



Statement of the American Farm Bureau Federation

TO THE
HOUSE SUBCOMMITTEE ON IMMIGRATION POLICY AND
ENFORCEMENT
HOUSE COMMITTEE ON THE JUDICIARY
HEARING REGARDING “THE H-2A VISA PROGRAM: MEETING THE
GROWING NEEDS OF AMERICAN AGRICULTURE?”

April 13, 2011

The American Farm Bureau Federation (AFBF), the nation's largest general farm organization, submits this testimony to the subcommittee and requests that it be included in the record of this hearing. AFBF represents farmers and ranchers in all 50 states and Puerto Rico, including growers who currently utilize the program and suffer from its deficiencies; others who would like to avail themselves of H-2A but cannot due to regulatory or statutory obstacles; and still others who, while eligible, cannot take on the risks and costs inherent in the program because it would jeopardize their ability to harvest and market their crops.

We will share with the subcommittee some examples of how the program fails to work, but at the outset we urge the committee to review and reform the H-2A program without delay. The reason is simple. H-2A, if properly implemented and administered, would give many farmers far greater assurance than they have today that their workers are legally authorized to work in the United States.

Congress, 25 years ago, gave farm employers two conflicting instructions. First, they made it unlawful for them to hire or employ individuals not authorized to work in the United States. At the same time, they told employers that they could not question an applicant for work about the worker's work eligibility status, nor could they question the documents that an employee proffered in the I-9 process. This legal obligation is explicitly spelled out on the website of the U.S. Department of Agriculture (USDA), where it states:

*Employers with four or more employees are prohibited from committing document abuse. Document abuse occurs when an employer requests an employee or applicant to produce a specific document, or more or different documents than are required, to establish employment eligibility or rejects valid documents that reasonably appear genuine on their face. Employers must accept any of the documents or combination of documents listed on the back of the INS Form I-9 to establish identity and employment eligibility. Examples of document abuse include requiring immigrants to present a specific document, such as a "green card" or any INS-ISSUED document, upon hire to establish employment eligibility, and refusing to accept tendered documents that appear reasonable on their face and that relate to the individual. U.S. citizens and all immigrants with employment authorization are protected from document abuse.*¹

So while many point the finger at farmers for hiring workers with fraudulent documents, in fact they are only doing what Congress has told them to do. As a result, we are now in a situation in which a significant number of agricultural workers lack work authorization. That is not the fault of farmers and ranchers. It is the fault of the system under which they have been forced to operate.

AFBF could support efforts to reform the work verification system under certain conditions. First, such increased obligations must not come at the expense of America's farmers and ranchers, nor should they jeopardize U.S. agricultural production. If and when such reforms are instituted, they should be undertaken judiciously and implemented carefully. AFBF released a report in January 2006 that underscored how important this matter is. Our economists estimated

¹ <http://www.usda.gov/oce/labor/ina.htm>

at that time that \$5-\$9 billion in agricultural production would be put in jeopardy if Congress does not resolve this matter correctly. Due to the rising value of fruit and vegetable production in particular, that figure is at least 20 percent higher today. Similarly, net farm income would decline by as much as \$3 billion. A copy of that report is included with this statement and we request that it also be included in the record of this hearing.

As many people know, agricultural production is unique. Our “manufacturing system” is subject to the vicissitudes of weather, soil conditions and other factors. Our finished product is perishable. For long periods, we may need only a handful of workers to tend the fields or orchards. During harvest, the demand for labor can increase exponentially. A critical factor is having sufficient labor available at a time and day of need and at a cost that keeps the product competitive in the market. For some sectors, such as fruits and vegetables, farmers may require a very large number of workers for only a short period of time. And while there is clearly skill required in hand-picking fruits and vegetables, it is also a fact that farm work is often physically demanding, can require long hours over brief periods, and, for harvesting crops in the field, does not require much formal education. On top of that, farm wages have been rising. According to a recent publication by the National Agricultural Statistics Service² the average wage for hired workers in January of this year was \$11.29 per hour, an increase of 21 cents from a year earlier. This figure is significantly above the federal minimum wage of \$7.25 an hour.

More importantly, however, this wage is well above what individuals in Mexico receive for the same occupation. USDA discussed the wide disparity between agricultural wages in Mexico and the U.S. in a report prepared by its Economic Research Service (ERS) several years ago. According to the ERS:

*The wage differential between Mexican and U.S. agriculture is huge. The daily wage for 8 hours of farm work in Mexico is about \$3.60 in U.S. currency, compared with the U.S. average of \$66.32 in October 2000. However, these figures overstate the real wage differential between Mexican and U.S. agriculture because the cost of living in Mexico is lower than in the U.S.*³

Thus, for a worker in Mexico, work in U.S. fields provides an enormous economic opportunity. This fact should put to rest the false notion advanced by some that farmers and ranchers are to blame for the number of undocumented workers in our sectors. Far too often, people say that if farmers would only pay a higher wage, U.S. citizens would be attracted to the jobs, and we would not have the problem of unauthorized workers. Given the disparity between U.S. and Mexican wages, it is hard to see how raising wages would eliminate the problem.

Much more importantly, however, is the simple fact of economic life. If producers were forced to pay wages higher than the economic system can bear in order to achieve some social or civic goal – for instance, to remedy the problems of a broken immigration system – simple economics would determine the outcome: many either would go out of business, change their crops or otherwise alter their mode of operation. Fruit and vegetable imports from South and Central

² <http://usda.mannlib.cornell.edu/usda/current/FarmLabo/FarmLabo-02-17-2011.pdf>

³ <http://www.ers.usda.gov/publications/AgOutlook/Jan2001/AO278G.pdf>

America have been rising for decades. Unless farmers can produce their crops and remain economically competitive, they will not stay in business. It is that simple.

Frankly, there is nothing growers want more than to stay competitive. And they can be. But the challenge is getting harder day by day. With more and more states adopting E-Verify requirements, and the prospects of federal legislation also mandating E-Verify, it is more imperative than ever that growers know that they have access to a legal, reliable, affordable supply of workers. An ideal solution, in our view, must take into account and accommodate the large number of existing agricultural workers who lack proper work status, assuring that they can transition into proper work status in the U.S. Were E-Verify mandated for agricultural employers, the impact in the near term could well be devastating if not coupled with provisions to accommodate existing workers. In the long run, growers will need a guest worker program that actually does what it is supposed to do – provide growers with a source of legal workers to accommodate their labor needs when U.S. workers are not available. Whether it is H-2A or something else, growers need to know that they have access to workers who will tend and harvest their crops and who are authorized to work in the U.S. The system we have today simply does not meet that need.

This problem is not new. Fifteen years ago, in the 104th Congress, agricultural employers pushed hard for amendments offered on the floor of the House to reform H-2A. Similar legislation was introduced in the Senate. In every Congress since, legislation has been introduced to reform the H-2A program. The fact is, farmers and ranchers want and need a workable H-2A program. Contrary to the claims of some, we are not looking to exploit workers who come here illegally. We are not trying to “game” the system by paying lower wages. Farmers and ranchers today are obeying the law. That is what has gotten us in trouble. It’s the law that needs to change. And now more than ever, the H-2A program needs to be fixed.

Following are some graphic examples of how broken the system is:

- In late 2010, a number of H-2A employers in New York encountered difficulties with Jamaican H-2A workers who have a long history working in that area. Those problems have carried into the application process of 2011, and growers began experiencing problems this past January. Some of these Jamaican workers have come to the same U.S. farms each season for years. U.S. Citizenship and Immigration Services (USCIS) is delaying H-2A applications by requesting that farmers supply additional information from the foreign Jamaican recruiters stating that the Jamaican Central Labour Organization does not require payments or deductions from wages from workers as a condition of employment. The statements that are required from the recruitment agency must be signed and completed by the agency itself; however, the employer effectively turns into a functionary for two governments.
- In Washington state, some growers have recently submitted applications for workers in H-2A and have included language to the effect that the applicant affirms that he is authorized to work. Government officials are insisting that this language be taken out of the application.

- In Tennessee, the Department of Labor (DOL) has been instructing growers to remove a provision in the H-2A contract that a worker waives his right to sue, in exchange for which he has the right to submit any grievances to arbitration. This provision has been used in the past, yet, DOL now is apparently refusing to recognize it.
- In the 2008 regulatory revisions to H-2A, state workforce agencies (SWAs) were required to determine the work authorization status of the individuals it refers to growers recruiting for the H-2A program. DOL has eliminated this simple safeguard. In one instance, a grower who entered the H-2A program after an I-9 audit received a list of names from the state SWA that included individuals the Department of Homeland Security had informed the employer were not authorized to work, putting the employer in the unusual circumstance of having one government office telling him to do something another government office has instructed him not to do.
- Earlier this year, a nursery grower filed an application with a date of need (DON) of Feb. 11. The application was denied by the state but approved on appeal by DOL, and visas were received by the grower on Feb. 8. The DON was pushed back to Feb. 15. The employer followed all pertinent guidelines and began on Feb. 8 to make a reservation for interviews at the U.S. Consulate in Mexico for a border crossing on Feb. 14 or 15, using the reservation system stipulated by the government. That system, operated by a private contractor, failed to reply and it was only after intervention by a U.S. senator with the U.S. consulate in Nogales that the private contractor finally called – on Feb. 24, more than two weeks after the initial contact was made. Furthermore, the private contractor refused to provide contact information and stated that no one was available to be in contact. The workers finally arrived on Friday, March 4 and began work on March 7 – nearly 3 weeks after they were needed at a cost of more than \$3,000 per worker.
- In Arizona, there has been a long history of individuals crossing the border daily or weekly to work in the fields. There is no prevailing practice of growers providing housing or transportation to such commuters, but H-2A lacks the flexibility to accommodate these needs.
- Since 1986, the department has provided shepherders the ability to utilize H-2A by adapting the program for the special needs of that sector while denying such treatment to other sectors (like dairy and packing and processing). The previous administration reviewed this arrangement, which has bipartisan support, and kept it intact but failed to extend it to other parts of agriculture, which require it as well.
- One state which previously had screened domestic referrals, forwarding applications to employers, no longer does so, and farmers now have to read entire job descriptions over the phone to prospective applicants.
- Some employers in the past had performed criminal background checks but the DOL is now rejecting any applications with this provision.

- Some H-2A employers are being denied the ability to request prior experience with applicants, even though in the past this was commonly done.
- Under new training requirements, some workers can possibly be employed for five days without actually performing any work. One farmer has reported that this has cost his operation \$61,000.
- The DOL appears to have revised its interpretation of the 50 percent rule by now requiring H-2A employers to consider for employment all workers who present themselves for employment during the first half of the contract (not simply the number of workers certified in the application). Given the high rate of attrition of SWA referrals, this could expose a farmer to a potentially unlimited amount of applicants.
- In one state, use of the H-2A program adds greater than \$4.00 per hour to the cost of each employee, including costs for application and transportation of the worker, housing, transportation from housing and other program fees.
- The adverse effect wage rate is not based on real wages paid in the market but is a formula devised years ago in an effort to counter supposed wage suppression by the presence of undocumented workers. It discourages employers from using the program.
- Legal activists have long targeted H-2A employers⁴ in lawsuits. Currently, one lawsuit is pending in Washington state against a farmer and agent alleging – although there is no regulatory requirement to do so – that they must provide a copy of the H-2A contract to all employees working for the employer when the H-2A application is filed. Legal services attorneys have filed a class action lawsuit.

We commend the subcommittee for convening this hearing and we strongly urge you to consider legislative reforms that truly improve the program. At a minimum, we would urge legislative reforms in the H-2A program that would:

- Eliminate bureaucratic delays and uncertainty so that farmers and ranchers have reasonable assurance that they will have the workers they need when they need them.
- Provide an opportunity for all sectors of agriculture to participate in the program. This is particularly important for sectors like dairy and others that employ agricultural workers year-round. It also is critical that border states like Arizona, where workers have traditionally commuted to work, have an opportunity to utilize H-2A.

⁴ Litigation abuse of the program was amply documented in *Harvest of Injustice: Legal Services vs. the Farmer* by Rael Jean Isaac (1996)

- Eliminate unnecessarily burdensome provisions (such as requirements for housing and transportation; mandating a wage that does not reflect actual prevailing market wages; and imposing a 50 percent rule) that make the program unattractive, unwieldy and uneconomic.
- Assure that workers' rights and employers' rights are fairly and equitably balanced. The program has a long history of litigation that has done little more than discourage participation in the program without truly protecting workers.
- Examine the possibility of additional changes, such as a longer, 3-year visa that is renewable multiple times.

These are just a few of the most important changes that should be made to the H-2A program. While substantive reform of H-2A is a critical component of any overall legislative approach, we also cannot minimize the importance to agriculture in the near term of resolving the status of many existing workers. Should E-Verify be mandated for agriculture without addressing this fundamental matter, the results could be truly devastating. We stand ready to work with the committee on these and all issues so that agricultural production in the United States is not harmed, either directly or indirectly, by any legislation adopted by Congress.

We appreciate the opportunity to submit this testimony to the subcommittee in its examination of the H-2A program.