)

Don't lend the growers.

except for

Have "on-farm" housing (one or 2 houses on a farm)  
SF house

New multi-family housing loan program. (loan guarantee)

Grower could apply

No subsidy involved

Would like to see growers donate land to CBO  
for use for building housing.

## Solution?

They have never not spent all their \$  
grant \$ + loan \$

need this  
need heavy  
subsidy

Barriers: local support; NIMBY issues  
grower support can make a difference.

(Projects typically have a childcare part to them.)  
(community rooms)

Farm Labor Housing Program

Can fund the construction (part of the development)

then can get operating subsidies

① have Community Facilities Program

(loans) for any essential community facilities

\$169 million  
in loans.

\$6.5 million  
in grant

can fund  
child care  
centers

migrant  
health  
clinics

FY 2000 request (\$35 loans; \$25 grants)

would have funded

new units of  
farmworker housing

for year-  
round  
housing

Self-Help Housing program (§ 523)

serves a lot of farmworkers

groups of 6-10 families get together and w/ asst. govt. grantee, help build own homes. sweat equity.

Get mortgage for the rest. (guaranteed by USDA)

(see 502)

subsidy get direct loan

## Jobs

Deich — fear  
proposal; \$ for it

not enough \$ — edley  
not his baby — Cuomo  
so, doesn't  
like it

more outreach

Wondering re: NACARA

standard changed

parity

including Eastern Europe

Read in Miami Herald

1989 from former Yugoslavia  
in law school  
NACARA members

## Reform Ideas -- Growers and Farmworkers

### Recruitment

#### 1. **America's Agricultural Labor Network -- AgNet**

The majority of farm workers find employment through a kinship/friendship network. One problem with this method is that it spawns and reinforces illegal migration to the U.S.; another is that it is highly inefficient in a geographically diffuse labor market. The Department of Labor could serve as an information broker by developing a system that allows growers to find workers and workers to find employment opportunities that meet their needs (e.g., location, duration, type of crop, etc.). This would benefit growers and workers by having an efficient alternative mechanism to match workers with employment opportunities. AgNet would be based on America's Job Bank,, but would be a separate web site devoted to the agriculture industry.

#### 2. **Employment Verification Pilots**

INS has indicated that their existing employer verification pilot program could be adapted to allow for effective participation by H-2A growers. The INS could conduct more aggressive outreach to growers to encourage them to participate in the pilot program.

Is there something that we can offer growers as a trade for participation in the pilot?

#### 3. **Farm Labor Contractor Certification Program**

Frequently, Farm Labor contractors (FLCs) are inexperienced, poorly educated, not aware of applicable laws and regulations, and lacking in business know-how.

We could require FLCs to satisfactorily complete a Wage and Hour administered course to ensure minimum competency levels for FLCs knowledge of applicable laws and regulations. These courses could also serve to enhance the FLCs's business skills. Successful completion of the course would be a prerequisite to initial issuance and/or renewal of a FLC registration card. The course would include instruction on how to properly comply with MSPA, FLSA, H-2A, OSHA filed sanitation, FICA/FUDA, EPA pesticide worker protection standards, and other labor standards as appropriate.

DOL has estimated the cost of the program to be approximately \$500K per year. We could, of course, charge a fee to each FLC to defray much of this cost.

After-school  
non-profits, etc.  
Boys & Girls Clubs

Debra  
build = not a lot  
overhead = \$  
Y

INS  
Low  
Priorities  
for  
enforcement  
bottom of list for  
random

require  
them to  
use this  
system  
to participate  
N

M  
have to  
open MSPA  
to do this  
b/c of specific  
criteria in  
the law

regulatory  
ways to  
provide  
incentives for  
people to do this  
JF/Rob

MSPA  
implications

#### 4. Farmworker Harvesting Cooperatives

The Cooperative State Research, Education, and Extension Service and the Rural Business-Cooperative Service staff, along with the Farmworker Coordinator and farmworker organizations, could conduct a feasibility study to research and design "farmworker harvesting" cooperatives. Such a cooperative would be designed to match the job skills of agricultural workers with employers as an alternative to the system of farm labor contractors. The cooperative would serve the functions of recruitment, employment, and transportation of farmworkers. The cooperative could also provide job training for individuals interested in learning skilled agricultural techniques.

#### Transportation and Housing

#### 5. Pilot Programs -- Transportation and Housing

The Department of Labor could conduct pilot programs on transportation subsidies without any legislative change (i.e., creative ways to structure subsidizing transportation costs for migrant farmworkers, including H-2A workers).

However, there is limited latitude to conduct housing demonstrations without a statutory change. Under the H-2A statute, the employer must either furnish housing owned or controlled by him or, in the alternative, provide housing that the employer has secured on the open rental market. We could try to obtain legislative authorization for pilots in housing.

#### Housing Regulation Reform

The current housing standard used by DOL in administering the Migrant and Seasonal Worker Protection Act is the OSHA "temporary labor camp" standard (used for housing built after 1980). DOL could revisit this standard and reevaluate whether it correctly balances the protection of workers with the needs of this industry. Given that adoption of this standard was a regulatory decision not a statutory mandate, DOL has the discretion to revise the standard.

#### 7. HUD-funded Housing for Migrant Workers

HUD does not currently have a specific program for migrant housing, nor did it request one as part of the FY 2000 agency request. However, there are a number of areas within HUD that could be evaluated as possible funding sources for additional migrant housing including the Community Development Block Grant, the HOME program, the Office of Rural Housing and Economic Development, and the Colonias initiative.

✓ 8.

## USDA Farmworker Housing Program

USDA currently provides farm labor housing loans, grants, and rental assistance to farmers. In the FY 2000 agency request, USDA essentially requested to double the funding levels for these programs. The requested increase would roughly equate to 570 more housing units (estimated between 2,280 and 3,420 more migrants housed depending on the type of unit -- family or single). However, according to USDA, H-2A workers are not eligible to reside in housing funded through this program. USDA is looking further into this issue.

## Transportation Subsidies

The Department of Transportation does not currently have a specific program for migrant transportation, nor did it request one as part of the FY 2000 agency request. Two programs that were previously evaluated for this purpose were Access to Jobs and the Formula Program for Other than Urban Areas. It may be possible to stretch Access to Jobs for use of transporting migrant workers. Localities could use funds from the Formula Program for helping migrants with their transportation needs, but it is unlikely that the locality would choose to use their dollars for this purpose without an additional incentive.

If we are able to generate funds from FICA/FUDA equivalent payments by growers (see below), we could use that money to fund pilot programs that subsidize migrant worker transportation.

## FICA/FUDA

### 10. Growers to pay the equivalent FICA/FUDA taxes for H-2A workers

We could require growers to pay the equivalent of FICA/FUDA taxes and put the amount in a fund to pay for transportation and/or housing subsidies for migrant farmworkers.

This would generate approximately \$12-\$15 million per year.

## Enforcement

### 11. Transfer from ETA to Wage & Hour

The Department of Labor is in the process of transferring authority for administering the H-2A program from the Education and Training Administration (ETA) to the Wage & Hour Administration. We could give the completion of this change a date certain.

## 12. Department of Labor (DOL) Enhanced Enforcement

DOL has a number of initiatives in FY 1999 targeted at domestic child labor in the agriculture industry. The funds are targeted at increasing enforcement (specifically, the "Salad Bowl" initiative -- targeting lettuce, tomatoes, onions, cucumbers), improving data collection in the National Agricultural Worker Survey, and training migrant workers to be child care providers. In FY 2000, DOL requested to enhance and continue these enforcement initiatives.

We could consider a more substantial increase in these enforcement areas, a more general increase in base funding for enforcement, or an increase in other crop or geographic specific areas.

## 13. Enhanced protections for U.S. workers

We could explore whether there are statutory or regulatory changes to existing worker protection statutes that could be implemented to better protect the rights of farmworkers. The following are examples of gaps in existing laws:

- FSLA exemption from minimum wage

The FSLA contains a number of specific agriculture exemptions from the minimum wage requirement. The primary exemption applies to growers who do not use at least 500 man-days of agricultural labor in any calendar year. There are no reliable figures for the number of workers affected by this exemption or the number of workers who, even if subject to the exemption, are paid less than the minimum wage. But it is not uncommon for employers to assert this exemption as a defense in minimum wage cases.

- FLSA exemption from overtime

Most farmworkers are completely exempt from the FLSA overtime provisions. It is very common for farmworkers to work in excess of 40 hours during a workweek but they have no claim to overtime for those hours. Some states -- such as California and Washington -- provide limited overtime coverage to farmworkers.

- FLSA exemption from child labor protections

Children who work on farms may work at younger ages, in more hazardous tasks, and for longer hours than children in other industries. For instance, children over 16 years old can work in any task in agriculture, whereas 16 and 17 year olds in other industries are prohibited from working in tasks deemed by DOL to be too dangerous.

Sara Rosen

broaden  
inquiring for  
other types of  
incentives

### NLRA coverage

If the work is defined as "agricultural labor" under the FLSA, it is exempt from coverage under the NLRA. Therefore, virtually all non-processing tasks in agriculture are outside the protections of the NLRA. However, some states -- notably California -- have enacted protections for farmworkers seeking to organize. These state protections may, in some areas, be more protective than the NLRA.

### Workplace health and safety

OSHA protections for farmworkers are much less extensive than similar protections for other workers (for example, ladder work is much less regulated in agriculture than in other industries) and covers fewer employers.

-- Since 1975, OSHA has been precluded from regulating health and safety on farms that employ fewer than 11 workers on any day during the year. Many farms are therefore beyond the reach of any OSHA standard, including field sanitation. However, under the Migrant and Seasonal Agriculture Worker Protection Act (MSPA), temporary work camp housing standards -- that mirror OSHA standards -- apply even if the OSHA standards do not apply because of the 10 or fewer employees exemption.

-- Farm work is one of the few industries in which workers are not entitled to specific information about the use of toxic substances in the workplace. OSHA does not have statutory authority to require a hazardous communication standard for pesticides and the EPA -- which has the authority -- has failed to issue such a standard.

### State Worker's Compensation

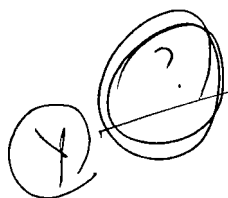
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### Unemployment Insurance

Some states either exclude farmworkers from unemployment insurance coverage or impose such stringent requirements on coverage that farmworkers are effectively excluded.

*Berman would say no.*

*constrains ability to do OSHA enforcement*



*USDA says they may have (DOL to explore what the real deal is here)*

- Protection against retaliation

We could propose to amend ~~MSPA~~ and the Pesticide Act to provide protection against retaliation.

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### 14. **Wage reform**

After extensive study and consideration, there does not seem much that we could do on the wage front that would more accurately reflect our goals of requiring a fair wage (for both growers and farmworkers) and providing some compensation in the wage for the presence of undocumented farmworkers in the workforce. (See materials handed out by Ceci Rouse).

## Research

### **Mechanization Adjustment Assistance**

If the cost of employing H-2A workers or illegal workers rises (or even remains constant), growers will have increased incentive to adopt mechanized farm equipment or other labor saving technologies. The transition from a farm economy based on inexpensive short-term labor to one based on greater use of mechanization (and higher paid, longer-term labor) will not be costless. The government could play a valuable role in lessening the cost of this transition for a number of farm sector participants including small farmers, farms run by elderly operators, and farmworkers. Government assistance could include tax incentives for mechanization, mechanization training programs for farmworkers, and mechanization training programs for growers.

## Childcare

### 16. **Access to childcare**

One of the barriers to employment for U.S. farmworkers is the lack of child care. Lack of proper facilities is a big problem in rural areas, and most child care programs do not provide funds for capital expenditures (though block grant funds may be available for Head Start).

- Funds could be allocated for the construction and/or renovation of child care facilities in rural areas.
- Also, tax incentives could be made available for farmers who provide child care for their workers.

tax credit for employers generally.

make land & structure available for a federal program

6  
Debra to ask Barbara who is on B child care people

Elise / Ceci  
take care of small farms and operators  
keep working on this

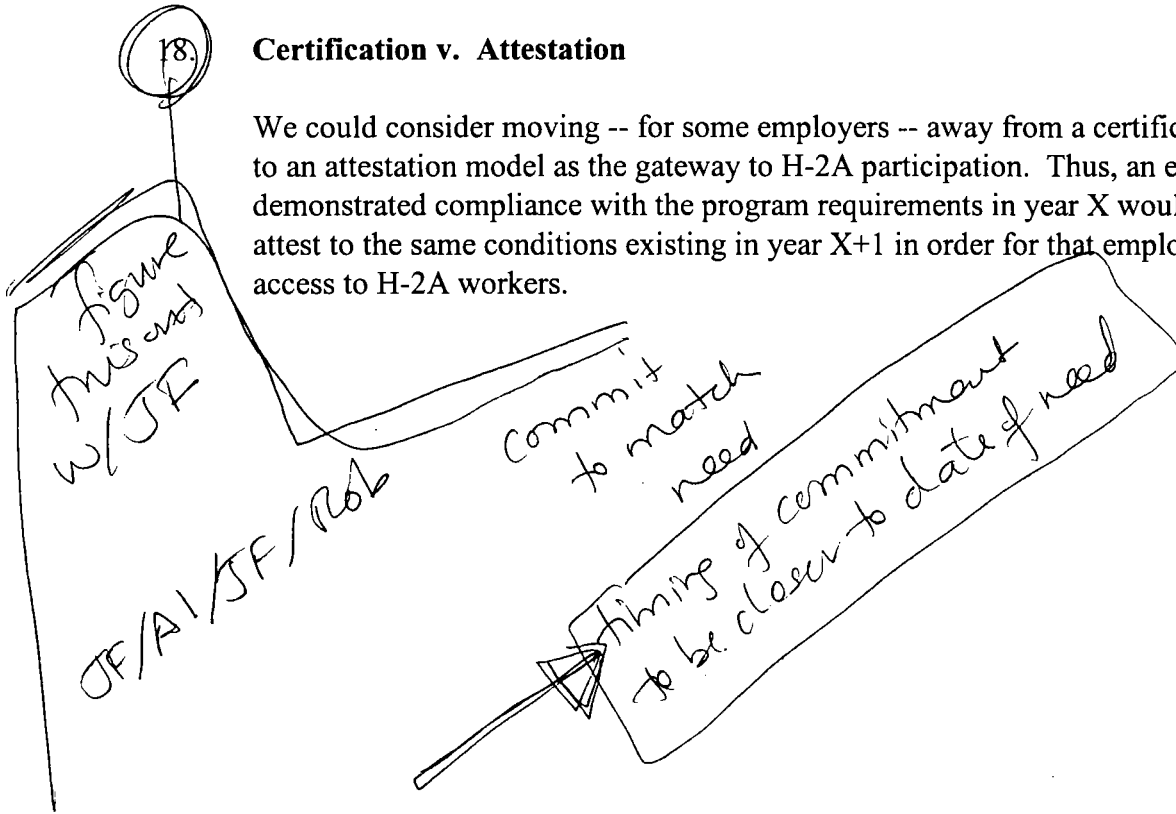
- Possible creation of a set-aside within existing child care centers for the children of migrant workers.

ETC.

18.

### Certification v. Attestation

We could consider moving -- for some employers -- away from a certification model and to an attestation model as the gateway to H-2A participation. Thus, an employer who has demonstrated compliance with the program requirements in year X would only have to attest to the same conditions existing in year X+1 in order for that employer to have access to H-2A workers.



## **H-2A Reform Proposal**

This proposal is for a NPRM in four parts. Part I would discuss the steps already taken by DOL to streamline the H-2A program. Part II would lay out the reforms that are being noticed for rulemaking. Part III would preview a proposed rule that is under development and would give a firm deadline for noticing that rule. Part IV would mention other areas where we are considering reform.

### **Part I**

#### **Actions accomplished**

(by General Administrative Letter (GAL) directive)

- a. The Labor Department now requires “positive recruitment” of U.S. farmworkers only in areas where DOL finds that there are a significant number of qualified workers willing to make themselves available for employment at the time and place needed.
- b. The Labor Department now counts as “available” for employment only those U.S. workers who are identified by name, address and social security number.
- c. The Labor Department has submitted a reprogramming request to Congress that would allow for the provision of automated support for the labor certification process. Such automation could be implemented within six to eight months of the availability of funding.

This automation would affect both the goal of meeting the existing 7-day deadline after receipt of initial application to notify employer of deficiencies precluding adjudication of the application and the 20-day deadline -- prior to the employers’ “date of need” -- to issue approved certifications.

### **Part II**

#### **Rulemaking proposals -- Stage 1**

- a. Require employers’ H-2A labor certification applications to be submitted 45 (rather than 60) days prior to the employers’ “date of need.”
- b. Reduce the deadline for employer-provided housing to be available for inspection from 30 to 15 days prior to the employers’ “date of need.”
- c. Growers will no longer be required to use a registered farm labor contractors (FLCs or “crew leaders”) as a source of U.S. workers if the FLC has a demonstrated history of employing illegal or unauthorized workers or of other labor abuses.
- d. Eliminate requirement that certified H-2A employers provide notice of H-2A workers’ departure for the place of employment.

### Part III

#### Rulemaking proposal -- Stage 2

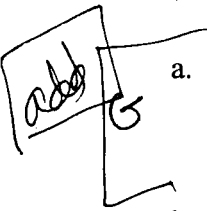
This notice would set a deadline (120 days?) for noticing a rule that effects this reform. This reform would likely require rulemaking by both DOJ and DOL.

- a. INS to delegate H-2A petition approval authority to DOL. Removing the INS adjudication step will result in a two-step (State -- DOL) process, rather than a three-step (State -- INS -- DOL) process. DOL will then provide simultaneous approval of H-2A certification and petition approval.

### Part IV

#### Rulemaking proposal -- Stage 3

This notice would mention the following other reforms as possibilities for future rulemaking.

- 
- a. Allow H-2A program applicant-employers to include a bonding requirement for FLCs they employ. This will help protect employers from risks such as the FLC employing unauthorized workers or failing to perform.
  - b. The Wage & Hour division at the Labor Department will have the authority to temporarily debar employers who commit serious labor standards or H-2A program violations from future use of the H-2A program.
  - ~~c.~~ INS (or DOL) will issue petition approval (I-797) for replacement of certified H-2A workers upon proof of the worker's repatriation.
  - d. Simplify H-2A application and related documentation -- both job order applications and accompanying disclosure documentation -- for ease of integration with America's Job Bank (AJB). This simplification will accommodate electronic filing by employer-applicants and will further ease application information burden on previous program users found in compliance with program requirements.

November 19, 1998

### **Some Statistical Facts about the Agricultural Economy**

The following data on growers and farm workers were compiled by economists at DOL, USDA, and CEA. Wherever possible, the data focus on likely users of the H-2A program (those sectors of the agricultural economy that rely on pickers and other low-skilled workers), such as fruits, vegetables, nuts, and tobacco.

#### *Farm Business*

- Real farm income among fruit, nuts, vegetable, greenhouse, and nursery growers increased between 1993 and 1997 to about \$40,000 among all farms and to \$140,000 among larger farms in this sector (see Figure 1a). In contrast, among all tobacco farms real income has decreased slightly since 1993 although larger tobacco farms experienced an overall decrease in real income (see Figure 1b).
- Among fruit, nuts, vegetable, greenhouse, and nursery growers, farm labor inputs comprise the largest single farm expense, as contract and hired labor consistently account for about 35-40% of total expenses (see Figure 2a). Labor comprises a smaller share of expenses for tobacco farmers (about 20%) (see Figure 2b). Labor's share of production expenses is higher among growers most likely to use the H-2A program (vegetable, fruit, and tobacco farmers) than among all farms (see Figure 3).
- Among fresh fruits and vegetables, the import share of agricultural products used has risen steadily over the past 16 years. Among fresh vegetables, the import share of domestic use has been fairly constant (see Figure 4).
- Fruit imports appear to have increased faster than fruit exports, however the ratio of imports to exports has been roughly constant over the past 25 years. Similarly, imports of vegetables are roughly equal to exports (see Figure 5).
- Although the data are noisy, it is likely that only farmers with at least \$100,000 in sales (only 21% of all farms) have a positive return on equity and have a positive ratio of net cash farm income to gross cash income. In addition, the value of assets is concentrated among the largest growers (see Table 1).
- The amount of agricultural production in pounds (among selected sectors) has increased over the past 20 years (see Figures 6a and 6b).

#### *Employment, Wages and Earnings*

- There is a long term secular trend of declining agricultural employment and rising real hourly wages. However, since the mid-1970's real farm workers wages have either declined or been flat (see Figure 7). (Note: Data for this sector is extremely limited and

hence should be viewed with caution.)

- Since 1985, farm worker wages have been relatively flat in real terms but have risen relative to other low skilled workers wages and now even exceed those in eating and drinking places. Despite the upward trend farm workers remain among the lowest paid workers earning 90 percent or less of what workers in such industries as apparel and accessory stores, general merchandise stores, laundry, cleaning and garment services, and apparel and other textile products make (see Figure 8).

### Employment and Unemployment

- Since the mid-1950's, unemployment among agricultural workers has generally been above that for non-agricultural workers. Since the 1970's the unemployment rate in agriculture has been rising relative to that in the nonfarm sector. In addition, unemployment in the agricultural sector is much more volatile, even using seasonally adjusted data, but generally shares the broad cyclical trends as the non-agriculture sector. The coefficient of variance of unemployment (.84) is almost twice as high in agriculture as in the nonfarm sector (.42). Finally, although the unemployment rate for agriculture workers has declined since 1993, it is still around 8 percent (see Figure 9).
- Although unemployment may be higher in the agricultural sector, the average duration of unemployment is shorter. Given the higher level of unemployment and the shorter duration of unemployment it appears that flows into and out of employment must be higher for agriculture workers. This may be explained by greater variance in demand, more homogenous wage offer distributions, or lower reservations wages due to liquidity constraints (low incomes generating less saving).

The duration of unemployment has trended down slightly since 1994, suggesting that agriculture workers are able find new jobs more quickly in this tighter labor market. Nonetheless, the current level is still above the level in 1990 and is much higher than the level in 1980, suggesting that the labor market is not tight by historical standards (see Figure 10).

- Farm workers are more likely to be engaged in agricultural activities in the spring through the fall; during the winter months they are more likely to be either abroad or not working while in the U.S. The proportion of farm workers who are employed doing non-farm work is fairly constant throughout the year (see Figure 11).

### Other Facts about Farm Workers from the NAWS (1994-1995)

- According to NAWS, 69 percent of farm workers are foreign born (almost all from Mexico). Of the remaining 31 percent U.S. born workers, 18 percent are non-Hispanic white, 10 percent are Hispanic and two percent are non-Hispanic blacks.

The fact that agriculture workers are paid less than workers in other low skilled (wage)

sectors, is consistent with a declining supply of domestic farm workers and an increased supply for foreign born legal and illegal agriculture workers.

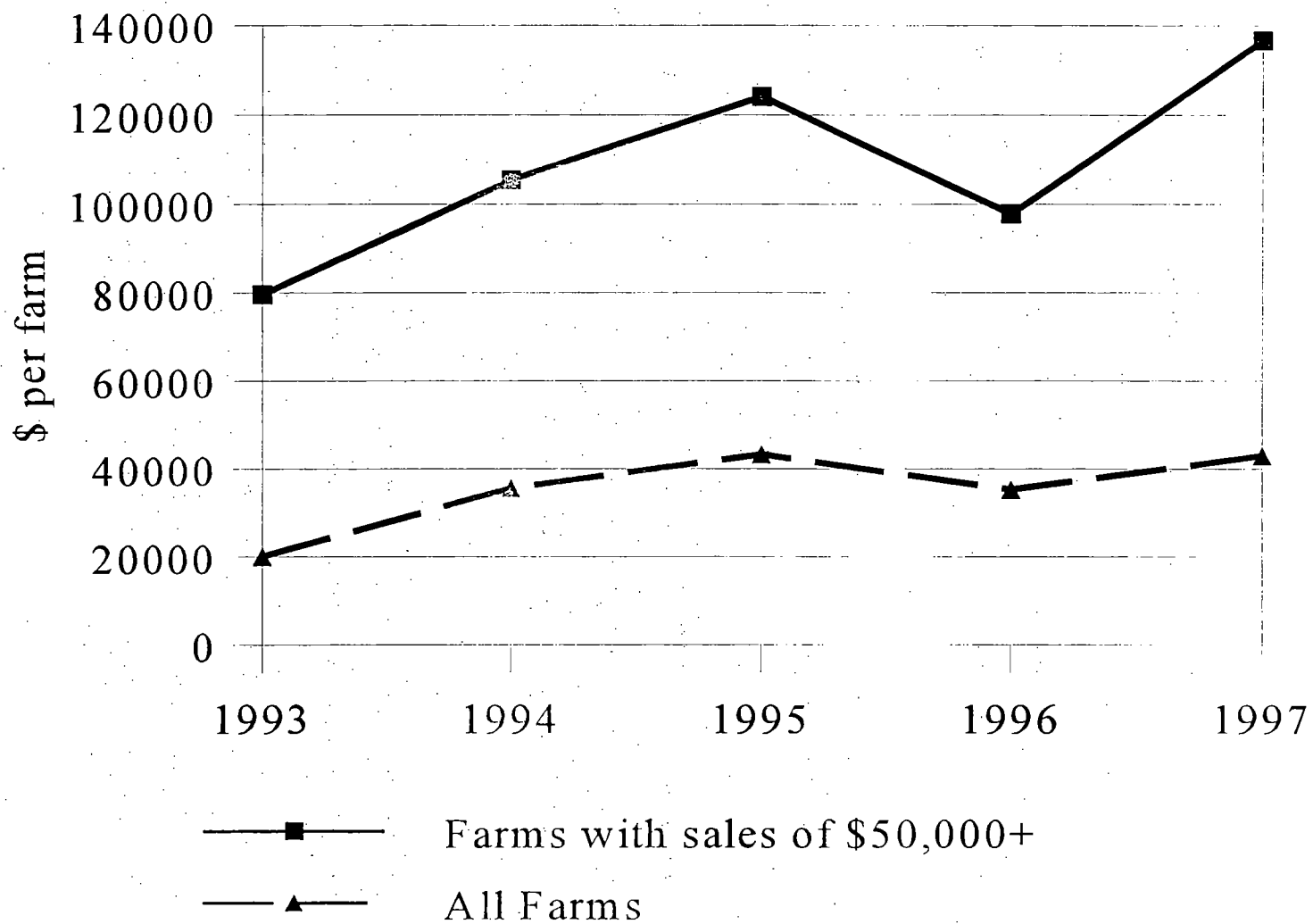
- Over one-quarter of farm workers are 21 year old or younger, two thirds are younger than 35.
- The median personal income for farm workers was between \$5,000 and \$7,500 during 1994-1995. Twenty eight percent had personal incomes under \$2,500.
- The median earnings of foreign-born workers was higher than for U.S. born workers (\$5,000 - \$7,500 vs \$2,500 - \$5,000). Green card holders or legal permanent residents have the highest earnings (between \$7,500 and \$10,000).

#### *Some Facts about the H-2A Program*

- Among current users of the H-2A program, 80% are located in just 9 states. North Carolina is the heaviest user of the program (because of tobacco) followed by Virginia (with tobacco and apples), Kentucky (tobacco), and New York (apples) (see Figure 12).
- 62% of H-2A growers grow tobacco, 18% grow apples; the other users include sheepherders, custom combine, fruit and vegetable growers, and irrigation (see Figure 13).

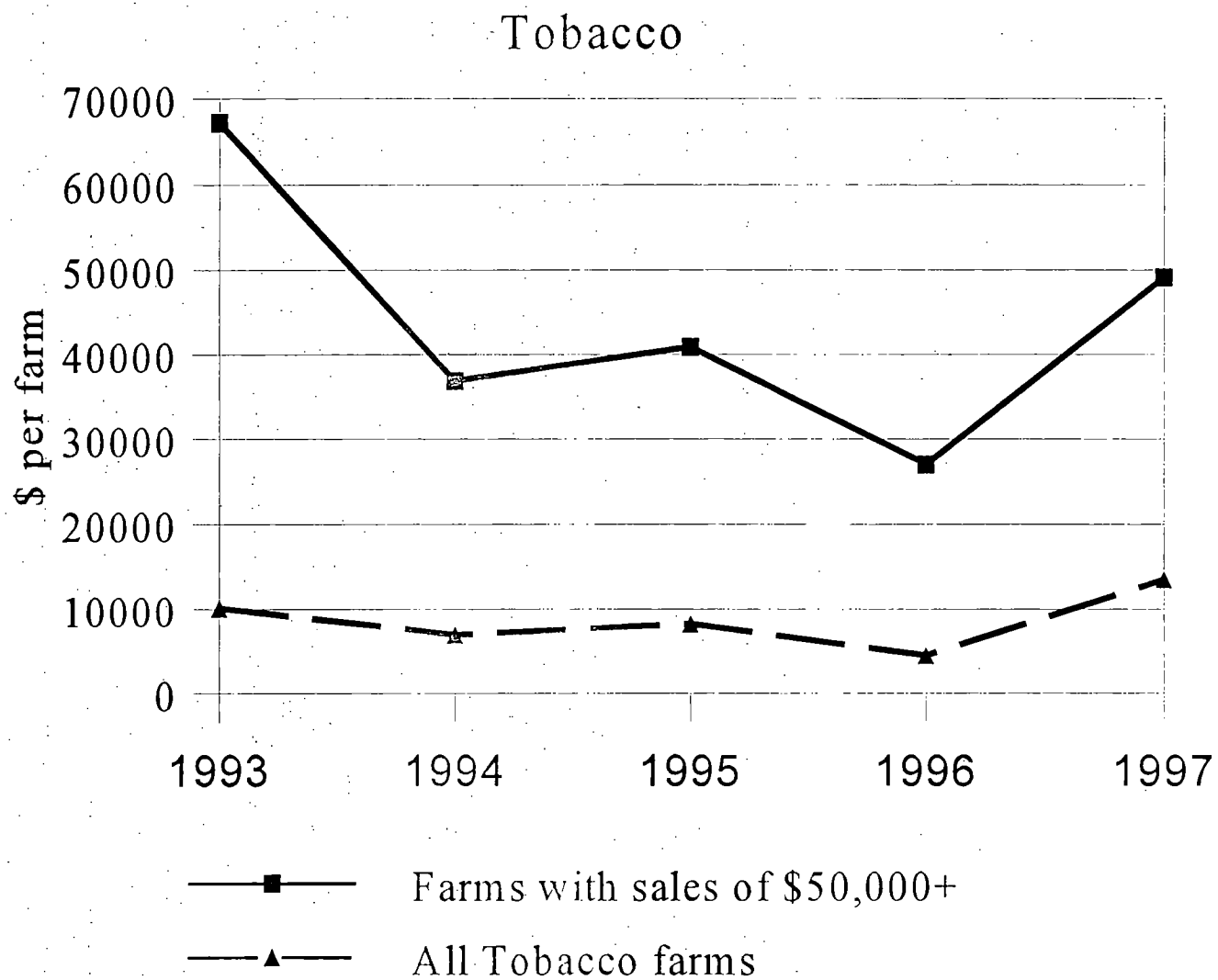
Fig. 1a: Net Cash Farm Income (1997 dollars)

Fruit, nuts, vegt, greenhouse, nursery



Source: Economic Research Service; 1997 USDA Agricultural Resource Management Study

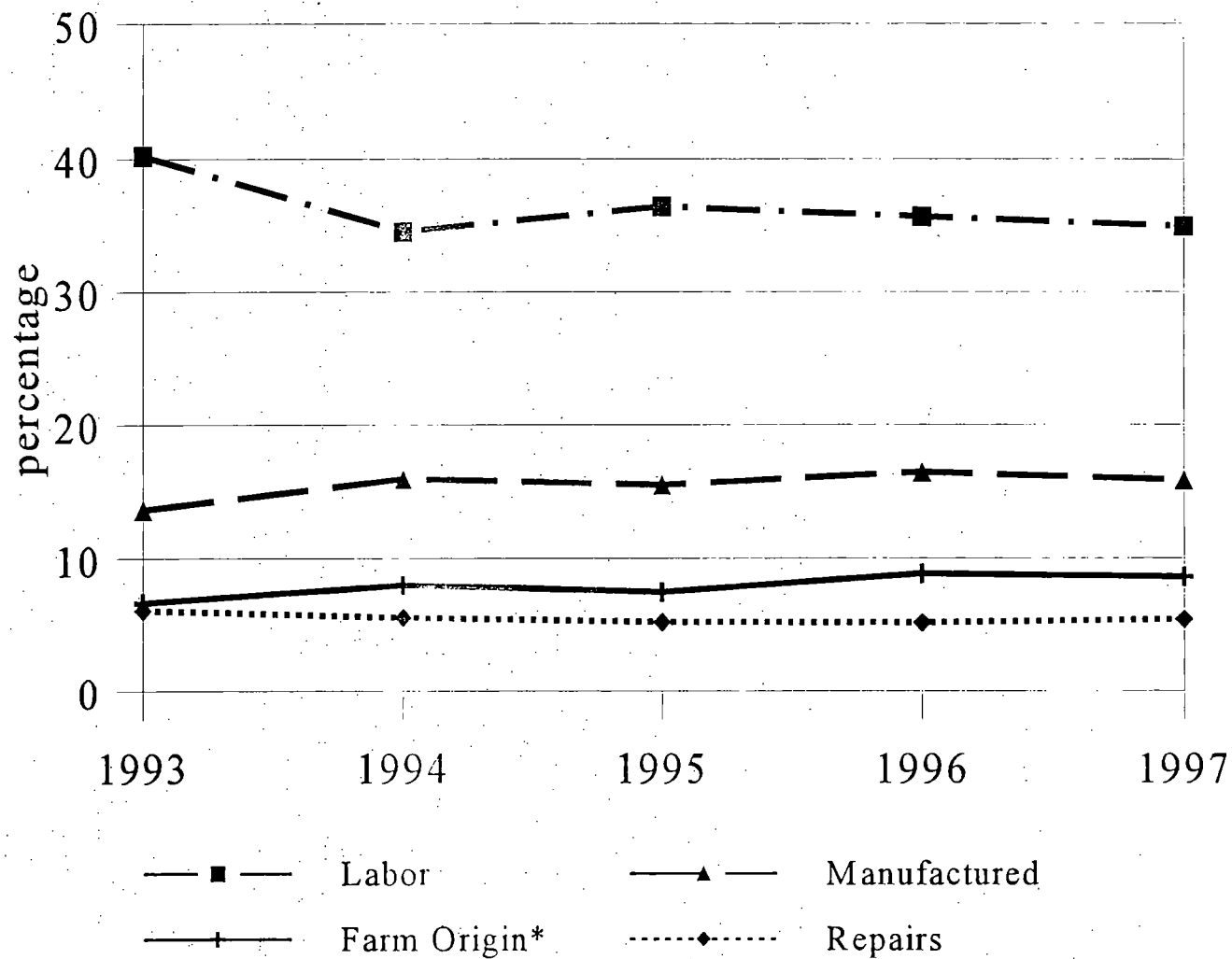
Figure 1b: Net Cash Farm Income (1997 dollars)



Source: Economic Research Service; 1997 USDA Agricultural Resource Management Study

Figure 2a: Percentage Shares of Total Farm Cash Expenses

Fruits, nuts, vegetable, greenhouse, nursery

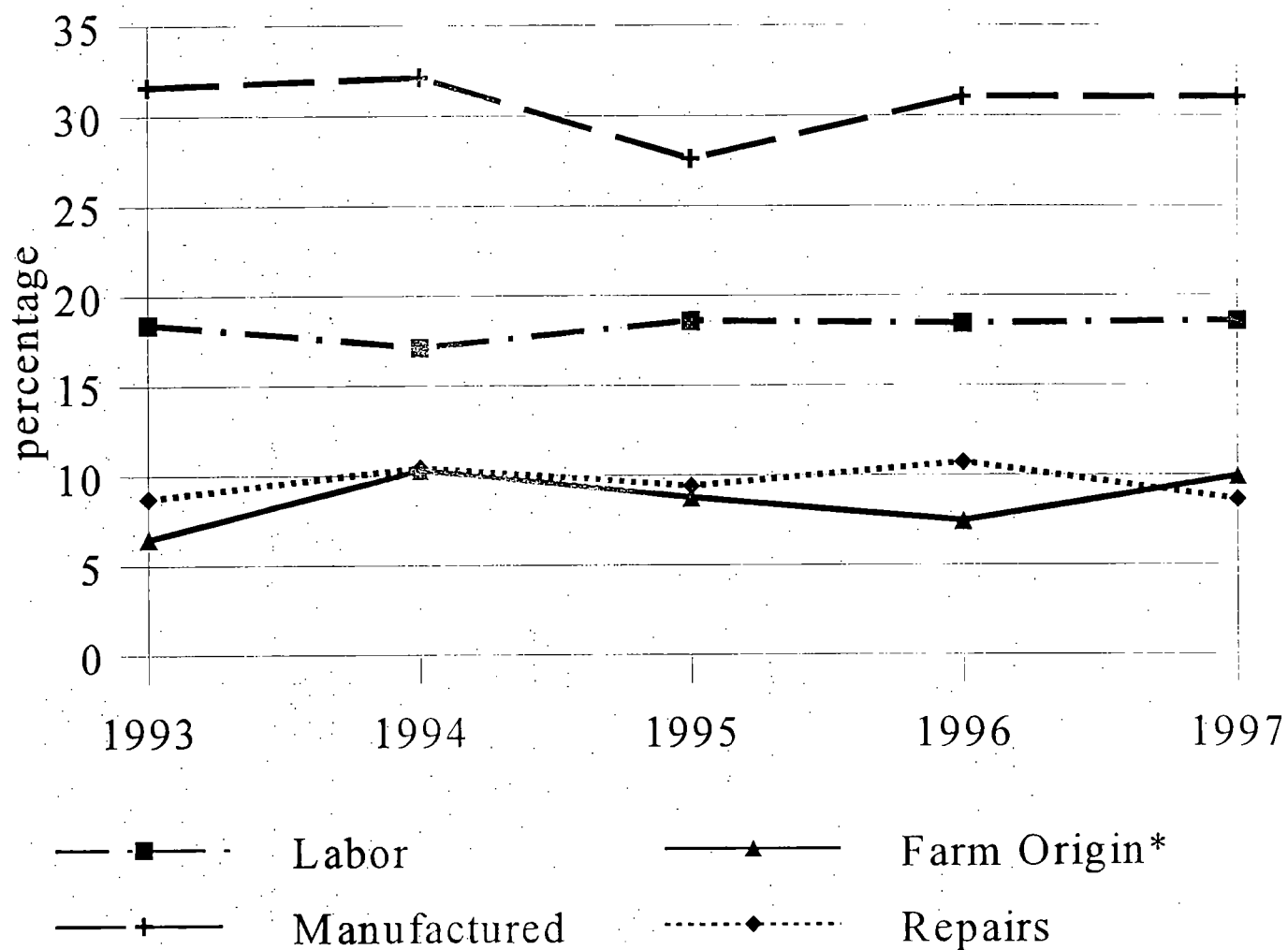


\* Includes livestock purchases, feed, other livestock related expenses, and seed and plants

Source: Economic Research Service; 1997 USDA Agricultural Resource Management Study

Figure 2b: Percentage Shares of Total Farm Expenses

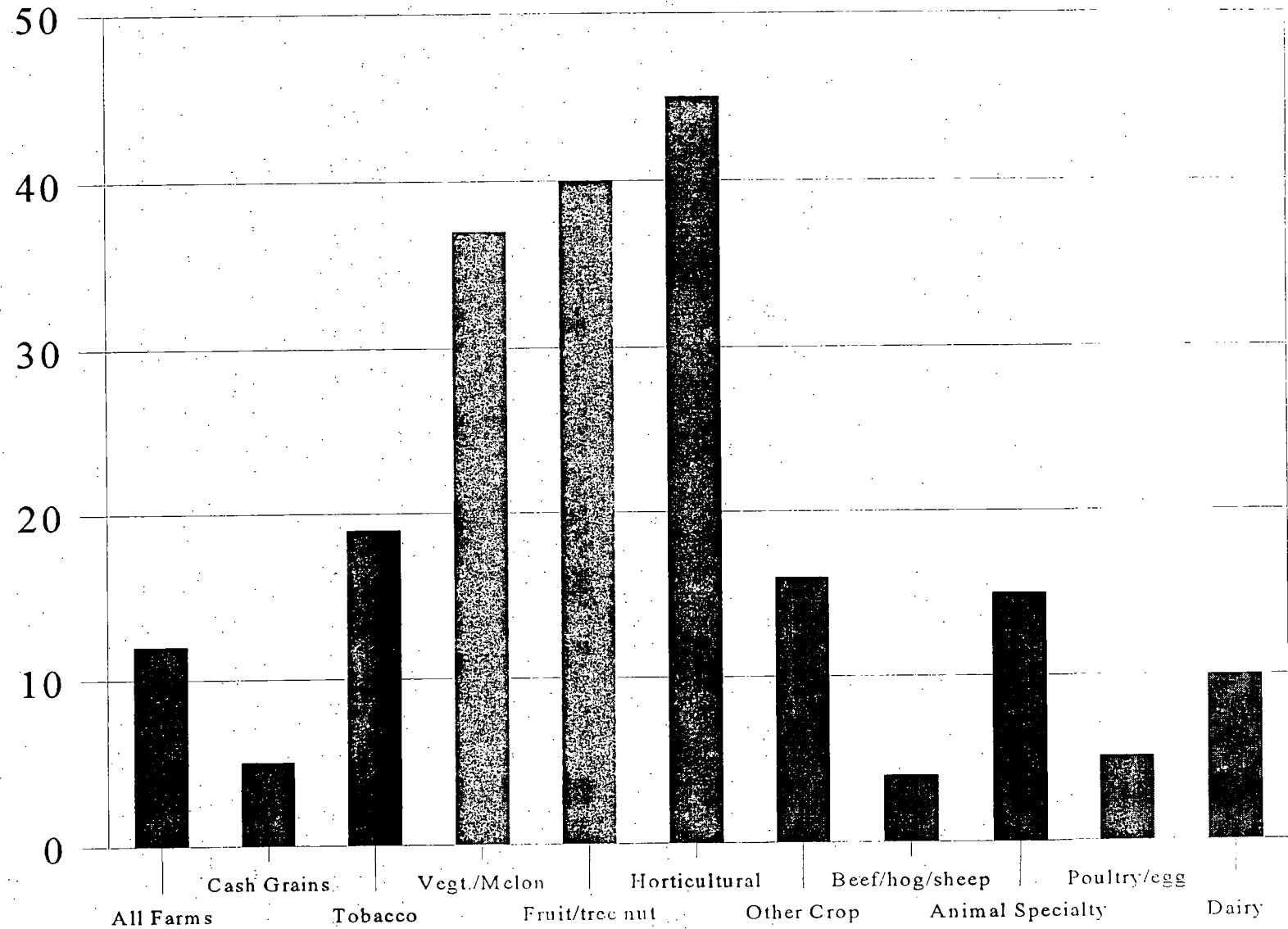
Tobacco



\* Includes livestock purchases, feed, other livestock related expenses, and seed and plants

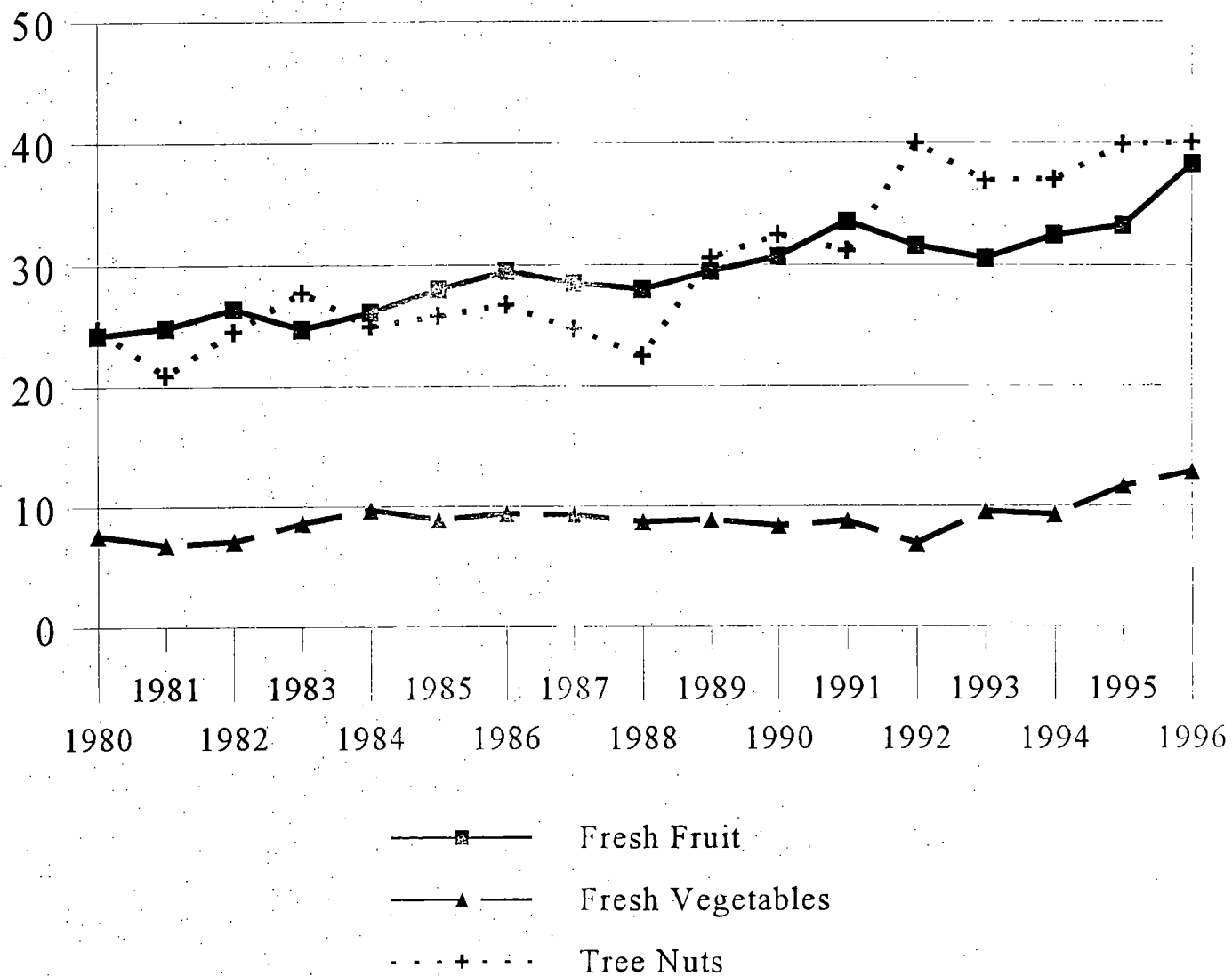
Source: Economic Research Service; 1997 USDA Agricultural Resource Management Study

Figure 3: Labor's share of production expenses



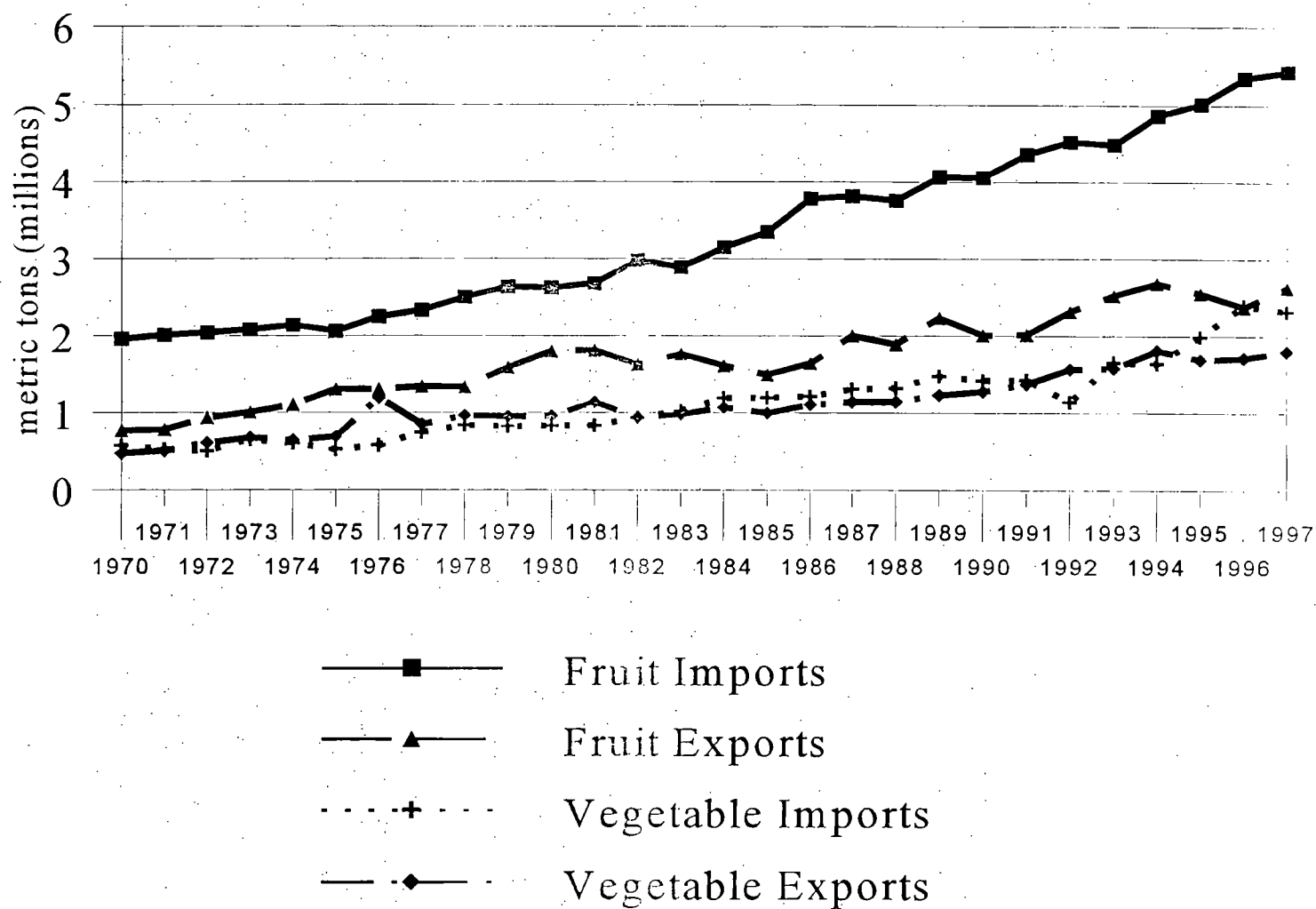
Source: 1992 Census of Agriculture

Figure 4: Import Share of Domestic Use



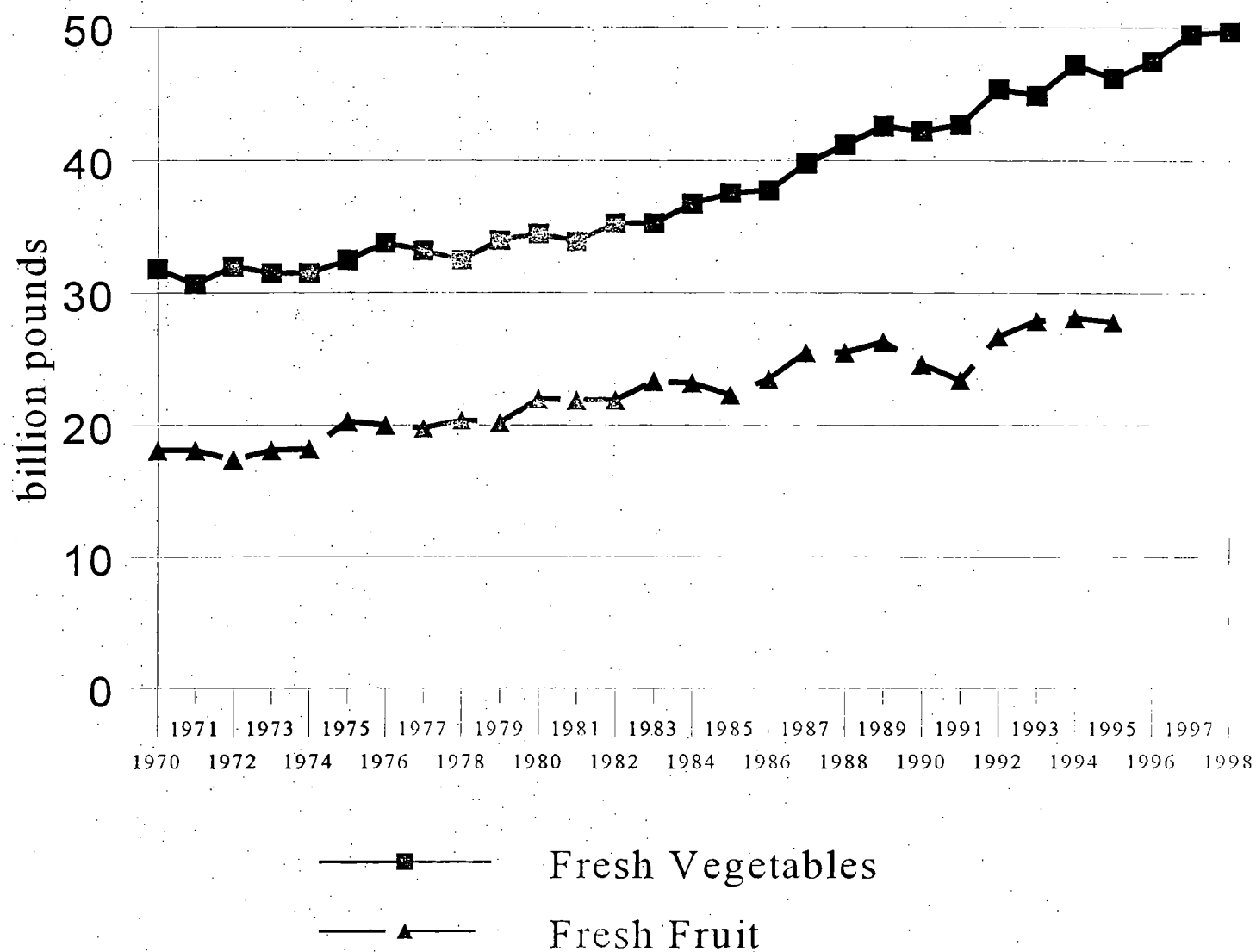
Source: USDA-ERS Statistical Bulletin 939, Aug 1997; USDA-ERS Fruit and Tree Nuts, Aug 1998; USDA-ERS Vegetables and Specialties, VGS-273, Nov. 1997

Figure 5: U.S. Exports and Imports  
Fresh Fruits and Vegetables, 1970 - 1997



Source: U.S. Bureau of the Census; Economic Research Service; Foreign Agricultural Service; UN Trade Data

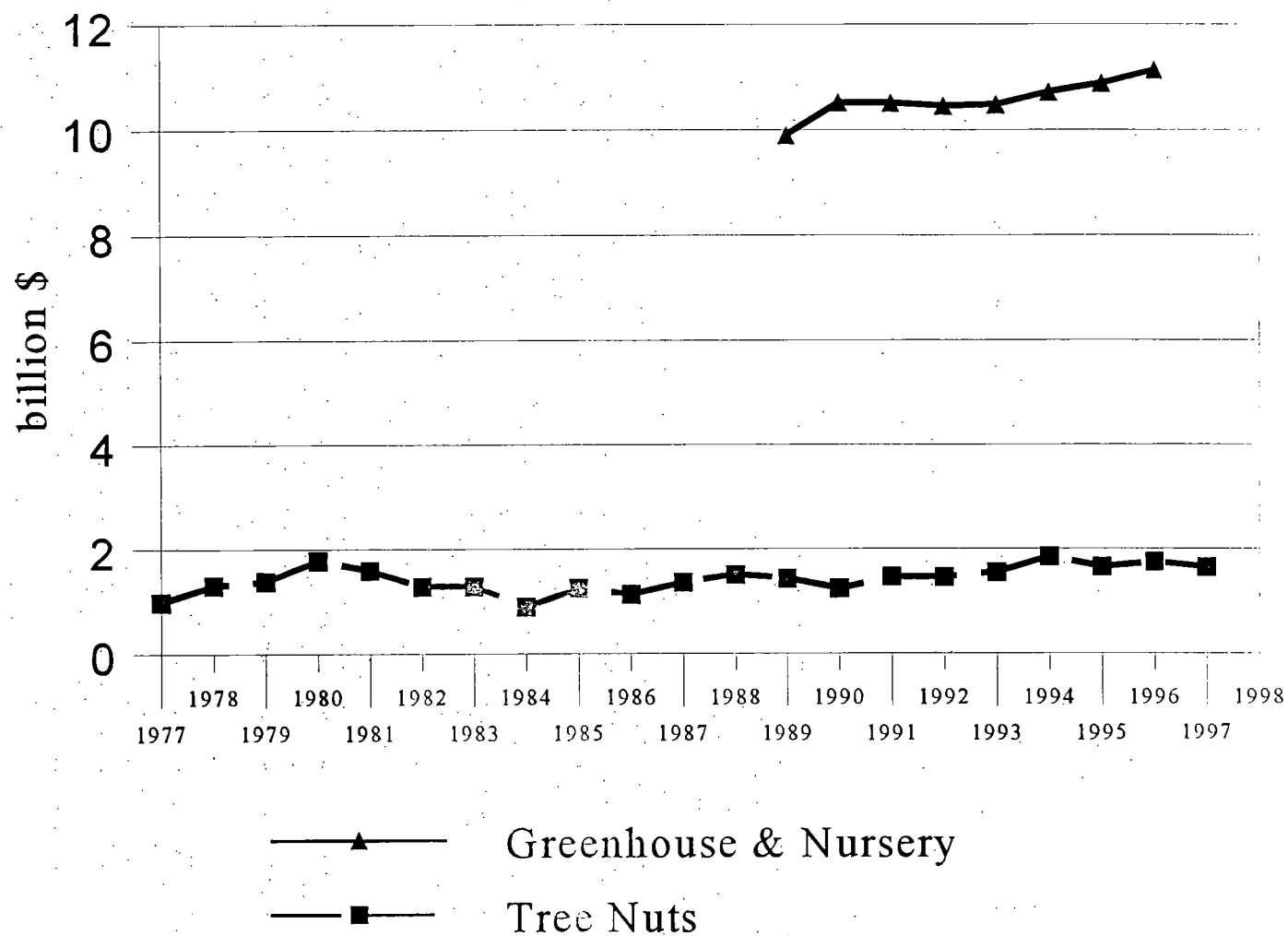
Figure 6a: Fresh Fruit and Vegetable Production



Source: Economic Research Service

Figure 6b: Value of Production (1997 dollars)

Greenhouse & Nursey, Tree Nuts



Source: Economic Research Service

Figure 7  
Farm workers wages and employment

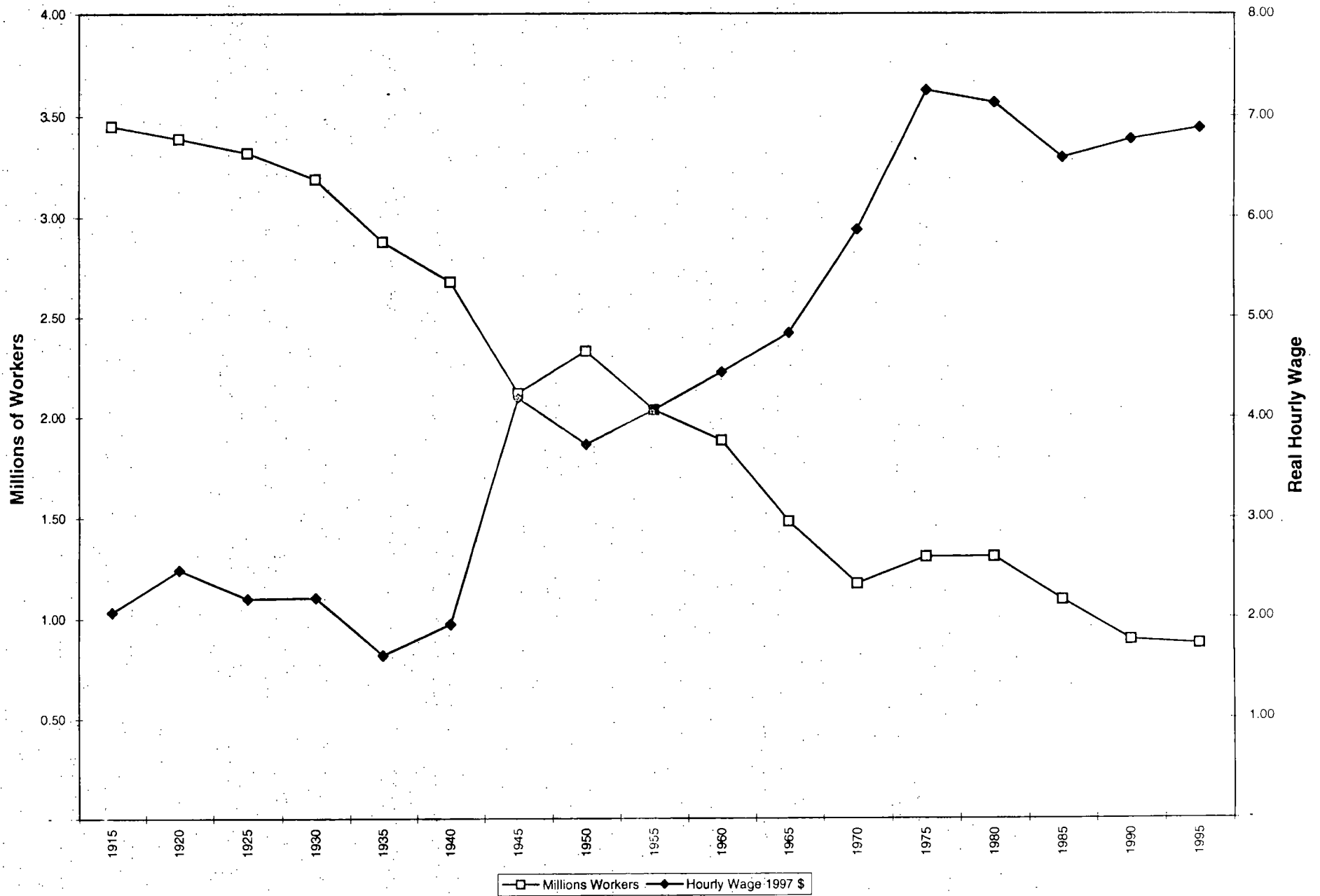


**Figure 8**  
**Real Hourly Wages in Selected Industries (1997 \$)**

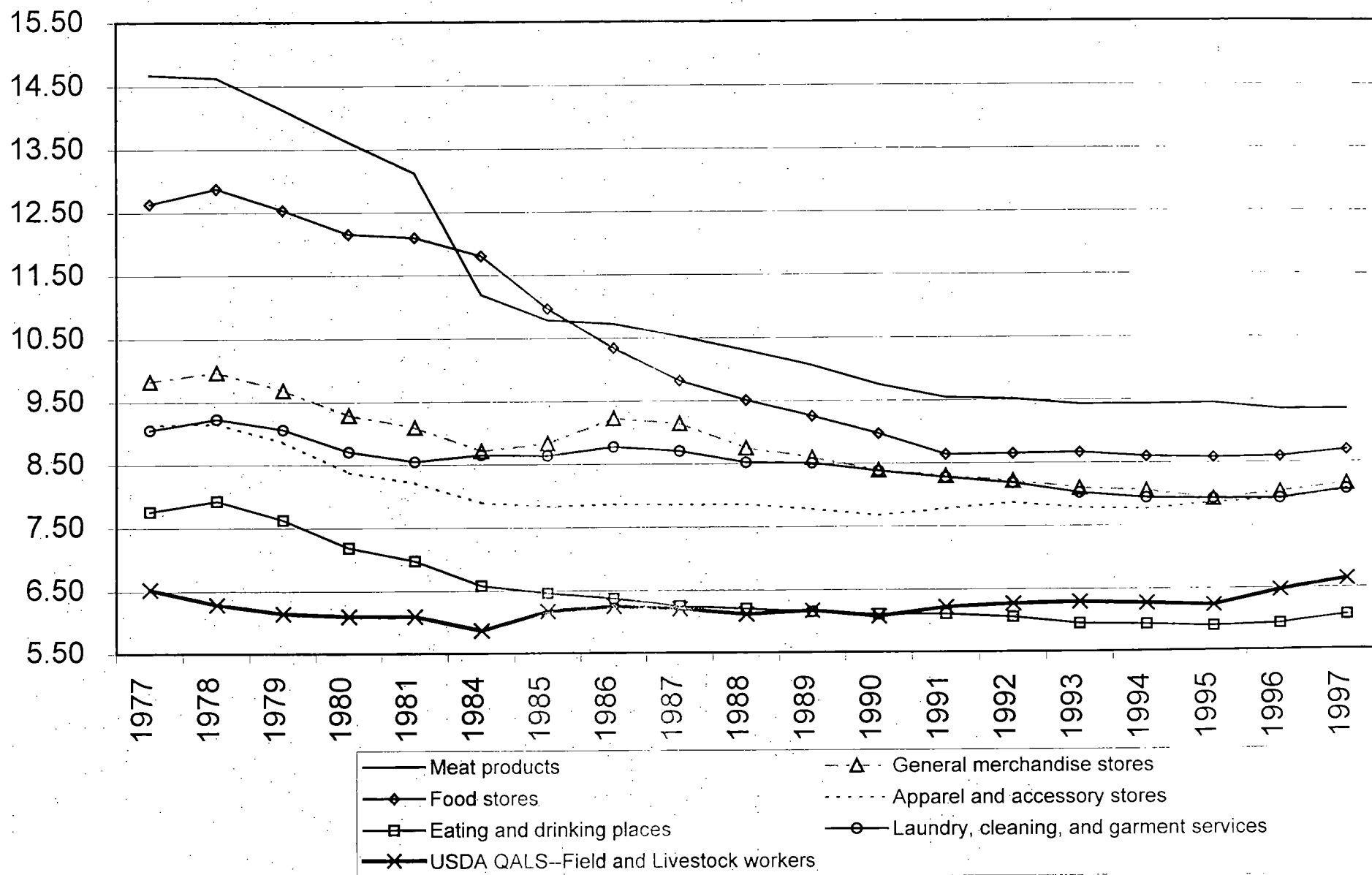


Figure 9  
**Unemployment rates**  
Seasonally adjusted

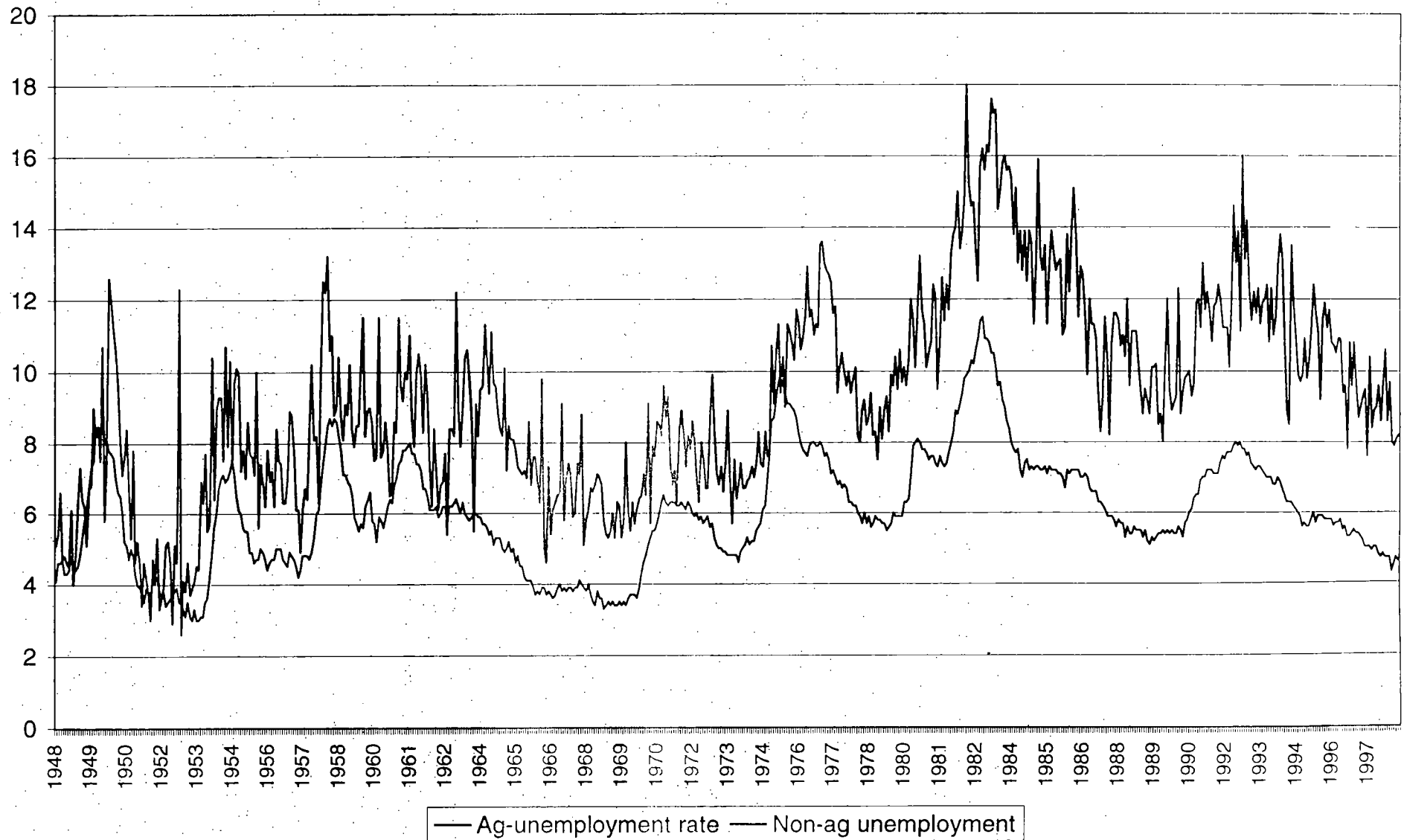


Figure 10  
Average weeks unemployed

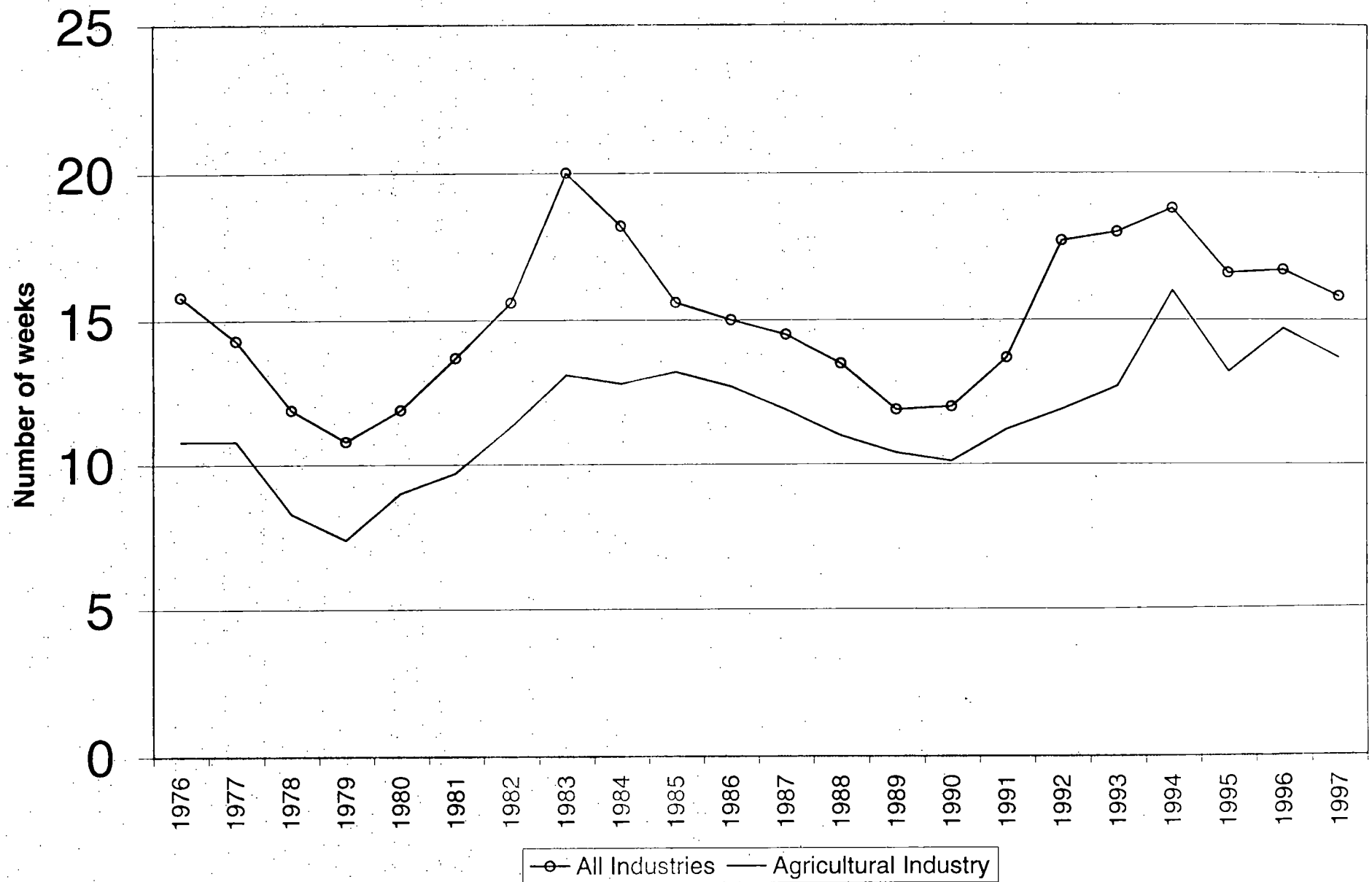
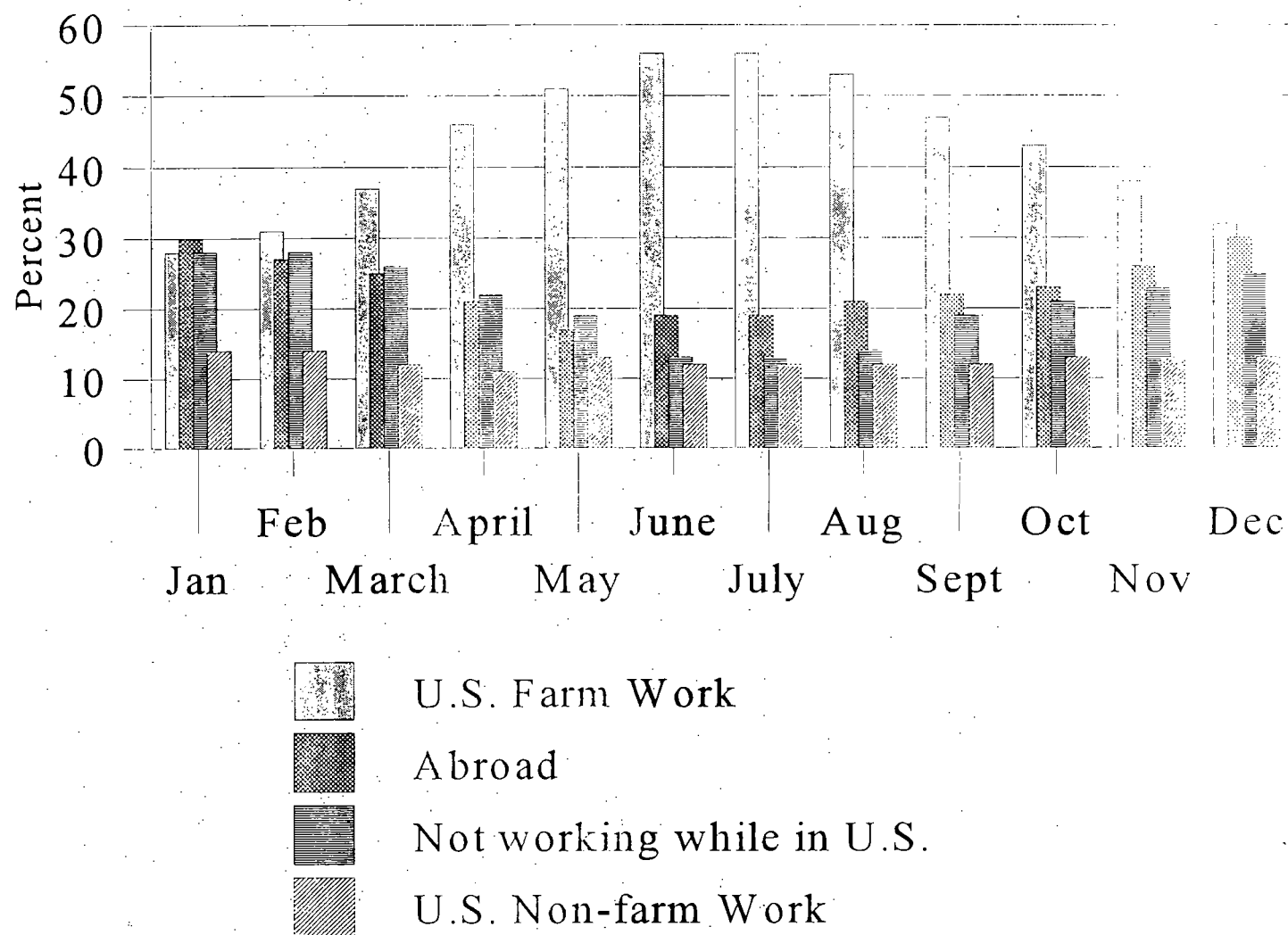


Figure 11: Percent of Farm Workers in Different Activities

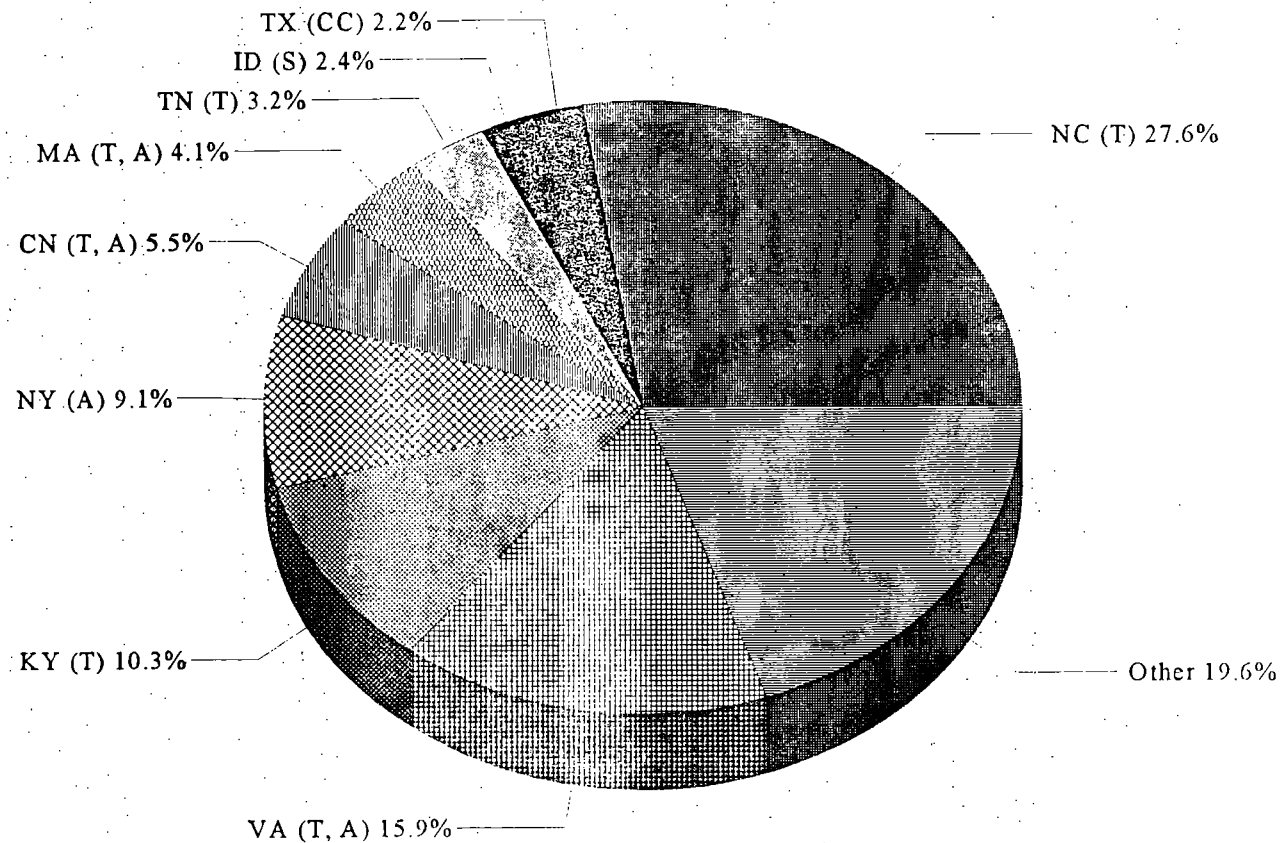
National Figures by Month



Source: Naws 1994-95 (represents activities from Oct. 1994-Sept. 1995)

Figure 12: Principal H-2A States and Crops

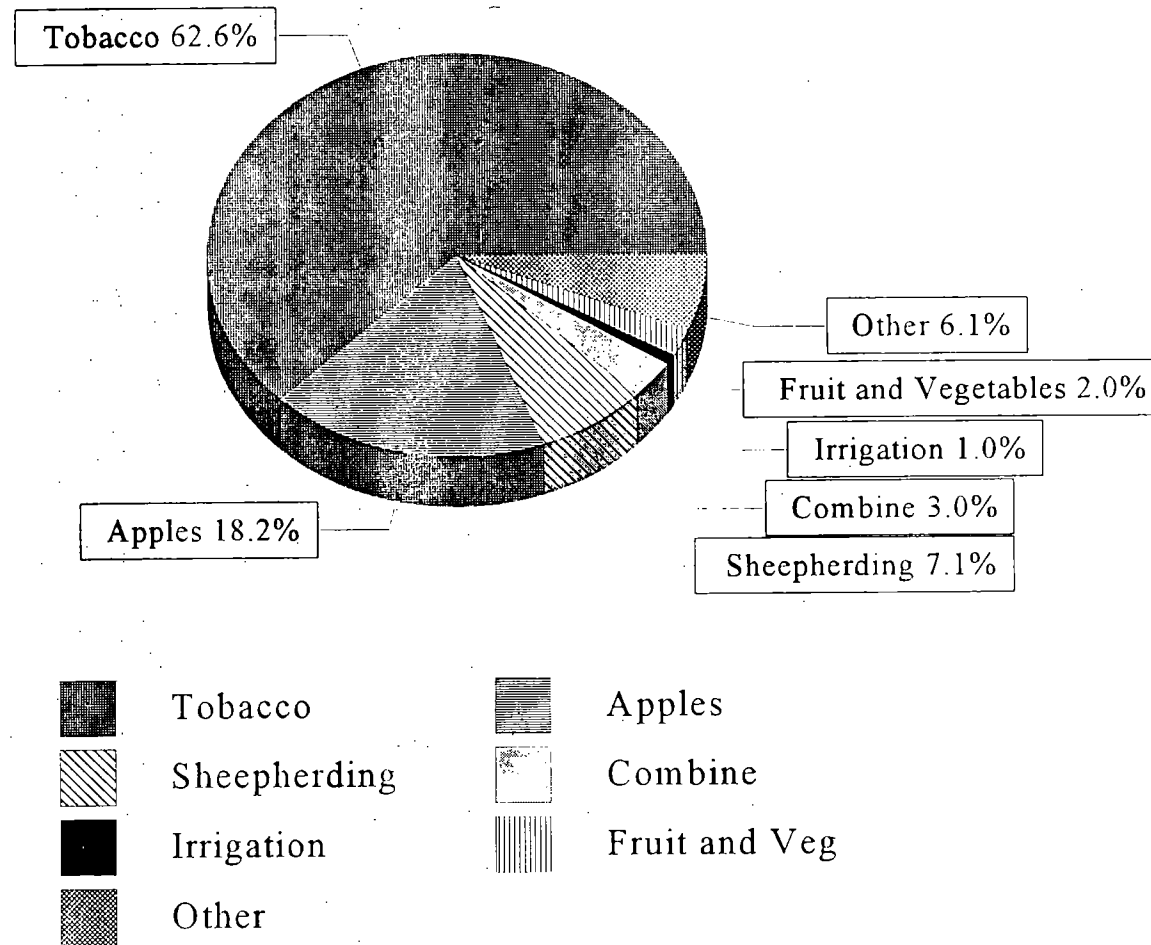
9 States Have 80% of H-2A Activity



T= Tobacco, A=Apples, S=Sheep, CC=Cust. Combine  
18,766 Positions Certified in these States of 23,352 Total in 1997

Figure 13: 1997 H-2A

Major Crop Activity



23,352 Positions Certified in 1997

November 17, 1998

## **Discussion of Options for Reforming the Wage Required of H-2A Employers**

### Background

Under the current program, growers who employ H-2A workers are required to pay their workers the higher of the prevailing wage (determined by the average wage for the crop and task in the local area), the federal, state or local minimum wage or an "adverse effect wage rate" (AEWR) (equal to the average regionwide (or statewide for CA and FL) agricultural wage rate). Because foreign workers can sometimes dominate a local labor market, this wage depression is often reflected in the local prevailing wage. The AEWR partially corrects for this depressive effect by measuring farmworker wages on a statewide basis -- thus dissipating the impact of foreign workers on the wage.

Under the Wyden-Graham bill, the worker is required to be paid either the prevailing wage or the AEWR (capped at 105% of the prevailing wage). This cap is not likely set high enough to compensate for the depression of wages in areas where there is a heavy reliance on foreign workers.

Wages are just one piece of the grower's total compensation calculation (which also includes housing, transportation and taxes). The impact of wages on the total compensation package varies by area of the country and by crop; e.g., for growers who do not now provide housing, the program's housing requirement is more significant. However, when considering wage levels generally, we should keep three things in mind: (1) that we want to set the wage high enough to continue to attract U.S. farmworkers; (2) that we don't want the wage to be prohibitively high for growers; and (3) that whatever the wage required in the H-2A program, it will become a wage ceiling for U.S. workers (because a domestic worker who demands more than the required wage is considered "unavailable" under the current system).

### Potential Options

The following represent three (conceptual) options for changing the calculation of the wage H-2A employers are required to pay their workers; the fourth option is to maintain current law:

**1. Eliminate use of the AEWR and base the required wage on some percentile in the distribution of the prevailing wage.**

We would consider eliminating use of the AEWR because as a statewide average of all agricultural products, it does not accurately reflect the wages for a particular crop in a particular area. One alternative would be to rely solely on some upper percentile in the distribution of the prevailing wage (which is based on surveys by crop, task, and area). The reason for using an "upper" percentile is to "adjust" for the potentially depressing effect of undocumented workers on wages and to prevent a low wage ceiling from developing for U.S. workers.

The advantage of this approach is that it would rely on wage measures that more accurately reflect the wages paid by crop, task, and area.

However, there are also many disadvantages. For example, it would be extremely costly for DOL to calculate prevailing wages nationally (currently DOL only conducts the surveys on which the prevailing wage is based in areas in which there are H-2A growers). And, any chosen percentile would be arbitrary. Finally, there is no guarantee that the distributions of wages would allow for a “clean” calculation of a particular percentile (i.e., there is no guarantee that the distributions would be bell-shaped).

**2. Eliminate use of the AEW and base the required wage on the wages that U.S. workers could earn in other low-skilled jobs (that are not dominated by undocumented workers).**

As noted above, exclusive reliance on the prevailing wage has several problems, including, 1) it would be expensive to conduct the survey nationwide for all potential H-2A employers and 2) if the H-2A program were to become large enough, the prevailing wage would become an effective wage ceiling for U.S. workers. However, basing the required wage on the wages paid in other low-skilled occupations would be both less expensive (many surveys contain wage information on other occupations and industries) and it would allow the wages paid through the H-2A program to rise and fall with the rest of the labor market for low-skilled workers.

The disadvantage of this approach is that it would be difficult to implement (how would we identify the jobs that are not dominated by undocumented workers?); and it is not clear that the required wage could be calculated at a more disaggregated level than the AEW.

**3. Eliminate use of the AEW and base the required wage on the wages that U.S. farm workers earn on other (nonagricultural) jobs throughout the year.**

The *National Agricultural Workers Survey* (an annual survey of 2,500 workers) asks farm workers about their employment on other (non-agricultural) jobs throughout the year. The wages on these jobs could potentially provide the basis for the required wage for the H-2A program. This approach contains many of the same advantages as option 2, above. However, 1) the wages on the non-agricultural jobs tend to be lower than those on the agricultural job; 2) data on non-agricultural wages exist for only about 300 agricultural workers per year which would lead to an extremely imprecise measure of these wages; and 3) because of the small sample size the required wage could not be calculated at a more disaggregated level than the AEW.

**4. Do not change the wage calculation.**

According to some knowledgeable sources, wages are not often cited as reasons why growers do not use the H-2A program. Therefore, we may not need to reform calculation of the minimum required wage rate as part of our reform package. The advantage of not

changing the calculation is that it would allow us to focus on more controversial and important aspects of the program rather than developing an ad-hoc “fix” to what may not be a big problem. In addition, although it appears clumsy, the AEWR combined with the prevailing wage is a practical solution to a difficult problem (calculating the wage that U.S. workers would earn if there were no undocumented workers).

The disadvantage is that because the Wyden-Graham bill changes the calculation of the required wage, we may have to offer an alternative in order for our reform alternative to be credible.

## 15. **Mechanization Adjustment Assistance**

If the cost of employing H-2A workers or illegal workers rises (or even remains constant), growers will have increased incentive to adopt mechanized farm equipment or other labor saving technologies. The transition from a farm economy based on inexpensive short-term labor to one based on greater use of mechanization (and higher paid, longer-term labor) will not be costless. The government could play a valuable role in lessening the cost of this transition for a number of farm sector participants including small farmers, farms run by elderly operators, and farmworkers. Government assistance could include tax incentives for mechanization, mechanization training programs for farmworkers, and mechanization training programs for growers.