

U.S. SENATE COMMITTEE ON THE JUDICIARY

Hearing on

“From Farm to Table: Immigrant Workers Get the Job Done”

May 31, 2023

WRITTEN TESTIMONY OF LEON R. SEQUEIRA

Good morning, Chairman Durbin, Ranking Member Graham, and members of the Committee. I appreciate the invitation to testify about the importance of farmworkers to our economy and how to best address the shortage of workers on our nation’s farms.

I am an attorney in private practice and a significant part of my work involves advising employers and trade associations about employment and immigration issues, including the H-2A temporary agricultural visa program. My clients range in size from small farms with only a handful of employees to large family farms with thousands of employees. Let me begin by noting that I am testifying today in my personal capacity and not on behalf of any client.

I have worked on employment and immigration policy for nearly 20 years, including as a staffer in this body, as an Assistant Secretary of Labor in the George W. Bush administration, and representing clients in private practice. I had the privilege of testifying before this Committee two years ago on the difficulties that American farmers face in trying to remain competitive in an international marketplace while participating in the H-2A program. Two years ago, I noted that poorly thought-out and poorly implemented U.S. Government policy was threatening the viability of labor-intensive agriculture in America. Since that time, both government policy and the domestic labor shortage have become worse.

USDA has projected that this year the United States of America will reach an alarming milestone by importing more food than it exports. Everyone could have seen this coming if they bothered to look. America has been a net importer of fruits and vegetables for 30 years and that trend has accelerated in recent years with the gap between imports and exports widening to more than \$37 billion in 2022.¹

These depressing statistics are the result of ill-advised government policy, including the misguided approach of the U.S. Department of Labor in administering the H-2A temporary agricultural visa program. Each year farmers with labor intensive crops face escalating costs imposed by the Department of Labor and ferocious competition from low cost imported fruits and vegetables.

The Department of Labor has administered the H-2A visa program since its inception in 1986 and administered the H-2 program before that. From the beginning, the Department seemed intent on making the program difficult and expensive to use, and often adopted a hostile approach towards farmers. Despite pleas for reform and more even-handed administration and

¹ See CRS In Focus IF11701, *Seasonal Fruit and Vegetable Competition in U.S.-Mexico Trade* (Feb. 22, 2023).

enforcement, the Department's unnecessarily adversarial approach and even contempt for farmers has persisted throughout much of the program's history.

Unfortunately, that continues to this day. We were reminded earlier this month of the Department's harsh view of farmers and the H-2A program when the outrageous remarks of a senior career enforcement official of the Department of Labor came to light. That senior official was quoted as saying that employers in the H-2A program were involved in the "purchase of humans to perform difficult work under terrible conditions" and that wage theft was part of how the H-2A program operates.²

Of course, such views are just wrong and unfairly malign the thousands of honest and hard-working American farmers who participate in the H-2A program each year. After learning of those comments, Senate Health Education and Workforce Committee Ranking Member Cassidy and Senator Budd wrote to Acting Secretary Su seeking additional information about her Department's bias towards farmers and "disregard for the evenhanded enforcement of our nation's laws."³

In addition, just last week, in response to repeated processing delays of farmers' time-sensitive H-2A labor certification applications, House Education and Workforce Chairwoman Foxx and Workforce Protections Subcommittee Chairman Kiley wrote to the Acting Secretary inquiring whether the Department's processing delays also result from "hostility to the H-2A program and to the agricultural employers who participate in the program."⁴

Department of Labor AEW Regulations

Against this backdrop, recent H-2A regulatory changes implemented by the Department have caused further concern about the Department's view of farmers and understanding of the agricultural economy. It appears that the Department believes farmers operate like other businesses and when their input costs go up, they can just increase the prices they charge their customers. But farmers are not like other businesses in the larger economy, and they do not get to set the price of their products based on their cost of production. Rather, the sale price of crops, including specialty crops that require extensive amounts of hand labor to harvest, are set on the open market. Thus, every time the Department of Labor drives up a farmer's costs with mandatory increases in wage rates and other regulatory burdens, they put U.S. farmers at a greater competitive disadvantage in the international marketplace. And that leads to domestically grown produce being replaced on grocery store shelves with lower cost imports.

The Department's primary role in the H-2A program is to approve employer applications with job terms that will not result in an adverse effect on the wages and working conditions of similarly employed U.S. workers. Toward that end, the Department imposes a minimum hourly

² See <https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-budd-call-out-shocking-dol-comments-bias-against-american-farmers>.

³ *Id.*

⁴ See <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409210>.

wage that must be paid to H-2A workers and U.S. workers performing the same work on the farm. That minimum hourly wage is referred to as the Adverse Effect Wage Rate (“AEWR”).

Over the past five years, the Department has increased the AEWR on average nationwide by some 25% to more than \$16 per hour. In Washington and Oregon, the wage is up to \$17.97 per hour and California has the highest rate in the nation at \$18.65 per hour. At the same time, U.S. farmers face intense competition from imports. Most of these imports come from Mexico, where wages are a fraction of what is required to be paid in the U.S. While the U.S. Department of Labor mandates H-2A wages that average more than \$16 per hour, in addition to free housing and transportation for workers, the “required” minimum wage rate in Mexico is about the equivalent of \$1.35 per hour (depending on the exchange rate). Just considering hourly wages and no other benefits, production costs for U.S. farmers are, on average, 12 times higher than their competition.

And if this was not bad enough, the Department of Labor recently devised yet another way to ratchet farmers’ costs higher. The Department’s new AEWR regulations, which take effect⁵ in the coming days, change how the AEWR is calculated for certain tasks performed on farms. These changes will result, according to the Department’s calculations, in more than \$38 million in additional annual costs for farmers in the H-2A program. But contrary to the Department’s estimates, which are based on selective data and questionable assumptions, commenters on the proposed rule estimated this change in wage rates could easily result in more than \$100 million in increased annual costs to farmers.

The Department’s claimed rationale for this rule change does not match up with the realities of the agricultural labor market, nor with the purpose of the H-2A program. As a result, the Department’s AEWR changes are currently being challenged by farmers and agricultural associations in two different lawsuits pending in federal courts.

With these new AEWR rules, in furtherance of supposedly preventing *potential* adverse effects on U.S. farmworkers, the Department is actually imposing substantial adverse effects on U.S. farmers. This is contrary to the intent of Congress in establishing the H-2A program, which requires that the Department balance the interests of farmers and U.S. farmworkers when setting wage rates. In these new AEWR rules the Department changes how it will calculate the minimum wage for certain tasks performed on the farm and will now use data collected from *non-farm employers* to set wage rates for work performed on the farm. These new wage rates will come from the Occupational Employment and Wage Statistics (“OEWS”) program of the Bureau of Labor Statistics. Wage rates for other tasks on the farm would continue to be set by the Department with data collected *from farmers* through the USDA Farm Labor Survey.

The Department has targeted for higher wage rates certain tasks, such as driving a truck loaded with the farmer’s produce or driving a van to transport workers to the field or erecting a fence to keep livestock contained. But the Department does not mandate the higher wage be paid just

⁵ The new regulations took effect on March 30, 2023, for H-2A labor certification applications filed on or after that date. See 88 Fed. Reg. 12760 (Feb. 28, 2023). Work pursuant to an H-2A labor certification typically begins as soon as 60 days after an H-2A labor certification is filed with the Department of Labor.

when the H-2A worker is performing that specific task. Instead, the Department also requires the H-2A worker be paid the higher wage for time spent performing every other (lower wage) task throughout the day.

A simple example illustrates the Department's new approach. In 2022, an H-2A farmworker in New York who harvests apples would be classified as a farmworker and paid the traditional AEW of \$15.66 per hour that applies to the state. But suppose that farmworker also spends 5 minutes driving his coworkers from the farmworker housing to the orchard each morning and spends 5 minutes driving his coworkers from the orchard back to the housing at the end of the day. For 7 hours and 50 minutes of the day, that farmworker is in the orchard harvesting apples alongside his colleagues, but for 10 minutes of the day he is driving a van transporting his coworkers to and from the orchard.

In the past, those driving duties would have just been part of his job as a farmworker. As a result of the rule change, however, DOL now says this farmworker will be classified as a "chauffeur" – and must be paid as a chauffeur – simply because at some point during the day he transports his co-workers in a van. In 2022 in New York, DOL says chauffeurs (SOC 53-3053) earn on average \$20.29 per hour, which is 30% more than a farmworker.⁶ And so, the farmworker who spends just 10 minutes a day driving his coworkers in a van now will be paid 30% more than his coworkers for every hour he works, including during the 98% of his workday when he is doing the exact same work as his coworkers harvesting apples. This makes no sense.

But it does not end there. DOL's H-2A rules also require that every other H-2A and U.S. worker performing any of the same work described on the H-2A application also must be paid the same wage rate. So, in the example above, if the farmer needs 12 farmworkers to harvest apples and just one of those farmworkers will drive a van for 10 minutes a day, then that "job" is now classified as a combination of a "farmworker" and a "chauffeur" and the higher wage rate for a chauffeur must be paid to everyone performing *any* work described in that labor certification.

The result is that the 12 farmworkers who should be paid \$15.66 per hour to harvest apples, instead must be paid \$20.29 per hour simply because one of them drives his coworkers in a van for just 10 minutes out of an 8-hour workday. Just like that, the Department has increased this farmer's labor costs by 30 percent. Based on same estimates of hours worked during a season that were utilized by the Department in the rulemaking, the 30% increase in wages would cost the employer in this example about \$50,000 in one season.⁷ One could hardly design a more effective policy if the goal was to inflate U.S. farmers' costs to make them less competitive in the international marketplace and eventually drive them out of business.

The Department claims that it must impose these rules for H-2A workers in order to avoid any potential adverse effect on the wages of similarly employed U.S. workers. Except that the Department of Labor has never produced any evidence that H-2A workers have adversely

⁶ See OEWS estimates by standardized occupational classification at https://www.bls.gov/oes/current/oes_ny.htm.

⁷ This example demonstrates that the Department's estimate of \$38 million in additional wage payments resulting from the rule is not realistic. There were more than 18,500 labor certifications issued by the Department in 2022 covering more than 371,000 positions and this example concerns just one hypothetical labor certification for 12 positions.

affected the wages of similarly employed U.S. workers. In fact, rather than putting downward pressure on farmworker wages, the evidence indicates the opposite: that mandated H-2A wage rates are leading to wage inflation, as farmworker wages have increased at a far faster pace than other sectors of the economy in recent years.

The entire reason for the Department to set the AEW rule is supposed to be to avoid adverse effect on *similarly employed* U.S. workers. But in the example above, U.S. chauffeurs employed year-round driving limousines in New York City are not similarly employed to a farmworker driving a van on a farm during harvest season in upstate New York. Yet, in this rule the Department claims the wages paid to New York City chauffeurs should be included in determining the wage rate paid to farmworkers driving a van on a farm. Thus, in an attempt to avoid an adverse effect that theoretically might possibly happen, but for which it can produce no evidence showing that it has happened, the Department is imposing untold millions of dollars in annual costs on farmers based on wage rates paid to people who do not perform work on farms.

In recognition of the misguided approach of the Department of Labor and the severe harm this rule will cause for American farmers, Senator Scott and 32 other Senators, including many members of this committee, have cosponsored S.J.Res. 25, disapproving of the AEW rule pursuant to the Congressional Review Act. In addition, the House of Representatives has also addressed this issue by passing the Secure Border Act of 2023 that contains a provision nullifying the AEW rule.⁸

Domestic Farmworker Shortage

The shortage of domestic farmworkers gets worse with each passing year and so it is no wonder that there has been dramatic growth in the H-2A program. Even when available farmworker jobs are advertised nationwide – as the Department of Labor does in connection with each H-2A application – few U.S. workers respond. U.S. workers do not fill even one percent of these available jobs. In fact, U.S. workers do not fill even one-half of one percent of these jobs. The Department of Labor’s H-2A data shows that U.S. workers fill only six one-hundredths of one percent (0.06%) of available farmworker job openings.

In 2022, out of more than 368,000 advertised farmworker job openings, only about 250 positions were filled by U.S. workers. Said another way, out of every 10,000 H-2A farmworker job openings in 2022, just 6 were filled by U.S. workers. And 2022 was not an unusual year. It is abundantly clear that America does not have enough domestic workers willing to perform labor on our nation’s farms.

Given the obvious and longstanding shortage of seasonal farmworkers, one would think that the federal government and the Department of Labor would be devoting resources and extraordinary efforts to help America’s farmers meet their workforce needs. But in reality, the opposite is true. Each year, Congress provides the Department with nearly \$100 million for the National Farmworker Jobs Program to train domestic farmworkers to take other non-farm jobs in the economy. No one would argue with workers improving their skills and moving up the economic

⁸ See H.R. 2, 117th Cong. § 816 (2023).

ladder. But it is hard to understand why the Department is actively working to decrease to the already limited supply of U.S. farmworkers, and thereby increasing farmers' reliance on the H-2A program, while at the very same time making the H-2A program more difficult and expensive to utilize when that is farmers' only viable labor source.

The Department's approach makes no sense and seems designed to intentionally make it difficult for farmers to remain competitive in the international marketplace. Instead, the federal government should be trying to improve U.S. farmers' market position in competing against imported food. But the Department of Labor offers no help to farmers. And when the Office of U.S. Trade Representative negotiated the 2020 United States-Mexico-Canada Agreement to updated to North American Free Trade Agreement, they included no provisions to protect specialty crop farmers from low cost imported fruits and vegetables. And so, our food trade deficit continues to grow.

In the near term, it will be our farmers who bear the brunt of this. But that suffering is going to trickle down to the U.S. companies and workers who supply tractors, trucks, seed, fertilizer and all the other inputs used on the farm. The jobs lost in farming will lead to job losses in the broader economy. And eventually the U.S. consumer and the nation as a whole will suffer when can no longer feed ourselves.

It is very fashionable these days to fret over the fact that America does not produce enough semiconductors to power all the various electronic devices we use in our daily lives. Of course, the reason for the lack of U.S. semiconductor production can be traced back to decades of illogical government policy that caused production to move offshore. The same thing happened with the U.S. production of cars, televisions, phones, clothes, furniture, and many other consumer goods.

With semiconductors being crucial to every aspect of our economy, as well as our military, policy makers have belatedly realized that having to rely on computer chips produced in foreign countries is a national security threat. And so, in an attempt to correct this problem, the Biden Administration and Congress recently provided more than \$200 billion through the CHIPS and Science Act of 2022 to encourage domestic semiconductor manufacturing.⁹

A generation from now – or even sooner – people are finally going to ask: “why doesn't America grow the food it needs to feed its citizens, and instead relies on other nations to feed us?” The answer to that question will be: “Because bad government policy drove the American farmer out of business.”

Despite the mountain of evidence of the labor crisis facing our farms and the international competition facing U.S. agriculture, the government, and especially the Department of Labor, seems intent on pursuing policies that are driving farmers out of business. The U.S. government needs to change course and enact policies that support farmers and that will save labor-intensive agriculture before it is too late. That needs to begin with significant reform of the H-2A program.

⁹ See Pub. L. No. 117-167 (2022).

Throughout its history, the H-2A program has been plagued by complicated regulations, bureaucratic inefficiencies, high costs, processing delays, artificial limits on the types of agricultural employers that can participate, and hostility from the Department of Labor. Despite its drawbacks, the H-2A program remains the only option for farms to meet their seasonal workforce needs. Going forward, we must improve the H-2A program to ensure that all sectors of agriculture have access to needed labor, and that the program is administered in a fair reasonable manner.

But too often in Washington, the focus has been on other policy priorities that are sold to farmers as solutions for the agriculture workforce shortage when they actually are not. A prime example is the Farm Workforce Modernization Act (FWMA) that passed the House of Representatives in the last Congress. While the FWMA included some minor changes to the H-2A program, it also contained several provisions that would make the H-2A program more unpredictable, complicated, costly, and would subject farmers to significant increased legal liability. Rather than improve the situation, that legislation would have made many things worse for farmers, especially those currently participating in the H-2A program.

Another difficulty with the FWMA is that it puts legal status for farmworkers who lack work authorization ahead of a long-term workforce solution for agriculture. This repeats the same mistakes of the past. The U.S. legalized more than a million undocumented farmworkers in 1986. That did not solve our agricultural labor crisis then and there is no reason to believe it would solve our labor crisis today. After the 1986 legalization, those workers began almost immediately to leave farms for other opportunities in the larger economy. By the early 1990s, the newly legalized workers represented only about 10 percent of the agriculture workforce.¹⁰ With legal status came endless new economic opportunities and legalized farmworkers pursued those opportunities. And who can blame them. Moving up the economic ladder is central to the American dream.

Congress may decide that legalizing the undocumented farm workforce (or even other undocumented workers) is a worthy public policy. But history shows us that legalizing undocumented workers will not produce more farmworkers and will not solve agriculture's workforce shortage. The thousands of open positions created by the exodus of legalized agricultural workers in the late 1980s and early 1990s was a significant contributor to the next wave of illegal immigration. To avoid repeating this cycle, Congress must establish a predictable future workforce solution that provides farmers to access needed labor with a fair and predictable cost structure that enables them to remain competitive in the modern international marketplace. Hopefully, this Committee will have an opportunity to consider such legislation in the near future. An updated H-2A program must be simpler, more efficient, less costly, and accessible to all agricultural employers.

Time is running out to solve this national security problem. Unlike semiconductor production, which we may be able to recover by spending \$200 billion and building new fabrication plants,

¹⁰ See Martin, Philip L., *Immigration Reform and Agriculture*, ARE Update 15(2):5-8 (2011), University of California Giannini Foundation of Agricultural Economics.

we will not be able to just build new fruit and vegetables farms in the future. Once a farm ceases production, that farmland is lost forever. Idle farms become housing developments, office parks, shopping centers, and semiconductor factories.