Testimony of Bruce Goldstein, Executive Director, Farmworker Justice
House of Representatives Education and Labor Committee
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Mr. Chairman and Members of the Committee: thank you for the opportunity to testify regarding the access of United States farmworkers to jobs at employers that use the H-2A temporary foreign agricultural guestworker program. My organization, Farmworker Justice, is a national advocacy organization for migrant and seasonal farmworkers that has sought to protect guestworkers and U.S. workers from abuses under the H-2A program and its predecessor since our founding in 1981.

My two main points are these: First, the Department of Labor is violating its obligations under the H-2A program and has announced plans that would harm workers still further. Second, there is an urgent need by agricultural workers and employers for Congress to act **now** to address immigration and labor issues in the agricultural sector by passing the AgJOBS compromise. Until Congress takes such action, it should stop the Department of Labor from finalizing its plans to change the H-2A regulations in ways that would be devastating to workers.

Here is the situation on the ground:

- There are about 2.5 million farmworkers on ranches and farms in the United States.
- The majority of farmworkers – 55% to 70% -- are undocumented. (The National Agricultural Workers Survey of the Department of Labor estimated that 53% of workers in fruits, vegetables and other crops were undocumented, but some say it is higher.)
- That means 30% to 45% of farmworkers – roughly 750,000 to 1,125,000 -- are U.S. citizens and lawful-resident immigrants performing farm work.
- The H-2A program is used by an increasing, but still small, number of employers. Perhaps 75,000 or 3% of the nation's farmworkers are now H-2A guestworkers.

Only Congress can resolve these urgent issues for several reasons:

- There is no immigration law program that allows the hundreds of thousands of hard-working undocumented farmworkers to obtain a legal immigration status. Agricultural employers have no way to help their undocumented farmworkers convert to legal status.
- Our immigration law bars an undocumented worker in the U.S. from obtaining an H-2A visa to work in the United States, even if the worker returns to his or home country first.
- Both agricultural employer trade associations and farmworker advocacy organizations agree that the H-2A guestworker program reform cannot be the sole solution to this current problem. Immigration policy must be changed.
- The Bush Administration has proposed changes to the H-2A program regulations that would decimate labor protections for U.S. and foreign workers and return us to an era of abuses we thought had ended long ago by removing protections that existed even under the old Bracero guestworker program. Congress needs to stop this from happening.

Congress Should Enact the AgJOBS Compromise

There is a compromise between labor and management, Republicans and Democrats, called AgJOBS, the Agricultural Job Opportunities, Benefits and Security Act, H.R. 341, S. 370. Congress should pass it immediately. It has broad support resulting from years of tough negotiations between the United Farm Workers and major agribusiness groups, as well as numerous members of Congress. It contains many concessions we never thought we could accept, but it's time for action. AgJOBS is fair to workers, fair to employers and would benefit the nation. AgJOBS has two parts: (1) an earned legalization program and (2) a set of changes to the H-2A program. We urge Congress to pass AgJOBS.

We also urge Congress to stop the Bush Administration from moving forwarded on the ill-advised, one-sided changes it has proposed to the H-2A program's regulations. These changes would only worsen conditions under the H-2A program for workers and poison the atmosphere for the kind of compromise that was reached in AgJOBS between farmworker advocates and agricultural employers.

The Department of Labor Fails to Enforce H-2A Program Protections

It would take too long to catalogue all the problems that U.S. workers and foreign workers face under the H-2A program. I will highlight just a few examples related to the problem of U.S. workers getting jobs at employers that want to use the H-2A program. This problem, however, is only one of many, and these examples are emblematic of widespread abuses.

The H-2A program inherently contains risks of abuses.

- First, the H-2A visa effectively restricts the foreign worker's ability to demand better, or even legal, wages and working conditions from their employers for fear of being deported or not being invited back in a following season. The H-2A worker may only work for the one employer that obtained the visa for them and must leave the country when the job ends. The worker has no right to a visa in a future year; the employer (absent a union contract) decides for whom it will request a visa. See 8 C.F.R. § 214.2(h)(v).
- Second, the poor economic circumstances of most H-2A workers cause them to be willing to accept less than what a U.S. worker will accept and less than what the law allows. Most H-2A workers are poor and come from poor nations, particularly Mexico, Guatemala, Jamaica, and Thailand.
- Third, the legal structure of the program deprives U.S. workers and foreign workers of economic power to demand better wages and working conditions. Under the H-2A program, an employer must offer at least the special minimum wage rate and benefits required by the program, but need not offer any more. 20 C.F.R. § 655.101. A U.S. or foreign worker who offers to work for 25 cents an hour above the minimum required wage can be deemed to be "unavailable" for work and substituted for a guestworker who accepts the minimum.

For these reasons, the H-2A program contains two basic protections. 8 U.S.C. § 1188(a)(1).

- The H-2A employers must seek approval from the DOL for a recruitment plan. 20 CFR § 655.102(d). They must recruit U.S. workers meaningfully through several methods, using both private-market mechanisms and the interstate job service offices. They must engage in the same kind and degree of recruitment inside the U.S. that they engage in to find foreign workers abroad. § 655.105(a), 655.103(f). Qualified U.S. workers who apply through the first half of the season must be hired under what is called the "50% rule." § 655.103(e).

- Second, the H-2A employer's job offer must contain certain minimum wages and working conditions to prevent employers from creating an artificial labor shortage. No amount of recruiting will succeed at attracting or retaining U.S. workers if the wages and working conditions are substandard or illegal.

Unfortunately, H-2A employers routinely discriminate against U.S. workers and the Department of Labor allows systematic discrimination. In fact, because the Department of Labor refuses to regulate the hiring process in the foreign countries, U.S. employers routinely discriminate on the basis of gender, age and disability. H-2A employers almost never hire women as guestworkers because they prefer young men. When employers can select *foreign* workers based on stereotypes and other prejudices to achieve the workforce they desire, they are less likely to be willing to hire U.S. workers who fall outside those stereotypes and prejudices.

Occasionally, H-2A employers admit that they engage in the very harm the law is intended to prevent. A Georgia grower of Vidalia onions told a newspaper reporter a few years ago:

> If we had a bunch of American workers, we would have to hire someone like a personnel director to deal with all the problems…The [migrants] we have now, they come and work. They do not have kids to pick up from school or take to the doctor. They do not have child support issues. They do not ask to leave early for this and that. They do not call in sick. If you say to them, today we need to work ten hours, they do not say anything. The problems with American workers are endless. [1]

Yes, the "problem" with American workers is that that they are human beings who have some economic freedom, must pay the cost of living in the United States, and even may have children to take care of. That "problem" should not disqualify them.

There are many ways employers can carry out their preference for guestworkers. The most obvious is a simple refusal to hire a US worker who manages to apply. The Department of Labor has permitted H-2A employers to hire guestworkers without requiring any meaningful recruitment. We have been reviewing H-2A applications and the recruitment plans are often limited to a phrase promising to comply with DOL's instructions or just placing an ad in a newspaper that few farmworkers read.

[1] *Chicago Tribune*, "Immigration Clash Leaves Vidalia Onion Farmers Bitter," May 28, 1998.

More subtle methods of avoiding or deterring U.S. workers include giving workers the "run around" when they try to apply for a job (e.g. by requiring a job application at inconvenient times or exhibiting a lack of willingness to hire a qualified U.S. worker who applies), imposing unusual or onerous job qualifications that deny jobs to US workers or cause them to avoid pursuing the job (like submitting a résumé, requiring extensive experience in a particular job, demanding unrealistic productivity), or unnecessarily changing the length of the season so that it no longer meshes with a migrant worker's itinerary along the migrant stream.

We offer here a few recent examples of how the Department of Labor and H-2A employers obstruct recruitment of United States workers deny jobs to U.S. workers.

The Hawaiian Queen Company: DOL Encourages Employers to Evade the Law

Recently, the US Department of Labor suggested (and persuaded) a company to alter its application to misstate the number of hours per week for several H-2A jobs. The understating of actual hours is illegal. Another impact is avoidance of the H-2A minimum work guarantee. An H-2A employer must file with its H-2A application a "job order" that states the hours it expects employees to work each week. The job order is used to recruit U.S. workers.[2]

The accurate statement of hours of work is a simple but important requirement. If the employer falsely advertises a job as having relatively few hours per week, U.S. workers may not choose to apply because they may seek full-time work that will yield greater weekly earnings. Further, workers who apply and are hired based on the false description of hours may quit because they were misled by the employer and the job's schedule may conflict with family obligations.

The statement of hours is also important to the three-fourths minimum work guarantee. An H-2A employer must offer workers at least three-fourths of the hours stated in the job offer or pay compensation for the shortfall. This longstanding obligation ensures workers a reasonable earnings opportunity. It also discourages employers from over-recruiting and then lowering their wage offers to the desperate people who came looking for work. If an employer's job is 40 hours per week for 10 weeks, or 400 hours, then the three-fourths guarantee would ordinarily entitle the worker to the opportunity to work at least 300 hours (absent an Act of God). An employer should not understate the actual number of hours the job requires in an effort to reduce the three-fourths minimum work guarantee. 20 C.F.R. § 655.102(b)(6).

In August 2007, the Hawaiian Queen Company, which raises and sells queen bees for agricultural purposes, applied for several H-2A workers for jobs on the big island of Hawaii. The company's application to the Department of Labor and the Hawaii job service stated that the workers would be employed for 50 hours per week, based on a 9-hour day, 5 days per week, and 5 hours on Saturday. On the form, it listed 40 hours per week as the basic hours and 10 hours a week of "overtime" (however, farmworkers are excluded from federal overtime pay so the wage rate was not time-and-one-half). At the H-2A minimum wage in Hawaii of $10.32 per hour, a

[2] 20 CFR §653.501(d)(2)(iii)-(iv); 20 CFR § 655.103(d), 655.104(a), 655.106(a).

50-hour week would yield $516 per week. For the full season, October 1, 2007 through July 31, 2008, about 44 weeks, a worker could expect to earn $22,704.

Through a request under the Freedom of Information Act, and a lawsuit to force responses from the Department of Labor, we obtained the application and the correspondence between the company and the Department of Labor regarding the approval of the H-2A application and the job terms. (Excerpts of the application and correspondence are in Exhibit 1.)

On August 10, 2007, a US DOL official wrote to the consulting firm that handled the H-2A application for the Hawaiian Queen Co. and suggested that she be permitted to change the company's stated number of hours for the job. She wrote, referring to the H-2A application:

> Item 10 of the ETA 750 states that 40 hours in [sic] the norm with 10 hours OT. Item 8 of the ETA 750 states 50 hours. Is there some particular reason the employer wants "to promise" the worker an extra 10 hour of work per pay period? The ¾ guarantee is more difficult to achieve at 50 hours per week required than 40 hour [sic] per week. If the employer requires 40 hours per week but offers the workers 50 hours per week, the extra 10 hours each pay period goes toward the ¾ guarantee.

The agent for the company responded by email on August 13 at 7:37 am, "please base on 40 hour work week." (See p. 29 of Exhibit 1.) The DOL official replied, "Do you want to remove the mandatory 10 hours per week OT?" The agent answered, "Please and thank you." Apparently realizing that another form (the Job Order) had to be consistent with the change made to the H-2A application, and that the 10 hours per week difference had to be accounted for by changing more than the Saturday hours, the DOL official wrote another email to the company at 8:50 am saying the following: "Hello again. It [sic] order to make Item 8 of the ETA 790 compute correctly the 9 hours should be changed to 8 with no hours showing on Sat. and Sun." The company's agent replied, "Please go ahead and make the necessary changes to the ETA 790."

The DOL official made changes on the forms submitted by the employer but did not do so consistently. Consequently the application contains contradictions. The H-2A application form (Form 750) in item 11, on the first page, was not altered and remained 7am to 4 pm, which would be 9 hours per day or 45 hours per week (not 40). The job order (Form 790) contains changes to the hours in handwriting and a pen that differs from those submitted on the original form by the employer. The number of hours per week is changed from 50 to 40 hours. The "9" for each weekday is changed to an unusual-looking "8" and the "5" hours per day on the weekends are crossed out. Item 8 in the Attachment to Form 790, was not changed and continued to state 9 hours per day, 5 days per week with 5 additional hours on the Sabbath or holidays.

Several U.S. workers expressed interest in the job. As far as they knew, the job opportunity only paid $412.80 per week, or $18,163 over the 44 weeks, which is 20% less than what the company admitted is the reality.

The H-2A official's suggestion was intended to undermine workers' right to the 3/4 minimum work guarantee. Suppose the H-2A workers who were hired averaged only 36 hours per week. DOL would take the position that the employer had offered 90% of the promised work (of 40 hours a week), which is more than the required three-fourths (75%) minimum work guarantee. If the stated work week were 50 hours, then the minimum guarantee would be 37.5 hours per week on average, and the workers would be owed compensation for 1.5 hours of work per week. DOL should reverse its action and ensure that workers receive any three-fourths guarantee compensation under the proper analysis. DOL should stop telling employers to misstate the number of hours of work.

A Tennessee Farmer/Farmworker Can't Get a Job at Local H-2A Employers

Sabrina Steele lives in Blount County, Tennessee, population 118,000; it is south of Knoxville. She has been a farmer for several years. She decided to seek work off her farm by contacting the Tennessee Career Center. She obtained information on several firms that were seeking work and had advertised with the state job service because they participate in the H-2A program or the H-2B program. She was amazed at her inability to get hired. Employers sought to dissuade her from applying for a job, refused to give her a job application, told her the job was filled despite the 50% rule that requires employers to offer qualified U.S. workers the job until half the season has elapsed, told her she'd have to work 80 hours a week, didn't accept her assertion that she could do the hard work of farming, and otherwise simply wouldn't hire her.

Her statement (Exhibit 2) and a local newspaper article, (Exhibit 3), about her unsuccessful efforts to gain a job at these employers, demonstrate that once a company decides to hire guestworkers, it often loses interest in hiring a U.S. citizen or permanent resident immigrants.

Ms. Steele was astonished at the stereotypical, discriminatory attitudes about "American workers" that she confronted. Her statement is consistent with the local newspaper's report about her efforts. The owner of a foreign labor contracting service that supplies H-2A workers in Kentucky and Tennessee said to the newspaper, "American farmers are frustrated . . .by American workers who takes [sic] jobs and then quit after a few days. This [the H-2A program] is the only way our farmers can know that they'll have a crew the next morning when they wake up." Treating all "American workers" as worthless is discriminatory, and contrary to the reality of hundreds of thousands of American farmworkers who work hard to put food on our tables for little money. That attitude also serves the interests of the labor contractors who make their money by recruiting foreign workers and make less money if a U.S. worker fills the job.

Tanimura & Antle; Laying Off U.S. Workers and Hiring H-2A Guestworkers

A large California company applied for and received approval to employ H-2A guestworkers in the lettuce harvest from November 2, 2007 to March 31, 2008. The company, Tanimura & Antle, laid off about 15 people on December 15, 2007 but gave the workers no opportunity to fill the positions that had been offered to H-2A workers. Under the H-2A program, an employer is

obligated to recruit U.S. workers actively and is expected to offer the position to former employees. Qualified U.S. workers are entitled to the job as long as they apply during the first half of the season (which would have been mid-January). Two such workers filed a complaint through the United Farm Workers stating that they inquired about other jobs at Tanimura & Antle upon being laid off in December, but were told that there were no positions. (Exh. 4, p. 2.)

After receiving notice of the complaint to the Department of Labor, Tanimura & Antle notified workers who had been laid off that they would be hired for the last month of work under the H-2A labor certification, in its fields near Yuma, Arizona and Bard, California. After the Fresno Bee ran a story about the layoff and the hiring of H-2A workers, the company agreed to offer work to the-laid off employees. However, one of the workers who was interviewed by the newspaper was told by a company official that he could not have a job due to publicly raising the issue. (Robert Rodriguez, "Laid-off worker says Salinas firm didn't try to rehire him," Fresno Bee, March 14, 2008). The United Farm Workers has filed a complaint on the worker's behalf with the U.S. Department of Labor.

The company said that any re-hired workers in Arizona would be paid $9.20 per hour and that any that were assigned to nearby Bard, California would be paid $9.72 per hour. The United Farm Workers supplemented its complaint on behalf of the workers because the wage in Arizona should have been $9.72 per hour, as the company had promised as part of the H-2A application to pay all the workers in the lettuce harvest at the applicable higher California H-2A rate. (Exh. 5 at p. 3 of H-2A application.)

The Department of Labor seemed to play no role in these developments despite its obligation to oversee the operation of the H-2A program. There are several complaints that the United Farm Workers has filed which the DOL is investigating.

Conclusion

DOL has before it ample evidence that the recruitment requirements in the H-2A program should be enforced more vigorously to reverse widespread violations of U.S. workers' rights to be recruited effectively for jobs by H-2A employers. Instead of proposing regulatory changes to weaken recruitment and enforcement, DOL should enforce the law. Congress needs to act to stop the DOL from changing the H-2A regulations. Congress also needs to pass the bipartisan labor-management compromise called AgJOBS to address the legitimate needs of workers, employers and the nation.