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H-2A AGRICULTURAL GUESTWORKERS

Status of Changes to Improve Program Services

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H-2A Agricultural Guestworkers: Status of Changes to Improve Program Services

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to contribute to the ongoing discussion regarding our nation's immigration policy and the role guestworker programs should play in that policy. Immigration is a tense and controversial subject, with the H-2A agricultural guestworker program representing some of the most passionate as well as complex aspects of this issue. The H-2A program provides a vehicle for U.S. agricultural employers to bring legal, nonimmigrant foreign workers into the United States to perform temporary seasonal agricultural work when domestic workers are unavailable. As we reported in 1997, about 15,000 workers, or less than 1 percent of the total agricultural workforce, were admitted under the H-2A program in 1996. Comparable data are not yet available for fiscal year 1999. However, the Department of Labor certified 41,827 workers in fiscal year 1999, compared with 17,557 workers in fiscal year 1996, suggesting a significant growth in the use of the program.[1]

Today, I would like to review the key findings and conclusions of our December 1997 report, in which we assessed the H-2A program's ability to meet the needs of agricultural employers while protecting U.S. and foreign agricultural workers, both in the present and if a significant number of guestworkers were to be needed in the future.[2] I will also review the steps we recommended to reduce the burden of the H-2A program on agricultural employers while better protecting domestic and H-2A workers and the progress that the cognizant agencies have made in implementing those recommendations.

In summary, we believe that the principal conclusions of our 1997 report continue to be valid. More specifically, a sudden, widespread farm labor shortage requiring the entry of large numbers of foreign workers continues

[1]In understanding the use of the H-2A program, it is necessary to distinguish between the number of worker certifications Labor approves, the number of H-2A visas the Department of States issues, and the number of workers who enter the United States with H-2A visas. Although the number of certifications Labor issues increased from 17,557 in fiscal year 1996 to 41,827 in fiscal year 1999, the Immigration and Naturalization Service (INS) does not have current figures on the number of workers imported into the United States with H-2A visas. However, if the ratio of workers who entered with H-2A visas to H-2A labor certifications has remained at its fiscal year 1997 level of about 85 percent, then the program has expanded significantly over the past several years.

[2]*H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers* (GAO/HEHS-98-20, Dec. 31, 1997). In congressional deliberations on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, concerns surfaced about whether the act's increased constraints on the entry of foreign workers into the country would result in a major, widespread shortage of farm labor to meet the needs of agriculture. As a result, the act required GAO to review the H-2A program.

to be unlikely now or in the near future, although localized shortages could emerge for specific crops or geographic areas. Although many farmworkers are not legally authorized to work in the United States, INS enforcement efforts are still unlikely to significantly reduce the aggregate number of unauthorized farm workers. While comparatively few agricultural employers seek workers through the H-2A program, those that do continue to be generally successful in obtaining workers. In 1997, we determined that poor information on H-2A program access and the involvement of many agencies in the program could result in redundant oversight and confuse employers that are considering participation and that Labor was not always processing applications in a timely manner. While Labor and INS have made progress in taking the steps we recommended to improve the program's operations, key changes remain to be implemented, particularly those that would permit Labor to assess the timeliness of its applications processing and to improve protections for domestic and H-2A agricultural workers.

Background

The Immigration Reform and Control Act of 1986 created the program, commonly referred to as the H-2A program, under which employers may bring agricultural workers into the country on a temporary, nonimmigrant basis. The program's purpose is to ensure agricultural employers an adequate labor supply while also protecting the jobs, as well as the wages and working conditions, of domestic farmworkers. Under the program, agricultural employers that anticipate a shortage of domestic workers can request nonimmigrant foreign workers. The Department of State issues nonimmigrant visas for H-2A workers only after the Department of Justice, through INS, has approved an employer's petition for authorization to bring in workers. Justice does not approve the petition until Labor has approved the employer's application for certification that a labor shortage exists and that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by bringing in guestworkers. This certification is based on, among other things, proof that the employer has actively recruited domestic workers, that the state employment service has certified a shortage of farm labor, and that housing for the workers meets health and safety requirements. The Department of Agriculture acts in an advisory role that includes conducting wage surveys for Labor's determination of the minimum wage rates to be paid by employers of H-2A workers–the so called "adverse effect wage rate"– which are designed to mitigate any negative effect their employment may have on domestic workers similarly employed.

Labor is also responsible for ensuring that agricultural employers comply with their contractual obligations to H-2A workers and for enforcing labor

laws covering domestic workers, including the wage, housing, and transportation provisions of the Migrant and Seasonal Agricultural Worker Protection Act. For example, workers who complete 50 percent of the contract period are due reimbursement for transportation from the place of recruitment, while those who complete the entire contract are guaranteed work or wages for a minimum of three-quarters of the contract period and reimbursement for transportation home.[3] Agricultural employers must provide the same wages, benefits, and working conditions to H-2A workers that are provided to domestic workers employed in "corresponding employment."

A Widespread Farm Labor Shortage Is Unlikely in the Near Future, Although Localized Shortages Are Possible

In our 1997 report, we concluded that a widespread farm labor shortage did not appear to exist and was unlikely in the near future. Although there was widespread agreement that a significant portion of the farm labor force was not legally authorized to work, INS enforcement activity was unlikely to generate significant farm labor shortages. On the basis of available evidence from a Congressional Research Service (CRS) reportthat recently examined this issue, data from the National Agricultural Workers Survey (NAWS) released in March 2000, and recent INS policy, we believe that our earlier conclusions remain correct.[4]

Ample Supplies of Farm Labor Appear to Be Available in Most Areas of the Nation

As we noted in our 1997 report, although data limitations made the direct measurement of a labor shortage difficult, our own analysis suggested that a widespread farm labor shortage had not occurred in recent years and did not then exist. Our conclusion was based on the combination of (1) the large number of illegal immigrant farmworkers granted amnesty in the 1980s, (2) persistently high unemployment rates in key agricultural areas, (3) state and federal designations of agricultural areas as labor surplus areas, (4) stagnant or declining farm labor wage rates as adjusted for

[3]Under the three-quarter wage guarantee, an employer must offer each worker employment for at least three-fourths of the workdays in the work contract period, including any extensions. If the employer provides less employment, the employer must pay the amount the worker would have earned had the worker been employed the guaranteed number of days.

[4] *Farm Labor Shortages and Immigration Policy*, RL-30395 (Washington, D.C.: Apr. 10, 2000) Labor, Office of the Assistant Secretary for Policy, *Findings From the National Agricultural Workers Survey 1997-1998: A Demographic and Employment Profile of United States Farmworkers,* Office of Program Economics Research Report 8 (Washington, D.C.: Mar. 2000). Since 1988, NAWS has collected detailed information on the basic demographics, legal status, education, family size and household composition, wages, and working conditions of domestic seasonal agricultural services workers, including their participation in the nonagricultural U.S. labor force. NAWS also collects information on hourly and piece rate wage rates, farm labor housing, health care, and many other aspects of field labor working conditions.

inflation, and (5) continued investments by growers in agricultural production.[5] For example, our analysis of the monthly and annual unemployment rates of 20 large agricultural counties–those that contain large amounts of fruit, tree nut, and vegetable production in dollar value–found that 13 counties maintained annual double digit unemployment rates and that 19 had rates above the national average during 1994 through 1996. As of June 1997, 11 counties still exhibited monthly unemployment rates double the national average of 5.2 percent, and 15 of the 20 counties had rates at least 2 percentage points higher than the national rate. We also noted that the lack of evidence of widespread farm labor shortages does not preclude the existence or potential for more localized shortages in a specific crop or remote geographic area.

Since our report, the national economy has continued to prosper. National unemployment declined from 4.9 percent in 1997 to 4.2 percent in 1999. Nevertheless, recent CRS work on this issue suggests that our earlier assessment accurately captures the current conditions of the national agricultural labor market. CRS based its conclusion on a variety of economic data that are inconsistent with an agricultural labor shortage scenario. (1) Employment of hired farmworkers, including contract workers, fluctuated erratically during the 1990s and actually declined in 1998 by 1.2 to 1.4 percent, in contrast to the growth in total U.S. employment.[6] (2) The national unemployment rate for hired farmworkers has remained above 10 percent since 1994, has increased since 1997, and at 11.8 in 1998, has remained well above the national average. (3) There was no discernible variation in the average number of weekly hours that hired farmworkers were employed in crop or livestock production throughout the 1990s. (4) The underemployment of farmworkers remains substantial, with the number of days crop workers employed on farms diminishing from an average of 186 days per worker in fiscal years 1993-95 to 174 days per worker in fiscal years 1996-98. And (5) while farmworkers' average hourly wages increased at a slightly faster rate than those of workers in the nonfarm private sector between 1990 and 1998, farmworkers continue to earn little more than $0.50 for every dollar earned by other private sector workers. The CRS study concluded that "indicators of supply-demand conditions generally are inconsistent with the existence of a nationwide shortage of domestically available

[5] *H-2A Agricultural Guestworker Program: Response to Additional Questions* (GAO/HEHS-98-120R, Apr. 2, 1998).

[6] For hired crop workers, employment increased by 9.3 percent from 1990 to 1998, according to one statistical series. However, this was still well below the 11.7 percent increase exhibited by all wage and salary employment over the same period.

farmworkers at the present time . . . . " Again consistent with our conclusions, the CRS report did not preclude the potential for localized farmworker shortages during various times of the year.

Data from the latest NAWS survey are also consistent with the conclusions of our 1997 report. If a labor shortage existed, one might expect larger than average increases in hourly agricultural wage rates. Although real wage rates for crop workers increased between 1997 and 1998, the latest years for comparison, they remain 10 percent lower than the average agricultural wage rates in 1989.

INS Enforcement Efforts Are Unlikely to Significantly Reduce the Number of Unauthorized Farmworkers

In our 1997 report, we estimated that approximately 37 percent of the agricultural labor force–about 600,000 farmworkers–in the United States lacked legal authorization to work. Since then, the estimated number of unauthorized agricultural workers has increased. The latest NAWS has estimated that, as of fiscal year 1998, the proportion of the agricultural labor force that lacked legal authorization to work was more than 52 percent.

The prevalence of such a large number of unauthorized and fraudulently documented farmworkers would leave individual employers vulnerable to sudden labor shortages if INS were to target enforcement efforts at their individual establishments. At the time of our 1997 report, fears of such targeting appeared to be unfounded. INS officials around the country were unanimous in their statements that they did not expect their enforcement efforts to have any general effect on the supply of farm labor, either nationally or regionally, given the large number of fraudulently documented farmworkers and competing enforcement priorities. At that time, most of INS' investigation resources were focused on identifying aliens who have committed criminal acts, including violent criminal alien gang and drug-related activity, and on detecting and deterring fraud and smuggling. Few investigations involved agricultural employers, and INS officials did not expect a significant increase in enforcement efforts directed at agriculture in the near future. We also acknowledged that although INS efforts were under way to improve employers' ability to identify fraudulent documents, these efforts were still in the early stages and were not likely to have any significant effect on the availability of illegally documented farmworkers in the near future. The degree to which these initiatives, if fully implemented, would affect the number of unauthorized workers and the supply of agricultural workers was unknown.

We believe this conclusion remains accurate for several reasons. Since our report, the percentage of INS' investigations dedicated to worksite enforcement programs has not changed significantly. As we reported in 1997, about 5 percent of the 4,600 investigations completed in fiscal year 1996 involved employers in agricultural production or services, with 40 percent of these involving employers in industries not associated with H-2A, landscapers, lawn maintenance firms, and veterinarians. In fiscal year 1999, INS completed about 3,900 investigations of employers, with about 7 percent directed at agricultural workplaces.

INS is also in the process of changing its approach to worksite enforcement. It has developed a new interior enforcement strategy with two worksite enforcement priorities–one calling for INS to pursue the criminal investigation of employers that are flagrant or grave violators and the other aimed at blocking and removing employers' access to unauthorized workers.[7] With respect to this second priority, INS acknowledged the limitations of worksite investigations–"raids"–and is focusing on the crucial employer role in creating an effective deterrent to illegal immigration. It will now work to educate and foster employer cooperation to deny employment to unauthorized workers. INS has not specified how many resources it intends to devote to such employer compliance efforts. Since INS plans to implement its strategy over the next 5 years, it is too soon to know how the proposed changes will be implemented or to assess their effect on the employment of unauthorized workers in agriculture.

In addition, as we reported in 1999, despite several ongoing INS initiatives, the employment verification process still remains susceptible to fraud.[8] INS continues to test three pilot programs in which employers electronically verify employees' eligibility to work. However, employer participation in the pilot programs under way has been significantly less than INS anticipated–only 1,658 employers in all industries as of June 2000 are participating, and only 425 of these are employers in agricultural production or services.

[7]According to our 1999 report, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist* (GAO/GGD-99-33, Apr. 2, 1999), an INS official expected that INS' new emphasis on dismantling the criminal infrastructure that supports unauthorized employment would result in (1) fewer worksite investigations and removals of unauthorized aliens from the workplace, (2) more criminal employer investigations, and (3) heavier penalties.

[8]GAO/GGD-99-33.

Finally, INS has made little progress toward its goal of reducing the number of documents that employers can accept for determining employment eligibility. In February 1998, INS issued proposed regulations to reduce the number of documents that can be used from 27 to 14. However, INS received numerous comments on the proposed regulations, and INS officials do not know when these regulations will be made final. INS has also begun issuing new documents with increased security features, which it hopes will make it easier for employers to verify the documents' authenticity. However, aliens are statutorily permitted to show employers various documents other than the INS documents that authorize them to work, and other widely used documents (for example, Social Security cards and birth certificates) do not have the security features of the INS documents.

It should be noted that the high percentage of fraudulently documented workers means that an employer may hire workers not legally authorized to work in this country without violating the law. An employer that hires illegal aliens who present documentation will be abiding by the law unless the employer knows or should know, based on an apparent irregularity in the alien's documentation, that the aliens are in this country illegally. The Immigration and Nationality Act allows an employer to rely on documentation that reasonably appears on its face to be genuine. Thus, more than 600,000 illegal aliens could be working in agriculture without any agricultural employers violating the law with respect to their responsibilities under federal immigration law.

GAO's Recommendations Targeted at Problems in H-2A Program Operations Have Been Partially Implemented

In our 1997 report, we identified a number of concerns with the operation of the H-2A program. These concerns included (1) Labor's inability to process applications in a timely manner, (2) multiple agency involvement in the approval of H-2A petitions that added little value to the process, (3) multiple agency involvement in program administration and insufficient information generally, and (4) worker protection provisions that are difficult to enforce. We made recommendations to the cognizant agencies that would address each of these concerns. Most of these recommendations are still in process or no action has yet been taken.

Although Employers Obtain H-2A Workers, Applications May Not Be Processed in a Timely Manner

In 1997, Labor issued certifications for most of the workers whom agricultural employers requested through the H-2A program, and agency officials reported that they could handle a major increase in program workload with additional resources. However, Labor did not generally process applications in a timely manner, and the lack of data made it difficult to monitor timeliness and oversee the program. Labor continues

to approve the overwhelming majority of applications, certifying more than 94 percent of all applications submitted during fiscal year 1999, or 2,948 of 3,130, and accounting for 88 percent of the 47,300 worker certifications requested.

The H-2A application process sets very specific time requirements that employers and Labor must meet. At the time of our report, these statutory and regulatory deadlines included a requirement that employers file an application for workers at least 60 days before they are needed and that Labor issue a decision on the certification of a labor shortage at least 20 days before the date of need. In 1997, we determined that Labor did not always process applications on time, making it difficult to ensure that employers were able to get workers when they needed them. Although no data were available on how many employers failed to obtain the required workers by the date of need, we identified some applications that were not certified by Labor until after the date of need. Because Labor did not have data on program operations, we could not assess the explanations Labor provided us for its inability to process applications in a timely fashion. In response, we recommended that Labor regularly collect data on its performance in meeting H-2A regulatory and statutory deadlines for processing H-2A applications and that it use these data to monitor and improve its performance. Labor is currently developing such a system and hopes to have it in place by October 2000.

Multiple Agency Involvement in Petition Approval Added Little Value to the Process

After receiving Labor's certification, INS must approve an employer's petition for H-2A visas before workers can apply to the State Department for visas, a procedure that can add up to 3 weeks to processing time. INS officials agreed that the INS petition approval process adds little value to the process because petitions for H-2A visas, unlike other visa petitions, do not generally identify individual workers. Therefore, INS examiners check only to make sure that Labor has issued a certification and that an employer has submitted the correct fees for the petition.[9] To simplify the H-2A application process and reduce the burden on agricultural employers, we recommended that the Attorney General delegate authority for approval of H-2A visa petitions from INS to the Secretary of Labor or the Secretary's designee and revise corresponding regulations as necessary to implement and facilitate such an agreement, including a revision of visa extension and appeals procedures. According to an INS

[9]This verification that Labor has issued a certification is performed again by the State Department, according to officials at the two consulates–Monterrey and Hermosillo, Mexico–that process almost all H-2A visas.

official, the Office of Management and Budget recently cleared and finalized the regulation, and it will be released after final administrative details are completed.

Even if all processing deadlines are met, agricultural employers, their advocates, and state employment officials told us that the workers may not be available when needed. This is because the weather and other factors make it hard to estimate 60 days in advance when workers will be needed. This is especially true for crops with short harvest periods. The 60-day deadline may also encourage employers to estimate the earliest possible date, which can have negative consequences for workers who arrive before an employer has work for them: They are left with no income until work is available. To address this problem, we recommended that the Secretary of Labor amend the regulations to allow H-2A applications to be submitted up to 45 rather than 60 days before the date of need, if INS' role in the petition approval process were eliminated as we recommended. Labor implemented our recommendation, and employers now need to apply only 45 days before the date of need.

Finally, to protect work opportunities for domestic workers by ensuring that sufficient time is available for agricultural employers to positively recruit domestic workers while reducing the total processing time, we recommended that the Congress amend the Immigration and Nationality Act so that, as long as the authority for approving H-2A visa petitions remained with Labor, Labor would be required to complete all applications at least 7 days before the date of need, rather than 20 days. However, rather than requiring Labor to complete all applications at least 7 days before the date of need, the Congress changed the requirement that Labor complete all applications from 20 days to no later than 30 days before the date of need (P.L. 106-78).

Insufficient Information and Multiple Agencies Administering the H-2A Program Can Make Program Participation More Difficult

As we reported in 1997, employers, advocates, and agency officials expressed frustration about the poor information on H-2A procedures. Labor's handbook on the H-2A Labor certification process included information that was outdated, hard to understand, and incomplete. Program participants can also be confused by the multiple agencies and levels of government involved in the H-2A program, which fosters redundant agency oversight and the inability to determine compliance with program requirements. In some states, for example, employer-provided farmworker housing is subject to federal, state, and local housing regulations and must be inspected by multiple agencies. To address this issue, we recommended that Labor update and revise the H-2A handbook to include the procedures for all agencies involved and key contact points,

both in Labor and other agencies. Labor has not yet taken action on this recommendation, preferring to wait until other regulations related to our recommendations have been promulgated.

Worker Protection Provisions Are Difficult to Enforce

Violations of H-2A worker protection provisions, including the requirement that foreign guestworkers be guaranteed wages equivalent to at least three-quarters of the amount specified for the entire contract period, are difficult to identify and enforce. H-2A guestworkers may be less aware of U.S. laws and protections than domestic workers, and they are unlikely to complain about worker protection violations, such as the three-quarter guarantee, fearing they will lose their jobs or will not be hired in the future.

Labor officials noted operational impediments in enforcing these protections. For example, the three-quarter guarantee applies only to the end of the contract period, and H-2A workers must leave the country soon after the contract ends. Labor officials said that monitoring the three-quarter guarantee is difficult because they cannot interview workers after they return to Mexico to confirm their work hours and earnings. Such enforcement difficulties create an incentive for less scrupulous employers to request contract periods longer than necessary: If workers leave the worksite before the contract period ends, the employer is not obligated to honor the three-quarter guarantee or pay for the workers' transportation home. And if a worker abandons the contract, it can be very difficult to determine whether he or she has left the country or is instead remaining and taking jobs that might otherwise go to domestic workers.

In general, Labor's Wage and Hour Division (WHD) of the Employment Standards Administration is the primary agency for enforcing existing H-2A contracts and other labor standard provisions, while the Employment and Training Administration (ETA) administers the H-2A program, working with state job services and agricultural employers to facilitate the application process. However, under current law, ETA exercises Labor's authority to suspend an employer's participation in the H-2A program in the event that the employer has committed a serious labor standard or contract violation, and WHD, when conducting an enforcement action, must request that ETA consider using this authority. Given the overall separation of program functions between WHD and ETA, placing this suspension authority in ETA seems incongruent. Consolidating this suspension authority in WHD would permit ETA to concentrate more effectively on the H-2A program's crucial duties and possibly increase the effectiveness of WHD enforcement.

The H-2A program also requires that agricultural employers provide H-2A workers the same minimum wages, benefits, and working conditions as those provided to domestic workers employed in "corresponding employment." Current Labor regulations guarantee wages for the first week of work to domestic workers who are referred to agricultural employers through the interstate clearance system of the employment service, unless the employer informs the state employment service of a delay in the date of need at least 10 days in advance. However, no provisions are made to provide the same guarantee to H-2A workers, resulting in a disparity of treatment and the potential for personal hardship for foreign workers.

To address these issues, we recommended that Labor transfer the authority to suspend employers with serious labor standard or H-2A contract violations from ETA to WHD, revise its regulations to require agricultural employers to guarantee H-2A workers wages for the first week after the date of need, pay workers those wages no later than 7 days after the date of need, and revise regulations to apply the three-quarter guarantee incrementally during the duration of the H-2A contract in a manner that would improve the protection afforded to H-2A workers but also minimize any additional administrative burdens on agricultural employers. At this time, Labor has not determined how best to take action in each of these areas.

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions you or Members of the Subcommittee may have.

GAO Contacts and Acknowledgments

For more information regarding this testimony, please call Cynthia M. Fagnoni at (202) 512-7215. Key contributors include Charles A. Jeszeck, Carolyn S. Blocker, and Ronni Schwartz.

Related GAO Products

Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist (GAO/GGD-99-33, Apr. 2, 1999).

H-2A Agricultural Guestworker Program: Experiences of Individual Vidalia Onion Growers (GAO/HEHS-98-236R, Sept. 10, 1998).

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