

# The Government Versus Small Businesses

What's a business owner to do when his most reliable workers may also be illegal?

by [Fawn Johnson](#)

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LEBANON, Conn.—Federal immigration agents showed up on Valentine's Day and turned Mark Sellew's life upside down. They wanted his employment records. They wanted to see if the workers at his nursery were legal. And to Sellew's horror, 140 of them couldn't prove it. If he wanted to stay in business, he had to dump them—as soon as he could—just as his busiest landscaping season was approaching and his need for manual labor was at its highest.

It took weeks to confirm the workers' status, but in the end all but one were fired. "It was horrible," says Toni Ruiz, the human-resources manager at Sellew's company who was forced to confront each of the suspect employees one by one with their false documents. "They cried and cried. There were families, husbands, wives, children—all worked here. Some had 10, 15 years. I was devastated."

Each week after the agents had come, Ruiz dutifully informed the Homeland Security Department that she had let another round of employees go. The workers who weren't fired, stung by the sudden release of their friends, struggled to keep up with demand. "It was hard for us, for a lot of us. All year long, we work on the same crew," says Jesse Hernandez, who was a laborer at the time. "The worst day was when all the people get together and they say they have to go. A lot of people were crying."

Was he crying? "Honestly, yes," he says.

Hernandez, a legal immigrant from Mexico, was promoted that summer to supervisor. He now manages the potting of 12,000 plants per day and a crew of 13 workers on an assembly line. "It was better for me, but I feel bad because I feel like I take somebody's job," he says.

Mark Sellew's landscaping business, Prides Corner Farms, was the unlucky target in 2011 of a government audit designed to ferret out unauthorized workers. The audits are the preferred work-site enforcement method of this administration. President Obama has shunned the Bush-era live raids that would prompt cries of *La Migra!* from Spanish-speaking laborers who fled their stations at the mere whiff of authorities. Employers and immigration attorneys call the paper audits "silent raids." They're less dramatic, but the end result is often the same.

Sellew barely made it through the growing season that year. He lost \$2 million just compensating his customers for giving them a shoddy product. "The plants are not good. They kept growing and growing and growing. The weeds kept growing. We would dump full houses of plants," remembers Jaime Alba, who oversees the grass nurseries.

Two years later, Sellew is still feeling the aftershocks of the investigation. "It's the most difficult thing I've ever been through in my life," he says. "I haven't grown my business at all."

Before the audit, his company was booming, even in the wake of the 2008 stock-market crash. In 15 years, Sellew had expanded it from a \$10 million operation to a \$30 million business. Now, he counts himself lucky to keep a steady production line going. He doesn't expect growth anytime soon.

But he is thankful that his workforce, finally, is stable. The summer after the feds paid him a visit, he cycled through almost 600 legal workers, mostly white or black locals, to fill the empty laborer spots. Four hundred of them didn't last the season. Most quit after a few days. Some quit after a few hours, "especially when it was raining," Alba recalls.

The lack of reliable help forced Sellew to turn to a heavily regulated government seasonal guest-worker program to fill his slots. The program allows employers to apply for short-term work visas for foreign workers during a growing season. The cumbersome application process involves the Homeland Security and Labor departments, as well as the U.S. consulates in the workers' countries of origin. Employers have to prove no willing and able American workers are available for the job openings. Even if employers get approved for a certain number of foreign workers, they have to offer jobs to all Americans who want them until halfway through their season. The H-2A program, as it is known, is expensive, too. Sellew must transport his foreign workers to and from their home countries, house them, transport them to and from the nursery, and provide transportation for things like laundry or banking. Its sole advantage is that it is by-the-book legal. No worries about raids, silent or otherwise. But it definitely cuts into his bottom line.

The H-2A program cost Sellew a whopping \$904,000 in 2012, the first year after the audit. That included \$224,000 just to board the foreign laborers and almost \$40,000 for their transportation and travel expenses. The wage increases for the nursery's local workers cost the company \$201,000, to ensure that they were making as much as the foreign workers.

It drives Sellew crazy that the public image of farm labor is that owners exploit and underpay their workers. "Everyone thinks we're taking advantage of them," he says. "We're not." He pays the federally mandated hourly wage for seasonal foreign workers, \$10.91 an hour. Even before the audit, Sellew was an above-board employer. He paid \$8.25 to all starting laborers, the state minimum wage. Many of his longtime workers made more. Now that he has to hire foreign workers, all his starting employees get the H-2A wage of nearly \$11 an hour. That means he hires fewer people.

Agriculture is replete with stories like Sellew's. It illustrates the broader clash between "living wage" advocates who want hourly wages of up to \$12 an hour and honorable employers who want to take care of their workers but say they can't pay that much and stay in business. Sellew, however, is squarely under the thumb of the federal government because he uses foreign workers. He probably couldn't exploit them if he tried. And now, because of the silent raid two years ago, he has little choice in what he must pay them.

Other employers like Sellew have a different kind of choice: gamble with using potentially undocumented workers and pay them less, or submit to the government's will, pay them more, but make less money. In a business such as landscaping, with its tight profit margins and seasonal variations, it can make the difference between surviving or surrendering. And it's a given that the workers suffer, too, with many ending up working inferior jobs—or worse, turning to crime.

## **NOBODY WINS**

Before the investigation, Sellew was a typical ag employer. He quietly relied on illegal labor. He also tacitly relied on his undocumented workers to provide authentic-looking identification documents, which gave him plausible deniability in the eyes of the government. Was he aware that 70 percent to 80 percent of agriculture workers had no papers? Yes. Were his hiring practices well within the law? Yes.

He personifies the dilemma facing business as they try to comply with the government's thicket of immigration regulations. Employers are required to verify each worker's identity and employment eligibility on federal form I-9. Hiring managers are required to accept authentic-looking ID without asking questions or risk being charged with discrimination. But anyone can purchase an authentic-looking green card on a city street corner for \$1,000. If investigators discover the fraud, the employer must fire that worker or face sanctions.

The problem from the government's side is that employers caught with undocumented workers can hide behind a giant fig leaf. Their workers' documents look real, so what were they supposed to do? "They're going to come back and say, 'Listen, I'm not an expert. I can't tell the difference,' " says Bruce Foucart, a special agent at DHS's Immigration and Customs Enforcement office in Boston, where the Prides Corner case was processed.

That's exactly what happened with Sellew's nursery, tucked in to the verdant hills of eastern Connecticut. Federal investigators found no legal violations in his hiring practices. Even they acknowledged that his workers' fake green cards and Social Security cards looked real. Sellew was off the hook. ICE can't prosecute employers who, however cynically, say they don't know the difference. The next best option is to fine them. "If we can't prove that they knowingly and intentionally hired illegal labor, we will go after them where it hurts, which is the pocketbook," Foucart said. Even that didn't work very well in the Prides Corner investigation. Sellew wound up paying a paltry \$1,000 fine for a mistake on one form.

Washington policymakers are well aware that they've placed employers in a no-win situation. Unfortunately, changing the law is even harder. Sellew ardently supports the immigration-reform bill pending in Congress, but he fears the chance to pass it is waning.

The legislation would give legal status to some 11 million unauthorized immigrants, allowing him to rehire the workers he had to fire. (They haven't gone anywhere, Alba says. He is still friends with a lot of them.) It would replace the cumbersome H-2A program with a smoother work-visa system that would give foreign workers the chance to stay in country year-round if they continue to work in agriculture.

The work-site investigations will continue regardless of immigration reform, given ICE's mandate to keep employers from hiring unauthorized labor. Most audits, like Sellew's, culminate in the firing of undocumented workers and a series of fines. Penalties range from hundreds of dollars for a few filing mistakes to hundreds of thousands of dollars for big employers with a large ratio of unauthorized workers. They can be lenient or severe depending on how cooperative an employer has been.

Still, the raids are extremely disruptive. "It's gut-wrenching," said Craig Regelbrugge, government-relations vice president at the American Nursery and Landscape Association. He says it is far too common for an audit to end how Sellew's did, with no actual legal violations and a bunch of fired workers who head down the street and take a job as a house cleaner or a dishwasher, usually for a lot less money.

"The way the policies are being conducted right now are, frankly, cynical. ICE comes in and audits a business, and it's completely exonerated," Regelbrugge said. "They fire a whole bunch of people. Those people are not deported, typically. It drives down their wages and working conditions. The business that is audited is thrown into turmoil. There's no good that comes of this. Nobody wins."

The audits purposely avoid rounding up and deporting unauthorized workers, making them distinct from the Bush-era raids. The Obama administration does not want workers to be punished more than their bosses. But it's hard to go after employers without harming the employees. They might not be deported, but they lose their jobs. They may end up working for more-unsavory bosses or worse, turning to organized-crime rings.

In areas that need a lot of migrant labor, the immigration audits can raise crime rates. ICE typically audits employers in local pockets, hitting all the dairies in northern Idaho, for example. The silent raids can displace thousands of undocumented workers whose only other employment options may be in the black market. Last

year, Margaret Mims, the sheriff of Fresno County, Calif., sent a letter to Sen. Dianne Feinstein, D-Calif., asking that ICE stop its I-9 audits in her area so that the unemployment rate would not be so high. If ICE redirected its efforts toward human trafficking, Mims suggested, it would "help families in these communities from losing their source of income."

Left unsaid in Mims's letter was this conclusion: If these folks had farm jobs, they would not be forced into working for the Mexican drug cartels.

## BACKBREAKING LABOR

There is no way to get around the grunt work of a nursery job. Ruiz, the Prides Corner human-resources manager, requires job applicants to lift two 25-pound potted plants as part of the job interview. She has heard every excuse in the book when workers walk off the job. "They said, 'I'm too tall to be bending over all day pulling weeds,'" she recalls. " 'It's too cold.' "

One laborer told a team leader, "Even my mother says I shouldn't be working this hard."

Prides Corner grows and ships everything from perennial flowers to woody shrubs like azalea bushes to retailers from Boston to Chicago. The idyllic setting of the place—perfect for a French picnic and perhaps a wedding proposal—belies the intensity of the pressure. Workers haul thousands of plants a day in all kinds of weather. When it rains in April, their hands are raw with cold. In July, they struggle to stay hydrated in the 90-degree humidity. Sellew has two kinds of sunscreen in his jeep. "I need the sport stuff because I sweat so much," he says.

Sellew advertises his job openings locally, as H-2A requires. If he gives a local applicant a shot at a job, it cuts into the number of H-2A workers he is allowed to have that year. It doesn't matter that those workers likely won't stick. "We have to kind of suck it up and hire them," he says. To screen out less serious applicants among the locals, Prides Corner now requires a drug test before work starts. "That's helped a lot," Ruiz says.

"For domestic workers, oh boy, you definitely need the drug test," Sellew agrees.

To discourage undocumented workers from applying, Prides Corner's job ads now prominently state that applicants must present valid driver's licenses. The legal rationale for this new requirement is that most workers have to drive around the property, and they sometimes have to make local deliveries. But before the audit, the company wasn't always so demanding. Not every worker needs to drive—and a license was just one of many forms of ID an applicant could provide.

After fulfilling the drug-free and driver's license requirements, few local workers are left. The H-2A program is the next option. It is the costliest way to get foreign labor, so almost all growers shun it. A scant 4 percent of agriculture workers in the United States are in the H-2A program. Most of the rest are undocumented. A majority of the agriculture employers who use it are like Sellew. After an audit, they turn to it as a last resort.

The truth is, nobody who isn't trying to make it as an immigrant laborer wants this work. Even unemployed people who can easily prove their legal status stay away from agriculture jobs. In 2010, only 20 percent of 36,000 domestic workers who answered H-2A-mandated job advertising actually accepted the jobs. Five percent stayed through the length of the contract, according to the National Council of Agricultural Employers.

In areas where growers can't get undocumented labor, the harvest situation can become dire. In 2011, after Georgia passed a harsh immigration law that required employers to electronically check workers' IDs, farmers had more than 11,000 jobs open. Gov. Nathan Deal, a Republican, encouraged prison probationers to take

them, but even they walked off the job. One blackberry farmer said he lost \$50,000 that season, according to *The Atlanta Journal-Constitution*.

Many H-2A workers are making out like bandits. Louis Barajas, one of Prides Corner's laborers, said he has sent already \$5,000 back home to his mom and nine siblings and has more in savings. He would make \$60 a week in construction at home. Most of Sellew's H-2A workers have saved \$10,000 or more. They all want to come back next year.

In the meantime, the federal requirements leave Sellew shaking his head. Take the wheelchair ramps mandated by the Labor Department. The wood-stained ramps are conspicuously affixed to the house that lodges 20 H-2A workers. Never mind that these guys are hired to lift and load potted plants all day. A person with back problems isn't qualified to do this job, let alone a person who uses a wheelchair.

"I still can't believe it," Sellew says, as he drives past the handicap-accessible houses. "It looks ridiculous."

Prides Corner's other 58 H-2A workers are housed in apartments about 10 miles away. Here again, the labor rules are precise and strict, intended to avoid barracks-like living conditions. Each worker must have 50 square feet of bedroom space. Two workers can share a room with 80 square feet if they are using bunk beds. If the room happens to be 75 square feet, however, only one worker can be placed there. There is no cheating. Ruiz is on a first-name basis with the state labor inspector who measures the living spaces.

Sellew saves some money over the winter because he doesn't have to pay rent on the two houses on the Prides Corner property. But he will pay \$8,700 per month (\$150 per person) for the empty apartments after his seasonal workers leave. "It's a one-year lease," Ruiz explains.

For Sellew, it helps that his H-2A workers, essentially prepackaged and shipped up North just for these jobs, are dream employees. He affectionately calls one of them his "stud H-2A" because he is a mean soccer player. "Their main request is, 'Give me more hours,'" he says.

Sellew's team leaders—the rough equivalent of foremen on a warehouse or shop floor—also say they much prefer the H-2A workers over locals. "You have a hard time to get local people," says Mickey Morales, who oversees construction and the potting stations. "I'm the one who has to hire every year. I call 20 people and only 10 answer the phone. Only one comes for the orientation, stays for a few hours, a few days, and then quits."

## A LAST RESORT

Like most growers, Sellew hates the seemingly endless rules under the H-2A program. "They do everything they can to have us hire domestic workers for these jobs," he says.

That's exactly what the rules are intended to do. Many of the current H-2A requirements were dismantled under the Bush administration, only to be put back under Obama at the request of organized labor. Labor unions are intent on keeping the H-2A program full of strict worker protections to ensure that it is truly a last resort for employers. They believe that employers should be doing everything they can to hire American workers first.

This isn't Sellew's first experience with the H-2A program. He used it in 2007 and 2008 for some of his supervisors, but he swore never to go back to it after the Labor Department fined him for paying them more than his manual laborers, who were making minimum wage. That's a no-no, even if the foreign supervisors are doing higher-level jobs. Sellew wound up paying all of his laborers back pay for that year, a retroactive 20

percent raise. Now the H-2A rate of \$10.91 per hour (probably more next year) marks the new wage floor for Prides Corner. Supervisors, of course, make more.

From a union perspective, that's what should happen—foreign workers should not make more than American workers, and it's better for everyone when wages go up. This isn't just the point of view of the United Farm Workers, the primary advocate for farm labor, but of organized labor as a whole. "What works best is a place where people can come and work and still have their worker rights respected," says Maria Machuca, UFW's communications director. "The H-2A program currently in place—if we don't get immigration reform, we'll keep that program. That works for us because it has some of the basic needs for farmworkers."

UFW is also unapologetic about the relatively high wages mandated under H-2A, reasoning that farm jobs are demanding and workers should be paid accordingly. "Hopefully, we're going to make agricultural work desirable, at least for some people," Machuca said.

The larger economic perspective is less rosy. Yes, the Prides Corner's wages did go up dramatically, which was good for the workers. But Sellew has hired fewer people. He has managed to trim his workforce by about 13 percent, and he relies on experienced H-2A workers rather than local teens who could learn on the job. "In the past, we hired high school kids and paid minimum wage. Guess what happened here? We stopped hiring them."

Yet both the farmworker unions and the business growers would prefer a new work visa that would allow employees to work for the registered agriculture employer of their choice. UFW and the grower community negotiated the details of the proposed farm visa this spring, and it became part of the Senate immigration bill that passed in June.

Agriculture lobbyists now are trying to convince House lawmakers that the agriculture visa in the Senate bill would make far more sense than changing the H-2A program to be more employer-friendly, as many Republicans want to do. But that conversation, as with many others on immigration, remains mired in the House GOP's reluctance to do anything at all. Many conservatives are opposed to the idea of legalizing undocumented immigrants, and they could block almost any reform legislation from passing.

## THE LONG VIEW

Sellew tries to keep a long-term perspective. Growing plants outdoors for commercial sale depends on so many factors beyond human control that it requires a Zen-like philosophy to survive. He has a copy of Henry David Thoreau's *Faith in a Seed* in his office.

He marvels that he survived the ICE audit relatively unscathed, even though his business has stagnated. But, he reflects, his life is stable. His marriage is intact. His blood pressure is still normal, probably helped by his avid mountain biking. His son Jack, a junior at Cornell University, still wants a career in agriculture, even after witnessing the hellish summer that followed the fateful visit from the government.

Like his father, Jack Sellew takes a long view on the future of agriculture. "My generation, and America, distances itself farther and farther from the farm. I'm at Cornell. Fifty years ago, a majority of people here would have worked on a farm, driving a tractor and all that," he says. "Now I'm a big minority that knows how to do any of that stuff. It's not a good thing."

Jack is also in the minority among American workers because he can handle, and even likes, agriculture work. "I spaced plants all summer," he said of the months after the audit. "I personally love putting on gym shorts and a shirt and just sweating all day, working hard." Some of his enthusiasm came from his youth and desire to

show the more established workers that he was up to the task. "I'm just a high school kid. I didn't want them to think, 'Aw, he's just the owner's son.' "

Another Prides Corner worker, Bryan Bill, is one of the few American laborers hired in 2011 who actually stuck. Bill said he wanted to quit initially, but he had a wife and two kids to support. "As a man, you do what you have to do." As a team leader now, he is proud he can keep up with "the guys," the H-2A workers.

As workers like Jack and Bryan become rarer, U.S. agriculture will depend on people who come from poorer countries to perform manual labor in this rich one. American growers generally agree it's not such a bad thing if those foreign workers put down roots here. And in fact many of them have. Some have children who are citizens because they were born here. Labor Department data show that others, even without papers, have moved on to less physically taxing industries.

Yet as long as the agriculture workforce has no simple way to get papers, policing the industry will be a nightmare. There are too many employers for ICE to keep up with all of them. The agency does the best it can to "send a message" to employers to act within the law. It is about as successful as the highway patrol is in stopping speeders.

Sellew doesn't blame ICE for his troubles. He knows the auditors were just doing their job. He does, however, blame Republicans who are holding up immigration reform. "I'm a Republican, but maybe I'm really an independent," he says. "I don't think [Republicans] are pro-business. A lot of people don't understand what it's like to get a labor force to do manual labor, and do it well. Immigrant labor does the work incredibly well."

It's an admission that many within the U.S.—a country built on farming—still have difficulty coming to terms with. The dream to work the land is one that now belongs to others.

<http://www.nationaljournal.com/magazine/when-the-feds-come-knocking-20130919>