

NLWJC - Kagan

DPC - Box 033 - Folder 005

Immigration - H2A Workers

[1]

lunif-H2A

**LESLIE
BERNSTEIN**
02/10/99 11:42:25 AM



Record Type: Record

To: Laura Emmett/WHO/EOP, Carolyn T. Wu/WHO/EOP

cc:

Subject: H2A

FYI.

My inclination is to do this Tuesday. If your bosses could figure out who needs to be in this, that would be great.

Thanks

----- Forwarded by Leslie Bernstein/WHO/EOP on 02/10/99 11:39 AM -----


Maria Echaveste 02/10/99 11:31:42 AM

Record Type: Record

To: Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP, Barbara Chow/OMB/EOP, Karen Tramontano/WHO/EOP

cc: Leslie Bernstein/WHO/EOP

Subject: H2A

Per John's request I called Caroline Verveer, in Bob Graham's office, to say that we would get together after I returned from Mexico to discuss Graham's ideas for how to proceed with this tough issue. She said that they were open to working and were not starting with the Wyden bill. Elena--you had said you had a mtg late last week--remind me, what was it on; and also you, Karen and I discussed that we would need to get DOL on the same page (whatever that page is)--so it seems to me time for a small mtg among us to figure out we're doing here--I'd like to do it Friday or Tues of next week---tell me what works and let's discuss agenda and participants--not a large mtg.

FEB-22-99 MON 16:01
 GEORGIA

Immig-H2A

REFERENCE SECRETARY

United States Senate
 WASHINGTON, DC 20510-1004

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CHAIRMAN
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 AGRICULTURE COMMITTEE

SMALL BUSINESS COMMITTEE

January 14, 1999

The Honorable Alexis Herman
 Secretary
 United States Department of Labor
 200 Constitution Avenue, N.W.
 Washington, D.C. 20210

Dear Secretary Herman:

As you recall, last year we agreed to organize a bi-partisan working group to carefully examine important issues regarding migrant workers in agriculture and to discuss reforms to the current H-2A program. It is imperative for Congress and the Administration to address this serious crisis facing our nation's agricultural employers, especially since a new growing season is soon upon us.

I appreciated our previous discussions on this matter and for your staff's willingness to address these issues in the fall and the informal meetings that occurred. Unfortunately, due to the debate on H-2A reform legislation and timing, we were never able to formalize the working group. Having consulted with other members of Congress, we believe it would now be a good time to begin. Therefore, I respectfully request that the Department of Labor establish a meeting schedule for this bi-partisan working group and a proposed agenda. If my staff can be helpful in this process please do not hesitate to let us know. Enclosed is a list of United States Senators and Members of Congress whose participation I recommend in these discussions. Adjustments, of course, could be made to the participants and structure.

There is a growing consensus that the current H-2A program does not work and needs to either be streamlined and simplified or eliminated and replaced with a new guest worker program. If we fail to act in a timely manner, farmers will continue to be plagued by labor shortages and uncertainty such as I have seen in my state. We need your help to remedy this situation.

Thank you for your consideration of this important matter. I look forward to hearing from you soon.

Sincerely,



Paul D. Coverdell
 United States Senator



ASSOCIATED PRESS
er was killed and several were
nday in an explosion and fire at a
Co. coal-fired power plant in
Mich. Story, Page A7.

WASHINGTON — After questioning Monica Lewinsky for four hours Monday, a House Republican prosecutor unearthed no significant new impeachment evidence against President Clinton, while White House lawyers offered her an apology for "what you have had to go through,"

The result in the first of three depositions... that the prosecutor... unable to buttress his charge that Clinton... in trying to keep secret his affair with Lewinsky... obstructed justice by allegedly trying to influence the former intern's testimony in the Paula Jones sexual harassment lawsuit against him.

Monday... She just reaffirmed her grand jury testimony... There's no wavering from that... My understanding is there was not any considerable new ground broken.

ground was broken in... prevented the House... (Rep. Ed Bryant of... see, from posing rebuttals. Instead, Nicole Salig... private lawyer for Clinton... a short statement. Sources said the st... Please see Impeach,

Davis vows better relations with Mexico

By Mike Lewis
BEE CAPITOL BUREAU

MEXICO CITY — Calling for a new era in California's relationship with Mexico, Gov. Davis began his whirlwind three-day tour Monday by promising that the state would work more closely with its southern neighbor to increase trade, better control immigration and possibly explore how to increase the state's pool of immigrant labor.

"My first goal would be to find a way to make the existing (guest-worker) program work," Davis said shortly after he arrived in his first trip to Mexico



Gray Davis

as governor. "There's no question that agriculture, in particular... and some of the... California... grant... The statement... marked one of the few specific policies... broached by Davis... said the purpose of his... was to "extend the hand of friendship... While making no direct reference to former Gov. Wilson, the state's... governor alluded to the... problems between Wilson and the Mexican gov...

ernment when he promised to end the days of "finger pointing" and mutual blame for border and immigration problems. "I intend to treat Mexico with the respect and the dignity that a sovereign, peace-loving nation deserves," Davis said, adding that during his run for governor, he promised he would mend fences that were damaged by perceived anti-immigrant policies of the former governor. He said top Mexican officials told him that the state and their country already do quite a bit of business but that "if the governor of the state were... Please see Mexico, Page A11

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Inventory - H2A

Local News/California

Mexico: Gov. Davis sees trip as way to build some bridges

Continued from Page A1
to come down and to show respect to Mexico and if there were ongoing meeting between the highest levels of the government, ... (Mexico) would do a great deal more business with California.

Mexican political leaders welcomed the message. Juan Robledo Gut, the undersecretary for North American and European Affairs, said California and Mexico share so many issues that a good relationship between the two is "paramount."

"We have found extremely good will by Gov. Davis, by business leaders, by academic leaders and other representatives from California in trying to enhance and improve our relations," he said after a Monday evening meeting between Davis' group and Mexican officials.

Li. Gov. Cruz Bustamante, Assembly Speaker Antonio Villarreal, other state lawmakers and business leaders joined Davis' entourage. The group promised the trip largely as an opportunity to build strong friendships in strong finances and shared culture between the state and the nation that share a border.

But Davis' remark about the guest-worker program appeared to surprise Villarreal, who made it clear the state would not return to the days of "braceros."

Now distinct, however — meaning laborer — was the federally sponsored guest-worker program of the 1940s and 1950s that was widely criticized for importing temporary Mexican workers and then giving them far fewer legal rights than other workers.

California currently has a narrow guest-worker law that generally does not allow for the wholesale importation of labor — an issue largely dictated by the federal government.

For the next two years, Valley agricultural leaders have called for a return to some form of a guest-worker program to solve what they have said is a chronic labor shortage.

Choosing his words carefully, Villarreal, a former labor organizer, said he agrees with the governor that any guest-worker program should be restricted.

"There are many of us who come from an era when we remember the abuses of the bracer program. By the same token, I think that we have to be able to discuss a number of issues — including guest-worker program issues," he said.

However, Villarreal — a Los Angeles Democrat who is the son of a Mexican immigrant — said there cannot be a revisiting of an expanded temporary worker program without assurances that the workers would get the same

"My first goal would be to find a way to make the existing [guest-worker] program work. There's no question that agriculture in particular and some of the hotels depend on immigrant labor."

— Gov. Davis, speaking in Mexico City

benefits and protections of citizens, such as minimum wage and laws governing worker conditions.

"We don't want to create a subclass of workers in our country," he said.

Late Monday evening, Davis dined with U.S. Ambassador Jeffrey Davidson. Today he is scheduled to meet with Mexican President Ernesto Zedillo.

Mexico City residents who knew of Davis' arrival said they were happy that a California governor was making the effort to visit.

While some didn't remember the former Gov. Wilson, there appeared to be a very high awareness of Proposition 187, the successful Wilson-backed ballot measure that denied social services to illegal immigrants and their U.S.-born children. Most of the measure eventually was ruled unconstitutional by a federal judge.

Guadalupe Canaval, a clothing store manager in Mexico City, said she can understand why California politicians want to limit immigration.

"I feel sorry for the people in the United States. It's like an invasion," she said. "But you have to be human about limiting it."

Canaval, who said she has spent time in Pasadena, said she hopes Davis "has a good time here."

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Freeze: Crisis is difficult to see, off

Continued from Page A1
Johnson and Emergency Services Director Dallas Jones.

At one of the first stops Monday, they listened to stories of financial hardships told by more than two dozen workers gathered at the Sanger Community Center. Many of the workers have been unemployed for weeks and have been struggling to survive on unemployment insurance payments. Those who are working sporadically aren't making enough to keep up with their monthly bills.

Citrus picker Martin Morales, laid off last week from a \$260-a-week job, has already fallen behind on his bills. He owes one month's rent of \$600. His car payment of \$225 and a utility bill of \$110 also are due.

"I expect to get \$97 in unemployment, but that is just not going to be enough to provide for me, my wife and four kids," he said. "We are not going to make it."

Throughout the three-hour Sanger meeting — organized by the United Farm Workers union — the government officials listened intently, often taking notes.

Suffering from the freeze likely will be prolonged and difficult to assess, the officials said. One of the major challenges will be determining how many workers are affected.

Estimates of unemployed citrus workers range from 10,000 to 14,000. The UFW announced Monday that its informal poll of workers in northern Tulare County found 28,600 people out of work.

Two task-force members, Mark Duggan, operations officer for the Federal Emergency Management Agency, and Marcia Hodges of FEMA's response

HOW TO HELP

Donations for the Valley Freeze-Relief Coalition can now be sent to:
■ The United Way of Fresno County, P.O. Box 5177, Fresno, CA 93755. Checks must be written to United Way of Fresno County Freeze Relief.
■ The United Way of Tulare County, 1975 S. Blackstone St., Tulare, CA 93274. Checks should be made to the agency, and "freeze relief" should be written on the envelope or at the bottom of the check.



and recovery program, said finding evidence of hardship is more difficult with a freeze than with other disasters.

In tornadoes, hurricanes and forest fires, for instance, it is easy to see destroyed and damaged property. Only two hours elapsed between the 1994 Northridge earthquake and President Clinton's disaster declaration, Duggan said.

It's not so easy with a freeze, which knocks out people's incomes, not walls and bridges. "This lacks the photographic impact of flying over a forest fire," he said.

The freeze called to his mind a crisis among salmon fishermen along the North Coast. It was difficult to show the lack of salmon, and it took 24 months from the governor's request until a presidential disaster declaration was issued.

If Clinton declares the disaster, FEMA will be in position to fund disaster unemployment assistance payments. They would compensate those not traditionally covered by unemployment insurance and others who have used up their regular unem-

ployment benefits.

Mortgage and rental assistance would become available, but people would need foreclosure or eviction notices to qualify. So that would be "six to eight months down the road," Duggan said.

It could also provide \$10 million for short-term jobs.

During a tour of the Father Hannibal House, state Emergency Services Director Dallas Jones said that Gov. Davis understands that the freeze conditions hurting people.

"The need is growing," Jones said. "So far, community groups have kept up, but this is a long-term problem. It is unlike a flood, where you see 5,000 homes inundated."

"We still don't know the actual loss to farmers," he said. "We hope any day to get a declaration" from Clinton. Jones said total losses for growers usually run \$3.50 for every \$1 of crop damage.

Bruce Wagstaff, a deputy director with the state Department of Social Services, said that some requirements for qualifying for food stamps have already been suspended. In Tulare and Fresno counties, applicants suffering effects of the

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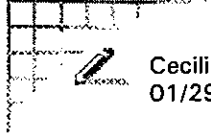
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Cecilia E. Rouse
01/29/99 08:13:10 PM

Record Type: Record

To: Robert F. Schoeni/CEA/EOP, Elise H. Golan/CEA/EOP
cc: Sally Katzen/OPD/EOP, Elena Kagan/OPD/EOP
Subject: H-2A and Wages

Bob and Elise,

I have sent each of you a copy of the briefing memo that Dr. Jim Hoyt left for us on the H-2A program and why the AEWR needs to be changed. After our conversation with him, it seemed to me that if we get pushed to the wall and absolutely must modify the AEWR, a reasonable way to do so might be to consider a better survey for the AEWR.

As you know, currently the AEWR is based on data that only varies by region and that includes many occupations not typically held by H-2A workers. I would suggest exploring with DOL the feasibility (and effect) of conducting a better survey that was at the state-level (or perhaps still at a regional-level) that focused more narrowly on the occupations typically filled by H-2A workers. The survey would undoubtedly cost more, but by making the occupations more relevant to the H-2A program and possibly conducting the survey at a slightly more disaggregated level, it would take away many of the arguments we hear most frequently against the AEWR while not completely eroding the wages of U.S. workers. (At least I assume so. DOL should study the effect of narrowing the range of occupations on the wages paid to H-2A workers.)

If you end up in future meetings on the H-2A program, you should also mention that one of the suggestions that will likely be made by the growers is to allow growers to use their own surveys to estimate the "prevailing wage" (as they do in the H-1B program). While this option would potentially make sole reliance on the prevailing wage (rather than on the AEWR) financially feasible, it would also likely erode wages of U.S. workers. In addition, DOL is not particularly happy with this provision in the H-1B program.

These are my quick thoughts (which I had promised to write down last week). Feel free to call me if you want to talk more. And, good luck!

-- Ceci

H2A Meeting - Podesta etc.

Non-responsiveness of program

Miss 40% of start deadlines

5 key elements of bill -

- way of meeting need for whrs
matching job registry

use info tech to make
syst wh more quickly

make sure refered whrs have legal status

- dealing w/ 'adverse effect wages rate'

means growers won't use program - depressed wages overall

Do - Davis-Bacon + 5%

- hearing - most difficult issue

w/6 - a transition

states do hearing surveys -

hearing allowance to whrs in 3-yr period.

- ^{if L. unavail, then build} transportation

- legal status of whrs

industry open-minded; not pressing

most imp

Immig- H2A

United States Senate

WASHINGTON, DC 20510

January 11, 1999

cc: Bruce
Barbara Chuw
Tulie F.
Maria G.

The Honorable William J. Clinton
President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

Late last year we considered legislation designed to reform the current temporary and seasonal alien agricultural worker program, known as the "H-2A" program. Few will disagree that the current program is broken and badly in need of reform.

Farmworkers are entitled to protections that will improve their lives and the lives of their families. Growers are entitled to a labor program that will end the uncertainty in finding a stable and legal supply of workers. The current H-2A program does neither.

Each of us has been working on this problem for many months, if not years. Over the last several months, officials within your Administration have committed to work with us to develop a solution. The time to move forward is now. We cannot wait for another growing season and harvest to come and go without a solution in place, particularly given the current financial crisis in American agriculture and the usual immigration pressures facing the United States.

Therefore, we seek your commitment to work with us to develop a package of meaningful and workable reforms to the current H-2A program no later than February so that the Congress will have time to enact the reforms into law in time for the 1999 harvest.

Respectfully Yours,

Ron Wyden

Bob Crenshaw

Blanche L. Lincoln

Max Cleland

The Honorable William J. Clinton

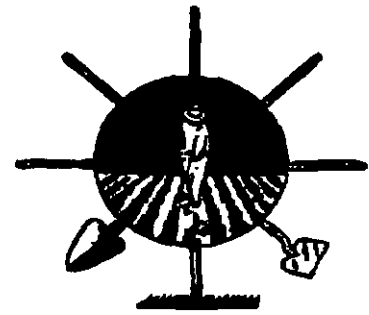
Page 2

Chuck Robb

Immig-H2A

FARMWORKER JUSTICE FUND, INC.

1111 19th Street, N.W., Suite 1000
Washington, D.C. 20036
Phone (202) 776-1757



December 17, 1998

President Bill Clinton
The White House
1600 Pennsylvania Ave.
Washington, D.C. 20500

Re: Appropriations for the Department of Labor Wage and Hour Division

Dear Mr. President:

The Department of Labor's Wage and Hour Division lacks the resources to fulfill its obligation to enforce labor laws for America's workers and the consequences of this harm fall harshly on immigrant workers in low-wage occupations. The organizations listed below, on behalf of low-wage immigrant workers, ask that you take action to secure from Congress supplemental funding for this fiscal year (FY 1999) and a substantial increase in appropriations for the next fiscal year (FY 2000).

The Department of Labor has conducted studies of several sectors of the economy, including the garment, poultry processing and agricultural industries. These studies reveal widespread violations of the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). Unlawful practices include child labor, substandard wages, denial of overtime pay (to the non-agricultural workers entitled to it), and dangerous housing and transportation of agricultural workers. In September, DOL released a study of the prosperous California grape industry which showed that seventy-seven percent of vineyards violated at least one provision of these laws. Of eighty-nine employers (growers and labor contractors), twenty-six employers failed to pay 369 workers the federal minimum wage rate of \$5.15 per hour. We commend your Administration for targeting such industries for compliance efforts.

We have received reports, confirmed by Department of Labor officials in several areas of the country, that the Wage and Hour Division cannot investigate important cases due to inadequate funding. Specifically, officials have said that their travel budgets have been depleted except in a limited category of cases. Unable to spend money to travel to interview workers and employers, DOL cannot vindicate serious violations of workers' rights.

These workers deserve better treatment from our government and their employers.

Law-abiding *employers* also deserve better protection. Congress expressed its view in the preamble to the Fair Labor Standards Act that the use of substandard employment

practices constitutes "an unfair method of competition in commerce." Absent a credible threat that government will discover and prosecute illegal conduct, some businesses will take the risk of violating employment laws. Other companies that wish to comply with the law will be pressured to remain competitive by lowering their own labor costs through similar methods. The Government must deter such cut-throat competition.

The Department's financial limitations are not temporary but rather ongoing and systemic. Although there have been some increases in the Wage and Hour budget in recent years, they have been insufficient to compensate for prior budget cuts. In agriculture, for example, by several measures the level of wage-hour enforcement is less than one-half of that which occurred during President Reagan's Administration. Under the Migrant and Seasonal Agricultural Worker Protection Act, in FY 1986, DOL conducted 4,769 investigations, spent 52,000 hours on direct enforcement and collected \$1.6 million in civil money penalties. In FY 1997, DOL conducted just 1,816 investigations, spent only 22,814 hours on enforcement, and collected a mere \$548,971.

The agency's insufficient funding not only reduces the quantity of investigations but the *quality* of investigations. Cases that are not investigated promptly and thoroughly are difficult to litigate well and, consequently, are less likely to secure for workers complete reimbursement of unpaid wages. Funding is needed to provide more bi-lingual investigators, specialized training for particular occupations and labor markets, more assistant solicitors of labor to litigate and settle cases, and other improvements.

To enable the Wage and Hour Division to carry out its labor law enforcement responsibilities in the areas of child labor, minimum wage, overtime, foreign contract labor and occupational safety and health, we ask that you request from Congress (1) a supplemental appropriations for the current fiscal year and (2) a substantial increase in the Wage and Hour enforcement budget for the next fiscal year.

Thank you for your consideration.

Sincerely,



BRUCE GOLDSTEIN
FARMWORKER JUSTICE FUND, INC.

NATIONAL COUNCIL OF LA RAZA
AMERICAN FRIENDS SERVICE COMMITTEE
NATIONAL IMMIGRATION LAW CENTER
FARM LABOR ORGANIZING COMMITTEE, AFL-CIO

LEAGUE OF UNITED LATIN AMERICAN CITIZENS
UNITE! UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES
ASSOCIATION OF FEDERAL, STATE, COUNTY & MUNICIPAL EMPLOYEES
NATIONAL EMPLOYMENT LAW PROJECT
CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION
WASHINGTON (STATE) ALLIANCE FOR IMMIGRANT AND REFUGEE JUSTICE
YALE LAW SCHOOL WORKERS' RIGHTS PROJECT
TEXAS APPLESEED ADVOCACY CENTER
SOUTH TEXAS CIVIL RIGHTS PROJECT
LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF TEXAS
RURAL COALITION

cc: Secretary of Labor Alexis Herman
Assistant Secretary of Labor Bernard Anderson
Acting Administrator, Wage and Hour Division, John Fraser

(unmi)-H2A

Agenda
Farmworker/Grower FY2000 Ideas
December 8, 1997

- I. Status report from DOL re: Secretary of Labor's meeting with Graham/Wyden
- II. Progress report on development of ideas (see ideas.2 attachment)
- III. Strategy for moving forward with the package
 - A. Timing for final package completion
 - B. Timing for discussions with various advocates (farmworker advocates; grower advocates; immigration advocates)?
 - C. Timing for discussions with members?

Reform Ideas -- Growers and Farmworkers

Program

- ✓ AgNet (OMB) 10m. to DOL
- × Employment Verification Pilots (INS)
immunity a terrible idea - also priority system
- Farm Labor Contractor Certification Program (DOL/USDA)
next wk
- ✓ Farmworker Harvesting Cooperatives (USDA)
5 pilot programs
- Pilot Programs -- Transportation (DOL/OMB) (5m)
next wk
- Pilot Programs -- Housing (OMB) (5m)
OMB has - doesn't want to do now - keep in back pocket
- Housing Regulation Reform (OMB)
Not done yet. Just announce review??
- USDA Farmworker Housing Programs (Julie/OMB)
10m ↑; 20m less than asked 190 more housing units
- Transportation Subsidies (OMB) *2 no immigrants allowed.*
Encourage franchises - use \$ for this & more.
- Child Labor Protections (Ceci) *USA hasn't looked into this*
- Mechanization Adjustment Assistance (Ceci/CEA (Elise))
Only way to pursue - w/ tax credit
- Child Care
earnback in back part
- Enhanced enf. *earnback in head start - exp - d?*
4.5↑ on top of - ?

Henny
 Verification } 2 key E's

~~cost of pilot?~~

Reform Ideas -- Growers and Farmworkers

Recruitment

YES

1. **America's Agricultural Labor Network -- AgNet**

The majority of farm workers find employment through a kinship/friendship network. One problem with this method is that it spawns and reinforces illegal migration to the U.S.; another is that it is highly inefficient in a geographically diffuse labor market. The Department of Labor could serve as an information broker by developing a system that allows growers to find workers and workers to find employment opportunities that meet their needs (e.g., location, duration, type of crop, etc.). This would benefit growers and workers by having an efficient alternative mechanism to match workers with employment opportunities. AgNet would be based on America's Job Bank,, but would be a separate web site devoted to the agriculture industry.

enthusiastic

budget - ?

growers

YES

2. **Employment Verification Pilots**

INS has indicated that their existing employer verification pilot program could be adapted to allow for effective participation by H-2A growers. The INS could conduct more aggressive outreach to growers to encourage them to participate in the pilot program.

- Is there something that we can offer growers as a trade for participation in the pilot?

works for both growers / workers

3. **Farm Labor Contractor Certification Program**

DOL/USDA both like good for both

Frequently, Farm Labor contractors (FLCs) are inexperienced, poorly educated, not aware of applicable laws and regulations, and lacking in business know-how.

We could require FLCs to satisfactorily complete a Wage and Hour administered course to ensure minimum competency levels for FLCs knowledge of applicable laws and regulations. These courses could also serve to enhance the FLCs's business skills. Successful completion of the course would be a prerequisite to initial issuance and/or renewal of a FLC registration card. The course would include instruction on how to properly comply with MSPA, FLSA, H-2A, OSHA filed sanitation, FICA/FUDA, EPA pesticide worker protection standards, and other labor standards as appropriate.

DOL has estimated the cost of the program to be approximately \$500K per year. We could, of course, charge a fee to each FLC to defray much of this cost.

duration - have to open MSPA.

MAYBE

Regulatory way to do this?

4. **Farmworker Harvesting Cooperatives**

PROBABLY

The Cooperative State Research, Education, and Extension Service and the Rural Business-Cooperative Service staff, along with the Farmworker Coordinator and farmworker organizations, could conduct a feasibility study to research and design "farmworker harvesting" cooperatives. Such a cooperative would be designed to match the job skills of agricultural workers with employers as an alternative to the system of farm labor contractors. The cooperative would serve the functions of recruitment, employment, and transportation of farmworkers. The cooperative could also provide job training for individuals interested in learning skilled agricultural techniques.

Transportation and Housing

5. **Pilot Programs -- Transportation and Housing**

CAN DO IF MONEY

The Department of Labor could conduct pilot programs on transportation subsidies without any legislative change (i.e., creative ways to structure subsidizing transportation costs for migrant farmworkers, including H-2A workers). *GRWERS WON'T CARE MUCH*

YES - MAKE NOT NOW? WHAT KIND?

However, there is limited latitude to conduct housing demonstrations without a statutory change. Under the H-2A statute, the employer must either furnish housing owned or controlled by him or, in the alternative, provide housing that the employer has secured on the open rental market. We could try to obtain legislative authorization for pilots in housing. *GRWERS WOULD CARE*

6. **Housing Regulation Reform**

YES?
OSHA HAS CONCERNS
DEPEND ON NEEDS TO P. ABOVE W/L - NEED SPECIFICS.

The current housing standard used by DOL in administering the Migrant and Seasonal Worker Protection Act is the OSHA "temporary labor camp" standard (used for housing built after 1980). DOL could revisit this standard and reevaluate whether it correctly balances the protection of workers with the needs of this industry. Given that adoption of this standard was a regulatory decision not a statutory mandate, DOL has the discretion to revise the standard.

HUD-funded Housing for Migrant Workers

NO

HUD does not currently have a specific program for migrant housing, nor did it request one as part of the FY 2000 agency request. However, there are a number of areas within HUD that could be evaluated as possible funding sources for additional migrant housing including the Community Development Block Grant, the HOME program, the Office of Rural Housing and Economic Development, and the Colonias initiative.

8. **USDA Farmworker Housing Program**

USDA currently provides farm labor housing loans, grants, and rental assistance to farmers. In the FY 2000 agency request, USDA essentially requested to double the funding levels for these programs. The requested increase would roughly equate to 570 more housing units (estimated between 2,280 and 3,420 more migrants housed depending on the type of unit -- family or single). However, according to USDA, H-2A workers are not eligible to reside in housing funded through this program. USDA is looking further into this issue.

YES
BUT THINK ABOUT THIS

GOOD FOR GROWERS

11

9. **Transportation Subsidies**

The Department of Transportation does not currently have a specific program for migrant transportation, nor did it request one as part of the FY 2000 agency request. Two programs that were previously evaluated for this purpose were Access to Jobs and the Formula Program for Other than Urban Areas. It may be possible to stretch Access to Jobs for use of transporting migrant workers. Localities could use funds from the Formula Program for helping migrants with their transportation needs, but it is unlikely that the locality would chose to use their dollars for this purpose without an additional incentive.

PERMANENT

FOR FARMWORKERS?

If we are able to generate funds from FICA/FUDA equivalent payments by growers (see below), we could use that money to fund pilot programs that subsidize migrant worker transportation.

FICA/FUDA

10. **Growers to pay the equivalent FICA/FUDA taxes for H-2A workers**

KEPT IN

We could require growers to pay the equivalent of FICA/FUDA taxes and put the amount in a fund to pay for transportation and/or housing subsidies for migrant farmworkers.

This would generate approximately \$12-\$15 million per year.

Enforcement

11. **Transfer from ETA to Wage & Hour**

GROWERS/WORKERS

The Department of Labor is in the process of transferring authority for administering the H-2A program from the Education and Training Administration (ETA) to the Wage & Hour Administration. We could give the completion of this change a date certain.

KEEP OUT OF PKB

GOOD FOR GROWERS

12. **Department of Labor (DOL) Enhanced Enforcement**

DOL has a number of initiatives in FY 1999 targeted at domestic child labor in the agriculture industry. The funds are targeted at increasing enforcement (specifically, the "Salad Bowl" initiative -- targeting lettuce, tomatoes, onions, cucumbers), improving data collection in the National Agricultural Worker Survey, and training migrant workers to be child care providers. In FY 2000, DOL requested to enhance and continue these enforcement initiatives.

We could consider a more substantial increase in these enforcement areas, a more general increase in base funding for enforcement, or an increase in other crop or geographic specific areas.

13. **Enhanced protections for U.S. workers**

We could explore whether there are statutory or regulatory changes to existing worker protection statutes that could be implemented to better protect the rights of farmworkers. The following are examples of gaps in existing laws:

- FSLA exemption from minimum wage
The FSLA contains a number of specific agriculture exemptions from the minimum wage requirement. The primary exemption applies to growers who do not use at least 500 man-days of agricultural labor in any calendar year. There are no reliable figures for the number of workers affected by this exemption or the number of workers who, even if subject to the exemption, are paid less than the minimum wage. But it is not uncommon for employers to assert this exemption as a defense in minimum wage cases.
- FLSA exemption from overtime
Most farmworkers are completely exempt from the FLSA overtime provisions. It is very common for farmworkers to work in excess of 40 hours during a workweek but they have no claim to overtime for those hours. Some states -- such as California and Washington -- provide limited overtime coverage to farmworkers.
- FLSA exemption from child labor protections
Children who work on farms may work at younger ages, in more hazardous tasks, and for longer hours than children in other industries. For instance, children over 16 years old can work in any task in agriculture, whereas 16 and 17 year olds in other industries are prohibited from working in tasks deemed by DOL to be too dangerous.

GOOD?
FOR ADVOCATES

THINK
MUST
SERIOUSLY

- NLRA coverage

If the work is defined as "agricultural labor" under the FLSA, it is exempt from coverage under the NLRA. Therefore, virtually all non-processing tasks in agriculture are outside the protections of the NLRA. However, some states -- notably California -- have enacted protections for farmworkers seeking to organize. These state protections may, in some areas, be more protective than the NLRA.

Bayern says: don't go there

- Workplace health and safety

OSHA protections for farmworkers are much less extensive than similar protections for other workers (for example, ladder work is much less regulated in agriculture than in other industries) and covers fewer employers.

-- Since 1975, OSHA has been precluded from regulating health and safety on farms that employ fewer than 11 workers on any day during the year. Many farms are therefore beyond the reach of any OSHA standard, including field sanitation. However, under the Migrant and Seasonal Agriculture Worker Protection Act (MSPA), temporary work camp housing standards -- that mirror OSHA standards -- apply even if the OSHA standards do not apply because of the 10 or fewer employees exemption.

-- Farm work is one of the few industries in which workers are not entitled to specific information about the use of toxic substances in the workplace. OSHA does not have statutory authority to require a hazardous communication standard for pesticides and the EPA -- which has the authority -- has failed to issue such a standard.

- State Worker's Compensation

Many major agriculture states -- such as North Carolina, Georgia, and Texas -- exclude farmworkers from workers' compensation coverage. The only recourse for an injured farmworker in these states is the slow, expensive, and uncertain tort law system. The consequence is that farmworkers are unable to get the immediate medical and rehabilitative care and wage replacement available under the State-administered workers compensation system.

- Unemployment Insurance

Some states either exclude farmworkers from unemployment insurance coverage or impose such stringent requirements on coverage that farmworkers are effectively excluded.

]

- Protection against retaliation

We could propose to amend MSPA and the Pesticide Act to provide protection against retaliation.

Wages

14. **Wage reform**

After extensive study and consideration, there does not seem much that we could do on the wage front that would more accurately reflect our goals of requiring a fair wage (for both growers and farmworkers) and providing some compensation in the wage for the presence of undocumented farmworkers in the workforce. (See materials handed out by Ceci Rouse).

NO

Research

15. **Funds for mechanization research**

The USDA could sponsor research into the possibilities for mechanization in the crops now dependent on H-2A or undocumented workers (fruits, vegetables, and tobacco). See paper by CEA (Elise Golan).

MORE DISCUSSION

TAX CREDIT?

Childcare

16. **Access to childcare**

USDA IDEA

One of the barriers to employment for U.S. farmworkers is the lack of child care. Lack of proper facilities is a big problem in rural areas, and most child care programs do not provide funds for capital expenditures (though block grant funds may be available for Head Start).

- Funds could be allocated for the construction and/or renovation of child care facilities in rural areas.
- Also, tax incentives could be made available for farmers who provide child care for their workers.
- Possible creation of a set-aside within existing child care centers for the children of migrant workers.

GOOD TO BRING UP TO CHIEF CAME PEOPLE

ETC.

18. **Certification v. Attestation**

We could consider moving -- for some employers -- away from a certification model and to an attestation model as the gateway to H-2A participation. Thus, an employer who has demonstrated compliance with the program requirements in year X would only have to attest to the same conditions existing in year X+1 in order for that employer to have access to H-2A workers.

Another idea

Allow Eps to include
banking req for FCCs.

Georgia growers like

November 19, 1998

Some Statistical Facts about the Agricultural Economy

The following data on growers and farm workers were compiled by economists at DOL, USDA, and CEA. Wherever possible, the data focus on likely users of the H-2A program (those sectors of the agricultural economy that rely on pickers and other low-skilled workers), such as fruits, vegetables, nuts, and tobacco.

Farm Business

- Real farm income among fruit, nuts, vegetable, greenhouse, and nursery growers increased between 1993 and 1997 to about \$40,000 among all farms and to \$140,000 among larger farms in this sector (see Figure 1a). In contrast, among all tobacco farms real income has decreased slightly since 1993 although larger tobacco farms experienced an overall decrease in real income (see Figure 1b).
- Among fruit, nuts, vegetable, greenhouse, and nursery growers, farm labor inputs comprise the largest single farm expense, as contract and hired labor consistently account for about 35-40% of total expenses (see Figure 2a). Labor comprises a smaller share of expenses for tobacco farmers (about 20%) (see Figure 2b). Labor's share of production expenses is higher among growers most likely to use the H-2A program (vegetable, fruit, and tobacco farmers) than among all farms (see Figure 3).
- Among fresh fruits and vegetables, the import share of agricultural products used has risen steadily over the past 16 years. Among fresh vegetables, the import share of domestic use has been fairly constant (see Figure 4).
- Fruit imports appear to have increased faster than fruit exports, however the ratio of imports to exports has been roughly constant over the past 25 years. Similarly, imports of vegetables are roughly equal to exports (see Figure 5).
- Although the data are noisy, it is likely that only farmers with at least \$100,000 in sales (only 21% of all farms) have a positive return on equity and have a positive ratio of net cash farm income to gross cash income. In addition, the value of assets is concentrated among the largest growers (see Table 1).
- The amount of agricultural production in pounds (among selected sectors) has increased over the past 20 years (see Figures 6a and 6b).

Employment, Wages and Earnings

- There is a long term secular trend of declining agricultural employment and rising real hourly wages. However, since the mid-1970's real farm workers wages have either declined or been flat (see Figure 7). (Note: Data for this sector is extremely limited and

hence should be viewed with caution.)

- Since 1985, farm worker wages have been relatively flat in real terms but have risen relative to other low skilled workers wages and now even exceed those in eating and drinking places. Despite the upward trend farm workers remain among the lowest paid workers earning 90 percent or less of what workers in such industries as apparel and accessory stores, general merchandise stores, laundry, cleaning and garment services, and apparel and other textile products make (see Figure 8).

Employment and Unemployment

- Since the mid-1950's, unemployment among agricultural workers has generally been above that for non-agricultural workers. Since the 1970's the unemployment rate in agriculture has been rising relative to that in the nonfarm sector. In addition, unemployment in the agricultural sector is much more volatile, even using seasonally adjusted data, but generally shares the broad cyclical trends as the non-agriculture sector. The coefficient of variance of unemployment (.84) is almost twice as high in agriculture as in the nonfarm sector (.42). Finally, although the unemployment rate for agriculture workers has declined since 1993, it is still around 8 percent (see Figure 9).
- Although unemployment may be higher in the agricultural sector, the average duration of unemployment is shorter. Given the higher level of unemployment and the shorter duration of unemployment it appears that flows into and out of employment must be higher for agriculture workers. This may be explained by greater variance in demand, more homogenous wage offer distributions, or lower reservations wages due to liquidity constraints (low incomes generating less saving).

The duration of unemployment has trended down slightly since 1994, suggesting that agriculture workers are able find new jobs more quickly in this tighter labor market. Nonetheless, the current level is still above the level in 1990 and is much higher than the level in 1980, suggesting that the labor market is not tight by historical standards (see Figure 10).

- Farm workers are more likely to be engaged in agricultural activities in the spring through the fall; during the winter months they are more likely to be either abroad or not working while in the U.S. The proportion of farm workers who are employed doing non-farm work is fairly constant throughout the year (see Figure 11).

Other Facts about Farm Workers from the NAWS (1994-1995)

- According to NAWS, 69 percent of farm workers are foreign born (almost all from Mexico). Of the remaining 31 percent U.S. born workers, 18 percent are non-Hispanic white, 10 percent are Hispanic and two percent are non-Hispanic blacks.

The fact that agriculture workers are paid less than workers in other low skilled (wage)

sectors, is consistent with a declining supply of domestic farm workers and an increased supply for foreign born legal and illegal agriculture workers.

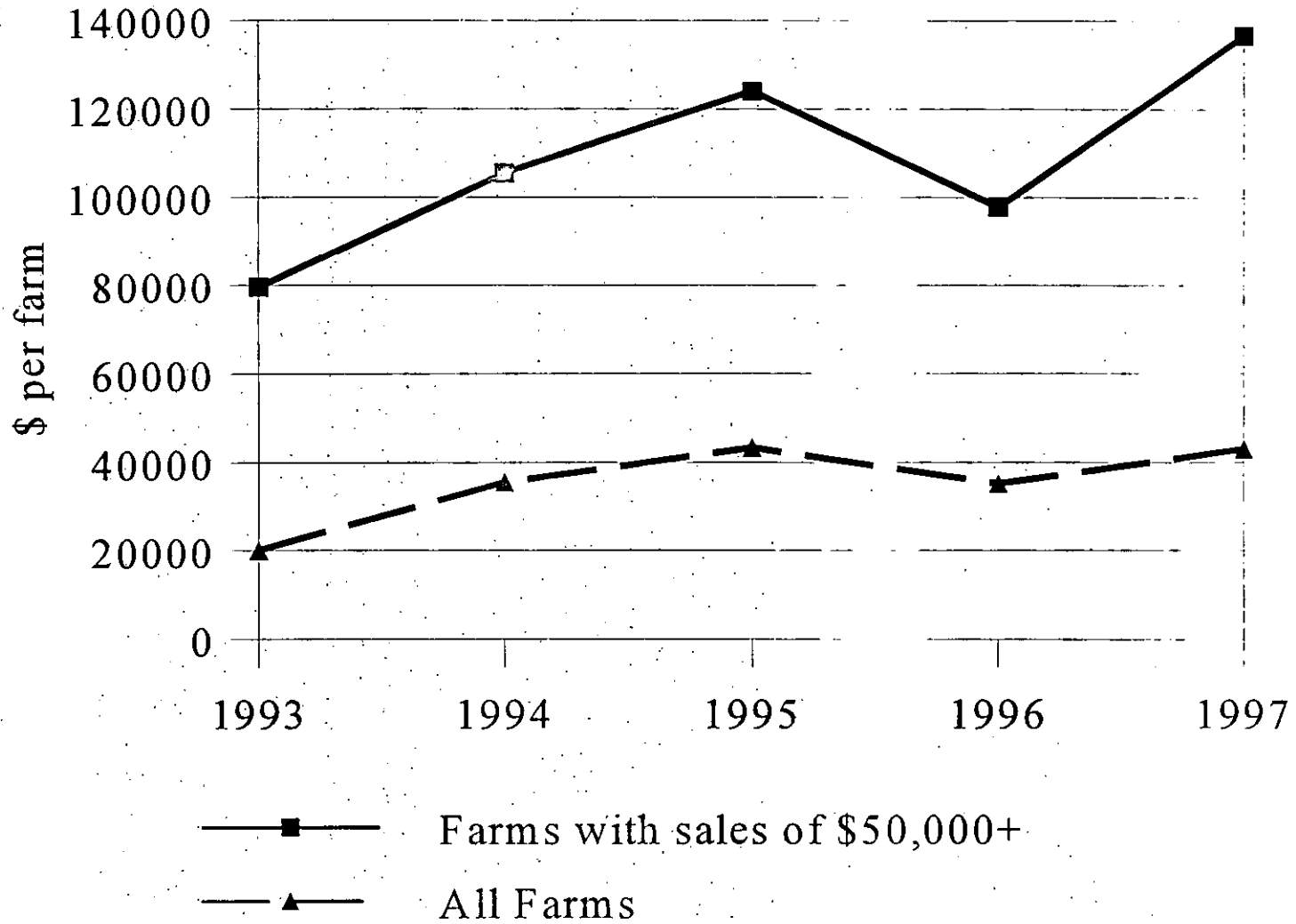
- Over one-quarter of farm workers are 21 year old or younger, two thirds are younger than 35.
- The median personal income for farm workers was between \$5,000 and \$7,500 during 1994-1995. Twenty eight percent had personal incomes under \$2,500.
- The median earnings of foreign-born workers was higher than for U.S. born workers (\$5,000 - \$7,500 vs \$2,500 - \$5,000). Green card holders or legal permanent residents have the highest earnings (between \$7,500 and \$10,000).

Some Facts about the H-2A Program

- Among current users of the H-2A program, 80% are located in just 9 states. North Carolina is the heaviest user of the program (because of tobacco) followed by Virginia (with tobacco and apples), Kentucky (tobacco), and New York (apples) (see Figure 12).
- 62% of H-2A growers grow tobacco, 18% grow apples; the other users include shepherders, custom combine, fruit and vegetable growers, and irrigation (see Figure 13).

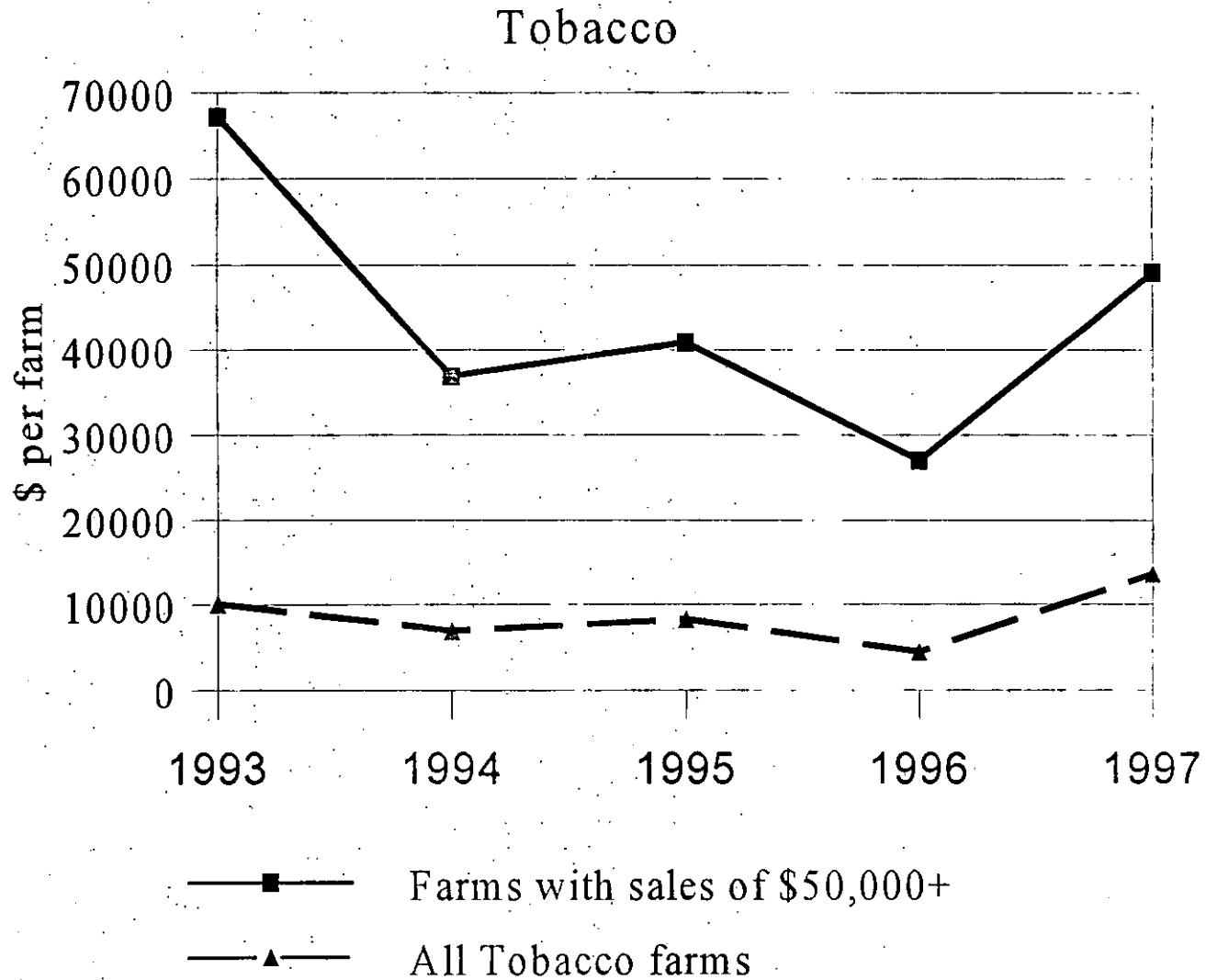
Fig. 1a: Net Cash Farm Income (1997 dollars)

Fruit, nuts, vege, greenhouse, nursery



Source: Economic Research Service; 1997 USDA Agricultural Resource Management Study

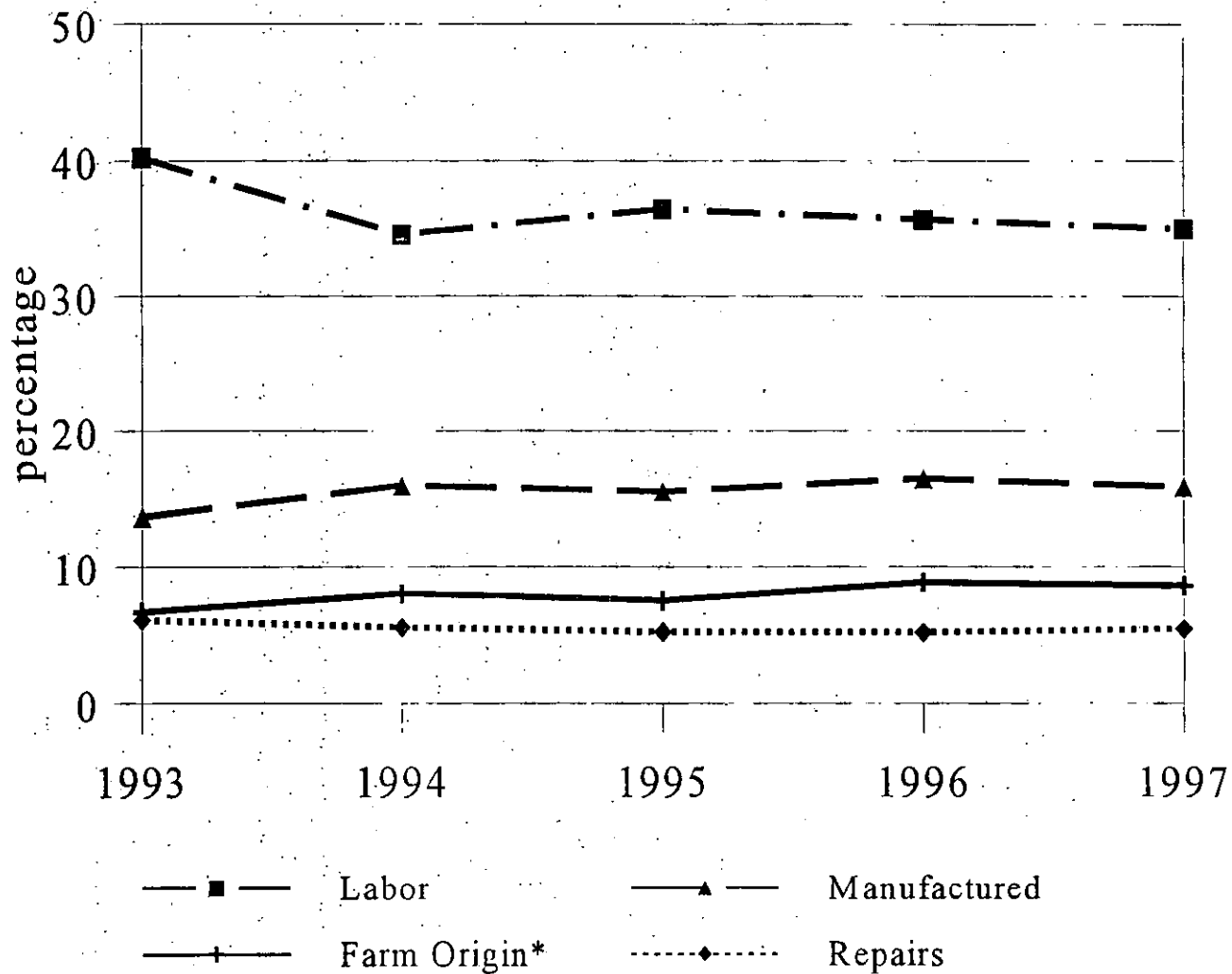
Figure 1b: Net Cash Farm Income (1997 dollars)



Source: Economic Research Service; 1997 USDA Agricultural Resource Management Study

Figure 2a: Percentage Shares of Total Farm Cash Expenses

Fruits, nuts, vegetable, greenhouse, nursery

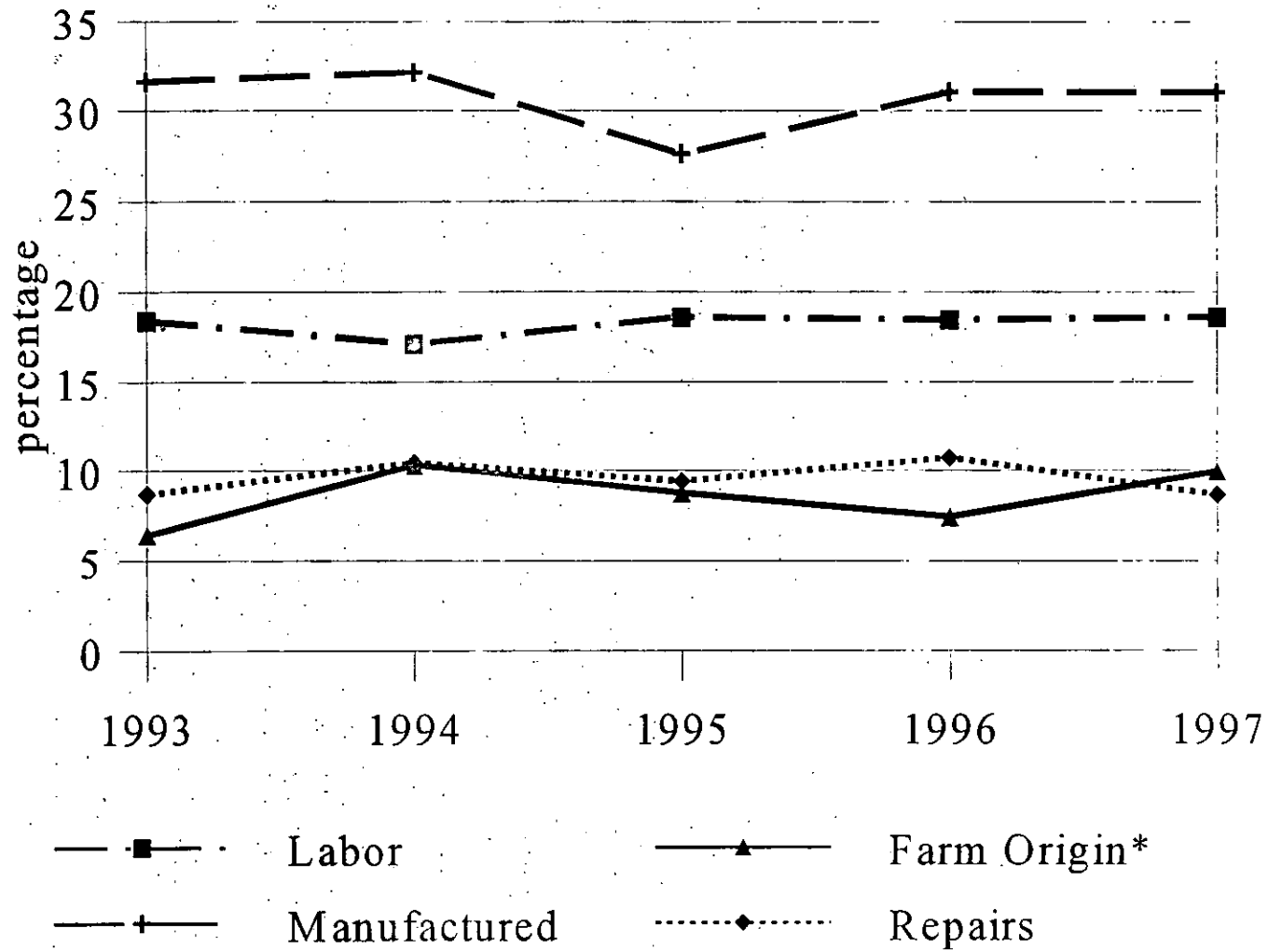


* Includes livestock purchases, feed, other livestock related expenses, and seed and plants

Source: Economic Research Service; 1997 USDA Agricultural Resource Management Study

Figure 2b: Percentage Shares of Total Farm Expenses

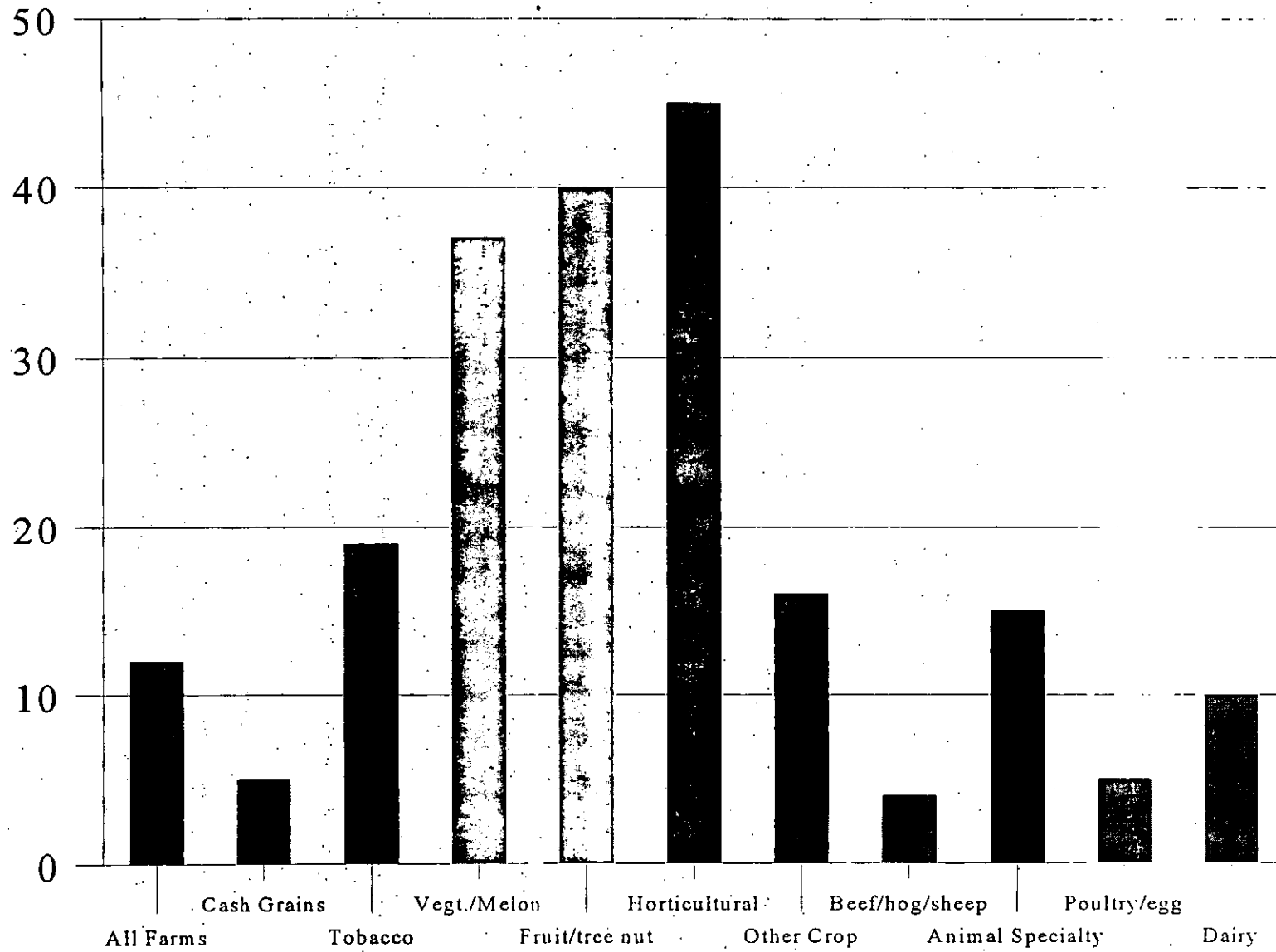
Tobacco



* Includes livestock purchases, feed, other livestock related expenses, and seed and plants

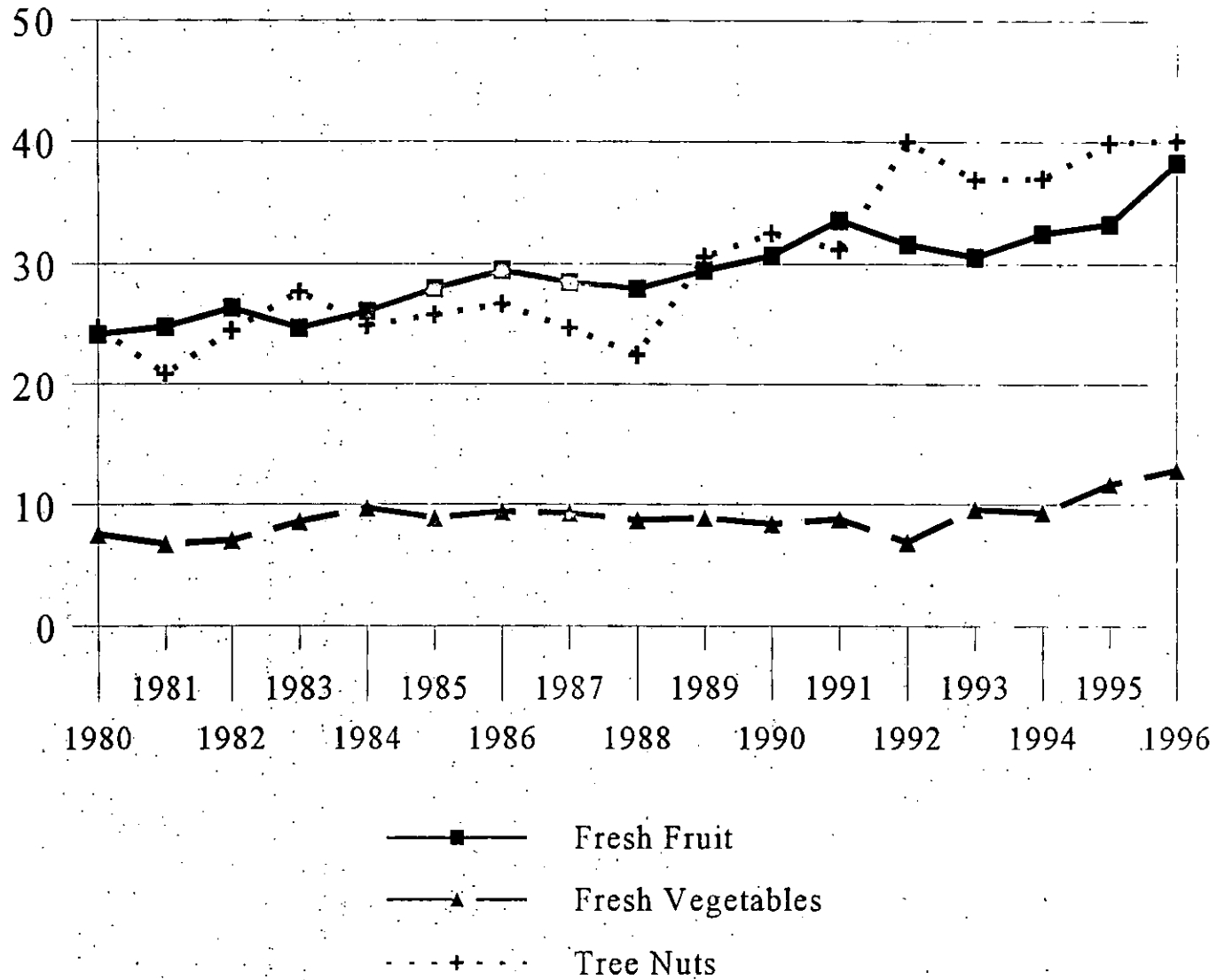
Source: Economic Research Service; 1997 USDA Agricultural Resource Management Study

Figure 3: Labor's share of production expenses



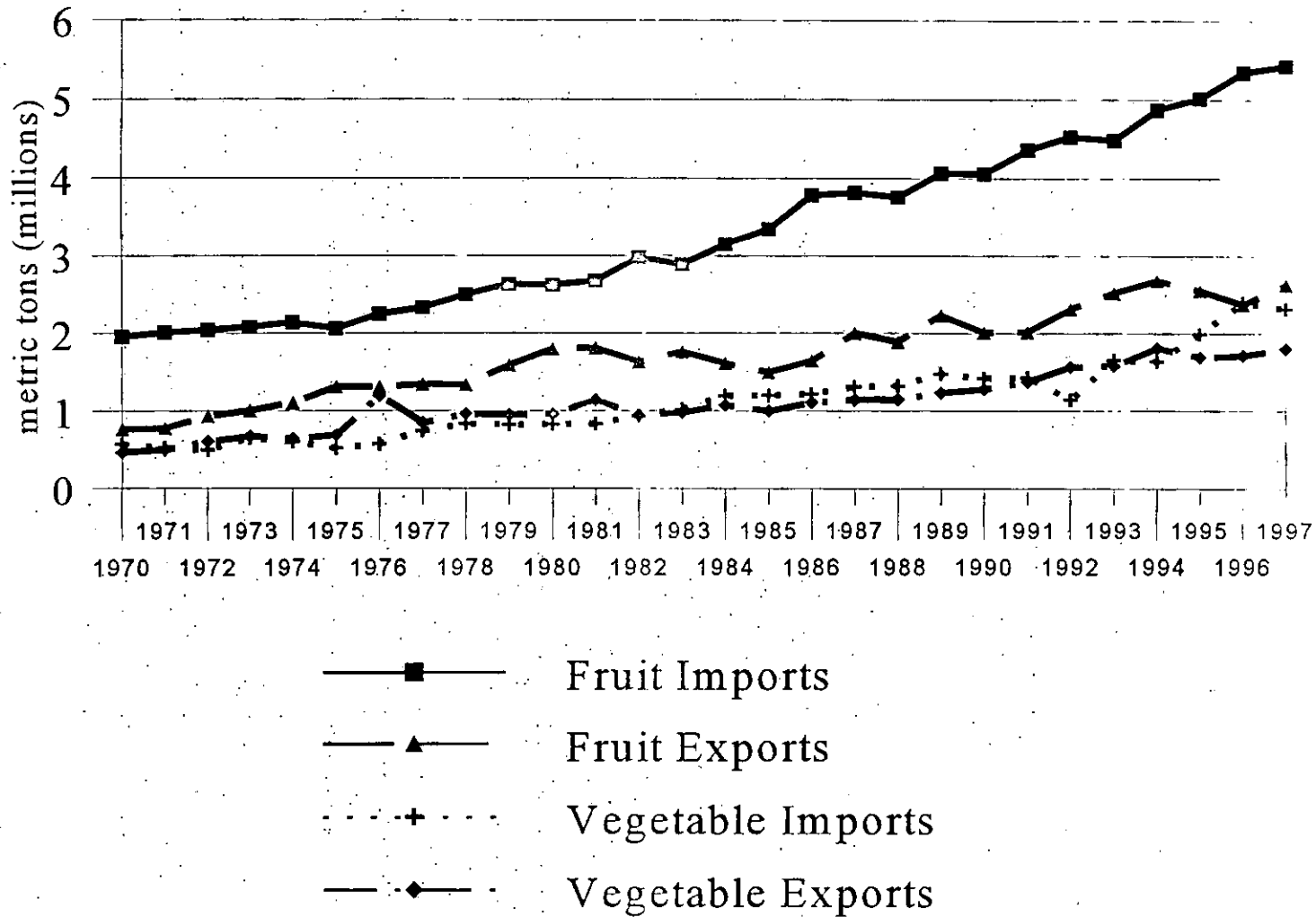
Source: 1992 Census of Agriculture

Figure 4: Import Share of Domestic Use



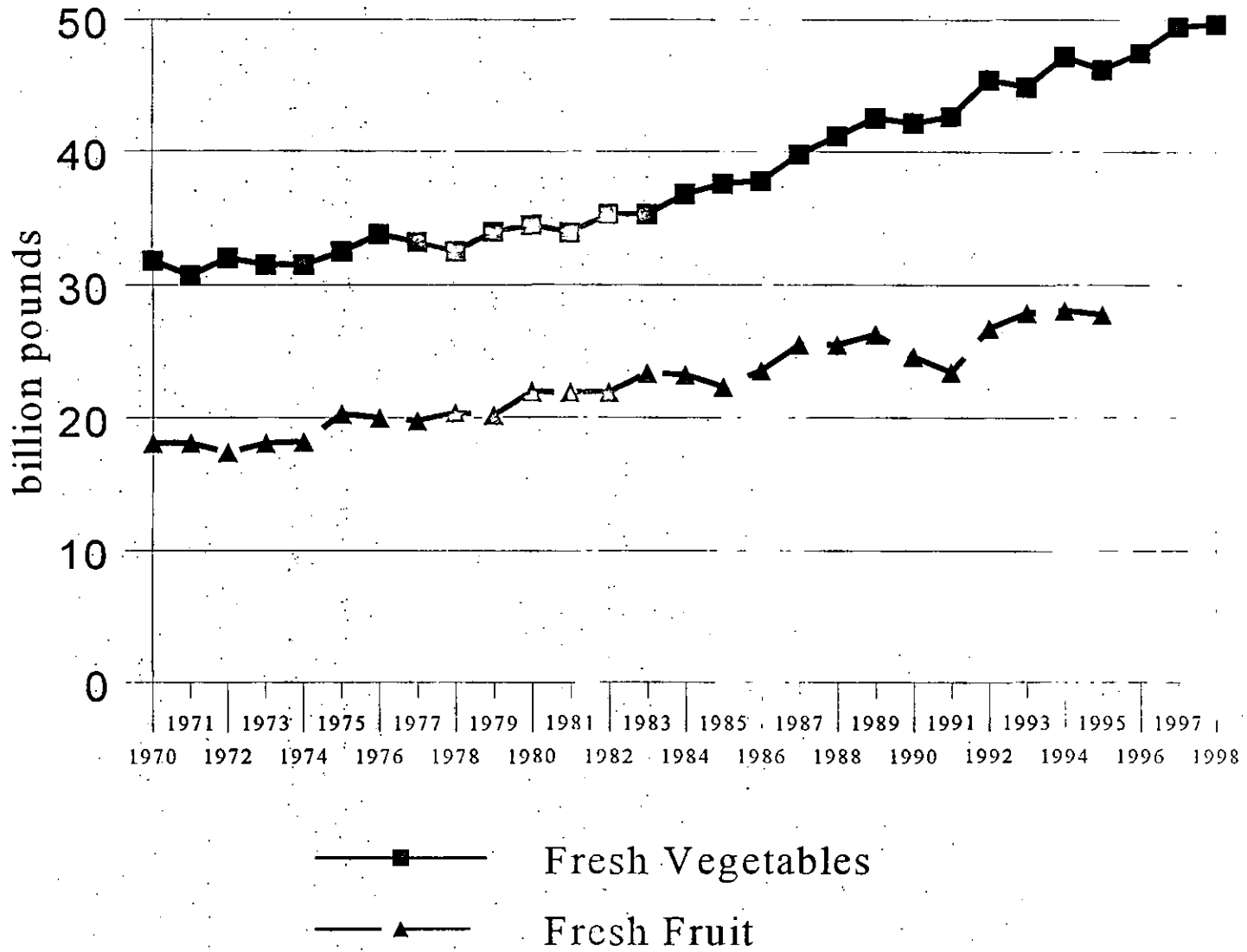
Source: USDA-ERS Statistical Bulletin 939, Aug 1997; USDA-ERS Fruit and Tree Nuts, Aug 1998; USDA-ERS Vegetables and Specialties, VGS-273, Nov. 1997

Figure 5: U.S. Exports and Imports
 Fresh Fruits and Vegetables, 1970 - 1997



Source: U.S. Bureau of the Census; Economic Research Service; Foreign Agricultural Service; UN Trade Data

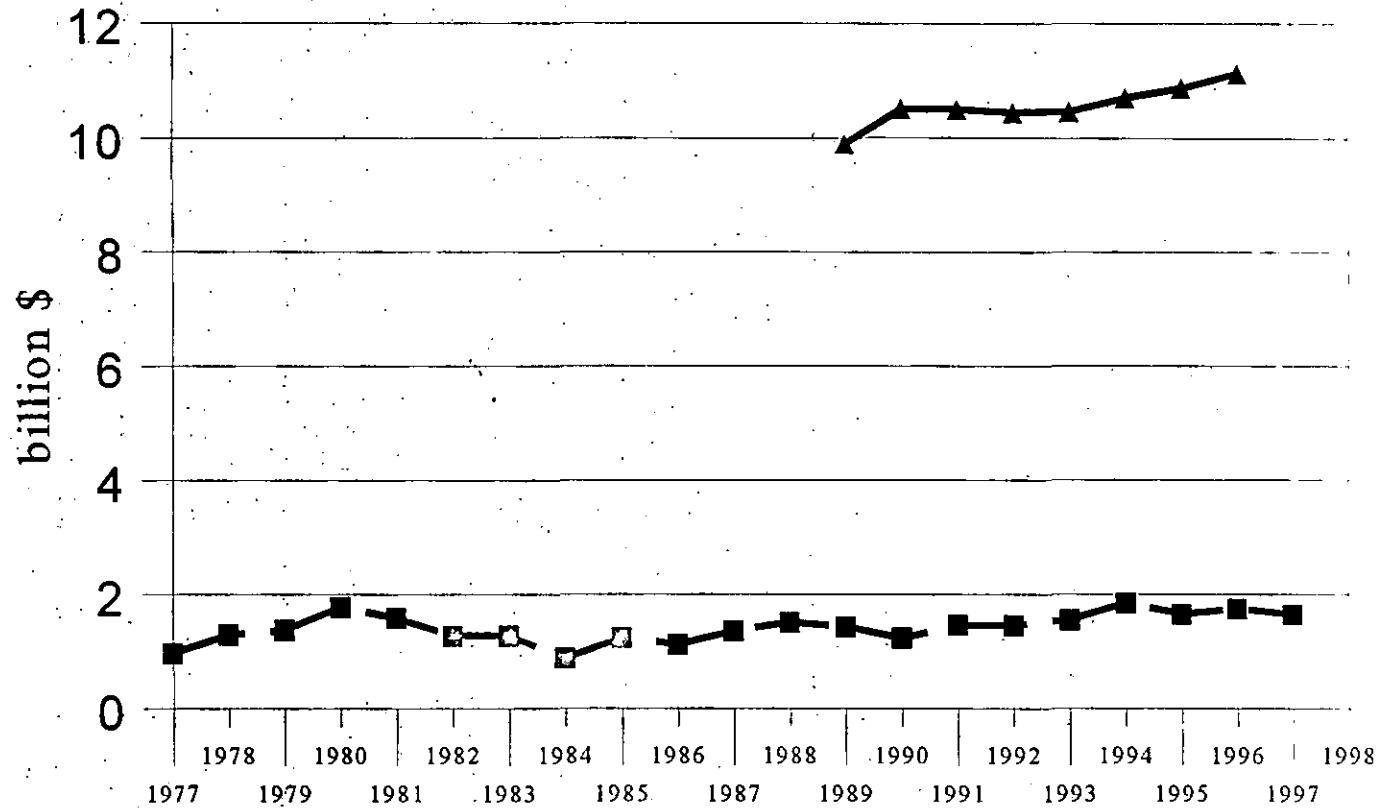
Figure 6a: Fresh Fruit and Vegetable Production



Source: Economic Research Service

Figure 6b: Value of Production (1997 dollars)

Greenhouse & Nursey, Tree Nuts



—▲— Greenhouse & Nursery
—■— Tree Nuts

Source: Economic Research Service

Figure 7

Farm workers wages and employment

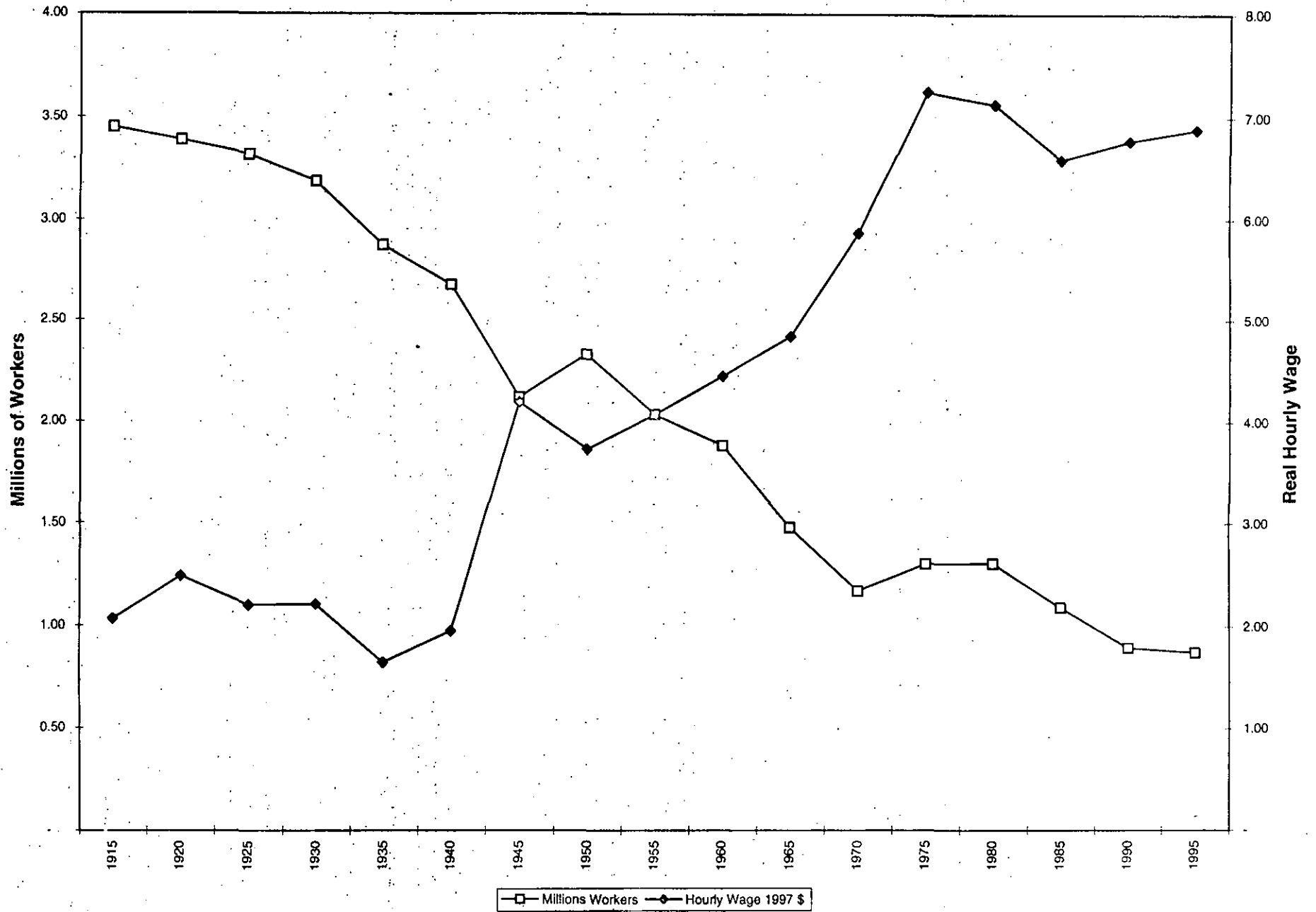
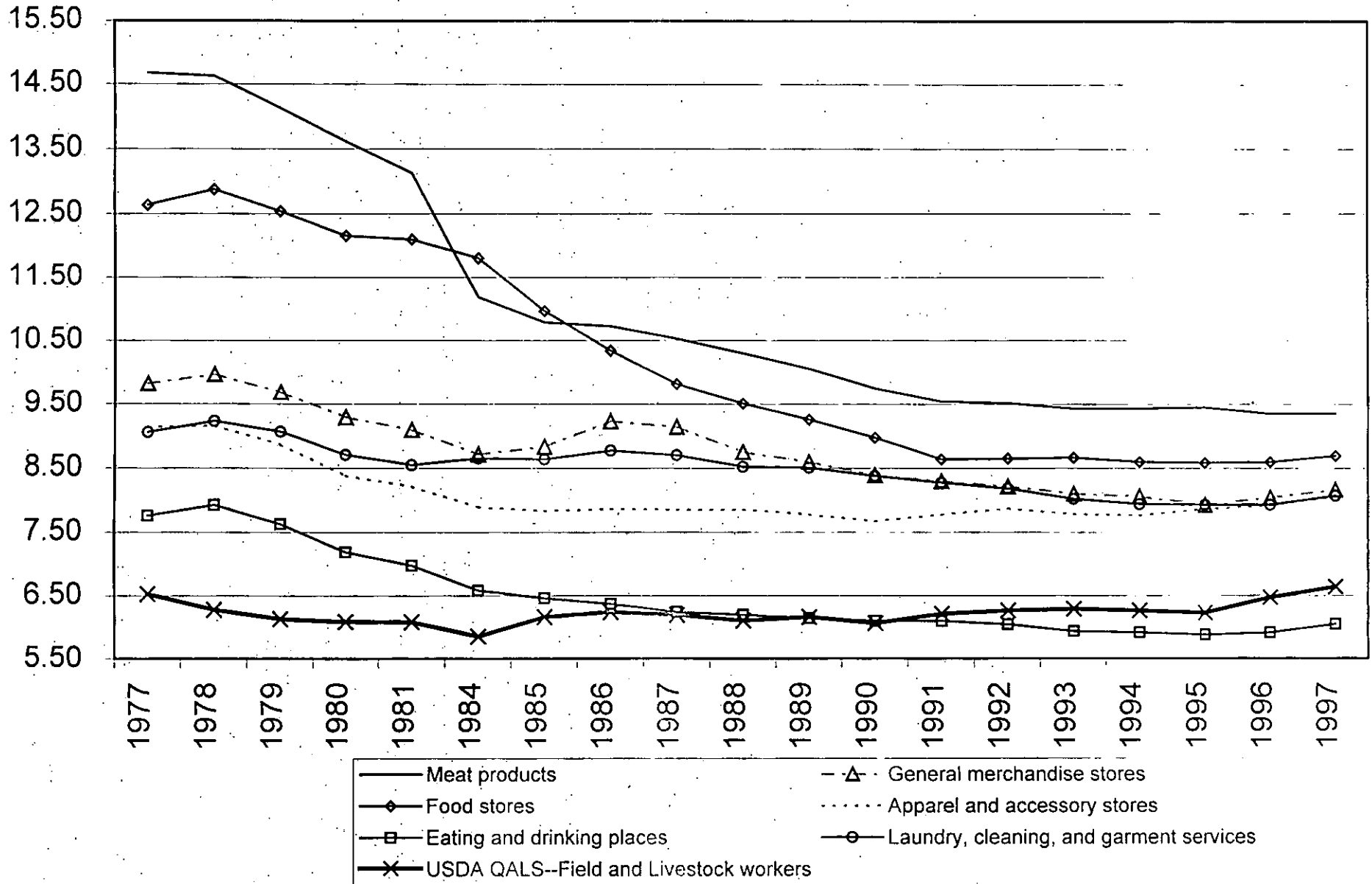


Figure 8
Real Hourly Wages in Selected Industries (1997 \$)



Source: BLS and USDA

Figure 9
Unemployment rates
Seasonally adjusted

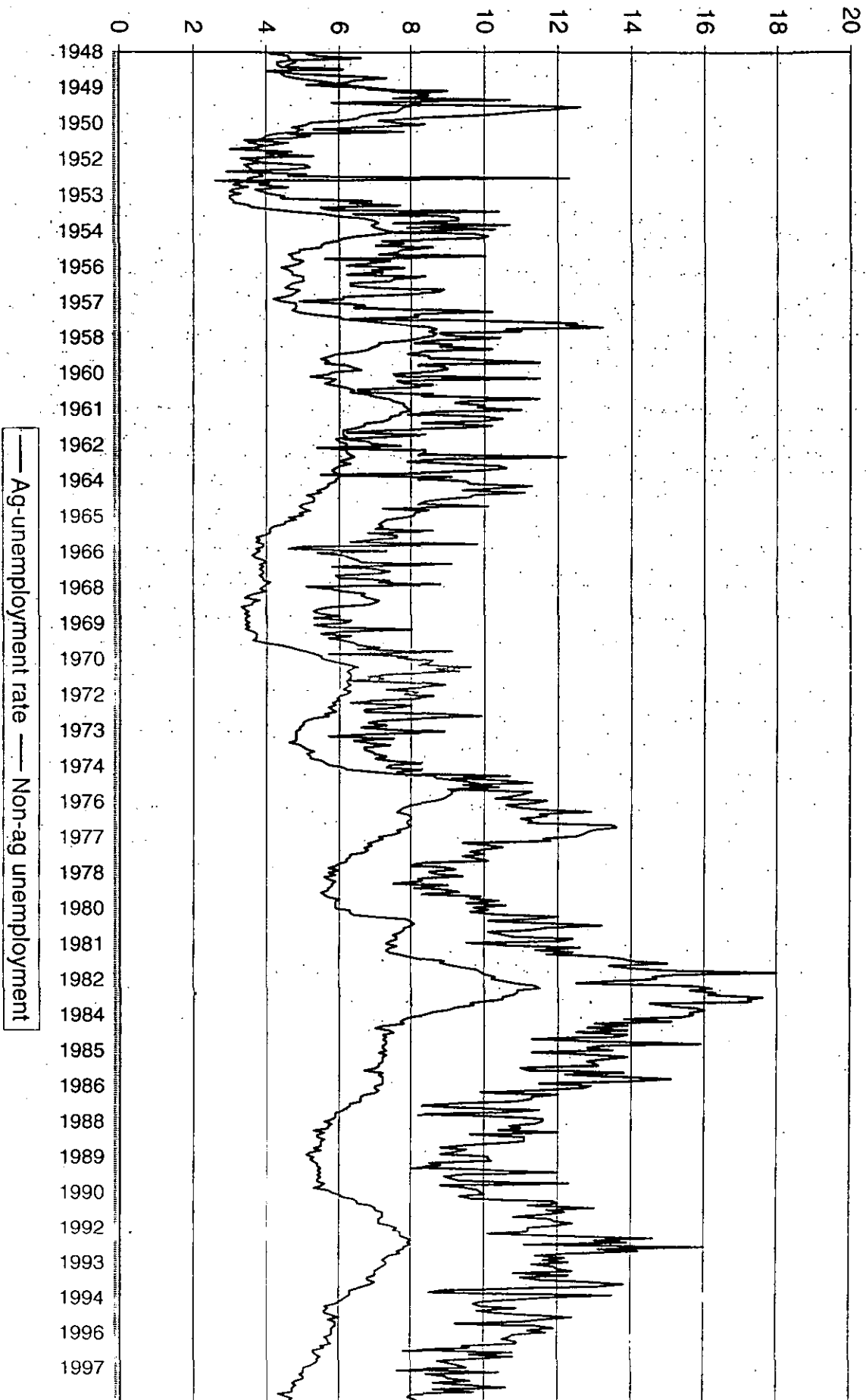


Figure 10
Average weeks unemployed

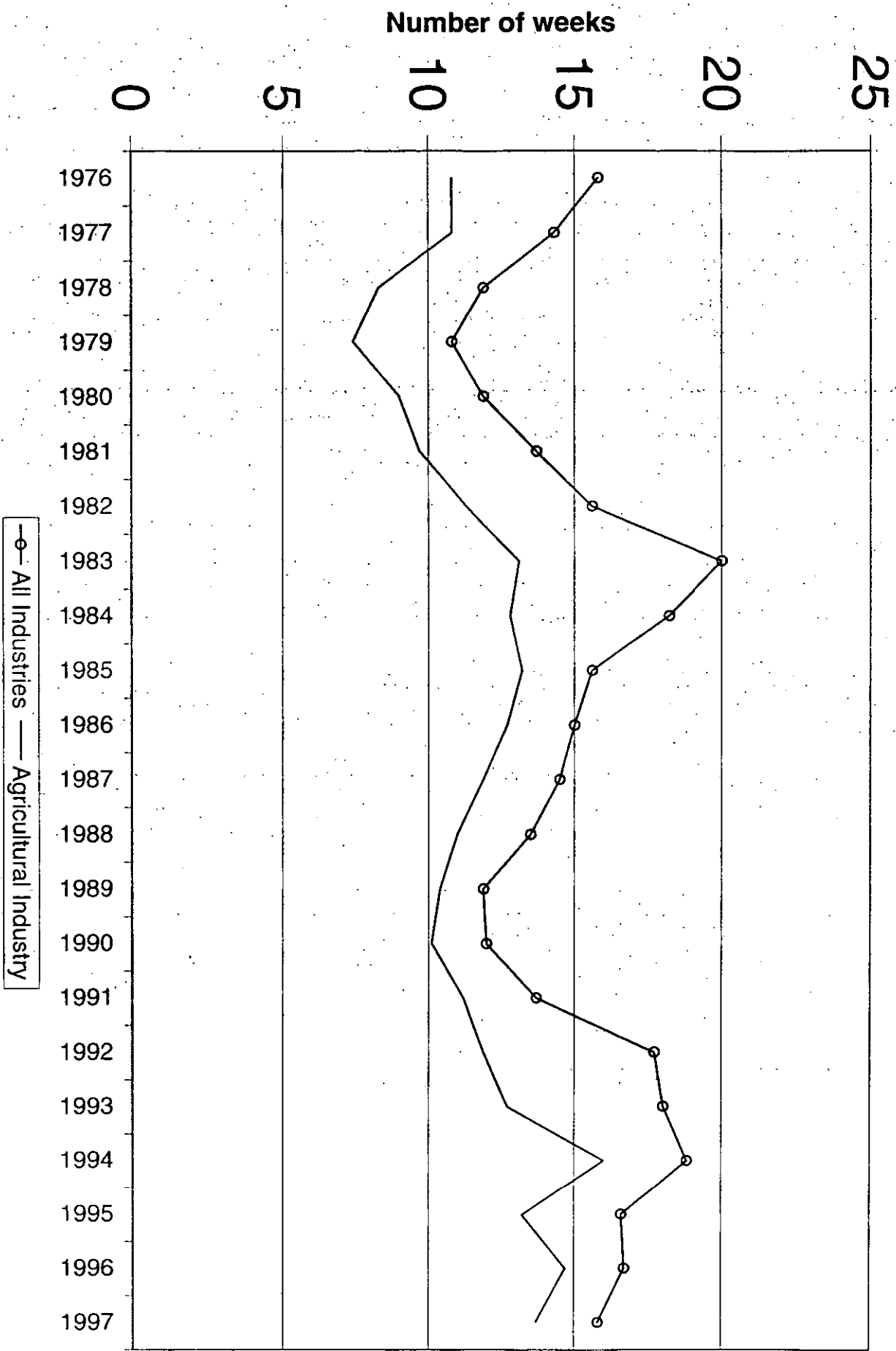
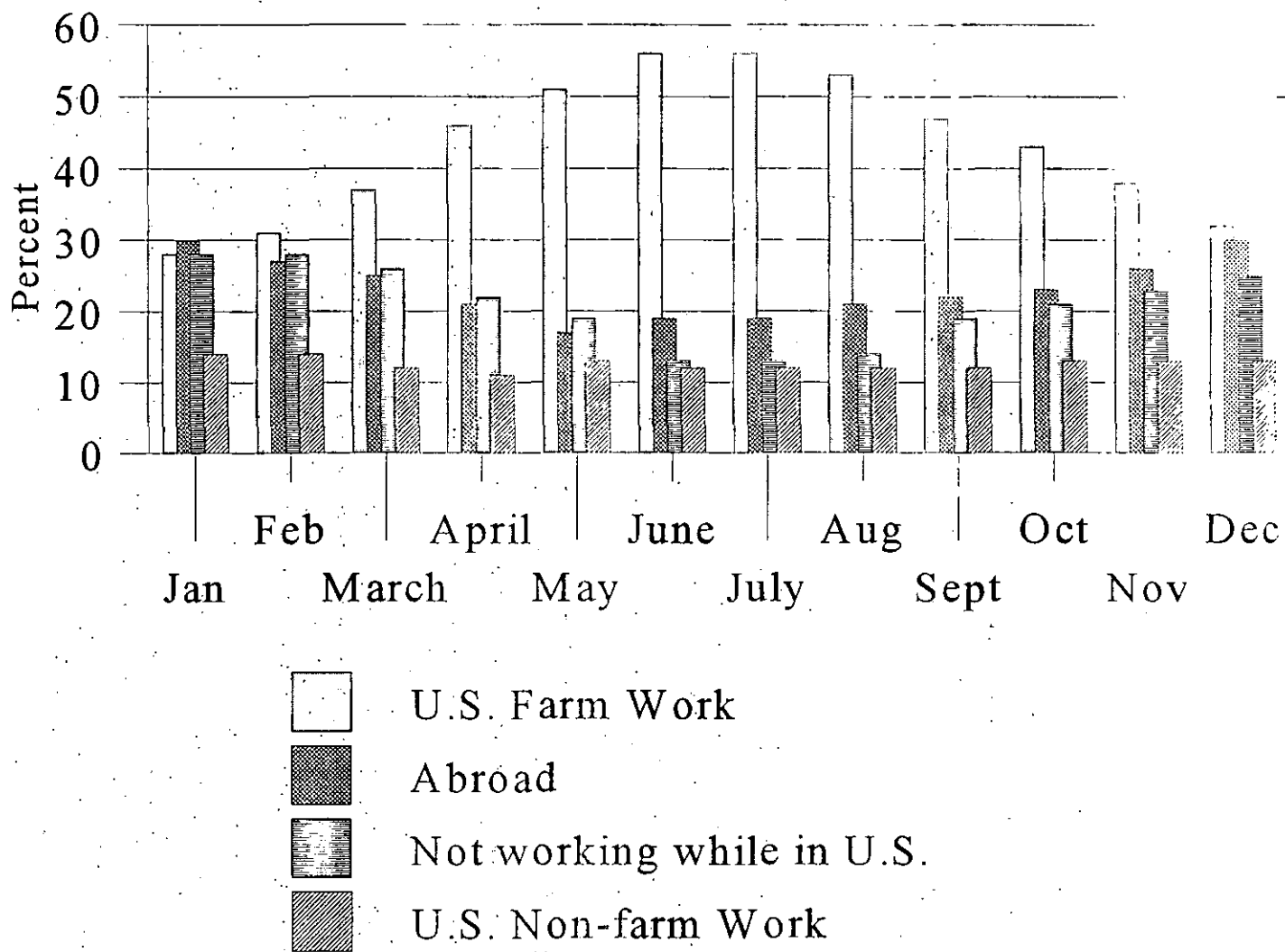


Figure 11: Percent of Farm Workers in Different Activities

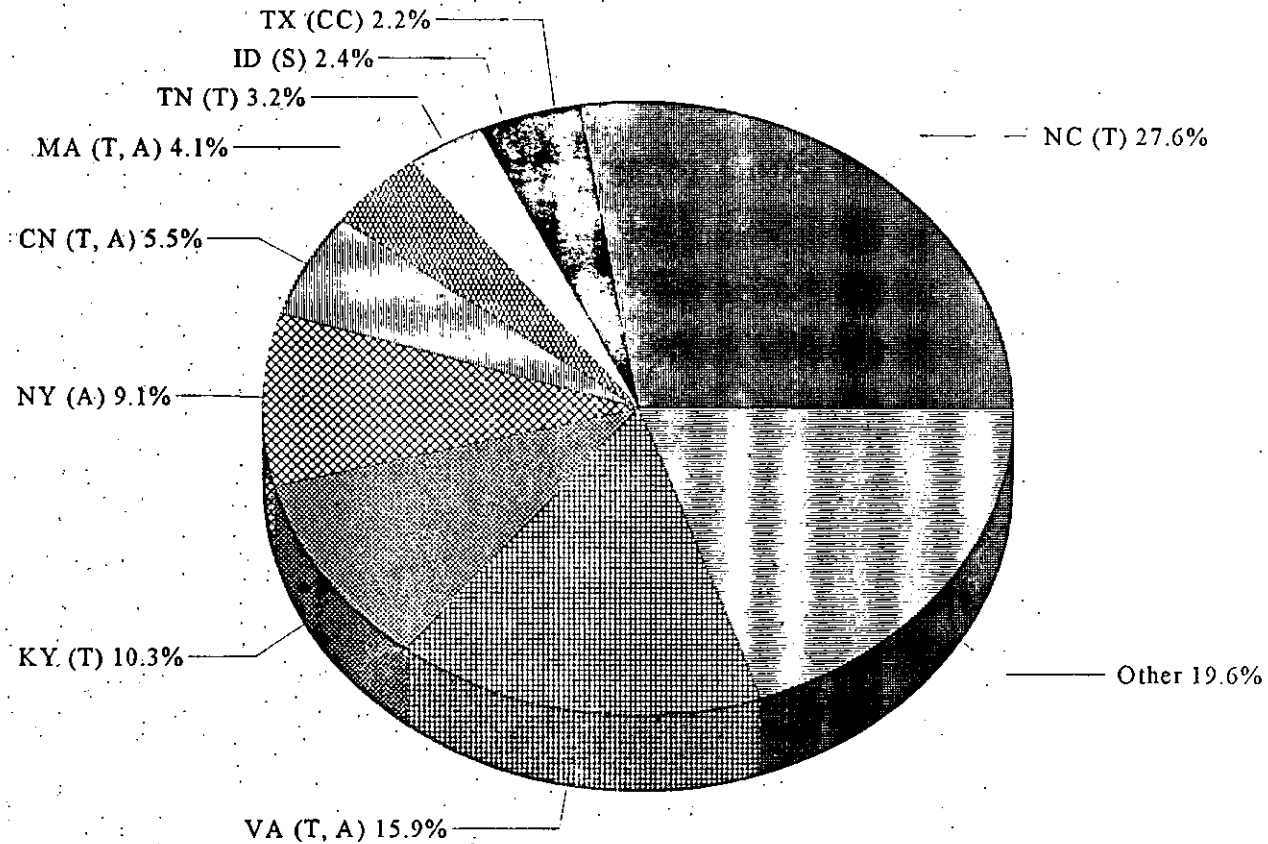
National Figures by Month



Source: Naws 1994-95 (represents activities from Oct. 1994-Sept. 1995)

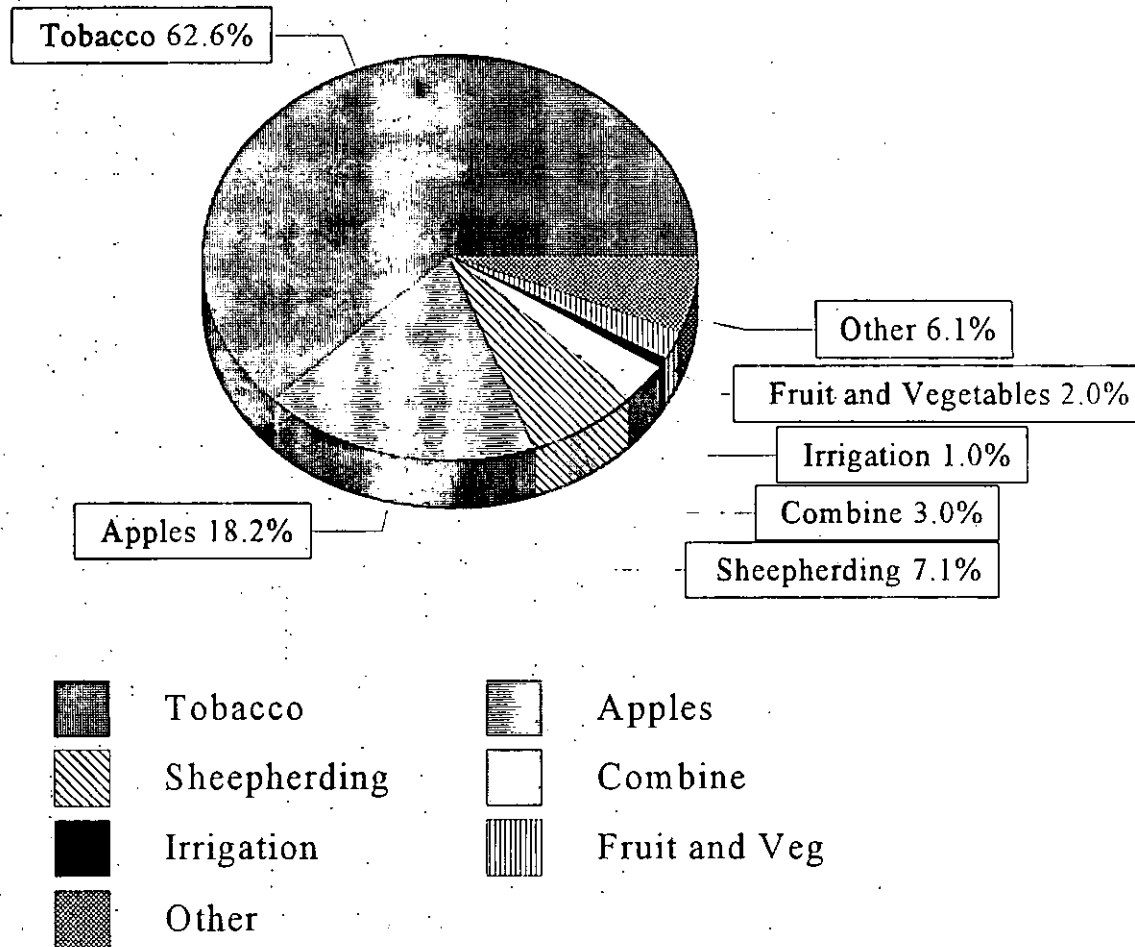
Figure 12: Principal H-2A States and Crops

9 States Have 80% of H-2A Activity



T= Tobacco, A=Apples, S=Sheep, CC=Cust. Combine
18,766 Positions Certified in these States of 23,352 Total in 1997

Figure 13: 1997 H-2A
Major Crop Activity



23,352 Positions Certified in 1997

November 17, 1998

Discussion of Options for Reforming the Wage Required of H-2A Employers

Background

Under the current program, growers who employ H-2A workers are required to pay their workers the higher of the prevailing wage (determined by the average wage for the crop and task in the local area), the federal, state or local minimum wage or an "adverse effect wage rate" (AEWR) (equal to the average regionwide (or statewide for CA and FL) agricultural wage rate). Because foreign workers can sometimes dominate a local labor market, this wage depression is often reflected in the local prevailing wage. The AEWR partially corrects for this depressive effect by measuring farmworker wages on a statewide basis -- thus dissipating the impact of foreign workers on the wage.

Under the Wyden-Graham bill, the worker is required to be paid either the prevailing wage or the AEWR (capped at 105% of the prevailing wage). This cap is not likely set high enough to compensate for the depression of wages in areas where there is a heavy reliance on foreign workers.

Wages are just one piece of the grower's total compensation calculation (which also includes housing, transportation and taxes). The impact of wages on the total compensation package varies by area of the country and by crop; e.g., for growers who do not now provide housing, the program's housing requirement is more significant. However, when considering wage levels generally, we should keep three things in mind: (1) that we want to set the wage high enough to continue to attract U.S. farmworkers; (2) that we don't want the wage to be prohibitively high for growers; and (3) that whatever the wage required in the H-2A program, it will become a wage ceiling for U.S. workers (because a domestic worker who demands more than the required wage is considered "unavailable" under the current system).

Potential Options

The following represent three (conceptual) options for changing the calculation of the wage H-2A employers are required to pay their workers; the fourth option is to maintain current law:

1. Eliminate use of the AEWR and base the required wage on some percentile in the distribution of the prevailing wage.

We would consider eliminating use of the AEWR because as a statewide average of all agricultural products, it does not accurately reflect the wages for a particular crop in a particular area. One alternative would be to rely solely on some upper percentile in the distribution of the prevailing wage (which is based on surveys by crop, task, and area). The reason for using an "upper" percentile is to "adjust" for the potentially depressing effect of undocumented workers on wages and to prevent a low wage ceiling from developing for U.S. workers.

The advantage of this approach is that it would rely on wage measures that more accurately reflect the wages paid by crop, task, and area.

However, there are also many disadvantages. For example, it would be extremely costly for DOL to calculate prevailing wages nationally (currently DOL only conducts the surveys on which the prevailing wage is based in areas in which there are H-2A growers). And, any chosen percentile would be arbitrary. Finally, there is no guarantee that the distributions of wages would allow for a "clean" calculation of a particular percentile (i.e., there is no guarantee that the distributions would be bell-shaped).

2. Eliminate use of the AEW and base the required wage on the wages that U.S. workers could earn in other low-skilled jobs (that are not dominated by undocumented workers).

As noted above, exclusive reliance on the prevailing wage has several problems, including, 1) it would be expensive to conduct the survey nationwide for all potential H-2A employers and 2) if the H-2A program were to become large enough, the prevailing wage would become an effective wage ceiling for U.S. workers. However, basing the required wage on the wages paid in other low-skilled occupations would be both less expensive (many surveys contain wage information on other occupations and industries) and it would allow the wages paid through the H-2A program to rise and fall with the rest of the labor market for low-skilled workers.

The disadvantage of this approach is that it would be difficult to implement (how would we identify the jobs that are not dominated by undocumented workers?); and it is not clear that the required wage could be calculated at a more disaggregated level than the AEW.

3. Eliminate use of the AEW and base the required wage on the wages that U.S. farm workers earn on other (nonagricultural) jobs throughout the year.

The *National Agricultural Workers Survey* (an annual survey of 2,500 workers) asks farm workers about their employment on other (non-agricultural) jobs throughout the year. The wages on these jobs could potentially provide the basis for the required wage for the H-2A program. This approach contains many of the same advantages as option 2, above. However, 1) the wages on the non-agricultural jobs tend to be lower than those on the agricultural job; 2) data on non-agricultural wages exist for only about 300 agricultural workers per year which would lead to an extremely imprecise measure of these wages; and 3) because of the small sample size the required wage could not be calculated at a more disaggregated level than the AEW.

4. Do not change the wage calculation.

According to some knowledgeable sources, wages are not often cited as reasons why growers do not use the H-2A program. Therefore, we may not need to reform calculation of the minimum required wage rate as part of our reform package. The advantage of not

changing the calculation is that it would allow us to focus on more controversial and important aspects of the program rather than developing an ad-hoc “fix” to what may not be a big problem. In addition, although it appears clumsy, the AEWR combined with the prevailing wage is a practical solution to a difficult problem (calculating the wage that U.S. workers would earn if there were no undocumented workers).

The disadvantage is that because the Wyden-Graham bill changes the calculation of the required wage, we may have to offer an alternative in order for our reform alternative to be credible.

lenny - H2A

▶ **Julie A. Fernandes**
11/13/98 04:16:15 PM
.....

Record Type: Record

To: Elena Kagan/OPD/EOP, Maria Echaveste/WHO/EOP, Sally Katzen/OPD/EOP, Cecilia E. Rouse/OPD/EOP
cc: Leslie Bernstein/WHO/EOP, Laura Emmett/WHO/EOP, Marjorie Tarmey/WHO/EOP
Subject: H2A and CNN

FYI -- John Fraser tells me that CNN is doing a program on H-2A that is scheduled to air either December 6th and 7th or December 13th and 14th. According to John, the angle is that growers are abusing the program and that they are intentionally avoiding hiring U.S. workers. CNN told John that they had interviewed 50-100 farmworkers (domestic and H-2A); DOL (including John F. and John Beverly) and the North Carolina Growers Association.

julie

lunnig-H2A

Julie A. Fernandes
11/09/98 11:37:28 AM

Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP
Subject: H2A meeting this afternoon

It is very likely that the issue of H-2A "reform" will come up again next session (as you know, the Secretary of Labor is meeting with Graham and Wyden the first week of December to discuss agricultural guestworkers). The goal of this afternoon's meeting is to establish our strategy for moving forward. Two key questions:

1. Process vis-a-vis the Hill -- convene bipartisan mtgs (consistent with DOL's commitment to Coverdell, but unlikely to produce anything) vs. outreach to selected Members individually -- on both sides of the issue (though, perhaps, not the aisle) -- who are looking for a reasonable compromise (Berman; Graham; Kennedy).
2. Internal process -- should we continue to move forward on developing our internal recommendations re: both legislative and administration options (including pilot proposals).
Example: AgNet?

julie

Graham, Wyden, Smith -- request mtgs w/ Human

1st week in December

Alt way to talk abt/ before it

- Process
- Put subst proposal down - e.g. AgNet

b)

Who to have caucus w/?

Kennedy
Wyden/Graham

→ Bosera

Benn

Feinstein

} Best strategic
approach?

} cover?

} affirm legislative?

a)

Put together subcommittee?

↓
Distribute paper
next

UNITED STATES SENATE

WASHINGTON, DC 20510-3703

1mm1-H2A

RON WYDEN
OREGON

Facsimile Transmission From Senator Ron Wyden

717 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510-3703
(202) 224-5244 - VOICE
(202) 228-2717 - FAX

TO: Elena Kagan 456-2878

FROM: David B. (phone 4-3163)

DATE: _____

NOTE: CRS
side by side

THERE ARE _____ PAGES TO THIS TRANSMISSION, INCLUDING THIS
COVER SHEET. IF YOU HAVE EXPERIENCED ANY DIFFICULTY, PLEASE
CONTACT _____ AT THE ABOVE NUMBER.



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Memorandum

September 23, 1998

TO : Hon. Ron Wyden
Attention: David Blair

FROM : Robin Jeweler
Legislative Attorney
American Law Division

SUBJECT : Applicability of the minimum wage to the "Agricultural Job Opportunity Benefits and Security Act of 1998."

This responds to your request for a follow-up memo to confirm our understanding that proposed amendments to the Senate bill dealing with a guest worker program for temporary agricultural workers would result in the requirement that covered workers receive minimum wage payments under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* The bill, S. 2337, 105th Cong., 2d Sess., was introduced on July 21, 1998. It is designed to "create a streamlined guest worker program to allow for a reliable supply of legal, temporary, agricultural workers."¹ The bill would create an agricultural worker registry system administered by the Department of Labor (DOL). You have provided us with an amended version of the bill which is proposed as an amendment to S. 2260, 105th Cong., 2d Sess. (1998), an appropriations bill.

You originally inquired whether S. 2337 would prohibit any farm worker from being paid less than either the federal or state minimum wage. The bill as drafted would clearly make the FLSA, including its minimum wage requirements, 29 U.S.C. § 206, applicable to registered farm workers. However, because the FLSA does contain some exemptions from minimum wage requirements for agricultural workers at 29 U.S.C. § 213(a)(6),² we

¹ 144 CONG. REC. S 8662 (daily ed. July 21, 1998).

² Specifically, 29 U.S.C. § 213(a)(6) exempts from 29 U.S.C. § 206:

any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii)

(continued...)

CRS-2

concluded that it would be theoretically possible for the wage formulas in the bill to result in a sub-FLSA minimum wage. This is so because the "prevailing wage" is established by conducting a survey of wages paid to agricultural employees in any given area, which could include workers exempted from the FLSA and/or state minimum wage laws.³

Specifically, "agricultural employment" is defined in § 2 of the bill as having the same meaning as "agriculture" under § 3(f) of the FLSA, 29 U.S.C. § 203(f). Section 7 of the bill addresses employment requirements, including the payment of wages. Subsection 7(a) requires employers to pay the greater of either the "prevailing wage" or the "adverse effect wage rate (AEWR)." These terms are defined in § 2 of the bill.⁴

The language that you have added would amend the definition of the AEWR to expressly provide that "[n]o adverse effect wage rate shall be less than the greater of the hourly wage rate published in 29 U.S.C. § 206(a)(1) and currently in effect or the State minimum wage[.]" This language would provide that the applicable federal or state minimum wage constitutes a floor in calculating the AEWR.⁵ Hence, even if agricultural workers exempt under the

²(...continued)

commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock[.]

³ Section 2 (6) of the bill defines "prevailing wage" to mean:

[W]ith respect to an agricultural activity in an area of intended employment, the rate of wages that includes the 51st percentile of employees in that agricultural activity in the area of intended employment, expressed in terms of the prevailing method of pay for the agricultural activity in the area of intended employment.

⁴ Section 2(1) of the proposed amendment defines "Adverse Effect Wage Rate" as:

[T]he rate of pay for an agricultural occupation that is 5-percent above the prevailing rate of pay for that agricultural occupation in an area of intended employment, if the average hourly equivalent of the prevailing rate of pay for the occupation is less than the prior year's average hourly earnings of field and livestock workers for the State (or region that includes the State), as determined by the Secretary of Agriculture. No adverse effect wage rate shall be less than the greater of the hourly wage rate published in 29 U.S.C. § 206(a)(1) and currently in effect or the applicable State minimum wage, nor more than the prior year's average hourly earnings of field and livestock workers for the State (or region that includes the State), as determined by the Secretary of Agriculture.

⁵ Under the definition of AEWR, *supra*, the federal minimum wage would constitute a floor, and "the prior year's average hourly earning ..." would constitute a ceiling for the AEWR. In the event that a conflict arises between the floor amount and the ceiling amount, i.e., if the "ceiling" amount was less
(continued...)

CRS-3

FLSA who might receive a sub-FLSA minimum wage are included in a survey to determine the "prevailing wage," the bill would establish an AEWR at the federal or state minimum wage level. Employers are required to pay the *greater* of either the prevailing wage or the AEWR. In summary, we conclude that the statutory language would establish the federal minimum wage as an applicable floor for payments to agricultural workers covered by the "Agricultural Job Opportunity Benefits and Security Act of 1998."

⁵(...continued)

that the minimum wage, we assume that the floor amount would apply.



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Memorandum

September 23, 1998

TO : Hon. Ron Wyden
Attention: David Blair

FROM : Margaret Mikyung Lee
Legislative Attorney
American Law Division

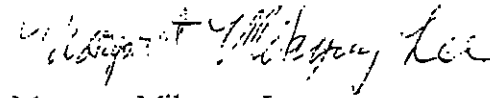
SUBJECT : Effect of definition of "agricultural employment" in S. 2337 on H-2A non-immigrant category

This memorandum is in response to your question concerning the effect of the definition of "agricultural employment" in section 1102(2) of S. 2337, the Agricultural Job Opportunity Benefits and Security Act, on the H-2A non-immigrant visa category. An earlier draft of S. 2337 defined "agricultural employment" as meaning "any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)) or section 3121(g) of the Internal Revenue Code of 1986 *and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.*" Some interested parties believed that the final, highlighted clause would have the effect of expanding the definition of the H-2A non-immigrant category in section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(a)). Accordingly, the definition of "agricultural employment" in S. 2337 has been changed in the current draft by eliminating the final clause. You requested written confirmation that this change has resolved the problem and that the H-2A category will not be expanded by the current definition of "agricultural employment."

The definition of H-2A worker in the Immigration and Nationality Act is "an alien . . . having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of Title 26 and agriculture as defined in section 203(f) of Title 29, of a temporary or seasonal nature." If the definition of "agricultural employment" in S. 2337 were to be adopted and promulgated by the Secretary of Labor as a definition in regulations of "agricultural labor or services" for the H-2A category, then the now-deleted clause could have had the effect of expanding the range of activities for which H-2A workers are admitted to the United States. Since the current definition of "agricultural employment" in S. 2337 is now virtually identical to H-2A, the only difference being the reference in the H-2A definition to labor regulations, it will not expand the H-2A category.

CRS-2

If we can be of further assistance, please contact us.



Margaret Mikyung Lee
Legislative Attorney

**COMPARISON OF SENATE-PASSED H-2A REFORM AGJOBS AMENDMENT TO S.2260
WITH PROPOSED CONFERENCE CHANGES**

| | Existing H-2A | Bipartisan Senate Reform Amendment | Proposed Conference Changes |
|--|---|--|--|
| MECHANICS OF ALIEN WORKER ADMISSION PROCESS | | | |
| Limitation on Covered Job Opportunities | Job opportunities must be "agricultural" and must be "temporary" or "seasonal". Maximum duration of temporary jobs 364 days; maximum practical duration of seasonal jobs 10 months. Agriculture defined as in FLSA and Internal Revenue Code. | Job Opportunities must be "agricultural" and must be "temporary" or "seasonal". Maximum duration 10 months per job. Agriculture defined as in Migrant and Seasonal Agricultural Worker Protection Act (MSPA). | Changes definition of "agriculture" to clarify that packinghouse and food processing jobs currently excluded from H-2A program are excluded from reformed program. Definition corresponds to current H-2A. |
| Mechanics of Process | <i>Labor Certification:</i> Application for temporary alien labor certification must be filed at least 60 days before date of need with local office and DOL regional office. DOL accepts or requests modification in 7 days. Certification 20 days before date of need. | <i>Farmworker Registry:</i> Application for workers filed at least 21 least days before date of need w/state registry. Referral of workers from registry and report of shortage 7 days before date of need. | |
| Domestic Recruitment | Local and interstate orders, advertising, any other requirements imposed by Secretary of Labor (SOL). | Contacting former workers and search of registry. | |
| Assurance that "U.S." Workers are Legal | None | Legal status of registry applicants verified by AG. | |

**COMPARISON OF SENATE-PASSED H-2A REFORM AGJOBS AMENDMENT TO S.2260
WITH PROPOSED CONFERENCE CHANGES**

| | Existing H-2A | Bipartisan Senate Reform Amendment | Proposed Conference Changes |
|---------------------------|---|---|--|
| LABOR STANDARDS | | | |
| In General | Open-ended; may not adversely affect U.S. workers. | Bounded; limited to standards in statute. | |
| Wages | Highest of Adverse Effect Wage Rate (AEWR) administratively established by DOL, prevailing wage, or minimum wage. | Higher of prevailing wage or minimum wage. AEWR of 5% above prevailing wage, but not more than state's average field and livestock worker wage, where prevailing wage is less than the state's average field and livestock worker wage. | Clarifies that the prevailing wage rate cannot be less than the federal or applicable State minimum wage. |
| Methods of Payment | Not addressed in statute or regs. Policy generally adverse to group and task rates. All workers must be paid the same rate. | Explicitly permits payment in terms other than prevailing method; authorizes group and task rates. Allows employers to pay higher rates to workers with more tenure, experience, etc. Prevailing wage determined by SESA or employer survey meeting DOL criteria. | |
| Housing | Employer must offer housing to all nonlocal workers. H-2A application limited to number of housing slots available. May use public accommodation housing. Local workers not requiring housing not counted against H-2A request up to number of local workers usually employed. No charge for housing permitted. | Employer must provide housing or a housing allowance. May use public accommodation housing. After 3 years, states can end allowance option in areas where sufficient housing is not available. If allowance option ends, 5 year transition period to provide housing. Reasonable charge (not more than cost) permitted for maintenance and utilities. | Requires employers to make a good faith effort to assist workers in locating housing where a housing allowance is provided. Also shortens the period for State determinations of the insufficiency of housing from 3 to 1 year, and requires that housing be provided 4 years rather than 5 years after a finding of insufficient housing. |

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 SEN RON WYDEN - DC
 10/09/98 11:54 P.009/013

COMPARISON OF SENATE-PASSED H-2A REFORM AGJOBS AMENDMENT TO S.2260 WITH PROPOSED CONFERENCE CHANGES

| Existing H-2A: | Bipartisan Senate Reform Amendment | Proposed Conference Changes |
|--|--|---|
| in-bound at 50% completion; and if complete 100% of transportation must be advanced filing practice. | Reimburse in-bound if complete 50% of work period; pay outbound if complete 100% of work period. | Eliminates any ambiguity that employers must reimburse inbound and outbound transportation costs when the required work commitments are met. |
| age or equivalent. | Same. | |
| ment | Requirement removed for CBO purposes | Provision requiring payment of unemployment insurance taxes on the wages of domestic workers otherwise exempted as a condition of program participation. |
| it guarantees employment for hours of anticipated period of t. | Guarantee for duration of job, unless worker is terminated for lawful job-related reason. | |
| n. | Must post Sec. of Labor's poster. Sec. of Labor authorized to advertise registry. | |
| qualified U.S. worker who . 50% of period of t has expired. | Must hire qualified U.S. worker who applies until 50% of period of employment, unless registry is seeking workers in the same or substantially similar occupation in the arc of intended employment. | |
| | Specifically permitted, including minimum productivity standard. | |

Ways and Means;
tax matter.
future legislation.

| | |
|--|---|
| | |
| Transportation | Reimburse pay outboard period. Tra if it is preva |
| Workers' Compensation | State cover |
| Unemployment Insurance | No Require |
| Employment Guarantee | Employer 1/2 of work h employment |
| Notice/ Advertising of Registry | No provisio |
| Preference for U.S. Workers | Must hire qu applies until employment |
| Lawful Job-Related Requirements | Permitted. |

COMPARISON OF SENATE-PASSED H-2A REFORM AGJOBS AMENDMENT TO S.2260
WITH PROPOSED CONFERENCE CHANGES

| | Existing H-2A | Bipartisan Senate Reform Amendment | Proposed Conference Changes |
|---------------------------------|-----------------------|---|---|
| MISCELLANEOUS PROVISIONS | | | |
| Admission of Dependents | Implicitly permitted. | Not permitted unless eligible in own right as a worker. | |
| Offsets/Cap/Sunset | None. | None. <i>100,000 worker cap, all 5 years.</i> | <p>Limitation on the Number of Visas Places caps on the number of visas allowed during the first 4 years after the effective date as follows: 10%; 20%; 40%; and 70% of the number of unauthorized workers found working in agriculture by DOL's most recent National Agricultural Worker Survey. After 4th year, there is no cap. Secretary of Agriculture ensures that visas are allocated on a geographically diverse basis, considering seasonal demand in all parts of the country.</p> <p>Termination of Program Requires reports to Congress by GAO on operation of program, including recommendations on program improvements and the continuation or termination of the program at the end of 5 years. If GAO recommends termination of program, an expedited and privileged joint resolution procedure is provided for prompt congressional action on termination. If Congress passes resolution ending reformed program, the existing H-2A will not sunset and will continue in its current form.</p> |
| Continuation of Current H-2A | Not applicable. | Replaces current H-2A after 5 years. | Continues in current form <i>[if Congress terminates reformed program after 5 years]</i> <i>strike.</i> |

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10/09/98 11:54 P. 010/013

**COMPARISON OF SENATE-PASSED H-2A REFORM AGJOBS AMENDMENT TO S.2260
WITH PROPOSED CONFERENCE CHANGES**

| Existing H-2A | Bipartisan Senate Reform Amendment | Proposed Conference Changes |
|--|--|---|
| on. | Worker information in registry kept confidential. | |
| or may investigate and can IPs, back pay and injunctive arment up to 3 years. | Sec. of Labor may investigate program violations. Back pay and CMP for failure to pay wages. CMP for other violations. Debarment up to lifetime. | <p>Department of Labor Investigations: Requires DOL to conduct expedited investigations and make findings within 10 days if a worker alleges the following serious violations:</p> <ol style="list-style-type: none"> 1) violation of existing child labor laws 2) failure to make wage payments 3) failure to pay housing allowance 4) providing housing in violation of applicable housing safety standards that pose an immediate threat of serious bodily injury or death to workers. Hearing process provided if violation found. <p>Transfer of Workers Dissatisfied with Employer: Provides DOL discretion to transfer a worker who has filed a complaint alleging an employer has violated program terms to another employer approved in the program. Provides that employer from whom the worker is transferred must first obtain replacement worker and clarifies responsibility for transportation reimbursement in transfer situation. Clarifies that employers may voluntarily agree to transfer workers to other qualified employers.</p> |
| y member do not penalize ers or association unless or other members participated nowledge of violation. | Violation of member not chargeable against other members or the association. | |

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SEN RON WIDEN - DC

10/09/98 11:54 P.011/013

| | |
|---|--|
| | |
| Public Access to Documentation | No Provisi |
| Enfor cement and Penalties/Debarment | Sec. of Lat impose CM relief. Deb |
| Violati ons By Associations | Violations by other membl association in or had kn |

**COMPARISON OF SENATE-PASSED H-2A REFORM AGJOBS AMENDMENT TO S.2260
WITH PROPOSED CONFERENCE CHANGES**

| | Existing H-2A | Bipartisan Senate Reform Amendment | Proposed Conference Changes |
|---|--|--|---|
| Procedures for Admission of Aliens | Governed by current INS statute and regs. Employer petitions INS and, upon approval, aliens apply for visas and admission. | Sec. of Labor's shortage report sent to consulate. Sec. of State issues visas and INS admits. (DOS and AG will have to flesh out in regs.) | <p>State Department Issuance of Visas: Clarifies that if the Secretary of Labor fails to act on an employer application within statutory timeframes that the Secretary of State may approve an application, but only if the employer meets all program requirements.</p> <p>Initial Waiver of Ineligibility States that otherwise admissible aliens who are petitioned by employer are not deemed inadmissible to participate in program if they leave the U.S. and apply for admission under the program no later than within 1-year after the 4-year phase-in period.</p> |
| Issuance of Identity and Employment Eligibility Document | Subject to current INS regs and law. Receives same documents as all other admissions. | Requires counterfeit proof document. | Identification Document and Document System Establishes tamper- and counterfeit-proof identification document to verify employment eligibility of aliens. Such document must be compatible with existing government law enforcement and benefit eligibility databases and must measure whether aliens depart U.S. as required by their visas. |
| Extension of Stay of H-2A Alien | Continuous stay up to 3 years with successive certified employers. | Continuous stay up to 3 years with successive approved employers. No more than ten months for each employer. | |
| Applicability of Labor Laws | All labor laws except MSPA apply. Preempts state or local laws regulating employment of aliens. | All labor laws applicable. Extends MSPA to H-2A workers. Preempts state or laws regulating employment of aliens. | |

**COMPARISON OF SENATE-PASSED H-2A REFORM AGJOBS AMENDMENT TO S.2260
WITH PROPOSED CONFERENCE CHANGES**

| | Existing H-2A | Bipartisan Senate Reform Amendment | Proposed Conference Changes |
|-------------------------------|--------------------------------|--|--|
| Credit Toward Legal Residency | No provision. | Makes aliens who complete at least 6 months of H-2A work in each of 4 consecutive years <u>eligible</u> to apply for permanent residency. (Does not increase permanent residency quotas). | Senate provision under review. <i>No Provision (Gulley letter)</i> |
| Expansion of Head Start | No provision. | Loosens Head Start eligibility for migrant farmworker children. | Provision under review. <i>Improved Head Start coverage for migrant/seasonal</i> |
| Study and Report to Congress | Not applicable. | Joint study and report to Congress by AG and Secretaries of Labor and Agriculture at 3 years and 5 years after enactment. | Establishment of Employer/Worker Advisory Board Establishes advisory board to consult with GAO in preparation of its reports on program operation. 4 employer representatives are selected by Secretary of Agriculture and 4 workers representatives are selected by Secretary of Labor. |
| Effective Date of Program | | | The effective date for the program is 1 year rather than 6 months after enactment to allow more time for government agencies to implement the program. DOL is mandated to issue report within 6 months regarding measures being taken and progress made in implementation. |
| User's Fee | Set by the Secretary of Labor. | No provision; but agreement to add one. | Set by Secretary of Labor to cover program costs incurred by government based on federal cost accounting and fee setting standards and guidelines. |

Immig - H2A

▶ **Julie A. Fernandes**
09/03/98 04:03:48 PM
.....

Record Type: Record

To: Elena Kagan/OPD/EOP, Peter G. Jacoby/WHO/EOP, Janet Murguia/WHO/EOP
cc: Laura Emmett/WHO/EOP, Mindy E. Myers/WHO/EOP
Subject: H2A -- Latino Summit on 9/10

On Thursday, September 10th, there will be a Latino Summit (sponsored by NCLR, MALDEF, and a few farmworker organizations) to protest the Wyden guestworker amendment attached to the Sen. CJS bill. The organizers of the summit have asked Maria E. to attend and to make a statement strongly opposing the amendment and pledging to work to get it removed from the bill in conference. As you know, when the amendment was considered in the Senate, we issued a statement (letter from Secy Herman) strongly opposing the amendment. Also, we have a Secy of Labor veto statement on a similar (but not as bad) bill in the House.

Though the amendment passed the Senate by a large margin, the Latino groups, farmworker advocates and labor unions have been working members of Congress to get them to understand how bad the Wyden amendment is. Also, Lamar Smith has sent a letter to Rogers asking that he oppose inclusion of this guestworker bill in the CJS conferenced bill. In addition, Gallegly sent a letter to Livingston (with 82 House signatories -- most, if not all, Republicans) also asking for this amendment to be excluded. According to Earl G. at Labor, it is likely that this amendment will not end up included in the conferenced bill.

The question is whether we think it would be a good idea for Maria E. to attend the Latino Summit and make a strong statement opposing the Wyden amendment. Maria returns this week-end, and may want our advice on this. Thanks.

julie

*Immig - H2A***Talking Points:****Working Group on Foreign Agriculture Guest workers**

- **During this Congress important issues related to the stability of an agricultural workforce and the use of foreign agricultural guest workers have been raised by both grower and worker advocates.**
- **The Administration has initiated a series of administrative reforms in an effort to provide workers in a more predictable and timely manner, and to reduce paperwork requirements in obtaining H-2A workers.**
- **The purpose of the working group is to engage Members of Congress who have expressed an interest in pursuing substantive discussions with the Administration on agricultural workforce issues and to work to achieve consensus on reforms to the H-2A program that comport with core principles to assure that our policy benefits both agricultural producers and workers.**
- **The Administration understands the importance of assuring a stable and legal farm labor work force, and is also committed to providing appropriate worker protections for both domestic and foreign farm workers who are among the poorest and most vulnerable in our society.**
- **The working group will focus on issues of concern to both workers and growers and will work to develop consensus on alternatives that effectively address those concerns.**
- **If the working group is able to reach consensus on particular issues related to foreign guest workers, the Administration is committed to move forward to implement the reforms either through regulations or legislation.**