

LABOR ISSUES IN THE FLORICULTURE AND NURSERY INDUSTRIES

Craig J. Regelbrugge

Senior Director of Government Relations, American Nursery & Landscape Association
National Co-Chair, Agriculture Coalition for Immigration Reform

If you were asked to name American agriculture and horticulture's most precious resource, which would you choose? Land is indispensable, so is water, and so is capital and so are customers and markets. And so, for many agricultural sectors, is access to an affordable and legal supply of labor. To suggest that any one of these resources is more important than the next is to suggest that the heart, or the lungs, or the brain has the most critical function in the human body. All are critical. The body fails if one is lost.

Labor-intensive agriculture in the United States is facing an historic and multi-dimensional crisis relative to the stability of its labor force. For the purposes of this discussion, I will focus on the lower-skilled manual labor jobs that are so critical to planting, tending, and harvesting a wide array of specialty crops and plants, to milking dairy cows, tending livestock and poultry, and even to harvesting the abundance of our nation's grain crops. Equally important labor concerns exist at other levels. Daily we hear from business owners wondering "where will the next generation of business owners come from?" or "how can we attract good, bright individuals to help supervise and our operations?" I will leave those topics to another forum on another day.

The problem I will discuss today is simple: most of the agricultural workforce is not properly authorized to work in the U.S. U.S. Department of Labor (DOL) studies show over 50% of the seasonal agricultural work force is not properly documented. Growers' experience suggests the number may be closer to 70%. Simply stated, the labor foundation for our industries is built on shifting sands. And the guest worker program intended to serve as a labor safety net is dysfunctional.

For the purposes of this talk, my primary focus is the nursery & greenhouse industry. Yet the problems I will describe, and the solutions I will outline, are relevant to all labor-intensive and perishable agriculture sectors. Indeed, many other sectors of the American business community, ranging from restaurants to hotels to landscape companies to nursing homes – have the same structural labor problems and urgent needs as labor-intensive agriculture. In the end, the fates of agriculture and the general business community are intertwined, though solutions may be incremental. I will describe past efforts to ensure a supply of labor for agriculture and horticulture, the current environment, and emerging opportunities.

Past Efforts to Ensure an Agricultural Labor Supply

Volumes have been written on the subject of agricultural labor. In the interest of time, I will focus on the past two decades. In 1986, during the Reagan administration, the Immigration Reform and Control Act (IRCA) was enacted. This law paved the way for the amnesty of millions of qualifying undocumented immigrants living in the U.S. For agriculture specifically, roughly 1.2 million qualifying agricultural workers were granted legal status under IRCA. As a trade-off, however, IRCA ushered in employer sanctions as a future disincentive for hiring undocumented workers.

Depending on one's perspective, IRCA was a major success or a colossal failure. Within agriculture, many employers have complained that workers who legalized under IRCA quickly moved into other occupations, leaving agriculture vulnerable once again. Still, many in our industry indicate the continued employment of many individuals legalized under IRCA. Many of these employees are highly skilled and have attained supervisory positions. Still, those most generally agree that IRCA was a short-term fix, and agriculture would face a similar scenario at some future time. That time is now.

Legislative debates on immigration in the mid-1990's were a wake-up call for agriculture of another looming crisis. Key elements of the legislative debate at that time included increased penalties for hiring undocumented workers, and a push for mandatory universal electronic verification of documents used to establish employment eligibility.

Guest Worker Reform Efforts Begin

Beginning in the mid-1990's, leaders in agriculture set out to get to a better place. The initial goal was to reform the antiquated agricultural guest worker program, known as H-2A. This program allows agricultural employers unable to find adequate domestic labor to bring in non-immigrant seasonal workers to fill those jobs. Fewer than 50,000 (or less than five percent) of U.S. agricultural workers are H-2A workers, though there is increasing pressure to use the program. Historic use has been highest in the fruit and vegetable industries in the Southeast and New England. However, use of guest workers in agriculture appears to be diversifying, both geographically and with respect to job tasks. For example, the custom harvester industry that harvests the bulk of the grain in the Midwest and Great Plains is increasingly relying on H-2A workers. In the nursery & greenhouse industry, roughly 3000 nursery jobs were certified for H-2A workers in fiscal year 2001. The largest numbers were in the states of Tennessee, Ohio, South Carolina, Maryland, and Alabama. Anecdotal evidence suggests that program use by the nursery and greenhouse industry is steadily increasing, and diversifying geographically.

From a policy perspective, the H-2A program exists to provide employers a safety net when adequate numbers of domestic workers cannot be found. However, the program has severe limitations. They include:

- An unrealistic regulatory wage rate known as the "adverse effect wage rate" or AEWR. The AEW R is calculated by averaging all field and livestock worker wages on a state or regional basis. This average generally serves as the minimum wage that must be paid to guest workers and any domestic workers performing the same tasks. While most guest workers are sought for entry level and lower-skilled jobs, by design the AEW R is skewed upward by higher-paying jobs and wages of more experienced workers. Over the past 20 years, the AEW R has increased an annual average of just about one full percentage point faster than the consumer price index. In addition to the AEW R, employers must provide housing as well as inbound and outbound transportation. Runaway wages have priced many H-2A users out of a competitive position in the national and international marketplace.
- A bureaucratic certification process. Current law subjects users to a Byzantine application and certification process characterized by unpredictability and delays. This has prompted growers to rely on expensive lawyers and consultants in order to use the program. A GAO study indicated that DOL missed its statutory approval deadline over 40% of the time.

- Fears of litigation. Growers using the guest worker program have been targeted for lawsuits by legal services and worker advocate organizations. A recent adverse decision by a three-judge panel in the 11th Circuit Federal Appeals Court directly contradicts the H-2A program regulations, and now presents millions of dollars of back pay liability for some H-2A users. The first two California growing operations to try to use the guest worker program in recent years received threats of lawsuits within weeks of receiving their labor certifications.

The Face of the Workforce – Increasingly Illegal

Over time, agriculture has again found itself relying more and more on a workforce feared to be fraudulently documented. Estimates based on Immigration and Naturalization Service (INS) enforcement and Social Security Administration reporting of employee name and Social Security number mismatches suggest that roughly 70% of the workforce lacks proper work authorization in the nursery and greenhouse industry and other labor-intensive sectors. Agricultural employers must walk a fine line between meeting the letter of the law as it relates to employment eligibility verification, and avoiding discrimination or document abuse in the hiring process. Many industry employers live in daily fear that a significant portion of their workforce could disappear overnight.

A Two-part Formula for Reform Takes Shape

The aforementioned efforts to reform the guest worker program in the 1990's failed in the face of political opposition and White House veto threats. By the late 1990's agricultural leaders decided to pursue a hybrid formula to stabilize the workforce. The formula was designed to attract sufficient bipartisan support to pass in both houses of Congress and withstand a Presidential veto. The formula called for near-term stabilization through legalization of the experience workforce, and a long-term safety net through reforms of the guest worker program. Various efforts were undertaken in the late 1990's; in 2000, a comprehensive reform package was included in that year's omnibus budget bill, but was dropped at the final moment in the face of a filibuster threat by a conservative Republican Senator.

September 11, 2001 Changes Everything

Momentum had been regained by mid-2001. Agriculture was riding the front of the wave created by the Bush/Fox migration talks. Yet, hopes for timely enactment of a deal were blown up by the terrorist attacks of September 11, and our leaders' shift to terrorism and national security concerns. Meanwhile, problems for employers have only worsened. Increases in enforcement and the INS's "special registration" process foretell what is next. Workers have hunkered down, afraid to leave the country. Some who have left and tried to return as legal guest workers have been barred reentry. As more and more employers receive Social Security mismatch letters, farmers and growers face an unacceptable choice – lose your workforce, or risk potential criminal liability. For H-2A employers, the wage rate and litigation continue to spiral.

The Framework for Resolution Evolves

U.S. agriculture is aggressively pushing immigration reform in order to sustain a workforce. The Agriculture Coalition for Immigration Reform (ACIR) is a national coalition of agricultural organizations established several years ago to enact legislation that would reform the H-2A program. ACIR also seeks legislation that would adjust the status of a significant number of experienced agricultural workers working in the U.S. who do not have proper work authorization. Proposed reforms

have resulted from months of negotiations and bridging of differences among employer advocates and worker advocates.

Proposed reforms to the H-2A program are as follows:

- Adoption of a streamlined labor condition application, which if complete and accurate, must be accepted by DOL.
- A freeze of the adverse effect wage rate (AEWR) which few employers can afford, and establishment, over several years, of a “de facto” prevailing wage rate, which is the standard in all other business immigration programs.
- Retention of an administrative enforcement scheme by DOL, with the limited exception of a narrow federal court right of action, after a mandatory mediation prerequisite, to enforce expressly offered promises offered in the employer’s application. State court rights of action to enforce the terms of the H-2A program are prohibited.

In terms of legalization of the existing workforce, some in Congress initially wanted to link an amnesty with H-2A guest worker reform. However, an amnesty fails to allow agriculture to transition to use of guest workers, and has little political viability. Worker advocates finally agreed to an “adjustment of status” concept where farm workers could initially obtain temporary legal status and, based on a formula, upon successful completion of an annual agricultural work requirement, could ultimately obtain permanent resident status at the end of a three to six year period. During the completion of the prospective agricultural work requirement (partial year), the workers could work in businesses outside of agriculture, as long as they met their annual farm work obligation. The workers are not tied by contract to specific employers and could move from employer to employer in the same manner as U.S. workers. While in temporary resident status, the workers would not be entitled to federal benefits.

What is the Environment for Agricultural Labor Reform?

Despite the nation’s economic and security anxieties, enactment of agricultural labor reform makes sense. In the security context, the prospect of obtaining legal status provides an incentive for many workers in the underground to come forward and regularize their status. Neither the employee nor the employer would face any legal exposure under this process. The program represents a significant start toward obtaining an inventory of the many illegal workers in the U.S. and thereby serves national security interests. To adjust their status applicants would have to undergo a criminal record check and be determined by the government not to be otherwise excludable from the U.S. The proposal is flexible with regard to visa integrity issues involving identity and document security. The same is true with regard to the visas and other documents to be used in the reformed H-2A guest worker program.

In addition, having a stable agricultural work force that is legally documented significantly enhances food security and safety. The current illegal work force in labor-intensive agriculture, especially fruit and vegetable production, poses food supply and safety risks that can be reduced through the legal workforce that would be established through the proposed legislation.

Many sectors of the general business community share agriculture’s structural workforce problems. However, the number of workers affected by the agricultural adjustment of status legislation is approximately 400,000 to 500,000 workers, a modest number when compared to the millions employed

in the general business community. In short, an “agriculture first” initiative can serve as a workable pilot program.

From an economic perspective, no one is arguing that agriculture’s fraudulently documented workforce is stealing jobs coveted by unemployed domestic workers. This reality, and the other factors I have mentioned, are why the general business community is publicly supportive of an “agriculture first” approach.

Other Solutions

The nursery and greenhouse industry is an old-fashioned American success story. While I will leave it to other speakers to provide more detailed statistics on the industry, it now represents roughly 11 percent of crop agriculture, and is considered among the fastest growing and most free-market sectors of agriculture. The industry needs a stable workforce in order to survive and grow.

To be clear, we are exploring other solutions as well. For example, there are mechanization and automation opportunities in our industry. ANLA’s research division, the Horticultural Research Institute, has helped to coordinate and fund a progressive multi-year mechanization research partnership with USDA’s Agricultural Research Service, the National Robotics Engineering Consortium, and the National Aeronautics and Space Administration. Such creative efforts are essential, yet the need for labor will remain.

Outlook

With the leadership of a committed bipartisan group of Senators and Representatives, we are cautiously optimistic that urgently needed reforms can be enacted in the very near future. We are also hopeful that USDA will again fulfill its historic role as an advocate for labor-intensive American agriculture. Staffing support at both the political and career staff levels in USDA is critical. Toward that end, we are hopeful that the labor advisor position held by Dr. Al French, who retired last fall, will be filled soon by a talented individual with agricultural labor experience.

Thank you for your time and attention. I would be pleased to answer questions later today or in the future.

Craig J. Regelbrugge
Sr. Director of Government Relations
American Nursery & Landscape Association
1000 Vermont Ave., NW, Suite 300
Washington, DC 20005
202/789-2900; 202/789-5980 ext 3013 direct
202/789-1893 fax
cregelbrugge@anla.org
www.ANLA.org