

U.S. Senate

Testimony Before the Committee on Judiciary, Subcommittee on Immigration, Refugees  
and Border Security

Hearing on America's Agricultural Labor Crisis: Enacting a Practical Solution

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Tuesday, October 4, 2011

10:00am

Good Morning. Chairman Schumer, Ranking Member Cornyn and members of the committee, thank you for the opportunity to appear before you today. I am Tom Nassif, President and CEO of the Western Growers Association which is an agricultural trade association headquartered in Irvine, California. Western Growers members are small, medium and large-sized businesses that produce, pack and ship almost 90 percent of fresh fruits, nuts and vegetables grown in California and approximately 75 percent of the fresh fruits, nuts and vegetables grown in Arizona. In total, our members account for nearly half of the annual fresh produce grown in the United States, providing American consumers with healthy, nutritious food.

### **Agriculture is Critical to the Health of the U.S. Economy**

Studies conducted by the University of California Davis, demonstrate that every California agricultural job creates two non-farms jobs in our economy, and every farm dollar generates an additional \$1.27 for the California economy. Nationwide, the Department of Labor reported that 24 million jobs, a full 14 percent of all people employed in the United States, are supported by the U.S. food and fiber industry.

Not only is agriculture's role in maintaining a safe and secure food supply vital to our economic recovery, it is critical to the strength of rural America. Western Growers members and their employees are members of the very communities in which they grow, pack, and sell products. In 2009, when the California water crisis forced us to fallow 500,000 acres in the Central Valley, thousands of farms jobs were lost, and rural non-farm businesses supported by these jobs suffered. Some communities realized unemployment levels of 40 percent.

Today, I'm here to talk about another crisis, our labor crisis. This is not a new challenge for agriculture. We've been working to secure a legal workforce for more than 15 years. But in the face of no immigration reform, a diminishing labor supply, threats due to I-9 audits and ICE raids, and now E-Verify legislation emerging at the state and the federal levels, it is clear that U.S. agriculture will be decimated without a workable mechanism

to hire the labor we need.

### **Demographics of U.S. Agricultural Work Force**

There are about 1.8 million people who perform hired farm work in the United States. Approximately 1.2 million or more of these people are not authorized to work here. Studies demonstrate that for a variety of reasons including the seasonal nature of the work, the difficulty of the work, and the skill level required for many agricultural jobs, unemployed Americans are unwilling to work in the labor intensive agriculture sectors—produce, dairy, nursery, livestock. The labor force in each of these sectors is overwhelmingly made up of foreign born employees.

In the late 1990's, at the insistence of Senator Dianne Feinstein, a multi-county welfare-to-farm-work program was launched in California's Central Valley. Regional unemployment ran 9 to 12 percent; in some localities, unemployment exceeded 20%. State and county agencies and grower associations collaborated to identify cropping patterns, labor needs, training, transportation, and other factors impacting employment levels. Out of over 100,000 prospective "welfare to work" placements, three individuals were successfully placed. In the aftermath of the program, several employment agencies stated – in writing – that they would no longer seek to place the unemployed in seasonal agricultural work because it suffered from such a low success rate, and that seasonal agriculture was "not a fit" for these individuals.

In 2006, in Washington State, a tight labor supply for the cherry harvest was a warning sign of a looming labor shortage for the much larger apple harvest. Again, state and local agencies teamed up with grower associations to conduct an advertising blitz and provide special training on how to safely pick apples without harming their market value or damaging the trees' future productivity. In that program, over 1700 workers were sought; roughly 40 were successfully placed.

In 2007, the North Carolina Farm Bureau Federation set up a statewide hotline for job seekers, and advertised it in print and on radio. North Carolina needs roughly 60,000 crop and livestock workers each season. Two calls were received; one was from a grandmother who felt that farm work would do her grandson good.

In 2010, the United Farm Workers Union launched the “Take Our Jobs” program. A media blitz included national coverage. As of mid October, which generally marked the end of the growing season and the campaign, 10,021 people had inquired about jobs in the fields, yet only nine people had taken jobs in the fields. Most of them quit after a few days.

Some might be tempted to consider wage rates as an additional factor that might discourage unemployed American workers from seeking agricultural jobs, but the facts do not bear this out. According to a July 2011 USDA farm labor analysis, wages for field and livestock workers averaged \$10.25 per hour. American workers do not seek nor stay in farm jobs, even today with unemployment hovering at 9.1 percent. The fact is the majority of farm jobs in this country will be filled by foreign workers.

### **Challenges to a Secure, Stable Workforce**

Even before the challenge of E-Verify, legislation, the need for a workable agriculture labor program could not have been more clear.

In California, a state with no E-Verify legislation pending, and across the country, agricultural employers are facing an increasingly difficult time finding a sufficient, stable workforce due to the existing federal enforcement-only work authorization laws.

As you know, the Immigration Control and Reform Act (IRCA) mandates procedures for employers to verify the employment eligibility of their workforce. Failure to comply with IRCA can lead to substantial civil penalties and, in some cases, criminal charges. However, employers are prohibited from questioning the documents the employee

presents if they appear to be valid. When the Department of Labor conducts workplace audits the employees' work authorization is scrutinized and run through DHS databases, often times with severe consequences for agricultural employers.

The Obama Administration has made enforcement of IRCA a priority. This year alone, the federal government has initiated 2,338 employer audits, up dramatically from past years, made more than 150 criminal arrests and levied more than \$7 million in fines on employers.

Agriculture and food processing are among a select group of industries that are receiving the most attention.

In March of this year, 85 percent of a California wholesale nursery's year round workforce—more than 70 employees—had to be terminated at the peak of their Mother's Day floral season when DHS determined their work documents were "suspect."

### **The Impact of E-Verify**

#### **State**

The existing challenges we face in securing a stable workforce will pale in comparison to the devastating impact of E-Verify legislation in the absence of a workable labor program.

State E-Verify laws are being enacted or considered across the country. The state of Georgia offers a glimpse into the future for the nation if E-Verify were to be imposed without a farm worker program. There, passage of a state law including E-Verify has led to farm labor shortages as high as 30 to 50%. Field workers are simply avoiding the state and Georgia growers and producers may lose \$300 million. And as described above, the economic misery resulting from lost production and lost payroll is also being felt in the community-based businesses that serve farms and farm workers.

The trends in California, which I noted does not have E-Verify legislation in place, are already startling. Our members, and other specialty crop producers across the country, are looking to foreign countries as they make plans to expand their businesses and create additional jobs there, not here. I have members who have moved portions of their operations out of the United States, not because the cost of getting product to market is less in other countries, but because of the uncertainty surrounding the labor supply in the United States. In foreign countries there are local populations able and willing to work in the fields. We are moving production to where the labor force is located and where the regulatory burdens allow us to continue in business, competing with global producers.

In the absence of a workable ag labor program, E-Verify not only promotes the movement off shore of what was once U.S. production, it is a jobs killer for rural America. When the incomes and taxes generated by farmers and employees leave a community, seed and fertilizer companies and distributors are impacted. Tractor and other equipment dealerships suffer. The decreased demand for packing and processing is injurious to the suppliers of packaging and processing equipment and their employees. Banks and storefronts close, and communities are imperiled.

Right now, the only program we have available to us to secure with certainty legal workers is the H-2A or temporary agricultural guest-worker visa program, As has been well-documented, it is utterly failing the agricultural industry including Western Growers members.

For example, H-2A is used to address only 2-3 percent of U.S. agriculture's labor needs. And even then, the just released nationwide study of H-2A users commissioned by the National Council of Agricultural Employers that was presented to the House Subcommittee on Workforce Protections last month, reports that 72 percent of workers arrived late, on average, 22 days after the date of need. In 2010, employers in the H-2A program reported \$320M in losses due to their inability to get the workers they needed or to get workers when they were needed.

The Department of Labor appears, at best, indifferent to agriculture's needs. The Western Growers members who farm in Yuma, Arizona hire Mexican H-2A workers who live in Mexico and commute to work. Many of these H-2A employees prefer to return home after each work day. These employees decline to use the approved housing that is required to be provided to them by the growers under H-2A regulations. Despite repeated requests for an adjustment to the requirements, the Department of Labor has taken the position that employers must make the housing available for the H-2A commuters *prior* to obtaining employer H-2A certification, regardless of whether the H-2A workers intend to use it. This imposes a significant cost on the growers without affording any benefit to the intended H-2A worker beneficiaries.

H-2A is administratively burdensome, implemented ineffectively, and is too unresponsive and inflexible to meet the labor needs of U.S. agriculture.

It is also unduly punitive. DOL seeks damages in the hundreds of thousands of dollars for minor technical violations of the program, including payment of  $\frac{3}{4}$  of the wages workers would have earned if they had worked an entire season. This requirement applies even if the workers voluntarily quit the first few days of the season, but the grower notifies DHS of the workers' departure more than two work days after they have left the job site.

The Department of Labor also appears to target growers who use H-2A (with wage and hour investigations). 8 percent of H-2A employers report that they were audited before they participated in the program, but 35 percent report being audited since entering the program.

As noted earlier, the H-2A program is used by a small percentage of agricultural employers. We are talking about the need for a program that will work for the remaining 96 percent of us and the greater than one million people we need to hire each year.

At the markup of E-Verify in the House Judiciary Committee last month, Congressman Dan Lungren, stated that even though he created the H-2A program in 1986, he recognizes it is irreparably broken.

### **Federal**

At the federal level, mandatory E-Verify legislation, H.R. 2885, was passed out of the House Judiciary Committee on September 21.

Similar to the state E-Verify laws, in the absence of an agriculture worker program, H.R. 2885 will deprive farms across America of a majority of their existing skilled workforce, as well as new employees willing to fill these jobs.

In H.R. 2885, agricultural employment is singled out for unique treatment with respect to the hiring process. The positive aspect of this provision is that it recognizes the special challenges agriculture faces. Unfortunately, the bill does not provide the needed solution to this challenge—a workable labor program.

Agriculture is provided with an extended period before employers are required to E-Verify their employees. This 36-month extension does little to provide us with relief, however. As soon as the IRS sends an employer a notification of non-matching wage and earning statements or the Social Security Administration or Department of Homeland Security sends a No-Match letter, the employer arguably has constructive knowledge that the employee is not work-authorized. If the no-match cannot be resolved, the employee must arguably be terminated. We are left without certainty about our work force.

Moreover, with DHS conducting an unprecedented number of audits of employer I-9 records, which, as noted above, often result in the termination of a large number of key employees, agriculture could be singled out for such audits during the 36 month deferral period. Other businesses will have already had to comply with E-Verify. Again, we are left without certainty about our work force.

Pending E-Verify legislation introduced in the Senate, S. 1196, is even worse for agriculture than the House proposal. There is no recognition of the challenges for agriculture imposed by E-Verify legislation. Under the Senate plan, all employers would be mandated to use E-Verify one year after enactment and it would eliminate a provision retained in the House bill, the agricultural commercial-off-the-shelf (COTS) exemption for agricultural products under current federal procurement regulations. Elimination of this exemption would make it nearly impossible to source U.S.-produced meat, milk, fruit, and vegetables for the school lunch program and U.S. military.

### **Steps Toward A Solution**

In order to move us closer to a solution to meet our labor needs, we must consider a new approach to an employee visa program: one that resembles the current labor market. The number of visas would be determined by the number of employer requests for workers on a monthly and annual basis and would vary year-to-year based on market conditions.

It would eliminate the contractual tie of the current H-2A program, benefitting employees and employers. A workable program would also provide farm workers with the same protections, no more, no less, than U.S. workers with respect to all employment related laws and employment taxes. Thus there would be no reason for an employer to prefer a temporary foreign worker over a U.S. worker. The perception of such preference is often a criticism levied at temporary worker visa programs. In reality, employers generally prefer to hire local workers first rather than rely on long distance migrants.

It is also imperative for this program to address, not only the need for future employees, but also the need to retain our experienced employees, the people who are already here. They must be eligible for the visa program.

## **Conclusion**

The labor emergency affecting American agriculture threatens not only farmers and rural communities' livelihoods; it puts at risk our stable and reliable food supply. If there are indeed 1.2 million or more falsely documented workers in agriculture and they were no longer able to work, then the 2 nonfarm jobs that they create will also be lost. That is a loss of 3.6 million jobs.

The workforce willing to grow and harvest crops exists, but it exists in other countries. Ensuring a stable and legally authorized farm workforce is about growing jobs in the United States, promoting economic activity in both rural and urban communities. It's also about avoiding a dependency on foreign food supplies. With less domestic production, more food will have to be imported, compromising the safety and security of our food supply since only 1-2% of imported food is inspected.

There is not a person in our country that is not connected to this problem. If you eat fresh produce, drink milk, grill steaks or purchase plants for your yard, you are benefiting from the hard work of a foreign agricultural worker. And do not forget that 90% of those working in this country illegally are employed in other industries, not agriculture.

Based on the experiences of ad hoc state implementation of E-Verify laws, we know that enforcement at the federal level, without a workable labor program for agriculture, would be devastating to farmers throughout the United States and the entire U.S. economy, as jobs are permanently lost.

I urge the Members of this Committee who are concerned about the survival of agriculture in your states to work together and reach out to your colleagues to craft a workable bipartisan solution to this important economic issue.

Foreign workers will harvest the produce Americans eat. The question is whether they will do so in the United States or abroad. E-Verify legislation in the absence of a workable agricultural labor program will answer this question, and it will not be in the best interest of America.

On behalf of Western Growers, I am appreciative of this Committee's willingness to examine the labor crisis facing U.S. agriculture. The impact of the labor market uncertainty has resulted in the competitive disadvantage for U.S. specialty crop production. We look forward to working with you to do something about it.