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UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

Hearing on
"Workforce Challenges Facing the Agriculture Industry"

September 13, 2011

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

It has been a little more than three years since I last testified before the Education and the Workforce Committee. Three years ago, I was here as an Assistant Secretary of Labor to testify about the temporary worker programs overseen by the Department of Labor. Today, I appear before the subcommittee as an attorney in private practice to discuss whether the H-2A temporary worker program is working as intended by Congress.

In the intervening years since I last appeared before the Committee, farmers have been subject to three different H-2A regulatory regimes. The Department even attempted a fourth regulatory regime in 2009, but that effort was enjoined by a federal judge because the Department promulgated the regulations in violation of the Administrative Procedure Act. Throughout all of this change and turmoil in the H-2A program, American farmers have maintained a fairly steady need for seasonal labor to help plant, tend, and harvest crops. Even though technology has increasingly become more and more important in our everyday lives, there remain scores of agricultural products that cannot be planted, tended, and harvested by machines. Thus, labor intensive agriculture remains an important and necessary part of the production of our domestic food supply.

In addition to the burdensome regulatory changes to the H-2A program that have been implemented in the past two years, the Department has also undertaken what most would say is an aggressive – and perhaps even hostile - approach towards farmers who participate in the H-2A program. And the Department's approach is routinely carried out by ignoring the clear congressional intent and statutory language describing how the H-2A program is supposed to operate. Unfortunately, rather than helping facilitate timely access to seasonal labor while ensuring appropriate worker protections, the Department instead regularly subjects farmers to a bureaucratic and regulatory morass that has left the program in near total disarray.

For more than a century, the U.S. has utilized guestworkers to come temporarily to this country to help plant and harvest our crops. Today, just as in years past, farmworkers come to work for just a few months and then to return home to their families. In those

few months, these farmworkers typically earn ten or twenty times the amount of money they can earn in their home countries. In recognition of America's persistent need for agricultural labor, the H-2A program was created by Congress to provide farmers with a reliable means to hire legal temporary workers on an expedited basis when there are insufficient numbers of U.S. workers willing or able to accept the jobs. But this simple concept - and the congressional intent in creating the program - has been consistently hindered by bureaucratic inefficiencies since the Department of Labor first issued H-2A regulations in 1987.

Indeed, as a result of the Department ignoring congressional intent and subjecting farmers to interminable application processing delays, Congress amended the H-2A governing statute in 1999, a little more than a decade after it was passed, to require the Department to issue decisions on farmers' applications even more quickly: by no fewer than 30 days before the employer needs the workers. But within just a few years, it was again abundantly clear that the Department regularly failed to meet its statutory obligation to administer the program in a timely manner.

As a result, rather than waiting for Congress to mandate changes to the program, in 2008, the Department itself proposed a series of regulatory reforms to modernize the H-2A program to ensure it operated consistent with congressional intent. The Department's reforms, which became effective in January of 2009, addressed many of the longstanding problems with the program that had been repeatedly discussed over the years by farmers and farmworker advocates alike, including the unnecessarily duplicative and bureaucratic application process and the artificially-high mandated wage rates.

The Department's 2008 reforms also included important worker protections, including new audit authority and increased penalties for substantial and repeat violations of program requirements. In addition, in recognition of legislation circulating at the time, the Department even adopted in the regulations some elements of those legislative proposals, such as the attestation-based application process that was included in the so-called AgJobs bill. Many other reforms were incorporated at the suggestion of groups such as the National Council of Agriculture Employers, the American Farm Bureau Federation, Farmworker Justice, as well as numerous other associations and individuals.

To be sure, the regulatory reforms did not deliver everything that every stakeholder wished to see from the H-2A program. After all, some complaints about the program arise from the statutory language, which the Department cannot change. But overall, the 2008 regulatory reforms provided important and balanced improvements to program.

Those reforms, however, were in effect for only a few weeks before the current Administration embarked on a concerted and sustained effort to reverse them. The Department's first effort to rescind the 2008 reforms was enjoined by a federal judge in the summer of 2009. Then, later in 2009, the Department proposed drastic changes in yet another complete rewrite of the H-2A program regulations. Despite protests from farmers that the Department's changes would re-impose the outdated bureaucratic processes that had long plagued the program, and would lead to increased costs, delays

and uncertainty for farmers, the Department nonetheless finalized those changes in March of 2010.

To fulfill its mission in administering the H-2A program, the Department is to provide farmers with timely access to labor and to review the farmer's applications to ensure that agricultural workers are being properly recruited and paid, so that the employment of foreign temporary workers does not result in an adverse effect on the wages and working conditions of similarly employed U.S. workers. Today, more than a year after the current Administration's H-2A rules went into effect, it is clear that mission is being perverted by questionable administrative practices that routinely impose substantial delays and added costs to employers, while delivering few, if any, measurable benefits. The program is so riddled with inconsistent and arbitrary decisions by state and federal agencies, and is so prone to delays that many farmers claim the program is worse now than it was before the 2008 reforms. As a result, many employers simply turn to other sources of labor to plant, tend, and harvest their crops.

The fact that the Department's administration of the program has employers turning to other sources of labor to meet their needs is an unfortunate, and some may say ironic, outcome of the Department's current misguided approach. While the Department no doubt would claim that its tactics, which frequently include unreasonable application processing delays, are all part of an effort to ensure U.S. workers are not adversely affected, the Department's efforts are, in fact, more likely contributing to the very adverse effect they claim to be attempting to prevent.

As the Department noted in its 2008 H-2A rulemaking, it is the workers who are illegally present in the U.S. that pose the greatest threat to the wages and working conditions of U.S. farmworkers. The Department of Agriculture estimates that there are more than 1.1 million hired farm workers in the U.S. each year. The Department of Labor's own National Agricultural Workers Surveys reveals that more than 50 percent of farm workers admit to being in the country illegally. Although, as the Department noted in the 2008 rulemaking, advocates for farm workers have estimated that the number who are illegally present in the U.S. is actually 70 percent or even more. In fiscal year 2010, the State Department reports that fewer than 56,000 H-2A visas were issued, which means that there are well in excess of ten times more illegal workers performing agricultural labor in the U.S. than there are legal H-2A workers.

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

This shortage has existed for decades and the demographic changes in rural America, as well as in the overall American workforce, show no signs of abating. American workers are not lining up to take farm jobs even in times of relatively high unemployment. Yet, despite the scarcity of U.S. farm workers, there are more mouths to feed in this country

than ever before. If our nation's farmers do not have reliable and timely access to seasonal labor to plant and harvest crops, then our competitors abroad will increasingly meet the food demands of the American consumer.

Curiously, the Department maintains the position that there are plenty of U.S. farmworkers ready to perform this work when the facts clearly demonstrate the opposite is true. At the same time, the Department is actively spending hundreds of millions of dollars providing the already limited supply of U.S. farmworkers with training to take other jobs in the economy. In the Department's Fiscal Year 2012 budget request, the Department proposes to spend more than $80 million on its Farmworker Jobs Training Program.

Given how large and complex the federal government has become, it might not be too surprising to discover that the federal government would spend hundreds of millions of dollars in the simultaneous pursuit of directly contradictory goals. But in this case, it is the very same office within the Department of Labor - the Employment and Training Administration - that is simultaneously pursuing these contradictory goals. Although recently, it would be difficult to argue that the Department is actively pursuing the goal of helping farmers meet their labor needs. Most would not argue with reasonable efforts to assist U.S. farmworkers in moving up the economic ladder. But when the Department spends hundreds of millions of dollars actively trying to reduce the supply of domestic farmworkers while simultaneously frustrating farmers' efforts to hire legal foreign temporary farmworkers, it would be appropriate to consider whether a more rational and balanced approach would better serve the nation's interest.

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

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

There are countless examples of the Department's recent troubled administration of the H-2A program. To cite just a few - the Department routinely imposes on farmers requirements that do not exist in statute or regulation. They also reject applications for unsupported or outright illegitimate reasons. They adopt positions about the program that are directly contrary to the plain language of the statute. They issue contradictory decisions when presented with identical facts. And particularly troubling is their refusal to respond to even basic inquiries from farmers requesting clarification or guidance about the program's complex requirements. The Department even disabled an email account previously established for the specific purpose of collecting questions from employers seeking guidance about how to comply with various program requirements.

Some of the most egregious examples of needless delay and questionable decisions by the Department involve instances in which State Workforce Agencies and the Department disagree about the requirements of the program. It is not uncommon for the State to approve an employer's H-2A Job Order as being in compliance with the program requirements, but then days or weeks later the Department of Labor rejects the application claiming the Job Order is not in compliance. Of course, in the midst of all the duplicative contradictory reviews and bureaucratic infighting that often takes weeks to resolve, an employer's application is delayed even more, and the timely planting or harvesting of crops is jeopardized.

As I previously noted, the Department frequently delays H-2A applications by requiring nonsubstantive modifications to the application paperwork. Once the employer agrees to make the changes, the application is typically approved as meeting all program requirements. But all too often that is not the end of the delays. Many of these farmers find that weeks later the Department has decided that the application does not meet the program requirements after all, and demands even further changes to the application. This costly and time consuming process plainly conflicts with the statutory requirements governing the program, yet the Department persists. The Department also routinely fails to advise employers of their due process rights to appeal these decisions, as required by the statute.

Unfortunately, this Kafkaesque application and review process is all too real for nearly every farmer that participates in the H-2A program. Faced with this mind-numbing process, farmers, who by definition have a pressing need for workers to perform time-sensitive agricultural tasks, are left with few options but to submit to the Department's arbitrary demands if they are to have any hope of securing workers in a timely fashion. But over the past year farmers have increasingly begun to exercise their rights and have begun to resist these bureaucratic abuses.

Over the past year, the Department's questionable approach to the H-2A program has led to an unprecedented level of litigation - both before administrative law judges and in federal court. One association of growers was actually forced to file a federal lawsuit just to get the Department to respond to their repeated requests for an explanation of specific regulatory provisions, and to resolve the Department's inconsistent application of the program requirements to farmers.

This year has also seen a record number of appeals filed by farmers with the Department of Labor's Office of Administrative Law Judges challenging the Department's decisions in the H-2A program. So far in FY 2011, more than 440 temporary labor certification cases have been heard by the Department's ALJs. That is more than twice the number of appeals filed during the same period the year before. In FY 2010 there were just under 160 appeals; in FY 2009 there were about 65; and in FY 2008 there just under 50. Amazingly, in just the last two years, administrative appeals of Department's decisions have increased by some 700%.

Even more stunning than the number of appeals, however, is the fact that the Department's position in these appeals overwhelmingly fails to withstand scrutiny. By last count, the Department had prevailed in fewer than 10 percent of these cases. In the others, the judge found in favor of the employer and/or the case was remanded back to the Department for approval or certification. Notably, the Department often asks the judge to remand a case as a way of avoiding an adverse decision when it is clear that there was no legitimate basis for the Department to reject the employer's application in the first place.

Although this means that the employer prevails, it requires the employer to endure additional delays, as well as expend additional time and money to file an appeal that would not have been necessary if the Department had simply complied with the statutory standards established by Congress. Unfortunately, this appeals process is becoming a regular step in the application process because of the Department's arbitrary decision-making and general lack of common sense, as the judges themselves have noted.

In an opinion[*] earlier this year, an Administrative Law Judge noted that the Department's refusal to reconsider a decision that was obviously erroneous, and that necessitated the employer filing an appeal, was "a patently inefficient and unnecessarily expensive way to proceed" and that requiring the employer "to file a request for administrative review . . . seems to reflect a breakdown in common sense." In addition, the judge admonished the Department, stating "I implore the Office of Foreign Labor Certification ("OFLC") to review this policy . . . and consider the costs it imposes on employers, the administrative review process, and the public coffers." Since that opinion was issued seven months ago, however, more than 150 additional appeals have been filed challenging the Department's decisions.

It is clear that there are substantial problems with the Department's administration of the H-2A program. Fortunately, Congress has taken notice of the Department's inability to rationally manage the program. Remarkably, this is the third congressional hearing this year to focus on the agricultural guestworker program. In addition, in just the past few months, several agricultural guestworker reform bills have been introduced and others are reportedly in development. Some are narrow bills that would correct specific problems, while others would completely overhaul the current program. In the latter category are

[*] *Virginia Agricultural Growers Association, Inc.*, 2011-TLC-00273 (Feb. 11, 2011)

the American Agricultural Specialty Act (H.R.2847) introduced by Representative Lamar Smith in the House, and the HARVEST Act (S.1384) introduced by Senator Saxby Chambliss in the Senate. Significantly, each of these bills has at least one major element in common: they vest the U.S. Department of Agriculture with the authority to operate the nation's agricultural guestworker program.

Given that the Department of Labor routinely disregards the clear intent of Congress about how the program is supposed to operate and given that the Department's inefficient administration unnecessarily drives up costs for farmers and taxpayers while providing virtually no demonstrable benefits, vesting the program operations in another federal agency seems like a reasonable proposal. If the Department of Labor is permitted to persist on its current course, it appears likely that its actions will continue to have substantial adverse effects both on U.S. workers and on the future of American agriculture.

The federal government should be pursuing policies that assist farmers in efforts to secure workers and to provide U.S. consumers with a healthy and domestically-produced food supply, rather than compounding the difficulties our farmers already face in a highly competitive global marketplace.