

**U.S. SENATE COMMITTEE ON THE JUDICIARY**

**Hearing on**

**“Immigrant Farmworkers are Essential to Feeding America”**

**July 21, 2021**

**WRITTEN TESTIMONY OF LEON R. SEQUEIRA**

Good morning Chairman Durbin, Ranking Member Grassley, 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 family 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 for more than a decade advising clients in private practice.

The domestic labor shortage on America’s farms continues to get worse with each passing year and it is threatening the viability of labor-intensive agriculture in America. If current trends continue and America produces less and less of the food we consume, this issue soon will become a significant national security problem. Relying on foreign countries to produce our televisions, computers and phones is one thing, relying on foreign countries to grow our food is something else altogether.

There is no doubt that many aspects of our immigration and visa system need to be improved. As members of this Committee know, there are few issues that generate more heated opinions and rhetoric than a discussion of immigration policy. Immigration policy involves complex national security, economic, legal, humanitarian, and political problems, for which there are few easy solutions.

My comments today focus on just one aspect of immigration policy: how to assist American farmers in accessing needed labor while remaining competitive in an international marketplace. Addressing this problem begins with recognizing that American agriculture is not monolithic. Different regions of the country have different weather, different growing seasons, different crops and livestock, different labor needs and different amount of available labor. Some large farms encompass thousands of acres and require only a handful of employees. Other farms may have only a few hundred acres but require dozens of employees. Some farms need labor for only a few months a year, others need labor all year round.

I hope we can agree that all of America’s farmers and those toiling in the fields, barns and packing sheds are essential to feeding this country – and many others around the world. Farm

work is difficult and unlike any other job in the economy. The work is physical and usually performed outdoors in harsh and changing weather conditions. The working hours can be unpredictable and irregular. Long hours are the norm during some times of the year, such as harvest, but at other times of the year work hours may be far less, or there may be no work at all.

For these reasons and more, farmers face many challenges attempting to fill their labor needs. Most people in the U.S. who are looking for work are not looking for a job that requires physical labor, with work outdoors exposed to the elements, with an irregular work schedule, and employment that lasts only part of the year. Most job seekers are interested in predictable, full-time, year-round employment in a climate-controlled environment that does not require manual labor.

Farm work is honest and honorable work. There just are not enough U.S. workers willing to do it. That is true regardless of the unemployment rate. This is not a new phenomenon. Foreign workers have been coming to the U.S. (both with legal authorization and without) to work in agriculture for much of the last century. But the shortage of willing and available U.S. workers to fill jobs on farms is getting worse with each passing year.

Congress long ago recognized there was a persistent shortage of U.S. workers to meet agriculture's seasonal labor needs, and in response created the H-2 visa program in 1952, which was revised somewhat and renamed the H-2A program in 1986.

The H-2A program enables farms that are unable to hire sufficient numbers of U.S. workers to apply to the U.S. Department of Labor ("DOL") for approval to hire foreign farmworkers with a temporary work visa. The application process takes months to complete, is complex, and requires the approval four different state and federal agencies. The H-2A program is highly regulated and includes numerous protections for both U.S. and foreign workers. Employers are required to test the labor market for U.S. workers, pay heightened wage rates and provide additional benefits, such as free housing, to their H-2A workers (and any U.S. workers performing the same work).

Only after the federal government determines that the employment of an H-2A worker would not adversely affect U.S. workers, is an employer's application approved. An H-2A visa is a "non-immigrant" visa, meaning that H-2A visa holders are permitted to enter the U.S. and work on a temporary basis and then must return home. Each H-2A certified job can last no more than one-year, and in most cases the job must be for 10 months or less.

For the first 20 years of its existence, the H-2A program was not widely utilized and participation was largely limited to growers in the Southeastern U.S. and upstate New York. In 2005, DOL certified about 48,000 farmworker positions as eligible to be filled by an H-2A worker and the State Department issued about 32,000 H-2A visas.<sup>1</sup>

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<sup>1</sup> The difference between the number of positions certified by DOL and the number of visas issued by the State Department is largely accounted for by H-2A workers who fill more than one position per year. That is, an individual with an H-2A visa completes one certified job and then transfers to another employer to fill a second certified job.

Eight years later, by 2013, the number of positions certified by DOL had doubled to nearly 99,000 and the State Department issued about 74,000 H-2A visas. Just four years after that, in 2017, the number of positions certified by DOL had doubled again to more than 200,000 with the State Department issuing more than 161,000 H-2A visas.

The explosive growth in the H-2A program during that time period reflects the general lack of available labor. Previously, in many parts of the U.S., there had been an ample supply of workers who could relatively easily cross the southern border, obtain legitimate looking identity documents, and find work on U.S. farms (and elsewhere in the economy). But beginning the early 2000s, an increase in border security and interior enforcement measures began to change that dynamic. As fewer people were able to cross the border, as interior worksite enforcement increased, and as states began implementing E-Verify, more and more employers had difficulty finding sufficient numbers employment-authorized workers. The only viable option for farmers with a temporary or seasonal need for labor was the H-2A program.

Although H-2A usage used to be largely confined to the Southeastern U.S., today H-2A workers are dispersed throughout the country, and two of the states with the largest and fastest growing number of H-2A workers are on the West coast. According to DOL, the top 10 states for H-2A employment are: Florida, Georgia, Washington, California, North Carolina, Louisiana, Michigan, Arizona, New York, and Kentucky. In 2020, those ten states accounted for more than two-thirds of all H-2A certifications, and the top five states accounted for more than 50 percent of all H-2A certifications.

In the past couple of years, growth in the H-2A program has begun to slow. Since 2018, the number of positions certified by DOL and the number of H-2A visas issued has continued to increase, but only at about five percent per year rather than the 20 percent growth previously seen for several years in row.

The reasons for this slowdown are not entirely clear but it does correspond to several years of extreme volatility in the H-2A wage rates that are set by DOL. In the past few years, employers in some states have seen one-year wage rate increases of 10 percent, 15 percent and even 23 percent. Notwithstanding of the slowdown in growth over the past couple of years, H-2A visas issued by the State Department surpassed 275,000 in 2020. H-2A workers are a vital labor source for American farms. Indeed, in many parts of the country, labor-intensive agriculture could not survive without H-2A workers.

We will continue to need farmworkers for the foreseeable future. While mechanization and robotics may replace some farm jobs in the future, the cost of that technology will be beyond the reach of the average farmer for many years to come. In the meantime, the care and harvest of most fruits and vegetables will continue to require the knowledgeable eye and gentle hand of an experienced human farm worker.

So where will we find these future farmworkers? The federal government should be the first to recognize that America is not going to produce enough domestic farm workers to meet our needs. Farmers in the H-2A program are required to hire any qualified U.S. worker who applies for an H-2A certified position. Even though these jobs offer higher than local market wages and

benefits like free housing that employers usually do not offer, and even though U.S. workers have the right of first refusal for these jobs, almost no U.S. workers are interested in taking them. DOL data demonstrate that far less than one percent of H-2A certified positions were filled by a U.S. worker in recent years.<sup>2</sup>

Moreover, each year Congress appropriates, and DOL spends, tens of millions of dollars providing job training to the limited pool of current farmworkers, so that they can find other jobs in the economy. The President's FY2022 budget requests nearly \$100 million for the National Farmworker Jobs Program that is administered by DOL. No one can argue with a worker improving their skills and moving up the economic ladder. But if the federal government can spend \$100 million a year to help farmworkers obtain other jobs, and thereby decrease the available agricultural labor pool, surely the government can acknowledge this severe labor shortage and spend a similar amount of money helping ensure farmers have access to the labor needed to grow our food.

American agriculture cannot survive much longer with our current labor situation. Historically, the biggest variable determining a farmer's success or failure was the weather. But today, for many farmers in the U.S., the biggest variable they face is the supply and cost of labor. Too many farmers spend most of their time not knowing if they will have enough labor for the season or how much that labor will cost. Getting into the H-2A program may help alleviate some concerns about the availability of labor, but the program is not equally available to all of agriculture, and it introduces a host of uncertainties about high costs. Because of the flawed methodology used to set mandatory wage rates, farmers have no way to predict from one year to the next what their labor costs will be. And mandatory wage rates are just some of the costs associated with the H-2A program.

Labor is one of the largest line-item costs on farms growing specialty crops, and for a farmer in the H-2A program, labor can be 40 percent or more of production costs. As DOL ratchets up the H-2A wage rate year after year, farmers are unable to raise their prices to keep pace. Many farms have seen little, if any, increase in the sale price of their specialty crops in recent years. For some farms, revenues are decreasing despite increases in their production costs. Unlike other businesses, farmers do not get to set the price of their products. These rising production costs cannot simply be absorbed when U.S. farmers are competing for space on grocery store shelves with imported fruits and vegetables. Americans want cheap food, and bad government policy is pricing U.S. farmers out of the market.

Thirty years ago, the U.S. was a global net exporter of fruits and vegetables. Today, we import more than twice as many fruits and vegetables as we export.<sup>3</sup> Nowhere is this disparity more evident than in our trade with Mexico. In the past 15 years, fruit and vegetable imports from Mexico into the U.S. have tripled. In 2019, the U.S. imported \$15.6 billion worth of fruits and vegetables from Mexico, while exporting just \$1.4 billion.<sup>4</sup>

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<sup>2</sup> DOL H-2A disclosure data available at <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

<sup>3</sup> See CRS In Focus IF11701, *Seasonal Fruit and Vegetable Competition in U.S.-Mexico Trade* (Dec. 11, 2020)

<sup>4</sup> *Id.*

Much of this can be attributed to the relative costs of production. The minimum wage in Mexico in 2021 is about \$7.00 *per day*. By contrast, the 2021 nationwide average mandated wage in the H-2A program is more than \$14.00 *per hour* –16 times higher than Mexico. It does not take a PhD in economics to realize that fruits and vegetables can be grown and harvested in Mexico, shipped to the U.S., and sold in grocery stores at prices far below U.S. farm production costs. And that is exactly what is happening. There are no government subsidies and no import protections for specialty crop growers in the U.S. The recently passed USMCA trade agreement did nothing to address the problem of low-cost imports displacing American grown food in the domestic marketplace. As a result, American farmers are getting crushed. Ultimately, the U.S. consumer and the entire nation will suffer when we become totally dependent on foreign countries for fresh fruit and vegetables.

Throughout its history, the H-2A program has been plagued by complicated regulations, bureaucratic inefficiencies, high costs, processing delays, and artificial limits on the types of agriculture employers who are eligible to participate. Despite its drawbacks, the H-2A program remains the only option for farms to meet their seasonal labor needs.

Going forward, we must improve the H-2A program to ensure that all of agriculture will have sufficient labor to meet its needs. In recent years, there have been various proposals considered in the House and in the Senate to change the H-2A program. Some of those proposals included minor adjustments to the current program and others envisioned wholesale replacement of H-2A with a new agricultural visa program.

Earlier this year, the House passed legislation that would make numerous changes to H-2A and that would also legalize currently undocumented workers. Although the House bill contains a few provisions that would make some limited positive changes to the H-2A program, many other provisions of the bill would make the H-2A program more unpredictable, complicated, costly, and would subject farmers to significant increased legal liability. Rather than improve the situation, the House bill would unfortunately make things worse for many farmers, including those currently participating in the H-2A program.

The House bill would also legalize undocumented farm workers. Estimates of the number of hired farmworkers in the U.S. vary widely. The quarterly USDA farm labor survey indicates there are just over 800,000 hired farmworkers during peak employment on America's farms. But other USDA data suggests hired labor exceeds 2.4 million.<sup>5</sup> Whatever the number of farmworkers, DOL data reflects that more than 50 percent of farmworkers admit to being in the country without work authorization, and worker advocacy groups have said the number is greater than 70 percent.<sup>6</sup> So, the number of undocumented farmworkers would seem to be at least 400,000 but could be far higher. Members of this body may decide that legalizing the

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<sup>5</sup> See 2017 Census of Agriculture at 339. The vast disparity in USDA reports of hired labor suggests that the higher number may reflect the number of hired farm positions, rather than the number of individual workers, as many farmworkers work for multiple employers during the year and thus an individual may be represented as a hired employee by more than one employer.

<sup>6</sup> See, e.g., *Temporary Agricultural Employment of H-2A Aliens in the United States*, 73 Fed. Reg. 8538, 8540 (Feb. 13, 2008).

undocumented farm workforce is a worthy public policy. Legal work status undoubtedly would remove a great deal of anxiety and uncertainty for farmworkers and their employers. But history shows us that legalizing the current undocumented workforce will not produce more farmworkers.

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. Initially, newly legalized workers were estimated to constitute more than 30 percent of the farm labor force, but by the early 1990s they represented just over 10 percent.<sup>7</sup> With legal status came endless new economic opportunities and legalized farmworkers pursued those opportunities.

Data from the Immigration and Naturalization Service regarding those who received legal status in 1986 and went on to become naturalized starkly illustrates this exodus out of agriculture. Of those who indicated at the time of legalization that their occupation was farming, just four percent said farming was still their occupation by the time they were naturalized.<sup>8</sup> As a result of the 1986 legalization, agriculture was again left with a shortage of labor. Soon new waves of people crossed the border to replace those who had moved from the fields to other jobs.

Additional data demonstrates that eight of the ten states with highest number of unauthorized immigrants are the same states with the highest participation in the H-2A program, including the all top five H-2A states.<sup>9</sup> By definition, the unauthorized farm workers in those states who would be legalized under the House bill are already performing full-time farm work, yet farmers in those states are already experiencing severe labor shortages. Again, there may be public policy reasons that support legalizing those undocumented farm workers but doing so will not alleviate any labor shortage.

Congress needs to get agricultural immigration reform right this time and not repeat mistakes of the past. The 1986 reforms did not relieve our labor shortages. It has been said before, but it bears repeating: Foreign workers are going to harvest our food, the only question is whether that food will be grown and harvested here in the U.S. – or grown and harvested abroad.

Hopefully, this Committee will have an opportunity to consider legislation that provides farmers with an H-2A program designed to ensure labor-intensive agriculture can remain competitive in an international marketplace. An updated H-2A program must be simpler, more efficient, less costly, and be accessible to all agricultural employers. The availability and cost of agricultural labor should not be more unpredictable and extreme than the weather.

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<sup>7</sup> See Martin, Philip L., *Immigration Reform and Agriculture*, ARE Update 15(2):5-8 (2011), University of California Giannini Foundation of Agricultural Economics.

<sup>8</sup> See Rytina, Nancy, *IRCA Legalization Effects: Lawful Permanent Residence and Naturalization through 2001*, Exhibit 7 (2002).

<sup>9</sup> See *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015-January 2018*, Population Estimates, January 2021, USCIS.