Washington Farm Labor Association

American Specialty Agriculture Act Hearing Dated September 8, 2011 Written Submission of Dan Fazio

According to the Congressional Research Office, there are approximately 1 million hired farm workers toiling in the U.S., and the majority of them are not eligible to work here. In Washington state, the most reliable figures indicate that 75 percent of the state's seasonal workforce (approximately 60,000 workers) is not work authorized.

But only 3,000 workers, about 5 percent of the total needed, come through the H-2A program in Washington state. In California and Oregon, less than one percent of the workers are provided by the H-2A system. In Washington, an employer can expect that it will add $4.00 per hour or more per hour to use the H-2A system. In other words, an employer who pays workers $13 per hour can expect this cost to rise to at least $17.00 per hour to use H-2A. Employers who use the government system to acquire a legal workforce are thus forced to pay a surcharge or tax, as compared to employers who simply hire the domestic workforce, which is largely undocumented.

Clearly, the H-2A program is not working. It is not being embraced by agriculture employers who desire a legal and stable workforce. And worker advocates tell us that the program does not work for their clients either.

I. Introduction: What is it going to take to solve the problem?

Farmer Perspective

What is the outcome that we are hoping to achieve, and how can we achieve that outcome?

The obvious outcome is a legal and stable workforce, in a cost effective manner. That outcome would support our nation's economic interest in having food produced in this country, where we have the world's best and safest food supply.

It would also satisfy our nation's moral imperative. We can provide jobs for people to help lift them out of poverty. The migrant workers who come from Mexico and Central America to my

state earn over $100 per day in the apple harvest. In their country, they earn far less than $10 dollars per day. The vast majority of them want to come here, earn a good wage for 6 months, and then go back home. And in six months in Washington state, they can earn more than they earn in three years back home.

And that is what this bill attempts to do.

Others workers may want to stay here permanently, and I think that this committee should work in the future on a plan for them. And the farmers from my state would be happy to help you in offering ideas there as well.

What will it take? It will take bi-partisanship. Farmers are asking Congress to work together to deliver a program where we can access a legal and stable workforce in a cost effective manner, offering workers a safe and secure workplace and an excellent wage.

Farm Worker Advocate Perspective

I have asked advocates for farm workers the same question – what is it going to take to get us this program? The response I hear is the H-2A guest worker program is full of abuses. While we all agree that the H-2A program is administratively complex and loaded with red tape, I disagree that the program is being abused. But that does not answer the question.

According to many worker advocates, the H-2A system is "indentured servitude," meaning that the worker is contractually obligated to work only for one farmer.

From my perspective, employers would be content to permit workers to be responsible for all costs, and thereafter to work for any employer. But that is not being suggested by worker advocates. Apparently, the idea being put forth by worker advocates is for the farmer to pay all of the costs for the guest worker, to provide housing and transportation, and thereafter allow the worker to work anywhere she pleases. This is not reasonable, and I hope that advocates for farm workers can articulate a better plan to solve this problem.

Right now, the position of farm worker advocates appears to be that we don't need a guest worker program; we only need to provide status adjustment for the workers who are currently here now.

Adjusting the status of workers may be part of the solution. But it raises two issues:

- Is this the permanent solution? In 1986, we provided amnesty for undocumented workers, and they were replaced with more undocumented workers. In order to avoid the same fate, we need to adopt a program that works in the future.
- If we adjust the status of workers, where do these people fit in the "immigration line?" Are these workers given legal permanent residence status, thus placing them in front of the current guest workers who have obeyed our laws and only come to this country in a

legal way? Or do we offer currently undocumented workers the same status as other guest workers, who are required to return to their native countries at some point.

What will it take? It will take advocates of farm workers proposing a guest worker program they are willing to support, or, in the alternative, for these advocates to propose modifications to this bill that they would require in order to support it.

II. Why Don't U.S. Workers want these jobs?

This is a simple question. Americans don't want these jobs because they are not desirable jobs, for the following reasons:

- This is not full time work. On average, there is only reliable work from May through October, approximately six months. In contrast, the construction industry in Washington state generally lasts for eight or nine months.
- The hours are not desirable. This is not an eight hour a day job, or anything approaching that. One week requires 60 hours of work, while the next week may only be 20 hours, due to rain or some other event related to weather or crops. The worker must be willing to place his/her personal plans and desires behind the requirements of the job, as dictated by mother nature.
- The pay is not consistent with the level of skill and dedication required. Although the pay for seasonal farm work is better than some would imagine - some harvest jobs earn consistently in excess of $15 per hour – it is not good when compared with jobs in the U.S. market that are similar in terms or skill. The prevailing practice is to pay piece rate, where the individual is compensated based on production. This is not the norm in the U.S. People who do not produce up to the piece rate standard are generally paid at the minimum wage.
- Pay is constrained by international markets. U.S. agriculture competes globally. For example, the average daily wage of worker harvesting apples in the U.S. is $100 per day; in Mexico, 8 - $10 per day; In China, $3 dollars per day. China currently produces about double the apples that are produced in the U.S., due in part to this competitive advantage. The U.S. must rely on its quality advantage, due in part to its skilled workforce, to offset this tremendous labor cost advantage. In other industries, such as retail, restaurant, hospitality, and construction, there is little or no pressure from foreign labor.

In summary, the average (documented) American who may be out of work has not shown an interest in seasonal agricultural jobs, and is not able to replace the foreign or undocumented work force.

III. The American Specialty Agriculture Act

Moving to the bill itself, on the west coast, we have struggled to implement the H-2A program because we have a large domestic workforce that must be integrated into the program. This challenge will remain. Specifically, domestic workers don't want to be tied down to one employer, as is required under the H-2A program, but they would like to receive the benefits of the H-2A contract, specifically, the higher wages. This is a difficult issue that must be addressed, and there are several other impediments. I am going to cover four areas of the bill. They are: housing, moving the program to US Department of Agriculture, length of the visa, and the dispute resolution process.

HOUSING

Housing is in short supply and very costly. Many domestic workers are requesting housing, and this has been a tremendous problem with the current H-2A program. Under the current program, the employer must maintain large quantities of excess housing on the chance that a domestic worker will arrive and request housing. This has happened to our association.

The bill (American Specialty Agriculture Act, ASAA) alleviates this problem by ending the requirement to hire domestic workers when the first foreign workers arrive.

Another way to alleviate the problem would be to require the employer to secure housing, but allow the employer to charge a reasonable amount for it. Most domestic workers are not willing to pay for housing and would not request it if there were a cost. In this way, the employer would only be providing housing for workers who truly need it.

MOVE TO USDA

The bill moves the program to USDA. That is an excellent idea because the Department of Labor is struggling with this program and is in fact hostile to it. From my perspective, the agency is not acting as an honest broker.

Right now, the DOL Wage and Hour Division has been ordered to investigate all growers that use H-2A in Washington state. Does it make sense to target the few employers in the state who are attempting to hire legal workers? Of course not. The objective by DOL is clearly to create charges of "worker abuse."

Currently, there is a disagreement between two sections within DOL - the Wage and Hour division and the Education and Training Administration.

Let me give you one example of this disagreement. The current H-2A regulation says that employers should follow state law regarding workers' compensation for the H-2A program.

State law requires employers to collect a portion of the workers' comp premium, and the applications from Washington employers were approved by DOL ETA with this language.

Apparently DOL Wage and Hour does not agree with the plain language of the regulation. It's a huge issue because Washington state law requires employers to deduct a worker portion of workers' compensation insurance. Even though the DOL education and training administration approved applications which clearly state that the worker portion will be deducted in accordance with state law, but the DOL Wage and Hour division told employers that the employers were going to be fined because the DOL Wage and Hour training manual says differently. In addition, the DOL inspectors have refused to provide employers with a copy of the training manual.

DOL Wage and Hour inspectors told employers in June that unless the employers immediately begin paying the worker portion of workers' compensation, the employer would be fined. The employers are therefore in a tough position – either pay millions in state workers' comp insurance that you do not owe, of face a fine.

Two months ago, on July 7, I wrote a letter to Secretary Solis asking her to resolve this issue, and to stop these investigations until we can all work together on complying with the new regulation. I haven't heard anything back. I included a copy of the letter in my packet.

I strongly support turning this program over to the Department of Agriculture.

The Length of the Visa

The ASAA would allow employers from all agricultural industries access to the program, but would limit the program stay to a single ten month period.

This is not practical for full time operations. A dairy farm or other full time agricultural employer could not survive by rotating crews every ten months. On the other hand, one of the goals of the program is to discourage long term stays in this country. We would therefore propose that the USDA be able to designate certain industries that are full time, and these industries could offer a visa of up to three years.

Dispute Resolution

Under the current program, individuals claim a private right of action. How this works, in practice, is that a person who does not agree with a provision of the law or related regulation can attack an employer, even though the employer is in fact complying with the law. The employer is therefore left to defend the regulation.

Let me provide a real life example. The 2008 changes to the H-2A regulation provide specific expenses that were the responsibility of the grower, and others that were not. In addition, the regulation did not require that payments be coordinated with the Fair Labor Standards Act.

In Washington state, the legal services provider is interested in challenging this provision of the regulation. The Legal Services provider has therefore contacted our association and threatened legal action unless the farmer provides payments that are specifically excluded in the regulation. Legal Services attorneys have admitted that the reimbursement they are seeking is not required by the regulation, and would acknowledge that it is the regulation which is being attacked. Thus, due to the private right of action, the workers are able to initiate a claim against the farmer for the decision of the agency not to include the H-2A program reimbursements in the FLSA.

The ASAA addresses this concern. The ASAA would require a mediation before a suit can be initiated. This is a reasonable compromise between allowing and denying a private right of action.