Currently, the H-2A program assists employers and foreign workers with visas for temporary and seasonal agricultural labor. The most common form of agricultural visa is for seasonal work in harvesting, planting, or maintaining crops. Workers usually need to return to their home countries to perform work for several months and then return to their home nations. However, Congress and the administration for decades have recognized a special segment of temporary agricultural workers which are distinct from the others, particularly those industries within agriculture which require workers for longer periods because of the unique work they perform. Under the existing H-2A program, these occupations are recognized by special procedures which allow employees to meet the needs of the specialized industries they serve. Occupations which involve the livestock industry are examples of agricultural jobs that require temporary work for longer periods of time. Herding and managing is an inherently different type of work than that which is performed by other temporary agricultural workers. In many cases, those working as temporary foreign workers in livestock related occupations often have rich cultural histories and families tied to herding which allow them to bring their unique experience to the United States and make significant contributions to our livestock industry.

This inherent challenge is evident in the special procedures which manage nonimmigrant shepherders in the existing H-2A program. Over the last 50 years, temporary nonimmigrant agricultural workers have been coming to the United States to work as herdsmen in the sheep and goat industry. Over all these decades, Congress has recognized the special nature of the shepherding program in immigration law. At this time, I ask unanimous consent that the following letter dated July 28, 1987, from U.S. Senator Al Simpson and the response from the INS, Commissioner Alan Nelson dated November 4, 1987 be printed in the RECORD at the conclusion of my remarks.

In this exchange, Senator Simpson, serving as the chairman of the Judiciary Subcommittee on Immigration and a primary author of the Immigration Reform and Control Act of 1986, wrote the administration expressing the continued intent of Congress that the agency and its rules reflect the historical arrangement that shepherders had within the H-2A program. Senator Simpson highlighted specifically the fact that shepherders should not be subject to the same return requirements as other nonimmigrant temporary agricultural workers programs. Under the existing H-2A program, the Immigration and Naturalization Service recognized the uniqueness of the shepherder program, its effectiveness operating under these special procedures, and shepherders should not be subject to the same return requirements as other nonimmigrant agricultural workers. As a result, the H-2A shepherder program has operated successfully with little change from when it first started. Currently, the special procedures fall under the authority of the U.S. Department of Labor and they largely reflect the unique needs of shepherders and other special procedure occupations.

That is why I am pleased this immigration bill includes language which authorizes special procedures for these very agricultural occupations. Section 2332 of the legislation creates the new nonimmigrant agricultural worker program. Within that section 218(A)(D) authorizes "special nonimmigrant visa, processing and wage determination procedures for certain agricultural occupations". Those occupations include (A) shepherding and goat herding; (B) itinerant animal shearing; (C) open range production of livestock; (D) itinerant animal shearing; and, (E) custom combining industries. This is an important step forward in making sure the nonimmigrant shepherders and workers in other special occupations can continue to enter our country and work in these unique temporary agricultural jobs.

Particularly important is that the bill provides these special occupations with unique rules on work locations, and housing. This is because unlike the typical temporary nonimmigrant agricultural jobs performed in the United States, the special procedure occupations operate in unique conditions. For example, shepherders may work alone or in teams monitoring animals grazed in remote areas where mobile housing is required. For shepherders, mobile sheep wagons serve as both a historical symbol and functional shelter from the extreme elements of the range where teams of shepherders prepare and keep supplies for livestock. By including the housing language in this section, Congress clearly intends that traditional uses of these housing units continue for special procedure occupations.

I have expressed concerns in recent years about efforts by the U.S. Department of Labor to avoid consulting stakeholders when drafting new policies for special procedure occupations. Bypassing stakeholders has confused employers and employees and led to a number of inconsistent enforcement actions by agency personnel.

I ask unanimous consent that the letter I sent to the Department of Labor on November 14, 2011, as the ranking member of the Senate Health, Education, Labor and Pensions HELP Committee as well as the letter I received on February 2, 2013, from Department of Labor Assistant Secretary Jane Oates be printed in the RECORD at the conclusion of my remarks. You will note that previous practice afforded the Secretary some discretion in how it
consults with special procedure stakeholders—specifically, that the "administrative conference with affected employer and worker representatives." I am pleased that this bill includes text which requires that agencies "shall consult with employer and employee representatives and publish for notice and comment regulations related to the implementation of the special procedures. This is an important step in ensuring that both employers and employees are heard in the rulemaking process and that their concerns are reflected in agency guidance. This consultation will help avoid future confusion amongst the parties, ensure that policies practically serve the program, and that there can be an end to inconsistent enforcement actions.

Mr. President, the occupations represented by these special procedures may affect only a few specific industries but play an important role in protecting the future of American agriculture. The bill allows occupations such as shepherding to operate under the new program as it has operated for the past 50 years. In addition, I am pleased that the legislation recognizes a specific need to address the unique wage, housing, and components of the special procedures. Finally, it is vital that rulemaking requires agency consultation with stakeholders whose drafting policies for the special procedure program. I thank the sponsors of this bill for their work on this section.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. Senate,
Committee on the Judiciary,

Hon. Alan Nelson,
Commissioner, Immigration and Naturalization Service, Washington, DC.

Dear Mr. Nelson:

I am writing to comment on the Immigration Service's interim final regulations regarding the H-2A program, as they would affect the shepherding program.

Congress clearly intended that the shepherding program be allowed to continue in its present form and under its present conditions. This was actually explicitly stated in previous Senate versions of the Immigration Reform and Control Act. I am now concerned that the proposed regulations might not fulfill congressional intent in this area.

I understand that the interim final INS regulations require all H-2A workers to return home for a minimum of 6 months after residing in the U.S. for a period equal to three labor certifications. Under present practice, there is no such requirement in the H-2 shepherding program. While I understand the reason for a "six month return" rule in other occupations, present practice allows a much broader time out of the U.S. after three labor certifications for shepherders. I suggest that current practice be continued in this area.

Thank you for your attention and assistance.

Most Sincerely,

Alan K. Simpson, United States Senator.
the Federal Register on August 4, 2011. The special procedures, as previously established under the H-2A Temporary Agricultural Program for occupations such as sheep and goat herding to reflect occupational conditions and measures as well as regulatory provisions contained in the Temporary Agricultural Employment of H-2A Foreign Workers (the United States) (H-2A Final Rule) published by the Department on February 12, 2010. Your letter has been referred to my office for response. The Employment Eligibility Verification Administration is responsible for administering foreign labor certification programs through the Office of Foreign Labor Certification (OFLC).

In your letter you state that even though there were some positive changes set forth in the agricultural wage caps that will not make changes with little or no input from stakeholders and offers little clarification as to how the guidance will be enforced. Of particular importance, you cite changes pertaining to sleeping units made available to workers and to the variance procedure previously required of employers when petitioning for more than one worker to be housed in mobile units used in the open range. You state that the change in guidance limits flexibility for employers to best serve the needs of their employees and creates impractical conditions for a number of range operators.

To provide for a limited degree of flexibility in carrying out the Secretary’s responsibilities under the Immigration and Nationality Act (INA), while not deviating from statutory requirements, the H-2A Final Rule provides the Administrator of OFLC with the authority to establish, continue, revise, or revoke special procedures for processing certain H-2A applications. The special procedures for sheep and goat herding, for example, have been recognized for many years and drawn upon the historically unique nature of the agricultural work that cannot be completely addressed within the regulatory framework generally applied to other H-2A employers. Such procedures recognize the peculiarities of the industry of agricultural activity, and establish a reasonable and tailored means for such employers to meet underlying program requirements while meeting unique requirements. Prior to making determinations regarding the use of special procedures, the H-2A Final Rule states that the OFLC Administrator may consult with affected employer and worker representatives. The Department published these procedures on August 2, 2011, with a delayed effective date of October 1, 2011, to provide affected employers time to understand and adapt to any changes. The Department then published each TSGA as a notice in the Federal Register on August 4, 2011.

The special procedures published by the Department covering occupations involved in the open range production of livestock do not change the longstanding requirement that employers provide efficient work and sleeping facilities to workers under the H-2A Program. Due to the unique nature of the work performed, the open range, employers in this industry are allowed to self-certify that housing is available, sufficient to accommodate the number of workers being requested, and meets all applicable standards. Within the housing unit, workers must be afforded a separate sleeping unit such as a bed, cot, bunk, or built with a clean mattress. Therefore, it would be possible for the employer to continue to have one camp with more than one worker so long as each worker has their own bed. Because employers participating in the H-2A Program must make arrangements for housing workers several months in advance of the start date of work, the Department believes employers should plan and arrange for the provision of sleeping units for its workers. Where it is temporarily impractical to set up a separate sleeping unit, the result of more than one worker having to share a bed, cot or bunk, the revised special procedures define “temporary impractical” to mean in consecutive days to ensure workers promptly receive the housing benefits they are entitled to under the H-2A Program.

In your letter you also state that the new guidance departs from the previous practice of allowing an employer to request a housing variance only after a conclusion of the Department’s investigation of the housing variance request and eligibility of the employer. The new guidance requires employers to submit a written request for a housing variance, the Department’s requirement has remained consistent by stipulating that the “When filing an application for certification, the employer may request a variance from the separate sleeping unit(s) requirement to allow for a second to second worker to temporarily join the herding operation.” Each open range production of livestock application must be based on a case-by-case basis and conform to housing safety and standards.

If you have any additional questions, please contact Mr. Tony Zaffarini, Office of Congressional and Intergovernmental Affairs, at (202) 693-4000.

Sincerely,

JANE OATHS, Assistant Secretary,

Come to the floor today in support of S. 744, the bipartisan comprehensive immigration reform bill before the Senate.

Through the process of negotiation and compromise, including 212 amendments that were considered during the course of the Senate Judiciary Committee markup last month and now much discussion on the Senate floor, a workable, tough—but fair—bill sits before us, ripe for us to take action on a problem that has gone unresolved for far too long.

Colleagues, this is our last, best chance to achieve immigration reform.

The bill before the Senate provides long-sought-after solutions that will help fix our broken immigration system. It will rationalize our country’s modern-day national security, economic, and labor needs, as well as our country’s age-old tradition of preserving family unity and promoting humanitarian policies.

It would also bring approximately 11 million undocumented immigrants now living in the United States out of the shadows and on a path where they could proudly and openly contribute to this great nation.

The first fundamental principle of the bill is that we must control our Nation’s borders and protect our national security. Before a single undocumented person in the United States earns a green card, several important “triggers” must be met, showing that the Federal Government has effectively secured the border and is enforcing current immigration laws. These triggers include the following:

No. 1, an unprecedented increase of 30,000 new full-time Border Patrol agents stationed along the southern border.

No. 2, the full deployment of the comprehensive southern border security strategy, which requires the Department of Homeland Security to conduct surveillance of 100 percent of the southern border region. This is a $10 billion completion of the southern border fencing strategy, which includes at least 700 miles of pedestrian fencing along the southern border.

No. 4, implementation of a mandatory employee verification system for all employers as E-Verify and ban unauthorized workers from obtaining employment.

No. 5, implementation of an electronic exit system at air and sea ports of entry that operates by collecting machine-readable visa or passport information from passengers of air and vessel carriers.

These enforcement improvements build upon the Department of Homeland Security’s substantial progress in securing and managing our border.

Over the past several years, DHS has deployed unprecedented amounts of manpower, resources, and technology to secure the Nation’s borders, and these efforts have contributed to enhanced border security but have also expedited legitimate trade and travel.

The second fundamental principle included in the bill is the creation of a path to citizenship for the 11 million individuals who are living and working in the United States without proper immigration documentation.

To those who have insisted that all 11 million undocumented immigrants should be deported, such a solution is not reasonable.

A majority of these individuals and families have become integrated into the fabric of their communities, and deportation would be a severe outcome. Many workers pay taxes, but they and their families live in the shadows and face the possibility of being picked up and deported, daily.

The State of California has the largest number of undocumented immigrants living in the United States. These individuals have become an essential part of the California economy, working in hotels, restaurants, agriculture, and the housing and construction industries.

A recent study of immigrants in California that was completed by Dr. Raul Hinojosa-Ojeda and Marshall Fitz of the Center for American Progress concluded that, “if all unauthorized immigrants were removed from California, the state would lose $352.8 billion in economic activity, decrease total employment by 17.4%, and eliminate 3.6 million jobs.” The study further showed that, “if unauthorized immigrants in California were legalized, it would add 633,000 jobs to the economy, increase labor income by $25.9 billion, and increase tax revenues by $5.3 billion.”

This bill establishes a process to bring these 11 million undocumented immigrants out of the shadows.

The need to provide a stable, legal, and sustainable workforce through immigration reform is critical in the agricultural sector.