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UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

September 8, 2011

Chairman Gallegly, Ranking Member Lofgren and members of the Subcommittee, thank you for the opportunity to testify at today's hearing on Chairman Smith's proposed new guest worker program for the agricultural sector, the American Specialty Agriculture Act.

I am here today as the Director of Florida Legal Services' Migrant Farmworker Justice Project. I have been involved in this issue for over three decades during which time I have represented U.S. citizen farmworkers, H-2A guest workers, and farmworkers without employment authorization. I also, for many years, have represented the United Farm Workers union with respect to the AgJOBS legislation.

We are told that a new guest worker program is needed because without it, American agriculture will be in jeopardy if agricultural employers are required to participate in the E-Verify program. I agree that it is not possible to replace the million unauthorized workers who currently work in agriculture with legal US workers; however, I believe a new guest worker program will not solve the problem of agriculture's chronic labor market instability and will, in fact, only make matters worse.

The Facts:

– The United States agricultural industry is dependent on immigrant labor – more than two-thirds of all crop workers in the United States were born outside the United States.[1]

– About three-fourths of the foreign-born farmworkers have been in the United States more than four years.[2]

– At least 50% of the agricultural workers in the United States are not legally present in the

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[1]Carroll, D., Georges, A., and R. Saltz. *Changing Characteristics of U.S. Farm Workers: 21 Years of Findings from the National Agricultural Workers Survey*, paper presented at the Immigration Reform and Agriculture Conference, University of California D.C. Campus, May 12, 2011. Available at http://migration.ucdavis.edu/cf/files/2011-may/carroll-changing-characteristic.pdf.

[2]*Id.*

United States and do not have work authorization.[3] Other estimates suggest the percentage of unauthorized workers might be as high as 70%.

– There are at least 1.8 million agricultural workers in the United States.[4]

– If two-thirds of the estimated 1.4 million workers employed on crop farms sometime during the year are unauthorized and a third of the estimated 429,000 livestock workers are unauthorized, American agriculture employs about 1.1 million unauthorized workers.[5]

– The unauthorized agricultural workers have at least 500,000 children under the age of 18; over 70% of these children are U.S. citizens.[6]

– Farmworker unemployment rates are double those of all wage and salary workers.[7]

– Hired farmworkers earn less than other workers. Median weekly earnings of full-time farmworkers are 59 % of those for all wage and salary workers. Poverty among farmworkers is more than double that of all wage and salary employees.[8]

– Housing conditions of farmworkers have historically been substandard because of crowding, poor sanitation, poor housing quality, proximity to pesticides, and lax inspection and enforcement of housing regulations.[9]

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[3] *Id.*

[4] 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*, United States Department of Agriculture, Economic Research Report, No. 60, July, 2008. Available at http://www.ers.usda.gov/Publications/ERR60/.

[5] Martin P., *supra* at p. 7.

[6] Based on the National Agricultural Worker Survey data for fiscal years 2007-2009, there were an estimated 399,244 children less than 18 years of age of unauthorized crop worker parents; 73% of these children were U.S. citizens. These estimates are only for crop workers; they do not include livestock workers.

[7] Kandel, *supra* at p. 17.

[8] Kandel, *supra*. Report Summary.

[9] *Id.*

– Agricultural work is among the most hazardous occupations in the United States, and farmworker health remains a considerable occupational concern. Farmworkers face exposure to pesticides, risk of heat exhaustion and heat stroke, inadequate sanitary facilities, and obstacles to obtaining health care due to high costs and language barriers.[10]

None of these facts are seriously disputed.

Framing the Issue

The underlying problem is that the U.S. has an unstable agricultural labor market that requires constant replenishment with new workers from abroad. The reasons for this chronic labor market instability were accurately described in a 1994 study by the United States Department of Labor:

> "The constant outflow of workers is a consequence of the difficulties of making a living from U.S. farm work. Most migrant farmworkers live a marginal existence, even after they stop migrating and settle in one location. The majority of migrants and former migrants live in poverty, endure poor working conditions, and receive no government assistance. Thus, only those migrants with few alternatives stay in farm work. This leads to a maturing labor force composed mostly of workers with low levels of education and lacking English skills, whose improvements in working standards are continually undermined by new workers willing to work for less.
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> The poor living and working conditions of migrant and formerly migrant farmworkers are the result of labor practices that shift production costs to workers. In particular, the farm labor system relies heavily on temporary jobs, often uses the highly competitive subcontracting market for labor management, and frequently recruits workers in a way that results in a chronic oversupply of labor. Each of these practices reduces employee costs at the expense of worker earnings. As a result, migrant workers, their families and communities, rather than producers, tax-payers and consumers bear the high costs of agriculture's endemic labor market instability.
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> The high outflow of farmworkers to non-farm work in the United States and the constant replenishment from abroad means the agricultural labor market serves as an entry point for low-wage, low-skilled immigrants for the entire U.S. economy. To slow this influx of new entrants and stabilize the farm labor market requires diverting the costs of instability from the migrants back to the employers, taxpayers, and consumers who benefit from their

[10] *Id.*

labor." (Emphasis added)[11]

This analysis is not new. Twenty years ago, the last blue-ribbon commission established by Congress to study the question reached the same conclusion. We find ourselves in the current situation because, unfortunately, the recommendations of that commission were never implemented.

The Commission on Agricultural Workers

In 1986 when Congress passed the Immigration Reform and Control Act ("IRCA") it authorized a Commission on Agricultural Workers to study the effects of the Act on the agricultural industry and make recommendations for the future. The Commission could not be accused of being a bunch of liberals or labor activists; eight out of the eleven Commissioners were appointed by Ronald Reagan or Strom Thurmond. Only two of the Commissioners, Dolores Huerta and Cardinal Mahoney, could be described as representing the interests of the farmworkers. Its recommendations, therefore, should be taken seriously by Republicans as well as Democrats.

The Commission noted that while IRCA was successful in legalizing large numbers of agricultural workers, "ineffective enforcement of employer sanctions and inadequate border controls have curbed neither illegal immigration nor the employment of unauthorized workers in agriculture." What agriculture needed most was a more stable labor market – " the goal of controlling illegal immigration would be best served by the development of a more structured and stable domestic agricultural labor market with increasingly productive workers:

> "Such a system would be characterized by more effective recruiting and job matching, reduced worker turnover and higher retention rates, a more dependable labor supply, institutionalized opportunities for training and advancement, and a better balance between labor supply and demand. Such a system would further address the needs of seasonal farmworkers through higher earnings, and the needs of agricultural employers through increased productivity and decreased uncertainty over labor supply. Market mechanisms would provide the incentives that would ultimately lead to and maintain this stabilization."[12]

"A stable and reliable workforce is critical to the long-term health of the industry and would thus

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[11]*Migrant Farmworkers: Pursuing Security in an Unstable Labor Market*, Research Report No.5, U.S. Department of Labor Office of Program Economics, May 1994.

[12]*Report of the Commission on Agricultural Workers*, Executive Summary, p. xxiv, Washington D.C. November, 1992.

provide clear benefits to both workers and employers."[13]

However, none of the Commission's specific recommendations to stabilize the labor force, improve productivity, and increase earnings for farmworkers through longer periods of employment were ever implemented:

– Recommendation: "Illegal immigration must be curtailed." Not done

– Recommendation: "The Department of Labor's U.S. Employment Service should develop a new and/or alternative system for recruiting qualified farm labor to meet agriculture's constantly changing labor needs." Not done

– Recommendation: "The U.S. Department of Agriculture's Extension Service, the U.S. Department of Labor's Employment Service, and state agencies and universities should undertake a major effort to educate growers, packing house operators, farm labor contractors, workers, and worker organizations in the need for and benefits of improving labor management practices in agriculture." Not done

– Recommendation: "Agricultural employees should be provided with federal/state unemployment insurance coverage that provides them with protection against unemployment comparable to that of other workers in the United States." Not done

– Recommendation: "Congress should encourage all states to provide Workers' Compensation Insurance coverage comparable to that of other workers in the United States." Not done

– Recommendation: "Farmworkers should be afforded the right to organize and bargain collectively, with appropriate protections provided to all parties." Not done

– Recommendation: "The enforcement of protective statutes for farmworkers should be made more effective..All laws relating to farm labor should be uniformly enforced by the agencies concerned so that employers not in compliance do not gain an unfair competitive advantage over those employers in full compliance with the various laws and regulations." Not done

The Commission concluded that "to the extent that job opportunities are secured by legal workers in a more stable labor market, the pull factor for illegal immigration is reduced."[14] That is just as true now as it was twenty years ago. We need a stable, legal workforce for agriculture. Enacting mandatory E-Verify with or without an expanded guest worker program will not address the underlying problem. In fact, the proposals under consideration are likely to have just the opposite effect – they will greatly disrupt and destabilize the farm labor market:

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[13] *Id.*

[14] *Id.* p. xxxi.

The Phase-in and Deferral Approach

The E-Verify program contained in H.R. 2164 would exempt agriculture (as defined for purposes of the H-2A program) from the E-Verify requirements for three years while E-Verify is gradually phased in for the non-agricultural workers. This will result in a tidal wave of new entrants into the agricultural workplace as unauthorized workers find it impossible to work in the non-agricultural sector and turn to agriculture as the employer of last resort. In the interim, farm labor contractors can continue to recruit new entrants from Mexico with impunity.

Even when the three-year deferral period ends, seasonal agricultural employers can continue to hire former workers without verifying their employment authorization.[15] There will be a huge pool of unauthorized workers who can be hired in perpetuity without going through E-Verify. Because of very high turnover in most seasonal agricultural work, it is not uncommon for an employer who at peak employs 500 to 1000 workers to employ 3,000 to 6,000 individuals during the course of the year. All of these workers could be rehired by that employer in the future without verification.

The other obvious way that the E-Verify requirement will be evaded is through the use of farm labor contractors. "Labor intensive agricultural firms, faced with potentially large fines for violations of immigration and labor law, increasingly modify the organization of their firms by shifting management of routine seasonal labor jobs to independent farm labor contractors."[16] That is exactly what happened following enactment of IRCA's limited employer sanction and enactment of H.R. 2164 will in all likelihood lead growers to turn all of the hiring function over to the contractors by the time the three-year deferral for agriculture ends. This is not good news for U.S. farmworkers since farm labor contractors generally provide lower wages and working conditions to their employees.

It seems very unlikely that enactment of H.R. 2164 will result in a legal agricultural workforce in the United States.

The Guest Worker Solution

Employer interests have used the fears generated by the threat of E-Verify to push for a new guest worker progam for agriculture with minimal labor protections. Obviously such programs will not improve the wages and working conditions of U.S. workers. While the

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[15]Section 2(b)(1)(D) of H.R. 2164 provides that "an individual shall not be considered a new hire subject to verification under this paragraph if the individual is engaged in seasonal agricultural employment and is returning to work for an employer that previously employed the individual."

[16]Polopolus, L. and R.D. Emerson, *Entrepreneurship, Sanctions and Labor Contracting*, Southern Journal of Economics, July, 1991.

proponents of these plans often give the impression that we would simply be substituting a legal guest worker for an illegal current worker, that is not what would happen in practice. First, as discussed above, there is nothing that will guarantee that the current unauthorized will simultaneously exit the country as the new guest workers enter. Given the fact that so many unauthorized farmworkers have U.S.-citizen children, it is highly unlikely that they will leave because of E-verify; they will go underground, working for unscrupulous labor contractors off the books. Growers have no problems employing both unauthorized workers and guest workers.[17] They often set up separate corporations to do just that and can always use contractors to insulate themselves from liability. It is far more likely that the workers who will be replaced by guest workers are the very U.S.workers the immigration restrictionists say they are so worried about. The current H-2A program already contains significant economic incentives to discriminate against U.S. workers. Employers of H-2A workers do not have to pay FICA or FUTA taxes on their H-2A workers wages resulting in cost savings of about 10% over an American worker. H-2A workers are excluded from the protections of the Migrant and Seasonal Agricultural Worker Protection which provides U.S. workers with a way to enforce their working arrangements with their employer. And H-2A employers are largely beyond the reach of U.S. civil rights laws; they can and do discriminate based on age, sex, disability, and race in their recruitment of foreign workers. Finally, guest workers are more attractive to employers than U.S. workers because they are not free to quit and look for a better job.

A new report to be released this week by the Farmworker Justice Fund finds that violations of the rights of U.S. workers and guest workers by H-2A employers under the current program are rampant and systemic.[18] The H-2A program certainly is need of reform, but it needs worker protections to be strengthened, not weakened.

The American Specialty Agriculture Act proposed by Chairman Smith will take a bad situation and make it much worse. The centerpiece of the bill is a wage methodology which will significantly lower wages for farmworkers in the United States. Up to 500,000 workers or one quarter of the entire farm labor workforce would be admitted to the U.S. for short-term employment at wages below those currently paid U.S. workers.

For the first time, the wage standard under an agricultural guest worker program no longer

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[17]See e.g. Martin, P. and M. Teitelbaum, *The Mirage of Mexican Guest Workers*, Foreign Affairs, Nov./Dec. 2001: "During the so-called *bracero* ("strong-armed one") program from 1942-1964, the number of unauthorized Mexicans slipping across the border actually expanded in parallel with the number of authorized temporary workers."

[18]*No Way to Treat a Guest: Why the H-2A Agricultural Visa program Fails U.S. and Foreign Workers*, Farmworker Justice Fund, Inc. Washington D.C. September, 2011.

would include compliance with the federal minimum wage.[19] Employers would only have to offer the "prevailing wage or the state minimum wage. Of course many states do not have a state minimum wage or exclude farmworkers from coverage.[20]

Most people associate the words "prevailing wage" with the "average wage" or the wages generally paid workers in an area but that is not how the prevailing wage is defined in the Smith bill. Under his approach the prevailing wage is defined as the "first level" in a four level wage system. The first level is actually the median wage for the lowest third of workers in an occupation while the level four wage is the median for the top two thirds of the wage distribution. The mean wage or the average wage for workers in the occupation is actually the level three wage. In practice, 80 to 85% of the workers surveyed are paid more than the first level wage– it is by definition a substandard wage. In many areas of the country, the level one wage is a dollar or more less than the average wage paid crop workers. If large numbers of workers are admitted to the United States at this wage rate, the average wages paid agricultural workers will fall to even lower levels than they are today, hastening the exodus of the remaining U.S. workers from agriculture.

In fact, the incentive to displace U.S. workers, as opposed to unauthorized workers, is greater precisely because U.S. workers are generally paid more than unauthorized workers.[21] The incentives to replace U.S. workers with the new H-2C workers are further enhanced when one considers that the employer will not have to pay FICA or FUTA taxes on the H-2C workers' wages. This will make it roughly 10% cheaper to employ an H-2C worker than to employ an American worker, even without the considerable wage differential established by the new wage methodology.

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[19]A summary of the American Speciality Agriculture Act posted on the website of the North Carolina Growers Association alludes to the fact that "when H-2A growers have to compete against growers employing illegal immigrants who might make the minimum wage or less, they are put at an unfair competitive advantage." The American Speciality Agriculture Act apparently is intended to remedy this situation not by raising wages to what American workers receive but by lowering the wages of the guest workers to what unauthorized workers are paid even if it is below the federal minimum wage.

[20]Five states (AL, LA, MS, TN, SC) have no minimum wage laws; four states (GA, AR, MN, WY) have minimum wages lower than the federal minimum wage law; many states either exempt agricultural employers, e.g. Georgia, or exclude agricultural workers from coverage, e.g North Carolina.

[21]Authorized workers in Florida report substantially higher wage rates than unauthorized workers. The real hourly wage for unauthorized Florida workers in 2002 - 2004 was $2.74 lower than for authorized workers. See Emerson, R.D., Walters, L., Nobuyuki, I.,Van Sickle, J.J. and F. Roka, *Florida Farm Labor*, Paper prepared for the Conference on Immigration and Agriculture, UC-DC Center, Washington DC, June 14-15, 2006.

A concrete example will show just how large the economic incentive to discriminate against U.S. workers would be under the proposed legislation..The most recent information available from DOL's Online Wage Library for Foreign Labor Certification shows that livestock workers in Ventura County, California are paid an average of $12.00 per hour. For a year-round employee that adds up to an annual income of $24,960. Under the Smith bill, an employer seeking to hire a livestock worker under the H-2C program would only have to advertise the job at $8.93 per hour. US workers would either have to accept a rate more than three dollars under the going rate or see the job go to a guest worker. For the employer, hiring an H-2C worker instead of an American will save $6,386 per year in wages. However, that is not the only savings; the employer doesn't have to pay employment taxes on the wages of the H-2C worker resulting in an additional saving of about $2,500 per year. The total savings to the employer is nearly $9,000 per year.

The short-term impact of the Smith bill in reinstating the level one wage under the H-2A program would be to transfer approximately $150 million per year from U.S. workers and guest workers to the current H-2A employers. The long-term impact, should the program expand to the 500,000 worker cap, would be to reduce the earnings of the poorest group of workers in America by at least a billion dollars per year.

In addition to the lower wage standard, the Smith bill eliminates or weakens labor protections which have been in effect for decades:

– Instead of providing workers with free housing that has been inspected and meets federal standards as the current law requires, the employer can provide a voucher unless the governor certifies there is not adequate housing available; workers who live on the border do not have to provided with any housing.

– The guarantee of employment for three-fourths of the hours worked in the contract is reduced to an almost meaningless guarantee of 50% of hours offered; the guarantee is the principle protection against over-recruitment.

– The transportation reimbursement is no longer from the place from which the worker traveled to come to the employer's job site but only from place where the worker was approved to enter the U.S., i.e,. a consulate which could be hundreds of miles from the worker's home.

– The bill also contains language which would eviscerate worker protections under the holding of Eleventh Circuit Court of Appeals in *Arriaga v. Florida-Pacific Farms*[22] and thereby allow their employers to reduce their wages below the minimum by imposing on the worker the obligation to absorb visa, transportation, and other costs relating to their entry into the U.S.

– The bill contains a number of provisions relating to legal services, access to labor camps, and compulsory arbitration and mediation which are transparently designed to make it as difficult as

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[22]305 F.3d 1228 (11th Cir. 2002).

possible for the guest workers to enforce their contract rights against their employers.

Protections for U.S. workers in the recruitment process have also been weakened. Instead of requiring the employer to petition DOL for certification of a labor shortage, the proposed H-2C program would only ask an employer seeking H-2C workers to include labor attestations in his application to the Department of Agriculture, an agency with no experience in the guest worker area. An unscrupulous employer can claim that no American workers are available (or at least none willing to work for a wage lower than the wage paid 80% of the workers in comparable employment) whether or not any efforts were made to recruit workers.

The most important protection for U.S. workers – the 50% rule has been eliminated. The 50% rule requires that the employer hire US workers who apply for the first 50% of the contract period. The 50% rule is virtually the only way an American worker can be hired under the existing program since American workers very rarely find out about the job opportunities before the work actually starts.

The elimination of the 50% rule, the substitution of an attestation procedure for labor certification, and the transfer of program responsibilities from the Department of Labor to the Department of Agriculture without any authorization of appropriations for monitoring and enforcement all send a clear signal that guaranteeing employers access to cheap foreign labor is more important than protecting the wages and working conditions of U.S. workers.

An E-Verify program which leaves the growers free to continue employing a million unauthorized workers (swelled by hundreds of thousands of other unauthorized workers who will no longer be able to find work in the non-agricultural sector) combined with a massive new guest worker program with essentially no labor protections will be a catastrophe for agricultural workers and their families. As the remaining U.S. workers are forced out of agriculture, the U.S. will be more dependent than ever on foreign workers.

The combination of the E-Verify bill with the American Speciality Agricultural Act will not result in more jobs or improved working conditions for American farmworkers nor will it end the United States' dependence on an immigrant farm labor force which must be continually replenished with new entrants. Instead, it will irreparably destroy any market mechanism that could provide the incentive for a more stable domestic labor market.

A Real Solution

Stabilize the Workforce

No real solution to the farm labor problem can ignore the one million current, unauthorized farmworkers. They and their half million children are simply not going to disappear because of the passage of E-Verify. Mandatory E-Verify will reduce their incomes pushing them to the brink of subsistence. Many will be driven further into document fraud and exploitive

employment situations. Some may self-deport as the restrictionists hope but one wonders, given the opportunities available in Mexico, how bad would conditions have to be before this would happen. Inflicting hardship and deprivation on hundreds of thousands of innocent children, most of whom are U.S. citizens, does not seem consistent with the values of most Americans.

The immigration restrictionists believe that E-Verify will enhance employment opportunities for U.S. workers and that a tight labor market would result in higher wages and better working conditions. Without a phase-in period, E-Verify might lead to economic dislocations in agriculture which will actually cost the jobs of U.S. workers, as the result of employers shifting production to Mexico and other countries. However, even in the long-term, U.S. workers would only benefit if the current unauthorized workers leave and are not replaced by other new entrants. E-Verify combined with the American Speciality Agriculture Act will result in just the opposite – more workers entering the farm labor market, both unauthorized workers from the non-agricultural sector who will gravitate to agriculture as one area where they still can find employment and the new H-2C guest workers with minimal labor protections. U.S. farmworkers are the losers in this scenario.

A final consideration is the very significant cost of driving out the current workforce and replacing it with new foreign workers. The human costs already alluded to will be very high. Some will come back to the taxpayers. No matter what is the fate of their parents, the hundreds of thousands of U.S. citizen children are and will be part of American society. Whether they grow up to be productive members of our society or a burden on the taxpayer depends in part on how we as a society treat them (and their parents) during their formative years. We can treat them with compassion or we can insist on harshly punitive measures which will have repercussions decades from now.

There is also an enormous loss of human capital involved in replacing the current workforce with a new inexperienced workforce. Recruiting and training one million replacement workers is costly. New workers, as a number of H-2A employers have found, are not as likely to be as productive as experienced farmworkers.

There is only one realistic way around all of these problems. The solution that will stabilize the agricultural labor market with the least societal cost is to allow the current unauthorized workers to pay a fine to adjust their status and provide them with a path to permanent resident status conditioned on their continuing to work in agriculture from three to five years. During this period, E-verify would be fully implemented, beginning with farm labor contractors six months after enactment, cutting off the flow of new unauthorized entrants. There would be an unprecedented enforcement of labor standards in agriculture which would both be a deterrent to further employment of illegal workers and an inducement for U.S. workers (including the newly legalized workers) to remain in the agricultural sector. The H-2A program would be reformed by removing the incentives which make it cheaper to employ H-2A workers than U.S. workers; there should be no need for the expansion of this program in the immediate future.

Unauthorized farmworkers would be eligible for legalization under a "blue card" program similar to the one proposed in the AgJOBS legislation if they worked at least 863 hours or 150 days or earned $7,500 over a two year period. NAWS data suggest that 80% of the crop workers were employed more than 74 days during the year. Using the 2/3 crop and 1/3 livestock unauthorized shares, and assuming that 80% of the 923,000 unauthorized crop workers qualified and all of the 142,000 unauthorized livestock workers qualified yields 880,000 eligible unauthorized farmworkers.

This legal workforce will be sufficient to meet the needs of American agriculture for at least a decade. Over twenty years after IRCA, the farmworkers who were legalized under the Seasonal Agricultural Worker ("SAW") program still comprise 15% of the crop workers in the United States. The SAW program was a success – the failure came from not taking the steps recommended by the Commission which would have allowed a transition to more structured and stable labor market.

Close the Door to New Entrants

A comprehensive approach requires that at the same time the blue card program is implemented, effective steps need to be taken to bar further illegal entry. The single most cost effective measure that the government can take to prevent illegal immigration is to require all farm labor contractors who hire workers to participate in the E-Verify program immediately. There is no reason to give the worst violators of our immigration laws an additional three years of immunity

Farm labor contractors (FLCs) are the intermediaries who, for a fee, recruit, transport, and supervise farmwworkers. Since IRCA was enacted in 1986, the share of all seasonal job matches made by FLCs has increased. Today it exceeds 50 % in many harvest labor markets. Worker, farmer, and agency testimony as well as research suggest that FLCs are practically a proxy for the employment of undocumented workers and egregious or subtle violations of labor laws.

IRCA's employer sanctions increased the potential cost of hiring illegal alien workers so growers rationally tried to shift those risks to FLCs, since under IRCA they can be employers in their own right. Given the highly competitive farm labor contracting market with very low entry costs, employers could shift any IRCA-related documentation and sanctions costs to FLCs *at no additional cost*, since a new influx of workers and competition between FLCs kept the commissions or overheads paid to FLCs low even as the minimum wage rose and payroll taxes increased.

Professor Philip Martin at the University of California at Davis, one of the members of the Commission on Agricultural Workers noted in the Commission's Report that "the expansion of FLC activities in the wake of IRCA has helped to lower wages and incomes in rural America. FLCs are perhaps the most important dynamic actors in bringing the new-new immigrants to the United States. As they play the role of 19th Century ship captains in recruiting, transporting, and

employing new arrivals, their activities promise to bring into rural communities some of the neediest immigrants – relative to the average American – that have ever arrived in the United States."

If we are serious about stopping the use of unauthorized workers in agriculture shouldn't we start with the source of the problem – the farm labor contractors, many of whom have direct contact with the coyotes and other human traffickers who bring people across the border?

Farm labor contractors are regulated by the United States Department of Labor under the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801 et seq.). About 12,000 contractors register each year with the Department. However, many farm labor contractors are not the actual employer, but recruit, transport or supervise for someone else, either another contractor or grower. The number of farm labor contractors who would be required to participate in E-Verify because they hire workers in their own right is probably less than 8,000.

A sustained, targeted approach directed at a relatively small number of employers who are known to be directly involved in the trafficking networks is more likely to yield real results than casting a wide net which would require over a hundred thousand agricultural employers, many of which only hire one or two workers a year to participate in the E-Verify system.

The Migrant and Seasonal Agricultural Worker Protection Act should also be amended to make it a violation for a farm labor contractor to hire an authorized worker. Thus, DOL as well as DHS could enforce compliance with the E-Verify requirement. Moreover, U.S. workers who were the victims of discrimination in favor of unauthorized workers could also go to court under the Act to enforce this requirement.

Remove the Incentives in the H-2A Program to Discriminate Against U.S. Workers

If a blue card program were enacted, there should be no need for a new guest worker program. Agricultural employers will have, in addition to hundreds of thousands of U.S. citizen and permanent resident farmworkers, a labor pool of approximately 900,000+ blue card workers who will be eager to meet the requirements for permanent residency by working as many days in agriculture as possible. Employers should be required to hire these workers first before turning to the H-2A program to bring in new workers. However, the existing H-2A program contains incentives to prefer H-2A workers over U.S. workers. Current indications suggest that farm employers might invest in housing and the recruitment of H-2A workers rather than raise wages and benefits to retain newly legalized farm workers.

Two simple reforms are necessary to remove two of the most significant incentives in the current program for preferring to hire H-2A workers over U.S. workers. First, at present, wages paid H-2A workers are not considered taxable wages for purposes of the FICA and FUTA employment taxes. This results in H-2A workers being about 10% cheaper than US workers. Companies which supply growers with H-2A workers openly advertise this tax saving as one of

the main reasons to get into the H-2A program. The other H-visa programs, e.g., H-2B, H-1-B, etc., do not contain this tax break for employers. Eliminating the exception for foreign agricultural workers will put U.S. workers and H-2A workers on a level playing field. The Advisory Council on Unemployment Compensation recommended that the wages of H-2A be subject to FUTA taxes in 1994[23]

The other reform is to provide H-2A workers with the same legal protections as U.S. workers by eliminating the exclusion from coverage under the Migrant and Seasonal Agricultural Worker Protection Act. U.S. workers have a cause of action in federal court to enforce the terms of their working arrangements with their employers. Not surprisingly, growers would rather hire workers who don't have this right. Not only does the exclusion lead to discrimination against U.S. workers, it is also a clear violation of the NAFTA Labor Side Accords in which the United States promised to provide its guest workers with the same labor rights as it provides its nationals.[24]

Effectively Enforce Labor Standards in Agriculture

The Commission on Agricultural Workers found that "a sustained commitment to enforce protective legislation for farmworkers is also essential" to stabilize the farm labor market. One reason American workers shun agricultural jobs is the practically ubiquitous violations of labor laws throughout the agricultural sector. The blue-ribbon, national, non-partisan Commission on Immigration Reform, also called in 1994 for "enhanced enforcement efforts targeted at farm labor and other contractors who hire unauthorized workers on behalf of agricultural growers and other businesses." It seems obvious that we should only expect a legal workforce in agricultural when legal working conditions are the norm and not the exception. Uniform and effective enforcement of labor standards takes away a major incentive to backslide into once again employing unauthorized workers.

As part of a blue card program, the fines paid by the blue card workers could go to a trust fund to be divided equally between the Department of Labor and the Department of Agriculture. The trust fund would provide around $50 million per year for five years for additional labor standards enforcement in agriculture including outreach to farmworkers to inform them of their rights in the workplace.

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[23] The Commission found that "[u]nder the current exemption, alien agricultural workers are less costly to hire than domestic workers, on whom FUTA taxes must be paid. This cost differential may create an incentive for the substitution of foreign workers for U.S. workers, which argues in favor of repeal of the exemption." Report and Recommendations to the President and Congress, pp. 13-14, February 1994, Washington, D.C.

[24] The North American Agreement of Labor Cooperation ("NAALC") obligates each nation to provide migrant workers with the same labor law rights as other workers in the country. The Smith bill would also deny the new H-2C workers the same labor rights as U.S. workers by continuing the exclusion from coverage under the Act.

Promote Better Labor-Management Practices in Agriculture

We need a stable labor market in which labor standards are observed; we also need an efficient labor market which fully utilizes the services of the available workforce. The most effective strategy to meet future labor demands post-legalization is to concentrate on the retention and effective utilization of the existing labor pool.

Many labor-intensive farm operations continue to be characterized by organizational inefficiency. Worker dissatisfaction and turnover increase employer costs and reduce farmworker earnings. Mutual employer-worker benefits are possible through the adoption of modern labor management techniques.

Farmworkers experience extensive underemployment even during the peak harvest season in addition to chronic seasonal unemployment. A key issue in stabilizing the post-legalization workforce is to use the existing farm workforce more efficiently since underemployment decreases current farmworkers' attachment to the farm labor force and increases the need for more workers. There are effective strategies which would allow agricultural employers to improve the balance of of farm labor and supply. These include the production of complementary crops to "fill in" work during labor demand troughs for labor in major crops; reorganizing farm labor tasks such as pruning and thinning to provide steady work for a smaller crew over a longer period of time; regular over-winter contracts with migrant workers and development of firm pre-season contracts with workers; and creation of multi-employer pools to facilitate workers' movement from one crop to another.

The trust fund monies received by the Department of Agriculture would be used to fund research and demonstration projects on these labor practices and promote and disseminate the results through the extension service system. An advisory committee with both farmworker and employer representation would be established to advise the Secretary on the use of the funds and identify the most promising measures for meeting future labor demand.

The Long-Term Future of Agricultural Labor in the United States

Agricultural employers in general support legalizing the current workforce, but they argue that we need to provide for a future flow of new workers because it is inevitable that the blue card workers will eventually leave agriculture for the non–agricultural sector. They also strenuously argue that any future program must be uncapped, i.e., it must allow an unlimited number of new entrants. This argument is circular. As long as there is no significant improvement in farm worker wages and working conditions, U.S. workers will not be interested in working in agriculture and retention of existing workers will be a problem. New entrants from abroad will continue to be necessary. As long as the goal of the policy is the maintenance of the status quo, we will be dependent on immigrant farmworkers. Admitting as many new entrants as is necessary to maintain the status quo guarantees it.

We do not have to accept the status quo. We can have a stable farm labor market which serves the interests of both employers and workers. But this labor market cannot be created by simply passing E-verify and replacing an exploitive system of illegal migration with an exploitive guest worker program. Unless we change the policies which lead employers to favor temporary foreign workers over U.S. workers, "employers will learn to exploit the rules of any guest worker program just as they have exploited the supply of unauthorized migrants and they will cease to look for alternatives involving domestic recruitment or investment in more efficient production."[25]

We can also have a "free" labor market in agriculture where workers are free to choose their employers and free to quit and look for a better job, in or out of agriculture. This would almost be an untried experiment – during the long history of agricultural labor from colonial times to the present, it is difficult to identify a period in which all agricultural workers in the United States had this freedom. The Smith guest worker program with its government-dictated below-market wage and captive employees would be the antithesis of a free labor market. The blue card workers by contrast would be free to choose their employer and could work outside of agriculture as long as they completed the prospective work requirements. Inevitably, some of the blue card workers will leave agriculture for better paying opportunities in the non-agricultural sector; however, the exodus of the blue card workers from agriculture will not happen overnight. To the extent that labor laws are effectively enforced in agriculture and modern labor management practices are adopted, it may be further slowed. Adoption of other legislative reforms providing unemployment benefits, workers compensation, and collective bargaining rights for farmworkers equivalent to those provided in the non-agricultural sector will further level the playing field. It is not a bad thing if the blue card workers eventually move on to better paying jobs where they presumably are more productive. A tightening labor market will lead to improvements in wages and working conditions for the farmworkers who remain.

Some growers view legalization as a necessary transition to a permanent guest worker program. However, legalization can also be a transition to a free agricultural labor market which is not dependent on a constant influx of new workers from abroad. Such a labor market would lead to real improvements in wages and working conditions as agricultural employers would finally have to compete in the marketplace for workers. Inevitably, allowing agricultural wages to rise will lead growers to consider the use of labor-saving technologies. But that is also a gradual process. Those who think that mechanically harvesting machines are a panacea do not seem to understand that even if feasible, the wide-scale adoption of such new technologies requires very large capital outlays and may not be worth the risk. Mechanization is not a short-run solution; however, if Congress gives a clear signal that neither illegal migration nor expanded guest worker programs will be available in the future to meet agriculture's labor needs, employers will begin to make the necessary long-run investments in labor saving technology.

The Commission on Agricultural Workers concluded its Report with the following words:

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[25] Martin, P. and M.Titelbaum, *supra* at p.130.

> "The response of the United States to competition from countries that pay even lower wages should be the development of a more structured and stable domestic agricultural labor market with increasingly productive workers. Industries must modernize to remain successful in the increasingly competitive international market place. Agriculture is no exception."

The American Speciality Agriculture Act would be a tragic step backward, not progress toward a stable domestic agricultural labor market.