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"Regional Perspectives on Agricultural Guestworker Programs"

February 9, 2012

Written Testimony
Bruce Goldstein, President, Farmworker Justice
before the Judiciary Subcommittee on Immigration Policy and Enforcement
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Mr. Chairman and Members: Thank you for the opportunity to testify about proposals to address our nation's broken immigration system and solutions to ensure a productive, fairly-treated farm labor force. For thirty years, my organization, Farmworker Justice, 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. Since its inception, Farmworker Justice has monitored the H-2A program throughout the country and analyzed proposals for policy changes.

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. The majority of our nation's farmworkers lack work authorization.[1] 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. The consequences of this untenable situation are serious.

Farmworkers' incomes are very low. Poverty among farmworkers is more than double that experienced by other wage and salary workers.[2] Farm work is one of the most hazardous occupations in the country, with routine exposure to dangerous pesticides, arduous labor and extreme heat. Despite their occupational risks, 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 meet our legitimate demand for labor, most of the newly hired farmworkers have been undocumented. Still, legally authorized U.S. workers number at least 540,000-600,000 under the lowest estimates of the agricultural labor force.[3] Improving wages and working conditions, increasing farmworkers' legal protections, and implementing the other recommendations made by

[1] 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.

[2] *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/.

[3] Estimations based on assuming 70% 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%).

the Commission on Agricultural Workers and other observers over many years would help attract and retain US workers in the farm labor force.[4]

The inescapable reality is that undocumented workers constitute anywhere from 52% to 70% of the approximately 2 million[5] seasonal workers on our farms and ranches.[6] We all agree this situation is bad for workers, bad for employers and bad for the nation. Agriculture would collapse if the undocumented workers suddenly left or were deported. However, most are not leaving the U.S., and such mass deportations are not feasible. The H-2A temporary foreign agricultural worker program could provide an unlimited number of guestworker visas, as there is no maximum annual cap on H-2A visas, but it is not a reasonable or practical solution. Currently, the H-2A program only provides 3-5% of the total agricultural workforce. Even with less than 100,000 H-2A guestworkers annually, the Departments of Labor, Homeland Security and State need more resources to ensure that the H-2A program meets the needs of employers and workers and complies with the law. Even if it were desirable, the Government could not act rapidly enough to remove the undocumented immigrants and process tens of thousands of employers' applications for hundreds of thousands of H-2A guestworkers. If such efforts were made, employers would not have their experienced workforce to cultivate and harvest their crops and raise their livestock, and taxpayers would foot the bill for a vast waste of money.

There is an urgent need for Congressional action in response to increased deportations and other immigration enforcement, harsh anti-immigrant state laws, proposals for state-level foreign-worker visa programs, and proposals to mandate employers' use of the E-Verify system. The common-sense and moral solution on which many diverse constituencies agree is a program offering undocumented farmworkers the opportunity to earn legal immigration status. Such immigration reform should be accompanied by efforts to stabilize the farm labor force, including by ending discrimination in labor laws, improving wages and working conditions and modernizing labor relations in agriculture.

Regrettably, several Members of Congress refuse to embrace such workable and humane solutions. Representatives Lungren, Smith and Kingston have put forth proposals for new bureaucratic guestworker programs that would have high costs for American jobs and American society. None of the proposals would address the presence of the undocumented workforce and they would all subject both U.S. workers and foreign workers to low wages and harsh working

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[4] *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.

[5] 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 ttp://www.ers.usda.gov/Publications/ERR60/.

[6] 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.

conditions. The guestworker proposals are being offered as an apparent trade-off to obtain the support of the agricultural industry for mandatory employment verification legislation.

Through sharp cuts in wage rates and worker protections, the Lungren, Smith and Kingston guestworker proposals encourage employers to hire guestworkers instead of their current workforce, which includes hundreds of thousands of US workers. Once employers realized the availability of extremely cheap foreign labor through a program with little government oversight or other worker protections, they would realize the benefits they could attain by laying off their US workers and importing foreign workers instead. Many US workers could lose their jobs under the Smith, Lungren, and Kingston proposals. Because US workers are typically paid better than undocumented workers, the US workers would be the first workers to lose their jobs. Undocumented workers would likely be pushed further into marginalized jobs. This is especially ironic given Rep. Smith's long history of opposition to guestworker programs based on the very rationale that "[n]early every study shows that competition from cheap foreign labor undercuts the wages of American workers and legal immigrants. Rather than importing cheap foreign labor, we should increase wages and make these jobs more attractive to American workers."[7]

One critical protection for US workers competing against guestworkers for their jobs are the wage requirements. Wage protections are necessary to protect US workers in a guestworker program for several reasons: 1) because without them US workers would be competing against workers who would be willing to work for much lower wages than US workers due to the lower costs of living and lower earnings in their home countries; 2) due to the legal restrictions of the H-2A worker's visa status, they lack economic freedom to switch employers and consequently are unable to improve wages at H-2A employers; and 3) while an H-2A employer must offer at least the required wage rates under the H-2A program, the employer need not offer more than the minimum required wage required by the H-2A program even when there are U.S. workers available to accept the job if the wage rates were higher. A worker who asks for a higher wage rate can be deemed to be "unavailable for work" and the available job can be filled with a guest worker at the minimum required wage.

The three proposals would drastically slash the wage rates that would be offered to both the U.S. and foreign workers: Kingston's bill would only require employers to pay 115% of the minimum wage, while Smith's bill would cut wages by requiring employers to pay only the higher of the minimum wage or a misleading "prevailing wage" (the average wage received by the lowest-paid one-third of farmworkers in a geographic area, i.e., the 16th percentile). A similar definition under the Bush Administration resulted in wage cuts of $1 to $2 per hour depending on location, before Secretary Solis restored the wage formula that the Reagan Administration installed. Lungren's bill has no wage protections on the theory that workers would have market economic freedom in the form of portability; a fundamentally flawed assertion in a guestworker program where workers are indebted, fearful, and not able to exercise their theoretical mobility in a meaningful way. With such drastic wage cuts available through the guestworker proposals, employers would waste no time in jettisoning their expensive US workers and replacing them with cheap foreign labor.

[7] Website of Representative Lamar Smith, available at http://lamarsmith.house.gov/News/DocumentSingle.aspx?DocumentID=196423 (last visited 2/3/12).

All of these proposals would eliminate the principal mechanism to give U.S. workers a job preference at H-2A program employers. The "50% rule" requires H-2A employers to hire qualified U.S. workers who apply for work until the first half of the season has elapsed. Due to the hiring patterns of farmworkers and the nature of agricultural work, which often involves varying start times and a gradual development leading up to the peak season, it makes perfect sense to ensure that qualified job applicants are hired even after the first "official" day of work. However, even when long-standing employees arrive at the same time as in years past for the peak harvest period, these proposals allow employers to deny them their jobs. A 1986 Congressionally-mandated study concluded that the 50% rule served the purpose of protecting American jobs and did so with no significant burden to employers. The desire to hire cheap foreign workers instead of domestic workers is not a proper justification for ending the 50% rule.

The Smith and Lungren proposals also drastically limit the ability of US workers to learn about job opportunities by reducing the positive recruitment requirements which employers are required to meet to demonstrate that no US workers are available. Recent experience demonstrates that there are US workers are willing and able to perform agricultural work, although not in adequate numbers to replace the undocumented workforce nationally. In Florida this very year, one H-2A employer received large numbers of US workers in response to his H-2A job order, and even has a lengthy waiting list.

For those American workers lucky enough to find and keep their jobs under the Kingston, Smith and Lungren proposals, they would experience diminished working conditions and protections because of reduced government oversight. Kingston's bill shortens the timeframe for DOL to process H-2A applications and then provides for applications to be deemed approved if the Secretary is unable to meet the very tight timeframe. The Smith and Lungren proposals would reduce government oversight, creating a system in which employers simply promise to comply with required job terms and other requirements, with little if any repercussions for failing to meet program requirements. Attestation in a massive guestworker program would guarantee rampant violations of workers' rights with minimal government capacity to punish violators.

Smith and Lungren's 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.

All three proposals would expand qualifying agricultural work to include year-round agricultural jobs, such as dairy. The proposals require the workers, not the jobs, to be temporary. For decades the H-2 programs have focused on seasonal jobs based on the claimed difficulty of attracting U.S. workers to jobs that last less than one year and therefore yield less annual income than year-round jobs. All three proposals eliminate any requirement that the work be temporary and drastically expand the scope and basis for the guestworker program. Good, year-round jobs should be offered to U.S. workers on fair terms. If our immigration system is so broken that inadequate numbers of workers are available for year-round jobs, we should reform our immigration system to allow workers to immigrate to fill these jobs. Further, the proposal to supply temporary visas for year-round jobs would guarantee the long-term separation of families since the Smith and Lungren proposals specifically exclude visas for spouses and children of the guestworkers and visas for spouses and children under the H-2A program are rarely, if ever granted.

Under the current H-2A program, employers are required to provide housing for their H-2A workers and for US workers not within commuting distance. Lungren's proposal would not require any housing and Smith's and Kingston's proposals could have the same effect by allowing employers to provide housing vouchers that workers could use to pay for housing that they would themselves arrange. While the voucher provision makes it seem as if the workers will have access to housing, the voucher would be of little practical benefit to workers in agricultural localities due to a scarcity of seasonal, affordable and safe farmworker housing and the difficulties non-English-speaking workers from abroad would face trying to locate what little housing is available. Moreover, there is no guarantee that a landlord would accept housing vouchers.

Also problematic is the Smith bill's housing exemption for employers located near the U.S. borders. Employers may claim that their workers prefer to engage in cross-border commuting so as to live with their families, but if that is true, nothing under the H-2A program requires the employer to provide such workers with housing. By eliminating the housing requirement by the border, many workers who need housing will be deprived of it. The reality is that many of these workers have migrated long distances from the interior of Mexico to the border in search of jobs. Without housing, many workers will live in substandard conditions in the slums of the Mexican border towns or on the streets, the fields, or in ditches along the fields. Each morning they will have to get up long before dawn to make their way to a border crossing check point where they might have to wait for hours to cross. Once across the border they will have to wait for labor contractors' buses to pick them up for the trip to the fields, some of which are hours away. Some workers will have to pay these "raiteros" to transport them. The frequent crossings over the border also could attract the attention of Mexico's drug cartels, who might use the workers as mules for drugs or other illegal substances, or could even result in the trafficking of persons. This proposal would not only undermine the standards of U.S. farmworkers and take advantage of vulnerable guestworkers, but would also place agricultural employers in other geographic areas at a competitive disadvantage.

For decades, H-2A program employers have had to reimburse workers for their in-bound transportation costs after one-half of the season has elapsed and then pay for their travel home if they complete the season. The transportation benefit helps attract U.S. (and foreign) workers to the jobs, limits the out-of-pocket expenses of these low-wage workers (and enables them to pay the loans taken out for transportation costs), and helps ensure that that they leave the country at the end of the season. Lungren's proposal would not require any assistance with transportation expenses, even though several courts have determined that these costs are primarily for the benefit of the employer. Smith's bill would require only that employers pay for travel costs to and from the place from which the worker was approved to enter the U.S., which could be a U.S. consulate hundreds of miles from the worker's home. Further, Smith seeks to overrule a U.S. Court of Appeals decision in *Arriaga v. Florida Pacific Farms*, regarding the Fair Labor Standards Act. These proposed changes would essentially allow guestworker employers to reduce the workers' wages below the federal minimum wage by imposing on the workers the obligation to absorb visa, transportation and other costs related to entering the U.S. This provision would drive foreign workers further into debt and make them even more vulnerable to exploitation.

Finally, the Smith and Kingston proposals would limit the ability of workers to learn about their rights and would limit their access to justice if workplace problems arose. The bills would only allow Legal Services Corporation's legal aid programs to represent guestworkers in the country at the time of legal assistance and would not allow legal services lawyers and outreach

workers to enter employer property (where many workers may be housed) unless they have a pre-arranged appointment with a specific worker. The goal is to limit worker access to representation as most workers will be too fearful to set up such appointments. Smith's bill would further limit workers' access to justice by allowing employers to impose mandatory arbitration and mediation requirements on H-2C workers and even holding any worker participating in such arbitration or mediation responsible for half of the costs.

While Lungren, Smith and Kingston's proposals differ in some ways, each would undercut essential protections designed to preserve US jobs for US workers and intended to prevent adverse effects on their wages and working conditions. Even while harming workers, these proposals do nothing to stabilize the farm labor workforce. 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 solution to the farm labor crisis is not E-Verify accompanied by massive importations of new foreign workers. The solution must be comprehensive and must offer the current experienced workforce an opportunity to earn permanent immigration status.

The proposals to remove labor protections, lower wages and reduce government oversight of the H-2A program contradict the appropriate policy needs of this nation. 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 rife with abuses that harm U.S. and foreign workers: 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.[8]

Abuses continue to occur in the H-2A program because it is inherently flawed. One fundamental flaw in the H-2A program is the worker's tie to a single employer: H-2A workers can only work for the one employer that obtained their visa. The workers do not have a right to seek a job at another employer if they are dissatisfied with or mistreated by that employer. If the worker leaves the job, or is fired, the worker must return to his home country. In addition, it is the employer who decides whether the worker will be offered the opportunity to obtain a visa in the next year. Under these constraints, most guestworkers are extremely reluctant to complain about their treatment on the job and are very vulnerable to abuse. In addition, the employers can extract very high levels of productivity from these vulnerable guestworkers without paying them higher wages or offering special incentives.

The H-2A workers' restricted, "non-immigrant" status not only deprives them of economic bargaining power but also prevents them from acquiring political power. No matter how many years an H-2A worker returns for agricultural work, he is not entitled to earn immigration status. Guestworkers never obtain the right to remain in the U.S., become citizens, or exercise the right to vote. The political powerlessness of the temporary foreign workers in comparison to their employers contributes to worker vulnerability and an inability to persuade government officials to protect them from abuse. Government officials represent the interests of citizens, not guestworkers. Thus far, few H-2A workers have been able to join unions. The H-2A program's restrictions are not

[8] 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. s*ee also* Southern Poverty Law Center, "Close to Slavery," 2007.

consistent with our nation's commitment to economic and political freedom. Ours is a nation of immigrants, not a nation of guestworkers.

H-2A employers also have financial incentives to hire foreign guestworkers rather than U.S. workers. Guestworkers are about 10% cheaper than a US worker because 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. Another incentive to hire H-2A workers is that while recruiting in foreign countries, employers can and do select workers based on ethnicity, age, gender, and race, which is far more difficult to do inside the United States. "[D]iscrimination based on national origin, race, age, disability and gender is deeply entrenched in the H-2 guestworker system."[9] 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.

We commend DOL for reversing the harmful changes put in place at the end of the Bush Administration. Despite employer pushback and complaints, DOL must continue to increase its oversight and enforcement of the H-2A program. 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.

We've been down this road before: guestworker proposals cannot solve the needs of our nation's farm labor system. Let's not repeat failed history. There are sensible policy solutions to provide the nation's agricultural sector with a stable, legal farm labor force that is treated fairly. Representative Berman has introduced a bill, the Agricultural Labor Market Reform Act of 2011, that offers a meaningful solution to the needs of agricultural employers, farmworkers and the nation. The bill would establish an earned legalization program under which current experienced undocumented farmworkers in the U.S. who meet stringent requirements are given temporary permission to work in agriculture for three to five years and the opportunity to earn permanent immigration status. Immediate family members in the U.S. also would be eligible to apply for immigration status. Along with the legalization program, Berman´s bill would take steps to prohibit the employment of illegal aliens through reforms to the Migrant and Seasonal Agricultural Workers Protection Act that would target the worst offenders, farm labor contractors and would require them to participate in E-Verify. The bill would maintain important worker protections in the H-2A guestworker program with some reforms aimed at leveling the playing field for U.S. workers, who are currently at a disadvantage with H-2A workers. The bill would remove incentives to prefer H-2A guest workers over Americans in two ways: by removing the FICA and FUTA tax exemptions employers currently enjoy when hiring H-2A workers (a savings of about 10% per H-2A workers hired) and by ensuring that employers are not able to escape certain legal obligations by hiring H-2A workers, such as transportation safety measures. Berman's bill also would address and remedy some of the underlying problems of our broken farm labor system by creating a trust fund for enhanced enforcement of labor standards in agriculture and for research and promotion of better labor management practices. Both the Agricultural Labor Market Reform Act and the long-standing joint grower-farmworker immigration compromise bill AgJOBS seek to stabilize our current farm labor system and improve wages and working conditions for farmworkers to bring to an end the rapid turn-over of farm labor jobs from one desperate newcomer to the next.

[9] Southern Poverty Law Center, "Close to Slavery," (2007) p. 34.

Congress should not get mired in guestworker program proposals that have been tried and rejected in the past. 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, as Rep. Berman's bill does. More than one million undocumented farmworkers are making U.S. agriculture productive. In fact, we have a positive trade balance in labor-intensive agriculture due to the value of the exports produced by farmworkers, but farmworkers are not sharing in their contribution to our economy. We need to stabilize the workforce and keep agriculture productive by allowing undocumented workers to obtain legal 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. ///