

Testimony of Bruce Goldstein, President, Farmworker Justice
United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections

September 13, 2011

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 lawful 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

¹ There 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/>.

² Findings 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>.

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-

³ Farmworker 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.

⁴ See 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/>.

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

⁵ Estimations 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%).

⁶ *Report 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>.

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 programs 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,

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

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

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

⁹ See 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.

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

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. ///

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