

## Agricultural Outlook Forum 2000

### “The Future of Agricultural Labor”

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on behalf of the  
National Council of Agricultural Employers (NCAE)**

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We appreciate the opportunity to present on behalf of the National Council of Agricultural Employers a statement on the future of agricultural labor and the public policy issues related to the need for an adequate legal workforce to meet the needs of America’s farmers and ranchers. Agriculture currently has a shortage of legal workers. As a result, NCAE believes legislative action is necessary to provide legal status to the current agricultural workforce and to reform the H-2A alien agricultural worker program.

The National Council of Agricultural Employers (NCAE) is a Washington, D.C. based national association representing growers and agricultural organizations on agricultural labor and employment issues. NCAE’s membership includes agricultural employers in fifty states who employ approximately 75 percent of the nation’s hired farm workforce. Its members include growers, farm cooperatives, packers, processors and agricultural associations. NCAE was actively involved in the legislative process that resulted in the enactment of the Immigration Reform and Control Act (IRCA) of 1986. NCAE’s representation of agricultural employers gives it the background and experience to provide meaningful comments and insights into issues concerning immigration policy and how it affects the employment practices of its members’ businesses and the availability of an adequate agricultural labor supply.

#### **Why is a program for the legal employment of alien agricultural workers needed?**

While the United States agricultural industry is overwhelmingly an industry of family farms and small businesses, it is also heavily dependent on hired labor. More than 600,000 farms hire some labor during any given year. Hired labor accounts, on average, for about \$1 of every \$8 of farm production expenses. In the labor intensive fruit, vegetable and horticultural sectors, hired labor costs average 25 to 35 percent of total production costs, and in some individual commodities the percentage is much higher.

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Even in labor intensive commodities, however, most of the production processes are mechanized. Typically the farm family and perhaps a few hired workers do all the farm work most of the year. But large numbers of hired workers are needed for short periods to perform certain very labor intensive tasks such as harvesting, thinning or pruning. In many crops these labor intensive tasks, particularly harvesting, must be performed during very brief windows of opportunity, the timing of which can not be predicted with precision and which is beyond growers' control. The availability of sufficient labor at the right time to perform these labor intensive functions can determine whether or not the farm produces a saleable product for that growing season.

The United States has some of the best climatic and natural resources in the world for agricultural production, and especially for the production of labor intensive fruits, vegetables and horticultural crops. In a world economy where all resources, including labor, were mobile and there were no trade barriers so that all countries could specialize in those commodities in which they have a comparative advantage, the North American continent would be, as it in fact is, one of the major world producers of agricultural commodities, including fruits, vegetables and horticultural specialties.

During the last several decades, markets for labor intensive commodities have expanded dramatically in the United States and throughout the world. This dramatic expansion has resulted from a number of factors, including technological developments in transportation and storage, increasing incomes both in the United States and worldwide, and changes in consumers tastes and preferences which favor fruits and vegetables in the diet. National markets for labor intensive commodities, once protected by trade barriers and the perishability of the commodities themselves, have now become global markets, due to technological improvements and the strong drive for freer trade that has occurred over the past two decades.

Although it has been little regarded in policy circles, U.S. farmers have participated fully in the dramatic growth in domestic and world markets for labor intensive agricultural commodities. U.S. farm receipts from fruit and horticultural specialties have more than doubled, and from vegetables more than tripled, since 1980. Labor intensive commodities are the fastest growing sector of U.S. agriculture. At the same time, agricultural labor productivity has also continued to improve. As a result, while production of labor intensive commodities has expanded dramatically over the past two decades, average hired farm employment has declined by about one quarter. But the expansion of labor intensive agriculture has created tens of thousands of new nonfarm jobs for U.S. workers in the upstream and downstream occupations that support the production and handling of farm products.

Aliens have always been a significant source of agricultural labor in the United States. In particular, labor from Mexico has supported the development of irrigated agriculture in the western states from the inception of the industry. As the U.S. economy has expanded, generating millions of new job opportunities, and as domestic farm workers have been freed from the necessity to migrate by the extension of unemployment insurance to agricultural

workers in 1976, and the federal government has spent billions of dollars to settle domestic migratory farm workers out of the migrant stream and train them for permanent jobs in their home communities, domestic farmworkers have moved out of the hired agricultural work force, especially the migrant work force,. These domestic workers have been replaced by alien workers, largely from Mexico, central America and the Caribbean.

As a result, the U.S. agricultural work force has become increasingly alien and increasingly undocumented. The U.S. Department of Labor's National Agricultural Worker Survey (NAWS) in 1997 reported that 36 percent of seasonal agricultural workers working in the United States self-identified as not authorized to work in the United States. This was an increase from only about 12 percent a decade earlier. More than 70 percent of the new seasonal agricultural labor force entrants in the 1997 NAWS report self identified as not authorized to work. We understand that the new NAWS survey, due out shortly, will show that more than half of the seasonal agricultural work force is not authorized to work in the United States.

Throughout this period there has also been a legal alien agricultural worker admission program. This program was enacted as the H-2 program in the Immigration and Nationality Act of 1952. In 1956 Congress attempted to streamline the program and redesignated it H-2A. In recent years use of the H-2A program has declined to a low of approximately 15,000 workers annually, although in the past two years the number of admissions has increased substantially and will probably exceed 30,000 workers this year.

The H-2A program has been used principally on the east coast in fruit, vegetables, tobacco and, until recently, sugar cane. The program's structure and requirements evolved from government-to-government treaty programs which preceded it. Over the years the program has become encrusted with regulations promulgated by the Department of Labor and adverse legal decisions generated by opponents of the program which have rendered it unworkable and uneconomic for many agricultural employers who face labor shortages. Now that government policy is eliminating the illegal alien work force, many growers are caught between an unworkable and uneconomical H-2A program and the prospect of insufficient labor to operate their businesses.

The illegal alien seasonal agricultural work force in the United States consists of two groups. Some are aliens who have permanently immigrated to the United States and have found employment in agriculture. Typically these permanent immigrant illegal aliens move into nonagricultural industries after they become settled in the United States. The other component of the illegal alien seasonal agricultural work force is nonimmigrant migrant farm workers who have homes and families in Mexico. Many of them are small peasant farmers. The adult workers from these families, usually males, migrate seasonally to the United States during the summer months to do agricultural work. Anecdotal evidence suggests that until recently the number of such migrant illegal alien farmworkers working was substantial. Now, as a result of increasingly effective immigration control policies, some of these migrants are finding it

necessary to remain in the United States during the off season for fear that they will not be able to get back in or because of the high cost of doing so, while many others are finding it impractical to continue their annual migration and are remaining in Mexico.

Congressional efforts to control illegal immigration began with the landmark Immigration Control and Reform Act (IRCA) of 1986. The theory of IRCA was to discourage illegal immigration by requiring employers to see documents evidencing a legal right to work in the United States, and thereby removing the “economic magnet” to illegal immigration. It did not work for at least three reasons. One was that one of the motives for illegal immigration to the U.S. was not simply to better one’s welfare, but to survive, literally and figuratively. This survival drive overwhelmed any fear of employer sanctions. The second was that Congressional concern about invasion of privacy and big brotherism resulted in an employment documentation process that was so compromised that it was easily evaded by document counterfeiting. The third was that a serious effort to enforce IRCA, including the provisions against document counterfeiting, was never mounted. The result was that IRCA had little impact on the volume of illegal immigration, and a perverse impact on the hiring process. Whereas previously an employer who suspected a prospective worker was illegal may have been willing to risk refusing to hire that worker, with the discrimination provision of IRCA an employer ran great risks in refusing to hire any worker who had genuine appearing documents, even if the employer suspected the worker was illegal.

With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IRRIRA) in 1996, Congress recognized the failure of IRCA. In IRRIRA Congress decided to test the conventional wisdom that it was impossible to control illegal immigration at the border by vastly augmenting the resources and personnel of the INS for border enforcement. The resources for interior enforcement of employer sanctions provisions were also augmented. The result has clearly been to make the process of illegal border crossing more expensive and dangerous. The anecdotal evidence from farm labor contractors and agricultural employers across the United States is that many prospective border crossers, especially migrant farmworkers and prospective migrant farmworkers, have been unable to cross the border or have made the calculation that the cost of doing so is too high based on their prospective earnings in the U.S. We have received reports from all regions of the United States of reduced numbers of workers and short crews, and this has been one of the major factors leading to the labor shortages that were observed in the 1997 season and to an even greater degree in the 1998 season. As INS continues to ramp up its border enforcement personnel, these shortages appear to be becoming more and more severe, and we expect continue significant shortages and crop losses in some crops and some regions.

Increased border enforcement has also had a perverse effect. It apparently has induced some alien farm workers, who in the past crossed the border illegally on a seasonal basis to work in the United States during the agricultural season, to remain in the United States during the off season for fear that they would not be able to get back in the next year. Some of these workers eventually try to smuggle their families in to join them. Many of these workers

would prefer to maintain their homes and families in Mexico and work seasonally in the United States, but current immigration policies make this an unattractive option.

IRRIRA also set in motion the testing of a process which many believe is the only way to effectively control the employment of illegal aliens. IRRIRA established a program of pilot projects for verification of the authenticity of employment authorization documents at the time of hire. These projects are about midway through a 4 year pilot phase. Presumably, at the end of that time Congress will revisit the question of requiring mandatory document verification at the time of hire. If and when this happens, there will be a real crisis in agriculture, given the fact that upwards of 60 to 70 percent of the industry's seasonal work force apparently has fraudulent documents.

In addition to the increasing effectiveness of border enforcement activities, additional INS resources for enforcement of employer sanctions is increasing the frequency of audits of I-9 forms. The I-9 form is the document completed by an employer and employee at the time of hire on which the employer records the employment verification documents the employee offers to verify the legal right to work in the United States. Employers are required to accept the documents offered by the worker if they reasonably appear on their face to be genuine, a test which virtually all documents meet. However, when INS does an audit of the employer's I-9 forms, the INS checks the authenticity of the employment authorization documents against government data bases, something it is precluded by case law and INS policy from doing at the request of an employer. At the conclusion of the audit, the employer receives a list from the INS of the workers whose documents have been determined to be invalid. Frequently, INS audits of agricultural employers reveal that 60 to 70 percent of seasonal agricultural workers have provided fraudulent documents. The employer is then required to dismiss each employee on the list who cannot provide a valid employment authorization document, something few can do.

Independently of the effort to improve immigration control, other forces are also affecting the agricultural work place. The Social Security Administration (SSA) is under a Congressional mandate to reduce the amount of wage reporting to non-existent social security accounts. Through its Enumeration Verification System (EVS), the Social Security Administration is now checking employers' tax filing electronically within a matter of days or weeks after they are filed to match names and social security numbers reported by employers with those in the SSA data base. Employers receive lists of mismatches with instructions to "correct the mistakes in reporting". Of course, in most cases the mismatch is not a result of a mistake in reporting, but a fraudulent number. When the employer engages the employee to "correct the mistake" the employee disappears.

It is not uncommon for employers to receive lists of mismatches from the SSA containing 50 percent or more of the names which the employer reported to the SSA. Confronting the employees on these lists can have devastating effects on an employer's work force. On the other hand, employers are concerned about their future liability under the

employer sanctions provisions if they do not act on the SSA lists. The existence of lists from the SSA that the employer had allegedly not acted upon were cited in a recent INS prosecution of an agricultural employer for knowingly employing illegal aliens.

While the incidence of INS I-9 audits is still relatively low, very large numbers of agricultural employers are receiving lists of mismatched numbers from the SSA. Thus many agricultural employers are having to confront for the first time the reality of the legal status of their work force. Both the I-9 audits and the SSA verification program are having a churning effect on the agricultural work force. Farmworkers with fraudulent documents are rarely picked up and removed. Instead the employer is required to dismiss them. In effect they are being chased from farmer to farmer as their employers receive SSA reports or are audited by the INS.

Increased border enforcement, increased interior enforcement and increased SSA verification activity have led to reductions in labor availability and destabilization of the agricultural work force. These trends will continue. The increase in border enforcement personnel authorized by IRRIRA will not be complete until FY 2002. The SSA plans to continue lowering its threshold for rejection of employer tax returns due to name/number mismatches. These factors, coupled with the extraordinarily high levels of nonagricultural employment, have resulted in increasing frequency of farm labor shortages and crop losses. The problem is rapidly reaching crisis proportions, and could easily do so in the 2000 growing season.

Some opponents of an alien agricultural worker program argue that a program is not needed because employer sanctions cannot be effectively enforced no matter what the government tries to do. The implication of this argument is that employers should endure the uncertainties and potential economic catastrophe of losing a workforce and workers should continue to endure the uncertainties of being chased from job to job on a moment's notice. We find such reasoning unacceptable. It is an argument for the status quo, which all agree is unacceptable. Furthermore, it is unacceptable to refuse to address one public policy problem on the grounds that another accepted and enacted public policy will be ineffective. We must honestly face the issues that our policy of immigration control and employer sanctions confronts us with. We believe that calls for a workable alien agricultural worker program.

### **Are there viable alternatives to an alien agricultural worker program?**

Opponents of the employment of an alien agricultural worker program suggest there are other ways to address the problem that would result from the removal of the illegal alien agricultural work force than the legal admission of alien agricultural workers.

One approach that is suggested is that agricultural employers should be "left to compete in the labor market just like other employers have to do". Under this scenario there would be no alien guestworkers. To secure legal workers and remain in business, agricultural employers

would attract sufficient workers away from competing nonagricultural employers by raising wages and benefits. Those who could not afford to compete would go out of business or move their production outside the United States. Meanwhile, according to this scenario, those domestic persons remaining in farm work would enjoy higher wages and improved working conditions.

There are several observations one must make about this “solution”.

No informed person seriously contends that wages, benefits and working conditions in seasonal agricultural jobs can be raised sufficiently to attract workers away from their permanent nonagricultural jobs in the numbers needed to replace the illegal alien agricultural work force and maintain the economic competitiveness of U.S. producers. Thus this scenario predicates that U.S. agricultural production would decline. In fact, given that the U.S. hired agricultural work force is, by most estimates, about 70 percent illegal, it would decline dramatically.

Seasonal farm jobs have attributes which make them inherently uncompetitive with nonfarm work. First and foremost is that they are seasonal. Many workers who could do seasonal farm work accepted less than the average field and livestock worker earnings of \$7.22 per hour in 1999 because they preferred the stability of a permanent job. Secondly, many seasonal farm jobs are located in rural areas away from centers of population. Furthermore, to extend the period of employment, workers must work at several such jobs in different areas. That is, they must become migrants. It is highly unlikely that many U.S. workers would be willing to become migrant farm workers at any wage, or for that matter that, as a matter of public policy, we would want to encourage them to do so. In fact, the U.S. government has spent billions of dollars over the past several decades attempting to settle domestic workers out of the migratory stream. The success of these efforts is one of the factors that has led to the expansion in illegal alien employment. In addition to seasonality and migrancy, most farm jobs are subject to the vicissitudes of weather, both hot and cold, and require physical strength and stamina. Thus it is highly unlikely that a significant domestic worker response would result even from substantial increases in wages and benefits for seasonal farm work.

However, substantial increases in current U.S. farmworker wages and benefits can not occur for economic reasons. U.S. growers are in competition in the markets for most agricultural commodities, including most labor intensive commodities, with actual and potential growers around the globe. Since hired labor constitutes approximately 35 percent of total production costs of labor intensive agricultural commodities, and 1 in 8 dollars of production costs for agricultural commodities generally, substantial increases in wage and/or benefit costs will have a substantial impact on growers’ over-all production costs. U.S. growers are in an economically competitive equilibrium with foreign producers at approximately current production costs. Growers with substantially higher costs can not compete. If U.S. producers’ production costs are forced up by, for example, restricting the supply of labor, U.S. production will become uncompetitive in world markets (including domestic markets in which foreign

producers compete). U.S. producers will begin to be forced out of business. In fact, U.S. producers will continue to be forced out of business until the competition for domestic farmworkers has diminished to the point where the remaining U.S. producers' production costs are approximately at current global equilibrium levels. The end result of this process will be that domestic farmworker wages and working conditions (and the production costs of surviving producers) are at approximately current levels and the volume of domestic production has declined sufficiently that there is no longer upward pressure on domestic worker wages.

These same global economic forces, of course, affect all businesses. But nonagricultural employers have some options for responding to domestic labor shortages that agricultural employers do not have. Many nonagricultural employers can "foreign source" the labor intensive components of their product or service without losing the good jobs. Since agricultural production is tied to the land, the labor intensive functions of the agricultural production process cannot be foreign-sourced. We cannot, for example, send the harvesting process or the thinning process overseas. Either the entire product is grown, harvested, transported and in many cases initially processed in the United States, or all these functions are done somewhere else, even though only one or two steps in the production process may be highly labor intensive. When the product is grown, harvested, transported and processed somewhere else, *all* the jobs associated with these functions are exported, not just the seasonal field jobs. These are the so-called "upstream" and "downstream" jobs that support, and are created by, the growing of agricultural products. U.S. Department of Agriculture studies indicate that there are about 3.1 such upstream and downstream jobs for every on-farm job. Most of these upstream and downstream jobs are "good" jobs, i.e. permanent, average or better paying jobs held by citizens and permanent residents. Thus we would be exporting about three times as many jobs of U.S. citizens and permanent residents as we would farm jobs if we shut off access to alien agricultural workers.

Another suggestion has been that recruitment of welfare recipients and the unemployed could replace the illegal aliens. Growers themselves, most notably the Neisi Farmers League in the San Joaquin valley, have tried to augment their labor supply by recruiting welfare recipients. While these efforts have resulted in some former welfare recipients moving into jobs on farms, the magnitude of this movement has been insignificant. In fact, welfare directors suggest that the long term impact of welfare reform is likely to exacerbate rather than reduce the shortage of domestic farm labor. Some seasonal farm workers currently depend on the combination of farm work in-season and welfare assistance during the off season. As limitations are set on persons' lifetime welfare entitlement, this pattern will no longer be viable. Seasonal farmworkers who supplement their earnings with welfare will be forced into permanent nonagricultural jobs. Other attributes of seasonal farm work are also deterrents. The preponderance of those now remaining on the welfare rolls are single mothers with young children. Many are not physically capable of doing farm work, do not have transportation into the rural areas and are occupied with the care of young children.



The unemployed also make, at best, a marginal contribution to the hired farm work force. Currently, the U.S. is enjoying historically low levels of unemployment and many labor markets are essentially at or above full employment. However, relatively high unemployment rates in some rural agricultural counties are often cited as evidence of an available labor supply or even of a farmworker surplus. First it should be noted that labor markets with a heavy presence of seasonal agriculture will always have higher unemployment rates than labor markets with a higher proportion of year round employment. By the very nature of the fact that farm work is seasonal, many seasonal farmworkers spend a portion of the year unemployed. Second, unemployed workers tend to share the same values as employed workers. They prefer permanent employment which is not physically demanding and takes place in an inside environment. They share an aversion to migrancy, and often have transportation and other limitations that restrict their access to jobs. The coexistence of unemployed workers and employers with labor shortages in the same labor markets means only that we have a system that enables workers to exercise choices.

Many welfare recipients and unemployed workers can not or will not do agricultural work. It is reasonable to expect an alien worker program to have a credible mechanism to assure that domestic workers who are willing and able to do farm work have first access to agricultural jobs, and that aliens do not displace U.S. workers. It is not reasonable to expect or insist that welfare and unemployment rolls fall to zero as a condition for the admission of alien workers.

A third alternative to alien workers often suggested is to replace labor with technology, including mechanization. This argument holds that if agricultural employers were denied access to alien labor they would have an incentive to develop mechanization to replace the alien labor. Alternatively, it is argued that the availability of alien labor retards mechanization and growth in worker productivity.

The argument that availability of alien labor creates a disincentive for mechanization is belied by the history of the past two decades. From 1980 to the present the output of labor intensive agricultural commodities has risen dramatically while hired agricultural employment has declined. The only way this could have happened is as a result of significant agricultural labor productivity increases. Yet this was also the period of perhaps the greatest influx of illegal alien farmworkers in our history.

It does not appear that there has been a great deal of increase in agricultural mechanization in fruit and vegetable farming since a spasm of innovation and development in the 1960's and 1970's. Indeed, some of the mechanization developed during that period, specifically mechanical apple harvesters, have proven to be uneconomical in the long term because of tree damage as well as fruit damage. Agricultural engineers claim the reason for this is the withdrawal of support for agricultural mechanization research by the U.S. Department of Agriculture following protests and litigation by farmworkers in California that such research was taking away their jobs.

But productivity increases can result from many different factors, of which mechanization is only one. Smaller fruit trees, which require less ladder climbing, trellised trees, and changes in the way trees or vines are pruned are also technological developments which improve labor productivity. The switch from boxes and small containers to bulk bins and pallets in the field has significantly improved labor productivity of some harvesting activities. Use of production techniques and crop varieties that increase yields also improves field labor productivity by making harvesting and other operations more efficient. These appear to be the techniques that farmers have used to achieve the large productivity increases obtained in the 1980's and 1990's. The fact that there appears to have been a slowing down in the pace of mechanization itself does not mean that growth in worker productivity has slowed.

The argument that alien employment retards productivity increases is also belied by logic. The incentive for the adoption of mechanization or any other productivity increasing innovation is to reduce unit production costs. If the innovation results in a net savings in production costs it will be adopted. It doesn't matter whether the dollar saved is a dollar of domestic worker wages or a dollar of alien worker wages. On the other hand, if the innovation results in a net increase in production costs, it will not be adopted. The only way one can argue that a reduction in alien labor will increase the incentive to mechanize is to argue that the reduction in alien labor will first increase production costs. But if, as is argued elsewhere in this testimony, the tendency for domestic producers costs to rise in response to a withdrawal of labor is offset by shifting domestic market share to foreign producers, the incentive for additional domestic mechanization will never occur. In a global market, the profitability of mechanization, just like the profitability of everything else, is determined by global production costs, not by domestic production costs.

A fourth alternative to the importation of alien farm workers which has been suggested is the unionization of the farm work force. The implication of this scenario is that unionization would augment the supply of legal seasonal farmworkers and make alien farm workers unnecessary. Alternatively, it is argued that an alien agricultural worker program will make it more difficult for domestic farmworkers to unionize and improve their economic welfare.

First it should be noted that use of the H-2A program as a strike breaking tool is expressly prohibited. H-2A workers may not be employed in any job opportunity which is vacant because the former occupant of the job is on strike or involved in a labor dispute. Secondly, there is no impediment to an H-2A worker becoming a union member. Indeed, the H-2A program has been used for decades in unionized citrus operations in Arizona. Recently, a farmworker union supported a grower's H2-A application as a means of providing legal status for its own members. If an employer seeking labor certification has a collective bargaining agreement and a union shop, the H-2A aliens, like all other employees, can be required to pay union dues and may become union members.

But there is no reason to believe that unionization will result in an increase in the availability of legal labor, nor, indeed, any reason to believe that the membership of farmworker

unions is more legal than the rest of the agricultural work force. Farmworker unions and farm employers are fishing out of the same labor force pool. The argument that increased farmworker unionization will increase the supply of legal labor is based on the supposition that farmworker unions will be successful in negotiating higher wages and more attractive working conditions than in nonunion settings, and that this will attract more domestic legal labor. Yet wages and working conditions in union and nonunion settings are not (and in competitive global markets cannot be) significantly different. Furthermore, the same reasons described above why higher wages and benefits for seasonal agricultural work, even if they were economically feasible, would not attract significantly more legal workers into seasonal agricultural work, are as applicable in a union setting as in a nonunion setting.

The reality is that an alien agricultural worker program is probably union-neutral. Existence of such a program will probably not make it significantly more difficult or easier to organize farm workers.

### **Why does the H-2A program need to be reformed?**

There are two broad reasons why the H-2A program needs to be reformed.

First, the program is administratively cumbersome and costly. Even at its present level of admission, fewer than 30,000 workers annually, the program is nearly paralyzed. Secondly, the program sets minimum wage and benefit standards that many employers cannot afford or cannot qualify for. As a result, the program's "worker protections" are cosmetic. They "protect" only about 30,000 job opportunities in an agricultural work force estimated at more than 2 million. The vast majority of agricultural workers, legal and illegal, get little or no benefit from the H-2A "protections".

The first reason why the current H-2A program must be reformed is that it is administratively cumbersome and costly. The regulations governing the program cover 33 pages of the *Code of Federal Regulations. ETA Handbook No. 398*, the compendium of guidance on program operation, is more than 300 pages. As a result of a recent change, employers must apply for workers a minimum of 45 days in advance of the date workers are needed. Applications, which often run more than a dozen pages, are wordsmithed by employers, by the Labor Department and by legal services attorneys. Endless discussions and arguments occur over sentences, phrases and words. After all this fine tuning, workers see an abbreviated summary of the order if they see anything at all. In hearings in Oregon this spring workers often testified that they were referred to H-2A jobs without even being told the wage rate that was offered.

Each employer applicant goes through a prescribed recruitment and advertising procedure, regardless of whether the same process has been undertaken for the same occupation by another employer only days earlier. The required advertising is strictly controlled by the regulations and looks more like a legal notice than a help wanted ad. Increasingly, the

Labor Department is requiring that advertising be placed in major metropolitan dailies, rather than the local newspapers that farm job seekers are most likely to read, if they look for farm work in help wanted ads at all. The advertisements rarely result in responses, yet they are repeated over and over again, year in and year out.

Certifications are required by law to be issued not less than 30 days before the date of need, but the GAO reported in 1997 that they were issued late more than 40 percent of the time.

Even after all this, the employer has no assurance that the “domestic” workers referred to it are, in fact, legal. Most state job services refuse even to request employment verification documents, much less verify that they are valid. It is the experience of H-2A employers that a substantial and increasing proportion of the “domestic” workers referred, and on the basis of which certification to employ legal alien workers is denied, are in fact illegal aliens themselves. State employment service officials have even been known to suggest to H-2A growers that they should go back to employing illegal aliens and save themselves and the employment service all the hassle.

Finally, a high proportion of the workers referred to H-2A employers and on the basis of which the employer is denied labor certification for a job opportunity, either fail to report for work or quit within a few hours or days. This then forces the employer to file with the Labor Department for a “redetermination of need”. Even though redeterminations are usually processed within a few days, the petition and admission process after redetermination means that aliens will, at best, arrive about 2 weeks late.

The second reason why reform is needed is that the current H-2A program requires wage and benefit standards that are unreasonably rigid or not economically feasible in many agricultural jobs, and effectively exclude those jobs from participating in the H-2A program.

The so-called Adverse Effect Wage Rate (AEWR) is one such standard. The Adverse Effect Wage Rate is a minimum wage set on a state-by-state basis by regulation, and is applicable to workers employed in job opportunities for which an employer has received a labor certification. The Adverse Effect Wage Rate standard is unique to the H-2A program and does not exist in any other immigration or labor certification program. It was established to create a minimum wage standard in jobs where foreign workers were employed, because the federal minimum wage law did not cover agriculture at that time. AEWRs were initially set at the level of the then non-agricultural federal minimum wage. Over time, AEWRs were adjusted by a variety of methodologies. Since 1987, each state’s AEWR is set at the average hourly earnings of field and livestock workers for the previous year in the state or a small region of contiguous states. For the 1999 season, AEWRs range from \$6.39 per hour in West Virginia, Kentucky and Tennessee to \$7.76 per hour in Iowa and Missouri. The average AEWR is \$7.22 per hour.

The AEWWR sets a minimum wage standard that makes it uneconomical to use the H-2A program in many agricultural occupations. The AEWWR standard, in effect, makes the average wage in one year the minimum wage in the ensuing year. Since the AEWWR is set at the average of the wages for *all* agricultural workers in the state, it will be above the actual wages paid for about half of the agricultural employment in the state, and below the actual wage for about half of all agricultural employment in the state. Obviously, this standard will not be a deterrent in using the H-2A program in occupations in which the actual wage is above the average wage for all agricultural occupations. But it can be an uncompetitive and unrealistic standard for an occupation in which the actual wage is below the average of all agricultural wages in the state. Since, by definition, half of all employment will always have an actual wage below the average wage, this standard will always set an uncompetitive wage for some occupations, no matter how much agricultural wages rise.

Another example of an unreasonably rigid standard is the requirement to provide housing. The current H-2A program requires an employer to have housing for all the job opportunities for which an employer applies for labor certification except those job opportunities from which local workers will commute daily from their permanent residences, and to provide that housing at no charge to the workers. Agricultural employers are only required to provide housing to workers if they participate in the H-2A program or use the Department of Labor's interstate clearance system to recruit workers. Only a tiny fraction of U.S. agricultural employers do either.

The U.S. Department of Agriculture stopped reporting the percentage of hired agricultural employment that included employer-provided housing after 1995. But up to that time only about 15 percent of agricultural employment included employer-provided housing, either free or at a charge. Given that this percentage had remained relatively unchanged for many years, it probably reflects current practice reasonably accurately. Since many employers who provide housing do so only for year round employees such as foremen and supervisors, it is likely that the proportion of seasonal workers provided housing is even lower. In other words, the vast majority of seasonal agricultural workers currently arrange their own housing. Employer-provided housing tends to be provided to seasonal workers only in those areas dependent on migrant workers that are so remote that community-based housing is unavailable.

The requirement for employer-provided housing is one of the greatest current obstacles to expanded use of the legal alien agricultural worker program. Providing housing is extremely expensive, and there are many other community obstacles to overcome as well. In areas where the housing stock is already adequate to accommodate the seasonal agricultural work force, agricultural employers are understandably reluctant to invest large sums to construct employer-provided housing. Even where the housing stock is not currently adequate, employers are reluctant to invest in housing unless there is assurance of a workable program for securing labor to live in the housing.

There certainly can be no disputing the proposition that there must be adequate housing for both domestic and alien seasonal agricultural workers. The policy question then is under what conditions this housing should be employer-provided, and in those circumstances how we get from where we are now to a situation where there is adequate employer-provided housing.

## **What reforms are needed?**

The H-2A program must be reformed by modernizing and streamlining the administrative processes, especially the procedures for domestic worker recruitment and the labor market test, and eliminating those administrative requirements that add cost or inflexibility to the program without providing any corresponding benefits to domestic farmworkers.

Rather than the cumbersome and antiquated paper process of the interstate clearance system, and the expensive and unproductive advertising that are now used to disseminate information about available jobs and to recruit domestic workers, NCAE has suggested bringing this process into the 21<sup>st</sup> century. We have suggested a computerized farmworker registry system modeled after the Labor Department's America's Job Bank and America's Talent Bank systems. Domestic workers who were interested in seasonal farm work would list themselves and their interests and experience with the registry. They would indicate whether they were only interested in working locally or whether they were also willing to consider work in other areas and/or, if they choose, specify specific areas. Growers who wanted to participate in the H-2A program would be required to list their jobs with the registry. Job offers listed with the registry would be examined to assure they included the required terms and conditions of employment, just as paper job orders are now scrutinized. If a job met the program requirements, the registry would be searched to identify qualified workers who might be interested in filling the job. Qualified workers would be provided with the information about the job and asked if they were interested in taking the job. Information about qualified domestic workers who had accepted the job would be provided to the employer. To the extent that sufficient qualified workers could not be located who were willing to accept the jobs, the employer would receive a "shortage report" authorizing the employment of sufficient aliens to fill the unmet need. Upon receipt of the shortage report the employer would be authorized to import sufficient aliens to fill the employer's need or to employ H-2A aliens already in the United States who were available for new assignments. In short, this process would work exactly as the current job service recruitment system now works in filling H-2A jobs, except that it would utilize 21<sup>st</sup> century technology rather than early 20<sup>th</sup> century technology.

Employers who used the registry and the Labor Department would be required to widely advertise the existence of the registry to potential farm workers. To assure that workers who were referred through the registry were, in fact, legal workers, the registry would check the validity of work authorization documents through the INS and the Social Security Administration, before listing the worker on the registry. This check would not obligate the worker to do anything more than show valid work authorization documents, just as the law currently requires. The registry would also presumably be able to assist workers whose documents did not pass the validation check, but who were, in fact, authorized to work to correct the problem with their documents.

Secondly, the program must be reformed to establish realistic wage and benefit standards that will, in fact, assure the economic viability of the jobs as well as providing benefits

to the workers. This is an essential balance that must be struck. To claim that wage and benefit standards “protect” domestic workers when jobs at those wage and benefit level do not exist and are not economically competitive, is deceptive and ultimately harmful to farmworkers.

The Adverse Effect Wage Rate (AEWR) must be replaced with a wage standard which is related to the competitive market wage in the occupation. NCAE has suggested that the prevailing wage in the occupation and area of employment be set as the minimum wage for employers to qualify for legal alien agricultural labor. In the H-2A program the prevailing wage is defined as the 51<sup>st</sup> percentile of wages of workers in the occupation and area of employment. This standard assures that employers who pay substandard wages are not permitted to employ aliens, but sets a standard that is viable in a competitive market. (Employers would still, of course, be subject to the federal, state or local minimum wage, if higher.)

The prevailing wage in the occupation and area of employment has widespread application and acceptance in other wage regulation programs. For example, it is the minimum wage for federal contractors under the Davis-Bacon and Service Contract Acts. It is difficult to understand how the prevailing wage standard could be good public policy in one setting and bad public policy in another.

A second reform that is needed is to provide flexibility in the provision of housing. Flexibility is needed both to enable employers to initially get into the program in order to provide legal status for their current illegal work force, and to accommodate circumstances where there is adequate housing in the community to accommodate the seasonal farm work force.

As noted above, only about 15 percent of agricultural employment currently includes employer-provided housing, and the percentage is probably lower for seasonal agricultural workers. For employers without housing, a transition period is needed to enable employers to meet housing requirement. If agricultural employers have a workable, functioning program for the legal employment of alien workers, they (and their lenders) will have the confidence to invest in additional housing. Such a transition period does *not* mean lessening farmworker benefits. Most farmworkers are not now provided housing, and any mechanism which increases the housing stock will benefit farmworkers.

In addition to a transition period, some assistance in financing farmworker housing will be needed. The U.S. Department of Agriculture’s Farmers Home Administration (FmHA) has a program of low interest loans to assist farmers and community organizations to provide in-season migrant housing. However, the regulations governing the program preclude housing aliens in the housing and set unrealistically restrictive standards for employer borrowers. The FmHA rules for migrant housing programs needs to be reformed, or some other mechanism for assisting in the funding of in-season migrant housing for domestic and alien farmworkers must be found.



Employers also face daunting community opposition when trying to construct migrant farmworker housing. Even employers who were willing and able to finance the housing have been prevented from constructing it by community opposition. While there is widespread agreement that there should be adequate housing for migrant workers, the not-in-my-backyard response quickly arises when actual projects are proposed. This opposition can take the form of restrictive zoning, unrealistic construction standards, or outright opposition to the presence of migrant farm workers. Some mechanism is needed to assist farmers who want to construct migrant housing that meets federal migrant labor camp standards on their own property to preempt local restrictions.

Finally, flexibility should exist in the way housing is required to be provided. The vast majority of seasonal farmworkers are currently living off the farm. Some agricultural communities have adequate housing for seasonal farm workers, and experience shows that many farmworkers prefer not to live on the farms. Some communities do not have adequate housing for seasonal farmworkers, and in those communities the housing stock must be increased. But the current requirement that the employer maintain a housing unit for every migrant worker, whether or not the worker chooses to live in it, leads to the absurd situation where employers must maintain vacant housing merely to meet the standard to qualify for H-2A certification, while the workers live elsewhere. NCAE has proposed that in communities where the housing stock is adequate to accommodate the seasonal agricultural work force, that employers be allowed the option of providing a monetary housing allowance in lieu of employer-provided housing. This has been portrayed as reducing farmworker benefits. In fact, workers are now living in this housing without the benefit of housing allowances. Clearly the provision of housing or a housing allowance will increase farmworker benefits.

A third reform that is needed is to amend the IRRIRA to assure that the current agricultural work force can obtain legal status under the program. NCAE would propose going even further and permitting aliens who have made a commitment to working in the United States and complying with the law, and who want to apply for permanent residency, to have a realistic opportunity to become permanent residents.

Under the current provisions of the IRRIRA, persons who have accumulated 365 days or more in illegal status in the United States after April, 1998 are debarred from immigration benefits for a period of 10 years. Admission to the United States as an alien worker is one such immigration benefit. Thus, this provision would debar most aliens who are currently in the U.S. agricultural work force from participating in the H-2A program, reformed or otherwise. Employers who choose to use the program would have to recruit a whole new work force of persons who were not inadmissible under the bar – in effect, persons who had not previously worked in the United States. This makes no sense whatsoever, and would cause chaos in the agricultural industry as well as in the immigrant community. Clearly the logical solution is to provide a waiver of the IRRIRA bar to aliens who wish to continue working as legal seasonal agricultural workers.

NCAE also feels that aliens who participate in the U.S. seasonal agricultural work force, who contribute to the U.S. economy, and who abide by U.S. law, including the requirements of the H-2A program while they are H-2A workers, should have a realistic opportunity to move up into permanent agricultural work and greater responsibilities and earnings, or to move up and out of the agricultural work force if they so desire. For many participants in the seasonal agricultural work force, seasonal agricultural work is an entry level occupation. They ultimately aspire to better jobs in or out of agriculture. We believe it is unjust to accept the work and dedication of alien farm workers as seasonal agricultural workers, but deny them the reasonable aspirations that accompany dedication to this work. On the other hand, it is our belief, based on the close association of our members with their farmworkers, that many persons who do farm work for a period in the United States do not want to live here permanently, bring their families here, or become permanent residents. They want to maintain their homes and families in their native land. They look at employment in the United States as a way of sustaining their families or launching a better life in their native country. We believe that so long as the individuals are contributing, law abiding members of our community, both options should be open to them.

### **What will be the impact of a reformed H-2A program on farm workers?**

For domestic farmworkers, the reformed program will assure them first access to all agricultural jobs before they are filled by legal alien labor. It will assure that this access is real, by assuring that there is widespread and easy access to information about the available jobs. It will protect the wages in jobs approved for the employment of aliens by making the prevailing wage the minimum wage – in effect a Davis-Bacon Act for farmworkers. It will assure housing or a housing allowance and transportation benefits to migrant farmworkers who have no such assurance at present. In short, it will raise the standards for domestic farmworkers in all H-2A-approved occupations.

It will also provide all of the above benefits for currently illegal alien farmworkers, the majority of the seasonal agricultural work force. In addition, it will free them from the fear, indignity and economic costs of apprehension and removal, or of being thrown out of work on a moment's notice. It will also free them from dependence on "coyotes" and the costs and physical dangers of illegal entry.

For domestic workers in the upstream and downstream jobs that are created and sustained by U.S. agricultural production, it will assure the continuation and growth in these employment opportunities.

For agricultural employers, it will assure them an adequate, legal work force if they are willing and able to meet the requirements of the program. It will give employers the certainty that will enable them to plan their businesses and make investments more effectively.

## **Why is a workable alien agricultural worker program good public policy?**

In the absence of effective control of illegal immigration and enforcement of employer sanctions, the status quo will continue -- illegal alien migration, little use of the legal alien worker program, fewer protections for domestic and alien farmworkers, crop losses due to shortages of workers, and vulnerability to random INS enforcement action for employers. This will be true whether or not the legal guestworker program is reformed, because without effective immigration control and document verification, agricultural employers as well as all other employers will continue to be confronted by a workforce with valid appearing documents and no practical way to know who is legal and who is not. No one can defend or advocate for continuation of the status quo. The current system of illegal immigration and an agricultural industry dependent on a fraudulently documented workforce is bad for employers, workers and the nation.

But if the nation achieves reasonably effective control of illegal immigration and enforcement of employer sanctions – which is the objective of current public policy – then agricultural production in the United States, particularly of the labor intensive fruit, vegetables and horticultural commodities, will be drastically reduced, with attendant displacement of domestic workers in upstream and downstream jobs, unless a workable agricultural guestworker program exists.

In conducting the public policy debate on creation of a workable alien agricultural worker program, it is important to be realistic about what the public policy options are and are not. The public policy options are *not* between greater and lesser economic benefits for domestic farmworkers. The level of wages and benefits that U.S. agriculture can sustain for all farmworkers, domestic and alien, are largely determined in the global market place. The public policy options we face are between a larger domestic agricultural industry employing domestic and legal alien farmworkers and providing greater employment opportunities for domestic off-farm workers, and a drastically smaller domestic agricultural industry and drastically fewer employment opportunities for domestic off-farm workers with a wholly domestic farm work force. In either case, the level of economic returns to farmworkers will be approximately the same, namely those economic returns that are sustainable in the competitive global marketplace.

The National Council of Agricultural Employers believes the national interest is best served by effective immigration control and a workable alien agricultural worker program that enables the United States to realize its full potential for the production of labor intensive and other agricultural commodities in a competitive global marketplace, and which supports a high level of employment for domestic workers in upstream and downstream jobs while assuring reasonable protections for domestic and alien farmworkers. The Council believes an alien agricultural worker program that is workable and competitive for employers and that protects access to jobs and the wages and working conditions of domestic farmworkers, and that

provides legal status, dignity and protections to alien farmworkers working in the United States, is important to accomplish now. But we do not believe it is the end of the job.

We also believe that there are other important public policy issues related to seasonal agricultural workers. Many individuals and families that engage in seasonal agricultural work face serious economic and social problems that should be addressed. Seasonal farm work alone is not sufficient to sustain a reasonable standard of living for most persons who engage in farm work at any reasonable wage rate. There are serious problems of housing, medical care and child care for workers who migrate, especially with families, and for persons who engage in intermittent employment or work for many different employers. Many of these problems extend far beyond the work place. In fact, for this component of our population, it is when they are *not* working that these problems are most severe.

## **Conclusion**

The National Council of Agricultural Employers stands ready to work with domestic farmworker and immigrant groups not only to develop a workable alien agricultural worker program, but to find workable solutions to the social and economic problems of those who engage in seasonal farm work. During the past several months, NCAE has reached out to worker, immigrant and church groups to explore solutions to these problems along with our need for a stable legal work force. These issues should be addressed now. Congress should not wait any longer to fix an indefensible status quo. Agricultural employers and worker advocates should put their differences aside and jointly work to solve these problems. We cannot afford to turn away from this challenge. The economic and social costs are too high.