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H-2A AGRICULTURAL GUESTWORKER PROGRAM

Changes Could Improve Services to Employers and Better Protect Workers

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H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to discuss the ability of the H-2A agricultural guestworker program to meet the needs of the agricultural industry both today and in the event of sudden and widespread farm labor shortages. The H-2A program provides a way for U.S. agricultural employers to bring nonimmigrant foreign workers into the United States to perform seasonal agricultural work on a temporary basis when domestic workers are unavailable. During fiscal year 1996, agricultural employers used the H-2A program to bring in about 15,000 workers, less than 1 percent of the U.S. agricultural field workforce. During fiscal year 1997, the number of workers brought into the country under the program increased to almost 21,000, just over 1 percent of the total farm labor workforce.

In congressional deliberations on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, concerns surfaced about whether the act's increased constraints on the entry of foreign workers into the country would result in a major, widespread shortage of farm labor to meet the needs of agriculture. As a result, the Act required that GAO review the program.

Today, I would like to address these concerns by discussing (1) the likelihood of a widespread agricultural labor shortage and its impact on the need for nonimmigrant guestworkers and (2) the H-2A program's ability to meet the needs of agricultural employers while protecting domestic and foreign agricultural workers, both at present and if a significant number of nonimmigrant guestworkers is needed in the future. My statement is based primarily on our December 1997 report on this topic.¹ To obtain information for this report, we interviewed federal and state agency officials, agricultural employers and representatives of agricultural associations, H-2A and non-H-2A farmworkers and farm labor advocates throughout the country. We also collected and analyzed data from numerous sources including the Department of Labor, Immigration and Naturalization Service (INS), state employment services, and grower associations. In addition, we provided an opportunity for the Departments of Labor, State, Justice and Agriculture to comment on the report.

In summary, a sudden widespread farm labor shortage requiring the importation of large numbers of foreign workers is unlikely to occur in the

¹H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers (GAO/HEHS-98-20, Dec. 31, 1997).

near future. There appears to be no national agricultural labor shortage now, but localized labor shortages may exist for specific crops or geographical areas. Although many farmworkers—an estimated 600,000—are not legally authorized to work in the United States, INS does not expect its enforcement activities to significantly reduce the aggregate supply of farmworkers. INS expects limited impact from its enforcement activities because of the prevalence of fraudulently documented farmworkers and INS' competing enforcement priorities. In fiscal year 1996, less than 5 percent of the 4,600 INS worksite enforcement efforts were directed at agricultural workplaces. INS conducts enforcement efforts largely in response to complaints, and it receives few complaints about agricultural employers. INS officials in both field and headquarters positions stated unanimously that operational impediments prevented the agency from significantly reducing the number of unauthorized farmworkers. The prevalence of unauthorized and fraudulently documented farmworkers does, however, leave individual growers vulnerable to sudden labor shortages if INS does target its enforcement efforts on their establishments.

Although few agricultural employers seek workers through the H-2A program, those that do are generally successful in obtaining foreign agricultural workers on both a regular and an emergency basis. During fiscal year 1996 and the first 9 months of fiscal year 1997, Labor approved 99 percent of all H-2A applications. However, both employers and Labor officials have difficulty meeting time frames specified by law and regulation. And because Labor does not collect key program management information, it is unable to determine the extent and cause of missed timeframes. In addition, the multiple agencies and levels of government implementing the program may result in confusion for both employers and workers.

While INS enforcement efforts are unlikely to create a significant increase in demand for H-2A workers, we have recommended changes in program operations that could improve the ability of growers to obtain workers when needed—whether or not a nationwide labor shortage exists—and better protect the wages and working conditions of both domestic and foreign workers. These include reducing both the time required to process applications and the period of time the worker must be employed to qualify for a wage guarantee.

Background

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

Labor is also responsible for ensuring that agricultural employers comply with their contractual obligations to H-2A workers and for enforcing labor laws covering domestic workers, including the wage, housing, and transportation provisions of the Migrant and Seasonal Agricultural Worker Protection Act. For example, workers who complete 50 percent of the contract period are due reimbursement for transportation from the place of recruitment, while those who complete the entire contract are guaranteed work or wages for a minimum of three-quarters of the contract period and reimbursement for transportation home. Agricultural employers must provide the same minimum wages, benefits, and working conditions to H-2A workers that are provided to domestic workers employed in “corresponding employment.”

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

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

A widespread farm labor shortage does not appear to exist now and is unlikely in the near future. Although there is widespread agreement that a significant portion of the farm labor force is not legally authorized to work, INS enforcement activity is unlikely to generate significant farm labor shortages.

Although data limitations make the direct measurement of a labor shortage difficult, our own analysis suggests, and many farm labor experts, government officials, and grower and farm labor advocates agree, that a widespread farm labor shortage has not occurred in recent years and does not now appear to exist. Our conclusion is based on the combination of (1) the large number of illegal immigrant farmworkers granted amnesty in the 1980's, (2) persistently high unemployment rates in key agricultural areas, (3) state and federal designations of agricultural areas as labor surplus areas, (4) stagnant or declining farm labor wage rates as adjusted for inflation, and (5) continued investments by growers in agricultural production.² For example, our analysis of the monthly and annual unemployment rates of 20 large agricultural counties—those that contain large amounts of fruit, tree nut, and vegetable production in dollar value—found that 13 counties maintained annual double-digit unemployment rates, and 19 had rates above the national average during 1994 through 1996. As of June 1997, 11 counties still exhibited monthly unemployment rates double the national average of 5.2 percent and 15 of the 20 counties had rates at least 2 percentage points higher than the national rate. Only two of the counties had unemployment rates below the June 1997 national average. These high unemployment rates generally existed over the entire year, even during peak agricultural periods. The lack of evidence of widespread farm labor shortages, however, does not preclude the existence or potential for more localized shortages in a specific crop or remote geographic area.

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

We estimate that approximately 600,000 farmworkers in the United States lack legal authorization to work. However, INS officials around the country were unanimous in their statements that they do not expect their enforcement efforts to have any general impact on the supply of farm labor either nationally or regionally, given the large number of fraudulently

²See H-2A Agricultural Guestworker Program: Response to Additional Questions (GAO/HEHS-98-120R, Apr. 2, 1998), p. 4.

documented farmworkers and competing enforcement priorities. Most of INS' investigation resources are focused on identifying aliens who have committed criminal acts, including violent criminal alien gang and drug-related activity, and on detecting and deterring fraud and smuggling. In fiscal year 1996, 304 INS staff years were devoted to noncriminal investigations, including worksite enforcement for all industries—an average of about 6 INS staff years per state. Fewer than 5 percent of the 4,600 investigations completed in fiscal year 1996 involved employers in agricultural production or services. Furthermore, fewer than 700 workers, about 4 percent of all employees at those worksites, were arrested during INS enforcement operations at these worksites. INS officials do not expect a significant increase in enforcement efforts directed at agriculture in the near future.

The prevalence of such a large number of unauthorized and fraudulently documented farmworkers leaves individual employers vulnerable to sudden labor shortages if INS targeted enforcement efforts at their individual establishments. Although INS efforts are underway to improve employers' ability to identify fraudulent documents, these efforts are still in the early stages and are not likely to have any significant impact on the availability of illegally documented farmworkers in the near future. The degree to which these initiatives, if fully implemented, would affect the number of unauthorized workers and the supply of agricultural workers is unknown; full implementation would require legislative action.

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

Agricultural Employers Receive Almost All Workers Requested but Program Could Be Improved

Labor currently certifies most of the workers that agricultural employers request through the H-2A program, and agency officials reported that they could handle a major increase in program workload with additional resources. However, Labor does not always process applications in a timely manner and the lack of data makes it difficult to monitor timeliness and oversee the program. Many employers were late filing applications for certification with Labor partly due to the difficulty in estimating 60 days in advance when workers will be needed. The multiple agencies involved in the H-2A program may cause confusion for program participants. The INS petition approval process also adds time and cost to the process without adding significant value. In addition, even though there are regulations to protect workers, these provisions are difficult to enforce.

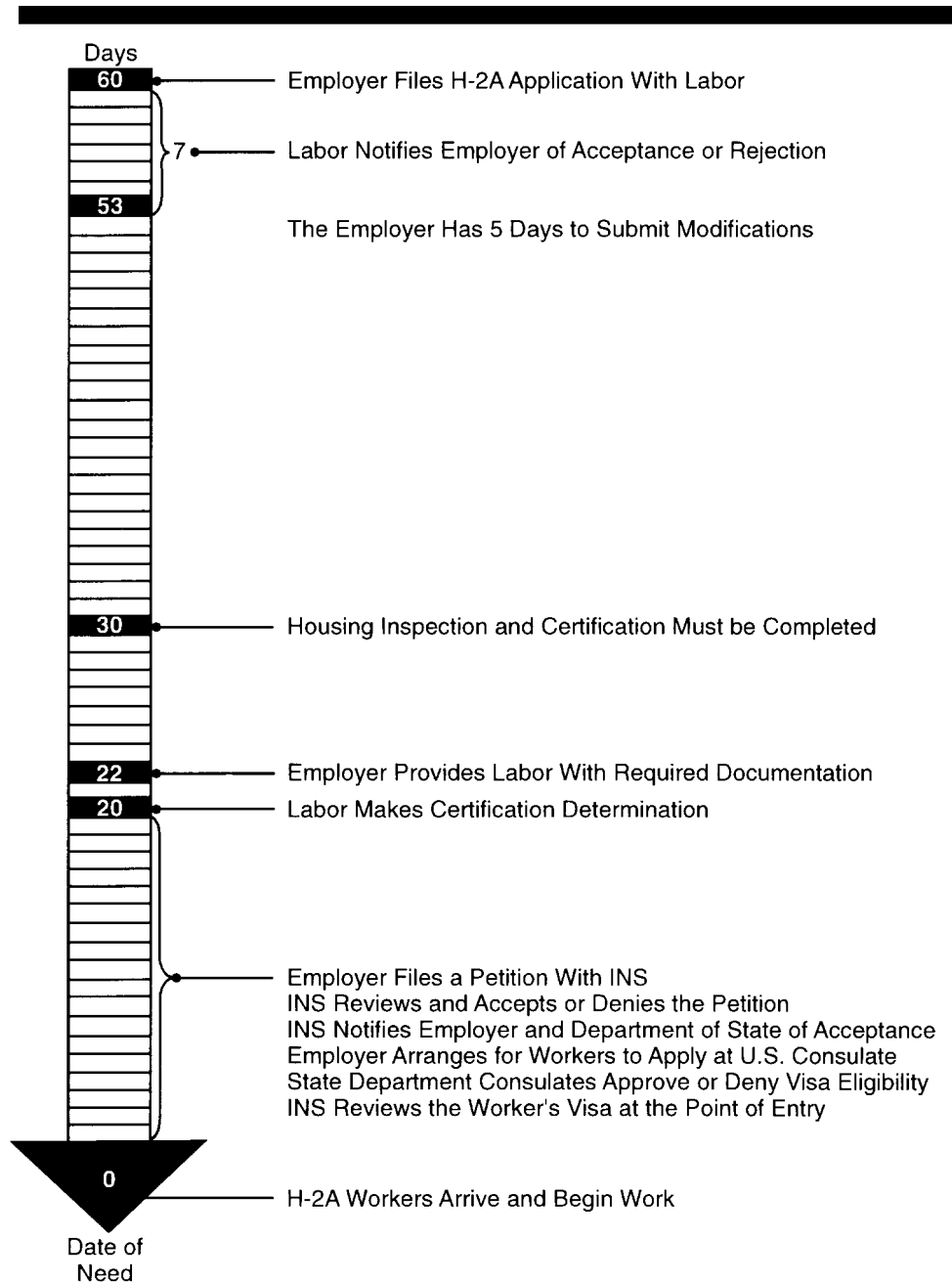
Although Employers Obtain
H-2A Workers, Applications Are
Not Processed in a Timely
Manner

Agricultural employers receive certification from Labor for most of the workers they request through the H-2A program on both a regular and an emergency basis, regardless of the skill level required. Labor's Employment and Training Administration issued certifications for 99 percent of the 3,689 applications filed nationwide from October 1, 1995 through June 30, 1997, and certified all but 11 percent of the 41,549 job openings requested on these applications.

The H-2A application process sets very specific time requirements that the employer and Labor must meet, as shown in figure 1.

**H-2A Agricultural Guestworker Program:
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**Figure 1: Time Requirements for
Applying for Agricultural Workers
Under the H-2A Program**



These statutory and regulatory deadlines include a requirement that employers file an application for workers at least 60 days before they are needed and that Labor issue a decision on certification of a labor shortage at least 20 days before the date of need. However, Labor does not always process applications on time, which makes it difficult to ensure that employers will be able to get workers when they need them. Our analysis showed that in fiscal year 1996, at least one-third of Labor's certifications missed the statutory 20-day deadline, limiting the time available to process visas through INS and the State Department. Although no data were available on how many employers failed to obtain the required workers by the date of need, we identified some applications that were not even certified by Labor until after the date of need.

**Lack of Data Makes It Difficult
to Monitor Timeliness and
Oversee Program**

Labor does not collect data necessary to determine the extent and cause of its failure to meet regulatory and statutory deadlines for both regular and emergency applications. A program official told us that while the agency does not maintain data on timeliness, he will hear from agricultural employers about any missed deadlines. Without adequate data, we could not corroborate Labor's explanation that the delay in meeting the certification deadline was due to reasons outside the control of the office responsible for certifications, such as the time required to inspect farmworker housing and employers' failure to provide in a timely manner required documentation of efforts to recruit domestic workers and of health care coverage.

**INS Involvement in Petition
Approval Adds Little Value to
Process**

After receiving Labor's certification, INS must approve an employer's petition for H-2A visas before workers can apply to the State Department for visas, a procedure that can add up to 3 weeks to processing time. INS officials agreed, however, that the INS petition approval process adds little value to the process because petitions for H-2A visas, unlike other visa petitions, do not generally identify individual workers. Therefore, INS examiners only check to make sure that Labor has issued a certification and that the employer has submitted the correct fees for the petition. Moreover, this verification that Labor has issued a certification is done again by the State Department, according to officials at the two consulates—Monterrey and Hermosillo, Mexico—that process almost all H-2A visas.

**Requirement to Request
Workers 60 Days in Advance Is
Problematic**

Even if all processing deadlines are met, agricultural employers, their advocates, and state employment officials told us that the workers may not be available when needed. This is because the weather and other factors make it hard to estimate 60 days in advance when workers will be

needed. This is especially true for crops with short harvest periods. This difficulty may help explain why many employers were late filing applications for certification with Labor: 42 percent of all applications in fiscal year 1996 were filed late. The 60-day deadline may also encourage employers to estimate the earliest possible date, which can have negative consequences for workers who arrive before the employer has work for them. They are left with no income until work is available.

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

Employers, advocates, and agency officials expressed frustration about the poor information on H-2A procedures. Labor's handbook on the H-2A Labor certification process includes information that is outdated, hard to understand, and incomplete. Program participants can also be confused by the multiple agencies and levels of government involved in the H-2A program, which fosters redundant agency oversight and the inability to determine compliance with program requirements. In some states, for example, employer-provided farmworker housing is subject to similar federal, state, and local housing regulations and must be inspected by multiple agencies. Some redundancy may also result in employers misunderstanding program requirements. Employers and employer and labor advocates in California, for example, told us that tents for farmworkers were effectively prohibited because they had to be heated and cooled. However, both federal and state housing officials said that tents are permitted and that air-conditioning is not required.

**Worker Protection Provisions
Are Difficult to Enforce**

Violations of H-2A worker protection provisions, including the requirement that foreign guestworkers be guaranteed wages equivalent to at least three-quarters of the amount specified for the entire contract period, are difficult to identify and enforce. H-2A guestworkers may be less aware of U.S. laws and protections than domestic workers, and they are unlikely to complain about worker protection violations, such as the three-quarter guarantee, fearing they will lose their jobs or will not be hired in the future. Labor, for example, received no complaints from workers employed by H-2A employers in fiscal year 1996 even though our analysis suggests it is likely that some workers did not receive their guaranteed wages. In general, Labor officials reported that it is hard to ensure that abusive employers do not participate in the H-2A program.

Labor officials also noted operational impediments in enforcing these protections. For example, the three-quarter guarantee is only applicable at the end of the contract period, and H-2A workers must leave the country soon after the contract ends. Labor officials said that monitoring the three-quarter guarantee is difficult because they cannot interview workers

after they return to Mexico to confirm their work hours and earnings. These enforcement difficulties create an incentive for less scrupulous employers to request contract periods longer than necessary: If workers leave the worksite before the contract period ends, the employer is not obligated to honor the three-quarter guarantee or pay for the workers' transportation home. And if a worker abandons the contract, it can be very difficult to determine whether he or she has left the country or is instead remaining and taking jobs from domestic workers.

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

Agencies Could Handle a Major Increase in Program Workload With Additional Resources

In the unlikely event of a national farm labor shortage, Labor, INS, and state employment service officials told us they could handle an unanticipated, major, short-term increase in program workload. In the event of a significant, sustained national increase in the demand for agricultural guestworkers, however, Labor and INS officials agreed that they would need additional resources to effectively process the increased number of applications. Although the administration's Domestic Policy Council has met with officials from Labor, INS, USDA, and State to address this issue, no proposals are currently available for review.

Conclusions and Recommendations

Given the condition of the agricultural labor market and INS' current enforcement resources and priorities, the likelihood of significant labor shortages, and the resulting massive increases in the demand for guestworkers, appears small. However, the potential for localized labor shortages for a specific crop or geographical area remains. In addition, individual employers that are, for any reason, the subject of an INS enforcement action could abruptly lose a large percentage of their workforce and need replacements quickly. For those employers who need the H-2A program, it is extremely important that it meet their needs fully and efficiently. At the same time, the program is intended to protect the

working conditions of both H-2A workers and the domestic workforce. Our work identified opportunities to improve both aspects of the program. As a result, we recommended changes that would improve services to employers and better protect workers.

Our recommendations were addressed to the Congress, the Attorney General, and the Secretary of Labor. These recommended actions would improve service to employers by shortening the application processing time from 60 days to 45 days. This shorter time period could be met by reducing the number of agencies involved from three to two—removing INS from the petition approval process—and by Labor’s more closely monitoring its performance in meeting deadlines. The recommendations also addressed protecting workers in several ways. First, the overall processing time would be reduced without decreasing the number of days allowed for recruitment of domestic workers prior to certification of a labor shortage. Second, we recommended better protecting H-2A workers by extending to them the same guarantee of first-week wages that now applies to domestic workers in corresponding employment. We also recommended revising the regulations regarding the three-quarter wage guarantee to remove the incentive to overestimate the contract period. Other recommendations we made would improve service to both employers and workers by providing them better information about the program and consolidating enforcement responsibilities within Labor.

Although the H-2A program is currently used by a very small percentage of all agricultural employers and brings in a very small percentage of the total farm labor work workforce, it is important that the program operate effectively to meet the needs of employers and protect workers. We believe the changes we have recommended will help move the program toward those goals.

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

Related GAO Products

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

H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers ([GAO/HEHS-98-20](#), Dec. 31, 1997).

Illegal Immigration: Southwest Border Strategy Results Inconclusive; More Evaluation Needed ([GAO/GGD-98-21](#), Dec. 11, 1997).

Passports and Visas: Status of Efforts to Reduce Fraud ([GAO/NSIAD-96-99](#), May 9, 1996).

Border Patrol: Staffing and Enforcement Activities ([GAO/GGD-96-65](#), Mar. 11, 1996).

Immigration and the Labor Market: Nonimmigrant Alien Workers in the United States ([GAO/PEMD-92-17](#), Apr. 28, 1992).

The H-2A Program: Protections for U.S. Farmworkers ([GAO/PEMD-89-3](#), Oct. 21, 1988).

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