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Health, Education and Human Services Division

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September 10, 1998

The Honorable Howard Berman
House of Representatives

Subject: H-2A Agricultural Guestworker Program: Experiences of Individual Vidalia Onion Growers

Dear Mr. Berman:

Some members of the Congress, agricultural employers, and the press have reported incidents in which growers have experienced worksite enforcement efforts by the Department of Justice's Immigration and Naturalization Service (INS) that have left growers with a shortage of labor during key harvest periods. The H-2A program provides a way for U.S. agricultural employers to bring nonimmigrant foreign workers (hereafter referred to as "H-2A workers") into the country to perform seasonal agricultural work on a temporary basis when workers within the United States are unavailable.[1] To qualify for the program, employers must demonstrate a shortage of agricultural workers in the United States (hereafter referred to as "domestic workers"). One step employers must take in demonstrating that domestic workers are not available is to attempt to recruit domestic workers within a multistate area where workers have traditionally been found or are expected to be found and to be unsuccessful in doing so. To qualify for the program, employers must also agree to provide specified wages, benefits, and working conditions to both domestic and H-2A workers.

On December 31, 1997, we issued a report reviewing various aspects of the Department of Labor's H-2A agricultural guestworker program, including the likelihood of a widespread agricultural labor shortage and its probable effect on the need for nonimmigrant guestworkers, such as those obtained from

[1]See 8 U.S.C. 1101(a)(15)(H)(ii)(a).

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programs like H-2A.[2] In May 1998, you sent us a letter asking that we provide information regarding the experiences of selected agricultural employers or growers with both INS and the H-2A guestworker program. In subsequent discussions with your office, we agreed to provide information describing the recent experiences of individual onion growers in the proximity of Vidalia, Georgia. You asked that we specifically address the following questions:

- What was the experience of these growers with the INS, the H-2A agricultural guestworker program, and the Georgia State Employment Service?

- What wages, benefits, and working and living conditions were offered to prospective domestic and H-2A workers?

- What recruitment efforts were proposed and conducted regarding domestic and H-2A workers?

- How consistent is the information we obtained for this review with the information we reported in December 1997?

To answer your questions, we interviewed Labor and INS officials at headquarters and in Atlanta, Georgia; officials at the Georgia Department of Labor; and five onion growers, including officers of Vidalia Harvesting, Inc., an organization that submitted an application for H-2A workers. We also interviewed farm labor advocates in Georgia, Florida, and Texas as well as farm labor employment agency officials and recruiters in Georgia and Texas. Finally, we reviewed H-2A applications and related correspondence, INS worksite enforcement documents, and other related documents. We conducted our work in accordance with generally accepted government auditing standards between July and August 1998.

In summary, in response to earlier INS warnings that it was planning to target illegal farmworkers in the Vidalia onion producing area of Georgia, growers filed an application for H-2A workers in February 1998 with Labor and the Georgia State Employment Service. However, the growers we spoke with told us that they dropped this application because they believed the program was too costly and left them vulnerable to lawsuits from labor advocates. Because

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[2]H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers (GAO/HEHS-98-20, Dec. 31, 1997).

the growers had withdrawn their application and INS officials believed that growers were employing many workers unauthorized to work in the United States, INS conducted an enforcement action in the Vidalia, Georgia, area in May 1998, during the height of the onion harvest. Although INS' enforcement operation lasted only 1 day and resulted in the detention of 21 workers out of an estimated harvest workforce of 3,500 to 5,000, growers reported widespread disruption to the onion harvest covering periods from a few hours to a few days because workers, both those legally and those not legally authorized to work, stayed away from work out of fear. Growers had not known that, in the event of an unexpected shortage of workers such as that caused by the INS enforcement action, Labor could certify an H-2A emergency application quickly--by waiving the requirement that growers apply 60 days before the date workers were needed.

The wages and benefits growers offered to domestic workers differed from those that would have been required had the growers hired workers under the H-2A program. Specifically, the wage rate Labor said growers would have had to pay to both H-2A and domestic workers doing similar work, as a condition for obtaining H-2A workers, was higher than the rate growers reported paying to domestic workers. In addition, some growers provide housing to some or all of their domestic workers, for which they generally charge workers a maintenance fee. Under the H-2A program, the growers would have been prohibited from charging a maintenance fee and would have had to provide housing to all workers--both H-2A and domestic--who lived too far from the worksite to commute.

If the growers had pursued their application to bring in workers from outside the United States through the H-2A program, their efforts to recruit domestic workers would have had to be more extensive than they were for the 1998 harvest. The growers have traditionally relied on approaches such as the use of farm labor contractors (crew leaders), who bring in workers from the traditional migrant sources in Florida and other states who stay throughout the harvest season. Labor had accepted the growers' plan for how they would first actively recruit domestic workers before obtaining H-2A workers. This plan included the provision that growers use farm labor contractors and pay them a "reasonable fee" of $8 per worker for their services. Because the growers dropped their H-2A application early in the process, however, the recruitment plan was never used, and the growers relied on their traditional recruitment strategy. The growers we spoke with did not attempt to recruit workers directly from onion-growing regions in Texas because they considered the recruitment fees to be too high, although officials at Texas farm labor

employment agencies we interviewed contend they had large numbers of workers available.

In general, the information we obtained during this review regarding the availability of workers within the United States, INS limited enforcement capabilities, and the prevalence of confusion about the requirements of the H-2A program is consistent with the information we reported in December 1997.

BACKGROUND

Growers of many fruits and vegetables rely on low-wage workers to perform seasonal farmwork, including tasks such as planting, pruning, harvesting, and packing. Workers must be available when needed or growers, particularly during the harvest, can suffer financial losses. Ensuring an adequate supply of harvest labor is especially important for crops with relatively short harvesting periods. Domestic workers can be U.S. nationals,[3] U.S. citizens, or aliens who present documentation that they are legally authorized to work. Many domestic workers currently employed in U.S. farmwork, however, are not legally authorized to work in the United States. Labor estimates that 37 percent of all farmworkers within the United States are not legally authorized to work in this country. Farmworkers are predominantly foreign-born, Hispanic, and male.[4]

Vidalia onions, vegetables that have grown in popularity in recent years, are only grown within 20 small counties in southeast Georgia. Many of the approximately 147 registered Vidalia onion growers from this region also produce other crops, including tobacco, and other vegetables, such as collard greens. The harvesting season for Vidalia onions stretches from late April to the middle of June. An estimated 3,500 to 5,000 workers are employed during

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[3]U.S. nationals, such as citizens of American Samoa, owe allegiance to the United States but do not have all the rights and responsibilities of citizenship, such as voting.

[4]Labor's National Agricultural Workers Survey found that in 1995, 69 percent of all farmworkers were foreign-born; 78 percent of these workers were Hispanic, and most of these were from Mexico. About 80 percent of all farmworkers were male, and about two-thirds were younger than 35. See U.S. Department of Labor, Office of the Assistant Secretary for Policy, A Profile of U.S. Farm Workers: Demographics, Household Composition Income and Use of Services (Apr. 1997), pp. 1-5.

the peak of the Vidalia onion harvest. The annual cash value of the Vidalia onion crop is estimated to be about $60 million.

The purpose of the H-2A program is to help ensure agricultural employers an adequate labor supply while protecting the jobs, as well as the wages and working conditions, of domestic workers. Under the program, agricultural employers who can demonstrate a shortage of domestic workers can request authorization to use H-2A workers. During fiscal year 1997, Labor certified over 23,000 H-2A job openings--a 28-percent increase over fiscal year 1996 levels.[5]

The Department of Justice, through INS, authorizes the State Department to issue nonimmigrant visas for H-2A workers only after Labor certifies that a labor shortage exists and that the wages and working conditions of domestic workers similarly employed will not be adversely affected by importing H-2A workers. This certification is based on, among other things, proof that the employer has actively recruited domestic workers, information from the state employment service indicating that a shortage of farm labor exists, and state or local certification that housing to be used for H-2A workers meets health and safety requirements. The state employment service agencies also conduct wage surveys to determine the wages prevailing in a particular area or crop. The Department of Agriculture conducts surveys and advises Labor in its determination of the lowest wage rates to be paid by employers of H-2A workers--the so-called "adverse effect wage rates"--which are designed to mitigate any adverse effect the employment of H-2A workers may have on domestic workers similarly employed.

Federal agencies are responsible for protecting the workplace rights of both H-2A and domestic workers. Labor's Wage and Hour Division, part of the Employment Standards Administration, is responsible for ensuring that agricultural employers comply with their statutory and contractual obligations to H-2A workers, including those regarding wages, benefits, and working conditions. The H-2A program's equivalent treatment, or "prevailing practices," provision requires that employers provide the same wages, benefits, and working conditions to both foreign workers hired under the H-2A contract and domestic workers employed in "corresponding employment," such as migrant

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[5]GAO/HEHS-98-20, Dec. 31, 1997, p. 18.

and seasonal farmworkers recruited through the Interstate Clearance System.[6] For example, employers of domestic workers recruited through the Interstate Clearance System must pay the workers the prevailing wage rate as determined by the state employment service and provide worker housing certified as meeting minimum health and safety standards. On the other hand, both H-2A workers and domestic workers similarly employed must be offered the highest of the federal or state minimum wage, the prevailing wage, or the adverse effect wage rate.

To protect the employment opportunities of domestic workers by giving them first choice of accepting these temporary positions, H-2A provisions also require that an employer conduct "positive recruitment" activities before Labor certifies that a labor shortage exists. That is, the employer must actively recruit domestic workers for the requested H-2A job openings in the ways described in the recruitment plan that Labor approved as part of the employer's application. As part of this recruitment requirement, employers must submit to the local state employment service agency a copy of the H-2A application, which includes a job offer for the H-2A positions that the state will enter into the Interstate Clearance System.

In addition to admitting qualified workers under the H-2A program, INS is responsible for protecting domestic workers by ensuring that (1) foreign workers do not enter the United States illegally and (2) U.S. employers do not knowingly employ unauthorized aliens. Within INS, border management is largely the responsibility of the Border Patrol, while INS investigators throughout the country are responsible for identifying, apprehending, and removing unauthorized aliens and for sanctioning employers who knowingly hire individuals who are not authorized to work in this country.

Our December 31, 1997, report assessed the H-2A program's ability to meet the needs of agricultural employers while protecting U.S. and foreign agricultural workers, both at the time of the review and if a significant number of nonimmigrant guestworkers is needed in the future. We concluded the following:

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[6]The Interstate Clearance System is a national network operated by Labor's Employment and Training Administration in conjunction with the individual state employment service agencies, where job orders are posted and referrals are made.

- A sudden, widespread farm labor shortage requiring the importation of large numbers of foreign workers is unlikely now or in the near future, although localized shortages could exist for specific crops or geographic areas.

- Although many farmworkers are not legally authorized to work in the United States, INS does not expect its enforcement activities to significantly reduce the aggregate supply of farmworkers.

- While few agricultural employers seek workers through the H-2A program, those that do are generally successful in obtaining workers on both a regular and an emergency basis. However, the Department of Labor does not always process applications on time, which makes it difficult to ensure that employers will get workers when they need them.

- Poor information on H-2A program access and the involvement of many agencies in the program may result in redundant oversight and could confuse employers who are considering participation.

The report presented a series of recommendations to the Departments of Labor and Justice that could enhance the H-2A program's ability to ensure growers an adequate supply of workers while maintaining protections of the wages and working conditions of foreign and U.S. farmworkers.

GROWERS' DECISION NOT TO USE THE H-2A PROGRAM LED TO INS ENFORCEMENT ACTIONS

During the year prior to May 1998, INS had participated in meetings with the Georgia onion growers, officials from the Georgia State Employment Service, farm labor advocates, and other interested parties to discuss how to ensure an adequate supply of legal workers for the Vidalia onion industry. The growers had publicly acknowledged the presence of large numbers of illegal workers in their industry and wanted to explore options for obtaining a legal workforce, including the use of the H-2A program. During these meetings, INS officials urged the growers to consider either accessing the H-2A program or otherwise ensuring they were obtaining legal workers. INS said that failure to either access the program or otherwise ensure a legal workforce would result in an INS enforcement action in the midst of the onion harvest. Growers agreed to explore using the H-2A program.

On February 13, 1998, a number of Vidalia onion growers, organized as Vidalia Harvesting, Inc., filed an application with Labor for H-2A workers. Labor initially rejected the application citing the applicant's failure to offer the prevailing wage rate, provide a description and location of housing, or include a recruitment plan for domestic workers. Labor also cited a lack of specificity in the work to be performed under the contract. The growers submitted modifications that corrected the last three deficiencies. At the same time, they contested the accuracy of the prevailing wage rate set by Labor, asserting that Labor's proposed wage was inconsistent with the actual local prevailing wage rate. On February 25, the growers filed an appeal for an administrative hearing on the issue of the prevailing wage. However, on March 4, before the hearing, the growers dropped their application for H-2A workers.

Growers told us that they withdrew their application primarily because they disagreed with Labor's determination of the prevailing wage that was to be paid to the H-2A workers. In addition, growers told us that they feared that participating in the H-2A program would leave them open to potential lawsuits by worker advocacy groups, who the growers believed opposed the use of the H-2A program in their area.

INS officials told us that they targeted illegal farmworkers harvesting Vidalia onions in response to the growers' decision to abandon their effort to obtain H-2A workers and reports that the growers were using illegal workers. INS also described the enforcement action as a response to the urging of a Member of the Congress to take action against the use of illegal workers in the Vidalia area. INS' operation plan for this action states that "the intent is to conduct an enforcement operation in the target area to target those farmers who are employing illegal aliens versus utilizing the H-2A program provided. Upon completion of the operation the farmers in the target area will then begin to utilize the H-2A program." INS officials told us that an additional motivation behind their enforcement action was the desire to contradict the impression presented in our December 1997 report that INS was not going to conduct enforcement operations in agriculture.[7] Despite citing this motivation, INS officials acknowledged that our report was accurate in asserting that it would

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[7]In our report, we outlined INS' inspection priorities, which emphasized "abusive employers"; the significant operational difficulties in conducting enforcement actions in agriculture; the costs of detaining large numbers of unauthorized workers; and the comparatively small number of inspections conducted at agricultural worksites, with little prospect of an increase in this number. See GAO/HEHS-98-20, Dec. 31, 1997, pp. 34-35.

be operationally impossible to remove the large numbers of illegal workers from agriculture.

Before their enforcement action, INS officials notified the growers, the Georgia Department of Labor, and the Mexican consulate that an enforcement action was imminent during the forthcoming harvest season. They did not, however, make public the place or the date.

INS initiated its planned 10-day operation, called "Southern Denial," on May 13, 1998, during the peak of the Vidalia onion harvest, targeting several farms in the Toombs and Tattnall counties area of southeastern Georgia that it believed to be employing illegal aliens. INS worksite enforcement activities were limited to 1 day and involved efforts to apprehend and detain illegal aliens at the two separate farms.[8] During the first day of operations, the growers asked INS to suspend operations and meet with them to discuss the situation. INS suspended operations and, after negotiations that included meeting with both growers and congressional staff, presented a written agreement to the growers on May 19. The growers agreed to share with INS all business records, including payroll records, involving the farm labor contractors with whom they did business. The growers also agreed to hire legal workers in the future.

Although INS officers apprehended only 21 workers out of an estimated regional harvest workforce of 3,500 to 5,000, all of the growers we spoke with reported some short-term disruptions in production because workers, both legal and illegal, fled or did not report for work. Estimates of these disruptions ranged from an hour to several days. Growers reported some financial losses, including one as high as $100,000 out of a $2.5 million crop, and strained

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[8]According to an INS summary of the enforcement action, the foreman at the first farm consented to an INS search of the premises, and 14 workers were detained. The second action involved an open field with an estimated 75 workers harvesting onions. INS agents were initially unable to locate a farm manager or owner and were, therefore, unable to question the workers that remained in the field. They did detain four workers who fled that field. Soon after, INS reported, its agents were met by the owners of the second farm, a congressional staff member, and a reporter for a Georgia newspaper. The owner of the farm challenged the authority of INS to enter the field and detain or question workers and refused INS' request to question the 20 workers who remained in the field. INS officers detained three additional people, two from the local jail and one apprehended in a store.

relations with some large customers. Other growers reported smaller financial losses. We did not verify the accuracy of the growers' loss estimates.

Despite the potential for losses from INS enforcement efforts, both the growers and Georgia State Employment Service officials told us that the growers did not file an emergency application for H-2A workers. Growers told us they were unaware that the statutory requirement that growers submit H-2A applications at least 60 days before the date of need could be waived when growers had an emergency need for workers. The growers' consultant, who filed their regular H-2A application, told us that he could have supplied workers through the H-2A program on an emergency basis to the affected growers within a week of their application but that none of the growers requested such assistance.

WAGES AND BENEFITS GROWERS PROVIDED TO DOMESTIC FARMWORKERS DIFFERED FROM THOSE REQUIRED UNDER THE H-2A PROGRAM

The wages and working conditions Vidalia onion growers provided during the 1998 harvest season to domestic farmworkers differ from what the H-2A program would have required. For domestic workers, these growers reported paying a piece rate of 70 to 75 cents per 60-pound bag of onions to workers harvesting onions and hourly wages ranging from $5.15 to $6.00 for workers in the packing shed. Some of the growers provided housing to some or all of their workers, using housing both on the farms and at local hotels. Growers told us that they generally charged a maintenance fee for the housing on their farms, which was generally $15 per week and as high as $50 per week for housing accommodating a worker's family of five people. Growers also told us that they did not increase either the wages or the benefits offered in order to replace workers lost as a result of INS' enforcement actions.

The growers' biggest concern with the H-2A program was the requirement that they pay the H-2A workers a prevailing wage rate determined by Labor to be 80 cents per 50-pound bag of onions. The growers we spoke with believed that this rate was too high and that the prevailing wage survey conducted by the Georgia State Employment Service was flawed. The growers said that there is only one size bag used in the Vidalia area, and it is a 60-pound bag. All of the growers we interviewed reported wage rates of 70 cents to 75 cents per 60-pound bag. The assertions of the growers we talked to, however, conflict with information we received from other sources in the Vidalia onion industry regarding the weight of a "standard" bag. For example, the Vidalia Onion Committee, the industry trade group, publishes production statistics estimating the average number of 50-pound bags of onions produced per acre. If the

growers had participated in the H-2A program, the Labor-specified prevailing rate of 80 cents per 50-pound bag would have been 28 percent higher than the rate of 75 cents per 60-pound bag. If using a 50-pound bag is actually the customary practice, however, so that the 75-cent rate is for a 50-pound bag, the prevailing wage rate specified by Labor for participation in the H-2A program would have been about 7 percent higher than the rate growers paid.[9]

Another factor to be considered is that growers using H-2A workers would also have been prohibited from charging housing maintenance fees to both H-2A workers and domestic workers similarly employed, as is their current practice. The growers also expressed dissatisfaction with the H-2A program's disparate treatment provisions that require growers employing workers from outside the country under the H-2A program also to provide housing to domestic workers from outside the work area who are employed doing similar work. Growers expressed confusion, however, about the details of this provision. For example, one of the largest onion growers said he thought that he would be required to provide housing for the 25 telephone operators he employs in his mail order business if he provided it to H-2A onion harvesters, although this was clearly not the "similar employment" that triggers this requirement.

Growers also expressed the view that the H-2A program tended to encourage costly litigation about wages, benefits, and working conditions from labor advocates. Many of the growers we spoke to feared being sued by labor advocate groups about housing or other issues. They believed these groups would sue them simply because the groups opposed the use of H-2A domestic workers in the area. For example, the consultant retained by the growers to advise them on their H-2A application stated that, at one point, the growers considered creating a separate corporation that would be the entity for importing H-2A workers. The proposed corporation would have had sufficient housing for the incoming H-2A workers but would have employed no domestic workers so growers would not have been subject to the disparate treatment provisions requiring them to provide housing to domestic workers. According

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[9]The actual increased wage cost of H-2A workers is also difficult to determine because some employer payroll costs for domestic workers, such as Social Security and unemployment insurance taxes, are not paid on the wages earned by H-2A workers. Conversely, growers must provide workers' compensation insurance for both H-2A workers and any domestic workers they employ for similar work. Under Georgia state law, growers not employing H-2A workers are not required to provide such insurance for domestic workers.

to the consultant, labor advocates had made it clear that they would sue the growers if that strategy was pursued and, therefore, it was dropped.

Growers we talked with believe the H-2A program should be revised to make it work in the Vidalia onion industry. Among their concerns were the current program rules requiring that growers guarantee H-2A workers wages for three quarters of the contract period regardless of market or weather conditions, growers pay an adverse wage rate, and H-2A applications be submitted 60 days before the date of need. Although growers supported the requirements of employer-provided housing and vigorously opposed the use of housing vouchers, they thought they should be permitted to charge workers housing maintenance fees.[10] The growers also believed that farm labor contractors should be more tightly regulated to protect growers and workers from unscrupulous individuals. The growers have submitted to their congressional representatives a written 10-point proposal for changes to the H-2A program, which we have enclosed.

GROWERS' RECRUITMENT EFFORTS DIFFERED FROM THOSE REQUIRED UNDER THE H-2A PROGRAM

Growers applying for permission to bring workers to the United States through the H-2A program would have had to conduct more extensive recruitment efforts to obtain domestic workers than the Vidalia onion growers used for the 1998 harvest. The onion growers used an assortment of strategies to meet their 1998 harvest labor needs, drawing domestic migrant workers mostly from outside the Vidalia onion growing area, as has been their custom for many years. Growers we interviewed told us that most of the growers used workers provided by farm labor contractors and groups of workers who perennially come to the Vidalia area for the harvest from Florida and other states. Growers stated that, in general, the farm labor contractors and workers just "show up" without advance notice. Growers told us that they also contacted the Georgia State Employment Service for workers, although they received

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[10]Growers, their consultant, and officials from the Georgia State Employment Service we interviewed all opposed the use of housing vouchers. They expressed fears about the impact of vouchers on the communities where workers would be brought, believing that vouchers could result in substandard working conditions for farmworkers and could spread communicable diseases like tuberculosis. The growers' proposal did not recommend moving the H-2A program out of Labor or eliminating the requirement of Labor's certifying a labor shortage.

comparatively few workers from this source. The growers told us that while these sources provide sufficient labor, growers are concerned about the extent to which these workers provide fraudulent documents, particularly when growers suspect that workers who do not speak English may not have been born in this country.

Growers told us that they have concerns about the value of meeting the Immigration and Nationality Act requirements that they verify that workers are either U.S. citizens or otherwise authorized to work in the United States. Growers said that while they can meet INS worker eligibility requirements by reviewing the required documents, they cannot distinguish between those that are valid and those that are fraudulent. They also fear that the only way INS will accept that workers are legally authorized to work is if they are H-2A workers.

In response to INS' notice that it planned to target enforcement efforts at farmworkers harvesting onions, attorneys for Vidalia Harvesting, Inc., contacted labor advocates in Georgia, Florida, and Texas for assistance in identifying sources of labor. These advocates provided the attorneys with a list of farm labor recruitment agencies and farm labor contractors in both Florida and Texas, which in turn provided names to the growers. However, few growers contacted these individuals.

The recruitment plan developed by the growers as a condition for participating in the H-2A program and approved by Labor specified that the growers would take the following actions:

- contact former workers;
- advertise in the local radio and print media;
- hold a job fair;
- advertise in Texas and Florida;
- use the state employment service, including the Interstate Clearance System;
- use word of mouth;
- use their consultant as a labor recruiter; and
- use other recruiters and farm labor contractors, including crew leaders.

Labor required that the growers fully use all means of recruitment in their approved plan, including the use of farm labor contractors. Labor specifically directed that the plan include the use of recruiters and farm labor contractors--and that they were to be paid a reasonable fee for their services--because it had determined that using contractors was a prevailing practice among the Vidalia

growers. The reasonable fee proposed by the growers, and accepted by Labor, was $8 per worker.

Because the growers abandoned their application, this plan was never implemented. However, labor advocates and Texas farm labor recruiters we spoke to said that the growers would not have been successful in obtaining the services of farm labor recruiters because the $8-per-worker fee was far too low to cover even the administrative costs of the typical recruiter. Labor recruiters we talked with in Texas reported fees ranging from $87 to $455 per worker. The owner of one farm labor recruitment agency stated that he had been contacted earlier in the season by a Georgia grower needing workers for the onion harvest. His fee ranges from $255 to $448 per worker, including recruitment costs, depending on the number of workers requested and the length of the contract. For this fee, he processes the paperwork verifying the employee's work eligibility, transports the worker to the worksite, and provides a food allowance to the worker. In addition, he provides up to a 2-month guarantee that the worker is legally authorized to work and will complete the contract or the worker will be immediately replaced at no charge. While he stated that his firm could only process about 400 workers because of its limited size, he believed that with the other farmworker employment agencies in his area he could easily supply the estimated 3,500 to 5,000 workers needed for the Vidalia onion harvest.[11] According to the farm labor contractor, the grower told him that his fees were too high, and he was not willing to pay more than $8 per worker.

If the growers had failed to recruit domestic workers under the H-2A contract and had been permitted to recruit H-2A workers from Mexico as they had

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[11]Texas labor advocates and a labor recruiter we spoke to said that the Rio Grande valley is one of the largest onion growing areas in the nation and currently has extremely high unemployment rates. The recruiter said that because the Vidalia, Georgia, harvesting season occurs when many Texas farmworkers are unemployed, there would be no problem meeting the labor needs of the Georgia growers. Further, these workers would be transported through INS checkpoints, which verifies their right to be in the United States, on their way to Georgia. Thus they would be unlikely to be so fearful of INS as to flee should INS conduct worksite enforcement efforts in the Vidalia area. Although some growers in the Vidalia area, including one who was one of the applicants for H-2A workers, had used Texas onion workers in past years, Vidalia growers who contacted this recruiter earlier this year said that his fees were too high and refused his services.

requested, the growers would not have incurred any recruitment fees for these workers because recruiters in Mexico can collect the fees from prospective H-2A workers for the privilege of participating in the H-2A program.[12] Vidalia Harvesting, Inc.'s labor consultant reported that he had heard of recruitment fees charged to foreign workers as high as $3,000 per worker.

INFORMATION OBTAINED IN THIS REVIEW IS CONSISTENT WITH 1997 REPORT

The information we collected from multiple sources--INS, Labor, the Georgia State Employment Service, Vidalia onion growers and the consultant on their H-2A application form, labor advocates, and labor recruitment agencies--is generally consistent with the major findings and conclusions of our December 1997 report regarding the conditions of the agricultural labor market, the presence of unauthorized farmworkers, INS enforcement capabilities and priorities, and the prevalence of confusion about the requirements of the H-2A program.

Consistent with the findings of our report, the Vidalia onion growing area, in aggregate, appeared to have ample supplies of labor for its 1998 harvesting needs, although an unknown proportion of that farm labor supply is fraudulently documented. The Vidalia onion industry provides a good example of the difficulties facing employers in conducting their operations as they attempt to comply with federal immigration and other workplace laws. The Vidalia onion growers defined a labor shortage as an inability to get sufficient numbers of domestic workers that they could be certain were not using fraudulent documents. However, as we reported, the growers do not currently have a means to identify fraudulent documents and could not refuse to hire the available workers without violating the Immigration and Nationality Act's antidiscrimination provisions.

The Vidalia onion industry also demonstrates the difficulty in determining the existence of a labor shortage. Officials at the Georgia State Employment Service, which is responsible for providing information that Labor's regional office relies on to certify the existence of a labor shortage for the purposes of the H-2A program, told us that they rely primarily on the recruitment success of the employment service, including the use of the Interstate Clearance

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[12]Depending on the relationship of the recruiter to the employer, however, shifting these costs might put the employer in violation of the Fair Labor Standards Act.

System, to provide the workers requested on the H-2A job order. If sufficient workers are not referred through the clearance system, which in recent years has not been a significant source of farmworkers, the employment service then assumes that a labor shortage exists for the purposes of that application.

Atlanta INS worksite enforcement officials and Georgia State Employment Service officials that we spoke to also relied on the number of unemployed workers in a grower's county as a primary indicator in determining the existence of a labor shortage. INS officials used this as a basis for their assessment that growers' participation in the H-2A program was essential to obtaining a legal workforce. Yet relying solely on unemployed workers living in the H-2A applicant's county to serve as the available pool of labor does not take into account workers from neighboring counties. More important, it does not consider available domestic migrant workers available from other areas or states, including the traditional supply states of Florida and Texas that have historically provided the labor required to harvest the onions. On the other hand, the growers' success at recruiting these workers is dependent on their ability and willingness to pay the necessary recruitment and transportation costs to obtain these workers.

The Vidalia onion growers we spoke with experienced the sudden, although short-term, labor shortages our 1997 report predicted for those employers INS targets for their limited enforcement efforts. Such shortages may not be limited to the percentage of workers not legally authorized to work. For example, one of the largest onion growers told us that although most of the 300 workers in his packing shed were legally authorized to work, when INS agents arrived to obtain payroll records, these workers fled, refusing to return for up to 3 days.

Further, the Vidalia onion industry may have been unusually vulnerable to INS enforcement efforts because Atlanta INS enforcement officials received a congressional request to conduct an enforcement action, and the growers identified themselves as using unauthorized workers. As we described in our 1997 report, this INS operation demonstrated the operational impediments facing the agency in conducting large-scale enforcement efforts. Although INS and the growers believed that the vast majority of the 3,500 to 5,000 workers estimated to be employed in the Vidalia onion harvest lacked legal authorization to work, the operation resulted in the detention of only 21 workers. As INS officials acknowledged in recent interviews with us, and consistent with the findings of our 1997 report, INS faces difficulties in conducting operations in agriculture, as well as the problem of balancing enforcement at agricultural worksites with its other enforcement priorities.

Confusion continues to hamper growers' efforts to access the H-2A program. Growers reported many concerns about the program, including issues about its wage, housing, and recruitment requirements. Yet, Labor determined that the growers' application met every requirement except offering the prevailing wage rate, which the growers had sought to appeal. Further, the growers, while reporting disruptions in production from INS activity, did not know that an emergency application for H-2A workers could be approved within days. Although growers would have had to pay the prevailing wage rate that they had contested, according to their consultant, he could have had H-2A workers in Georgia within 1 week.

As our December 1997 report stated, the current farm labor situation, coupled with the enforcement impediments facing INS in agriculture, may provide an opportunity to find viable alternatives to the use of illegal workers, including the use of other domestic labor supplies and reforms to the H-2A program that we suggested in our report. For example, during this review, we contacted a number of farm labor contractors and labor recruitment agencies in the Rio Grande Valley of Texas, a major onion producing region of the United States, who told us that they could provide supplies of legal farm labor with experience in harvesting onions on short notice to Georgia growers. Recruiters also told us growers could be assured that workers willing to be bused through the many INS checkpoints located between the border areas of Texas and Georgia would not flee should INS conduct enforcement actions within the vicinity of their workplace. Workers could also be hired under a variety of relationships, including the direct supervision and payment of these workers by the Georgia growers themselves. It is conceivable that using domestic onion workers from Texas could alleviate the legitimate fear onion growers now have of hiring an illegal workforce.

AGENCY COMMENTS

In commenting on a draft of this letter, Labor officials responsible for H-2A program enforcement stated that the correspondence provided an accurate description of the H-2A program and its application procedures. INS officials responsible for immigration policy enforcement stated that the report was an accurate representation of the matters concerning INS, principally those describing the worksite enforcement efforts of the INS Atlanta District Office. However, both Labor and INS officials emphasized the need to balance the concerns of the growers regarding INS requirements and enforcement actions and H-2A program requirements with the program goals of protecting the jobs and working conditions of domestic workers. We agree that both INS worksite enforcement and the H-2A program seek to protect the wages and working

conditions of domestic workers. A more detailed discussion of how the programs are designed to protect domestic workers can be found in our 1997 report. We made technical corrections suggested by both Labor and INS to this correspondence where appropriate.

As arranged with your office, unless you publicly announce the contents of this correspondence earlier, we plan no further distribution until 1 day after its issuance date. At that time, we will send copies of this correspondence to other committees that have oversight responsibilities for federal agencies involved in the H-2A program. We will also send copies to Members who have previously expressed interest in these issues.

If you have any further questions, please call me at (202) 512-7014. Other major contributors to this correspondence include Charles Jeszeck, Assistant Director; Lise Levie, Evaluator-in-Charge; and Robert C. Crystal, Assistant General Counsel.

Sincerely yours,

Carlotta C. Joyner
Director, Education and
Employment Issues

Enclosure

10-POINT H-2A REFORM PROGRAM OF GEORGIA GROWERS' ASSOCIATION

1. The requirement than an application must be filed at least 60 days prior to [the] need [for workers] should be reduced to 30 days.

2. [The H-2A] contract time should be amended to include "or duration of crop activity," and market conditions as well as acts of God should be considered legitimate reasons for ending the contract. (The three quarters guarantee would continue to apply to either case.)

3. [Labor's] regulations should be modified to allow the federal minimum wage rather than the Adverse Effect Wage Rate (AEWR) to be used as a base "training wage" for inexperienced workers for the duration of the training period stipulated in the contract. Further, employers should be allowed to specify agricultural experience as conditions of [workers'] being hired.

4. Change the 50 percent rule so that once employers are certified [for the H-2A program] and foreign workers are employed, employers would be obligated only to hire local (non-immigrants who reside within commuting distance) applicants. We also recommend that the obligation to hire local workers be for the duration (100 percent) of the H-2A certification period or the duration of the crop activity.

5. Continue to require employer provided housing but allow reasonable charges (perhaps capped at $25 per week) to cover maintenance, repair, clean up and utility costs.

6. Eliminate the Adverse Effect Wage Rate (AEWR) and use only the prevailing wage rate for the area in which the employment occurs.

7. Allow foreign workers to move from one H-2A certified employer to another certified employer at any time during the certification period. Subsequent employers could amend their certifications and the final employers would be responsible for transportation back to the workers' country.

8. Strengthen the program of registering farm labor contractors (FLC) to require some sort of certification/licensing and bonding. At a minimum, allow employers to require bonding as a condition of employment.

9. Eliminate the requirement that FLCs must be hired by employers who apply for H-2A certification if use of FLCs is the prevailing practice in the area.

10. Create a national verification system so the employers can check on the legal status of domestic workers who are hired before and during the H-2A program.

RELATED GAO PRODUCTS

H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers (GAO/T-HEHS-98-200, June 24, 1998).

H-2A Agricultural Guestworker Program: Response to Additional Questions (GAO/HEHS-98-120R, Apr. 2, 1998).

H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers (GAO/HEHS-98-20, Dec. 31, 1997).

Illegal Immigration: Southwest Border Strategy Results Inconclusive; More Evaluation Needed (GAO/GGD-98-21, Dec. 11, 1997).

Passports and Visas: Status of Efforts to Reduce Fraud (GAO/NSIAD-96-99, May 9, 1996).

Border Patrol: Staffing and Enforcement Activities (GAO/GGD-96-65, Mar. 11, 1996).

Immigration and the Labor Market: Nonimmigrant Alien Workers in the United States (GAO/PEMD-92-17, Apr. 28, 1992).

The H-2A Program: Protections for U.S. Farmworkers (GAO/PEMD-89-3, Oct. 21, 1988).

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