Testimony of Elizabeth (Libby) Whitley

On Behalf of the
National Council of Agricultural Employers

Before the
House Education and the Workforce Committee
Subcommittee on Workforce Protections

Hearing on
"Workforce Challenges Facing the Agriculture Industry"

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Good morning, Chairman Walberg, Ranking Member Woolsey, and Members of the Committee. My name is Libby Whitley, and I am the Chair of the H-2A Committee for the National Council of Agricultural Employers (NCAE). NCAE represents agricultural employers and their associations throughout the U.S. on labor and immigration issues, including many H-2A program users. NCAE's H-2A users range from the West Coast to New England and include the nation's oldest program users. I am also the President of Mid-Atlantic Solutions, Inc. (MASLabor) of Lovingston, Virginia, the leading for-profit service provider of H2 guestworkers in the United States. MASLabor serves more than 600 diversified agricultural, green industry, and other seasonal employers in more than 30 states. I am testifying today on behalf of NCAE and its members are grateful for the opportunity to address the Subcommittee today and share our views of the dysfunctional H-2A program.

The H-2A program is the only way for many farmers to hire enough legal workers to grow and harvest their crops. Congress created the program with two purposes: (1) to require the U.S. Department of Labor (DOL) to admit in a timely manner temporary and seasonal alien agricultural workers if there are insufficient able, willing, and qualified U.S. workers to meet

workforce needs and (2) to ensure that the admission of alien workers does not adversely affect U.S. workers. Unfortunately, DOL singularly focuses on administrative requirements intended to ensure employment of U.S. workers. As a recent survey conducted under NCAE's auspices shows, DOL delivers few U.S. workers who want farm jobs, in spite of the extreme costs and burdens it imposes on farmers for this purpose.

DOL does not attempt to meet its other statutory requirement—the timely admission of legal workers. This results in serious delays in the admission of needed H-2A workers without providing any benefit to U.S. workers. To the contrary, DOL's program administration threatens the jobs of year round U.S. workers and other businesses that rely upon farmers producing labor intensive crops. As currently administered, the H-2A program fails to meet its purposes and, as a result, the safety net on which these farmers rely for a legal workforce is fundamentally broken.

For many years farmers have expressed their frustration with the H-2A program and this has increased dramatically in the past two years. We hear egregious examples of administrative mistakes and arbitrary action taken by DOL on the weekly calls of NCAE's H-2A users committee. From all over the country, farmers tell the same story: regulatory burdens and arbitrary treatment that make the system unworkable and drive farmers out of the program, imposing hundreds of millions of dollars of losses due to delays in DOL's processing of growers' applications, and arbitrary and frivolous denials of applications that result in unnecessary appeals to the Office of Administrative Law Judges. Rather than rely upon anecdotal stories, NCAE decided this past spring to commission a national statistical survey of employers using the H-2A program in 2010 to demonstrate to Congress that the H-2A program

needs to be replaced with a new program that will ensure the survival of labor intensive agriculture.

NCAE's National Survey of H-2A Program Users

I have referred in my testimony to information from a survey conducted by Carol House, who designed a nationwide survey of all users of the H-2A program in 2010 on behalf of NCAE. Ms. House is an agricultural statistical expert, recently retired from the U.S. Department of Agriculture, where she was responsible for 500 annual statistical releases of the National Agricultural Statistics Service (NASS) and the Census of Agriculture. The survey was implemented by Washington State University. I will be making reference to the preliminary findings of the survey throughout my testimony in order to provide members of the Subcommittee some context for my statements. The following comments are based on the survey, publicly accessible statistics and examples of H-2A program problems provided by NCAE members based on their experience that illustrate the conclusions drawn from the statistics.

E-Verify & H-2A

The timing of this hearing is critical, as the House Judiciary Committee is expected to report out in the coming weeks a mandatory E-Verify program that would exclude an estimated 70 percent of the seasonal agricultural workforce from employment. In June of this year,

Representative Lamar Smith, Chairman of the Judiciary Committee, introduced H.R.2164, the "Legal Workforce Act." This would make E-Verify mandatory for all employers. Although the language of the bill contains provisions that implicitly recognize the undocumented nature of the agricultural workforce and would delay its mandatory application to farmers for three years, it does not provide a long-term solution to agriculture's need for a workable program. This creates the imminent threat of losing the majority of America's seasonal agricultural workforce, as well as year round dairy and livestock workers who do not have access to any legal worker program.

We have seen the dramatic effect of the passage of a mandatory E-Verify law in Georgia this summer as farm workers have not sought jobs in that state, leaving farmers to watch their crops rot in the field for lack of workers to harvest them—causing millions of dollars in damage. This demonstrates why there is such a critical need for a workable program that will meets the needs of labor intensive agriculture. Whether Congress passes mandatory E-Verify or not, the states are passing E-Verify laws at a rapid rate and the U.S. Supreme Court this year upheld such laws. The current dysfunctional program leaves growers without a safety net and without access to a legal workforce.

The H-2A Program: The Growers' Perspective

Why are farmers who utilize the H-2A program frustrated? They are frustrated by regulations that changed twice between 2008 and 2010, after having previously been without change for the prior 21 years; they are frustrated by being second-guessed by officials at DOL with no agricultural background telling them how to operate their farms; they are frustrated by

being disproportionately targeted for Wage and Hour Division audits; and they are frustrated by a Department of Labor that seems more interested in creating paperwork and looking for mistakes than in administering a program that ensures the employers have access to a legal workforce sufficient to sustain the labor-intensive agriculture industry in the U.S.

Highlights of Survey Findings

Nearly 50% of Those Who Quit Using the H-2A Program Do So Because of Administrative Burdens and Costs. Of those choosing not to participate in the program in 2012, 42% give the reason that it is "too administratively burdensome or costly," as supported by their accounts of delayed or denied applications and huge economic losses. Administrative and litigation expenses continue to pile up. Nearly half of the employers surveyed state that they are "not at all satisfied" or only "slightly satisfied" with the H-2A program; only 14% were "very satisfied" or "completely satisfied." More than half of the employers say that they became so frustrated that they complained about the program to their Senator or Representative. Of those choosing to remain in the program, nearly 40% cite as reasons for their continued participation that they are "dissatisfied with the program, but have no legal alternative" or "anticipate that an electronic employment authorization verification program will become mandatory."

The Imposition of Large Regulatory Burdens and Costs Does Not Result in U.S. Workers Taking Farm Jobs. Employers reported that of the qualified domestic workers found through state work force agencies, 68% did not accept the offered job, 7% accepted the job but did not

start and 20% started work but did not work through the entire job contract period. Only 5% actually worked through the entire contract period.

DOL Statistics, Consistent with the Survey, Show that It Historically and Currently Fails to Meet Statutory Deadlines for Acting Upon H-2A Applications. Applications Denials Have Increased Significantly. Historically, DOL missed its statutory deadlines and workers arrived late; however, nearly all employers eventually received approval of their applications. Under the new rules, the application approval rate has dropped dramatically. The GAO issued a report to Congress in December 1997, *H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers*, noting that during FY 1996 and the first 9 months of FY 1997, DOL approved 99% of all H-2A applications.[1] The approval rate remained near that level until FY 2010, when it fell to 89%, and has since fallen again to less than 78% of the applications processed in the first three quarters of FY 2011.[2]

While growers using H-2A and DOL may disagree over the specific decisions by CNPC for these applications, they would both agree that the decisions are not being made in a timely manner in many cases. By law, DOL must make a certification on an H-2A application within 15 days of receipt and at least 30 days prior to the employer's stated date of need. From 1997 to the present, DOL met its statutory deadlines for handling H-2A applications only 40 to 60 percent of the time. Moreover, DOL does not appear concerned with this consistent failure to meet its legal obligations.

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[1] http://www.gao.gov/archive/1998/he98020.pdf.

[2] http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm.

In annual documents submitted to Congress in support of its budget requests, DOL sets forth targets for compliance with these H-2A deadlines. The first year that DOL set compliance targets in its CBJ was FY 2006.[3] For both FY 2006 and FY 2007, the target was set at 95% -- that is, the Department would try to issue timely decisions on 95% of the H-2A applications received during those years; the actual compliance rates for those years were 57% and 55%.[4] The Department's solution to this problem was to lower expectations. The compliance targets for FY 2008, 2009, and 2010 were lowered to 60%, 61% and 62%, respectively.[5] Even these modest goals proved to be overly ambitious, as the actual compliance rates for handling H-2A applications in a timely manner were 56%, 46% and 58%.[6] The targets set forth in the 2012 CBJ have been lowered again, to 57% for 2011 and 2012.[7]

DOL Now Rejects Applications that It Accepted in the Past. Employers are reporting that applications for temporary labor certifications filed with DOL's Chicago National Processing Center (CNPC) that had been routinely granted in years past are now being denied without explanation. Many growers had used the same workers year after year, doing the same specific work on their farms with the experience developed over that period. Now, DOL tells them that everything must change. In the NCAE survey, 68.7% of growers said that it is "substantially harder to get certified" or "somewhat harder to get certified" under the latest regulations, compared to 2.4% who believed that it was "somewhat easier to get certified." Even more than

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[3] *See* FY 2010 Congressional Budget Justification – Employment and Training Administration, State Unemployment Insurance and Employment Service Operations, at 58.
[4] *Id.*
[5] *Id.*
[6] *Id.* as to 2008 compliance rate; 2009 and 2010 rates are from the FY 2011 and FY 2012 Congressional Budget Justification documents, at pages 12 and 65, respectively.
[7] FY 2012 CBJ at 65.

other industries, agriculture depends on consistent practices and predictability. The current regulatory culture deprives growers of that consistency.

Examples of typical arbitrary and unreasonable deficiencies and denials follow:

Application Denials and Deficiency Notices Based on Small Errors or Inconsistencies in Paperwork—"White Out" and Zip Codes. Even where growers adjust to the new requirements of the most recent set of regulations, they see their applications denied for small errors or inconsistencies in submitting the paperwork. As shown in the nationwide survey, where growers receive a "deficiency notice" from DOL on their application, a handful of these notices actually relate to the wage rate or other substantive conditions of the proposed work, but 58%, by far the greatest portion, arise from small errors and inconsistencies in the application.[8]

Applications have been held up because the grower could not fit the detailed information requested into the small boxes on Form ETA 790, even though the employers wrote "see Attachment 1" and provided the required information on separate sheets of paper. In the past, CNPC had consistently accepted such applications for certification, including applications earlier in the very same growing season, but suddenly began issuing Notices of Deficiency based on this, stating that the employer should instead answer within the limited space. If an employer uses too few words in that space, he or she risks having the application denied for not providing enough information for DOL to consider the application.

Applications were rejected by DOL because the employer needed to correct the form and used correction fluid or "white-out" when completing the form. Employers have had

[8] *See* attached survey results, at p.3.

applications denied for transposing digits in a zip code on Form ETA 790. These application forms are not easy to complete, 89% of H-2A users reported using an agent to help them complete the forms, and they still spent more than 185,000 hours on this paperwork in 2010.

Rejection of Applications for Word Choice. Growers have had their applications turned away by DOL for hyper-technical issues of word choice. For example, as set forth in the H-2A regulations, employers must pay the wage rate required at the time the contract begins. If that rate increases during the contract period, the employer must pay a higher wage, but if the wage decreases, may pay the lowered wage. In past years, applications were approved where the advertising for the job set forth the wage to be paid but indicated that it may change. Recently, DOL has rejected language that stated "the required wage *may be higher or lower than* it is at the time of filing this job offer," and required that the order state "the required wage *may be different than* it is at the time of filing this job offer." DOL never explained how these two wordings are actually different or would provide any extra information to applicants, but the delay cost the grower weeks of work while the wording was changed to meet DOL's new preference.

Denials or Deficiency Notices Because DOL Officials Dictate When and How Farmers Should Conduct Their Farming Operations. Beyond the challenges of simply completing the forms required by DOL, DOL officials at CNPC have been denying applications from growers based on second-guessing matters of farm operations. For example, CNPC denied several applications from growers for including an earlier or later starting or ending date in their application than in the prior year's application. The CNPC denied an application from an employer in Massachusetts because the season shown on the application began in February and

the Certifying Officer processing the form in Chicago decided that nothing could be grown there in February. When the employer explained that it was using greenhouses and needed workers to begin planting in the greenhouses so that the crops would be ready by summer, DOL eventually granted the certification, but only after weeks of work had been lost.

In another case, DOL denied the application of a Connecticut apple orchard, telling them that the orchard had the incorrect season for growing apples. The employer's 2009 application was approved for April through December 2009. In 2010, facing financial limitations, the employer could only afford to use workers for June through October, and his application for that period was also approved. When filing the paperwork for the 2011 season, the employer was again able to apply for workers from April to November. DOL denied the application, telling the employer, a family-owned orchard, that the correct season for doing this work was June through November and not April through December, even challenging whether the work was "seasonal or temporary" at all. The orchard owner had to explain that workers prune the trees and maintain farm equipment in the spring, and that the growing cycle may vary with the weather in a given year. After weeks of unnecessary delay, the application was approved.

In the past, DOL had regional offices and personnel with agricultural expertise who could address what the "normal and accepted experience qualifications," e.g. "experience"—should be for a given candidate for an agricultural job. Today, those decisions are made in Chicago, with CNPC personnel dictating what experience or other qualifications are appropriate for particular agricultural work. Although "prevailing practices" surveys used sometimes used to shed light on this issue, these are often unreliable and often not statistically defensible. CNPC now routinely

challenges experience requirements, issuing deficiency notices until the grower accepts DOL's requirement or appeals. Several examples illustrate the arbitrary decisions DOL has made this past year that has resulted in an unprecedented number of appeals.

DOL refused to accept a Georgia farmer's 30 day experience requirement for pruning a fruit orchard, notwithstanding the fact that it was supported by an agricultural extension agent from the University of Georgia who indicated that an inexperienced worker could cause the loss of a crop and damage trees. The grower had to appeal. A Texas farmer who required a commercial driver's license (CDL) to operate trucks to haul farm products and livestock had its application rejected. When it changed its application to eliminate the CDL requirement it again had its application rejected because DOL changed its mind and wanted a CDL requirement.

Arbitrary DOL Deficiency Notices and Application Denials Require Farmers to Take Costly Legal Appeals. While the CNPC will sometimes relent when the grower responds and explains the issues in the application, more often, these denials result in fully-litigated appeals to the DOL Office of Administrative Law Judges (OALJ). The recent flood of denial letters has led to a corresponding spike in the number of OALJ cases filed. For the 15 years from 1995 through 2009, the average number of OALJ appeals filed each fiscal year was 18.4.[9] To date in FY 2011, there have been 442 OALJ appeals filed, a total that before now took decades to reach. 37% of employers forced to file appeals had to retain lawyers. In the vast majority of these cases, an initial denial by the CNPC resulted in an appeal to the OALJ, at which time the DOL Solicitor's Office concluded that CNPC's position is indefensible and agrees to remand the application to

[9] All docket information for OALJ appeals is from www.oalj.dol.gov/LIBINA.HTM.

the CNPC for approval, weeks after the original determination, and often after the date on which the workers were needed.

All of this unnecessary delay and administrative proceedings costs taxpayer dollars and imposes significant burdens on growers, even if the OALJ agrees with the employer and directs the CNPC to approve the application. In some cases, there appears to be no justification but delay. In one case, an Arizona grower applied in August 2010 for 500 H-2A workers to pick cantaloupes during a very brief harvest season of October 5 to November 19, 2010. CNPC denied the application, the grower had to appeal to the OALJ, and DOL finally agreed to certify the application for 499 workers instead of 500 on October 25, 2010—after a third of harvest season had passed. A California lettuce grower had to appeal from a CNPC denial, only to have DOL approve the application for 138 instead of 140 workers, but 5 days after the date that the workers were needed to begin work. DOL finally conceded that it should have granted a Montana cattle rancher's application after an ALJ appeal, but did so in March 2011 for workers needed from December 1, 2010 to April 30, 2011.

Even the Administrative Law Judges hearing these appeals have grown frustrated with the Department's handling of H-2A applications. In a recent case, CNPC denied the grower's application because the employer did not file a recruitment report on the Sunday prior to the Monday on which the employer was notified that the recruitment report was due, forcing the grower to file and litigate an appeal to the OALJ. The Judge chastised the Certifying Officer, stating that, "it is a patently inefficient and unnecessarily expensive way to proceed. I implore the Office of Foreign Labor Certification to review this policy of the CNPC and consider the

costs it imposes on employers, the administrative review process, and the public coffers."[10] In the end, the Judge attributed the CO's decision to force the employer to file an appeal to "a breakdown in common sense."

DOL's Delays and Arbitrary Denials of Applications Results in $320 Million Dollars in Economic Loss to Farmers. 72% of Growers Report Workers Arrived on Average 22 Days Late. These processing delays result in delays in recruiting workers and bringing them to the farm (all at grower expense) for crops that are inherently time-sensitive. The NCAE survey showed that 72% of growers reported that workers arrived on average 22 days after the "date of need" for them to begin work. These delays resulted in more than $320 million in economic losses for these farmers. The harm that results from an arbitrary denial is illustrated by a New York farmer who had to take 1,000 acres of onions out of production and plant mechanically harvested corn instead, as a result of an unjustified denial of an application. This resulted in the farmer's payroll going from $2.5 million to $70,000. Local businesses suffered from the decline in spending from the seasonal workforce that otherwise would have benefitted them.

It is estimated that 70% of the seasonal agricultural workforce is comprised of workers providing documents that appear legitimate but are not. Less than 4% of the seasonal agricultural workforce is represented by H-2A workers. If E-Verify is mandated and works as intended, 66% of the workforce would have to be replaced with H-2A workers. Given the H-2A program's current inability to provide a timely legal workforce at current levels, enactment of mandatory E-Verify legislation without congressional enactment of an alternative workable

[10] *Virginia Agricultural Growers Association*, 2011-TLC-00273.

program, the $320 million in current losses could easily rise into the billions of dollars every year.

Wage and Hour Enforcement. Growers able to get applications accepted by CNPC face further challenges from DOL. Only 8% of H-2A employers report being audited by DOL's Wage and Hour Division before participating in the program, compared to 35% once they started participating. This incredibly high level of auditing would perhaps be justified if Wage and Hour investigators were finding frequent or large violations among H-2A employers, but they simply are not. Of the 64, 978 compliance actions by WHD from 2008 to 2010 in WHD's "Wage and Hour Investigative Support and Report Database" (WHISARD), only 301 involved H-2A violations.[11] Even for those cases, where actual violations were found, the average amount of back wages and civil money penalties per employee were $1,323 for H-2A cases.[12] By contrast, cases involving H-1B violations involved $13,818 per employee and Davis-Bacon Act cases involved $3,244 per employee.[13] From 1998 to 2008, 2.6% of all WHD cases involved agricultural employers, even though only 1.4% of American workers were employed in that sector.[14] The DOL's disproportionate focus on agriculture, in general, and H-2A users, in particular, speaks to DOL's hostility to the program rather than to any actual measure of compliance.

The Wage and Hour Division under the new H-2A regulations is seeking severe penalties and back pay for minor technical violations that do not harm workers or deprive them of their

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[11] http://ogesdw.dol.gov/raw_data_catalog.php
[12] *Id.*
[13] *Id.*
[14] http://www.dol.gov/whd/resources/strategicEnforcement.pdf at pp. 8, 20 (WHD study of enforcement efforts).

legal rights. DOL has been seeking astronomical fines in the hundreds of thousands and millions of dollars from growers who gave late notice to DOL that workers had voluntarily quit their jobs or were fired for just cause. In addition to seeking up to $1,000 in civil money penalties for each worker for whom notice was untimely, DOL is demanding that the growers pay the workers three quarters of the wages they would have been paid for the entire contract period had they not quit, even though the workers voluntarily quit and did not complain about any mistreatment. By contrast, the Department of Homeland Security has an identical notice requirement with regard to H-2A workers who quit their jobs. DHS imposes a $10 fine for failure to provide timely notice. That's it.

DOL's punitive regulatory approach is counterproductive to its mission to protect jobs for U.S. workers. To the contrary, it is crippling businesses and their year round U.S. workers. It is also forcing employers to suffer the expense and disruption of litigation in defending themselves from overreaching charges.

Conclusion

The threat of enactment of mandatory E-Verify this Congress looms over any discussion of H-2A. Agriculture is an extremely labor-intensive business. American growers need to have access to workers to plant, tend, and harvest their crops. Enacting E-Verify will take away hundreds of thousands of these workers, forcing growers to turn to H-2A for legal workers. The current dysfunctional system has proven to be dramatically insufficient to meet even the current

needs of these growers. Legislation that would drastically increase the demand on an already broken system would prove disastrous.

NCAE strongly urges this Subcommittee and the Congress to enact a seasonal farm worker program that is not based on the H-2A structure. History has shown that it simply does not work. The current statute has been interpreted in completely opposite ways by the last two Administrations, demonstrating that a new statute is required. NCAE strongly believes that a new farm worker program must be enacted as part of the E-Verify legislation. We cannot gamble that Congress will address this important issue at a later time—when it is too late.

Thank you for the opportunity to testify on behalf of NCAE.