

WORKFORCE CHALLENGES FACING THE AGRICULTURE INDUSTRY

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION

AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

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WORKFORCE CHALLENGES FACING THE AGRICULTURE INDUSTRY

**Tuesday, September 13, 2011
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC**

The subcommittee met, pursuant to call, at 10:01 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Goodlatte, Bucshon, Woolsey, Payne, and Bishop.

Staff present: Katherine Bathgate, Press Assistant/New Media Coordinator; Casey Buboltz, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Ryan Kearney, Legislative Assistant; Donald McIntosh, Professional Staff Member; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Joseph Wheeler, Professional Staff Member; Kate Ahlgren, Investigative Counsel; Daniel Brown, Junior Legislative Assistant; John D'Elia, Staff Assistant; Livia Lam, Senior Labor Policy Advisor; Brian Levin, New Media Press Assistant; Celine McNicholas, Labor Counsel; Megan O'Reilly, General Counsel; Julie Peller, Deputy Staff Director; and Michele Varnhagen, Chief Policy Advisor/Labor Policy Director.

Chairman WALBERG. Well, good morning. A quorum being present, the subcommittee will come to order.

We want to welcome all to the Subcommittee on Workforce Protections and I would like to thank our witnesses for being with us here today, and specifically the first panel, which consists of one. We are looking forward to a good hearing, as generally is the case in this subcommittee.

Across the country countless farmers and workers are beginning to bring in this fall's harvest. I know my beans are ready, and as I was telling the assistant secretary, it is the best bean year I have had so far, and not expecting it earlier this spring with the wet, but it has worked well for Michigan, and we wish the best for the rest of the nation. A number of states that are struggling with drought as well as too much rain.

Despite the rapid advances of farming technology more than a million workers are still needed to bring crops to market each year. It is hard work that often goes unnoticed by the average consumer in the local grocery store.

Without any doubt, the men and women who earn a living in our nation's agriculture industry deserve our gratitude. For these employers and workers timing is crucial. A missed day in the field can result in a substantial loss of crops, which means a decline in revenue for employers and lost wages for workers.

And the consequences don't stop there. According to one estimate, for every one farm worker there are 3.1 additional jobs in agriculture and its supporting industries. Agriculture remains an integral part of our economy.

As elected officials, we have a responsibility to ensure federal programs and agencies operate efficiently and effectively. This should be the standard of good government under any circumstance, but especially when the country faces a significant jobs deficit and a serious fiscal crisis.

Our farmers, workers, and taxpayers deserve nothing less, and that is why we are here today. This hearing provides us with an opportunity to examine whether an important program is adequately meeting the demands of the nation's farms.

Each year agricultural employers across the country petition the U.S. Department of Labor for thousands of seasonal guest workers. Since 1986 the H-2A visa program has provided these employers a legal avenue to hire the workers they need.

An employer's petition must pass two tests intended to protect American workers: First, the employer must demonstrate there is an insufficient number of U.S. workers available to perform the work as needed; second, the employer must attest that employing guest workers will not adversely affect U.S. workers. If the Department denies an employer's petition that employer must appeal the decision to an administrative law judge.

This is a program that has proven invaluable to employers. One farmer in my Michigan district described the program as "critical" to hiring the workers necessary for success.

However, despite the importance of the program it has long been plagued by a number of challenges that stretch across party lines. In 2008 the Bush administration finalized a proposal intended to streamline the program for employers and strengthen protection for workers. Yet, in the early months of the Obama administration these new policies were suspended, and last year a new set of rules were adopted.

I recognize that a change of administration can usher in new policies and priorities, but those changes should improve the support and services the American people rely upon, not undermine their success.

Unfortunately, the facts suggest this may not be the case for the H-2A visa program. Since the new policies were enacted the frequency of disapprovals for employers' petitions has increased significantly and the number of appeals filed before the administrative law judge has risen dramatically.

This year it is estimated more than 700 appeals will be filed. To put this estimate in perspective, only 158 appeals were requested

last year. Is the Department trying to root out bureaucratic delay, or is it administering an overly burdensome program that provides little benefit to employers?

In an effort to answer the question, Madam Assistant Secretary, we look forward to receiving your testimony this morning.

This program is an important piece of our effort to ensure a strong, legal workforce. We hope you will take this opportunity to assure the nation's agricultural employees that you remain committed to administering an effective and efficient H-2A visa program.

At this time I would like to recognize my colleague from California, Lynn Woolsey, the ranking Democratic member of the subcommittee, for her opening remarks.

[The statement of Chairman Walberg follows:]

**Prepared Statement of Hon. Tim Walberg, Chairman,
Subcommittee on Workforce Protections**

Good morning and welcome to the Subcommittee on Workforce Protections. I would like to thank our witnesses for being with us today.

Across the country, countless farmers and workers are beginning to bring in this fall's harvest. Despite the rapid advances of farming technology, more than a million workers are still needed to bring crops to market each year. It is hard work that often goes unnoticed by the average consumer in the local grocery store. Without any doubt, the men and women who earn a living in our nation's agriculture industry deserve our gratitude.

For these employers and workers, timing is crucial. A missed day in the field can result in a substantial loss of crops, which means a decline in revenue for employers and lost wages for workers. And the consequences don't stop there. According to one estimate, for every one farm worker there are 3.1 additional jobs in agriculture and its supporting industries. Agriculture remains an integral part of the economy.

As elected officials, we have a responsibility to ensure federal programs and agencies operate efficiently and effectively. This should be the standard of good government under any circumstance, but especially when the country faces a significant jobs deficit and a serious fiscal crisis. Our farmers, workers, and taxpayers deserve nothing less. And that is why we are here today. This hearing provides us with an opportunity to examine whether an important program is adequately meeting the demands of the nation's farms.

Each year, agricultural employers across the country petition the U.S. Department of Labor for thousands of seasonal guest workers. Since 1986, the H-2A visa program has provided these employers a legal avenue to hire the workers they need. An employer's petition must pass two tests intended to protect American workers: First, the employer must demonstrate there is an insufficient number of U.S. workers available to perform the work as needed. Second, the employer must attest that employing guest workers will not adversely affect U.S. workers. If the department denies an employer's petition, that employer may appeal the decision to an Administrative Law Judge.

This is a program that has proven invaluable to employers. One farmer in my Michigan district described the program as "critical" to hiring the workers necessary for success. However, despite the importance of the program, it has long been plagued by a number of challenges that stretch across party lines.

In 2008, the Bush administration finalized a proposal intended to streamline the program for employers and strengthen protections for workers. Yet in the early months of the Obama administration, these new policies were suspended, and last year a new set of rules were adopted. I recognize that a change of administrations can usher in new policies and priorities. But those changes should improve the support and services the American people rely upon, not undermine their success.

Unfortunately, the facts suggest this may not be the case for the H-2A visa program. Since the new policies were enacted, the frequency of disapprovals for employers' petitions has increased significantly and the number of appeals filed before an Administrative Law Judge has risen dramatically. This year, it is estimated more than 700 appeals will be filed. To put this estimate into perspective, only 158 appeals were requested last year.

Is the department trying to root out bureaucratic delay, or is it administering an overly burdensome program that provides little benefit to employers? In an effort

to answer the question, Madam Assistant Secretary, we look forward to receiving your testimony. This program is an important piece of our effort to ensure a strong, legal workforce. We hope you will take this opportunity to assure the nation's agricultural employers that you remain committed to administering an effective and efficient H-2A visa program.

At this time, I would like to recognize my colleague from California, Lynn Woolsey, the senior Democratic member of the Subcommittee, for her opening remarks.

Ms. WOOLSEY. Thank you, Mr. Chairman.

Today's meeting to discuss the workforce challenges facing the ag industry is very, very important. And of course, in these economic times, our focus must be to do everything we can to get Americans back to work. So my global goal—my goal for today's discussion—will focus on ensuring that U.S. workers have a real shot at jobs in the ag industry and that these jobs have—provide a decent wage and basic protections for workers both during the hiring process and after they are employed.

The H-2A visa program allows farmers to hire foreign workers for seasonal agricultural work under regulations issued by the Department of Labor, and the reality is this: these workers perform grueling work, routinely putting in 15 hours a day and enjoying very few workplace protections such as wage and hour and safety protections. H-2A workers are not covered by the National Labor Relations Act and have little resources to protest working conditions if they are not favorable.

They are tied to their employer. If they are treated unfairly or required to perform dangerous work they risk being fired, and if they are fired they are sent home if they even speak up.

In short, they are not afforded the same quality of life or protections in the workplace that most of us take for granted.

Despite this, there are some who complain that the rules and regulations covering the H-2A program are burdensome and expensive. In reality, the current H-2A rules are quite modest and are similar to those issued during the Reagan administration.

During the George W. Bush administration the Department of Labor loosened the rules governing the H-2A program and ag employers merely had to state or attest that they had attempted to recruit U.S. workers for open positions. They no longer had to demonstrate their recruitment efforts or coordinate with state workforce agencies, so they just needed to say, "Yes, we did it and there are no American workers available."

So the Bush administration also adjusted wage requirements to allow farmers to pay H-2A workers lower wages, which resulted in an average reduction of farm worker wages overall of \$1 to \$2 per hour, which depressed wages for all agricultural workers. Under common sense rules issued by the Obama administration in 2010 many of the damaging changes the Bush administration made to the H-2A program have been addressed.

Ag employers must again demonstrate that they actually attempted to recruit U.S. workers first before petitioning for H-2A workers. There is no question that foreign workers are eager to find jobs in the United States. However, it seems really unreasonable to argue that there are no United States workers to fill these positions.

Nearly 25 million Americans are either unemployed or underemployed. It seems perfectly reasonable to me that farmers should first make a good-faith effort to hire U.S. workers before being granted the authority to bring in foreign workers to do the exact same work. And it is also shortsighted, I believe, to assume that there is no U.S. workforce for these jobs.

It is a closed circle, Mr. Chairman. If workers come in on an H-2A visa with poor working conditions, are underpaid and underappreciated, those jobs will certainly be less attractive to U.S. workers.

So in addition, when programs like the H-2A visa program fail to provide adequate wages and protections and they are not properly enforced all workers lose. And that does not work to the advantage of employing U.S. workers.

So, Mr. Chairman, we don't need a race to the bottom. We need to administer the H-2A program to ensure that U.S. workers have the first chance at employment and foreign workers aren't exploited. The H-2A regulations issued in 2010 are an important step at accomplishing this.

However, there is no question that reforms are still necessary. What is not necessary is the creation of a new temporary worker program that loosens the critical protections for farm workers—U.S. and guest workers alike.

Thank you, Mr. Chairman. I look forward to exploring these issues and questioning and hearing from our witnesses. Thank you very much.

Chairman WALBERG. I thank the gentlelady.

Pursuant to Committee Rule 7c all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow questions for the record, statements, and extraneous material referenced during the hearing to be submitted for the official hearing record.

We have two distinguished panels of witnesses today, and I would like to begin by introducing the first panel: Assistant Secretary of Labor for the Employment and Training Administration Jane Oates.

We welcome you here. And before I recognize you to provide your testimony let me briefly explain our lighting system that I am sure you are well aware of, but for the record to prove that I have done a major portion of my job, and being a traffic cop, which sometimes I get so wrapped up in the interest of the testimony that I forget to do. You will help me with the light system.

One minute is left, the light will turn yellow. It is green at the beginning of the 5 minutes. And when the time has expired the light will turn red, at which point I will ask that you wrap up your remarks as best as you are able.

And as is normal for the process when we have secretaries or assistant secretaries we give a little more latitude than normal, but I am not supposed to give any more latitude to my committee members for that, and so we will make that a point as well.

We won't get into a battle here right now at that point.

Ms. WOOLSEY. Good to know.

Chairman WALBERG. So have said all of that, I recognize the assistant secretary for your testimony. Thanks for being here.

**STATEMENT OF HON. JANE OATES, ASSISTANT SECRETARY,
EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPARTMENT OF LABOR**

Ms. OATES. Thank you so much, Chairman Walberg.

And thank you, Ranking Member Woolsey, for inviting me here today. And in respect for your time I won't read my testimony that I have provided you all and instead just highlight some of the successes that I would like to bring to your attention.

The Department of Labor has two primary concerns with regard to the statutory mandate for the H-2A program. First is maintaining a fair and reliable process for employers. They have legitimate need for temporary foreign agricultural workers and it is our job to help them get those temporary workers. Second is enforcing necessary protections for both the workers in the United States and for those temporary foreign workers.

Within these statutory mandates is the important responsibility of ensuring that U.S. workers have first access to these jobs.

To ensure that these mandates are met the Department implements the H-2A regulations and accepts and processes employer-filed H-2A applications for labor certifications. For almost a quarter of a century, before 2008, the Department's H-2A regulations remained largely unchanged. In 2008, as both of you mentioned in your opening comments, the new regulations were promulgated with significantly revised revisions to the program.

An extensive review of these changes during the beginning days of the Obama administration and our Department's program experience demonstrated that the new regulations did not adequately satisfy the Department's mandate to protect U.S. workers. It also found that the regulation failed to allow for sufficient, robust, and meaningful enforcement.

To correct failures identified in this review the Department published a final rule which became effective in March 2010. As I noted in my written testimony, the 2010 final rule in many ways reflects a return to the processes and procedures which were in place for all but 13 months over a 24-year period. This includes key features of the 2010 rule, such as the documentation of compliance, the use of the USDA Farm Labor Survey as the basis for determining wage rates, and the role of the state workforce agency in inspection and approval of employer-provided housing.

The Department believes that the enforcement provisions in the 2010 final rule better achieve a reasonable balance between meeting the seasonal workforce needs of growers and protecting the rights of agricultural workers. The enforcement protects the integrity of the program, protects workers from potential abuse by employers who fail to meet the requirements of the program, and, quite frankly, ensures that employers who play by the rules have a level playing field with their peers.

Also important is the underlying statutory requirement which governs the development and implementation of the regulation that the employment of the temporary foreign worker does not adversely

affect the wages and working conditions of workers who are similarly employed in the United States.

Finally, the Department takes very seriously its obligation to ensure that U.S. workers have first access to these jobs. Probably never before in my lifetime has this been more important. So in addition to enhancing recruitment the 2010 final rule created an on-line job registry so that U.S. workers could more easily access information about and apply for these jobs.

The Department planned and implemented extensive stakeholder meetings and briefings to reacclimate users of the program to many of the features that had been in place and were now brought back. Activities included public hearings across the country, national webinars, and a question and answer process through a dedicated public e-mail at the Department of Labor.

Our outreach efforts continue today. We know employers with legitimate needs are successfully using the H-2A program. So far, in fiscal year 2011, the Department has certified 93 percent of the applications for 74,000 workers.

Despite the tight processing deadlines and large filing volumes, 67 percent of all applications are processed timely. That is a number we are working every day to improve.

The Department is continuing to provide employer assistance and implement more program improvements, and that is an area we hope to work continually with this committee to make sure we know what your growers' questions are and needs are in terms of those improvement strategies.

We continue to assist employers as they become more familiar with the application process and the information necessary for the Department to issue a final determination. For example, employers are no longer denied because of an incomplete application.

In the beginning of the implementation of the rule we saw a spike in denials and we did an internal process to look at why that was happening. Clearly we saw that an employer—many of them small growers—put in an application that was incomplete, and we were denying that.

That is silly. We changed our process so that an incomplete application goes back and we work with the employer to get the information necessary for a complete application.

The most common reasons for denial or partial denials for our process are, again, those improper applications, which we are working to finish and fix, insufficient housing, and failure to provide documentation that they have done the right thing by American workers.

In conclusion, Mr. Chairman, I hope you hear the sincerity from the Department of Labor. We want to work with you. We are working every day to improve this process and we are committed to it.

So I wait and appreciate any of your questions.

[The statement of Ms. Oates follows:]

Prepared Statement of Hon. Jane Oates, Assistant Secretary for the Employment and Training Administration, U.S. Department of Labor

Chairman Walberg, Ranking Member Woolsey, and Members of the Committee, thank you for the invitation to appear before the Education and Workforce Committee's Subcommittee on Workforce Protections to discuss workforce issues in the Agricultural industry. As you know I will focus on the U.S. Department of Labor's role

and administration of the H-2A temporary agricultural guest worker program, a program designed to serve a critical workforce need for agricultural employers. I am Jane Oates, Assistant Secretary for the Employment and Training Administration at the U.S. Department of Labor.

DOL's Role in the H-2A Program

The Immigration and Nationality Act assigns specific responsibilities for the H-2A program to the Secretary of Labor. The Department's primary concerns with regard to its statutory mandate are maintaining a fair and reliable process for employers with a legitimate need for temporary, foreign, agricultural workers and enforcing necessary protections for U.S. and temporary foreign workers.¹ The non-enforcement duties are delegated to the Employment and Training Administration, specifically the Office of Foreign Labor Certification. The Department's Wage and Hour Division has been delegated responsibility for enforcing the terms and conditions of the work contract and worker protections.

Among the responsibilities delegated to the Office of Foreign Labor Certification is the important responsibility of ensuring that U.S. workers are provided first access to temporary agricultural jobs and that U.S. and temporary foreign workers are provided with appropriate worker protections. The U.S. Department of Homeland Security may not approve an H-2A visa petition unless the Department of Labor has certified that there are not sufficient U.S. workers qualified and available to perform the labor requested in the visa petition and that the employment of the temporary foreign worker(s) will not have an adverse effect on the wages and working conditions of similarly employed workers in the U.S. The Department of Labor ensures this important statutory responsibility is met through applying the applicable regulatory standards in the acceptance and processing of employer-filed H-2A applications.

Regulatory History

The Immigration Reform and Control Act of 1986 (IRCA) established a separate H-2A program for temporary agricultural guest workers. The first H-2A regulations were issued by the Department in 1987 in accordance with IRCA.² The Department's H-2A regulations remained largely unchanged from the 1987 rule until 2008, when the Department issued regulations that significantly revised the program.³ The 2008 Final Rule among other changes, substituted an attestation-based application process, in which the applicants merely asserted that they have met regulatory requirements, such as having obtained workers' compensation insurance and requested a housing inspection, for the long-standing evidence based program model, in which the applicant actually produces documentation of having met such requirements prior to the Department granting a labor certification. Numerous other substantive changes to the program were made, including a significant reduction in the role that State Workforce Agencies (SWAs) play in the processing of job orders, the mechanism by which employers seek domestic workers through our nation's labor exchange system.

In 2009, the Department undertook an exhaustive review of the policy decisions underpinning the 2008 Final Rule as well as a review of our actual program experience. During this review, the Department focused on access to these jobs by U.S. workers, individual worker protections, and program integrity measures. This review also examined the process for obtaining labor certifications, the method for determining the program's prevailing wage rate which, by statute, must avoid an adverse effect on the wages of similarly employed U.S. workers, and the level of protections afforded to both temporary foreign workers and domestic agricultural workers.

The Department determined that the 2008 Final Rule did not adequately satisfy its statutory mandate to protect U.S. workers and the regulation failed to allow for sufficient, robust, and meaningful enforcement of the terms of the approved labor certification and other regulatory requirements. In September 2009, the Department published a Notice of Proposed Rulemaking designed to address the findings from its review.⁴ Nearly 7,000 interested parties submitted comments. The Department's H-2A rulemaking process concluded with the publication of a Final Rule on February 12, 2010, which had an effective date of March 15, 2010.⁵

2010 Final Rule

The 2010 Final Rule, in many ways, reflects a return to processes and procedures that were in place between 1987 and 2008. Regulatory improvements include enhanced mechanisms for enforcement of the worker protection provisions that are required by the H-2A program to properly carry out the Department's statutory obligation to protect U.S. workers from any adverse effect due to the presence of temporary foreign workers in U.S. labor markets. Among other provisions, the 2010

Final Rule requires employers to document compliance with the program's prerequisites for bringing H-2A workers into the country, rather than merely attesting to compliance. This return to the requirement that was in place before the 2008 Final Rule was necessary because, even with employers making assurances on their applications that they would comply with specific provisions, the Department continued to see high rates of violations of fundamental requirements, such as meeting housing safety and health standards. The 2010 Final Rule also returns to the long-established use of the USDA Farm Labor Survey as the basis for determining the program's Adverse Effect Wage Rate or AEWR. The employer must pay H-2A workers and domestic workers performing the same work the highest of the AEWR, the agreed-upon collective bargaining wage, the Federal or State minimum wage or the prevailing hourly wage or piece rate^[0]. In addition, the 2010 Final Rule reinstates the requirement that the SWA inspect and approve employer-provided housing before the Department issues an H-2A labor certification, extends the H-2A program benefits to workers in corresponding employment to ensure that all similarly employed workers are not paid a lower wage and fewer benefits than a temporary foreign worker (thereby creating an adverse effect that the statute prohibits), and strengthens the Department's revocation and debarment authorities.

The Department believes that the enforcement provisions in the 2010 Final Rule achieve a reasonable balance between meeting the seasonal workforce needs of growers while simultaneously protecting the rights of agricultural workers, including U.S. workers hired as part of the H-2A process, H-2A temporary foreign workers, and workers already employed in corresponding employment with that employer. This level of enforcement is necessary to protect workers from potential abuse by employers who fail to meet the requirements of the H-2A program and to ensure that law-abiding employers with a legitimate need for temporary workers have a level playing field.⁶

The 2010 Final Rule's enhanced enforcement provisions allow the Department to sanction those employers who fail to meet their legal obligations to recruit and hire U.S. workers or fail to offer required wages and benefits to workers. Enhanced civil money penalties do not impact those employers who play by the rules. These penalties impact violators who disregard their obligations, and they provide the Department with an effective tool to discourage potential abuse of the program and to deter violations, discrimination, and interference with investigations. The increase in monetary penalties demonstrates the Department's commitment to strengthening the necessary enforcement of a law that protects workers who are unlikely to complain to government agencies about violations of their rights under the program.⁷

In addition to stronger mechanisms for enforcement of the requirements of the H-2A program, the 2010 Final Rule also strengthened certain worker protections to ensure that the program's underlying statutory requirement is being met—that the employment of the temporary foreign worker in such labor or services does not adversely affect the wages and working conditions of workers who are similarly employed in the U.S. These protections include clarifying the rules to ensure employers do not pass on fees associated with recruitment to the workers being recruited, recovering back wages in the event a U.S. worker is adversely affected by an improper layoff or displacement, reinstating U.S. workers who are displaced by a temporary foreign worker in violation of the program's requirements, and ensuring that corresponding workers who are employed by an H-2A employer performing the same work as the H-2A workers are paid at least the H-2A required wage rate for that work.

The Department takes seriously the need to ensure that job duties for agricultural occupations in H-2A are not presented in such a way as to inhibit the recruitment of U.S. workers. The standard applicable to the H-2A program since its inception in 1987 requires the Department to compare the jobs in H-2A applications to those open with employers not seeking H-2A workers. If the employers of non-H-2A workers do not commonly seek those qualifications or require those special skills sought by an H-2A applicant, the application will be questioned. Employers seeking solely to eliminate potential U.S. workers will be denied the opportunity to hire temporary foreign workers, in keeping with the Department's statutory obligation to ensure that U.S. workers receive preference for these jobs.

The 2010 Final Rule also created an online registry of H-2A jobs to make it easier for U.S. workers to access information about and apply for temporary agricultural jobs. This online registry became available in July, 2010 and offers a range of customizable searches, giving users the ability to view, print, or download information about agricultural jobs easily and without the need to file a request under the Freedom of Information Act. Since the online job registry became available in July, 2010 over 5,300 job orders requesting approximately 90,500 agricultural workers

have been posted, leading to substantially greater access for U.S. workers to these available jobs.

Outreach and Education

Despite the similarity of the 2010 Final Rule to the 1987 rule, the Department planned and implemented extensive stakeholder meetings and briefings designed to familiarize program users and others with the regulatory changes. For example, the Department undertook a number of steps to educate the employer community about the H-2A application process and program requirements. Well-publicized public briefings were held in San Diego, California; Dallas, Texas; and Raleigh, North Carolina between February 2010 and March 2010, during the period between the Final Rule's publication date and its effective date. Almost 200 parties representing large numbers of growers and agricultural associations attended these briefings.

The Department also conducted a national webinar⁸ for program participants that was publicized widely, including in the Federal Register.⁹ Weekly consultations were held with the SWAs to provide guidance on the implementation of their responsibilities in the recruitment of U.S. workers and these consultations continue today. The Department established a public e-mail box dedicated to receiving questions related to the Final Rule. Responses to some of these inquiries have been posted as Frequently Asked Questions (FAQs) to make answers to commonly-asked questions and clarifications easily accessible to all stakeholders via the OFLC website.¹⁰

Future plans include the publication of a user's manual aimed at assisting smaller employers understand the legal obligations of the program. The Department also continues to meet with different groups and constituencies to explain the H-2A program's requirements and answer questions.

Program Implementation

The H-2A program continues to be the source of legal temporary foreign workers for our nation's agricultural community. Thus far in FY 2011, more than 4,788 H-2A agricultural labor applications have been processed with 4,443 (93 percent) of applications certified for approximately 74,000 workers. Each year, more than 70 percent of all H-2A applications are filed during the peak filing period from December through April. Despite the tight processing deadline of 15 calendar days and a large filing volume, 67 percent of all H-2A applications in FY 2011 have been processed timely.

Since the implementation of the 2010 Final Rule, the Department has been focused on ensuring that the program is meeting the needs of both U.S. workers and employers. In order to ensure that the H-2A program is efficient and effective for employers with a legitimate need for temporary foreign workers, the Department continues to provide employer assistance and to implement program improvements. For example, the current regulations require the Department to evaluate each application on a case-by-case basis to determine if the application meets regulatory requirements. In the event that deficiencies are found, the employer is provided with an opportunity to make the corrections necessary to permit the application to be accepted for further processing. Once an employer has corrected the deficiencies, the application is accepted for processing and the employer is provided instructions for completing the application process by undertaking the required recruitment and providing required documents. Through this process, the Department is guiding employers as they become familiar with the application process and identifying for employers the documents and information necessary to enable the Department to issue a final determination.

Recognizing that the program's appellate process could create delays and uncertainty around processing timeframes, the Department designed a more flexible process and determined that where employers have not originally timely submitted the required documents, such as recruitment reports and proof of workers' compensation insurance, we have added some small amount of additional time for the receipt of these documents. This allows employers seeking certification additional time to comply with program requirements and receive a certification rather than a denial and subsequent appeal and experience time delays in getting their H-2A workers. The Department has already seen an increase in the ability of employers to comply with the revised time frame and this trend continues.

In certain instances, at the end of the case review, the Department will issue partial, rather than full, labor certifications. Since the implementation of the new Final Rule, the most common reasons for partial certification include issues such as insufficient housing capacity for the full number of workers requested, hiring commitments made to U.S. workers, and the apparent unlawful rejection of U.S. worker applicants. The most common reason for denials has been the employer's failure to

provide the documentation required to issue a labor certification, even with the additional time permitted, such as proof of workers' compensation, which is a mandatory statutory requirement. Another common reason for denial is the employer's failure to provide appropriate housing that meets the Department's standards. Each employer must provide a recruitment report, evidence of workers' compensation, and compliant housing in order to receive certification.

Recent Program Developments

The Department also notes that it has initiated a series of administrative improvements to the H-2A program that it hopes will improve the program's transparency and customer responsiveness. Some of these improvements include a dedicated e-mail box at the Chicago National Processing Center to receive questions from growers about the H-2A program. A set of "filing tips" based upon our actual program experience, which provides reminders of actions to help employers comply with the program's requirements. These "filing tips" are already available on the Office of Foreign Labor Certification's web site. Additionally we intend to design and develop a new web-based filing system for the H-2A program to improve access to our services and allow growers to check an application's status electronically.

The Office of Foreign Labor Certification also intends to post State Workforce Agency-conducted survey results on key issues, such as the acceptability of experience requirements and other prevailing practices, so growers and other individuals interested in the H-2A program can review this information at any time. This is particularly important since State Workforce Agency prevailing practice surveys and determinations of normal and accepted job requirements are used to determine the acceptability of wages, benefits and working conditions on an employer's H-2A application. Unfortunately we have recently found that many users of the H-2A program are not fully familiar with how we make these determinations and that the source of data comes from the workforce agencies in their own state.

Conclusion

The H-2A program serves the American people by helping those employers who have a legitimate need for temporary, foreign workers. The H-2A program as you know though is only one component of the Department of Labor's efforts for rural America. I would like to encourage the Agriculture industry as well as this Committee to discuss with the Department how we can increase domestic worker participation in agriculture industry to help reduce unemployment levels in rural America.

The Department will continue to focus on maintaining a fair and reliable H-2A process while enforcing necessary protections for both U.S. and nonimmigrant workers. To do so is good not only for workers but also for law-abiding employers. The Department is confident that as program users become more familiar with requirements, overall program compliance will continue to increase and any delays attributed to failure to follow the program's rules will continue to decrease.

Mr. Chairman and Members of the Committee, thank you again for the opportunity to discuss the U.S. Department of Labor's role in addressing workforce issues faced by the agricultural industry. I look forward to answering your questions.

ENDNOTES

¹ 75 Fed. Reg. 6884, 6903 (Feb. 12, 2010)

² 52 Fed. Reg. 20496 (June 1, 1987)

³ 73 Fed. Reg. 77110 (Dec. 18, 2008)

⁴ 74 Fed. Reg. 45906 (Sept. 4, 2009)

⁵ 75 Fed. Reg. 6884 (Feb. 12, 2010)

⁶ 75 Fed. Reg. at 6940 (Feb. 12, 2010)

⁷ 74 Fed. Reg. at 45926 (Sept. 4, 2009)

⁸ Although the webinar is no longer available online, a PowerPoint briefing for stakeholders is available on the Office of Foreign Labor Certification's website at: <http://www.foreignlaborcert.doleta.gov/h2a-briefing-materials.cfm>.

⁹ 75 Fed. Reg. 13784 (Mar. 23, 2010)

¹⁰ www.foreignlaborcert.doleta.gov

Chairman WALBERG. I thank you for your testimony.

I recognize myself for a series of questions here.

You noted in your testimony that the Department's mandate with regard to the H-2A program is to provide a, quote—"fair and reliable process for employers with a legitimate need for temporary foreign agricultural workers." I would ask before going on with the

question, have you had a chance to read the testimonies of the second panel?

Ms. OATES. I have not, Mr. Chairman. I am sorry. I just returned from a visit to the Southern states and I—my plane was delayed, unfortunately, for mechanical reasons and I didn't get back until this morning.

Chairman WALBERG. Okay. Well, then let me move on to a second question, then, because it would be—wouldn't be valuable to ask you a question that you hadn't had any—

Ms. OATES. But I am happy to respond to your question in writing, and I will certainly—

Chairman WALBERG. Okay.

Ms. OATES [continuing]. Read the testimony of the second panel.

Chairman WALBERG. If you would, please, I would like you to explain how the Employment and Training Administration establishes goals and evaluates its performance. You have indicated some change in how you approve or disapprove applications already, but can you describe the goals that are in place for the Office of Foreign Labor Certification and give us some sense of how successful the office has been at meeting these goals?

Ms. OATES. Well, clearly we operate with a written operating plan. We have goals for all of the offices within ETA. I meet with my senior managers about their success in meeting their quarterly goals on a biweekly basis; they meet with my deputies on a weekly basis.

We have a very in-the-weeds discussion about what is going on with the numbers that they are hitting. So for instance, we do—we did know after one quarter that we were having a problem with the certification of these applications and the OFLC team had a plan in place by the second quarter to really improve that. That is how we became aware of this denial based on an incomplete application.

So we are doing that at the very least quarterly, looking at the numbers as they come in, and clearly looking at things more often than that when letters come in or concerns come in. We meet on a regular basis with folks who are really doing this.

And I just want to say for the record, Mr. Chairman, we really learn the most when real people come in and talk to us about things, when they bring their concerns to us, and we make every effort to make that as pleasant as possible and would really appreciate members of this committee encouraging their folks to call us with their concerns, or if they are in Washington to come in and talk to us. Or when any of us are out in the field we do try to meet with stakeholder groups, both workers and employers.

So those are the kinds of things that bubble up concerns in between those quarterly assessments that we do with each of our different parts of the agency.

Chairman WALBERG. Well, I guess along that line, I appreciate that willingness and offer. As I mentioned to you earlier as we met, there is concern in the number of growers—agricultural employers out there—when even asked to consider giving testimony before this committee it ended up with them saying, "I will give you information, but I don't want you to use my name."

And there is a concern about that. I don't know why that is the case, but I think it is worth addressing, especially as you give testimony here that you are open to hearing from them and meeting the stakeholders' needs. If there is a concern that they will run amuck of some bureaucratic negatives that doesn't help you or our efforts in the process. So we will plumb those depths a little bit more and take your offer as sincere and see if we can work that out together.

Ms. OATES. Absolutely. I will look forward to that.

Chairman WALBERG. One of the witnesses on the second panel, Mr. Bailey, is from a large wholesale nursery, and in fact, one of the largest in the United States. His company participated in the H-2A program but ultimately was forced out of the program, allegedly, because of the repeated regulatory changes that went on.

As Mr. Bailey noted in his written statement to the subcommittee, and I quote—"If a company like ours, one of the largest, most sophisticated in the industry, cannot make H-2A work something is very wrong." And so if a large, sophisticated company can't function with an H-2A regulatory scheme how would a medium-sized or small business be able to make it work?

Ms. OATES. I share Mr. Bailey's concern and would look forward to working directly with him to find out how we could make this work better for him and for other growers. I absolutely agree, if a sophisticated stakeholder can't work within the system we need to help him and provide whatever technical assistance we can.

Chairman WALBERG. Okay. Well, we will make sure that that—any further statements to ask for assistance and offer suggestions how to handle it gets toward you.

I see my time is expired, and so I recognize the ranking member, gentlelady from California, Ms. Woolsey.

Ms. WOOLSEY. Thank you, Mr. Chairman.

So, as I have said, I don't believe that there aren't any U.S. workers willing to do this work, but that is one of the myths out there is that, you know, we can't find workers in the United States—and I represent Marin and Sonoma County, just north of the Golden Gate Bridge; we have got a really good grape and dairy industry, and if we can hire American workers in the high-cost area, I mean, I know anybody can.

But Bruce Goldstein's testimony after you, we are going to learn that even though there are low—the low estimates of U.S. workers are that at least 540,000 to 600,000 are in the ag labor force right now. So another one of the complaints, then, is with those American workers in the ag workforce that the growers are saying that wages have gone up unreasonably in just 1 year with the new regulations.

Well, help me understand how that—the H-2A wage structure would bring wages up and why that is not okay.

Ms. OATES. Well—

Ms. WOOLSEY. You are not going to tell me it is—

Ms. OATES [continuing]. I mean, I think that American workers are much more likely to be attracted to jobs when the wages are better and the protections are better, and clearly in this recession and the subsequent recovery I have met workers all over the country who are doing things they never dreamed they would do—auto

workers who are going into health care who never saw themselves becoming a male nurse but want job security and want jobs available. You know, I think that the same is true of agricultural workers, that more Americans—particularly young people who have the ability where we have such incredibly high unemployment—they have the physical ability to do these demanding jobs. I think we are much more likely to see them going into them.

Now, the problem is how do we sell those jobs, and I think that is something I would like to work with this committee about: How do we tell somebody that there is dignity in picking berries or dignity in picking beans? And as more and more Americans exhaust their unemployment insurance benefits I think they will be looking to these jobs. But we need to make sure they are paying prevailing wage.

Ms. WOOLSEY. All right.

So for years—from Reagan until George W. Bush—we worked under the same rules and regulations, and then George W. Bush changed, and then we came back to the current administration make—changing back. Were there no changes between George W. Bush and the Obama administration that made things—were things that need to be—needed to be fixed, that needed to be made more efficient?

I mean, this is the 21st century; Reagan wasn't. So what did you do that improved things?

Ms. OATES. Well, I think that the big question mark is the removal and the ignoring of the public workforce system. I mean, states have worked very hard to improve their level of functioning, both technologically and with human resources with the state workforce boards as well as the local workforce boards, and I think taking them out of the advertising and recruitment for these jobs was a huge mistake.

I think that also the self-attestation piece that employers did look for American work—I don't think there was anything bad about employers; I think they are limited to their own work. I can't imagine how hard it is—I have never run my own business, but I think any business owner would say that running an agricultural business where you are not only fighting economic situations but you are also fighting mother nature and the clock in a much different way than you do in a non-agricultural business—how do you have time to go out and recruit workers, American or anything else?

So I think that the attestation was not something that they were doing that they thought was illegal; it was just a time pressure. They posted jobs somewhere but in the new regulation we give them the added help of including the public workforce system.

For me—and I would be biased on that because ETA also is the mother of the public workforce system—but I think the removal of that assistance for particularly small growers to be able to use that for recruitment was a real mistake.

Ms. WOOLSEY. So is there any effort between the feds and the states and our Labor Department to post these jobs at the state level when people go in and sign up—well, I don't know. Does anybody walk in to the unemployment office anymore? But at least online do they lay out these jobs that are available locally?

Ms. OATES. Yes. We have a very close relationship with the state workforce agencies for not only this program but for a number of programs, and through the implementation of this program we have been able to enlist the enormous support of the state workforce agencies across all the states implicated. There are electronic job banks that we have done as well as the state job banks.

We have incorporated two new electronic tools across all programs called My Skills My Future and My Next Move to really show people where the jobs are by zip code. It is searchable so that somebody can not only look for jobs in their own area but can have a relative that lives in an area search by their zip code. We think that has been very helpful.

And the states have been very—you know, as they always are—terrific partners by telling us not only the positives that they are going through, but they have also been part of the system—the communication system—to tell us how we can improve.

Ms. WOOLSEY. Thank you very much.

Ms. OATES. Thank you, Congresswoman.

Chairman WALBERG. Gentlelady's time has expired, and it appears that the lighting system isn't working. A yellow light isn't coming on. So maybe we will get it fixed now, so—

It is a pleasure, as always, to recognize the chairman of the full committee, the gentleman from Minnesota, Mr. Kline?

Mr. KLINE. Thank you, Mr. Chairman.

Thank you, Secretary Oates, for being with us today. I appreciate your testimony, and of course we are looking forward to the second panel. I have some feeling that there is going to be some disagreement between your assessment and theirs on the availability of workers, but we will get at that.

I appreciate your testimony today. I know that you are not the assistant secretary for the Wage and Hour division, but there has been some discussion about H-2A workers not having protections, and I would argue that under the DOL that it appears they have quite a few.

And I am looking at a print from the DOL's Web site where it says that, for example, no later than the time at which an H-2A worker applies for a visa and no later than on the first day of work for workers in corresponding employment the employer must provide each worker a copy of the work contract, and that must be available to them; and it talks about the hours, and the start and end dates, and so forth. They have got to guarantee to all workers employment for a total number of hours equal to at least 75 percent of the workdays in the contract period.

They have got to provide housing; they have got to provide transportation; they have to provide contract wages; they have to provide inbound and outbound expenses. All these supervised by Wage and Hour in the Department of Labor.

So to suggest that there are no protections is just inaccurate.

Let's get to your—more to your area here. We are going to hear—and again, in the second panel, and I know it is a little bit of a disadvantage for you here because you are testifying first and haven't had a chance to hear from them—some testimony that says for the 15 years from 1995 to 2009 the average number of employer appeals to administrative law judges regarding the H-2A applica-

tions was about 18. This year there have already been 442 appeals filed.

And testimony, again later, will reveal that the Department is prevailing on only 10 percent of these appeals. How do you explain the spike and essentially the Department losing 90 percent of the appeals? Is that right? Do you agree with those numbers, or—

Ms. OATES. I don't have the accurate numbers in front of me, Mr. Chairman, but I will certainly get them to you. But, I mean, I think—look, 18 to 442, I am not going to defend that. That is difficult.

What I am going to say to you is that any time a new rule is promulgated there are more appeals because people are getting used to the change. But I think that that kind—if those numbers are correct it is indefensible and we need to work—continue to work, again, working with this committee to get those down—

Mr. KLINE. If I may—I am sorry to interrupt, but we are—

Ms. OATES. That is all right.

Mr. KLINE [continuing]. We are short of time. Not only is there the spike—a huge spike.

Ms. OATES. I agree.

Mr. KLINE. Eighteen to 442. You are only winning 10 percent of the time, so it is not like these are spurious or dilatory. These are genuine appeals to administrative law judges that the Department is losing.

And when you have that kind of a spike I would argue that you are having a worse than chilling—a freezing effect across the industry and across the country. And this is a time when we are worried about jobs.

We will hear, again, in testimony about the effect of when a company is put in this position and you have got crops that fail in the field it is not just H-2A workers who suffer from this; it is the American workers suffering as well. If a company goes under because of this it does damage to American workers, not just to H-2A visa workers.

Again, we are going to have testimony addressing some of these issues, but it seems to me when we look at some of the testimony we are going to hear that only 5 percent of U.S. workers found through the workforce agencies actually work through the entire contract period. In other words, they come, they try it for a few days, they try it for a week, decide it is too hard or something, and then they leave. And something close to 70 percent of U.S. workers don't accept the agricultural job offered to them.

So there is an enormous amount of pressure here—and again, one of my friends and colleagues, the aforementioned Bailey Nursery, Joe Bailey is here from Minnesota to testify to this, and so I don't want to jump ahead to his testimony, but at a time when the economy is struggling as bad as this one is—and I don't think anybody denies that it is in trouble and that we have high joblessness—when you have got a Department that is causing this kind of disruption where you have 442 appeals where you used to have 18, you are causing great distress in the system.

And so I heard your offer to work and hear. I hope that we can count on you to do that. I am certainly going to encourage all of my constituents who are running into this problem to start that

dialogue. It is a big problem, and I think we can do something about it if we will work together.

I am sorry I have exceeded my time, and I yield back.

Chairman WALBERG. I thank the chairman for your questions.

I now recognize the gentleman from New York, Mr. Bishop?

Mr. BISHOP. Thank you, Mr. Chairman. I appreciate very much you having this hearing. I represent Suffolk County, New York, which—little known fact about Suffolk County, New York is that it is the largest agricultural producing county in the state of New York—

Ms. OATES. And lovely ducks, as well. Big duck industry.

Mr. BISHOP. Very few of them left, by the way.

Ms. OATES. Oh, I am sorry to hear that.

Mr. BISHOP. We didn't like what they did to the waterways.

I really just have two questions. What do you think would be the impact on the farm—on the entire farming industry if we were to pass legislation that would require all employers, including agricultural workers—or agricultural employers—to participate in E-verify?

Ms. OATES. We could probably have a long discussion about that. I think that I am not able to really tell you exactly what the—what it would be, but clearly it would have an impact on some of the people working on agricultural—

Mr. BISHOP. My understanding is that the agricultural workforce is—nationwide is projected to be approximately 70 percent undocumented.

Ms. OATES. I have seen those, yes. I have seen that data.

Mr. BISHOP. And I suppose an argument could be made that some proportion of that 70 percent would be filled with a domestic workforce in the event that the undocumented workforce were basically sent away. But it strikes me as unreasonable to think that we would be able to fill all 70 percent of the existing workforce with native-born workers. Am I right about that?

Ms. OATES. Well, I would agree with you, Congressman, because if any of the anecdotes that we hear about American workers showing up and not staying—not staying the whole season—if any of them are true your supposition would be completely correct.

Mr. BISHOP. And then I guess the other question is, would not the most comprehensive path here for a solution to H-2A, to E-verify, and so on, would not the most comprehensive solution be comprehensive immigration reform?

Ms. OATES. Without a question.

Mr. BISHOP. Okay. Thank you.

I yield back, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

Now I recognize the gentleman from Virginia, Mr. Goodlatte?

Mr. GOODLATTE. Thank you, Mr. Chairman, and thank you for holding this hearing on this very important issue. As you know, I am also a member of the Agriculture Committee, which has a deep concern on this issue, and I am a member of the Judiciary Committee and have served on the Immigration Subcommittee, although I do not serve on that subcommittee right now. And to top it all off, I used to practice immigration law before I came to Congress.

So I have a great interest in what we are talking about here today, but I also have a great concern, having heard from a number of my agricultural producers who have used the H-2A program. And in fact, as you may be aware, some of the regions of the country are higher users of H-2A than others.

Across the country as a whole only a small percentage of farms that need seasonal workers utilize this program. And I have for years sought to change the program because I felt that it has discouraged farmers from utilizing it rather than encourage it because it didn't meet their needs in a way that they could remain competitive and remain in agriculture, which is obviously an important goal of ours.

So I have been greatly disturbed by the regulations that the Department has recently put in place that seem to be going in the wrong direction. The chairman cited statistics that show that both only a small percentage of U.S. workers are staying on these jobs when they are hired for them.

Statistics, I think, will also show that a greater percentage of farms are not utilizing H-2A. I would attribute that to these new requirements.

And I would also express concern about some of the particulars that are not new but are a problem. For example, the adverse effect wage rate that is utilized in this designed to encourage U.S. workers to take these jobs. It obviously doesn't work.

If only 5 percent of the people referred are actually staying on the job in spite of the fact that these are not just competitive wages, but they are super-competitive wages, because instead of having the marketplace determine through a prevailing wage what they should be compensated, instead it is sort of a bureaucrat's dream of sitting down and trying to come up with a formula that indicates what it is that the farmer would have to pay in order to keep the workers on the job. And the fact of the matter is, based upon the numbers cited by the chairman, it simply isn't working.

Secondly, it creates havoc with these farmers who have a product with a limited period of time in which they can harvest their crops having to deal with an unreliable workforce because of the new rules that have been put into effect.

And then finally, going from having H-2A employers able to wait until the employee had been working for a period of time before paying 50 percent—paying for transportation costs, now they are required to reimburse the workers for the cost in the first week. They come, sometimes from great distances—sometimes the employer is required to hire from great distances even though they know that the H-2A workers are reliable, they go through a program, they come, they stay for a limited period of time, they go back.

The U.S. workers are not a part of any such program but they may be recruited from great distances at great expense to the employer and then leave after they get reimbursed for that cost, maybe simply transportation to get wherever they wanted to get to and have very little desire to actually work for that employer.

So these are really unworkable situations for farmers, and given the fact that the frustration level has risen to the point that now hundreds of appeals are being filed and they are prevailing on most

of them, don't you think that your department is going about this the wrong way if you are getting that kind of result?

Ms. OATES. Well, no, I don't think we are going about it the wrong way, with great respect, Congressman. I think that one of the conditions that these workers come in under is—one of the protections they don't have is overtime. So they get a flat wage, an hourly wage, and that is set by a survey done by the Department of Agriculture state by state. I think that is the right way to do it, and I respect your disagreement on that.

I do think, as I said earlier, that we are in a continuous improvement mode. I don't see huge differences in the numbers from—I am looking at numbers in front of me from 2007 until today. I am seeing in 2007 we—there were 80,000 workers requested under this program, and in 2010 there were 90,000.

So I don't see a huge running away from the program, but I am not walking away from the fact that I can't defend over 400 appeals. What I can defend is that if you disaggregated that by month we are getting better every month. I am not defending the number, but I really look forward to working with the committee and your employers to find out what is causing in your state as well as the other member states and all the states across the country.

We think this is the right way—yes, sir?

Mr. GOODLATTE. Let me interrupt, because my time is expired, and I wanted to ask the chairman if I might ask one additional question.

Chairman WALBERG. I am certain I will pay for that, but—

Mr. GOODLATTE. All right, well, it may not even be a question, or just a statement. This is a hearing on H-2A workers. I note that the chairman has a witness coming from Minnesota. Many nurserymen utilize the H-2B program, as do people in the seafood industry, resort hotels that need seasonal workers, and so on.

And that may be an even more urgent situation because you have new rules that are being accelerated in when they are going to be put into effect, and a number of us have written to you and asked you to ask the Department to delay putting those rules into effect because the dramatic change in wages that are going to have to be paid are in those instances actually going to put many, many, many small businesses out of business and a lot of workers out of work, particularly U.S. citizen workers.

Because I applaud your objective to want to employ more U.S. citizens. We have got to design programs that encourage that rather than discourage the ability to conduct these businesses, whether they are farms or whether they are other seasonal work in the U.S.

So if you have a response to that, I would welcome it.

That is my question, Mr. Chairman. Thank you.

Ms. OATES. I would be happy to work with the committee out of respect for people's time on the H-2B issue separately at your convenience.

Chairman WALBERG. We would appreciate that. That is a good question. I am glad, I think, I let you ask that one, but I think it is a good question because I know we wrestle with that in Michigan with the Grand Hotel versus some of the growers.

The gentleman's time is expired.

I now recognize the gentleman from New Jersey, Mr. Payne?

Mr. PAYNE. Thank you very much.

Sorry that I missed your testimony, Assistant Secretary, but coming from New Jersey, and I know of your extensive background work in our state and the outstanding job you did, and also commend you for the fine job you are doing here. So it is good to see you again.

Ms. OATES. Thank you, Congressman.

Mr. PAYNE. I guess many people may not realize that, of course, about 40 years ago—40 or 50 years ago—New Jersey was a very, very big agricultural state, and much of the progressive legislation that came to Congress—to the U.S. Senate in particular—was, as you may know, from Senator Harrison “Pete” Williams, of New Jersey, who was chair of the Education and Labor Committee and really took on the whole problem of migratory workers and the horrible conditions that they were living under, actually even in New Jersey. And much of the attention began at that time through him to start focusing on the—on some of the adverse conditions that migratory workers were experiencing, and child labor, and the abuses, and the lack of educational opportunities for persons who were working in our state. And I know that this was through the country.

Under the H-2 program—I don’t know if anyone asked you this already, but—we know that workers cannot switch employers; they must leave the U.S. when they end their program that particular year, and if they want to return to participate the following year they depend on that employer that they worked for the previous year to apply for a visa for them. They have no right to become permanent residents, as we know under this particular program.

Given these facts, is the Department concerned that H-2A workers are vulnerable to abuse and limited to their ability to voice concern over working conditions if they know that they have got to depend on the employer to fill—to make the request, and employer is not going to request a worker who seems to be speaking up for his or her rights, and therefore that employer would be more inclined not to have an application resubmitted by them? How do you deal with that, or is it a problem, or is it just something that is potential but you have no way of verifying whether it is happening or not?

Ms. OATES. Again, Congressman, this is one where we hear anecdotes, but certainly our sister agency, Wage and Hour, when they go out and investigate often find it difficult to get people to testify because they are afraid of the next year. And ABC News, when they did their expose on the blueberry world with young children and child labor violations talked to us and told us off the record the same thing: people were afraid to talk.

And I don’t know how we fix it. Workers are afraid to talk, Chairman, employers are afraid to talk. How do we get the message out to this industry that we need them to talk to us so that we can make the improvements that we need?

But, Congressman, I definitely think that these workers are very afraid to bring some of their concerns forward and do so many times through their advocacy groups so that they can keep their anonymity rather than putting their name on the line. But even

afraid to talk about regions, because if you talk about blueberries in New Jersey you are talking about Hammonton, and it is not hard to figure out who—you know, what farm you worked on. So I think people are very nervous.

Mr. PAYNE. It seems like the employer ought to, since he knows that he has to somewhat rely on the workers coming back, it would seem that there would be a more positive attitude on the part of the employer. I know that they are not all Simon Legrees, but, you know, there are certainly a lot of them that do not give the full rights. And of course, a person who is here—you know, it is just like, you know, invite a cousin to stay with you they are certainly going to act right in your house or you are not going to invite them back again. So, I mean, these guest workers know that they have to—and it seems like the employer would try to have a better work relationship so they can have a dependable workforce.

But this is something that concerns me and hopefully we can quantify it at some point in time. But thank you very much for all the great work that you are doing.

Ms. OATES. Thank you, Congressman, very much.

Chairman WALBERG. I thank the gentleman.

And I thank the assistant secretary, as well, for the time you have given. I believe there will be some written questions coming to you based upon the following panel as well. I thank you for your statement of openness to hear concerns of growers, of employers as well as employees on this issue.

And I, for one, would certainly like to see that happen, because if we are working in partnership I think the Department of Labor is given the very important responsibility of encouraging labor in this country, and whether it is in the mining industry or whether it is in the agricultural industry, more people that are working that are American citizens, but then, ultimately, the more people that are doing the job that provide the best quality in the most efficient fashion for the work that needs to be accomplish is important, too. So we want to work to that end.

Ms. OATES. You have my commitment, Mr. Chairman.

Chairman WALBERG. I appreciate your time. Thank you so much.

Ms. OATES. Thank you very much.

Chairman WALBERG. We will ask the second panel to join us at the table at this time, and we want to continue right on. The danger of giving a break is it is a danger, and that is why we don't give a break, with the schedules that we are all involved with.

So as the panelists are coming to the table I would turn to the chairman of the full committee, gentleman from Minnesota, Mr. Kline, to introduce a—one of our panel members who has the great pleasure and benefit of coming from the district he is privileged to represent.

Mr. Chairman?

Mr. KLINE. Thank you, Mr. Chairman.

I want to thank all of our panelists, as you are getting your seats there.

I am really honored today to introduce a fellow Minnesotan, Mr. Joe Bailey. Joe is the director of human resources for Bailey Nurseries, Incorporated, an industry-leading company his family founded in 1906. And I have known Joe, and his dad, and his family for

a number of years and watched the travails that they have been going through for some time.

So I am very pleased, Joe, that you could make it out here today. We are looking forward to your testimony.

Back to Bailey Nurseries, it is headquartered in Newport, Minnesota, with growing fields throughout the state of Minnesota and nationwide. Bailey Nurseries is one of the country's largest wholesale nurseries, producing an immense variety of landscape and greenhouse plants.

Mr. Chairman, I am thrilled Joe has joined us today and agreed to share his experience with the H-2A visa program for agricultural guest workers. I will look forward to hearing his testimony and the testimony of all of our witnesses, and I yield back.

Chairman WALBERG. Thank you, Mr. Chairman. And thank you for providing us a resource for the committee today that has those credentials, especially staying power with the family in the business.

Joining Mr. Bailey will be Libby Whitley, president of MASLabor; Bruce Goldstein—is that Goldstein or Goldstein?

Mr. GOLDSTEIN. Goldstein.

Chairman WALBERG. I always wrestle with that, and generally get it right on the second try—president of Farmworker Justice; and Leon Sequeira, senior counsel with Seyfarth Shaw and former assistant secretary of labor for policy at the Department of Labor.

Appreciate you all being there.

All of these witnesses have extensive experience with the issues before the subcommittee today and we look forward to their expert testimony.

Again, before I recognize you for your testimony let me quickly remind you of the lighting system. It is like the traffic light. Use it as legally as possible; we would appreciate that—give us more opportunity for question and response also.

And again, after everyone has testified through the whole process we will have 5 minutes for each of our panel members to address questions from our committee.

And so, having said that, I will ask Mr. Bailey to begin your questioning. Thank you for being with us.

Begin your testimony—not questioning.

**STATEMENT OF JOE BAILEY, DIRECTOR OF HUMAN
RESOURCES, BAILEY NURSERIES, INC.**

Mr. BAILEY. Okay. Thank you.

Chairman Walberg, Ranking Member Woolsey, distinguished members and guests, thank you for this opportunity to testify on the workforce situation and the dilemmas facing the specialty crop agricultural industry.

As Congressman Kline said, Bailey Nurseries is a fourth-generation, family-owned nursery started in 1905. We are one of the United States' largest wholesale nurseries, with our main offices and growing fields located just outside the Twin Cities of Minneapolis and St. Paul, and we also grow in Oregon, Washington, Illinois, and Iowa.

We employ over 500 year-round employees and another 900 seasonal employees during our peak spring shipping and planting sea-

son. Our nursery has relied on seasonal workers since our humble beginnings.

During the early years the seasonal workers were primarily young men off of local farms. During World War II these young men went overseas, and as was common, we relied on Mexican immigrants to assist with the seasonal work. As my grandmother put it many times, “we would never have made it without the men who came up from Mexico.” The respect for these hardworking people is shared by everyone I have ever met in the nursery and landscape industry.

We struggle each year to fill our seasonal positions. Few Americans apply for, accept, and stay in seasonal and intermittent employment. Many who are hired to not last long as they find the work too physically demanding, are not willing to work in unfavorable weather conditions, or find the seasonal work unacceptable in preference to year-round employment.

Over the years our company has seen and lived through it all—audits, an INS raid in 1996, H-2A program utilization, and E-verify. In 2008 we began using the H-2A, bringing in about one third of our seasonal workers on the program.

We spent hundreds of thousands of dollars each year to use H-2A but there were some advantages. The same workers returned each year. They were trained and productive from day one, but you never knew if the workers would arrive when needed. The program has been a bureaucratic nightmare to work with.

Between 2008 and 2010 the H-2A regulations changed three times. These changes forced us out of the program at the end of 2010.

Essentially we went through the same exercise we did in the 1996 immigration raid. We had a trained and productive workforce that we lost in 1 day due to the government, only this time it was a regulation change instead of a publicized raid. It is hard to imagine the entire seasonal agricultural workforce coming in on the current H-2A program when less than 5 percent of the workforce does now.

In 2008 we began using the E-verify program at our headquarters in Minnesota, which has screened out a substantial portion of our applicant pool. As of today we continue to use E-verify program.

In 2011 we have truly struggled to attract and retain a seasonal workforce. We have spent more time, effort, and money than ever on recruitment.

We needed to fill 500 seasonal positions in Minnesota, yet we are only able to hire 350 people that came through our front doors. Of these 350 workers, as of September 1st over 50 percent have voluntarily quit. With the high turnover throughout the season we are short over 100 people to do time-sensitive work.

In theory at least, E-verify would level the playing field with all employers. But supporters of mandatory E-verify are wrong when they say it will create U.S. jobs.

At least for agricultural and seasonal employers E-verify would shrink the seasonal labor supply and threaten U.S. jobs. In our own company 500 year-round American jobs on our farms are at risk if we can't access enough seasonal workers.

Congress needs to set aside the politics and, in our view, establish a new agricultural worker visa that allows experienced current workers and future workers to participate, scrap the broken H-2A model, allow workers to move among registered employers. Bad employers will have to clean up their act to be able to retain workers.

Limit the role of government. There is just too much bureaucracy, and that is why H-2A is failing to do the job. If a large company like ours cannot make H-2A work something is very wrong.

Agriculture needs a legal labor safety net program that actually works. We are open to E-verify, but only with a workable program. Otherwise you will export American jobs and businesses, export economic activity, and import more food and agricultural products.

The lack of a workable program jeopardizes the viability of our 106-year-old family business, and most importantly, the livelihood of hundreds of year-round American jobs. With all the attention on creating jobs let us not forget to protect the existing jobs.

Thank you.

[The statement of Mr. Bailey follows:]

Prepared Statement of Joe Bailey, Bailey Nurseries, Inc.

Chairman Walberg, Ranking Member Woolsey, distinguished members of the subcommittee, and guests, thank you for this opportunity to testify on the H-2A temporary and seasonal agricultural worker program, and the implications of mandatory E-Verify on the specialty crop agricultural industry. Bailey Nurseries is a fourth-generation family-owned nursery started in 1905. We are widely recognized as one of the United States' largest wholesale nurseries, with products distributed by more than 4000 garden centers, landscapers, growers and re-wholesalers throughout the U.S. and Canada. Our main offices and growing fields are located in Newport, Minnesota, (just outside the Twin Cities of Minneapolis and St. Paul) and we also operate nurseries in Yamhill and Sauvie Island, Oregon; Sunnyside, Washington; Onarga, Illinois; and Charles City, Iowa.

My testimony today is also offered on behalf of the American Nursery & Landscape Association (ANLA). ANLA is the national trade organization representing my industry. ANLA's 15,000 members and grassroots participants are mostly small and family-based businesses who grow, sell, and install landscape plants as well as much of the planting stock for America's orchards, vineyards, Christmas tree and berry farms, and even managed forests.

Bailey Nurseries employs over 500 year-round employees and another 900 seasonal employees during our peak spring shipping and planting season. We grow and offer thousands of different nursery and greenhouse products that include deciduous trees and shrubs, evergreens, fruits, perennials, annuals and roses. Our plants are offered from seedlings and rooted cuttings to finished bareroot and container-grown stock, often taking 3 to 5 years to grow. The attention our plants receive throughout their growth results in some of the finest plants available.

Bailey Nurseries, Inc. has relied on seasonal workers since our humble beginnings. During the early years of the nursery the seasonal workers were primarily young men off of local farms. During World War II many of these young men went overseas to fight the war and, as was the case with growers elsewhere, we relied on Mexican immigrants to assist with the seasonal work. As grandma Bailey put it many times "we never would have made it without the men who came up from Mexico". We are proud of our long standing relationship with the people from Mexico and immigrants from many other countries as well. The respect for the hard working people that make up the majority of the seasonal agricultural workers in this country is shared by everyone I have ever met in the nursery and landscape industry.

During the 1990's our seasonal workforce became predominantly Hispanic. We became reliant on this demographic as the local unemployment rate dipped below 3% and the local applicant pool all but dried up.

In 1996 the INS audited our Form I-9's and discovered a number of our employees lacked proper work authorization. We were shocked as the applicants had presented us with documents that appeared genuine. The INS raided our farms during the

middle of our fall harvest and we lost 137 experienced workers. Many of the employees had been with us for over 10 years and had close personal ties to their co-workers and the community.

We have struggled every year since to find enough people to help fill our seasonal positions. As we have learned first-hand, few Americans who are seriously seeking work will apply for, accept, and remain in seasonal and intermittent employment, especially in the agricultural sector.

Many who are hired do not last long as they find the work too physically demanding or repetitive, are not willing to work in unfavorable weather conditions, or find the work schedule too demanding.

In 2008 we began using the H-2A program, bringing in about one-third of our seasonal workers on the program. We spent hundreds of thousands of dollars in expense to utilize the H2A program each year, but we believed it was worth it to have a somewhat stabilized and trained seasonal work force. Between 2008 and 2010 the H2A program regulations changed three times. Due to the finalized H2A regulation changes and the size and sophistication of our business we were forced out of the program at the end of the 2010. Essentially we went through the same exercise as we did in the 1996 INS raid; we had a trained and productive work force that we lost in one day due to the government (this time a regulation change instead of a publicized raid).

By some measures, the H2A program worked very well for us. It allowed us to bring back the same workers each year. As returning workers they were already trained on skilled work (identification of hundreds of plant varieties, order pulling, pruning, etc.) and productive from day one. 100% of the H2A workers went back to their homeland after our season was finished. Our experience was that all of the H2A workers played by the rules, were happy for a seasonal job opportunity with an employer who valued their skills and work ethic, and were happy to go back to their homeland for the winter to be with their families.

Our experience with the H2A program was that it was a gamble whether you would get the workers that you needed on time for the busiest time of the year, April and May. The program is a bureaucratic nightmare with multiple hoops to jump through. Getting our seasonal workers late does not offer a valid excuse to our customers who are wondering why their shipment of plant material is late. The nursery business is very seasonal and time sensitive for shipping, planting, and tending the plants. It is impossible to imagine the entire agricultural seasonal workforce coming in on the current H2A program when less than 5% currently does. The size of government and its budget would certainly need to grow in order to administer increased use of H2A.

In 2008 we began using the E-Verify program at our headquarters in Minnesota which has screened out a substantial portion of our applicant pool who were using fraudulent documents. As of today we continue to use the E-Verify program. The upside is that we believe we know who we have on our staff (even though E-Verify may be prone to failure in detecting use of false documents that contain a legitimate name and number combination). The downside is that we are drastically short on help during the spring rush, even in the down economy.

In 2011 we have withstood tremendous difficulty with our seasonal work force. We spent more time, effort, and money than we ever have on recruitment. We advertised our positions in the newspaper and on the radio, held job fairs, recruited from local unemployment offices, recruited other ethnic groups through their social services networks (Hmong, Burmese, and Vietnamese refugees), recruited at local seasonal businesses that were laying off staff, started a referral program, and sent letters to previous employees asking for them to return. Unfortunately, we were not able to attract enough people to work in our shipping facilities, greenhouses and fields. This led to being understaffed and a lot of frustration by our supervisors and customers.

We had hundreds of applicants, but many were not willing to do the work after hearing about it, did not show up to be hired after we made the job offer, preferred to stay on unemployment, only wanted summer work, lacked basic requirements, could not work the demanding schedule which can be 6 or 7 days a week and 9-14 hour days during the spring rush, or did not pass E-Verify or the criminal background screening we run on all new hires.

We needed to fill 500 seasonal positions in Minnesota, yet were only able to hire 350 people that came through our front doors. Of the 350 seasonal workers we hired this year, as of September 1, over 50% have voluntarily quit and the balance are still with us. With the increase in turnover throughout the season, we were short over 100 people to do our time sensitive work. Many of the local workers that we hired this year have left us for companies that can offer year-round work, i.e. meat packing, or gone back to school.

We continue to wonder what else we can do to attract seasonal workers other than raise our wages. We operate in the real world: how do we raise wages when we have had a wage freeze on our fulltime staff for three years now due to the current economic conditions? How do we raise wages when we are operating in an increasingly competitive global economy? Nurseries in Canada, for instance, can grow the same crops we grow. The difference is that Canada has a seasonal agricultural worker program that actually works. The Canadian government facilitates use of the program and the success of its growers. This is a vastly different reality than that facing our company and our peers across the U.S., where government is a hostile impediment rather than a help.

Of all the problems our industry and our company face, seasonal labor is the biggest. We do 60% of our business in 60 days in April and May. If we do not have qualified seasonal staff on a timely basis at our peak we are in a very, very difficult position. A shortage of qualified workers leads frustrated supervisors, lost sales, and lost customers.

We are trying to do everything the right way, but we remain very cautious and uncertain about the future because we do not know what kind of seasonal labor force we will have from one year to the next. The 500 seasonal workers we employ in MN directly support over 500 year-round positions within our company. Without an adequate supply of seasonal workers we will be forced to cut year round jobs, drastically downsize our business, or worse, affecting our customers and suppliers as well. Many Americans could lose their jobs in production, sales and marketing, logistics and transportation, and management if we don't have an adequate seasonal labor pool.

In many ways, we would support mandatory E-Verify to level the playing field with all employers. But the proponents of mandatory E-Verify are wrong when they say it will create U.S. jobs. At least in the agricultural and seasonal settings, mandatory E-Verify constrains the seasonal labor supply and in turn threatens U.S. jobs. With mandatory E-Verify the agricultural economy in particular will suffer without a safety valve to find enough seasonal workers on a timely basis and without the Soviet-like bureaucracy which companies now face when they try to use the H2A program. In our own company, 500 year-round American jobs on our farms are at risk if we can't access enough seasonal workers. But the impact is even broader, as we purchase goods and services needed to farm. And, our payroll of \$28 million each year is largely spent in the local economies where we operate.

If we can't find enough local Americans to do seasonal work with the current high unemployment rate, what will happen when the rate goes down and everyone is using E-Verify? Even though we are next to a major metropolitan area, our experience has shown that there simply is not an adequate supply of seasonal workers. Our peers from California to Connecticut to the Carolinas report the same experience.

I would like to make a few comments regarding solutions. Congress needs to set the politics aside and roll up its sleeves and get to work to solve the problem. Here is the outline of a balanced approach:

- Establish a new agricultural worker visa. Allow experienced workers who are here as well as future workers to participate in such a visa program. Ideally, the visas should be valid for at least a year or two, and be renewable so long as terms and conditions are followed. A shorter visa term means more interactions with government, which means the need to build up more capacity for the program to work.
- Scrap the H-2A model, where the contract tie limits flexibility for both the employer and the worker and leads to calls for layers of added worker protections. Instead, allow agricultural workers to move among registered employers. Bad employers will have to clean up their act to be able to retain their seasonal workforce.
- Establish better incentives for workers to return home when the work is done. Withholding the equivalent of the employee's Social Security contribution in escrow, only to be accessed when one returns home in compliance with their visa, would provide such an incentive.
- The greatest need for such visas is for seasonal workers, though we are sensitive to the fact that some year-round farm production jobs are difficult to fill and should be eligible to participate in a new program.
- Limit the intrusive hand of government in the program. Too much bureaucracy is why H2A is failing to do the job. Design a new program with an eye toward how the market works, and how seasonal workers move among employers and among crops.

In closing, I would like to make three points. First, if a company like ours, one of the largest and most sophisticated in our industry, cannot make H2A work, something is very wrong. Agriculture needs a legal labor safety net that actually works. We need a new program structure.

Secondly, we are open to E-Verify being applied uniformly across the agricultural industry, but only after a workable program is implemented. To put the cart before the horse will kill American jobs and companies in industries like mine, export jobs and economic activity to other countries, and import more food and agricultural products.

Thirdly, the lack of a workable program jeopardizes the viability of our 106 year old family business and the livelihood of hundreds of year-round jobs. With all the attention on creating jobs let's not forget to protect the existing jobs.

Thank you.

Chairman WALBERG. Thank you, Mr. Bailey, for your time and testimony.

And now I recognize Ms. Whitley for your testimony. Thank you for being here.

STATEMENT OF LIBBY WHITLEY, PRESIDENT, MASLABOR

Ms. WHITLEY. Thank you, Mr. Chairman.

Good morning, Chairman Walberg, Chairman Kline, Ranking Member Woolsey, and other members of the committee. My name is Libby Whitley and I am chair of the H-2A Committee of the National Council of Agricultural Employers. NCAE represents agricultural employers and their associations throughout the U.S. on labor and immigration issues, and its H-2A program users range from the West Coast to New England and include the nation's oldest program users.

I am also president of Mid-Atlantic Solutions, Incorporated, of Lovingson, Virginia, known as MASLabor, which serves more than 600 diversified agricultural, green industry, and other seasonal employers in more than 30 states.

NCAE and its members are grateful for the opportunity to address the subcommittee today and share our views of the dysfunctional H-2A program.

NCAE and its members, along with agricultural employers throughout the U.S., have concluded that the H-2A program is broken and cannot be fixed. Historically, it has been difficult to use. In the past several years it has become impossible.

Users have faced three sets of conflicting regulations based on the same statute in the past 3 years. Administration and enforcement of the program by the U.S. Department of Labor is dysfunctional.

We are here to ask the subcommittee and Congress to provide us a new program, structured in a manner that growers can use and which ensures that workers arrive at the farm in a timely manner. Right now less than 4 percent of the seasonal agricultural workforce is comprised of H-2A workers because of the problems I will describe.

With the anticipated reporting out of mandatory E-verify legislation pending before the House Judiciary Committee in the coming weeks it is imperative that a new and workable program be enacted at the same time. Mandatory E-very legislation would deprive seasonal agricultural employers of nearly 70 percent of its workforce estimated to be employed through the use of genuine-appearing but invalid work authorization documents without any workable program to replace them.

How do we know the H-2A program is broken? We have heard grower anecdotes—you have heard grower anecdotes for years.

But to objectively measure program performance among H-2A users this year NCAE commissioned an expert to design a nationwide statistically valid survey of employers using the H-2A program in 2010. The survey was implemented by Washington State University.

An explanation and preliminary summary of the survey results is attached to my full testimony, my written testimony. The survey and publicly available statistics show the following: Growers are frustrated with the administrative burdens and costs of the program. Some of the subcommittee members have undoubtedly heard about these because 54 percent of those surveyed had complained to their congressmen and senators about the program.

The heavy administrative burdens and costs imposed by the program do not result in U.S. workers taking farm jobs. Sixty-eight percent of workers found by the state workforce agencies did not accept the offered job, and only 5 percent who did accept the job finished the entire contract period.

DOL historically and currently fails to meet its statutory deadlines for acting upon H-2A applications. Typically it meets them less than 60 percent of the time.

Seventy-two percent of the growers surveyed report that they receive their H-2A workers on average 22 days after the date they were needed. This is devastating for the production and harvesting of perishable crops.

DOL now rejects the same applications it has accepted routinely in the past, often with no legal basis and with no advanced warning to the affected employers or the public. Typical examples of the small employers or inconsistencies cited include using an attachment to a DOL form to provide the detailed information requested rather than putting all the of the information on the form, using White-Out to correct an error, and a transposed digit on a zip code.

DOL officials in Chicago are now dictating to farmers when and how they should conduct their farming operation and if farmers refuse to submit to this legally unjustified intermeddling DOL issues a deficiency notice or denies the application. DOL's arbitrary denials required farmers to hire lawyers to make expedited appeals to an administrative law judge to get their workers and save their crops. Appeals have skyrocketed in the past from a national average of 18 annually from 1995 through 2009 to, as we have discussed previously today, 442 in 2011, and that is only partial-year data, by the way.

In most cases the farmer prevails those that actually appeal. Our survey shows that many just abandoned the effort. But the workers invariably arrive late, usually weeks or months after the date of need.

Delays in admission of workers or application denials resulted in \$320 million in economic losses in 2010 to the surveyed farmers. This is an astronomical number when you consider this involves only less than 4 percent of the agricultural workforce. If the entire workforce was forced into the H-2A program the annual losses would be in the billions.

The Wage and Hour division of DOL, which enforces the H-2A program requirements, singles out H-2A employers for enforcement. It often ignores those who don't incur the cost and burden of seeking to obtain a legal workforce through the H-2A program, and our statistics in our survey bear this out quite vividly.

Under the current regulations DOL is seeking hundreds of thousands, millions of dollars in back-pay and fines for employers who failed to let the Department of Labor know that some of their workers had terminated the contract early—voluntarily quit their jobs. For this technical violation growers are forced to pay three quarters of the wages for the entire contract period even though there obviously was no injury involved of people who voluntarily quit.

This has been financially devastating to employers and hurts their year-round U.S. workers. By comparison, the Department of Homeland Security only asks for a \$10 fine for this violation of failure to notify.

NCAE strongly urges this subcommittee and Congress to enact a seasonal farmworker program that is not based on the H-2A structure as part of the E-verify legislation. We cannot gamble that Congress will address this important issue in the future. It will be too late.

If we want to produce labor-intensive agricultural products in this country, including fruits and vegetables, rather than importing them from abroad, we have to address this program now. And I thank the committee for its time.

[The statement of Ms. Whitley follows:]

**Prepared Statement of Elizabeth (Libby) Whitley, on Behalf of the
National Council of Agricultural Employers**

Good morning, Chairman Walberg, Ranking Member Woolsey, and Members of the Committee. My name is Libby Whitley, and I am the Chair of the H-2A Committee for the National Council of Agricultural Employers (NCAE). NCAE represents agricultural employers and their associations throughout the U.S. on labor and immigration issues, including many H-2A program users. NCAE's H-2A users range from the West Coast to New England and include the nation's oldest program users. I am also the President of Mid-Atlantic Solutions, Inc. (MASLabor) of Lovingson, Virginia, the leading for-profit service provider of H2 guestworkers in the United States. MASLabor serves more than 600 diversified agricultural, green industry, and other seasonal employers in more than 30 states. I am testifying today on behalf of NCAE and its members are grateful for the opportunity to address the Subcommittee today and share our views of the dysfunctional H-2A program.

The H-2A program is the only way for many farmers to hire enough legal workers to grow and harvest their crops. Congress created the program with two purposes: (1) to require the U.S. Department of Labor (DOL) to admit in a timely manner temporary and seasonal alien agricultural workers if there are insufficient able, willing, and qualified U.S. workers to meet workforce needs and (2) to ensure that the admission of alien workers does not adversely affect U.S. workers. Unfortunately, DOL singularly focuses on administrative requirements intended to ensure employment of U.S. workers. As a recent survey conducted under NCAE's auspices shows, DOL delivers few U.S. workers who want farm jobs, in spite of the extreme costs and burdens it imposes on farmers for this purpose.

DOL does not attempt to meet its other statutory requirement—the timely admission of legal workers. This results in serious delays in the admission of needed H-2A workers without providing any benefit to U.S. workers. To the contrary, DOL's program administration threatens the jobs of year round U.S. workers and other businesses that rely upon farmers producing labor intensive crops. As currently administered, the H-2A program fails to meet its purposes and, as a result, the safety net on which these farmers rely for a legal workforce is fundamentally broken.

For many years farmers have expressed their frustration with the H-2A program and this has increased dramatically in the past two years. We hear egregious examples of administrative mistakes and arbitrary action taken by DOL on the weekly calls of NCAE's H-2A users committee. From all over the country, farmers tell the same story: regulatory burdens and arbitrary treatment that make the system unworkable and drive farmers out of the program, imposing hundreds of millions of dollars of losses due to delays in DOL's processing of growers' applications, and arbitrary and frivolous denials of applications that result in unnecessary appeals to the Office of Administrative Law Judges. Rather than rely upon anecdotal stories, NCAE decided this past spring to commission a national statistical survey of employers using the H-2A program in 2010 to demonstrate to Congress that the H-2A program needs to be replaced with a new program that will ensure the survival of labor intensive agriculture.

NCAE's National Survey of H-2A Program Users

I have referred in my testimony to information from a survey conducted by Carol House, who designed a nationwide survey of all users of the H-2A program in 2010 on behalf of NCAE. Ms. House is an agricultural statistical expert, recently retired from the U.S. Department of Agriculture, where she was responsible for 500 annual statistical releases of the National Agricultural Statistics Service (NASS) and the Census of Agriculture. The survey was implemented by Washington State University. I will be making reference to the preliminary findings of the survey throughout my testimony in order to provide members of the Subcommittee some context for my statements. The following comments are based on the survey, publicly accessible statistics and examples of H-2A program problems provided by NCAE members based on their experience that illustrate the conclusions drawn from the statistics.

E-Verify & H-2A

The timing of this hearing is critical, as the House Judiciary Committee is expected to report out in the coming weeks a mandatory E-Verify program that would exclude an estimated 70 percent of the seasonal agricultural workforce from employment. In June of this year,

Representative Lamar Smith, Chairman of the Judiciary Committee, introduced H.R.2164, the "Legal Workforce Act." This would make E-Verify mandatory for all employers. Although the language of the bill contains provisions that implicitly recognize the undocumented nature of the agricultural workforce and would delay its mandatory application to farmers for three years, it does not provide a long-term solution to agriculture's need for a workable program. This creates the imminent threat of losing the majority of America's seasonal agricultural workforce, as well as year round dairy and livestock workers who do not have access to any legal worker program.

We have seen the dramatic effect of the passage of a mandatory E-Verify law in Georgia this summer as farm workers have not sought jobs in that state, leaving farmers to watch their crops rot in the field for lack of workers to harvest them—causing millions of dollars in damage. This demonstrates why there is such a critical need for a workable program that will meet the needs of labor intensive agriculture. Whether Congress passes mandatory E-Verify or not, the states are passing E-Verify laws at a rapid rate and the U.S. Supreme Court this year upheld such laws. The current dysfunctional program leaves growers without a safety net and without access to a legal workforce.

The H-2A Program: The Growers' Perspective

Why are farmers who utilize the H-2A program frustrated? They are frustrated by regulations that changed twice between 2008 and 2010, after having previously been without change for the prior 21 years; they are frustrated by being second-guessed by officials at DOL with no agricultural background telling them how to operate their farms; they are frustrated by being disproportionately targeted for Wage and Hour Division audits; and they are frustrated by a Department of Labor that seems more interested in creating paperwork and looking for mistakes than in administering a program that ensures the employers have access to a legal workforce sufficient to sustain the labor-intensive agriculture industry in the U.S.

Highlights of Survey Findings

Nearly 50% of Those Who Quit Using the H-2A Program Do So Because of Administrative Burdens and Costs. Of those choosing not to participate in the program in 2012, 42% give the reason that it is "too administratively burdensome or costly," as supported by their accounts of delayed or denied applications and huge economic losses. Administrative and litigation expenses continue to pile up. Nearly half of the employers surveyed state that they are "not at all satisfied" or only "slightly satis-

fied” with the H-2A program; only 14% were “very satisfied” or “completely satisfied.” More than half of the employers say that they became so frustrated that they complained about the program to their Senator or Representative. Of those choosing to remain in the program, nearly 40% cite as reasons for their continued participation that they are “dissatisfied with the program, but have no legal alternative” or “anticipate that an electronic employment authorization verification program will become mandatory.”

The Imposition of Large Regulatory Burdens and Costs Does Not Result in U.S. Workers Taking Farm Jobs. Employers reported that of the qualified domestic workers found through state work force agencies, 68% did not accept the offered job, 7% accepted the job but did not start and 20% started work but did not work through the entire job contract period. Only 5% actually worked through the entire contract period.

DOL Statistics, Consistent with the Survey, Show that It Historically and Currently Fails to Meet Statutory Deadlines for Acting Upon H-2A Applications. Applications Denials Have Increased Significantly. Historically, DOL missed its statutory deadlines and workers arrived late; however, nearly all employers eventually received approval of their applications. Under the new rules, the application approval rate has dropped dramatically. The GAO issued a report to Congress in December 1997, H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers, noting that during FY 1996 and the first 9 months of FY 1997, DOL approved 99% of all H-2A applications.¹ The approval rate remained near that level until FY 2010, when it fell to 89%, and has since fallen again to less than 78% of the applications processed in the first three quarters of FY 2011.²

While growers using H-2A and DOL may disagree over the specific decisions by CNPC for these applications, they would both agree that the decisions are not being made in a timely manner in many cases. By law, DOL must make a certification on an H-2A application within 15 days of receipt and at least 30 days prior to the employer’s stated date of need. From 1997 to the present, DOL met its statutory deadlines for handling H-2A applications only 40 to 60 percent of the time. Moreover, DOL does not appear concerned with this consistent failure to meet its legal obligations.

In annual documents submitted to Congress in support of its budget requests, DOL sets forth targets for compliance with these H-2A deadlines. The first year that DOL set compliance targets in its CBJ was FY 2006.³ For both FY 2006 and FY 2007, the target was set at 95%—that is, the Department would try to issue timely decisions on 95% of the H-2A applications received during those years; the actual compliance rates for those years were 57% and 55%.⁴ The Department’s solution to this problem was to lower expectations. The compliance targets for FY 2008, 2009, and 2010 were lowered to 60%, 61% and 62%, respectively.⁵ Even these modest goals proved to be overly ambitious, as the actual compliance rates for handling H-2A applications in a timely manner were 56%, 46% and 58%.⁶ The targets set forth in the 2012 CBJ have been lowered again, to 57% for 2011 and 2012.⁷

DOL Now Rejects Applications that It Accepted in the Past. Employers are reporting that applications for temporary labor certifications filed with DOL’s Chicago National Processing Center (CNPC) that had been routinely granted in years past are now being denied without explanation. Many growers had used the same workers year after year, doing the same specific work on their farms with the experience developed over that period. Now, DOL tells them that everything must change. In the NCAE survey, 68.7% of growers said that it is “substantially harder to get certified” or “somewhat harder to get certified” under the latest regulations, compared to 2.4% who believed that it was “somewhat easier to get certified.” Even more than other industries, agriculture depends on consistent practices and predictability. The current regulatory culture deprives growers of that consistency.

Examples of typical arbitrary and unreasonable deficiencies and denials follow:

Application Denials and Deficiency Notices Based on Small Errors or Inconsistencies in Paperwork—“White Out” and Zip Codes. Even where growers adjust to the new requirements of the most recent set of regulations, they see their applications denied for small errors or inconsistencies in submitting the paperwork. As shown in the nationwide survey, where growers receive a ?deficiency notice? from DOL on their application, a handful of these notices actually relate to the wage rate or other substantive conditions of the proposed work, but 58%, by far the greatest portion, arise from small errors and inconsistencies in the application.⁸

Applications have been held up because the grower could not fit the detailed information requested into the small boxes on Form ETA 790, even though the employers wrote “see Attachment 1” and provided the required information on separate sheets of paper. In the past, CNPC had consistently accepted such applications for

certification, including applications earlier in the very same growing season, but suddenly began issuing Notices of Deficiency based on this, stating that the employer should instead answer within the limited space. If an employer uses too few words in that space, he or she risks having the application denied for not providing enough information for DOL to consider the application.

Applications were rejected by DOL because the employer needed to correct the form and used correction fluid or “white-out” when completing the form. Employers have had applications denied for transposing digits in a zip code on Form ETA 790. These application forms are not easy to complete, 89% of H-2A users reported using an agent to help them complete the forms, and they still spent more than 185,000 hours on this paperwork in 2010.

Rejection of Applications for Word Choice. Growers have had their applications turned away by DOL for hyper-technical issues of word choice. For example, as set forth in the H-2A regulations, employers must pay the wage rate required at the time the contract begins. If that rate increases during the contract period, the employer must pay a higher wage, but if the wage decreases, may pay the lowered wage. In past years, applications were approved where the advertising for the job set forth the wage to be paid but indicated that it may change. Recently, DOL has rejected language that stated “the required wage may be higher or lower than it is at the time of filing this job offer,” and required that the order state “the required wage may be different than it is at the time of filing this job offer.” DOL never explained how these two wordings are actually different or would provide any extra information to applicants, but the delay cost the grower weeks of work while the wording was changed to meet DOL’s new preference.

Denials or Deficiency Notices Because DOL Officials Dictate When and How Farmers Should Conduct Their Farming Operations. Beyond the challenges of simply completing the forms required by DOL, DOL officials at CNPC have been denying applications from growers based on second-guessing matters of farm operations. For example, CNPC denied several applications from growers for including an earlier or later starting or ending date in their application than in the prior year’s application. The CNPC denied an application from an employer in Massachusetts because the season shown on the application began in February and the Certifying Officer processing the form in Chicago decided that nothing could be grown there in February. When the employer explained that it was using greenhouses and needed workers to begin planting in the greenhouses so that the crops would be ready by summer, DOL eventually granted the certification, but only after weeks of work had been lost.

In another case, DOL denied the application of a Connecticut apple orchard, telling them that the orchard had the incorrect season for growing apples. The employer’s 2009 application was approved for April through December 2009. In 2010, facing financial limitations, the employer could only afford to use workers for June through October, and his application for that period was also approved. When filing the paperwork for the 2011 season, the employer was again able to apply for workers from April to November. DOL denied the application, telling the employer, a family-owned orchard, that the correct season for doing this work was June through November and not April through December, even challenging whether the work was “seasonal or temporary” at all. The orchard owner had to explain that workers prune the trees and maintain farm equipment in the spring, and that the growing cycle may vary with the weather in a given year. After weeks of unnecessary delay, the application was approved.

In the past, DOL had regional offices and personnel with agricultural expertise who could address what the “normal and accepted experience qualifications,” e.g. “experience”—should be for a given candidate for an agricultural job. Today, those decisions are made in Chicago, with CNPC personnel dictating what experience or other qualifications are appropriate for particular agricultural work. Although “prevailing practices” surveys used sometimes used to shed light on this issue, these are often unreliable and often not statistically defensible. CNPC now routinely challenges experience requirements, issuing deficiency notices until the grower accepts DOL’s requirement or appeals. Several examples illustrate the arbitrary decisions DOL has made this past year that has resulted in an unprecedented number of appeals.

DOL refused to accept a Georgia farmer’s 30 day experience requirement for pruning a fruit orchard, notwithstanding the fact that it was supported by an agricultural extension agent from the University of Georgia who indicated that an inexperienced worker could cause the loss of a crop and damage trees. The grower had to appeal. A Texas farmer who required a commercial driver’s license (CDL) to operate trucks to haul farm products and livestock had its application rejected. When it

changed its application to eliminate the CDL requirement it again had its application rejected because DOL changed its mind and wanted a CDL requirement.

Arbitrary DOL Deficiency Notices and Application Denials Require Farmers to Take Costly Legal Appeals. While the CNPC will sometimes relent when the grower responds and explains the issues in the application, more often, these denials result in fully-litigated appeals to the DOL Office of Administrative Law Judges (OALJ). The recent flood of denial letters has led to a corresponding spike in the number of OALJ cases filed. For the 15 years from 1995 through 2009, the average number of OALJ appeals filed each fiscal year was 18.4.⁹ To date in FY 2011, there have been 442 OALJ appeals filed, a total that before now took decades to reach. 37% of employers forced to file appeals had to retain lawyers. In the vast majority of these cases, an initial denial by the CNPC resulted in an appeal to the OALJ, at which time the DOL Solicitor's Office concluded that CNPC's position is indefensible and agrees to remand the application to the CNPC for approval, weeks after the original determination, and often after the date on which the workers were needed.

All of this unnecessary delay and administrative proceedings costs taxpayer dollars and imposes significant burdens on growers, even if the OALJ agrees with the employer and directs the CNPC to approve the application. In some cases, there appears to be no justification but delay. In one case, an Arizona grower applied in August 2010 for 500 H-2A workers to pick cantaloupes during a very brief harvest season of October 5 to November 19, 2010. CNPC denied the application, the grower had to appeal to the OALJ, and DOL finally agreed to certify the application for 499 workers instead of 500 on October 25, 2010—after a third of harvest season had passed. A California lettuce grower had to appeal from a CNPC denial, only to have DOL approve the application for 138 instead of 140 workers, but 5 days after the date that the workers were needed to begin work. DOL finally conceded that it should have granted a Montana cattle rancher's application after an ALJ appeal, but did so in March 2011 for workers needed from December 1, 2010 to April 30, 2011.

Even the Administrative Law Judges hearing these appeals have grown frustrated with the Department's handling of H-2A applications. In a recent case, CNPC denied the grower's application because the employer did not file a recruitment report on the Sunday prior to the Monday on which the employer was notified that the recruitment report was due, forcing the grower to file and litigate an appeal to the OALJ. The Judge chastised the Certifying Officer, stating that, "it is a patently inefficient and unnecessarily expensive way to proceed. I implore the Office of Foreign Labor Certification to review this policy of the CNPC and consider the costs it imposes on employers, the administrative review process, and the public coffers."¹⁰ In the end, the Judge attributed the CO's decision to force the employer to file an appeal to "a breakdown in common sense."

DOL's Delays and Arbitrary Denials of Applications Results in \$320 Million Dollars in Economic Loss to Farmers. 72% of Growers Report Workers Arrived on Average 22 Days Late. These processing delays result in delays in recruiting workers and bringing them to the farm (all at grower expense) for crops that are inherently time-sensitive. The NCAE survey showed that 72% of growers reported that workers arrived on average 22 days after the "date of need" for them to begin work. These delays resulted in more than \$320 million in economic losses for these farmers. The harm that results from an arbitrary denial is illustrated by a New York farmer who had to take 1,000 acres of onions out of production and plant mechanically harvested corn instead, as a result of an unjustified denial of an application. This resulted in the farmer's payroll going from \$2.5 million to \$70,000. Local businesses suffered from the decline in spending from the seasonal workforce that otherwise would have benefitted them.

It is estimated that 70% of the seasonal agricultural workforce is comprised of workers providing documents that appear legitimate but are not. Less than 4% of the seasonal agricultural workforce is represented by H-2A workers. If E-Verify is mandated and works as intended, 66% of the workforce would have to be replaced with H-2A workers. Given the H-2A program's current inability to provide a timely legal workforce at current levels, enactment of mandatory E-Verify legislation without congressional enactment of an alternative workable program, the \$320 million in current losses could easily rise into the billions of dollars every year.

Wage and Hour Enforcement. Growers able to get applications accepted by CNPC face further challenges from DOL. Only 8% of H-2A employers report being audited by DOL's Wage and Hour Division before participating in the program, compared to 35% once they started participating. This incredibly high level of auditing would perhaps be justified if Wage and Hour investigators were finding frequent or large violations among H-2A employers, but they simply are not. Of the 64, 978 compliance actions by WHD from 2008 to 2010 in WHD's "Wage and Hour Investigative

Support and Report Database” (WHISARD), only 301 involved H-2A violations.¹¹ Even for those cases, where actual violations were found, the average amount of back wages and civil money penalties per employee were \$1,323 for H-2A cases.¹² By contrast, cases involving H-1B violations involved \$13,818 per employee and Davis-Bacon Act cases involved \$3,244 per employee.¹³ From 1998 to 2008, 2.6% of all WHD cases involved agricultural employers, even though only 1.4% of American workers were employed in that sector.¹⁴ The DOL’s disproportionate focus on agriculture, in general, and H-2A users, in particular, speaks to DOL’s hostility to the program rather than to any actual measure of compliance.

The Wage and Hour Division under the new H-2A regulations is seeking severe penalties and back pay for minor technical violations that do not harm workers or deprive them of their legal rights. DOL has been seeking astronomical fines in the hundreds of thousands and millions of dollars from growers who gave late notice to DOL that workers had voluntarily quit their jobs or were fired for just cause. In addition to seeking up to \$1,000 in civil money penalties for each worker for whom notice was untimely, DOL is demanding that the growers pay the workers three quarters of the wages they would have been paid for the entire contract period had they not quit, even though the workers voluntarily quit and did not complain about any mistreatment. By contrast, the Department of Homeland Security has an identical notice requirement with regard to H-2A workers who quit their jobs. DHS imposes a \$10 fine for failure to provide timely notice. That’s it.

DOL’s punitive regulatory approach is counterproductive to its mission to protect jobs for U.S. workers. To the contrary, it is crippling businesses and their year round U.S. workers. It is also forcing employers to suffer the expense and disruption of litigation in defending themselves from overreaching charges.

Conclusion

The threat of enactment of mandatory E-Verify this Congress looms over any discussion of H-2A. Agriculture is an extremely labor-intensive business. American growers need to have access to workers to plant, tend, and harvest their crops. Enacting E-Verify will take away hundreds of thousands of these workers, forcing growers to turn to H-2A for legal workers. The current dysfunctional system has proven to be dramatically insufficient to meet even the current needs of these growers. Legislation that would drastically increase the demand on an already broken system would prove disastrous.

NCAE strongly urges this Subcommittee and the Congress to enact a seasonal farm worker program that is not based on the H-2A structure. History has shown that it simply does not work. The current statute has been interpreted in completely opposite ways by the last two Administrations, demonstrating that a new statute is required. NCAE strongly believes that a new farm worker program must be enacted as part of the E-Verify legislation. We cannot gamble that Congress will address this important issue at a later time—when it is too late.

Thank you for the opportunity to testify on behalf of NCAE.

ENDNOTES

¹<http://www.gao.gov/archive/1998/he98020.pdf>.

²<http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm>.

³See FY 2010 Congressional Budget Justification—Employment and Training Administration, State Unemployment Insurance and Employment Service Operations, at 58.

⁴Id.

⁵Id.

⁶Id. as to 2008 compliance rate; 2009 and 2010 rates are from the FY 2011 and FY 2012 Congressional Budget Justification documents, at pages 12 and 65, respectively.

⁷FY 2012 CBJ at 65.

⁸See attached survey results, at p.3.

⁹All docket information for OALJ appeals is from www.oalj.dol.gov/LIBINA.HTM.

¹⁰Virginia Agricultural Growers Association, 2011-TLC-00273.

¹¹<http://ogesdw.dol.gov/raw—data—catalog.php>

¹²Id.

¹³Id.

¹⁴<http://www.dol.gov/whd/resources/strategicEnforcement.pdf> at pp. 8, 20 (WHD study of enforcement efforts).

Chairman WALBERG. Thank you, Ms. Whitley.
I recognize you now, Mr. Goldstein, for your testimony.

**STATEMENT OF BRUCE GOLDSTEIN, PRESIDENT,
FARMWORKER JUSTICE**

Mr. GOLDSTEIN. Mr. Chairman and members, thank you for the opportunity to testify about workforce challenges facing our nation's agricultural industry. Our nation's broken immigration system, labor laws that discriminate against farmworkers, and the labor practices of many agricultural employers have combined to create an agricultural labor system that is unsustainable and fundamentally unfair to our farmworkers. The resulting turnover in the farm labor force means that now more than one half of the approximately 2 million seasonal farmworkers lack authorized immigration status.

The presence of undocumented workers depresses wages for all farmworkers, including the roughly 700,000 U.S. citizens and lawful immigrants in agriculture. But undocumented farmworkers are not leaving and they are needed.

To help U.S. workers and agricultural employers Congress should establish a program to allow undocumented farmworkers to earn legal immigration status. Some members of Congress have proposed new guest worker program, but it makes no sense to bring in hundreds of thousands of new guest workers when there are over 1 million undocumented farmworkers besides U.S. citizens and documented immigrants working our farms.

In addition, the H-2A program is available and has no limit on the number of guest workers that may be brought in annually. Our new report, "No Way to Treat a Guest," shows the H-2A program contains modest labor protections but is fundamentally flawed and ripe with abuses of both U.S. and foreign workers.

Many employers prefer guest workers over U.S. workers because they are more vulnerable and are less likely to challenge illegal conduct. H-2A workers may only work for the employer that obtained their visa, must leave the country when their job ends, and must hope that the employer will request a visa for them in the following year. They never earn the opportunity to become a permanent legal immigrant no matter how many seasons they work here.

H-2A workers typically arrive heavily indebted due to travel costs and recruitment fees and must pay that debt even if their job ends prematurely. Guest workers will work at the limits of human endurance at low wages when U.S. workers seek more sustainable productivity expectations.

Also, H-2A employers do not pay Social Security or unemployment taxes on guest worker wages but must do so on U.S. workers' wages. H-2A workers also are excluded from the principal federal employment law for farmworkers.

These factors have led to tremendous obstacles for U.S. workers who seek jobs at H-2A employers. As our report shows, H-2A employers discourage U.S. workers from applying for H-2A jobs or subject them to such unfair working conditions that workers either vote with their feet or are fired.

We commend Secretary Solis for restoring H-2A protections that the Bush administration unconscionably removed. The restored protections evolved over several decades and were issued by conservative President Reagan. For example, the principal wage pro-

tection requires H-2A employers to recruit U.S. workers using at least the average hourly wage paid to farmworkers in their region as determined by the U.S. Department of Agriculture; the Bush formula set most H-2A wages at the average of the lowest paid one third of farmworkers in a local area, resulting in pay cuts of \$1 to \$2 per hour for thousands of U.S. and H-2A workers.

We also commend DOL's increasing oversight of H-2A applications, as required by statute, which has led to the rejection of unlawful job terms that discourage U.S. workers from applying for H-2A jobs. One example is a contract clause that waives farmworkers' right to bring lawsuits for illegal employment actions and requires them to accept arbitration instead. Nonetheless, as detailed in our report, violations of basic program requirements are rampant, harming both U.S. and H-2A workers.

Our report recommends strengthening protections and enforcement.

Some growers complained about DOL's delays processing their H-2A applications even though often they caused the delay by submitting illegal job terms. If necessary to accommodate increased numbers of applications we can agree that government could expand its staff.

Some agricultural groups support guest worker proposals by Representatives Lungren and Smith, which would slash wage rates, remove longstanding labor protections such as U.S. worker recruitment protection, and minimize government oversight. Their proposals would enable employers to bring in hundreds of thousands of vulnerable foreign workers despite an adequate supply of farm labor among U.S. workers and experienced undocumented farmworkers already here. We strongly oppose these bills.

Large-scale guest worker programs are also anathema to American values because they take advantage of foreign workers by depriving them of economic freedom and denying them the opportunity to become permanent members of our society who participate in our democracy.

In conclusion, there are sensible policy solutions to provide the nation's agricultural sector with a stable, legal, farm labor force, ensure that U.S. farmworkers are treated fairly, and assures our nation of a safe, secure food supply.

Thank you.

[The statement of Mr. Goldstein follows:]

Prepared Statement of Bruce Goldstein, President, Farmworker Justice

Mr. Chairman and Members: Thank you for the opportunity to testify about workforce challenges facing our nation's agricultural industry. My organization, Farmworker Justice, for thirty years has engaged in policy analysis, education and training, advocacy and litigation to empower farmworkers to improve their wages and working conditions, immigration status, health, occupational safety and access to justice.

Our nation's broken immigration system, labor laws that discriminate against farmworkers, and the labor practices of many agricultural employers have combined to create an agricultural labor system that is unsustainable and fundamentally unfair to the farmworkers who harvest our food. More than one-half of the approximately 2 million¹ seasonal workers on our farms and ranches lack authorized immigration status.² Undocumented workers' fear of deportation deprives them of bargaining power with their employers and inhibits them from challenging illegal employment practices. The presence of so many vulnerable farmworkers depresses wages and working conditions for all farmworkers, including U.S. citizens and law-

ful immigrants. In the face of increased deportations and other immigration enforcement, harsh anti-immigrant state laws, and ill-advised proposals to mandate employers' use of the E-Verify system, there is an urgent need for Congressional action. The sensible, rational and moral solutions include ending discrimination in labor laws, improving wages and working conditions for farmworkers, and establishing a program to allow undocumented farmworkers to earn legal immigration status. Some Members of Congress who oppose earned legalization are proposing new agricultural guestworker programs. But we already have an agricultural guestworker program available to employers, the H-2A program, and its provisions do not need to be expanded because—unlike most other visa programs—it has no limit on the number of guestworkers that may be brought in annually. As detailed in our report, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, the H-2A program, despite its labor protections, is fundamentally flawed and rife with abuses that harm U.S. and foreign workers.³ Certainly it should not be made any worse by reducing government oversight, lowering wage rates and removing labor protections, as these new legislative proposals would do. Moreover, it makes no sense to bring in hundreds of thousands of new guestworkers—under either the H-2A program or a new guestworker program—when there are already hundreds of thousands of undocumented farmworkers, in addition to citizens and documented immigrants, performing agricultural work productively. More importantly, large-scale guestworker programs are anathema to American values of freedom and democracy. A practical, meaningful, fair solution has to include an opportunity for our current workforce to earn immigration status.

The treatment of U.S. farmworkers (U.S. citizens and lawful resident immigrants) in this country is unreasonable and unsustainable. As in generations past, today's farmworkers experience high rates of unemployment and low wages. Poverty among farmworkers is more than double that experienced by other wage and salary workers.⁴ Farm work is one of the most hazardous occupations in the country, with routine exposure to dangerous pesticides, arduous labor and extreme heat. Despite these working conditions, farmworkers are excluded from many labor protections other workers enjoy, such as many of the OSHA labor standards, the National Labor Relations Act, overtime pay, and even the minimum wage and unemployment insurance at certain small employers.

Such poor conditions and discriminatory laws have resulted in substantial employee turnover. In the absence of an immigration system that functions sensibly to control our borders and to provide immigration visas when workers are needed, most of the newly hired farmworkers have been undocumented. Still, even the lowest estimates indicate that there are at least 540,000-600,000 legally authorized U.S. workers in the agricultural labor force.⁵ Improving wages and working conditions, increasing farmworkers' legal protections, and implementing the other recommendations made by the Commission on Agricultural Workers and other observers over many years would help attract and retain US workers in the farm labor force.⁶ H-2A workers constitute another three to five percent of our agricultural workforce. Employers complain that the program is too bureaucratic, burdensome and expensive. The reality is that the H-2A program has not been needed because employers have had adequate supplies of labor, including the million or more undocumented workers currently in the farm labor force. The H-2A program is very similar to the old Bracero program, which at its peak allowed as many as 400,000 workers per year in to the United States. If employers substantially increased their demand for guestworkers, the government could expand its staff to accommodate the increased volume of applications.

In the context of mandatory E-Verify legislation, agribusiness has been lobbying for changes to the H-2A program, but their demands go far beyond a request for increased government resources to accommodate greater numbers of guestworkers. Rather, these grower groups have demanded that the wage rates be lowered, labor protections be removed and government oversight minimized so that they may offer job terms that U.S. workers would not accept and have unfettered access to the millions of foreign citizens who would accept the opportunity to work in American agriculture at extremely low wage rates and under poor conditions.

Rep. Lamar Smith's and Rep. Dan Lungren's guestworker proposals seek to respond to growers' demands and apparently seek to persuade them to support mandatory use of the E-Verify system. Their proposals create labor attestation guestworker programs instead of using the current labor certification system, meaning employers simply promise to comply with required job terms and other requirements, with limited government oversight. Both guestworker proposals also would move the application process and enforcement of the worker protections from DOL to USDA, despite its lack of experience enforcing labor protections and despite the fact that other guestworker programs are run by the DOL. In addition, both pro-

grams would slash wages for U.S. workers and foreign workers; eliminate or greatly reduce worker protections, including recruitment protections for US worker, minimum work guarantees and housing requirements; and make other changes to ensure farmers have a steady stream of cheap replaceable workers. Both proposals also limit worker access to attorneys and courts to enforce their few remaining rights. Contrary to Rep. Smith's professed dedication to protecting American workers, these proposals would lead to massive job loss for U.S. workers as they encourage growers to hire cheap exploitable guestworkers. For those American workers lucky enough to keep their jobs, they would experience wage cuts and diminished working conditions and protections. And these bills do nothing to address the status of the many undocumented workers already here productively harvesting our crops. While supporters of this approach may believe undocumented workers will return to their home countries, the reality is that these workers will be pushed further underground where they are likely to be exploited by the worst employers. Chairman Smith's mandatory e-verify legislation, the Legal Workforce Act, encourages this hidden world of exploitation through various loopholes for agricultural employers. These guestworker proposals bring to mind the words of a farmer from Edward Murrow's famous documentary *Harvest of Shame*, who said, "[w]e used to own our slaves; now we just rent them."

The Bush Administration, in its last few days, sought to appease growers by making drastic anti-worker changes to the H-2A program regulations, slashing wage rates and job protections for U.S. and foreign workers. Even these anti-worker changes, which resulted in wage cuts of \$1.00 to \$2.00 per hour, did not approach in scope the proposals put forth by Lungren and Smith. Fortunately, Secretary Solis reversed these changes, largely restoring the Reagan regulations and their modest wages and labor protections, most of which had evolved over decades of experience with agricultural guestworker programs. The Department also instituted additional common-sense protections, such as a requirement to disclose job terms to workers.

As detailed in our report, *No Way to Treat a Guest*, even with its modest protections, the H-2A program is plagued with pervasive abuses.⁷ The abuses are inextricably part of the H-2A program due to its inherently flawed nature: (1) H-2A workers are tied to their employer and dependent on them for present and future employment, as well as their ability to remain in the country; (2) H-2A workers are temporary non-immigrants who can never become permanent members of our society no matter how long they work here; and (3) H-2A workers are desperate to earn income as they typically arrive heavily indebted due to travel costs and recruitment fees with the frequent fear that their families at home may suffer repercussions if they are unable to repay their debt quickly. For all these reasons, H-2A workers are extremely reluctant to challenge unfair or illegal treatment. While a small percentage of H-2A workers have rights and remedies under collective bargaining agreements, the vast majority have no union to represent them. Moreover, H-2A growers frequently exercise their right to contact their elected representatives to complain about the H-2A program's requirements, but guestworkers have no political representation in the United States and therefore have no meaningful voice in policy debates that directly affect them. This political power imbalance is another reason guestworker programs are inappropriate solutions in the United States.

Once employers decide to apply for H-2A guestworkers, many employers prefer them over U.S. workers because guestworkers are cheaper than U.S. workers for several reasons. First, the H-2A employer does not pay Social Security or Unemployment Tax on the guestworkers' wages, but must do so on the U.S. workers' wages. Second, guestworkers' vulnerability also means that they work to the limits of human endurance for the modest wages offered in the H-2A program, while most U.S. farmworkers would expect higher wages for such onerous, often dangerous productivity demands. The H-2A workers are highly prized for their productivity. These financial incentives lead to discrimination against U.S. workers. Unfortunately, the main job preference for U.S. workers, known as the "50% rule," is not adequately enforced and has been eliminated in the Smith and Lungren proposals. A third incentive to hire H-2A workers is that while recruiting in foreign countries, employers can and do select workers based on ethnicity, age, gender, and race, which is far more difficult to do inside the United States. "[D]iscrimination based on national origin, race, age, disability and gender is deeply entrenched in the H-2 guestworker system."⁸ Almost uniformly, H-2A workers are single relatively young men who are not accompanied by their families.

These and other incentives to use H-2A workers have led to tremendous obstacles for U.S. workers who seek jobs at H-2A employers. While the majority of the agricultural workforce is undocumented and in need of an earned legalization program, there are still roughly 600,000-800,000 legal immigrants and citizens who seek employment in agriculture. Unfortunately, H-2A program employers routinely turn

away U.S. workers, discourage them from applying for H-2A jobs, or subject them to such unfair and illegal working conditions and production standards that workers either vote with their feet or are fired. For example, two American women in Georgia were fired by an H-2A employer after just a few days in the fields for allegedly failing to meet a production standard which had not been approved by the government and about which the workers had not been told until arriving at the farm.⁹ The H-2A application's job offer stated the workers would be paid \$9.11 an hour and would be provided with 40 hours of work a week. During the few days they worked, these women were not allowed to begin working until after many H-2A workers had started picking; they were only allowed to work for a few hours in the morning even while H-2A workers continued to work; and they were forced to spend time bringing their buckets of zucchini a great distance to tractors. One of these women had actually grown up on the farm in question and picked vegetables as a child.¹⁰ Their discharges illustrate the challenges willing U.S. workers face at many H-2A employers. There are many similar cases around the country. The regulations governing recruitment, including the 50% rule, which is the principal job preference for U.S. workers in the H-2A program, are key measures designed to protect the ability of U.S. workers to obtain employment with H-2A employers.

Despite restored protections in the H-2A program and unionization of some H-2A employers, systemic problems persist that the Department of Labor should stop. We commend DOL for increasing its overview of H-2A applications, as required by the statute, which has led to the rejection of unlawful job terms, such as clauses that waive farmworkers' right to bring lawsuits and require them to accept arbitration instead, and other requirements designed to discourage US workers from applying for H-2A jobs. Despite employer pushback and complaints, DOL must continue to increase its oversight and enforcement of the H-2A program. As detailed in our report, *No Way to Treat a Guest*, violations of basic program requirements are rampant: employers frequently fail to pay transportation costs and wages owed; workers live in abysmal housing and work under hazardous conditions; and workers even suffer trafficking violations, including confiscations of their passports and verbal and physical abuse.¹¹ Government also must do more to overcome the systemic problem of growers using farm labor contractors as a shield against responsibility and liability for violations of labor and immigration laws—the growers and their labor contractors must be held jointly responsible.

In conclusion, there are sensible policy solutions to provide the nation's agricultural sector with a stable, legal farm labor force that is treated fairly. Discriminatory labor laws should be reformed, enforcement of labor laws should be enhanced and employers should be encouraged to offer job terms that attract and retain productive farmworkers. Congress should not get mired in guestworker program proposals that have been tried and rejected in the past. The proposed new guestworker programs would only worsen the situation, and contravene our traditions of freedom, opportunity and democratic principles. Congress and the Administration should strengthen the current H-2A labor protections, including by ending employers' incentives to hire vulnerable guestworkers rather than US workers. Most importantly, Congress should provide current undocumented agricultural workers with an opportunity to earn permanent immigration status. These recommendations will help ensure a productive, law-abiding, fair farm labor system and maintain our nation's commitment to economic and democratic freedom. Thank you for this opportunity.

ENDNOTES

¹There are at least 1.8 million agricultural workers in the United States. Martin, P. Conference Report, *Immigration Reform: Implications for Farmers, Farm Workers, and Communities*, University of California D.C. Campus, May 12-13, 2011. Available at <http://migration.ucdavis.edu/cf/files/2011-may/conference-report.pdf>. Other estimates range from 2.0 to 2.5 million individuals working as hired farmworkers over the course of the year. See Kandel, W. Profile of Hired Farmworkers, A 2008 Update, U.S. Department of Agriculture, Economic Research Report, No. 60, July, 2008. Available at <http://www.ers.usda.gov/Publications/ERR60/>.

²Findings from the National Agricultural Workers Survey (NAWS) 2001–2002: A Demographic and Employment Profile of United States Farm Workers, available at <http://www.doleta.gov/agworker/report9/chapter1.cfm#eligibility>.

³Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, September 2011. Available at <http://farmworkerjustice.org/images/stories/eBook/pages/fwj.pdf>. We ask that this report be included in the record of this hearing.

⁴See Kandel, W. Profile of Hired Farmworkers, A 2008 Update, United States Department of Agriculture, Economic Research Report, No. 60, July 2008. Available at <http://www.ers.usda.gov/Publications/ERR60/>.

⁵Estimations based on assuming 30% undocumented workers of a total labor force of 1.8-2 million farmworkers (this is highest number of undocumented workers in most estimates. Official government statistics indicate a rate closer to 50%).

⁶Report of the Commission on Agricultural Workers, Washington D.C. November, 1992. See also the testimony of Robert A. Williams, Director of Florida Legal Services' Migrant Farmworker Justice Project, before the House Judiciary Committee, subcommittee of Immigration Policy and Enforcement, Hearing on H.R. 2847, the "American Specialty Agriculture Act," September 8, 2011 (incorporated herein by reference). Available at <http://judiciary.house.gov/hearings/pdf/Williams%2009082011.pdf>.

⁷See also Cindy Hahamovitch. *No Man's Land*. Princeton: Princeton University Press, 2011.

⁸Southern Poverty Law Center, "Close to Slavery," (2007) p. 34.

⁹See OSC Charge Form, EEOC Atlanta Office, *Kathern Bentley v. J & R Baker Farms, LLC*, March 25, 2011; OSC Charge Form, EEOC Atlanta Office, *Mary Jo Fuller v. J & R Baker Farms, LLC*, March 25, 2011.

¹⁰See *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, September 2011.

¹¹See also Southern Poverty Law Center, "Close to Slavery," 2007.

Chairman WALBERG. Thank you for your testimony.
Now I turn to Mr. Sequeira for your 5 minutes of testimony.
Thank you.

**STATEMENT OF HON. LEON SEQUEIRA, SENIOR COUNSEL,
SEYFARTH SHAW LLP**

Mr. SEQUEIRA. Thank you, Chairman Walberg, Ranking Member Woolsey, and members of the subcommittee. I appreciate the opportunity to testify at today's hearing.

My name is Leon Sequeira. I am a labor and employment attorney in the Washington, D.C. office of Seyfarth Shaw. My practice includes counseling employers on a variety of labor and employment issues, including the H-2A program.

A little more than 3 years ago I appeared before the subcommittee as an assistant secretary of labor to discuss the temporary worker programs overseen by the Department. Today I appear before the subcommittee in my personal capacity to discuss whether the H-2A program is meeting the workforce challenges facing America's agriculture industry.

Since the Department of Labor issued new H-2A regulations last year American farmers with a need for seasonal labor to help plant, tend, and harvest their crops all too often find themselves trapped in a dysfunctional Department of Labor bureaucracy that is either unable or unwilling to make coherent decisions in a timely manner. But this is not what Congress had in mind when it created the H-2A program 25 years ago.

When establishing the program Congress understood that the timing of a farmer's labor needs is dictated by the weather, not by the arbitrary whims of some government bureaucracy in a far away city. That is why Congress established strict deadlines by which the Department of Labor has to act on H-2A applications.

But on a near daily basis the Department now ignores this clear congressional intent and the explicit statutory language governing the program. Indeed, today the assistant secretary admitted that the Department of Labor only processes 67 percent of applications on time.

But, Mr. Chairman, the statute requires that all applications be processed on time.

The Department's mission in administering the H-2A program is to provide farmers with timely access to labor and to review their 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 U.S. workers. That mission, however, is consistently perverted by arbitrary administrative practices that routinely impose substantial delays and added costs to employers while delivering few, if any, measurable benefits.

Rather than helping facilitate timely access to seasonal labor, the Department instead subjects farmers' applications to round after round of nitpicking over minor, non-substantive paperwork issues and typographical errors that have absolutely nothing to do with ensuring that U.S. or even foreign workers are properly recruited and paid for these jobs.

The Department also frequently imposes on farmers requirements that appear nowhere in the statute or in the regulations, and numerous farmers find their applications delayed or denied as a result of state and federal bureaucratic infighting over the meaning of certain program requirements.

This questionable administration of the H-2A program has led to a dramatic increase in litigation, both before administrative law judges and in federal court, as we have heard here this morning.

More stunning than the number of appeals is the fact that the Department's position in these appeals is nearly always wrong. At last count a few months ago the Department was on track for the rather dubious distinction of getting it right just 10 percent of the time. This is a horrendous waste of time, money, and effort for America's farmers, not to mention for America's taxpayers.

The Department's hostile approach towards farmers who want to participate in the H-2A program and legally hire foreign farmworkers is simply inexplicable. There is, after all, year in and year out, a persistent shortage of U.S. workers to fill this nation's seasonal foreign labor needs. No one can reasonably dispute this fact.

We need a functional agricultural guest worker program even in times of relatively high unemployment. But curiously, despite all the evidence to the contrary, the Department maintains that there are plenty of U.S. farmworkers ready to perform these jobs. And at the same time, the Department is discouraging farmworkers from participating in the H-2A program but is spending hundreds of millions of dollars providing the already limited supply of U.S. farmworkers with skills training to take other jobs outside of agriculture.

Indeed, for fiscal year 2012 the Department has already requested more than \$80 million to retrain farmworkers for other jobs. Now, few would argue with reasonable efforts to assist U.S. farmworkers in moving up the economic ladder to higher-paying work, 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 raises the question of whether the Department's diametrically opposed policies are effectively serving the nation's interest.

Based on the current Department's track record it is no wonder that there has been a flurry of legislation introduced in Congress this year to overhaul the agricultural guest worker program. I suppose it is also not surprising that many of these reform proposals

have at least one major element in common: They vest the U.S. Department of Agriculture with the authority to operate the agricultural guest worker program in the future.

Mr. Chairman, it is time for the federal government to stop compounding the many difficulties that U.S. farmers already face in a highly competitive global marketplace. Instead, the federal government should pursue policies that assist farmers in meeting their seasonal labor needs so that they can continue to provide us with a safe, healthy, and domestically produced food supply.

Thank you again for the opportunity to be here, and I look forward to answering your questions.

[The statement of Mr. Sequeira follows:]

**Prepared Statement of Hon. Leon R. Sequeira, Senior Counsel,
Seyfarth Shaw LLP**

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 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.

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

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.

Chairman WALBERG. Thank you.

Mr. Sequeira, let me just follow up on a statement that you just made a short few seconds ago where you indicated that the Department is spending significant dollars—millions of dollars—to train these farmworkers in other fields of endeavor, in other job opportunities. In your opinion, why is the Department pursuing these opposing courses of action which seem destined to ruin the U.S. agricultural economy?

Mr. SEQUEIRA. Mr. Chairman, the short answer is I have no idea. I think—

Chairman WALBERG. Well, that makes it short, but—

Mr. SEQUEIRA. I think certainly the Department could pursue the goal of helping U.S. farmworkers move up the economic ladder and gain higher-paying jobs with better skills. As I said, few would argue with that goal.

Simultaneously, the Department could operate the H-2A program in such a manner as it encouraged and helped U.S. farmers find adequate sources of foreign labor if there aren't sufficient U.S. farmworkers. The two goals could be pursued, I think, simultaneously and not be diametrically opposed.

Unfortunately, the current administration, in the case of the H-2A program, seems intent on driving farmers from the program rather than to the program.

Chairman WALBERG. Thank you.

Mr. Bailey, you were here for the testimony of the assistant secretary. A good journalist ending question is, are there any more thoughts that you would like to get across or points you would like to make? I guess I would alter that in saying, are there any responses that you would give further to what you heard Ms. Oates present this morning in relationship to your personal experience in the H-2A program and now that you are out of it?

Mr. BAILEY. Yes. Thank you, Mr. Chairman.

You know, our business has tried to do everything the right way. We have been on H-2A; we have been on E-verify. It just simply does not work for us.

My feeling is the only way we can solve this problem is by giving a worker visa to the experienced workers that are working in agriculture right now. The current system is broken with the H-2A program.

It is a bureaucratic mess and it is untimely. As the research has shown, when 72 percent of the H-2A users are getting their work-

ers late in a very time-sensitive business it is simply not acceptable.

Chairman WALBERG. Thank you.

Ms. Whitley, I guess I would start by asking that same question: Any response, follow up, any additional comments you would make, concerns of what you heard from the assistant secretary, having asked the question or offered the opportunity to hear from those in the ag industry about the H-2A program? What would you add to it?

Ms. WHITLEY. Well, Mr. Chairman, Ms. Oates prefaced her statement by saying that it was DOL's objective to achieve a fair and reliable program for employers, and I would say that they are failing both tests. And I don't know whether it is out of—whether that is their objective or whether they just don't understand how their actions impact farmers, but I can tell you that it is an absolute disaster.

I have been either directly or tangentially involved with the H-2A program for over 30 years, and I used to say, as Mr. Goldstein pointed out, the Reagan administration promulgated regulations in 1987 after the passage of IRCA on the H-2A program. I used to think that that program had significant issues. It is nothing compared to the current problem.

There was a quote made in the survey that we conducted and I thought it summed it up perfectly. This survey respondent described the H-2A program as a bureaucracy gone mad, and I would say that I would echo that opinion.

Chairman WALBERG. Well going beyond that, additionally, in your expert opinion what are the top issues confronting employers and their ability to access these crucial guest workers through the H-2A program—maybe the top three?

Ms. WHITLEY. I had seven outlined, actually, Mr. Chairman, but I will try to winnow the numbers down.

I would say the corresponding—under the current interpretation of the H-2A program promulgated by this administration the definition of “corresponding employment,” which I think is what affected Mr. Bailey's decision to get out of the H-2A program. Basically that means if you are a nurseryman or you are an agricultural farmer growing apples, for instance, anyone who has anything to do with your operation automatically becomes a corresponding worker under the H-2A program and is subject to all the terms and conditions of employment. That drives the cost of your participation and your agricultural operation exponentially high.

The wage rate issue we have discussed. I would say that another recent change by this administration forcing an employer to reimburse the entirety of participating workers, both foreign and domestic workers from outside the local area—requiring that they be reimbursed their expenses for participating in the program at the first pay period, which means that any domestic worker who arrives to take a job and decides within a day or 2 this isn't for him receives a check for the entirety of the cost that he incurred in making a decision to even try the employment.

Those are all issues, Mr. Chairman—

Chairman WALBERG. Well, thank you for your—yes, thank you for reinforcing those. Appreciate that.

And my time is expired. I recognize the ranking member, Ms. Woolsey?

Ms. WOOLSEY. Thank you, Mr. Chairman.

Mr. Goldstein, let us turn this around just a little bit. What goes around comes around. We know if employers take care of their employees they are much more apt to have a good workforce, right?

Mr. Bailey, I am sure you know that, and I feel absolutely confident that that is where your heart is and that is what you do.

And we have a country that needs to have jobs for American workers. We can't forget this. So will you talk about, from your perspective, what do we need to appeal to out-of-work United States workers that can do these jobs and how do we get them there?

What opportunities do we need to ensure—I mean, I don't blame an employer for not wanting to move somebody across the country and then have them there for 2 days. I mean, what can we do to make this competitive like other industries?

Mr. GOLDSTEIN. We can read the reports of numerous U.S. commissions for the last 107 years and follow their recommendations. In 1992 the Commission on Agricultural Workers, which was established by the Immigration Reform and Control Act of 1986, sought to answer that exact question, and the Commission on Agricultural Workers, when it was constituted we were very unhappy because it was dominated by agro-business representatives and we were just sure it was going to be really unfair. And it turned out to be a very objective analysis and set of recommendations that refer to previous commissions going back to 1904 Commission on Country Life that made recommendations to Teddy Roosevelt.

You have to stabilize the agricultural workforce, stop relying on new waves of desperate foreign workers from poor countries, improve wages and working conditions so workers are attracted to the job and stay there, and the discrimination in labor laws that cause people not to want to work in agriculture. And in the context of immigration the H-2A program or guest worker program has to offer wages and working conditions that attract and retain U.S. workers. And because of the restrictive non-immigrant status of the guest workers that is so favorable to employers and unfavorable to workers, you have to create protections for U.S. workers so that employers will actually want to and be required to hire U.S. workers rather than vulnerable guest workers.

Ms. WOOLSEY. So do you see that—I mean, do U.S. workers, if they are hired by an ag industry or a big farm or something, do they have to be connected at the hip? Do they have to be handcuffed with the employer in order to keep that person there and pay back what they have invested in them in training, and moving, and all that?

Mr. GOLDSTEIN. We don't think that the guest worker model should be the model of labor relations in the United States. We really think the H-2A program is fundamentally flawed.

And we also believe that there are something like a million undocumented farmworkers employed in the United States working hard, producing, and all they want is a chance for legal status, and we should give it to them, and we should improve the conditions

so that we keep them and the U.S. workers who are already here working.

Ms. WOOLSEY. And would that include—from your opinion would that include housing, and benefits, and making it a real not quite career, but a real job with—

Mr. GOLDSTEIN. Well, of course I think they should be—

Ms. WOOLSEY. Besides work?

Mr. GOLDSTEIN [continuing]. You know, lots of things should happen. The H-2A program really requires a lot of—should require a lot of protections because the workers are so vulnerable to their—from where they are coming, and their temporary status, and their non-immigrant status.

You know, how are they going to find a place to live if they are coming from a foreign country? You know, they can't arrange for housing. How can they afford to make sure to save enough money to come into the country without being indebted to some recruiter in a foreign country? You know, they need to be able to afford to get home.

But if we have a workforce that is here that are U.S. workers—legal immigrants and citizens—then we can recognize that while, you know, employers don't have to guarantee housing because Congress doesn't guarantee housing to its members either—

Ms. WOOLSEY. No. But I have just a minute.

Tell us what are the labor laws that ag workers aren't covered by.

Mr. GOLDSTEIN. They are not covered by? Farmworkers are excluded from the National Labor Relations Act, which means that they can be fired for joining a labor union. They are not covered by overtime pay, so they routinely work 10, 12 hours a day and they just make straight time.

They are not covered by the same child labor rules as other workers, and so in most jobs a task that is deemed hazardous can only be performed by somebody who is 18 years old or older; in agriculture it is 16 years or older.

There is a longer list. I mean, farmworkers are not—smaller farms, 10 and under, are not even guaranteed a toilet to go to the bathroom during work.

Ms. WOOLSEY. Thank you so much.

Chairman WALBERG. Thank the gentlelady.

And I now recognize the chairman of the full committee, Mr. Kline?

Mr. KLINE. Thank you, Mr. Chairman.

Thanks again to all our witnesses for your testimony and engaging in the discussion today.

Mr. Bailey, I have the advantage of having had discussions with you before that some of my colleagues here haven't had the benefit of, so I am going to ask you some things that we have already talked about but I want to kind of get them on the record and have—give you a chance to talk about the challenges that you face and some of the things that you have—some of the actions you have taken.

For example, talk to us about the adjustments that you have made—your company has made—to confront the shortage of workers. For example, let me get it specific here, has Bailey Nurseries

had to curtail operations or forego expansion because there simply weren't enough available workers to keep up with the needs of the business?

Mr. BAILEY. The answer to that is yes, we have. We have had to curtail our business and curtail expansion, and in fact, actually reduce some portions of our business because there is not an adequate supply of seasonal labor.

Mr. KLINE. So it seems to me that would be probably pretty difficult—in fact, I know that it is—when you have to do that, determining how to curtail it, and that is driven simply because you don't have the workers who show up.

Mr. BAILEY. That is right.

Mr. KLINE. Right. We know—those of us in Minnesota—that we are a border state, sometimes forgotten by some of my colleagues. But Canada has a seasonal agricultural worker program that seems to work pretty well, I think, in our discussion.

Given your company's proximity to Canada—at least part of it; I know you grow in other states—and the similarities in growing conditions, this becomes a real problem, this competition. How would a functioning agricultural guest worker program most benefit your company, keeping in mind the proximity to Canada?

Mr. BAILEY. Could you restate that question, Chairman?

Mr. KLINE. Yes. I mean, you have got—Canada is in competition. It is a neighboring country; it is a bordering state, if you will. They have a seasonal guest worker program that seems to work. We don't.

What sort of problems is that causing you?

Mr. BAILEY. Well, if we are not able to get the seasonal workers to help ship and grow our product that business could go across the border and go into Canada where they do have an effective and working seasonal agricultural worker program.

Mr. KLINE. We are not going to have enough time to do this, because as I recall, when we were having a meeting it took us about 30 minutes to walk through the process that you have gone through as you tried to get people to show up for work. Secretary Oates said if American workers had better information they would just show up and go to work. If they had access to information they would apply for these temporary jobs.

But you worked really hard to make that happen, so we have got about 2 or 3 minutes left in my time. Can you talk about how you went—tell us—walk us through that process of trying to get the American workers to come, and what happened, and how many left, and that sort of thing? Just take a couple minutes and walk us through that.

Mr. BAILEY. Sure. Yes, this year we made the most effort that we ever have on recruitment. We advertised our positions in the newspaper, on the radio, we held job fairs. We recruited from several local unemployment offices; we recruited with other ethnic groups within the Twin Cities and their social services networks. We even recruited at a local business that was laying staff off to get their workers, or hire their workers and keep them off the unemployment payroll.

We had a referral program within our own workforce. We sent letters to previous employees asking for them to return to work,

much as we had done—or in the same way that we had done with the H-2A program.

In short, we felt like we made every effort possible to attract workers, and we were not—we did get a lot of people to apply but a lot of them did not show up once we had made an offer to hire them.

Mr. KLINE. So they came and they applied—

Mr. BAILEY. That is right.

Mr. KLINE [continuing]. And you said, “You got a job,” and then they just didn’t show up?

Mr. BAILEY. That is right. When they had to come back to do the hiring paperwork they would not show up.

Mr. KLINE. Well, I, with all respect to Secretary Oates, I mean, it seems to me your testimony is pretty much in conflict with what she was saying about the availability of workers there to come take these jobs, because you are a very big company; you are sophisticated, as we talked about earlier. You reached out through a broad range of outlets to try to get people and you simply couldn’t get the workers.

And then again, just to reiterate, if you fail to get enough seasonal workers, H-2A or others, the impact is not just to them but to your overall business and to the 500 full-time employees.

Mr. BAILEY. That is right. And that is who I am here to speak for today, and that is who we are most concerned about are our 500 year-round U.S. workers.

Mr. KLINE. Because without the seasonal workers the full-time workers lose their jobs as well?

Mr. BAILEY. That is right. That is right.

And I will just add one more thing to further compound the difficulty with attracting seasonal workers: We have got a relatively high unemployment rate now and our business is currently down due to the economic conditions, so what we are really concerned about is in the future—a year, 2, 3 years down the road when the economy picks back up, unemployment rate drops again, our business goes up, we need even more seasonal workers. If things are tough now we are very concerned about the future.

Mr. KLINE. Thank you.

I am sorry I exceeded my time. I yield back.

Chairman WALBERG. Thank you.

I now recognize the gentleman from New York, Mr. Bishop?

Mr. BISHOP. Thank you, Mr. Chairman.

Thank you all very much.

I want to just make sure I heard some things correctly. As I asked Secretary Oates, my understanding is that there is legislation pending in the Judiciary Committee that would bring about mandatory E-verify for all sectors of our economy, including the agricultural sector.

Mr. Bailey, if I heard you correctly you would characterize the passing of that legislation as a mistake. Is that correct?

Mr. BAILEY. Yes.

Mr. BISHOP. Okay.

And, Ms. Whitley, I believe I heard you say that even though that legislation is basically being presented as a means of pro-

protecting American jobs that it would, in fact, have the opposite effect. Is that what I heard you say?

Ms. WHITLEY. Yes, Mr. Bishop.

Mr. BISHOP. And could you expand on why you think it would have the opposite—why you think legislation that I would presume in good faith is being presented as a means of protecting American jobs would, in fact, be injurious to the American workforce?

Ms. WHITLEY. Well, I think both the bills pending in the Judiciary Committee have many good aspects to them. National Council of Agricultural Employers has not taken a position on either piece of legislation right now.

If mandatory E-verify was enacted it would put seven out of 10 guest worker—agricultural workers rather than—sorry, I misspoke; not guest workers, but agricultural workers—out of a job. And it would affect, as Mr. Bailey—

Mr. BISHOP. Presumably it would make it awful difficult for the agricultural employers to get their work done, right?

Ms. WHITLEY. Precisely. It would have a devastating effect on the U.S. workers that are employed by American farmer right now.

Mr. BISHOP. Okay. Thank you.

Now, I also asked Secretary Oates if she thought that a better solution to this larger problem was comprehensive immigration reform, and her response to that was yes, that would be a better solution.

I will put this to the panel. Is that an assessment that you share as well?

Mr. Bailey, can we start with you?

Mr. BAILEY. Yes, yes. I believe that comprehensive immigration reform would be a solution.

Mr. BISHOP. Okay.

Ms. Whitley, do you agree?

Ms. WHITLEY. I certainly think it is an issue Congress needs to grapple with, but the National Council of Ag Employers does not have a position on CIR.

Mr. BISHOP. I want to press you a bit. You indicated that we needed some other program, which you did not define, beside—beyond H-2A. Would the ag jobs component of comprehensive immigration reform constitute that “some other program” that you would find helpful?

Ms. WHITLEY. In past years the National Council of Agricultural Employers has endorsed an ag jobs approach, but I understand, of course, this year ag jobs has not been reintroduced and so we are waiting to see what proposal Congress comes up with.

Mr. BISHOP. I guess, if I may, what I am finding frustrating—and again, I represent a lot of agricultural employers and I am trying to find a way to help them—is I know that it is a lot of fun to bash the Obama administration and the Department of Labor, but it seems to me as if we are ignoring the 800-pound gorilla in the middle of the room, and the 800-pound gorilla in the middle of the room is that our entire immigration system is broken, and that there is a proposal to at least make a good faith effort to fix it called comprehensive immigration reform, which at least used to enjoy bipartisan support. I suspect that that bipartisan support would be hard to find right now.

But it seems to me that we are spending a lot of time addressing a problem that even if we solve it we would still have a larger problem. And wouldn't our time be better spent focusing on comprehensive immigration reform and finding ways that we could sort of bridge the partisan gap that we have right now and help the agricultural industry, help the landscaping industry, help the service industry, help the resort industry—all of the industries that right now are struggling to maintain a workforce.

And as you say, Mr. Goldstein, that workforce is right here. We have already trained them; we have already embraced them; we already know they work hard. And yet, we are telling them that they are subject to deportation if they get stopped for running a red light.

I mean, shouldn't we have some form of—I mean, shouldn't we take the same amount of effort—Mr. Chairman, shouldn't we have a hearing in this committee on the impact of comprehensive immigration reform on maintaining an adequate workforce?

And, Mr. Bailey, to your point, we have 9.1 percent unemployment in this country. I don't know what it is in your area of Minnesota, but is it north of 7, north of 8 percent?

Mr. BAILEY. It is around 7 percent, a little bit north.

Mr. BISHOP. Okay. But even with that you are operating with a workforce that is 150 people below what would be your optimum workforce. Is that right?

Mr. BAILEY. That is correct.

Mr. BISHOP. So even though 7 percent of our workforce—and we have 16 percent of our workforce is either unemployed or underemployed—you have been unable to find an adequate workforce yet we have them right here in this country, but we are forcing them underground. Is that not the case?

Mr. BAILEY. I would agree with that.

Mr. BISHOP. Thank you.

So, Mr. Chairman, I would say—I know you can't respond, but I would ask that we have some effort in this committee to address the larger issue. And, I mean, I am not going to suggest that this is unimportant or a sideshow, but if we were to address the larger issue the solution to this more specific issue would be folded in.

And my time is expired. I yield back. Thank you.

Mr. GOLDSTEIN. Could I just say that if I was asked the question, yes, we agree.

Mr. BISHOP. Oh, I am sorry. I am sorry. Thank you.

Chairman WALBERG. We will accept that, and probably assumed it as well, from your testimony.

And, Mr. Bishop, you make a strong point. I wish the chairman were here at this point in time. He would have greater jurisdiction in expanding the responsibility of this—

Mr. BISHOP. He also would have argued with me, so—

Chairman WALBERG. I now recognize the gentleman from Indiana, Mr. Bucshon?

Mr. BUCSHON. Thank you, Mr. Chairman. I also, in my district, have a large number of immigrant workers. We have, surprisingly, in southwestern Indiana, significant melon farms and other things around in my district, and this is a very important issue.

I would agree, also, that immigration reform is in order and that it would help us some.

Mr. Sequeira, your testimony says that the Obama administration has made drastic changes in the H-2A rules with a complete rewrite—what are really, I mean, what are the nuts and bolts, the practical aspects of the changes that have been made on farmers and farm workers?

Mr. SEQUEIRA. Congressman, I am not sure we have enough time to get into all of those changes. I think the testimony you have heard here today has pretty well described thematically what those changes are.

Overall, the regulatory changes have resulted in simply a more bureaucratic process that consumes more time, more money, and more effort on behalf of farmers and increases their uncertainty about whether or not and when they are going to receive an adequate labor supply. I mean, there are endless number of details and particular regulatory provisions that have changed, interpretations of longstanding requirements that have suddenly changed, been proffered by the Department, that they are not tethered to the statute, they are not tethered to any reasonable interpretation of the regulation, and in fact, the Department loses before administrative law judges in those positions, yet the Department persists.

So I think overall it is just best to describe it as—it is really hostility by the current administration towards the program and towards farmers.

Mr. BUCSHON. Would you think that some of these are—these new changes were put in place with a larger big-picture goal towards some of our immigration challenges that we have, trying to, I would say, push us more towards allowing amnesty to some of these folks? Do you think it is a bigger picture plan?

Mr. SEQUEIRA. Well, Congressman, I think that it is indisputable that across the government all of the agencies that are involved in immigration have increasingly, for lack of a better term, put the screws to employers through the process, whether that is in low-skilled or high-skilled, virtually any immigration program. And there is no shortage of immigration practitioners and employers who have come to the conclusion that the current administration's goal is to make the current programs as difficult as possible to use in hopes that those employers will, in turn, put pressure on their elected representatives to do something about comprehensive immigration reform.

Mr. BUCSHON. Ms. Whitley, would you like to comment on that question?

Ms. WHITLEY. I agree completely with what Mr. Sequeira said. I hesitate to characterize it this way, but I think there is an animus from the Department of Labor of I haven't seen before in the administration of these programs, both H-2A and, as Mr. Goodlatte mentioned earlier, H-2B.

Mr. BUCSHON. Yes. I am a health care practitioner on the health care side, just as a sideline, I think it is a similar approach being taken towards our health care system to make things so difficult that finally we all and the American citizens demand that the federal government take over the program.

So with that, I yield back.

Chairman WALBERG. I thank the gentleman.

And now I recognize the gentleman from new Jersey, Mr. Payne?

Mr. PAYNE. Thank you very much.

I just have questions regarding—you mentioned, Mr. Sequeira, that these new regulations have become very difficult. The regulation that evidently you supported or approved of when the 2008 rule changed, I think they—well, before that, but with the Bush administration's regulations that you supported wanted reduced or eliminated worker's protection, like 50 percent recruitment protection, the transportation reimbursement requirement, and several wage protections specifically eliminating the 50 percent rule required H-2 employers to hire any qualified worker who applied for a position until 50 percent of the work contract under which H-2A workers are employed as run eliminates an important protection that ensure that U.S. workers have a meaningful shot at agricultural jobs.

Now, one of the things—I am not sure that—you know, there has been a lot of tough industries in this country, and listening to you all I guess government is probably the worst thing that could ever happen to the United States of America. The fact that everything seems to be what they have messed up.

However, a H-2 guest worker—many employers—not saying Mr. Bailey, but many—prefer them over U.S. workers because guest workers are cheaper than U.S. workers for several reasons. First, the H-2A employer does not pay Social Security or unemployment tax on guest workers' wages but must do so on U.S. workers. Second, guest workers want a building means that they work to the limits of human endurance for modest wages offered in the H-2A program while most U.S. farmworkers would expect higher wages and such, and we can go on and on.

You know, it makes it seem that the only tough job in America have been farmworkers. I worked in a place at Curtiss-Wright, when they were in operation—but fortunately I didn't work in that department—the average temperature was about 130 degrees, 140 degrees. They were pouring molten steel because they were making engines. They have always had workers. I have seen people work on steel beams that were tipping and they were up 20, 30 stories.

I can't understand why only agriculture seems to be the place that nobody wants to work. Maybe the industry needs to take a look at itself and see what—I can't see why every other industry in America can flourish, however nobody wants to plant a potato. Poor Johnny Appleseed would be rolling over in his grave.

You know, there is something radically wrong. I have no idea what it is, but I have done all kinds of jobs. I have worked on the docks; I have driven cranes; I have walked on beams. You can't tell me that there is something not radically wrong—either your wages are so low that any decent American has a very difficult time, but I see everybody has drawn it up, especially, I mean, I guess you haven't seen a government agency that you like, and that is your right.

But all of the problems happen to be regulations and so forth, that the industry is doing everything right, and evidently Mr. Bailey is maybe the exception to the rule, it seems to me. It is a family business going on for 100-plus years, seem to be moving forward,

and so I am not—you know, I am excluding you, Mr. Bailey; I don't even know you that well.

But I am just talking about the industry in general, there is something that is radically wrong. I really can't put my finger on it, but I have been hearing this since Pete Williams talked about the industry back in the 1960s with farmworkers, the lettuce problem with—it is just something that we need to, I think, as we look into how bad these government agencies are we ought to take a look at the industry itself. It is so vital to the United States of America and something, I think, is radically wrong.

And I don't have a question. I just wanted to make a statement, and I yield back the balance of my time.

Chairman WALBERG. I thank the gentleman.

And, having worked in those same places, pouring hot molten steel myself at U.S. Steel South Works, south side of Chicago, they are challenging jobs. But I also know in agriculture we don't want to pay \$20 for a head of lettuce and we have stipulations in place that we, the government, have put in.

I also hesitate, but I know my ranking member would encourage me to show the sensitive side of me, being a former minister before going to the dark side, I don't think that we would say that government is the worst institution ever created. In fact, as I understand, from my theological perspective, God created government even before the Church, coming right after the family institution. So I think we want to make it work well, and make it work well for agriculture, make it work well for the employers as well as the employees.

So let me end that diatribe and ask the ranking member if she has closing comments that we will entertain those at this time.

Ms. WOOLSEY. Thank you, Mr. Chairman.

I know Secretary Solis and I am absolutely certain that she and her department support agriculture—agricultural business and agricultural workers—and if there is an animus it would be that she wants—they want to level the playing field, and that is our challenge, and make it possible for Americans to be part of the ag worker industry, and that when we have an H-2A visa program that the workers are taken care of fairly so that the industry in and of itself does not become something that nobody wants to work in unless they are so poor or so bad off that they will have to work at anything. This is the United States, and we are not going to go there.

So, Mr. Chairman, I would like to ask unanimous consent to submit the Farmworker Justice report, "No Way to Treat a Guest," into the record?

[The report may be accessed at the following Internet address:]

<http://farmworkerjustice.org/images/stories/eBook/pages/fwj.pdf>

Chairman WALBERG. Without objection, we will—

Ms. WOOLSEY. Okay.

We have learned today, we have known all along the H-2A is a very important program. It provides farmers with access to foreign workers as they are needed.

However, with 25 million Americans unemployed or underemployed it is absolutely essential that U.S. workers come first. There is no question that there is a U.S. workforce willing to do some of these jobs and they must have access to them.

At the same time, we need to ensure that farmers are following the rules, are treating their foreign workers fairly and humanely. And the last thing we should do is press for changes to the program that would loosen requirements on employers or start a race to the bottom in which foreign workers are asked to do more for less and U.S. workers are shut out of the workforce.

So, Mr. Chairman, let us strive to make improvements to this program. It is obvious there are things that need to be done and we can do it to help employers and workers alike.

And with that, I thank you, witnesses. You were great. Thank you.

Chairman WALBERG. I thank the gentlelady.

And I would make that commitment, that there are things that need to be done to make our system related to guest workers work. And I think today has been an excellent hearing to hear some statements that make it, I think, clear that it is not a myth that workers can't be found. There is great difficulty that we see here for workers that will come the second, third, fourth day, do the job that is intended, to be found, and that the program that is to administer the guest worker program is—has become a significant hurdle in the way.

And yet, on the other side of the ledger, as we look at the problem with low application on-time percentage that certainly wouldn't be accepted in the private sector, high appeal loss rate for decisions that are made. That evidences that there are, indeed, problems that must be addressed in order to make sure that we have the workers.

I think on top of it all, following what our president said last week in his speech, that we need to move forward in creating, expanding jobs in this country, I think all on this committee would concur with that. I think the fact of what he stated in reducing unnecessary regulation that stands in the way and the commission that he has put together to ascertain what regulatory relief there should be and what needs to be addressed, we would applaud those efforts and would roll up our sleeves and say we would be glad to assist in putting together that list and then addressing them in a concrete fashion.

Because until we actually are about the business of increasing the economy—the job economy—increasing the opportunity for people to be employed to a greater degree at their own desire in jobs that they would ascertain would be best and most encouraging for themselves, and ultimately, then, producing competition for jobs, as opposed—competition for jobs that comes from having plenty of jobs that are out there, whether they be agriculture, or manufacturing, or service industry, whatever they are. Until we are capable and able to do that by ratcheting unnecessary hurdles out of the way, including government hurdles that are put in the way, I don't think we will be successful in addressing this problem.

On the issue of immigration and the issue of guest workers, certainly there appears to be a serious need for immigration reform—

comprehensive immigration reform. But until we ensure the people—the people that we are privileged to represent—the taxpayer, citizen, consumer—in this country that we have secured the borders and we are, indeed, dealing with equal opportunity, consistency for all that are in this great God-blessed land, we will not have the support or the necessary encouragement to deal with the fuller issue of immigration, and I think ultimately with the farm-worker program in the detail.

So this committee—this subcommittee—has held this meeting today to start the process in this specific instance, but also would indicate that the broader issue of increasing economy, growing jobs, making the impact upon our economy so that people do have choices and businesses like Mr. Bailey’s and others across our districts will have the employees to do the job, that they will pay, that they will provide with working conditions that they, I am sure, desire in a humane, solid, positive way, will be there as well.

To that end, I certainly make my commitment to my ranking member and the minority members of this committee as well as the majority members of the committee.

I thank you, each of the witnesses, for being here today and the committee members for the attention to the details heard this morning.

There being no further business at this time, the committee stands adjourned.

[Additional submissions of Ms. Woolsey follow:]

INTERNAL DELIBERATIVE DOCUMENT

**Department of Labor’s Follow-up Response to
Questions Regarding H-2A Appeals**

Why have there been so many appeals of H-2A cases? Why has the Department of Labor (Department) lost so many appeal cases?

There have been approximately 440 appeals of H-2A applications in FY 2011 to date. This represents approximately 9 percent of the total final determinations issued in FY 2011 (4,867 including certifications, denials and withdraws). About 78 percent of the appeals were filed in the first half of FY 2011. It represented a significant increase in the number of appeals in the H-2A program over the previous year. The initially high number of appeals (60%) was the direct result of employers/growers not providing required documentation with their H-2A application. Our program experience tells us that with any new regulation there is a period of adjustment during which program compliance is not going to be as high as it would be a year or so later.

Specifically, the Department has determined that one of the most common reasons for denial was the employer’s failure to provide the documentation required to issue the labor certification within 30 days of the employer’s need for workers: the statutory time period within which the Department must issue the determination. The vast majority of these cases became approvable within a few days of the appeal because the required documentation was provided as part of the employer’s appeal. The appellate process allowed the Chicago National Processing Center (NPC) to accept additional documentation from the employers, as required by regulations, and render a positive decision. Therefore, the appeal in essence was resolved informally and was not “lost” by the Department as some are claiming.

The Department was made aware that the increased rate of denials forced growers into the program’s appellate process which created additional burden and delays. To ameliorate this problem, the Department implemented, within the limits of its statutory requirements, a more flexible process in late January 2011 to provide employers with additional time to submit documents necessary to meet program requirements and receive a certification rather than a denial. These revised procedures have already significantly reduced the number of appeals filed. For example in the last quarter of FY 2011, only seven appeals have been filed.

OFFICE OF FOREIGN LABOR CERTIFICATION H-2A APPEALS INFORMATION

	10/01/2010– 01/31/2011	02/01/2011– 06/30/2011	07/01/2011– 09/29/2011	Total
Total number of cases appealed	190	235	9	*434
Total number of appeals on denial decisions	156	**205	5	366
Total number of appeals on denials for employer's failure to provide document required	133	80	4	217
• Recruitment reports				
• Workers' compensation				
• Housing				
• Surety bonds				

*The difference between the 440 cases and 434 is the OALJ case docketing system had duplicate entries.

**It is important to note that a large portion of the appeals were carried over from cases that were decided in the prior period, before the strict interpretation of the regulations ceased. Employers were afforded the opportunity to provide their documents to the CNPC after the 30th day without facing a denial. As a result, the number of appeals dropped considerably during the last quarter.

Over 90% of the appeals which were filed from October 1, 2010—June 30, 2011 were a result of the strict application of the regulatory required 30—day determination due-date (employers failed to provide the required documentation and the vast majority of cases were denied). The vast majority of the cases became approvable upon receipt of the required documentation—the cases which had been appealed were remanded back to the Chicago National Processing Center (NPC) for further processing where majority were certified.

[Additional submission of Ms. Whitley follows:]

H-2A Temporary Agricultural Program

How Well Is It Working for Agricultural Producers?

The Department of Labor's H-2A Program was enacted to allow agricultural producers to obtain, in a timely manner, authorization for non-U.S. citizens to perform temporary agricultural labor when the domestic workforce is insufficient to meet the demand. This program is critical for U.S. agriculture.

The purpose of this survey is to learn directly from producers who use it whether this program is fulfilling its purpose.

It is extremely important to fill this questionnaire out accurately. Please use your records or contact your agent for assistance.

This project is sponsored by the National Council of Agricultural Employers.

SECTION 1. APPLICATION FOR H-2A WORKERS FOR 2010

Q01. Did your operation submit an application (ETA Form 9142) to participate, in 2010, in the Department of Labor's H-2A program? (The application may have been submitted in 2009.)

- Yes
- No → Skip to Q51, page 9

Q02. How many different applications did you submit to the program for 2010?

- A single application → Skip to Q04
- More than one application

Q03. How many separate applications did you submit for 2010?

_____ # of separate applications

Please select one application and answer the remaining questions about that application.

Q04. Did you use an agent to assist you in the application process?

- Yes
- No

Q05. What was the final certification decision regarding your 2010 application by the Department of Labor's Office of Foreign Labor Certification (OFLC)?

- Certified – Full
- Certified – Partial
- Denied
- Withdrawn or other disposition

Q06. Regarding your 2010 application, how many H-2A workers: Number of H-2A Workers

- a. Were requested for certification....._____
- b. Were certified by OFLC (Chicago)....._____
- c. Were admitted by the U.S. Customs & Immigration Service (USCIS)_____
- d. Began work on your operation....._____

Q07. For which commodities was the H-2A job order? (Check all that apply.)

- Fruit
- Vegetables
- Nursery/greenhouse
- Livestock
- Grains
- Other (Please specify): _____

Q08. What tasks were H-2A workers intended to perform? (Check all that apply)

- Planting/Propagation
- Pruning
- Cultivation and/or ongoing care of plants
- Harvesting /Packing
- Feeding / care of livestock
- Other (Please specify): _____

Q09. Was your 2010 application Initially Fully Certified?

- Yes → Skip to Q18, page 5
- No

SECTION 2. DENIALS AND PARTIAL CERTIFICATIONS

Q10. What reason(s) was given by OFLC (Chicago) in its Notice of Deficiency? (Check all that apply)

- Hourly wage too low
- Piece rate wage too low or other issue with piece rate
- Requirement for "work experience"
- Requirement for a background check or drug test
- Productivity standards
- Small errors or inconsistencies in the paperwork
- Other (Please specify): _____

Q11. Did you revise and resubmit your application for reconsideration?

- Yes
- No → Skip to Q13

Q12. (If yes to Q11) What was the outcome of this revised submission?

- Certified – Full → Skip to Q18, page 5
- Certified – Partial
- Denied

Q13. Did you appeal your partially certified or denied application to an administrative law judge?

- Yes
- No → Skip to Q17, page 5

Q14. Did you have legal counsel or other professional assistance with your appeal?

- Yes
- No

Q15. Was your appeal...

- Decided by an administrative law judge?
- Resolved through an agreement reached between parties before the hearing? → Skip to Q18
- Other (Please specify): _____ → Skip to Q18

Q16. If your appeal was decided by an administrative law judge, what was the judge's decision?

- ₁ OFLC was reversed by the judge and the case remanded for processing
 - ₂ OFLC denial of your certification was upheld by judge
 - ₃ OFLC denial of your certification was partially upheld by judge
- } **Skip to Q18**

Q17. Why did you choose not to appeal? (Check all that apply.)

- Generally satisfied with OFLC (Chicago)'s decision
- It was too costly to appeal
- There was insufficient time to appeal
- Did not think the decision would be reversed
- Other (Please specify): _____

SECTION 3. CRITICAL DATES AND TIMING ISSUES

Q18. On what date did you initially file...

- a. Form 790 with a State Workforce Agency? ___/___/____ (MM/DD/YYYY)
- b. Form 9142 with the Office of Foreign Labor Certification (OFLC)? ___/___/____ (MM/DD/YYYY)

Q19. What was the start "date of need" on your application? ___/___/____ (MM/DD/YYYY)

Q20. What was the end "date of need" on your application? ___/___/____ (MM/DD/YYYY)

Q21. Did you file an amended "date of need"?

- ₁ Yes
- ₂ No → Skip to Q24

Q22. What was your amended start "date of need"? ___/___/____ (MM/DD/YYYY)

Q23. What was your amended end "date of need"? ___/___/____ (MM/DD/YYYY)

Q24. On what date did you get initial acceptance or denial of your application from the OFLC (Chicago)? ___/___/____ (MM/DD/YYYY)

Q25. Following any resubmission or administrative appeal, on what date did OFLC issue a final decision on your application? ___/___/____ (MM/DD/YYYY)
Check here if question is not applicable.

Q26. On what date did you file a petition with the USCIS? ___/___/____ (MM/DD/YYYY)
Check here if question is not applicable.

Q27. On what date did you receive approval from the USCIS? ___/___/____ (MM/DD/YYYY)
Check here if question is not applicable.

Q28. On what date did H-2A workers begin work? ___/___/____ (MM/DD/YYYY)
Check here if question is not applicable.

SECTION 4. DOMESTIC WORKERS

Q29. With how many different state workforce agencies did you file a Form 790?

_____ Number of state workforce agencies

Q30. How many referral job candidates did you receive from those state workforce agencies?

_____ Number of job candidates referred
Check here if no job candidates were referred → **Skip to Q41**

Q31. How many of these referrals were received after the "date of need"?

_____ Number of referrals received after the "date of need".

Q32. If you received more referral candidates than jobs on the job order, did your state workforce agency still require you to offer jobs to all referrals that you received during the first 50% of the contract period? (50% rule)

- I did not receive more referral candidates than jobs on the job order. → **Skip to Q35**
 Yes, I received more referral candidates than jobs on the job order, and I was required to offer a job to each referral received in the first 50% of the contract period.
 No, I received more referral candidates than jobs on the job order, but I was not required to offer a job to each referral received during the first 50% of the contract period. → **Skip to Q35**

→ **Q33. How were you informed of this requirement?**

Q34. Was this requirement a change from previous years?

- Yes, this requirement was different than in past years
 No, this was also required in the past

Q35. How many referral candidates accepted a job with you?

_____ Number of referral candidates who accepted a job.
Check here if no job candidates accepted a job with you → **Skip to Q41**

Q36. How many referral candidates began work on your operation?

_____ Number of referral candidates who began work on your operation.
Check here if none began work → **Skip to Q41**

Q37. How many referral workers worked through the entire contract period?

_____ Number of referral candidates who worked through the entire period.
Check here if none worked the entire period

Q38. If any referral workers left your employ before the end of the contract period, why did this happen? *(Check all that apply)*

- Worker quit or failed to show up for work
- Worker terminated for cause, other than failure to show up
- Worker failed to produce acceptable work authorization documentation
- Worker terminated because there was no more work to be performed
- Other (Please specify): _____

Check if none left before the entire period

Q39. Considering all referral workers, what was the average number of hours one of these referrals worked on this job order?

_____ Average number of hours worked

Q40. How many total hours did you, or others on your operation, spend on paperwork processing for referral workers and training these workers for this job order?

_____ Hours spent on processing and training of referral workers

SECTION 5. PETITIONS TO THE U.S. CUSTOMS AND IMMIGRATION SERVICE AND CONSULAR PROCESSING

Q41. How well did the U.S. Customs and Immigration Service handle your petition for H-2A workers?

- ₁ Approved petition in a timely manner
- ₂ Approved petition, but not in a timely manner
- ₃ Did not approve petition
- ₄ Issued a Request for Evidence

Q42. How well did the U.S. Embassy or Consulate handle the visa processing for your H-2A workers?

- ₁ Processed in a timely manner
- ₂ Processed, but not in a timely manner
- ₃ Did not process

Q43. Did you use the U.S. Embassy in a second country to process visas for this work order?

- ₁ Yes
- ₂ No → Skip to Q45

Q44. How well did the U.S. Embassy or Consulate in this second country handle the visa processing for your H-2A workers?

- ₁ Processed in a timely manner
- ₂ Processed, but not in a timely manner
- ₃ Did not process

SECTION 6. ECONOMIC IMPACT AND COST

Q45. How many hours did you, a family member, or others in your operation spend in the administrative processes to obtain H-2A workers for 2010?

_____ Hours

Q46. Did you hire an agent to do some or all of the application/appeal process for your operation?

Yes

No → Skip to Q48

Q47. Why did you hire an agent? (Check all that apply)

Process is very complex

Agent is more cost effective than doing the work ourselves

To help protect against liability

Other (Please specify): _____

Q48. What was the economic loss (in dollars) or other injury to your operation due to the inability to get the workers you needed?

_____ Dollars

Check here if some other injury to your operation. Please indicate what this was.

Q49. What was the economic loss (in dollars) or other injury to your operation because the workforce was not available at date of need?

_____ Dollars

Check here if some other injury to your operation. Please indicate what this was.

Q50. On which activities did the loss occur? (Check all that apply)

Planting / Propagation

Pruning

Cultivation and/or ongoing care of plants

Harvesting /Packing

Feeding / care of livestock

Other (Please specify): _____

No loss

SECTION 7. ENFORCEMENT ISSUES

Q51. The following questions pertain to audits conducted of your business by the Wage and Hour Division (W & H) of the Department of Labor. Please circle Yes, No, or N/A (not applicable) in each cell.

		2010	2009	2008	2007	2006
a.	In these years, did you apply to participate in the H-2A program?	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A
b.	Were you audited by the Wage and Hour Division during any of these years?	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A
c.	If audited, was it a paperwork-only audit?	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A
d.	If audited, did an investigator come to your place of business?	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A
e.	If audited, were any violations found?	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A
f.	If violations were found, were any fines levied or back wages sought?	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A
g.	If violations were found, did you contest them at a hearing before an administrative law judge?	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A	Yes No N/A

Q52. Prior to participating in the H-2A program, were you ever audited by the Wage and Hour Division?

- ₁ Yes
₂ No → Skip to Q54

Q53. How many times were you audited in years before participation?

_____ Number of times audited

Q54. How many times have you been audited in the years since you began participation?

_____ Number of times audited

Q55. Have you ever been sued in court by workers regarding matters related to your participation in the H-2A program?

- ₁ Yes
₂ No

SECTION 8: YOUR PERSPECTIVE

Q56. How many years have you been farming?

_____ Years farming

Q57. How many years have you (your operation) participated in the H-2A program?

_____ Years participating in the H-2A program

Q58. Please rank in order of priority (1 being the highest) the biggest challenges to using the H-2A program:

_____ Administrative burden

_____ Program costs

_____ Delay in processing by OFLC

_____ Delay in processing by USCIS

_____ Delay in processing by consular office

_____ Enforcement actions by W&H

_____ Lawsuits brought by workers

_____ Other (Please specify): _____

New regulations became effective for H-2A applications with "date of need" in June 2010 and thereafter (Obama Administration regulations).

Q59. What impact did these regulation changes have on the overall burden and cost of participation in the program?

- Substantially more burdensome and costly
 Somewhat more burdensome costly
 About the same as under previous regulations
 Less burdensome and costly
 Substantially less burdensome and costly

Q60. What impact did these regulation changes have on the labor certification process?

- Substantially easier to get certified
 Somewhat easier to get certified
 About the same as under previous regulations
 Somewhat harder to get certified
 Substantially harder to get certified

Q61. What impact did these regulatory changes have on your ability to find qualified domestic workers in lieu of H-2A workers?

- Substantially easier to find qualified domestic workers
 Somewhat easier to find qualified domestic workers
 About the same
 Somewhat harder to find qualified domestic workers
 Substantially harder to find qualified domestic workers

Q62. Are you planning to apply for H-2A workers in 2012?

- ₁ Yes → Skip to Q64
₂ No

Q63. Why are you not planning to apply for H-2a workers in 2012? (Check all that apply.)

- Too administratively burdensome or costly
 Workers not available in a timely manner
 Sufficient domestic workers are available for my needs
 Mechanization has reduced my need for H-2A workers
 Changes in what I produce have reduced my need for H-2A workers
 No longer farming
 Other (Please specify): _____
- } Skip to Q65

Q64. Why are you planning to apply for the program in 2012? (Check all that apply.)

- Generally satisfied with the program
 Dissatisfied with the program, but have no legal alternative
 Anticipate that an electronic employment authorization verification program will become mandatory
 Other (Please specify): _____

Q65. Have you ever complained to your U.S. Senator or Representative about the difficulties in using the H-2A program?

- ₁ Yes
₂ No → Skip to Q67

Q66. If yes to Q65, what response did you get?

Q67. How would you rate your overall satisfaction with the H-2A program as it is currently administrated?

- ₁ Not at all satisfied
₂ Slightly satisfied
₃ Moderately satisfied
₄ Very satisfied
₅ Completely satisfied

Q68. Please provide any additional comments you would like to make regarding the H-2A program.

SECTION 9. OPERATION DESCRIPTION	
<p>This section will be used to determine whether the H-2A program is administered differently for different sizes and types of farming operations.</p>	
Q69.	<p>In 2010, what was this operation's gross value of sales?</p> <p><input type="checkbox"/>₁ Less than \$250,000</p> <p><input type="checkbox"/>₂ \$250,000 to \$499,999</p> <p><input type="checkbox"/>₃ \$500,000 to \$999,999</p> <p><input type="checkbox"/>₄ \$1,000,000 or more</p>
Q70.	<p>Which commodity grouping represents the largest value of sales for this operation in 2010?</p> <p><input type="checkbox"/>₁ Grains, oilseeds, dry beans and dry peas</p> <p><input type="checkbox"/>₂ Tobacco</p> <p><input type="checkbox"/>₃ Cotton and cottonseed</p> <p><input type="checkbox"/>₄ Vegetables, melons, potatoes and sweet potatoes</p> <p><input type="checkbox"/>₅ Fruits, fruit nuts, and berries</p> <p><input type="checkbox"/>₆ Nursery / Greenhouse</p> <p><input type="checkbox"/>₇ Cut Christmas trees and short rotation woody crops</p> <p><input type="checkbox"/>₈ Other crops and hay</p> <p><input type="checkbox"/>₉ Poultry and eggs</p> <p><input type="checkbox"/>₁₀ Cattle and calves</p> <p><input type="checkbox"/>₁₁ Milk and other dairy products from cows</p> <p><input type="checkbox"/>₁₂ Hogs and pigs</p> <p><input type="checkbox"/>₁₃ Sheep, goats and their products</p> <p><input type="checkbox"/>₁₄ Horses, ponies, mules, burros and donkeys</p> <p><input type="checkbox"/>₁₅ Aquaculture</p> <p><input type="checkbox"/>₁₆ Other animals and other animal products</p>
Q71.	<p>What was the management structure of this operation in 2010?</p> <p><input type="checkbox"/>₁ An individual or family operation (exclude partnerships)</p> <p><input type="checkbox"/>₂ Legal partnership operation (include family partnerships)</p> <p><input type="checkbox"/>₃ C-Corporation</p> <p><input type="checkbox"/>₄ S-Corporation</p> <p><input type="checkbox"/>₅ Other (Please specify): _____</p>
<p>Thank You!!</p> <p>Please return your completed questionnaire to Social & Economic Sciences Research Center Washington State University PO Box 641801 Pullman, WA 99164-1801</p>	
<p>Page 12 of 12</p>	

[Questions submitted for the record and their responses follow:]

U.S. CONGRESS,
 Washington, DC, October 17, 2011.

Hon. JANE OATES, *Assistant Secretary,
 Employment and Training Administration, U.S. Department of Labor, 200 Constitu-
 tion Avenue, NW, Washington, DC 20210.*

DEAR ASSISTANT SECRETARY OATES: Thank you for testifying at the Committee on Education and the Workforce's Subcommittee on Workforce Protections September 13 hearing on "Workforce Challenges Facing the Agriculture Industry." I appreciate your participation.

Enclosed are additional questions for the record submitted following the hearing. Please provide written responses no later than October 31 for inclusion in the offi-

cial hearing record. Responses should be sent to Ryan Kearney of the Committee staff who may be contacted at (202) 225-4527.

Thank you again for your contribution to the work of the Committee.

Sincerely,

TIM WALBERG, *Chairman,*
Subcommittee on Workforce Protections.

QUESTIONS FROM REPRESENTATIVE WALBERG:

1. You stated in your written testimony that the Department has “planned and implemented stakeholder meetings and briefings designed to familiarize program users and others with the regulatory changes” in the 2010 Final H-2A Rule. With respect to said stakeholder meetings and briefings, and any other stakeholder outreach or education efforts relating to the 2010 Final Rule, please provide responses to the following:

a. Since implementation of the 2010 Final Rule, please provide a list of all such stakeholder meetings and briefings requested of or conducted by the Department, including any webinars or other web- or teleconference-based discussions. As part of said list, please identify all stakeholders who requested a meeting or briefing and whether a meeting or briefing was conducted. Please also identify all upcoming stakeholder meetings and briefings you have planned. Finally, please provide the committee with copies of any materials (e.g., handouts, memos) prepared for and provided to participants in stakeholder meetings and briefings.

b. What is the Department’s process for planning and implementing these stakeholder meetings and briefings? For example, how do you determine the location, timing, and frequency of meetings and briefings; the materials, if any, provided to meeting and briefing participants; and who participates on behalf of the Department?

c. How are stakeholders notified in advance of meetings and briefings?

2. Your testimony mentioned a “dedicated public e-mail at the Chicago National Processing Center” through which H-2A program users may participate in a “question and answer process” with the Department. With respect to said “dedicated public e-mail,” please provide responses to the following:

a. What is the address of the e-mail account?

b. When did the Department begin using the e-mail account?

c. How are H-2A users notified that they may communicate with the Department via the e-mail account?

d. What is the Department’s process, whether formal or informal, for responding to these e-mail inquiries? For example, who monitors the e-mail account, and who responds to inquiries submitted to the account?

e. How many total e-mail messages has the account received since its creation, and how many e-mail messages has the account received each month since its creation? How many of the e-mails received has the Department responded to?

f. How often is the account checked for new e-mail messages, and what is the average response time to inquiries submitted to the account?

3. In your written testimony you stated, “we intend to design and develop a new web-based filing system for the H-2A program to improve access to our services and allow growers to check an application’s status electronically.” With respect to this web-based filing system, please provide responses to the following:

a. What steps has the Department taken, and what steps does the Department plan or intend to take, to implement online access for program users to monitor the status of their applications?

b. Will the aforementioned “dedicated public e-mail” be integrated into or otherwise become a part of a web-based filing system? If not, how would program users communicate with the Department under a web-based filing system?

c. Has the Department held meetings with stakeholders or any other outside groups relating to the development, makeup, or any other aspect of a web-based filing system? If so, please provide an account of any such meetings. If the Department has not held any such meetings, does it intend to?

d. When does the Department expect a web-based filing system to be available to program users?

4. How many H-2A applications were received, and how many applications were ultimately processed and approved, in fiscal years 2009 and 2010? How many H-2A applications have been received, and how many applications have been processed and approved, to date in fiscal year 2011?

5. You testified at the hearing that with respect to the Department’s H-2A program goals and evaluation of its performance, “[w]e have a very in-the-weeds discussion about what is going on with the numbers that they are hitting.” Please provide

the committee with an account of when each of these discussions occurred, the subject and general substance of these discussions, and who participated in these discussions.

6. During the hearing's second panel of witnesses, a witness outlined results of a 2010 H-2A employer user survey which found that, on average, H-2A guest workers arrive 22 days after the date they were needed to start work. Is the Department aware of this problem? If so, please explain what the Department is doing to ensure that guest workers arrive on time, including a full description of any steps the Department has taken to remedy the problem. Further, please provide any data or other information the Department has collected or received relating to its role in the timely or untimely arrival of H-2A guest workers.

7. You stated at the hearing that "67 percent of all applications are processed timely. That is a number we are working every day to improve." Please describe for the committee how the Department is working to improve that number, including, but not limited to, a full description of the following:

a. the process by which the Department identified and continues to identify issues with its ability to process applications timely;

b. problems the Department has identified that hinder its ability to process applications timely; and

c. steps the Department has taken or plans to take to remedy problems with its ability to process applications timely.

8. Your written testimony states that the 2010 Final Rule "reflect[ed] a return to processes and procedures that were in place between 1987 and 2008." If that is true, why were 95-99 percent of H-2A applications certified in full during that time while, according to witness testimony provided at the hearing, less than 80 percent are being certified in full this year?

9. You stated at the hearing, "we saw that an employer—many of them small growers—put in an application that was incomplete, and we were denying that." With respect to these denials, you stated further that "[w]e changed our process so that an incomplete application goes back and we work with the employer to get the information necessary for a complete application." Please describe how that process has changed, including a full description of the relevant process previously in place, the new process in place, and how specifically the Department identified the need for a change in process and implemented the new process. Please also provide all documents and communications relating to the Department's change in process.

10. Witness testimony at the hearing cited data from the Department's Office of Administrative Law Judges showing that the number of user appeals of the Department's denial of H-2A applications or issuance of deficiency notices averaged 19 annually from 1995-2009. Witness testimony also revealed that, in contrast, in fiscal year 2011 to date, 442 such appeals have been filed. Please explain why there has been such an increase in appeals this fiscal year. Also, if the Department has differing data or information with respect to said increase in appeals, please provide same.

11. Witness testimony at the hearing revealed that not only have a record number of appeals been filed this year, but also the Department's position is being overturned on appeal approximately 90 percent of the time. Please explain why the Department's position is being overturned on appeal at such a high rate. Also, if you have differing data or information with respect to the Department's appeal record, please provide same.

12. During the hearing's second panel, a witness noted that the Department has started to deny or otherwise delay H-2A applications because, for example, applicants used "white out," transposed a digit in a mailing zip code, or used an attachment to provide the Department with additional information. Are you aware that applications are being denied and employers are forced to file appeals because of these practices? Is it the Department's position that these denials are proper and supported by statutory, regulatory, or other legal precedent or Department policy? Why or why not? As part of your response, please identify and provide the committee with any such

13. During the hearing's second panel of witnesses, a witness provided results of the 2010 H-2A employer user survey which found that the Department's increased denials of applications and delays in timely approvals of applications resulted in approximately \$320 million in economic losses to H-2A program users. Is the Department aware of the economic costs associated with its increased denials of applications and delays in timely approvals of applications? Further, is the Department aware that when growers do not get the guest workers they need on time, U.S. growers and U.S. agricultural workers also suffer? If the Department is aware of these concerns, please provide a description of your understanding of how denials

of H-2A applications and delays in the approval of applications economically affect U.S. growers and U.S. agricultural workers.

14. You stated at the hearing that “the role of the state workforce agency in inspection and approval of employer-provided housing” was a “key feature[] of the 2010 rule.” Please state for the record how the role of state workforce agencies has changed in the wake of the 2010 Final Rule and what the Department’s role has been in instituting and implementing those changes.

15. One of the concerns raised by users of the H-2A program is that the Department and the Department of Homeland Security need to improve their inter-agency communications. With respect to said concern, please provide responses to the following:

a. What is communicated between the Department and the Department of Homeland Security regarding the H-2A program? How often do any such communications occur between the departments? What, if any, inter-agency communications between the departments are required, whether formally or informally, e.g., pursuant to any Memos of Understanding or other inter-agency agreements? Please provide the committee with copies of any such communications between the departments.

b. Has the Department identified a lack of communication between the departments as a concern or an area requiring improvement? If so, what steps have been undertaken to improve communications between the departments? Has the Department heard from outside stakeholders or program participants, or from the Department of Homeland Security, that a lack of communication between the departments is a concern?

Ms. Oates’ Response to Questions Submitted for the Record

RESPONSE TO QUESTION 1

a) The Department of Labor announced three stakeholder briefings in the Federal Register on February 19, 2010 (75 FR 7367) (<http://edocket.access.gpo.gov/2010/pdf/2010-3282.pdf>) to familiarize stakeholders with the 2010 Final H-2A Rule. The dates and time of the briefings were:

- February 23, 2010, San Diego, CA
- February 25, 2010, Dallas, TX
- March 2, 2010, Raleigh, NC

The briefings were scheduled for the time period between the publication of the 2010 Final H-2A Rule (February 12, 2010) and the rule’s implementation date (March 15, 2010) so that attendees could review the Rule and be prepared by its effective date. Approximately 200 individuals who represented thousands of H-2A users across the country attended the sessions. Some stakeholders attended more than one session.

In addition, a public webinar was held on March 25, 2010. The webinar was publicized on the Office of Foreign Labor Certification (OFLC) web site as of March 19, 2010 and details for attending the webinar were published in a notice in the Federal Register (75 FR 13784, Mar. 23, 2010) (<http://edocket.access.gpo.gov/2010/pdf/2010-6367.pdf>).

The Department of Labor regularly holds briefings to meet identified needs of the stakeholder community. The Office of Foreign Labor Certification (OFLC) holds quarterly stakeholder meetings on what are primarily H-1B labor condition application and permanent labor certification program-related issues. While H-2A issues have occasionally arisen in the context of these meetings, in October 2011 OFLC began to invite members of the H-2A stakeholder community to these meetings and provide an opportunity to raise H-2A-related issues. The date for the next meeting is January 6, 2012. Representatives from both the worker and employer communities are expected to be invited.

b) Upon promulgation of a final regulation, the Department determines whether a stakeholder briefing(s) is needed or would be beneficial. OFLC has conducted briefings after issuing H-2A and H-2B final rules in December 2008 and those were held in 2009. The timing of such briefings depends upon the implementation and/or effective date of each rule. For example, the H-2A rule was to take effect in January 2009, so OFLC held briefings in December 2008. Full implementation of the 2008 H-2B rule began in October 2009, and OFLC held stakeholder briefings in September 2009. Locations are selected to maximize accessibility to the regulated community. For example, sites on the West Coast and in the nation’s mid-section were selected to enable attendees to choose a site that generally was a regional flight away. Raleigh, NC was selected because employers in NC are the largest users of

H-2A employees, and the North Carolina Growers' Association's headquarters are located near the state capital.

Because both the H-2A and H-2B regulations were joint rules between the Employment and Training Administration (ETA) and the Wage and Hour Division (WHD), both agencies participated in the stakeholder briefings. The materials provided in the 2010 H-2A Final Rule briefings consisted of copies of each agency's presentation and the rule itself (these materials are available at <http://www.foreignlaborcert.doleta.gov/h2a—briefing—materials.cfm>). We would invite representatives of other agencies (such as the Department of Homeland Security and Department of Justice) to participate in the briefings if they have issued guidance or a companion rulemaking on the topic. However, there were no companion rules or guidance to that effect in 2010.

c) Please see our response to a). For the briefings on the 2010 H-2A Final Rule, the Department issued a Federal Register announcement. In addition, the briefing schedule and locations were posted on the OFLC web site in advance of the Federal Register announcement to provide as much notice as possible to stakeholders.

The Department has recently scheduled and held two of the three planned "seasonal" H-2A webinars described below. The purpose of these sessions was to invite questions from the filing community prior to the actual filing of applications for the coming spring season. The Department scheduled the sessions based upon traditional spring filing patterns, and there has been a large turnout for each of the sessions held as of December 19, 2011.

- December 8, 2011—New England region
- December 14, 2011—Southeast and mid U.S.
- January 5, 2012—Midwest and West Coast

RESPONSE TO QUESTION 2

a) The dedicated public e-mail account for the Chicago National Processing Center (NPC) is TLC.Chicago@dol.gov.

b) The Department started using this public account in June 2007.

c) H-2A users are notified that they may communicate with the NPC through routine correspondence (Notices of Acceptance, Notices of Modification, certifications) issued to participating employers by the NPC, and by the Frequently Asked Questions (FAQs) posted on the Office of Foreign Labor Certification's Website: <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2a>.

d) Upon receipt of an inquiry, the Chicago NPC Helpdesk team sends a short, initial acknowledgement notification, informing stakeholders their inquiries have been received.

Depending on the nature of an inquiry, some inquires may be assigned to and further researched by an H-2A staff person. All inquiries receive a response that is sent from the Chicago NPC Helpdesk via TLC.Chicago@dol.gov.

e) As of September 30, 2011, the estimated number of H-2A inquiries received through the public e-mail account is outlined below. All of the inquiries received into the Chicago NPC Helpdesk have received responses.

Months	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
January		142	174	535	875
February		95	6	551	934
March		51	506	671	1,290
April		65	545	563	651
May		69	231	393	462
June	27	55	279	397	477
July	12	74	193	492	261
August	33	45	206	371	248
September	19	80	190	354	213
October	30	225	345	277
November	34	179	277	310
December	77	307	361	369
Totals	232	1,387	3,313	5,283	5,411

f) Chicago NPC Helpdesk staff monitors the public e-mail account on a daily basis with the goal of responding to any inquiry within 48 hours.

RESPONSE TO QUESTION 3

a) The Department of Labor has heard from employers about their interest in the OFLC using more technology to simplify and expedite filing and tracking the status of H-2A applications. Pending finalization of the FY 2012 budget process, the Department plans to award a contract to initiate the design and development of a new web-based filing system for the H-2A program to improve employer access to OFLC services and allow growers to check an application's status electronically.

b) Yes. The dedicated public e-mail will be integrated into the web-based system.

c) No, the Department has not held any meetings with stakeholders or outside groups to solicit input in terms of system design; however, the Department plans to solicit ideas from interested stakeholders.

d) Pending the availability of FY 2012 funds and the timing of contract awards, the Department hopes to have a new web-based filing system ready for use by growers in the last quarter of FY 2012 or the first quarter of FY 2013.

RESPONSE TO QUESTION 4

The number of H-2A applications received at the Chicago NPC for FY's 2009, 2010, and 2011 is displayed below:

	FY 2009	FY 2010	FY 2011*
H-2A Applications Received	5,267	4,439	4,938
H-2A Applications Approved	4,863	4,092	4,583

*FY 2011 data is still being reviewed by the Department and has not been finalized. The information provided reflects current estimates.

RESPONSE TO QUESTION 5

The OFLC develops internal program goals, which include measures for the H-2A program. OFLC senior management staff review progress against program goals on a weekly basis and, where actual results are not being met, work to determine the reason(s) and develop internal management plans to ensure performance goals are met. Progress in meeting program goals is reported to the ETA Assistant Secretary on a bi-weekly basis.

RESPONSE TO QUESTION 6

The Department is aware of anecdotal reports about H-2A workers arriving after the employer's expected start date of work. However, the Department of Labor's role in the initial adjudicatory process is limited to the review and processing of employer-filed H-2A labor certification applications in accordance with statutory processing times, and is only the first of several non-DOL application procedures for entry. The timing of the actual entry of an H-2A worker is dependent upon the actual application processing of three agencies of which the Department of Labor is only the first, with the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS) and the Department of State following. Based on the Department of Labor's FY 2011 H-2A program data, 82 percent of employer-filed H-2A applications received a final determination from OFLC in a timely manner in order to complete the remaining two steps in the employment-based immigration process. We routinely monitor the Chicago NPC's timeliness of processing H-2A applications. If we find processing delays that are not a result of an employer deficiency in the application, we take prompt management action(s) to remedy the issue(s). Upon receipt of a labor certification from the Department of Labor, an employer must still seek approval of the Departments of Homeland Security and State while also allowing time for transportation to the actual worksite.

If the Committee wishes to forward a specific case which resulted in a 22 day delay, the Department will be happy to assist the Committee in determining what occurred.

RESPONSE TO QUESTION 7

a) While the initial rates of timeliness were at 67 percent, the Department subsequently implemented a process, consistent with statutory provisions, that has raised the timely processing of applications to 82 percent. OFLC produces weekly internal program reports for its senior managers that track the timeliness of employer-filed H-2A applications. This information is reviewed and discussed and, where necessary, corrective actions and plans are developed.

b) The following are representative of the types of problems experienced by OFLC that hindered timely processing during the first year of implementing the 2010 H-2A Final Rule; employers:

- Submitting H-2A applications using the wrong forms, inconsistent or conflicting information entered on the forms, or other obvious errors or inaccuracies;
- Failing to include the correct Adverse Effect Wage Rate and/or daily food allowance for workers while on travel;
- Including terms and conditions of employment, such as excessive experience requirements;
- Failing to provide proof of compliant housing; and
- Failing to provide required documentation, such as a recruitment report or proof of workers' compensation coverage, to grant the labor certification 30 days before the start date of need.

c) Over the past year, OFLC has issued numerous Frequently Asked Questions (FAQs) and filing tips on its website to clarify program requirements. In addition, to help employers comply within the tight statutorily required processing time, OFLC implemented, within the limits of its statutory requirements, a more flexible process beginning in January 2011 to provide employers with additional time (up to five days) to submit documents necessary to meet program requirements and receive certification as appropriate, rather than a denial. This revised procedure has significantly reduced the number of appeals filed by employers. In the last quarter of FY 2011, only seven appeals were filed.

RESPONSE TO QUESTION 8

Annual reports published by the OFLC covering each year between FY 2006-2010 confirm that the certification rate for employer-filed H-2A applications did not fall below 95 percent. OFLC's most recent estimates suggest that the certification rate for FY 2011 also will not fall below 95 percent.

RESPONSE TO QUESTION 9

The Department has determined that one of the most common reasons for denial is the employer's failure to provide the documentation required to issue the labor certification within 30 days of the employer's need—the statutory time period within which the Department must issue a final determination. Denials often force growers into the H-2A program's appellate process, which creates additional delays. To ameliorate this problem, the Department implemented, within the limits of its authority, a more flexible process in January 2011, which provides employers with additional time to submit documents necessary to meet program requirements and receive certification rather than a denial. Revised procedures have already resulted in a significant reduction in the number of appeals employers filed. In the last quarter of FY 2011, employers only filed seven appeals.

RESPONSE TO QUESTION 10

The Department's data confirm that employers with legitimate needs successfully use the H-2A program. Preliminary estimates indicate the Department has certified 95 percent of applications it received requesting more than 74,000 workers in Fiscal Year 2011. We know, however, from experience that any new final regulation requires a period of adjustment for both the regulated community and OFLC staff.

Please see the response to Question #7 for a listing of the reasons for employer non-compliance with the 2010 H-2A Final Rule during the first year of implementation. These non-compliance issues resulted in the issuance of deficiency notices to employers, and many employers chose to exert their right to administrative review by the Department's Office of Administrative Law Judges.

The combination of additional technical assistance materials—for example, filing tips and FAQs, growing familiarity with the requirements, and implementation of a new procedure to provide employers additional time to submit documentation required to grant a labor certification—led to a dramatic decline in the number of appeal cases since February 2011. Only seven employer appeals were filed in the last quarter of FY 2011.

RESPONSE TO QUESTION 11

The Department believes significant confusion exists around the issue of H-2A appeals being "overturned" by the Office of the Administrative Law Judges. The Department of Labor routinely requests the remand of appeals when employers submit the required documentation for the first time after the Department has issued a denial according to the statutory timeframe. While such remands permit the Depart-

ment to reconsider its decisions, they should not be counted—as they appear to have been—as decisions “overturned on appeal.” Rather, the Department views this step as facilitating, not hindering, the process of getting H-2A workers into the country in a timely fashion.

RESPONSE TO QUESTION 12

The Department is required to protect the H-2A program against fraud, and historically we have not accepted for processing applications containing substantive corrections impacting the issuance of a labor certification decision. This includes, for example, the wage offered, the job description, or priority dates. Pen-and-ink changes that are initialed and dated by the employer are acceptable.

Where we have inconsistent or conflicting information on H-2A applications that impact our ability to properly communicate with the employer (e.g., incorrect mailing address information), we have issued notices and more recently, electronic mail notifications requesting clarification and/or correction on both substantive and non-substantive deficiencies so that these deficiencies can be corrected by the NPC. OFLC continues to routinely apprise the filing community across all visa programs of the need to proofread information for accuracy to avoid unnecessary delays in processing.

RESPONSE TO QUESTION 13

The Department is aware of the importance of acting on H-2A applications in a timely and accurate manner, and in the vast majority of cases, the Department is doing just that, even though the process is largely dependent on employers submitting fully responsive and complete H-2A applications. In fact, based on OFLC’s estimates for FY 2011 program data, 82 percent of employer-filed H-2A applications received a final determination in a timely manner from the Department, in order to complete the remaining two steps in the employment-based immigration process with the Department of Homeland Security’s United States Citizenship and Immigration Services and the Department of State, respectively.

RESPONSE TO QUESTION 14

From the 2008 regulation to the 2010 regulation, the role played by State Workforce Agencies (SWAs) has been strengthened. For example, under the 2008 Rule an employer could make a timely request for a housing inspection and that request was sufficient for a labor certification. However, under the 2010 H-2A Final Rule, the SWA must conduct the housing inspection before the Department may issue a labor certification. In addition, under the 2008 Rule, SWAs were responsible only for placing a job order, whereas they are responsible for more recruitment activities under the 2010 H-2A Final Rule, such as placing the job order into interstate clearance with all States listed in the job order as anticipated worksites, and placing it in all required locations for a longer period of time.

RESPONSE TO QUESTION 15

a) The Department of Labor communicates with the Department of Homeland Security (DHS) as necessary in order to inform them of final program debarments or revocations, and provide program integrity referrals. In addition, the Department informed DHS when it released new Training and Employment Guidance Letters (TEGLs) for special procedures in the H-2A program to notify that agency of the new procedures. Although we are not aware of any MOUs or other formal inter-agency agreements between the ETA/OFLC and DHS specific to the H-2A program, DHS and DOL recently signed an MOU, the purpose of which is to ensure that their respective worksite enforcement activities do not conflict and to advance the mission of each Department.

b) We believe that the Departments communicate as necessary to carry out their respective responsibilities under the H-2A program. We have not identified a lack of communication between the Departments as a concern.

[Whereupon, at 11:59 a.m., the subcommittee was adjourned.]

