Written Testimony
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Mr. Chairman and Members: Thank you for the opportunity to testify in this important oversight hearing of the H-2A temporary agricultural guestworker program. The conditions for farmworkers in this country are not what they should be and Congress should address discriminatory immigration, labor, occupational safety, health and other policies that impede farmworkers' efforts to achieve the American dream for themselves, their families and their communities.

The H-2A program allows agricultural employers to hire temporary foreign workers for labor shortages in seasonal jobs if they can show that they have actively recruited U.S. workers and have offered and are paying wages and working conditions that do not "adversely affect" the job terms of U.S. workers. Between World War II and 1986, the program's rules evolved through Department of Labor regulations. In 1986 Congress revised the H-2A statute, primarily by codifying in the law what had primarily been in regulations while continuing to give the Secretary of Labor substantial discretion in carrying out the law's purposes.

The H-2A program is deeply flawed and should not be a vehicle for filling the nation's 2 to 2 ½ million jobs on farms and ranches. In addition, Congress should not allow history to repeat itself. Many agribusiness groups lobbied in the 1990's for changes to "streamline" the H-2A program by cutting worker protections and reducing government oversight. Their legislation would have created a farm labor system of exploitable guestworkers with wages and other job terms at unconscionably low levels. These legislative efforts failed, as did efforts of farmworker advocates to pass their own policy proposals. Recognizing the need for a policy solution and the inadequacy of the H-2A program, growers and workers reached a compromise, known as the AgJOBS bill. That compromise would allow eligible undocumented farmworkers to earn legal immigration status, revise the H-2A program in balanced ways, and provide America with a stable, decently-treated farm labor force.

After the failure of comprehensive immigration reform in 2007, the Bush Administration turned to the H-2A program as the solution for agriculture's labor needs. The reform's intent was to give agricultural employers unlimited access to cheap foreign labor with little government oversight. The Bush Administration's changes were devastating to workers and to our nation's most basic democratic, labor and immigration policy tenets. Under the Bush regulations, worker protections were slashed, key recruitment protections for U.S. workers were eliminated, and government oversight in an already abusive program was restricted. Farmworker wages fell an average of about $1.00 to $2.00 per hour. Most H-2A employers in North Carolina, for example, were permitted to pay $7.25/hr instead of the $8.85/hr in 2008 and $9.34/hr in 2009 that they would have earned under the long-standing H-2A wage formula. Under the prior, longstanding regulation adopted by the Reagan Administration, which has been reinstated, DOL required H-2A employers to offer workers at least the average regional hourly wage for farmworkers as determined by the USDA Farm Labor Survey. Although this survey's results are low because of the presence of a large number of undocumented workers, the Bush Administration decided to

lower the wage rates even further by switching to a different, utterly inaccurate formula. The Bush Administration based its H-2A wage levels on the Bureau of Labor Statistics' Occupational Employment Survey, which does not even survey farms and therefore included few farmworkers. However, that survey does include farm labor contractors, the lowest paying employers of farmworkers. In addition to using this skewed survey, the Bush Administration applied a mathematical manipulation of the survey results; it allowed employers to pay one of four "wage levels" that were arbitrarily created. Most employers were permitted to pay the lowest level, which was the average wage received by the lowest-paid one-third of farmworkers in a geographic area (i.e., generally the 16th percentile). In no way did this wage formula protect U.S. workers from adverse effects on their wages.

Fortunately, the Department of Labor, under Secretary of Labor Solis, reversed these harmful changes. While the Bush regulations remained in effect for more than one year, thousands of U.S. farmworkers and guestworkers at H-2A employers suffered low wages and other harm. The Department also instituted additional common-sense protections, such as a surety bond requirement for labor contractors, a requirement to disclose job terms to foreign workers by the time of the visa application, and increased opportunity for U.S. workers to learn about H-2A jobs via online posting of approved H-2A applications. With these changes, the DOL and state workforce agencies were able to exercise more meaningful oversight of worker protections, farmworker wages increased, transportation reimbursements again reflected true costs to workers, the right of U.S. workers to H-2A jobs was restored and increased protections against recruitment fees and potential trafficking abuses such as passport confiscation were implemented. Despite these improvements, abuses are still rampant and stronger protections and additional resources are needed to adequately police the H-2A program and address the many abuses.

The Bush administration failed to understand that the H-2A program cannot and should not be a solution for agriculture's labor needs. Undocumented workers constitute anywhere from 52% to 70% of the estimated 2 to 2.5 million workers on farms and ranches. Deporting the large number of undocumented farmworkers is not feasible and would harm our agricultural production. Currently, the H-2A program only provides 3-5% of the total agricultural workforce. Even if it were desirable, the H-2A program cannot be expanded rapidly enough to provide a replacement workforce for the current unauthorized workforce. DOL, DHS and the State Department do not have the capacity to accommodate such a huge deportation and massive new influx of guestworkers. Employers would not have their needed workforce in a timely manner and crops would rot in the fields, wreaking havoc not only farmworkers and farmers but on the broader economy. Such efforts also would be a vast waste of taxpayers' money. Even today, with H-2Aworkers making up such a small percentage of the total workforce, DOL needs more resources to adequately police the H-2A program.

Abuses continue to occur in the H-2A program because it is inherently flawed. One fundamental flaw in the H-2A program is the worker's tie to a single employer – H-2A workers can only work for the one employer that obtained their visa. The workers do not have a right to seek a job at another employer if they are dissatisfied with or mistreated by that employer. If the worker leaves the job, or is fired, the worker must return to his home country. In addition, it is the employer who decides whether the worker will be offered the opportunity to obtain a visa in

the next year. Under these constraints, most guestworkers are extremely reluctant to complain about their treatment on the job and are very vulnerable to abuse. In addition, the employers can extract very high levels of productivity from these vulnerable guestworkers without paying them higher wages or offering special incentives.

The H-2A workers' restricted, "non-immigrant" status not only deprives them of economic bargaining power but also prevents them from acquiring political power. No matter how many years an H-2A worker returns for agricultural work, he is not entitled to earn immigration status. Guestworkers never obtain the right to remain in the U.S., become citizens, or exercise the right to vote. The political powerlessness of the temporary foreign workers in comparison to their employers contributes to worker vulnerability and an inability to persuade government officials to protect them from abuse. Government officials represent the interests of citizens, not guestworkers. Thus far, few H-2A workers have been able to join unions. The H-2A program's restrictions are not consistent with our nation's commitment to economic and political freedom. Ours is a nation of immigrants, not a nation of guestworkers.

Further compounding this vulnerability, many guestworkers arrive deeply in debt, having paid enormous recruiters' fees for the opportunity to work in the United States, often under very misleading descriptions. Depending on their country of origin, workers pay anywhere from hundreds to thousands of dollars. In addition, workers are sometimes required to leave collateral, such as a property deed, with recruiters to ensure that workers will complete their contract. False promises of potential earnings, misleading or undisclosed contract terms, excessive recruitment fees and increasingly, the involvement of organized crime found in countries of origin often lead to cases of debt bondage and human trafficking in the United States. Although Secretary Solis strengthened the prohibition on recruitment fees, recruitment abuses continue, and more must be done by DOL, DHS, and the State Department to effectively prevent recruitment fraud in the home countries of guestworkers**.**

The vulnerability of H-2A workers makes them attractive to many agricultural employers in comparison to immigrants and U.S. citizens, but the H-2A employers also have financial incentives to hire foreign guestworkers rather than U.S. workers. Once in the H-2A program, employers often prefer foreign workers for the substantial tax benefits. Under the H-2A program, employers do not pay Social Security (FICA) or unemployment (FUTA) taxes on their H-2A employees' wages. This means that an H-2A employer saves more than 10% by hiring a foreign worker instead of a legal U.S. resident. It should not be cheaper for employers to hire H-2A workers than to hire U.S. workers.

Another incentive to hire H-2A workers is that while recruiting in foreign countries, employers can and do select workers based on ethnicity, age, gender, and race, which is far more difficult to do inside the United States. "[D]iscrimination based on national origin, race, age, disability and gender is deeply entrenched in the H-2 guestworker system."[1] Almost uniformly, H-2A workers are single relatively young men who are not accompanied by their families. Women, who once worked side-by-side with male counterparts, are absent from the H-2A workforce but still represent about 21% of the national farmworker population.[2] In addition

[1] Southern Poverty Law Center, "Close to Slavery," (2007), p. 34.
[2] National Agricultural Worker Survey, NAWS Findings: 1989-2007

to not having any daily family responsibilities to distract them from performing their H-2A jobs, H-2A workers have no ties to the local community outside of work and return at the end of the day to a barracks or trailer shared by other male workers. As one grower stated, "[H-2A workers] are here with one thing on their mind -- to work. They don't have vehicles. It's perfect." [3] Even within the H-2A program itself, discrimination and stereotypes about the characteristics of workers from countries and ethnicities abound. For example, one employer criticized the Hispanic population for "Americanizing," which he defined as "becoming lazy." [4] He subsequently decided to hire Asian H-2A workers "just to try a new breed."[5] When employers discriminate against protected traits in foreign countries under the H-2A program, their discriminatory intent can carry over to their recruitment in the U.S. For example, age discrimination impacts many U.S. agricultural workers who were legalized as a result of the Special Agricultural Worker ("SAW") provisions of the Immigration Reform and Control Act of 1986 or workers who have been a part of the agricultural workforce for years. Race and national origin discrimination have impacted the ability of many Puerto Rican workers to get agricultural employment in traditional workplaces such as North Carolina.

These and other incentives in the H-2A program have led to tremendous obstacles for U.S. workers who seek jobs at H-2A employers. While the majority of the agricultural workforce is undocumented and in need of an earned legalization program, there are still several hundred thousand legal immigrants and citizens who still seek employment in agriculture. Unfortunately, employers routinely turn away U.S. workers, discourage them from applying for H-2A jobs, or subject them to such unfair and illegal working conditions and production standards that workers either vote with their feet or are fired. For example, two American women in Georgia were fired from an H-2A employer after just a few days in the fields for allegedly failing to meet a production standard which had not been approved by the government and about which the workers had not been told until arriving at the farm.[6] The H-2A application's job offer stated the workers would be paid $9.11 an hour and would be provided with 40 hours of work a week. During the few days they worked, these women were not allowed to begin working until after the H-2A workers had started picking; they were only allowed to work for a few hours in the morning even while H-2A workers continued to work; and they were forced to spend time bringing their buckets of zucchini a great distance to tractors. One of these women had actually grown up on the farm in question and spent many years during her childhood working the fields of this farm. Their discharges illustrate the challenges willing U.S.workers face at many H-2A employers.

Also common is the experience of U.S. workers who had worked in agriculture for years before being displaced by employers who preferred to hire vulnerable guestworkers.[7] There are many similar cases in Arizona and around the country. The regulations governing recruitment,

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[3] *The Atlanta Journal Constitution*, "Debate Over Illegals Roils Onion Country," Apr. 6, 2006.
[4] Comments submitted by Farmworker Justice on behalf of Farmworker Justice, the United Farm Workers, and other farmworker advocates to RIN 1205-AB55, 4/14/08, p. 25; Exhibit R-4 at 320.
[5] Id. at 25, Ex, R-4 at p. 226.
[6] See OSC Charge Form, EEOC Atlanta Office, Kathern Bentley v. J &R Baker Farms, LLC, March 25, 2011; OSC Charge Form, EEOC Atlanta Office, Mary Jo Fuller v. J &R Baker Farms, LLC, March 25, 2011.
[7] See Baeza v. S & H Farm Labor, L.L.C., 2:10-cv-01151-MHM (D. Ariz. 2010).

including the 50% rule, which is the principal job preference for U.S. workers in the H-2A requirements, are key measures designed to protect the ability of U.S. workers to obtain employment with H-2A employers.

In addition to abuses already mentioned, other abuses abound: workers are frequently not paid the wage rate they have been promised, they are routinely exposed to pesticides and other unsafe workplace conditions, they are housed in unsafe and unsanitary housing, and they do not receive the transportation costs they have been promised, among other problems. In one case, H-2A workers were hired to pick strawberries in Louisiana at Bimbo's Best Produce.[8] Upon their arrival, the employer confiscated their passports and H-2A visas. Throughout their employment, the workers were routinely threatened with deportation and blacklisting if they did not continue working or if they did not work according to the employer's specifications. The employer carried a gun, shot it over their workers while they worked and shot and killed a neighboring dog befriended by the workers near the fields while the workers were harvesting. On one occasion, the employer screamed at a worker and shoved him for weeding incorrectly, and he routinely berated and insulted the workers while they worked, including for standing to stretch out their backs.

Another common problem is the failure of employers to pay workers' inbound and outbound transportation costs. Many employers tell the Department of Labor an artificially long season, such as April to November, even though few people are needed for that length of time. When the workers begin to leave at the end of the summer due to lack of work, many employers contend that the workers are "abandoning" their employment before the end of the contract and are therefore not entitled to the payment of their transportation costs. Most workers know that if they complain about losing the transportation costs, they are not likely to be called back the next year.

The experience in North Carolina demonstrates the value of union representation under the H-2A program, which admittedly is a rare event and has not been able to reform all abuses. Prior to entering into a contract with the Farm Labor Organizing Committee, the North Carolina Growers Association was notorious for its abuses of workers. Workers arriving in North Carolina were instructed to throw away the "know your rights" booklets they received from nonprofit legal advocates and were warned against contacting legal services. Workers who did seek to enforce their rights were "blacklisted." While the FLOC contract has helped workers employed through NCGA and is continuing to address problems that persist, other H-2A workers are not so fortunate and continue to experience such threats. In many instances, employers confiscate the workers' passports and other forms of identification to ensure that the workers do not leave, or threaten to call immigration enforcement on workers who complain. Because workers do not have freedom of choice, the H-2A regulatory protections are invaluable, and outside enforcement and oversight by DOL is essential to ensuring that protections are meaningful.

Even where workers find the courage to come forward regarding their treatment, they face many obstacles pursuing justice. H-2A workers are excluded from the Migrant and

[8] Israel Antonio-Morales, et al v. Bimbo's Best Produce, Inc. and Charles "Bimbo" Relan, individually and d/b/a Bimbo's Best Produce, No. 08-cv-5105, United States District Court for the Eastern District of Louisiana, filed 1/29/09.

Seasonal Agricultural Worker Protection Act (AWPA), the primary law protecting farmworkers. AWPA gives U.S. workers protection against abusive labor contractors, unsafe transportation, assurances that their employers' promises are enforceable, and the right to file a lawsuit in federal court to enforce these rights. AWPA's exclusion of H-2A workers deprives them of these substantive protections and denies them the ability to go to federal court to enforce the promises made to them. Another barrier to H-2A guestworkers seeking redress for illegal actions and worker abuses is their difficulty, and often inability, to obtain visas to return to the United States to testify at their trials or to provide deposition testimony.

In conclusion, the H-2A program abuses are rampant and should be cleaned up. As history and H-2A experiences demonstrate, the H-2A program should not and cannot be the principal mechanism in our free market economy for hiring farmworkers. More than one million undocumented farmworkers are making U.S. agriculture productive. In fact, we have a positive trade balance in labor-intensive agriculture due to the value of the exports produced by farmworkers, but farmworkers are not sharing in their contribution to our economy. We need to stabilize the workforce and keep agriculture productive by allowing undocumented workers to obtain legal immigration status. We also must improve wages and working conditions to attract and retain farmworkers, which requires both improvement in employer practices and reforms in employment laws and regulations. Rather than repeating battles of the past, Congress should embrace the hard-fought AgJOBS compromise that would provide employers and consumers with a stable, legal supply of farm labor by offering farmworkers the opportunity to earn legal immigration status and by making balanced changes to the H-2A program. The nation would be well-served by such policy improvements.

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