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THE H–2B GUESTWORKER PROGRAM AND IMPROVING THE DEPARTMENT OF LABOR'S ENFORCEMENT OF THE RIGHTS OF GUESTWORKERS

HEARING

BEFORE THE

SUBCOMMITTEE ON DOMESTIC POLICY

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

APRIL 23, 2009

Serial No. 111–8

Printed for the use of the Committee on Oversight and Government Reform



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THE H–2B GUESTWORKER PROGRAM AND IMPROVING THE DEPARTMENT OF LABOR'S ENFORCEMENT OF THE RIGHTS OF GUESTWORKERS

THURSDAY, APRIL 23, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON DOMESTIC POLICY,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:20 a.m., in room 2154, Rayburn House Office Building, Hon. Dennis J. Kucinich (chairman of the subcommittee) presiding.

Present: Representatives Kucinich, Jordan, Cummings, Tierney, Watson, and Foster.

Staff present: Jaron R. Bourke, staff director; Claire Coleman, counsel; Jean Gosa, clerk; Charisma Williams, staff assistant; Leneal Scott, information systems manager; John Cuaderes, minority deputy staff director; Jennifer Safavian, minority chief counsel for oversight and investigations; Dan Blankenburg, minority director of outreach and senior advisor; Adam Fromm, minority chief clerk and Member liaison; Seamus Kraft, minority deputy press secretary; Christopher Hixon, minority senior counsel; and Marvin Kaplan and Mitchell Kominsky, minority counsels.

Mr. KUCINICH. The subcommittee will come to order.

Good morning. Buenos dias. Namaste. I want to thank the witnesses for being here. I am Congressman Dennis Kucinich, chairman of the Domestic Policy Subcommittee of the Oversight and Government Reform Committee. I am here with the ranking member of the committee, Mr. Jordan of Ohio.

The subcommittee's hearing is entitled, "The H–2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers."

We have a panel of witnesses who are prepared to testify. Today's hearing is going to go into issues of enforcement, particularly with respect to labor rights for non-agricultural guestworkers who come to the United States lawfully through the H–2B visa program.

Now, without objection, the Chair and ranking minority member will have 5 minutes to make opening statements, followed by opening statements not to exceed 3 minutes by any other Member who seeks recognition. Without objection, Members and witnesses may have 5 legislative days to submit a written statement or extraneous materials for the record.

This hearing, "The H–2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers," continues an investigation that this subcommittee began in 2007, evaluating the adequacy of labor law enforcement in New Orleans during period following Hurricane Katrina.

During the course of our investigation and the two hearings we held on labor law enforcement in New Orleans, the subcommittee discovered that H–2B visa holders, who are non-agricultural guestworkers, have been exposed to egregious forms of abuse by sponsoring employers who brought them to the Gulf Coast to assist with the cleanup. These abuses include wage theft, poor living conditions, and threatening actions which amounted to human trafficking.

Unfortunately, it is clear that the abuse of guestworkers continues today in New Orleans and across the country. Today we will hear testimony from three guestworkers, all of whom worked in different industries that the Department of Labor allows to hire foreign guestworkers. Take, for example, the case of one of our witnesses, Aby Karickathara Raju, who came to the United States from India to work for Signal International LLC at the Gulf Coast Shipyard. Lured by false promises of permanent U.S. residency, Mr. Raju, along with hundreds of other Indian guestworkers, paid tens of thousands of dollars to obtain this job with Signal, only to have their passports confiscated and find themselves forced into involuntary servitude, working for substandard wages and living in overcrowded, guarded labor camps.

Unfortunately, these cases of worker abuse have gone largely unprosecuted by the Federal cop on the workplace beat. The Department of Labor did virtually nothing to protect these workers. The explanation has two components: First, there are very limited legal protections in place for H–2B workers. Unlike H–2A guestworkers, H–2B guestworkers do not have access to legal services, do not have protection from retaliation or payment of transportation to the United States.

Second, the Department of Labor has utterly failed to enforce the rights of H–2B guestworkers. The Department of Labor has interpreted the Immigration and Nationality Act and its implementing regulations to preclude Department of Labor authority to enforce the conditions of H–2B visa petitions in favor of Homeland Security's enforcement authority.

At our hearing in June 2007, when we questioned former Department of Labor officials about why the abuse of guestworkers in New Orleans had gone unchecked, we were told to ask the Department of Homeland Security. While that is debatable, Department of Labor itself has acknowledged it still maintains authority to oversee wage and hour laws which apply to guestworkers. Based on this subcommittee's scrutiny, advocacy by labor groups, as well as recent reports by the GAO, however, it is clear that the Department of Labor's Wage and Hour Division has failed to do even that.

There is a development in the law that requires mentioning as well. The previous administration passed a midnight regulation that weakens, instead of strengthens, protections for H–2B visa guestworkers. The new regulation is also extremely harmful to U.S. workers because it makes it easier for employers to bring in

guestworkers for longer periods of time, increasing the risk that U.S. workers will be overlooked for a cheaper, less regulated labor source.

Congressman Miller, chairman of the Committee on Education and Labor, and Congresswoman Zoe Lofgren, chairman of the Immigration Subcommittee of Judiciary, have been working tirelessly on and will soon be introducing a new bill that will increase protection for H–2B guestworkers and U.S. workers. This subcommittee supports and applauds those efforts. The current weak regulatory framework for the H–2B visa program cannot be allowed to stand.

The one silver lining in the previous administration's midnight regulation is the delegation of authority by DHS to the Department of Labor to establish an enforcement procedure to investigate compliance with H–2B requirements and to remedy violations uncovered as a result by imposing fines or debarment. Many questions remain about the nature of that delegation and how DOL's oversight and enforcement of the H–2B visa will be carried out. But the acknowledgment by both Homeland Security and Labor that Labor has clear authority to enforce the rights of H–2B guestworkers give this subcommittee hope that the Department of Labor will finally commit to investigating and prosecuting H–2B sponsoring employers who are abusing the program and exploiting workers.

We had hoped to hear from Labor Secretary Hilda Solis today on the Department of Labor's plans to improve such oversight, but we understand that the Department is still in the policy development stage, and the Department asked that it be allowed to testify at a later date once the Senate has confirmed the Assistant Secretary for the Employment Standards Administration and an Administrator of the Wage and Hour Division. We are hopeful that the Department will consider the testimony presented in today's hearing as they draw conclusions about what needs to be done with the H–2B visa program. This subcommittee certainly intends to see that Secretary Solis's introductory remarks to the Department of Labor, that "there's a new sheriff in town," will benefit the lives and working conditions of guestworkers.

Today, I hope we can better understand the problems faced by guestworkers and how the Department of Labor, in the past, has failed them. We are lucky to have a very strong panel of labor advocates that can shed light on how to create a stronger Department of Labor that can fulfill its mission of protecting the rights of all workers.

[The prepared statement of Hon. Dennis J. Kucinich follows:]

Opening Statement
Dennis Kucinich
Chairman
Domestic Policy Subcommittee

"The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers"
Thursday April 23, 2009
2154 Rayburn HOB
10:00a.m

Good morning and welcome.

This hearing – "The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers" – continues an investigation that this Subcommittee began in 2007, evaluating the adequacy of labor law enforcement in New Orleans during the period following Hurricane Katrina.

During the course of our investigation and the two hearings we held on labor law enforcement in New Orleans, the Subcommittee discovered that H-2B visa holders, who are non-agricultural Guestworkers, have been exposed to egregious forms of abuse by sponsoring employers that brought them to the Gulf coast to assist

with the cleanup. These abuses include wage theft, poor living conditions, and threatening actions which have amounted to human trafficking.

Unfortunately, it is clear that the abuse of guest workers continues today — in New Orleans and across the country. Today we will hear testimony from three Guestworkers – all of whom worked in different industries that the Department of Labor (DOL) allows to hire foreign Guestworkers. Take, for example, the case of one of our witnesses, Aby Karickathara Raju, who came to the United States from India to work for Signal

International LLC at a Gulf Coast Shipyard. Lured by false promises of permanent U.S. residency, Mr. Raju, along with hundreds of other Indian Guestworkers, paid tens of thousands of dollars to obtain this job with Signal, only to have their passports confiscated and find themselves forced into involuntary servitude, working for substandard wages and living in overcrowded, guarded labor camps.

Unfortunately, these cases of worker abuse have gone largely unprosecuted by the federal cop on the workplace beat. The Department of Labor did virtually nothing to protect these workers. The explanation has two components:

First, there are very limited legal protections in place for H-2B workers. Unlike H-2A guestworkers, H-2B guestworkers do not have access to legal services, protection from retaliation, or payment of transportation to the United States.

Second, the Department of Labor has utterly failed to enforce the rights of H-2B Guestworkers. The Department of Labor has interpreted the Immigration and Nationality Act and its implementing regulations to preclude DOL's authority to enforce the conditions of H-2B visa petitions in favor of the Department of Homeland Security's enforcement authority. At our hearing in June, 2007, when we questioned former DOL officials about why

the abuse of Guestworkers in New Orleans has gone unchecked, we were told to ask the Department of Homeland Security. While that is debatable, DOL itself has acknowledged that it still maintains authority to oversee wage and hour laws which apply to Guestworkers. Based on this Subcommittee's scrutiny, advocacy by labor groups, as well as recent reports by the GAO, however, it is clear that DOL's Wage & Hour Division has failed to do even that.

There is a development in the law that requires mentioning as well. The previous administration passed a midnight regulation that weakens, instead of strengthens, protections for H-2B Guestworkers. The new regulation is also extremely harmful to US workers, because it makes it easier for employers to bring in Guestworkers for longer periods of time, increasing the risk that US workers will be overlooked for a cheaper, less-regulated labor source. Congressman Miller, Chairman of the Committee on Education and Labor, and Congresswoman Zoe Lofgren, Chairwoman of the Immigration Subcommittee of Judiciary, have been working tirelessly on and will soon be introducing a new Bill that would increase protection for both H2-B Guestworkers and US workers. This Subcommittee supports and applauds those efforts. The current weak regulatory framework for the H-2B visa program cannot be allowed to stand.

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introductory remarks to the Department of Labor – that "there's a new Sherriff in town!" – will benefit the lives and working conditions of Guestworkers too.

Today, I hope we can better understand the problems faced by Guestworkers and how the Department of Labor has failed them in the past. We are lucky to have a very strong panel of labor advocates that can shed light on how to create a stronger Department of Labor that can fulfill its mission of protecting the rights of all workers.

Mr. KUCINICH. I want to thank you again for being here. Thank my colleagues who are present, and now turn to the ranking member of this subcommittee, Mr. Jordan of Ohio.

You may proceed.

Mr. JORDAN. Thank you, Mr. Chairman. I want to thank you for putting this hearing together and for the great working relationship I have with you, a fellow Ohioan.

I thank our panel, our first panel and our second panel as well.

This hearing provides an excellent opportunity to discuss and debate the existing H–2B guestworker program and the newly delegated enforcement of H–2B violations to the Department of Labor. This is an important matter and I look forward to having a productive discussion on the many issues surrounding the present H–2B visa program and their economic implications.

We all agree that enforcement of the law and protection of guestworkers is critical. Many organizations and individuals, including some that we will hear from later, have advocated for substantial reforms to the H–2B guestworker program. Indeed, some of these proposed reforms might be helpful.

But let's also keep in mind today that implementing many of the suggested policy changes may require Congress to entirely overhaul the guestworker program. As a result, our discussion needs to also examine how reforming the current program will affect the economy and U.S. workers. Being a Representative from Ohio, a State struggling with economic hardship in the housing crisis, this is an issue that hits close to home.

In 1986, Congress passed the Immigration Reform and Control Act. The act contained major revisions of the temporary worker H–2 program. Specifically, it divided the H–2 program into two separate visa categories, the H–2A program for temporary agriculture workers and the new H–2B was created for temporary non-agricultural workers. Today's hearing will focus on the existing H–2B program.

On January 18, 2009, the Department of Homeland Security delegated its enforcement authority of H–2B violations to the Labor Department. I would like to emphasize that prior to this delegation H–2B violations went largely unenforced by DHS. Without a doubt, the failure to enforce existing laws is unacceptable.

Prior to January 18, 2009, Labor's enforcement of H–2B wages was limited to laws specifically delegated to the Department of Labor, such as the Fair Labor Standards Act. However, following the delegation of enforcement by DHS, the Department of Labor immediately promulgated regulations that would enforce the H–2B program.

As it now stands, an H–2B employer will have to make certain guarantees to the Department of Labor regarding their hiring of H–2B workers. Most relevant to today's hearing, it is important for this subcommittee to take into consideration that an H–2B employer must attest and demonstrate that qualified persons in the United States are not available and that the terms of employment will not adversely affect the wages and working conditions of the workers in the United States similarly employed. These employer attestation requirements for the H–2B application provide a foun-

dation to prevent employer violations, while at the same time encouraging employers to use U.S. workers.

Now that the DHS has delegated to Department of Labor enforcement authority for the H–2B violations, the Department of Labor has supplemented U.S. worker protection with new mechanisms to ensure compliance with H–2B filing and added attestation requirements, including penalties, debarment, supervised prefiling recruitment, and post-adjudication audits. In short, the Department of Labor now has the authority and capability to enforce the H–2B violations.

Unfortunately, the change in administration and the slow appointment process has left the Department of Labor with a limited management staff, and no one who is capable of testifying on the implementation of the H–2B program is present today. No accurate assessment of the H–2B regulations can be made without a representative from the Department of Labor.

But it appears that the Department of Labor has failed to implement any of the new H–2B regulations laid out above. I hope to eventually hear, as the chairman indicated in his opening statement, the administration's perspective on the H–2B program before this subcommittee. In fact, I think the words the chairman used were the Department of Labor has utterly failed in many of the things we are talking about today.

The Department of Labor should be given a chance to enforce the regulations promulgated on January 18, 2009. To be sure, once the existing regulations are enforced, Congress and the Department of Labor will be in a better position to assess the H–2B visa program. However, before Congress and the Department of Labor can seriously consider future changes to the H–2B program, the broader economic implications of the guestworker program must be thoroughly examined and discussed.

Thank you, Mr. Chairman, for holding this important hearing today. These issues not only affect our home State of Ohio, but also the entire United States, and I look forward to hearing from our witnesses.

Mr. KUCINICH. I thank the gentleman. I just want to say that I appreciate the chance to work with you. And the one good thing about this Domestic Policy Subcommittee, as with all subcommittees of Government Oversight, is that—and this doesn't relate specifically to the Department of Labor, but to any Government agency or department—that we generally get their cooperation, and that is nice. That has nothing to do with the fact that we have subpoena power, by the way.

Mr. Foster, the Chair recognizes you for 3 minutes.

Mr. FOSTER. Thank you, Mr. Chairman.

While today's hearing will no doubt have wider implications on labor policy and the economy, this is also an opportunity to further understand and address the administrative shortcomings within the Labor Department in this area. In a previous hearing, this subcommittee has investigated labor law enforcement and protection of guestworkers by the Department of Labor in the aftermath of Hurricanes Katrina and Rita, and has uncovered cases of abuse by sponsoring employers during the Gulf Coast cleanup.

Today, however, we may gain a clearer view of nationwide patterns of abuse and fraud within our guestworker programs and begin to devise rigorous reporting and accountability measures to ensure the Department of Labor acts swiftly to uncover abuse and enforce existing labor laws.

In a recent report, the GAO noted that the Labor Department's Wage and Hour Division, the body charged with administering laws like the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, insufficiently responds to reports of abuse and fails to consistently enforce the terms of guestworker labor certifications which designate wages and work schedules.

Many of today's witnesses will correctly point out the vulnerability of guestworkers who have no leverage to bargain for higher wages or better working conditions. The downward pressure on wages that results from this lack of enforcement is not only exploitative for the guestworker, but also means that jobs become increasingly undesirable for U.S. workers.

I look forward to hearing from each of our witnesses on the ways the bureaucracy can be made more responsive and accountable, including any proposals for publicizing patterns of abuse and fraud.

Thank you and I yield back.

Mr. KUCINICH. Thank you very much, Mr. Foster.

Does Mr. Tierney have an opening statement?

Mr. TIERNEY. No, I don't, Mr. Chairman, other than thank you for having this hearing. As always, you are looking out for people's rights, and we appreciate that.

Mr. KUCINICH. Thank you for being on this subcommittee.

Ms. Watson, do you have an opening statement?

Ms. WATSON. I do.

Mr. KUCINICH. The Chair recognizes the distinguished lady from California, Ambassador Watson.

Ms. WATSON. I also want to thank the chairman for holding today's important hearing examining the state of H–2B non-agricultural guestworker visa program. I sincerely hope that today's proceedings will reveal the weaknesses associated with the program and the steps that can be taken to strengthen the rights and protections for H–2B visa holders.

Previous hearings and investigations conducted by this subcommittee revealed serious abuse by sponsoring employers in the Gulf Coast during the cleanup after Hurricane Katrina. Unfortunately, these practices were not isolated incidents, but representative of similar abuses which occur across the country due to the uneven power dynamic between guestworkers and their employers and an ineffective system within the Department of Labor to regulate employers who violate labor laws.

Due to the loophole in H–2B regulations and the assertion that enforcement of labor laws affecting these guestworkers was outside the authority of the Department of Labor, this program has operated with essentially no enforcement mechanism or penalties for employers who violate their guestworkers' rights.

A new Department of Labor regulation on December 19, 2008 solidified the notion that enforcement authority was within the jurisdiction of the Department of Labor. But while this was a positive

step, its practical application has proven to be unevenly flawed. According to a March 2009 report by the GAO, the Department of Labor's Wage and Hour Division processes for complaint intake, conciliation, and investigation are so ineffectual they actually discourage workers from making complaints.

Healthy immigration and labor policy needs to be based upon the premise of fair wages for honest work in a safe environment. Employers who rely upon temporary foreign workers must operate under this principle with the knowledge if they are in violation, they will be investigated and penalized by the Department of Labor.

With the advent of a new administration and a new Secretary of Labor, this hearing occurs at an opportune moment to assess current practices and to reveal the actions needed to protect the rights of all guestworkers.

I would like to thank all of today's panelists for participating. Sharing your experiences will help us ensure future guestworkers in the H–2B visa program are empowered with the proper rights and the necessary infrastructure to protect you.

With that, Mr. Chairman, I yield back the remainder of my time, and, again, thank you.

[The prepared statement of Hon. Diane E. Watson follows:]

Opening Statement

Congresswoman Diane E. Watson

"The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers"

Subcommittee on Domestic Policy
Oversight and Government Reform Committee

Thursday, April 23, 2009
2154 Rayburn HOB
10:00 A.M.

Thank you Mr. Chairman for holding today's important hearing examining the state of the H-2B non-agricultural guestworker visa program. I sincerely hope that today's proceedings will reveal the weaknesses associated with this program, and the steps that can be taken to strengthen the rights and protections for H-2B visa holders.

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With the advent of a new administration and Secretary of Labor this hearing occurs at an opportune moment to assess current practices and to reveal the actions needed to protect the rights of all guestworkers.

I would like to thank today's panelists for participating in today's proceedings. Sharing their experiences with us will help ensure future guestworkers in the H-2B visa program are empowered

with the proper rights and the necessary infrastructure to protect them.

Thank you Mr. Chairman and I yield back the remainder of my time.

Mr. KUCINICH. I thank the gentlelady.

If there are no additional opening statements from members of the subcommittee, the subcommittee will now receive testimony from the witnesses.

I want to start by introducing our first panel. Mr. Aby Karickathara Raju is a former H–2B guestworker for Signal International LLC. Mr. Raju is a structural welder from Kerala, India. He is a member of the Alliance of Guestworkers for Dignity.

Mr. Miguel Angel Jovel Lopez is a former H–2B guestworker for Cumberland Environmental Resources. He came to the United States from El Salvador and works as a construction laborer. He is also a member of the Alliance of Guestworkers for Dignity.

Mr. Daniel Castellanos-Contreras is a former H–2B guestworker for Decatur Hotels LLC. He came to the United States from Peru, where he is a licensed engineer and formerly owned a small business. He is an organizer and founding member of the Alliance of Guestworkers for Dignity.

I want to thank you for appearing before this subcommittee today.

Now, we also have two interpreters, and I would like the interpreters, if you would please identify yourself, your name, where you are from, and if the court stenographer can also take that information and members of the committee can be aware of it.

If you would start with Mr. Raju's interpreter, your name.

Ms. JACOB. My name is Bincy Jacob. I work with the New Orleans Workers' for Racial Justice.

Mr. KUCINICH. And would you spell your last name?

Ms. JACOB. Sure. It is J-A-C-O-B.

Mr. KUCINICH. OK. Yes, sir.

Mr. HORWITZ. My name is Jacob Horwitz. I am also with the New Orleans Workers' for Racial Justice. And that is H-O-R-W-I-T-Z. Thanks for having us.

Mr. KUCINICH. OK.

Now, it is the policy of this subcommittee to swear in all witnesses before they testify. Since we have individuals who are interpreting, we are going to ask that you be sworn as well. So I would ask that all witnesses please rise and please raise your right hands.

[Witnesses sworn.]

Mr. KUCINICH. OK, let the record reflect that each witness answered in the affirmative.

I would ask the witnesses now to give a brief summary of their testimony and to try to keep their summary under 5 minutes in duration. Since we are working with interpreters, we may have to give a little bit of play to that, but I want you to keep in mind that your written statement will be included in the hearing record.

Thank you. Do you have any questions about that, by the way? Do you have any questions about this procedure?

Ms. JACOB. No.

Mr. KUCINICH. No? OK. All set? OK, let's proceed, then, with Mr. Raju.

STATEMENTS OF ABY KARICKATHARA RAJU, FORMER H–2B GUESTWORKER FROM INDIA FOR SIGNAL INTERNATIONAL LLC, MEMBER OF THE ALLIANCE OF GUESTWORKERS FOR DIGNITY; MIGUEL ANGEL JOVEL LOPEZ, FORMER H–2B GUESTWORKER FROM EL SALVADOR FOR CUMBERLAND ENVIRONMENTAL RESOURCES, CO., MEMBER OF THE ALLIANCE OF GUESTWORKERS FOR DIGNITY; AND DANIEL CASTELLANOS-CONTRERAS, FORMER H–2B GUESTWORKER FROM PERU FOR DECATUR HOTELS LLC, ORGANIZER AND FOUNDING MEMBER OF THE ALLIANCE OF GUESTWORKERS FOR DIGNITY

STATEMENT OF ABY KARICKATHARA RAJU

[The following testimony was delivered through an interpreter.]

Mr. RAJU. Thank you.

Mr. KUCINICH. And please speak into the mic as best you can, and the interpreter can go back and forth. Go ahead.

Mr. RAJU. My name is Aby Karickathara Raju.

Mr. KUCINICH. We are going to have to ask you to bring that mic a little bit closer to both of you and kind of move it back and forth. Go ahead.

Mr. RAJU. I came to this country as a guestworker on an H–2B visa from India. I am here to share with you the experiences of what I saw and I heard and I felt in my life as a guestworker in this country.

In 2008, as a result of the company and the recruiter's labor trafficking, over 200 of us escaped the labor camps and found refuge. Signal and the recruiters lied to us and gave us false promises of H–2B visas with permanent resident visas, and collected up to $20,000 from each of us. Not only that, when we came here, we had to live in very poor conditions and work under very poor conditions. And for those of us who spoke up against it, they tried to forcibly deport and threaten then. They used the security guards to hold back the pastor who came to help us to have a prayer meeting. These are the reasons why we had to raise our voice and file a lawsuit.

Unfortunately, we have yet to receive justice from any government agency. Advocates told us that there are laws in this country to protect workers like us, but we have not received any justice. We really believe that you in Congress created these laws to protect us, but the truth is we haven't received any of the benefits of these laws.

Since coming to this country, I had never heard of the Department of Labor. Not a single person from this Department came to where we lived or to our work site and conducted an inspection.

When we complained about the poor conditions in the camp, the company told us this camp is under U.S. laws. When the company used armed guards to lock up workers and tried to forcibly deport them, the company told us that we are doing this because Immigration told us. When we filed a lawsuit, instead of the Department of Justice working with the Department of Labor to help, Department of Justice worked with Immigration, and after that we had surveillance over us; and we are still awaiting the decision of foreign agency.

If a foreign worker comes to this country, the Department of Labor should directly go and do an inspection. Before the work even starts, they have to ensure that the living conditions and working conditions are good enough for them to stay there. When a worker comes forward and makes a complaint about what they experienced, the Department of Labor should work with other agencies to see what the investigation should be and to move forward correctly. Not only that, for workers who come forward, the Department of Labor can support them in finding another employer so that they can be safe in this country. I truly believe that it is only with these steps that the Department of Labor can help stop trafficking in this country.

Thank you.

[The prepared statement of Mr. Raju follows:]

Testimony of Mr. Aby K. Raju
Former H-2B Guestworker with Signal International, LLC
Member, Alliance of Guestworkers for Dignity

The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers

Committee on Oversight and Government Reform
Domestic Policy Subcommittee
April 23, 2009, Thursday, April 23, 2009, 10 a.m., Rayburn HOB 2154

My name is Aby K. Raju, and I am a structural welder from Kerala, India. I am married, and I have a one and a half year old son named Abraham, who we call Bobby. My father is retired and mother is a housewife. I support my wife, son, and parents financially.

I speak today on behalf of a group of about 500 guestworkers who were trafficked from India to Mississippi and Texas and on behalf of their families who are also victims of this crime.

I am honored to be invited by this Committee and to speak, along with the other guestworkers here today, about the severe labor exploitation that exists in the H-2B guestworker program. We urge the Department of Labor to work to make sure the laws of the United States are enforced to protect H-2B guestworkers, who are made especially vulnerable by the imbalance of power between workers and employers in the rules of the program.

We were recruited to perform welding, pipefitting, and other marine fabrication work, and we were subjected to forced labor and other serious abuses at Signal International LLC operations in Pascagoula, Mississippi and Orange, Texas. Signal and Signal's recruiters and agents operating in India, the United Arab Emirates, and the United States exploited and defrauded us by fraudulently recruiting us to work in the United States and effectuating a broad scheme of psychological coercion, threats of serious harm and physical restraint, and threatened abuse of the legal process to maintain control over us. Lured by their fraudulent promises of legal and permanent work-based immigration to the United States for ourselves and our families, we plunged ourselves and our families into debt to take advantage of these seemingly promising opportunities. We took out substantial loans, liquidated our life savings, and sold our family homes and valued possessions to pay mandatory recruitment, immigration processing, and travel fees totaling as much as $20,000 per worker. Trusting in the truth of the immigration and work benefits that we had been promised, we further relinquished stable jobs in India and as guestworkers in the Persian Gulf.

Signal's main recruiting agents in India and the United Arab Emirates held our passports and visas and threatened, coerced, and defrauded us into paying extraordinary fees for recruitment, immigration processing and travel. We believed that if we did not work for Signal under the auspices of temporary Signal-restricted H-2B guestworker visas, we would suffer abuse or threatened abuse of the legal process, physical restraint, and/or other serious harm.

Upon our arrival in the United States, Signal required us to live in guarded, overcrowded, and isolated labor camps. Signal further deceived us regarding our visa status, threatened us with loss of immigration status and deportation, and generally perpetrated a campaign of psychological abuse, coercion, and fraud designed to render us afraid, intimidated, and unable to leave Signal's employ.

On March 9, 2007, Signal, in coordination with Sachin Dewan and private security guards, attempted to forcibly and unlawfully deport several guestworkers in retaliation for speaking out against discriminatory conditions in Signal's labor camp in Pascagoula, Mississippi. Terrified by the threat of imminent deportation and the security guards pursuing him, one guestworker in the Mississippi labor camp attempted suicide and had to be taken to a local hospital. During the same morning, Signal personnel and security guards successfully forced several other guestworkers into a locked and guarded room, detaining them for several hours, refusing their pleas for drinking water and permission to use the bathroom.

Having witnessed and/or heard of the events of March 9, 2007, we reasonably feared that we would suffer serious harm or physical restraint if we were to leave Signal's employ. Deeply indebted, fearful, isolated, disoriented, and unfamiliar with our rights under United States law, we workers felt compelled to continue working for Signal.

Advocates tell us that there are laws in the United States to protect guestworkers, but we have not found a U.S. government agency willing to enforce the laws to protect guestworkers. Instead, Signal told us that the U.S. Department of Labor had investigated its camps and its labor practices and approved them. Signal has also said publicly that the Immigration and Customs Enforcement Agency advised it to detain and attempt to deport our colleagues who spoke out against illegal conditions in the workplace and labor camps.

As workers, we have taken the steps that we can take to expose the truth of our reality and fight for justice. After escaping labor trafficking in the shipyards of Signal, we went on a Ghandian *satygraha*, a truth march where we told the truth about our experience as survivors of trafficking and listened to the truth of severe labor exploitation and racial discrimination in the South. On May 14, 2008, we began a hunger strike in front of the White House that lasted 29 days to expose the ugly reality of the guest worker program. We demanded action against the criminal trafficking ring of Signal and its U.S. and Indian recruiters. We demanded that the Department of Justice vigorously pursue our case and protect us during the investigation so that we could fully participate in the criminal trafficking investigation against Signal.

To protect guestworkers and enforce the law, the Department of Labor must understand and respond to the situation guestworkers find themselves in—deeply indebted and with a visa tied to one employer. We have experienced firsthand how workers who make complaints face retaliation from their employers and surveillance by Immigration and Customs Enforcement. And we have not seen that our complaints have been taken seriously.

To earn the confidence of guestworkers and build an effective enforcement system, the Department of Labor Wage and Hour Division should begin with the following steps:

• DOL should develop an outreach plan to inform guestworkers of the rights they have and the way to contact DOL. The plan should include mandatory postings by employers at worksites and labor camps where H-2B guestworkers work and live listing their rights and contact information for the DOL. DOL should also plan ahead to arrange for interpreters in languages spoken by guestworkers in their region.

• DOL should prioritize enforcement of laws requiring repayment of debts guestworkers incur in advance of coming. The pressure of these debts keeps many guestworkers from demanding their rights because they fear being deported back into debts they cannot repay.

• DOL should ensure guestworkers who make complaints are not retaliated against by their employers. Guestworkers are at a high risk of retaliation because their visa is tied to one employer. If a guestworker is fired in retaliation and deported, DOL will not be able to finish the investigation and the rest of the guestworkers will be afraid to cooperate.

• DOL should assist the guestworkers in remaining in the United States with work authorization during the investigation and resolution of the complaint. Because guestworkers are tied to the employer sponsoring their H-2B visa, employers easily exploit them. If employers saw that guestworkers facing exploitation could leave an abusive employer and receive adequate protections from the government to remain and work legally in the United States during the investigation, this would deter illegal exploitation by employers.

• DOL should ensure cases of severe labor exploitation, including human trafficking, that come in to DOL as complaints about federal wage and hour violations are identified through screening and referred to trained investigators working in collaboration with the Department of Justice.

• When guestworkers make complaints, DOL should expedite its investigation and resolution. Because guestworkers are present in the United States on temporary contracts, complaints should be investigated and resolved while the guestworkers are still in the United States. Otherwise DOL may lose its witnesses and guestworkers who have returned home may never receive their unpaid wages.

• DOL should report annually on the number of complaints received by H-2B guestworkers, the way they are resolved, and the percentage of settlement funds that are distributed within six months and one year from the settlement.

• DOL should prohibit employers, recruiters, lawyers, and others who abuse the program from brining in guestworkers in the future.

Right now, many guestworkers are facing exploitation, but they are suffering silently. The Department of Labor cannot fix the abuses of this program without the confidence of these workers. Guestworkers will be watching how the Department of Labor responds to new

complaints. When complaints are not investigated and resolved in a timely way, it sends the message to guestworkers that DOL supports "business as usual." When employers move forward without apparent oversight even after a worker comes forward, it sends the message to workers that their life has no worth.

Thank you for the opportunity to present this testimony and for your work to make sure future guestworkers do not suffer the way that we have suffered.

Mr. KUCINICH. Mr. Lopez, you may proceed.

STATEMENT OF MIGUEL ANGEL JOVEL LOPEZ

[The following testimony was delivered through an interpreter.]

Mr. LOPEZ. My name is Miguel Angel. I am from El Salvador and I have come here to share and expose my testimony, what I have been living and experiencing in the United States.

In order for me to come to this country from El Salvador on an H–2B visa, I had to indebt myself and my family $4,000, and I still haven't gotten out of this debt. I am the head of my household. I have a young daughter, a wife, and four younger brothers that depend on me, and since I have come here I haven't satisfied even one of my hopes of coming to the United States.

I was promised many things in my home country, but, when I arrived, I realized that they were completely false. Instead of working in demolition, which is what I was promised, I was put to work doing asbestos cleanup. The company that I was brought to work for rented us out to other contractors, including on government work sites, military bases, hospitals, and universities, and they paid us a small percentage of what the work was really worth.

Seeing all these problems, my coworkers and I began to organize. We went on strike and were fired, and then we put a complaint in with the Department of Labor in February. We only wanted to have a meeting with our boss to talk about the requirements of the contract, but our boss never accepted that meeting with us. So it has been 2 months since we reported this abuse to the Department of Labor, and still we have heard no response at all, and we want the Department of Labor to really take this case seriously and investigate.

As a representative of this group of the Alliance, I ask that the Department of Labor investigate these companies, that they make sure that people who are coming to these companies are treated in the way that they are supposed to be treated under the law. I also ask that the Department of Labor offer immigration protection for workers who report companies, so that they are not afraid to come forward if they are in a situation where their rights are being taken advantage of. And we ask for ourselves and everyone else that the Department of Labor doesn't take so long to give a response, because we cannot wait.

Thank you for the opportunity to give my testimony. I hope that this results in justice and we demand that the Department of Labor really takes this case seriously and investigates it so that there is justice for us and for our workers. Thank you.

[The prepared statement of Mr. Lopez follows:]

New Orleans Workers' Center for Racial Justice

Testimony of Mr. Miguel Angel Jovel Lopez
Former H-2B Guestworker with Cumberland Environmental Resources Co.
Member, Alliance of Guestworkers for Dignity

The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers

Committee on Oversight and Government Reform
Domestic Policy Subcommittee
Thursday, April 23, 2009, 10 a.m., Rayburn HOB 2154

My name is Miguel Angel Jovel Lopez. I am from El Salvador, where eight people depend on me to contribute to their livelihood – my four younger brothers, my wife, my two year-old daughter, and my parents. In El Salvador, I worked as a plumber and as a farmer. But the economy of my country made it impossible to live and provide for my loved ones. Even with two jobs, I was barely able to make $30.00 a week. That is why I decided to leave my family, and become a guestworker.

I am honored to speak, along with the other guestworkers here today, about the severe labor exploitation that exists in the H-2B guestworker program. We urge the Department of Labor to work to make sure the laws of the United States are enforced to protect H-2B guestworkers, who are made especially vulnerable by the imbalance of power between workers and employers in the rules of the program. A year ago I came to this country full of hopes but after a year away from my daughter and my wife I haven't satisfied a single dream. My family is now deeper in debt having borrowed additional money to cover expenses in the last ten months. Cumberland did just cheat me, they cheated my family

If I had known then what I know now about the U.S. guestworker program, I would never have come. I am here with you today on behalf a group of guestworkers from El Salvador, Peru, and Bolivia. We were recruited with false promises by agents of a U.S. company called Cumberland Environmental Resources Co. Cumberland's agents promised me stable demolition work in Louisiana. Instead, when work was available, they leased to me to jobsites across the South doing asbestos removal. I am here today to tell you our story, and to introduce you to the realities of the guestworker program.

Towards the end of 2007, I first met with the recruitment office Salvadorian Industrial Workers (T.I.S.) who promised me a job doing demolition in Louisiana with guaranteed minimum of 40 hours per week at $9.50 per hour. They assured me the U.S. employer would extend my visa so I could stay in the U.S. long enough to recoup the recruitment fees and earn money to support my family.

My sister-in-law lent me the fees it cost to obtain the job and the visa. In total, I paid over $4,000. When my visa was approved by the U.S. Consulate, they mailed my passport and visa to T.I.S., who held it until I paid the final fees and signed documents they presented minutes before check-in for my flight.

At the airport, I first learned that T.I.S. had arranged tickets to Nashville, Tennessee instead of Baton Rouge, the address listed for the company "Jeni Care" on my H-2B visa. But what could I do? I had already paid so much money. I had no power to negotiate for what had been promised.

When I arrived in Nashville, things changed even further. A company called Cumberland Environmental Resources Co. told me that my work would be asbestos removal. I was ready to do anything to start working, providing for my family, and paying down my debt. Instead of starting work, however, I was dropped off at an apartment and left for two weeks. Then I was told to attend a two week training course. I waited three more weeks before working for one day on a private home and then sitting for three more weeks. The other workers and I had been promised work in Louisiana, but when we did work, Cumberland instead leased us out to other contractors across the South. These included contractors working on local, state, and federal government worksites. We were employed on Maxwell Air Force Base in Alabama, Camp Lejuene in North Carolina, Vanderbilt Hospital in Nashville, Veteran's Hospital in Nashville, and universities across the South. Another time I was brought to work at our boss, Gary Lang's house. I worked hard all day but he never paid me.

During long periods with no work, I was barely surviving myself and was unable to send money home or pay my debts. Cumberland loaned other workers and me money to eat, but when we eventually did work, Cumberland took the majority of our wages back through deductions. The deductions were confusing, and even now I do not know all the reasons for them. I know they deducted the portions of my wages for loans they had given me, for my asbestos licensing in five states, for food, and for portions of an additional $2,500 recruiting fee. I worked every chance I got, but it still took me ten months to pay all the money I supposedly owed to Cumberland. For those ten months, I was not able to pay any of the debt that I had in El Salvador.

The other workers and I started to realize that we would never get ahead. We started to meet and talk together to understand what was happening to us. We were depressed by our situation—even when we worked, the deductions swallowed our earnings. And this was not what we had been promised in our home countries.

We asked the head of Cumberland to meet with us, and we asked to see the contract Cumberland had submitted to the U.S. government describing our jobs, wages, and working conditions. We wanted to see if this document matched the promises made to us at home.

Instead of meeting us and showing us the contract, Cumberland illegally threatened us with termination and deportation and then fired us on February 13, 2009. So we went on strike and filed an unfair labor practice charge with the National Labor Relations Board. On February 17, 2009, we also asked the DOL's Office of Inspector General to investigate fraudulent statements on Cumberland's application for H-2B workers. We have not yet received a response from DOL on the status of our complaint, and we have received no protections from DOL.

To protect guestworkers and enforce the law, the Department of Labor must understand and respond to the situation guestworkers find themselves in—deeply indebted and with a visa tied to one employer. No one should be forced to work for just one boss—especially not when he lies and breaks the law. There needs to be a change in the law so that labor brokers like Cumberland cannot bring in guestworkers.

My suggestions are that the Department of Labor take the following steps to ensure guestworkers' rights are protected, and they are treated with dignity:

• DOL should not grant visas to labor brokers. Without anyone checking to see if work is available, labor brokers lure vulnerable workers into debt with lies and false promises. There is no one to help guestworkers at that point, and they and their families suffer.

• DOL should prioritize enforcement of laws requiring repayment of illegal debts forced on guestworkers during initial recruitment and for extensions of the H-2B visa. The consequences of these extreme debts on families keeps many guestworkers from demanding their rights because they fear being deported back into debts they cannot repay

• DOL should ensure guestworkers who make complaints are not retaliated against by their employers. Guestworkers are at a high risk of retaliation because their visa is tied to one employer. If a guestworker is fired in retaliation and deported, DOL will not be able to finish the investigation and the rest of the guestworkers will be afraid to cooperate.

• DOL should assist the guestworkers in remaining in the United States with work authorization during the investigation and resolution of the complaint. Because guestworkers are tied to the employer sponsoring their H-2B visa, employers easily exploit them. If employers saw that guestworkers facing exploitation could leave an abusive employer and receive adequate protections from the government to remain and work legally in the United States during the investigation, this would deter illegal exploitation by employers.

• DOL should prohibit employers, recruiters, lawyers, and others who abuse the program from brining in guestworkers in the future.

To conclude, there is a lot of abuse in the guestworker program because our visa depends on one single person—our boss. There are too many employers that use this power to profit from the suffering of guestworkers. The DOL should enforce laws protecting guestworkers and give guestworkers an opportunity to work and be protected when their boss breaks that law.

Thank you for the opportunity to present this testimony and for your work to make sure future guestworkers do not suffer the way that we have suffered.

Mr. KUCINICH. Gracias, Senor Lopez.
Senor Castellanos-Contreras.

STATEMENT OF DANIEL CASTELLANOS-CONTRERAS

[The following testimony was delivered through an interpreter.]

Mr. CASTELLANOS-CONTRERAS. Good morning. My name is Daniel Castellanos. I am from Peru and I come here representing many guestworkers that are members of the Alliance. Four thousand dollars, that is what I paid to come to the United States, leaving my family extremely in debt.

In Peru, $4,000 is what I would make during a whole year of hard work, and an amount of money that only rich people have on hand. As an organizer with the Alliance, I have known hundreds and hundreds of workers, all of whom have suffered and been oppressed by the huge debt that they have, all in order to come and work in this country, the United States, workers that sold their houses, mortgaged land, and sold personal family items in order to come. The majority of guestworkers continue to be in debt because their visa terms are very short and they have to pay for very expensive extensions, which trap them in this cycle of debt. For this reason, the debt is so important in the relation between the boss and the worker.

With the current regulations, the way debt plays out is a clear violation of the minimum wage. Also, the debt is what keeps workers silent, because, if you protest, you could be fired, deported, and never be able to pay that money back. So we believe that the Department of Labor should really take a clear stance on the law around H–2B workers and publish the position that the fees and the money that workers pay to come to this country are the responsibility and are for the benefit of bosses that bring them to this country, and that they should reimburse this money to workers during the first 15 days of their employment.

Also, the Department of Labor should take much stronger actions in order to enforce this law so that they can fully eliminate the debt servitude that we live daily. The Department of Labor should also prioritize the immigration protection of workers that are in labor disputes with their employers, because, without having protection, we are completely vulnerable to retaliation by employers.

We of the Alliance of Guestworkers for Dignity believe that we are the experts in the H–2B visa because we live the experience daily, so we demand that we be consulted when there is improvements to the law. We know that there are many interests by companies to expand the number of visas, but if the laws don't change so that the workers can come with more human conditions, then this is going to just go from bad to worse.

Thank you very much.

[The prepared statement of Mr. Castellanos-Contreras follows:]

New Orleans Workers' Center for Racial Justice

Testimony of Mr. Daniel Angel Castellanos Contreras
Former H-2B Guestworker with Decatur Hotels, L.L.C.
Organizer and Founding Member, Alliance of Guestworkers for Dignity

The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers

Committee on Oversight and Government Reform
Domestic Policy Subcommittee
Thursday, April 23, 2009, 10 a.m., Rayburn HOB 2154

My name is Daniel Castellanos. I am from Peru. I am 37 years old. I am the husband of a woman who I love, and the father of two beautiful children who wait for me at home in Lima. I am a licensed engineer and the owner of a small business, but when a political and economic storm swept my country, Peru was engulfed in joblessness. My business collapsed, like thousands of others, and I found myself unable to provide for my children. I was faced with an impossible choice for a husband and a father: to live with the family I love, or to provide for them. I was forced to leave Peru in search of work. And so, in December 2005, I became one of the first guestworkers to arrive in New Orleans in the aftermath of Hurricane Katrina.

I am here today as an organizer with the Alliance of Guestworkers for Dignity, a grassroots project of the New Orleans Workers' Center for Racial Justice. As an organizer of guestworkers across the Gulf Coast, I have met with over 1,000 guestworkers from 10 countries, who have worked across the major industries of New Orleans and the Gulf Coast. I also speak on behalf of hundreds of guestworkers from Peru, Bolivia, and the Dominican Republic who were imported in the aftermath of Hurricane Katrina to work for Decatur Hotels L.L.C., a luxury hotel chain in New Orleans. And I speak on behalf of the hundreds of guestworkers from around the world with whom I have had direct and constant contact as an organizer – workers who have spoken out courageously against severe forms of labor exploitation within the U.S. guestworker program.

I am especially proud to be testifying in this Congressional hearing because I know firsthand what it took for us, as guestworkers, to be sitting here in front of you today. It is not easy for guestworkers to speak out and testify on their conditions in the United States. Aby Raju escaped from a surveilled labor camp, and then marched from New Orleans to Washington D.C. in the spirit of Mahatma Gandhi to expose the realities of the H-2B visa. When Miguel Angel Jovel Lopez spoke out against his exploitative workplace conditions, his employer fired him and threatened to deport him into virtual debt servitude. Miguel and his colleagues then went on strike to ensure that his employer follow U.S. labor law. We sit here today to testify with the hope that workers who come after us will not have to travel as far as we did far to seek justice.

We have already written to the Department of Labor about our concerns, and we join this Subcommittee in urging the Department of Labor to work to make sure the laws of the United States are enforced to protect H-2B guestworkers, who are made especially vulnerable by the imbalance of power between workers and employers in the rules of the program.

My own experience as a guestworker began in late 2005, when I read an advertisement in the local newspaper in Lima, Peru that sought workers for the reconstruction of New Orleans. When I arrived at the recruiters' offices, there were already hundreds other others there, who read the same advertisement and saw in it the salvation of their families. The recruitment agency, called InterJobs, informed us that they needed construction workers. They promised us the world. They would pay $10.00 to $15.00 per hour, with 60 hours of guaranteed work per week. They would provide luxury housing with televisions and telephones in every room. They promised free food and transportation to and from work each day. It was a good offer. But it came with a price tag. We would ultimately have to pay approximately $4000 each for the contract to work in the United States.

For Peruvian workers, this was an extraordinary cost-- representing years of savings – but were desperate to solve our economic problems, and had no other options.

For the recruiters, it was a goldmine – a market among economically desperate Peruvian workers. About 800 Peruvians paid recruiters the initial application fee of $500.00. Only eighty of us received visas. So InterJobs, the recruitment agency, pocketed $40,000.00 just for initial application fees.

We plunged our families into debt for the visas. I was one of the "lucky" applicants – my visa was approved. So after the initial $500.00, I had to pay $1,500.00 more for the job contract. Then I paid an additional approximately $1,400.00 for my plane ticket. The U.S. embassy also charged me $110.00 for the interview. I also was obligated to pay for a series of vaccinations and medical exams which brought me to a total cost of over $4,000.00. I borrowed at a high interest from a bank, and sold household items in order to pay the fees. It was huge investment for my family. But recruiters promised us we would recuperate the money very quickly once we came to the United States.

With my visa in hand, I left Lima for New Orleans. Despite the burden of an overwhelming debt, I arrived in New Orleans filled with dream of being able to dig my family out of their desperate circumstances.

In New Orleans, I found that I had arrived into a nightmare. The promises that the recruiters had made to us were false. I had been told I would be working construction – helping to rebuild New Orleans. Instead, I found myself working for Patrick Quinn III, owner of a local luxury hotel chain called Decatur Hotels L.L.C. Quinn put us to work doing maintenance and housekeeping in his hotels. We had been promised $10.00 to $15.00 per hour. Instead we were earning $6.02 to $7.79 per hour. The guarantee of 60 hours per week became an average of only 20 to 30 hours per week—sometimes less. With so little work at such low pay it was impossible even to cover our expenses in New Orleans, let alone to pay off the debt we incurred to come to work and save money to send home.

Our families did not understand why we weren't sending money home. Out of love and shame we could not bear to tell them the reality we faced. The promises made to us had been lies. Instead of luxury housing, we were installed at a semi-destroyed, rat infested hotel with as many

as eight people per room. Rather than provide transportation to work, Decatur often expected us to walk 45 minute everyday through destroyed areas of the city each day. At that time there was no public transportation. We were provided with food – but only for the first month. Later we learned that Decatur had been feeding us free food it had picked up from FEMA.

The other 300 guestworkers from Peru, Bolivia and the Dominican Republic had also plunged their families into debt to come. Our dreams were in pieces at our feet. The pressure from our families was unbearable – especially when we received news that our children had fallen sick or that someone from the bank had come by to make threats about our loan payments.

We were not in a position to change employers – the H-2B visa did not allow us to work for a company other than Decatur Hotels L.L.C. We tried to have a good-faith dialogue with our boss, Patrick Quinn. We asked him to make good on his promises to us. But he had no interest in changing our situation. After countless attempts at negotiation, Quinn refused to make even the most basic concessions to the workers. So, on August 17th, 2006 – close to the second anniversary of Hurricane Katrina – almost one hundred guestworkers filed a federal lawsuit against Decatur Hotels in New Orleans.

Decatur wasted no time in retaliating. As the lead plaintiff in the case and one of the main leaders in our campaign, I was fired immediately after we filed the lawsuit. Decatur claimed the firing had to do with job performance – but we all knew that this was another lie. It was clear Decatur fired me because I organized my coworkers to protest Decatur's treatment of us. He retaliated to make an example out of me and to intimidate the other workers into dropping out of our campaign and our lawsuit. It didn't work. The workers held strong against Decatur. We filed a charge with the National Labor Relations Board and added Fair Labor Standards Act retaliation claims to our lawsuit. Eventually Decatur was forced to reinstate me.

At that same time, we began to meet hundreds of other guestworkers across the post-Katrina Gulf Coast. They worked in restaurants, factories and shipyards, and they came from different countries. But all of us shared the common experiences of deep debt, broken promises and bondage to one company.

On January 21st 2007, we convened the first ever assembly of H-2B guestworkers in the United States. They were from countries all over the world working in industries and workplaces across Louisiana. We brought together hotel workers from New Orleans, welders and pipefitters from the shipyards of Houma, factory workers from Ponchatoula, housekeepers from La Place, and many others. At this historic meeting, we founded the Alliance of Guestworkers for Dignity, a guestworker-led membership body rooted in our belief that we who have lived the reality of the H-2B visa are the true experts on the guestworker program. Our voices need to shape public debate to create labor and migration policy that protects all workers.

I would like to share some of their stories with you now, to give you a glimpse of the reality of guestworkers.

Fernando Rivera came from Mexico, like I did, in search of work to feed his family. His boss, Matt Redd of LA Labor, broke all of his promises to the workers. He held Fernando and his co-

workers in squalid conditions and leased them out for a profit to businesses in Lake Charles, Louisiana. Fernando wanted to leave his employer, but he was in debt – he had paid Redd's recruiters for the opportunity to work. And Redd confiscated the workers' passports, so that they could not leave, coercing them to continue to working for him.

David Arredondo is a welder from Bolivia who was recruited by Elizabeth Rassmuseen to work for a company called Five Star Contractors, LLC, only to be smuggled away by another recruitment agent and told not to work for Five Star. David and four of his brave coworkers decided they wanted to do the right thing – they decided to seek out the owner of Five Star, so that they could work for him at the promised worksite. When workers found the address of Five Star, they rang the doorbell. Brian Knight, the owner, invited the workers in, and offered them lunch. While they were eating, Brian Knight called immigration. Immigration and Customs Enforcement (ICE) agents quickly arrived and handcuffed David and the others, putting them in removal proceedings.

Guillermo Reyes Sanchez, a welder with over 30 years of welding experience, came on an H-2B visa from Veracruz, Mexico. Guillermo and his coworkers were promised work by a local labor broker called Black Hawk. But the work never materialized, and Guillermo languished in a crowded trailer with 30 others, uncertain of the future. Finally, the workers escaped Black Hawk's surveilled apartments. However, Black Hawk soon found them and arrived accompanied by Captain George Tillman of the Pascagoula Police Department and an additional uniformed officer. Captain Tillman told the workers that Black Hack was "their owner." Captain Tillman ordered the workers to return with him back to Black Hawk's apartments. Otherwise, he told the workers, he would call immigration, who would come vans, pick them up, detain them for two months in jail and deport them. The workers escaped the control of Tillman and Black Hawk with the assistance and protection of local advocates.

These are just a few of experiences of our members as H-2B guestworkers in the Gulf Coast region. Despite the position of powerlessness that we find ourselves in as guestworkers in the U.S., we refuse to be silenced. We continue to publicly expose the realities of the guestworker program and to defend the rights of guestworkers. We have confronted recruiters, subcontractors, and the police -- the white power structure of the racist South. We have conducted citizens' arrests, triggered federal investigations, filed litigation, and freed guestworkers from conditions of involuntary servitude in labor camps and plantations. Our members have traveled on foot to Washington, DC and held hunger strikes to expose members of Congress and the U.S. Department of Justice to the exploitative realities of the H-2B program.

These stories of our members reveal patterns of abuse and illuminate a structure of exploitation. Employers are able to exert an extraordinary level of control over guestworkers – control that rises to the level of severe labor exploitation and abject coercion. The following are the fundamental ingredients of guestworker exploitation:

- **The Recruitment Industry Thrives on Guestworker Debts and Fraudulent Promises.** The growing crisis of joblessness in our home countries has turned recruitment into a bonanza industry, often with direct kickbacks to U.S. recruiters. Recruiters, acting as agents of U.S. employers, sell H-2B visas in the open market, and desperate workers

plunge their families into debt in order to work. Our members have paid anywhere between $1,000 and $20,000 to work on H-2B visas.

This means workers enter the U.S. under the pressure of debilitating debt. Members regularly spend the first three to six months of their ten month visa simply working to make up their debt. Others never manage to work it off—even by the end of their temporary visa. Workers are, in effect, indentured servants, working off their debt. Not only that, but workers who enter with the burden of debt cannot speak out against abuse. They risk being fired, and forced to return home to a state of virtual debt servitude.

Employers also control workers and keep them further indebted through promises of visa extensions. Workers have no ability to apply for their own visa extensions and employers and recruiting agents take advantage of this to squeeze more money out of workers and keep them from organizing. Workers are often given visas for as little as three months but told that they will get an extension; however this extension is held over workers' heads as blackmail-- if they do not bend to the will of the boss, they will be sent home, usually still in debt. Workers have to pay a second recruiting fee to receive these extensions which forces workers into in a vicious cycle of debt in order for them to maintain their employment and legal status.

- **Guestworkers Are Treated Like the Property of the Sponsoring Employer Because They Cannot Work for Anyone Else.** Guestworkers can only work for one employer. Because their visa is tied to the sponsoring employer, employers have total economic power over their H-2B workers. Workers cannot negotiate better wages and conditions, because if they were fired, they cannot legally work for anyone else. Workers have no leverage and therefore are in no position to negotiate with employers.

- **Because Guestworkers' Immigration Status Is Tied to Their Employment, Guestworkers Face Deportation or Fugitive Status Even in Retaliatory Firings.** The legal status of H-2B workers is tied to their employment. If they are not working for the sponsoring employer, they lose their legal status in the U.S. Workers escaping dangerous or abusive situations often face the choice of returning home or become undocumented. They are subjected to deportation and risk being barred from returning to the U.S. Employers control guestworkers' immigration status and therefore have the power to deport or threaten to deport guestworkers for any reason they please. This power relationship fundamentally violates the guestworkers' right to negotiate the terms and conditions of his or her labor.

- **Guestworkers Have Nowhere To Turn When They Are Abused.** There is no agency that actively oversees and enforces the few regulations that protect guestworkers. It is up to us, the guestworkers, to fight to get agencies to take an interest in the legal violations committed by their employers. The vast majority of H-2B workers are too isolated and too afraid of retaliation to report abusive employers to U.S. authorities. When our members have come forward, they have been ignored by U.S. authorities – or worse, punished by the very authorities that are supposed to protect them.

As you can see, the compounded impact of debt, being tied to one employer, the fear of deportation, and the inability to hold employers accountable is clear: guestworkers are rendered utterly powerless.

The abuse I have detailed is pervasive. The names of workers and companies change, but the problems will remain unless the program is fundamentally changed. In a recent survey of over one hundred of our members, we asked if they thought that abuse and severe labor exploitation was common under the H-2B program. All one hundred said they believed it was. We asked if they or other guestworkers would report severe labor exploitation to the U.S. authorities. Overwhelmingly they said no. For the reasons I have listed above, guestworkers reported being too afraid and facing risks that were too high.

We also asked the workers what they wanted us to say to Congress and to the Department of Labor. These are their recommendations:

• DOL should ensure guestworkers who make complaints are not retaliated against by their employers. Guestworkers are at a high risk of retaliation because their visa is tied to one employer. If a guestworker is fired in retaliation and deported, DOL will not be able to finish the investigation and the rest of the guestworkers will be afraid to cooperate.

• DOL should prioritize enforcement of laws requiring repayment of illegal debts forced on guestworkers during initial recruitment and for extensions of the H-2B visa. The consequences of these extreme debts on families keeps many guestworkers from demanding their rights because they fear being deported back into debts they cannot repay

• DOL should assist the guestworkers in remaining in the United States with work authorization during the investigation and resolution of the complaint. Because guestworkers are tied to the employer sponsoring their H-2B visa, employers easily exploit them. Guestworkers facing exploitation should be able to leave an abusive employer and receive adequate protections from the government to remain and work legally in the United States during the investigation.

• DOL should hire and train special staff to respond to guestworker complaints. DOL should be the point of access for guestworkers who are paid illegal wages, trafficked, defrauded, and retaliated against by their employers. DOL-WHD staff should have the capacity and training to investigate and resolve complaints within its jurisdiction as well as screen and refer complaints exposing broader criminal actions by employers, including severe labor exploitation and fraud in foreign labor contracting. DOL should increase its language capacity to account for increasingly global recruitment of guestworkers.

• DOL should develop an outreach plan to inform guestworkers of the rights they have and the way to contact DOL. The plan should include mandatory postings by employers at worksites and labor camps where H-2B guestworkers work and live listing their rights and contact information for the DOL. DOL should also plan ahead to arrange for interpreters in languages spoken by guestworkers in their region.

• DOL should ensure cases of severe labor exploitation, including human trafficking, that come in to DOL as complaints about federal wage and hour violations are identified through screening and referred to trained investigators working in collaboration with the Department of Justice.

• When guestworkers make complaints, DOL should expedite its investigation and resolution. Because guestworkers are present in the United States on temporary contracts, complaints should be investigated and resolved while the guestworkers are still in the United States. Otherwise DOL may lose its witnesses and guestworkers who have returned home may never receive their unpaid wages.

• DOL should not grant visas to labor brokers. Without anyone checking to see if work is available, labor brokers lure vulnerable workers into debt with lies and false promises.

• DOL should prohibit employers, recruiters, lawyers, and others who abuse the program from brining in guestworkers in the future.

• DOL should report annually on the number of complaints received by H-2B guestworkers, the way they are resolved, and the percentage of settlement funds that are distributed within six months and one year from the settlement.

• DOL should regularly consult with Guestworkers about its enforcement priorities to get firsthand experience on abuse within the program and obstacles to DOL-WHD's good faith enforcement attempts.

• DOL should revoke the December 2008 Bush Administration Midnight regulations. DOL should revoke the policy changes implemented clandestinely in the final days of the Bush administration that leave guestworkers even more vulnerable and exploitable than before and replace them with regulations that address the real problems guestworkers are facing, which I have described. At a time of global economic despair, we need Congress to lead the way in enacting sound policies that do not undermine the labor rights of temporary workers or of U.S. workers. The DOL should strengthen and enforce its positions making employers responsible for their costs in using the program, that strengthen workers' right to organize, and that include real enforcement mechanisms. Instead of undermining core labor rights—like the Fair Labor Standards Act-- the DOL should eliminate obstacles to the right to organize—complementing protections included in the Employee Free Choice Act-- for all workers in the U.S. regardless of their immigration status. These protections block employers from exploiting workers who can't fight back because of debt and exclusion from legal protections and enforcement mechanisms—they are necessary to protect both U.S. and foreign workers.

Thank you for the opportunity to testify before the Subcommittee on behalf of myself and the membership of the Alliance of Guestworkers for Dignity. I welcome your questions.

Mr. KUCINICH. I want to thank the witnesses. We are now going to proceed to questions from the committee. I just would like the staff to take note of this matter. You know, there are a number of constitutional questions that are being raised by this testimony, including, I think, one that could present an unusual 13th amendment case, which amendment prohibits slavery and involuntary servitude, because there is a condition that we are talking about here that really reflects being coerced into a form of involuntary servitude, and I would like staff to take note of that as a possible course of action that this committee may want to pursue.

I would like to begin my questions with Mr. Raju.

I understand that the Department of Labor failed to investigate even the most basic wage violation claims. Has the Department of Labor, to your knowledge, done anything to prosecute wage claims since the filing of your lawsuit?

Mr. RAJU. From even coming to the camp in the beginning until this day, I don't believe the Department of Labor has been involved in any part of our——

Mr. KUCINICH. No action whatsoever that you are aware of?

Mr. RAJU. I am not aware of anything that they have done.

Mr. KUCINICH. OK, staff is also going to have to take note of that testimony.

I want to assure you, Mr. Raju, and your fellow plaintiffs that this subcommittee is going to continue to advocate that the Department of Labor and the Department of Justice adequately investigate these allegations of trafficking of guestworkers.

Now, with respect to Senor Lopez, I am going to be instructing my staff to contact the Department of Labor and inquire about the status of the complaint that you made in February to the Office of Inspector General regarding the abuse that you received by your H–2B employer. It may take longer than we would all like for this new administration to make changes, but we are going to hold them to their promise to protect workers' rights.

What is the single-most important protection you feel would help ensure guestworkers do not experience the difficulties that you have had? What kind of protection do you think would be necessary?

Mr. LOPEZ. That would be the fact that I belong to one boss, and the change would be that we would have the freedom to work for other companies, not just the boss that brought us here.

Mr. KUCINICH. Thank you very much. To Mr. Castellanos-Contreras, as an organizer for Alliance of Guestworkers for Dignity, have you ever met with the Department of Labor about improving its outreach and enforcement of the rights of guestworkers?

Mr. CASTELLANOS-CONTRERAS. As an organizer, we have gone to the Department of Labor many times, trying to bring cases to them in different States, but they always deny taking action on these cases, saying that it is not their responsibility or jurisdiction. They have told us that it is the responsibility of the State Department because we are immigrants, not nationals, even though, reading the law, I know that, as temporary workers, we have the same labor rights as any American.

Mr. KUCINICH. I thank you. I want to ask one final question, and that is did the Department of Labor ever investigate charges that

Decatur violated the Fair Labor Standards Act by retaliating against you?

Mr. CASTELLANOS-CONTRERAS. No.

Mr. KUCINICH. Did you have any contact with the Department of Labor about that case?

Mr. CASTELLANOS-CONTRERAS. We did have some contact, but the Department of Labor never——

Mr. KUCINICH. Nothing was done. OK, thank you for your testimony.

We are going to now move to questions from the ranking member, Mr. Jordan. You may proceed.

Mr. JORDAN. Thank you, Mr. Chairman.

I want to thank all of you for your testimony. Let me just ask a couple basics, first. How long have each of you been in the United States?

Mr. CASTELLANOS-CONTRERAS. We have been invited to discuss improvements to the laws of the H–2B program, and as a policy of the Alliance, we don't really think that is an appropriate question.

Mr. JORDAN. OK. Well, let me ask you this. Have you or would you reapply for the H–2B visa?

Mr. CASTELLANOS-CONTRERAS. As an organizer, I have seen guestworkers that reapply many times to come and work here, because in the very short time that they are given the visa for, they don't have the ability to recuperate the money that they paid to come. So it creates a vicious circle where people are forced to continue to pay to come back to the country.

Mr. JORDAN. I understand, I understand. The question is did any of the witnesses on this panel, have any of you reapplied or would you consider reapplying, based on the experience you have had and the experience that you have testified to.

Mr. CASTELLANOS-CONTRERAS. Again, we are just going to have to say, as a policy of Alliance, we don't comment on individual immigration status.

Mr. RAJU. If you are asking me will I apply again, if it is this same way that I am coming, I have no more homes to sell or nothing else left in my life. I would not come here under this circumstance again.

Mr. JORDAN. If you could—and I don't care which of the witnesses takes this question—talk to me more about this recruitment process; who the recruiter is. It sounds to me like they are getting compensated basically from both sides, the potential employers are compensating the recruiter to find workers, you are having to pay to come to the United States.

I know there have been some changes there, but talk to me a little bit more about that. And I know we are going to explore this issue with the second panel, but I was interested on your thoughts on the recruitment process. And we have the general gist, but if you could go into it a little bit more, I think that would be helpful. And I don't care whichever one of our witnesses wants to answer. But my time is running, so one of you jump in there. [Laughter.]

Mr. Raju, go ahead, if you would like to. It doesn't matter.

Mr. CASTELLANOS-CONTRERAS. I have personal experience and also the experience that we see daily as organizers. We have seen that the recruitment process is totally a business——

Mr. JORDAN. This is a guy who is somewhat naive in all this. Is the recruiter an organization in your home country, the country you came from, your native country, or is the recruiter a company here in the United States? How is it typically done?

Mr. CASTELLANOS-CONTRERAS. It is really a chain that starts in the United States and then comes to our countries. There are local recruiters in our home countries, and everybody is taking money from us and we are unable to recuperate anything. I repeat, it is a business.

Mr. JORDAN. No, I understand that.

OK, Mr. Chairman.

Mr. KUCINICH. I thank the gentleman for his question. Actually, that is something that this subcommittee thinks is worth of a little bit closer look, because you raise an interesting point; are people raising money from both sides here.

Mr. JORDAN. They definitely are.

Mr. KUCINICH. Thank you, Mr. Jordan.

The Chair recognizes Mr. Foster.

Mr. FOSTER. This would be for Mr. Raju. Did you have difficulty contacting the Department of Labor? Is there an 800 number? Do most people in your situation have a cell phone, or is there an impediment to even making contact with anyone who will help you?

Mr. RAJU. Since coming to this country, we had no idea of the laws or the ways of this land. When we came here, the living conditions were horrible, and we asked for it to be improved and they said this is the living condition of this land, it is according to the laws of this land that you are living this way. We did not even know which departments exist to protect us, and we didn't have the number or information, so we were unable to contact them.

Mr. FOSTER. Did you receive any information at all about what your rights are as a worker?

Mr. RAJU. No, we never got any papers or anything that said it. Sometimes in companies they say if you are harassed, you can call this number, but we never got any information like that even hanging up in the companies.

Mr. FOSTER. One last question. Mr. Raju, can you weld aluminum?

Mr. RAJU. Aluminum, carbon steel, stainless steel.

Mr. FOSTER. All right, you have my respect. Particularly aluminum. One of the most humiliating experiences of my life was trying to weld aluminum. [Laughter.]

Mr. KUCINICH. If the gentleman would yield, I know you are speaking not only as an amateur aluminum welder, but also as a physicist.

Mr. FOSTER. Mr. Lopez, are you aware of any labor brokers that actually do a good job and treat their workers fairly?

Mr. LOPEZ. I only know my own boss, and I know how he has treated me and what he has done to us. I actually only know him by name, not by face. I don't know any other bosses that have treated workers well.

Mr. FOSTER. Mr. Castellanos-Contreras, how are these debts enforced? Are they enforced against your families back home? Are they enforced in the United States? Do you have to put all the

money up front so that you become indebted to third parties? How exactly does the debt enforcement work?

Mr. CASTELLANOS-CONTRERAS. In terms of the debt that happens to workers, you have to pay everything up front. Many in our poor countries, we don't have this kind of money, so we sell our things, we borrow money from banks, or the more common and worst case is when you get loans from loan sharks that charge huge interest rates; and all because the recruiters promise you that you are going to recuperate this money very quickly. But when you find that what the recruiter told you was a lie, your debt is growing hugely, and that is what prevents you from protesting or from raising your voice against the abuses that your boss is doing to you.

Mr. FOSTER. Thank you. I yield back.

Mr. KUCINICH. Thank you, Mr. Foster.

I want to thank the witnesses for taking time to share your experiences with this subcommittee. It is clear that the Department of Labor failed to adequately protect your rights. When people come to this country and use a legal process to get here, they should be entitled to the protections of law. You were not. The recommendations you have provided for how the Department of Labor can better ensure guestworkers' rights are insightful, and this committee will continue to press the Department of Labor to take actions that will protect the rights of workers.

In many ways, I believe workers' rights are human rights. Yo creo es muy importante para los derechos de los trabadores. So I thank you very much for being here and the first panel is dismissed.

Let's go to the second panel.

Mr. CASTELLANOS-CONTRERAS. Thank you. It is time to hope.

Mr. KUCINICH. As the second panel is getting into place, I would like to begin the introductions of the second panel.

We have Mr. Saket Soni, co-founder and organizer for the New Orleans Workers' Center for Racial Justice and a member of the Advancement Project, the Workers' Justice Center for Racial Equality and the New Orleans Workers' Justice Coalition, which is an independent community-based organization advocating for and organizing workers in post-Katrina New Orleans. Mr. Soni also works to bring together immigrant Latinos and displaced New Orleaneans. He is co-author of a book called "And Injustice For All, A Comprehensive Documentation of the Conditions for Workers in Post-Katrina New Orleans."

Ms. Mary Bauer is the director of the Southern Poverty Law Center's Immigrant Justice Project, now located in Atlanta, GA. The Immigrant Justice Project represents guestworkers and other low-wage immigrant workers in high-impact cases in nine States in the south. Ms. Bauer is the author of "Close to Slavery: Guestworker Programs in the United States," published in 2007, and "Under Siege: Life for Low-Income Latinos in the South," published in 2009. Prior to joining the Southern Poverty Law Center, she was legal director of the Virginia Justice Center for Farm and Immigrant Workers and legal director of the Virginia ACLU.

Catherine Ruckelshaus is legal co-director at the National Employment Law Project in New York City. Her primary areas of expertise on behalf of low-wage workers are the labor and employ-

ment rights of contingent and immigrant workers. Ms. Ruckelshaus co-founded the National Wage and Hour Clearinghouse dedicated to advancing labor standards for all workers. Among recent cases, Ms. Ruckelshaus was lead counsel in the class action *Ensumana* v. *Crestedas,* a Fair Labor Standards Act case brought on behalf of nearly 1,000 West African immigrant grocery delivery workers against the contracting services who hired them and stores who employed them. That case netted over $6 million in unpaid wages for the workers.

Patrick A. McLaughlin is a Ph.D. research fellow at the Mercatus Center at George Mason University, which he joined in the summer of 2008. He was previously a graduate research fellow at the Property Environmental Research Center. Dr. McLaughlin's research interests include environmental and homeland security regulations. Some of his current research is particularly focused on the consequences of regulatory actions on small business, foreign direct investment, and trade flows. He has been published in World Economy and Regulation Magazine.

I want to welcome this distinguished panel of witnesses. It is the policy of the Committee on Oversight and Government Reform to swear in all witnesses before they testify. I would ask that you now rise and raise your right hands.

[Witnesses sworn.]

Mr. KUCINICH. Let the record reflect that each of the witnesses answered in the affirmative.

Thank you for being here. Mr. Soni, let's start with your testimony. I would again remind the witnesses that your entire testimony will be included in the record of this hearing. I ask that you try to keep your testimony to around 5 minutes or under 5 minutes. That would be appreciated.

Please proceed, Mr. Soni.

STATEMENTS OF SAKET SONI, EXECUTIVE DIRECTOR, NEW ORLEANS WORKERS' CENTER FOR RACIAL JUSTICE; MARY BAUER, DIRECTOR, IMMIGRANT JUSTICE PROJECT, SOUTHERN POVERTY LAW CENTER; CATHERINE RUCKELSHAUS, LEGAL CO-DIRECTOR, NATIONAL EMPLOYMENT LAW PROJECT; AND PROFESSOR PATRICK A. MCLAUGHLIN, PH.D., MERCATUS CENTER AT GEORGE MASON UNIVERSITY

STATEMENT OF SAKET SONI

Mr. SONI. Chairman Kucinich and members of the subcommittee, thank you for the opportunity to speak about how the exploitation of guestworkers continues to be a critical building block of the post-Katrina reconstruction. I also want to thank you for this opportunity to talk about how this exploitation has been directly enabled by the inadequate response and, indeed, the abject absence of the Department of Labor Wage and Hour Division.

My name is Saket Soni. I am the executive director of the New Orleans Workers' Center for Racial Justice. In 2007, we founded the Alliance of Guestworkers for Dignity, the only organization in theUnited States that is membership driven, that brings guestworkers together on H–2B visas across many industry sectors and countries. Our members come from around the globe, including

the Dominican Republic, Mexico, Peru, El Salvador, Brazil, Bolivia, and India.

In the last 3 years, we have had hundreds of consultations, conversations, and interviews with guestworkers facing severe labor exploitation in a vacuum of Federal worker protections. Our members have organized and exposed exploitation within this program.

Since Hurricane Katrina, hundreds of our members have also brought four major lawsuits against employers whose abuse is exemplary of the realities of this guestworker program. Earlier, on the last panel, you heard the testimonies of three of our members. I would like to start by sharing with you some of the stories of our members that illustrate the severe exploitation that they face and that expose the pattern of abuse that is pervasive in the guestworker program.

You all know, of course, the story of Decatur Hotels. Decatur imported workers from Peru, Bolivia, and the Dominican Republic to come to the United States. These workers arrived heavily in debt and faced exploitative conditions. They also faced threats for raising their voice. Patrick Quinn, the luxury hotelier who brought these workers from these countries, did it at a time when hundreds of thousands of American workers, African-American workers were displaced from the region and when hundreds of unemployed African-American survivors of Hurricane Katrina were living in his hotels.

At this time, the Department of Labor certified him to bring guestworkers, agreeing with him that he couldn't find a single U.S. worker willing or able to take these jobs. If Mr. Quinn had wanted to hire U.S. workers, all he would have had to do would be to go to one of the floors of any one of his hotels and knock on the door. Instead, he brought workers to do $14 and $12 an hour jobs at just above $6 or $7 an hour from Latin America on H–2B visas.

Meanwhile, guestworkers in Mississippi and Texas who were brought from India escaped a situation of severe labor exploitation and, along with other organizations, brought legal suit in Louisiana against Signal International and an international recruitment chain that plunged these workers into debt, brought them here, and exposed them to exploitative conditions.

In Tennessee, while an economic crisis engulfed families in the south, a company called Cumberland Environmental Resource defrauded both the U.S. Government and guestworkers to bring them here. They said there would be work in Tennessee. The workers were brought and for 3 months there was no work. The workers were then leased across the south in several States, astonishingly, even at military bases. Meanwhile, Cumberland represented to the U.S. Government that local workers had applied for the jobs, but, when they had been offered the jobs, had turned them down.

When we interviewed the local workers who had applied for these jobs, every one of the interviewees said that they were in a state of economic desperation when they applied and they would have gladly taken those jobs. Every one of our interviewees said that, if the jobs had been offered to them, they would have taken them. The reality is, though, that these U.S. workers could not have taken the jobs at the wage rate offered and on the terms and conditions offered by the company.

These stories reveal a pattern of abuse and they illuminate a structure of exploitation, and I would like to unpack a little bit what hundreds of our members have reported as the salient features of exploitation within the guestworker program.

Mr. KUCINICH. The gentleman's time has expired.

Mr. SONI. OK.

Mr. KUCINICH. Your complete testimony will be included in the record of this hearing, and we thank you for being here and for making this presentation. But I will assure you that everything that you present to this committee is going to be analyzed and followed up on.

Mr. SONI. Thank you.

[The prepared statement of Mr. Soni follows:]

Testimony of Mr. Saket Soni
Executive Director
New Orleans Workers' Center for Racial Justice

The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers

Committee on Oversight and Government Reform
Subcommittee on Domestic Policy
U.S. House of Representatives
April 23, 2009, Thursday, April 23, 2009, 10 a.m., Rayburn HOB 2154

Chairman Kucinich and Members of the Subcommittee, thank you for the opportunity to speak about how the exploitation of guestworkers continues to be a critical building block in the ongoing reconstruction of New Orleans and the Gulf Coast since Hurricanes Katrina and Rita; exploitation that has been directly enabled by the inadequate response of the United States Department of Labor, Wage and Hour Division ("DOL-WHD").

My name is Saket Soni. I am the executive director of the New Orleans Workers' Center for Racial Justice. Founded after Hurricane Katrina as immigrant workers were increasingly locked into exploitative workplace conditions while long-time African-American residents were locked out of the fair jobs and fair wages necessary to return and rebuild their communities, the New Orleans Workers' Center for Racial Justice is dedicated to organizing workers across race and industry to build the power and participation of workers and communities. We organize guestworkers, day laborers, and homeless residents to defend the dignity and rights in the post-Katrina landscape.

The Alliance of Guestworkers for Dignity, a grassroots project of the New Orleans Workers' Center for Racial Justice is the only membership organization in the United States comprised of H-2B guestworkers and former guestworkers. Our hundreds of guestworker members include some of the most vital workers in the post-Katrina Gulf Coast economy-- the housekeepers and front desk clerks in New Orleans' French Quarter, the welders and pipefitters of the Mississippi Gulf Coast, construction workers across the Southeast, and the strawberry and sugar cane harvesters of Louisiana. They come from countries around the globe, including Dominican Republic, Mexico, Peru, El Salvador, Brazil, Bolivia, and India. Although they come to the U.S. from different countries and work in different industries, Alliance members have joined together to advocate for fair treatment on the job and immigration policies in the U.S. and their home countries that allow foreign workers and families to enter the United States into dignified life and work, without being pitted against U.S. workers.

Facing severe labor exploitation in an utter vacuum of federal worker protections, these guestworkers have organized and exposed exploitation within the program. Since Hurricane

Katrina, hundreds of our members have also brought four major lawsuits against employers who abuse is exemplary of the realities of the guestworker program.

In the three and a half years since Hurricane Katrina, the Alliance has been in regular contact with hundreds of guestworkers imported to New Orleans and the Gulf Coast supporting them to obtain federally mandated wages for each hour work as well as fighting more severe and criminal forms of severe labor exploitation including human trafficking, forced labor, racketeering, and fraud. Most recently, in April 2009, we conducted a survey of over 100 members of the Alliance from eight different countries regarding their knowledge of abuse within the program and their confidence in federal worker protection agencies, including the United States Department of Labor. My testimony is based on this data as well as my firsthand knowledge of the work of the Alliance in the past three years.

My remarks today will address extreme level of exploitation occurring within the current H-2B guestworker program in New Orleans and the Gulf Coast as well as the crisis of confidence facing the DOL-WHD as it attempts to begin responsibly enforcing federal protections for guestworkers. In my view, the DOL-WHD has failed to provide a reasonable level of resources to combat exploitation of H-2B guestworkers generally, and this has been exacerbated in the general under-resourcing of the DOL-WHD in this region, as has been well documented by this Committee and the General Accountability Office (GAO). Because of this failure, the DOL-WHD, through its New Orleans and Gulf Coast offices, has failed to intervene in employers' increasing manipulation of the structural imbalances of power in the program to create an underground economy of labor not subject to federal worker protection laws. This harms both exploited guestworkers and U.S. workers who demand jobs at standards mandated by federal law. When unregulated, employers manipulate the extreme levels of debt facing guestworkers, the bonding of their visa to one employer, and the deportation or fugitive status facing a guestworker who is separated from his employer even because of retaliatory firing. As I will describe here further, these imbalances of power are exacerbated by aggressive retaliation by employers, local law enforcement, and the U.S. Immigration and Customs Enforcement (ICE) agency. In the resulting lawlessness, the DOL-WHD is nowhere to be found, and worker protection laws are not enforced. In my closing, I will suggest critical changes necessary for the DOL-WHD to fulfill its responsibility to enforce guestworkers' rights to federal minimum wage and overtime as well as contract wages and other worker protection provisions of the guestworker program.

I would like to start by illustrating the severe exploitation that our members face, exposing the patterns of abuse and illuminating the structures of policy and practice that create the conditions for abuse. In the last three years, hundreds of our members have been engaged in defending themselves from employers and fighting to hold employers accountable. These are some of their stories.

Just after Katrina, major New Orleans hotel tycoon Patrick Quinn III imported guestworkers to work as housekeepers and front desk clerks in his luxury hotel chain, Decatur Hotels. At a time when hundreds of thousands of African American survivors of Hurricane Katrina were looking for work and when unemployment in the region was at an all-time high, Quinn convinced the

Department of Labor that he could not find a single U.S. worker willing or able to work in his hotels. Quinn had a profitable contract with FEMA at the time, and hundreds of New Orleaneans were living in his hotels on FEMA vouchers – unemployed and looking for work. If Quinn was searching for U.S. workers, he would only have had to knock on the doors of his own hotels. Instead, he hired a Baton Rouge recruiter to bring guestworkers on H-2B visas from Peru, the Dominican Republic, and Bolivia. Quinn's recruiters lured workers into the jobs by making false promises, and charged thousands of dollars in illegal visa fees. Deeply indebted workers were brought into a decimated city, subjected to horrific conditions, and told they could not ask for even the basic improvements – or they could be deported. These had been permanent jobs that paid $12 -- $14 an hour before Katrina; Quinn had the guestworkers working on a temporary basis, paying the guestworkers starting at just over $6 an hour. In other words, *Quinn could not find a U.S. worker willing or able to do the work at the wage rate, and in the conditions, that Quinn was offering.* With the help of the New Orleans Workers' Center, the workers fought back, seeking first to negotiate with Quinn for the most basic improvements. When Quinn refused, workers brought a major civil lawsuit (Castellanos, et al. v. Decatur Hotels, civil action no. 2-06-4340, U.S. Dist. Ct., E.D. La., and no. 07-30942, U.S. Ct. of Appeals for Fifth Circuit).

Meanwhile, Louisiana real estate agent Matt Redd reinvented himself as a labor broker and went to Mexico shopping for workers. The Department of Labor certified his company, LA Labor, to bring guestworkers from Mexico. Redd recruited economically desperate workers, selling them promises of post-Katrina construction work in New Orleans. He packed our members into vans and brought them instead to a small town about four hours away called Westlake, Louisiana. He confiscated workers' passports to hold them in his employ and leased them out to car washes, garbage disposal companies, restaurants, and other small businesses across Lake Charles, Louisiana. When workers demanded the return of their passports, he repeatedly refused. Workers had to stage a public protest at great risk to their own safety, with help from residents and activists from the African American community in New Orleans, forcing the intervention of local police and news media, before they could get their passports back.

Agents for Mississippi shipyard Signal International, LLC recruited our members from India, promising them green cards, permanent residency. Welders and pipefitters were imported to the United States on H-2B visas after plunging their families up to $20,000 in debt based on promises of greencards with family status. Signal and its agents then manipulated their indebtedness through fear and isolation, convincing them that they would face serious harm, restraint, and abuse of the legal process if they did not continue working for Signal. Furthermore, when they organized to collectively their rights, the trafficking ring again conspired with the involvement of armed private security in the forcible restraint and attempted deportation of the organizers while simultaneously quashing any resistance to the existing involuntary servitude and forced labor. One year after the attempted retaliatory deportations, workers courageously escaped from the labor camps. 250 workers reported Signal International, LLC and its agents to the Department of Justice, triggering a DOJ investigation into human trafficking that is still ongoing. Days after their escape, workers filed a major federal lawsuit (Kurian David, et al. v. Signal International, LLC, et al., civil action no.2-08-01220 U.S. Dist. Ct., E.D. La.) bringing claims of trafficking and racketeering against Signal International and its

international recruitment chain. Workers then went on a Ghandian *satyagraha* truth pilgrammange from New Orleans to Washington, D.C. to expose the realities of the guestworker program and to demand that U.S. lawmakers search their souls about the terms on which they are willing to put migrant workers to work in the United States. When the Department of Justice continued to deny workers the legal protections Congress has mandated in the Trafficking Victims Protection Act for trafficking victims who come forward and cooperate with law enforcement, the workers launched a 29 day-long hunger strike, demanding that Signal be prosecuted and that they be granted "continued presence" in the United States. Instead of being rewarded for their courage in coming forward and reporting violations of federal law to U.S. authorities, workers were punished. Instead of immediate protections mandated by Congress for victims of severe forms of labor exploitation, they faced surveillance by Immigration and Customs Enforcement (ICE) while their debts and desperation continued to mount.

In Tennessee, while economic crisis engulfed families, a company called Cumberland Environmental Resource, Inc. defrauded the U.S. government to exploit foreign workers, excluded U.S. workers, and illegally attacked the fundamental right of all workers to organize. Cumberland submitted fraudulent applications to the U.S. government claiming that workers would be working for his company onsite in Brentwood, Tennessee. He claimed that he had these jobs and that he could not find U.S. workers to fill them. DOL certified Lang to bring workers on H-2B visas. When workers arrived, they learned that the jobs they had been promised did not exist. Workers languished for weeks, sometimes months, waiting for the work they were promised. They had plunged their families into debt to pay thousands of dollars in recruitment fees to Cumberland's agents. Some of the workers were forced to leave the deeds to their homes as collateral with recruiters, to guarantee that they would finish their contracts with Cumberland. Cumberland held the workers hostage to the hope of jobs that didn't exist, while their debts grew and their desperation rose. When Cumberland did provide jobs, the work was not in Nashville. Cumberland leased the workers out to other contractors across the South. Astonishingly, these included contractors working on local, state, and federal government worksites. Workers were employed on Maxwell Air force Base in Alabama, Camp Lejuene in North Carolina, Vanderbilt Hospital in Nashville, Veteran's Hospital in Nashville, and universities across the South. Cumberland violated the terms of the H-2B contract with the U.S. government and the workers. Workers finally asked to see their contracts. Cumberland refused. When workers asked for a meeting with the head of Cumberland, they were threatened with termination and deportation. Cumberland interrogated workers about their organizing efforts, and attempted to force workers to sign away their right to organize in closed-door meetings. When workers stood up for their dignity and rights and pressed for a meeting, Cumberland retaliated by firing them. The workers have filed complaints with the Department of Labor, asking that the Office of the Inspector General investigate Cumberland for fraud.

And earlier this week, our members from Brazil filed a major civil suit exposing Mississippi labor supply kingpins who Brian and David Knight. (Aldomon Saucedo et al., v. Five Star Contractors LLC et al., civil action no. 1-09cv 268HSO, U.S. Dist. Ct., S. D. Miss.). Their companies, Five Star and Knights Marine, manipulated the H-2B guestworker program and defrauded the U.S. government and vulnerable migrant workers to generate a large pool of easily exploitable workers for on-call labor at Gulf Coast shipyards. Lured by false promises, workers

paid thousands of dollars in illegal recruitment fees to agents of the U.S. companies. Upon arrival in Mississippi, they were transported to a surveilled labor camp consisting of windowless portable metal buildings while they waited weeks to be leased out. They waited weeks without work as their debts grew and they became increasingly desperate for Five Star and Knights Marine to comply with their contractual promises to worker and the U.S. Government. Stripped of their dignity in the labor camp, workers fought back and to demand that the companies comply with their promises to them and the U.S. government. But Five Star and Knights Marine took advantage of the rules of the H-2B guestworker program—which renders guestworkers completely dependent on their sponsoring employer for legal status, employment, and housing—to further coerce and threaten the guestworkers. When worker Moises Santos submitted a petition on behalf of the workers, he faced illegal and retaliatory termination. Santos later filed claims with the National Labor Relations Board. In a watershed victory, Santos and won $13,000.00 in back wages.

The stories of our members reveal a pattern of abuse – and illuminate the structure of exploitation. Workers arrive in debt. They are tied to one employer. Their legal status is tied to their visa. And there is no government agency regulating employers or responsible for holding employers accountable.

The result has been a human rights disaster.

Our organization recently conducted a survey of over 100 members of the Alliance of Guestworkers for Dignity from eight different countries regarding their knowledge of abuse within the program and their confidence in federal worker protection agencies, including the United States Department of Labor. The results clearly demonstrate the disastrous consequences of the guestworker program on workers – and warn that workers are experiencing a crisis of confidence in U.S. federal agencies whose job is ostensibly to intervene on behalf of workers to defend their labor rights. Workers are locked into exploitation, and are not willing to report the labor crimes of employers – because they have no basis for believing that the Department of Labor, the Department of Justice, and other federal authorities would help them. Recent scenarios, in fact, suggest that although exploitation is persistent, widespread, and well known, the federal government under the previous administration clearly punished workers for coming forward, rather than giving them the protection that they deserve.

The follow are key findings in our survey of guestworkers.[1]

[1] Official survey data is on file with the New Orleans Workers' Center for Racial Justice.

Widespread Exploitation of Guestworkers in the Gulf Coast Is a Core Building Block of the Reconstruction of New Orleans and the Gulf Coast.

"We have seen many abuses of guestworkers—and they have been increasing. Now they are at their worst point."

Edward Dahua, Peru, 40 years old.

Guestworkers surveyed unanimously confirmed what has been reported by Alliance members for the last three years—noncompliance with federal law is rampant within the unmonitored H-2B guestworker program in New Orleans and on the Gulf Coast since Hurricane Katrina. Furthermore, the federal government's failure to enforce the law has drawn more unscrupulous employers to the program and emboldened those participating to commit more egregious violations of law. Increasingly, employer fraud and coercion rises to a criminal level of severe forms of labor exploitation, human trafficking, racketeering, and criminal fraud. As the quote from Mr. Dahua illustrates, guestworker participants themselves have experienced instances of abuse increasing in number and severity. Explained another way by Emilio Duran, a 32 year old guestworker from the Dominican Republic, "The fear is always going to exist, but because few people report problems, the employers every day are more abusive." And workers were very clear that it was not just because of a few bad employers, it was because of the fundamental structure of the visa-- tying deeply indebted guest workers to one employer -- and guestworkers' perceptions that U.S. government supports or at least acquiesces to unscrupulous employers.

Structural Inequality in the H-2B Guestworker Program Blocks Workers from Coming Forward.

"Guestworkers are afraid to report abuse. I've known people in Mississippi that have even been assaulted and didn't report it because they were so afraid of losing everything—their job, their visa, everything. Guestworkers are really afraid of retaliation."

Ignacio Zaragoza, Mexico, 39 years old.

As great as the crisis of exploitation itself is the crisis of confidence guestworkers have in the U.S. Government to intervene on their behalf. Over 100 workers surveyed in April 2009 reported across the board that they would not come forward to report abuse-- even when facing severe labor exploitation. Given the abject absence of government regulation of the H-2B program, government's failure to resolve even the most extreme cases of labor violations in favor of workers, and the government's inability to protect victim-witnesses during investigative processes, guestworkers are becoming increasingly unwilling to report even criminal activities of their employers. This is despite the fact that Congress has legislated and mandated that the federal government, including the DOL-WHD among other agencies, act on guestworkers' behalf. Instead, our members who worked in the post- Katrina Gulf Coast clearly articulated that it is an unwritten benefit H-2B employers enjoy and rely on that guestworkers will not come forward to report abuse.

Although bad bosses exist, guestworkers and advocates are very clear the problem is not a few bad apples- the problem is the entire orchard is rotten. The structure of the visa outlines the elements of worker exploitation, creating the structure and incentivizing exploitative behavior on the part of employers. Guestworkers are clear that recruiters, subcontractors, employers, and even the local polices the police have a stake in the economic system which turns guestworkers into exploitable and disposable machines to be used, abused, and cast aside through deportation when no longer wanted or needed.

Workers are also clear that the structure of the visa tying workers to one employer locks those power relationships in place. Many guestworkers that we surveyed are afraid that they will lose everything and be deported. They arrive with have huge debts from recruitment, visa, and travel fees. If they are sent before they have an opportunity to earn the wages promised under their contracts, they will have to work their whole life to pay their debt.

Debts Incurred for Recruitment, Visa, Travel, and Extension Fees Block Guestworkers from Reporting Labor Violations.

"Guestworkers don't report abuse because they are afraid that they will lose everything and be deported if they come forward. They have huge debts from fees to get the visa. If they go back, they might have to work their whole life to pay off these debts."

Hemant Khuttan, India, 26 years old.

Guestworkers surveyed named crushing debts from recruitment, visa, travel, and extension fees as a main reason guestworkers do not come forward and report violations of federal law. Recruiting agents of U.S. employers regularly charge exorbitant fees to workers in their home countries, some of which are kicked back to U.S. based recruiters—in effect "selling" the job opportunity. Some workers also reported leaving deeds to their homes with recruiters as further "assurances" that they would finish the contract. Guestworkers borrow at high rates of interest, pledge land, and otherwise mortgage their futures on the promises of U.S. employers through their agents-- promises which are often false and generally unenforceable. Debts are often exacerbated when they arrive in the U.S. to find no work, or significantly less hours than promised in the contract. At the end of the contract period, recruiters and employers offer guestworkers a chance to extend their visa—again for thousands of dollars in fees. This increases the debt and starts the vicious cycle again.

Deep in debt and desperate to keep up with payments while also supporting families, guestworkers become a compliant workforce. They have no choice but to perform whatever type of work is provided, wherever it is offered, under any circumstances. We have seen guestworkers arrive under an H-2B visa for one employer only to be leased to construction sites and shipyards across the South, including universities, hospitals and military bases. Their jobs are switched among housekeeping, construction, etc. And guestworkers in virtual debt bondage acquiesce to any and all of this because the alternative is to return home without a lifetime of debt.

Guestworkers were also clear that employers manipulate their indebtedness, aware that the threat of retaliatory termination and sending them home is strong enough to keep most guestworkers from complaining. "Yes, we ought to report our problems to the U.S. government," said Serman Morales, a 35 year old guestworker from Bolivia, "but the fear of losing everything is greater than our rights."

Tying Guestworkers Employment to One Employer Blocks Them Reporting Labor Violations.

"The way it is structured now, we have to accept everything the employer says or become illegal."

Victor Becerra, Peru, 48 years old.

Guestworkers lack the fundamental right to change jobs when they find themselves working for an employer who breaks the law. Their choices are to return to their home country deeply in debt and try to fight for their rights from there, attempting to cooperate with U.S. agencies often ill equipped to work with transnational workers or to remain working for the employer sponsoring their H-2B visa about whom they are complaining. Guestworkers know that this choice between two bad options leaves them vulnerable and powerless. "They should change the rules so that we can only work for one employer because this rule allows our employer to abuse us," explained Oscar Bellido, a 50 year old guestworker form Peru. Many guestworkers implored that, at minimum, there be relief from this provision of the guestworker program in cases of illegal conduct by the employer. "We should be able to change employers when the employer is bad or abusive with us," requested Franklin de Leon, a 34 year old guestworker from the Dominican Republic. "Otherwise, how can we protect ourselves from retaliation?"

Tying Guestworkers' Legal Status to Continued Employment Blocks Them from Reporting Labor Law Violations.

"Most guestworkers do not report abuses because they are afraid of going to jail or being deported."

Ronivon Pereira da Luz, Brazil, 29 years old.

Finally, tying a guestworker's legal status to his continued employment facilitates unchecked retaliation and blocks guestworkers' participation in enforcing their legal rights. Workers from every country reported the same fears. Julio Sibrian, a 24 year old guestworker from El Salvador, succinctly summed up the reality for many guestworkers saying, "Most people don't report abuses because they are afraid of being deported." He explained, "You come here to try to feed your family and give them a better life, and if you get deported, you have all this debt that you cannot pay."

And while DOL-WHD has remained weak, ICE operates with a strong fist, often punching as directed by retaliatory employers. While Congress and the GAO have repeatedly confirmed that

DOL-WHD's enforcement activity in the Gulf Coast has been under-resourced and weak, guestworkers are clear that immigration enforcement is aggressive and often operates in the service of retaliatory employers. Alliance members have been detained by ICE and placed in removal proceedings at the behest of a temporary labor broker after he called immigration when they sought to meet with him and be hired pursuant to valid visas sponsored by his company. He invited them to lunch, called ICE, and ordered them detained. Other members have been surveilled by ICE even after coming forward and reporting themselves as victims of trafficking, turning over their names to the US Department of Justice and ICE. Furthermore guestworkers who believe themselves to be in-status have been detained at bus stations and other public places because their employers have lied about having filed for extensions of their visas to keep them employed and under their control.

Unchecked Retaliation by Employers Holds Guestworkers Captive to the System

"Guestworkers don't report abuses by their employer. People are afraid of the reaction of their employers. Like what happened with us-- our boss retaliated against us and sent guards to follow and threaten us in his truck. Guestworkers regularly suffer maltreatment and they stay quiet-- sometimes they even come back to work with the same company and suffer the humiliation again because they face so much economic desperation in their home countries."

Alfredo Dominguez Lopez, Mexico, 31 years old

José Antonio Mendoza, a 29 year old guestworker from Mexico, makes the obvious point that, "People who bring workers to the U.S. should not have the right to threaten and retaliate against the workers, take their documents, or scare them." Yet guestworkers we surveyed from around the world made this point again and again. Guestworkers emphasized that they did not report labor abuses because they feared retaliatory termination and deportation.

Some guestworkers also listed fear of detention by the police, exposing a Southern power structure where private security, local police, and immigration and customs enforcement too often work together in the service of employers. This fear is echoed by Alliance members who have seen employer and law enforcement cooperation firsthand. For example, in the Alliance's work, we have seen a U.S. based recruiter threaten workers based on the fact that he moonlights as a Mississippi police officer. Our members were confronted by a Mississippi police captain who arrived at a labor camp in uniform and explained the H-2B employment relationship to the workers as follows, "this man is your owner." We've encountered Parish sheriffs in uniform who have been posted outside Louisiana labor camps used by shipyards to surveil travel in and out of the camps and meetings. We have fought the forced deportation of workers by a Mississippi shipyard who used hired armed private security to raid its own camp—purportedly at the advice of ICE. And guestworkers who have come forward and reported severe labor exploitation have uncovered covert ICE surveillance of their activities.

Recommendations for Improving the Department of Labor's Enforcement of the Rights of Guestworkers.

For all these reasons, DOL-WHD faces significant hurdles in encouraging workers to come forward, adequately investigating and resolving guestworker complaints, and in protecting victim-witnesses during an expeditious resolution of their complaint. As described herein, guestworkers experiences over the last three years have left them with the clear sense that deportation and not protection is the U.S. government's priority when it relates to immigrant workers—even those who have gone through the "legal channels" and are present in the U.S. on a valid employment-based visa defending federally protected labor rights. We therefore offer the following suggestions as a starting place for DOL-WHD policies that respond to and countermand the imbalances of power inherent in the program and begin to compensate for the vacuum in past enforcement.

Recommendations for Improving the Department of Labor's Enforcement of the Rights of Guestworkers.

My first recommendation is that the Congress and the DOL take seriously the expertise of workers arising from years of experience and often years of abuse as guestworkers. The DOL and indeed every federal agency has been deaf to the complaints, the testimonies, and the expertise of those directly experiencing the brutal everyday realities of the guestworker program. The recommendations of members of the Alliance of Guestworkers for Dignity should be the occasion for a real policy conversation. We ask that the DOL meet with our members in order to demonstrate that they are committed to listening to workers and creating policy that comes from experience. I would also like to reiterate the recommendations that come directly from the members of the Alliance to the Department of Labor as presented by the testimony on the first panel of my colleague Daniel Castellanos.

- DOL should ensure guestworkers who make complaints are not retaliated against by their employers. Guestworkers are at a high risk of retaliation because their visa is tied to one employer. If a guestworker is fired in retaliation and deported, DOL will not be able to finish the investigation and the rest of the guestworkers will be afraid to cooperate.

- DOL should prioritize enforcement of laws requiring repayment of illegal debts forced on guestworkers during initial recruitment and for extensions of the H-2B visa. The consequences of these extreme debts on families keeps many guestworkers from demanding their rights because they fear being deported back into debts they cannot repay

- DOL should assist the guestworkers in remaining in the United States with work authorization during the investigation and resolution of the complaint. Because guestworkers are tied to the employer sponsoring their H-2B visa, employers easily exploit them. Guestworkers facing exploitation should be able to leave an abusive employer and receive adequate protections from the government to remain and work legally in the United States during the investigation

- DOL should hire and train special staff to respond to guestworker complaints. DOL should be the point of access for guestworkers who are paid illegal wages, trafficked, defrauded, and retaliated against by their employers. DOL-WHD staff should have the capacity and training to investigate and resolve complaints within its jurisdiction as well as screen and refer complaints exposing broader criminal actions by employers, including severe labor exploitation and fraud in foreign labor contracting. DOL should increase its language capacity to account for increasingly global recruitment of guestworkers.

- DOL should develop an outreach plan to inform guestworkers of the rights they have and the way to contact DOL. The plan should include mandatory postings by employers at worksites and labor camps where H-2B guestworkers work and live listing their rights and contact information for the DOL. DOL should also plan ahead to arrange for interpreters in languages spoken by guestworkers in their region.

- DOL should ensure cases of severe labor exploitation, including human trafficking, that come in to DOL as complaints about federal wage and hour violations are identified through screening and referred to trained investigators working in collaboration with the Department of Justice.

- When guestworkers make complaints, DOL should expedite its investigation and resolution. Because guestworkers are present in the United States on temporary contracts, complaints should be investigated and resolved while the guestworkers are still in the United States. Otherwise DOL may lose its witnesses and guestworkers who have returned home may never receive their unpaid wages.

- DOL should not grant visas to labor brokers. Without anyone checking to see if work is available, labor brokers lure vulnerable workers into debt with lies and false promises.

- DOL should prohibit employers, recruiters, lawyers, and others who abuse the program from brining in guestworkers in the future.

- DOL should report annually on the number of complaints received by H-2B guestworkers, the way they are resolved, and the percentage of settlement funds that are distributed within six months and one year from the settlement.

- DOL should regularly consult with Guestworkers about its enforcement priorities to get firsthand experience on abuse within the program and obstacles to DOL-WHD's good faith enforcement attempts.

- DOL should revoke the December 2008 Bush Administration Midnight regulations. DOL should revoke the policy changes implemented clandestinely in the final days of the Bush administration that leave guestworkers even more vulnerable and exploitable than before and replace them with regulations that address the real problems guestworkers are facing

that I have described. I would also like to add the following recommendations for DOL and Congress.

Additional Recommendations for DOL.

- DOL should establish a special position reporting to the Administrator of the Wage and Hour division who screens, trains, and monitors criminal exploitation of workers including severe forms of labor exploitation, human trafficking, and criminal fraud. DOL should designate the authority to sign law enforcement certifications for T and U visa applications to this position.

- DOL should establish a special position reporting to Secretary of Labor Solis who is responsible for monitoring patterns of abuse of the guestworker program across the divisions of the Department of Labor and setting enforcement policies and priorities. This position should include liaisons in relevant subdivisions of the DOL including the Wage and Hour Division, Office of the Inspector General, the Employment and Training Administration, and the Officer of the Solicitor.

- DOL should establish a special position reporting to Secretary of Labor Solis who monitors enforcement of labor standards in the Gulf Coast. This administration's DOL remains responsible for the failure of the DOL in the face of epidemic wage theft, retaliation, and broader exploitation since Hurricane Katrina. Special planning, oversight, monitoring, and evaluation of these offices remains critical.

- DOL should prioritize complaints that involve retaliation and should be prepared to act swiftly, intervening where appropriate with DHS to seek deferred action, T visas, U visas, and other appropriate worker protections. This action is critical to ensure the enforcement of labor laws is appropriately balanced with DHS's immigration enforcement priorities. DOL should also pursue immediate injunctive and other immediate relief.

- DOL should train its staff on the rights guestworkers have to organize as protected by 8 C.F.R. § 214.2 (h)(17)(iii), Operating Instruction Operating Instruction 287.3a, (Revised 12/04/96; Added to INSERTS April 1999), redesignated as 33.14(h) of the SAFM) and the Nov. 23, 2003 USDOL Memorandum of Understanding.

- DOL should be aggressive in seeking available penalties against employers who willfully break the law, including liquidated damages.

- The Department should immediately end its non-enforcement policy related to point-of hire, travel, visa, and recruitment costs which bring the guestworkers wages below the minimum wage. These costs are often imposed pre-employment and at the time H-2B extensions are sought.

- DOL should improve its response to FOIA requests related to applications for guestworkers as well as enforcement actions against employers violating the law. Such information should be easily accessible to U.S. workers, foreign workers, advocates, and the general public.

Conclusion

The effect of DOL-WHD's failure to enforce federal worker protection laws for guestworkers in the Gulf Coast has caused the suffering of individual guestworkers and their families as courageously presented by the first panel here today. As this Subcommittee has heard, in addition to not being paid federally protected wages, many workers suffered serious retaliation by employers, local law enforcement, and ICE when they tried to complain. The greater legacy, as our recent survey shows, is this: the only laws applicable to guestworkers in New Orleans and the Gulf Coast are the laws of power. In such a regime, the outcome is clear, and guestworkers have stopped reporting abuse and focused on mere physical and economic survival for themselves and their families. That lesson, as learned by guestworkers and their employers, has been carried throughout the United States as these workers are transferred to new guestworker jobs in Nashville, Tennessee and across the United States.

The Alliance therefore commends this Subcommittee for this hearing. A national response is needed to create a national policy ensuring enforcement of labor laws protecting guestworkers that in turn also improves the working conditions for all workers in the U.S., to strengthen the New Orleans and Gulf Coast Offices, and to change the practices of employers in the region. DOL-WHD offices should receive increased funding based on the population of guestworkers in their area. We further urge the Subcommittee to ensure that special resources are directed to DOL-WHD regions affected by Hurricanes Katrina and Rita and reiterate our past recommendations that future federal disaster responses with increased funding for federal contracting should likewise include increased resources for the enforcement of federal wage and hour laws. These resources should not be directed to compliance assistance programs aimed at employers but should prioritize outreach to workers as well as prompt and serious directed and complaint-driven investigation.

The New Orleans Workers' Center for Racial Justice and the Alliance of Guestworkers for Dignity are committed to working with this Subcommittee and with the DOL-WHD to follow up on our recommendations and help develop rational policies that will result in enhanced labor protections and restore workers' confidence in the U.S. government.

Thank you for the opportunity to present this testimony to the Subcommittee. I look forward to your questions.

Mr. KUCINICH. Ms. Bauer.

STATEMENT OF MARY BAUER

Ms. BAUER. Thank you, Mr. Chairman and members of this committee for inviting me to speak about DOL's role in protecting H–2B guestworkers.

You have heard substantial testimony today about the abuses endemic in this program. I have personally represented and interviewed thousands of guestworkers over the course of my career and can certainly confirm that our experiences representing H–2B workers reveal that the program is deeply flawed. Further, it is clear that the flaws in this program are not the product of a few bad apple employers, but are the product of the very structure of the program and the utter failure of the Department of Labor to take action to protect these workers.

None of the significant protections that have existed, at least on paper, for H–2A workers, for example, have been adopted relative to H–2B workers, as the Department of Labor has never promulgated substantive labor protections for H–2B workers. So there is no requirement for free housing in the H–2B context, no requirement that housing be decent, and when they are abused on the job, H–2B workers are not even eligible for federally funded legal services. Under this system, workers lack the real ability to combat exploitation.

Historically, the Department of Labor has taken the position that it could not enforce the H–2B contract. Thus, in their view, if a worker was promised a prevailing rate wage of $12 an hour, but paid only the Federal minimum wage, the DOL would take no action. We believed that this analysis was simply wrong, but we are heartened that there has been a formal delegation from DHS to DOL to permit DOL to enforce the H–2B provisions.

Nonetheless, we should acknowledge the inadequate job DOL has done historically in protecting guestworkers under the statutes, such as the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, where it has always conceded that it did have the authority. In recent years, for example, when DOL has asked how many investigations of H–2B employers they have conducted, they simply cannot answer that question, respond they don't keep records in those ways. Our experience is that they undertake very few investigations, and when they do they tend to be limited in scope, with little relief for workers.

In our written testimony we laid out some of these examples where the Department of Labor conducted an investigation, issued a modest civil money penalty, waived that penalty in its entirety when the company promised to comply with the law. We came along several years later, filed a class action lawsuit, got that class action certified, won a summary judgment decision, and obtained an expert evaluation of the records that found that major discrepancies were apparent on the face of those records and that workers had been cheated out of something like $20 million. All of this would have been apparent to the Department of Labor had they conducted a full investigation of that company.

Unfortunately, the poor track record of protecting H–2B workers is not limited to one administration or to one party. For example,

the Department of Labor has historically taken the position that the one-time travel and recruitment costs of migrant workers cannot cut into workers' wages in such a way that caused them to earn less than the minimum wage in the first week of work.

This has been the position of the Department of Labor since before 1970. This is an incredibly important rule under the Fair Labor Standards Act to protect guestworkers. However, during the 1990's, the DOL announced that, while this was still the stated position of the administration, they were adopting a non-enforcement position and the Department would decline to enforce this critical part of the law.

Worse, the Bush administration tried to actively subvert the law by attaching a preamble to midnight regulations which went into effect in January 2009. This preamble purported to undue more than 30 years of policy and law in one fell swoop and was never subjected to notice and comment. The regs that were enacted by the Bush administration eviscerated the very few protections which did exist for H–2B workers. Those regs should simply be repealed and the Department should promulgate true substantive labor protections which would serve to protect guestworkers and U.S. workers in the industries which employ H–2B workers.

This deeply troubled program requires oversight by Congress. Specifically, we would ask that Congress hold additional hearings on the issue related to the administration of the guestworker programs, and we are heartened that the Secretary of Labor will be back to testify about plans for this administration.

In conclusion, the abuses of these programs are too common to blame on a few bad employers; they are the foreseeable outcome of a system that treats foreign workers as commodities to be imported, without providing them adequate legal safeguards.

Thank you.

[The prepared statement of Ms. Bauer follows:]

Testimony of Mary Bauer
Director, Immigrant Justice Project
Southern Poverty Law Center
before the
House Domestic Policy Subcommittee of the
Oversight and Government Reform Committee
U.S. House of Representatives
April 23, 2009

The Department of Labor Fiscal Year 2010 Budget and Priorities for Enforcing the Rights of Guest Workers

Thank you for the opportunity to speak about the abuse of guestworkers who come to the United States as part of the H-2 program administered by the U.S. Department of Labor ("DOL").

My name is Mary Bauer. I am the director of the Immigrant Justice Project of the Southern Poverty Law Center ("SPLC"). Founded in 1971, the Southern Poverty Law Center is a civil rights organization dedicated to advancing and protecting the rights of minorities, the poor, and victims of injustice in significant civil rights and social justice matters. Our Immigrant Justice Project represents low-income immigrant workers in litigation across the Southeast.

During my legal career, I have represented and spoken with literally thousands of H-2A and H-2B workers in many states. Currently, the Southern Poverty Law Center is representing workers in eight class action lawsuits on behalf of H-2A and H-2B guestworkers. We also published a report in 2007 about guestworker programs in the United States entitled "Close to Slavery," which I have attached to these comments as Exhibit I to my written testimony.

The report discusses in further detail the abuses suffered by guestworkers and is based upon thousands of interviews with workers as well as review of the research related to guestworkers and the experiences of legal experts from around the country. As the report reflects, guestworkers are systematically exploited because the very structure of the program places them at the mercy of a single employer. It provides no realistic means for workers to exercise the few rights they have.

The H-2B (non-agriculture) guestworker program permits U.S. employers to import human beings on a temporary basis from other nations to perform work when the employer certifies that "qualified persons in the United States are not available and . . . the terms of employment will not adversely affect the wages and working conditions of workers in the U.S. similarly employed."[1] Those workers generally cannot bring with

[1] U.S.C. §1188(a)(1); 1101(a)(15)(H)(ii); 20 CFR Part 655.

them their immediate family members, and their status provides them no route to permanent residency in the United States.

In practice, the program is rife with abuses. The abuses typically start long before the worker has arrived in the United States and continue through and even after his or her employment here. Unlike U.S. citizens, guestworkers do not enjoy the most fundamental protection of a competitive labor market — the ability to change jobs if they are mistreated. If guestworkers complain about abuses, they face deportation, blacklisting or other retaliation.

Because H-2B guestworkers are tied to a single employer and have little or no ability to enforce their rights, they are routinely exploited. If this program is permitted to continue at all, it should be radically altered to address the vast disparity in power between guestworkers and their employers.

Guestworker Programs Are Inherently Abusive

When recruited to work in their home countries, workers are often forced to pay enormous sums of money to obtain the right to be employed at the low-wage jobs they seek in the United States. It is not unusual, for example, for a Guatemalan worker to pay more than $5,000 in fees to obtain a job that will, even over time, pay less than that sum. Workers from other countries may be required to pay substantially more than that. Asian workers have been known to pay as much as $20,000 for a short-term job under the program.

Because, generally, only indigent workers are willing to go to such extreme lengths to obtain these jobs, workers typically have to borrow the money at high interest rates. Guatemalan workers routinely tell us that they have had to pay approximately 20% interest *per month* in order to raise the needed sums. In addition, many workers have reported that they have been required to leave collateral — often the deed to a vehicle or a home — in exchange for the opportunity to obtain an H-2 visa. These requirements leave workers incredibly vulnerable once they arrive in the United States.

Guestworkers under our current system live in a system akin to indentured servitude. Because they are permitted to work only for the employer who petitioned the government for them, they are extremely susceptible to being exploited. If the employment situation is less than ideal, the worker's sole lawful recourse is to return to his or her country. Because most workers take out significant loans to travel to the United States for these jobs, as a practical matter they are forced to remain and work for employers even when they are subjected to shameful abuse.

Guestworkers routinely receive less pay than the law requires. In some industries that rely upon guestworkers for the bulk of their workforce — seafood processing and forestry, for example — wage-and-hour violations are the norm, rather than the exception. These are not subtle violations of the law but the wholesale cheating of workers. We have seen crews paid as little as $2 per hour, each worker cheated out of hundreds of dollars per week. Because of their vulnerability, guestworkers are unlikely

to complain about these violations, and public wage-and-hour enforcement has minimal practical impact.

Even when workers earn the minimum wage and overtime, they are often subject to contractual violations that leave them in an equally bad situation. Workers report again and again that they are simply lied to at the time they are recruited in their home countries. Another common problem workers face is that they are brought into the United States too early, when little work is available.

Similarly, employers often bring in far too many workers, gambling that they may have more work to offer than they actually do. Because the employers are not generally paying the costs of recruitment, visas, and travel, they have little incentive not to overstate their labor needs. Thus, in many circumstances, workers can wait weeks or even months before they are offered the full-time work they were promised. Given that workers bring a heavy load of debt, that many must pay for their housing, and that they cannot lawfully seek work elsewhere to supplement their pay, they are often left in a desperate situation.

Guestworkers who are injured on the job face significant obstacles in accessing the benefits to which they are entitled. First, employers routinely discourage workers from filing workers' compensation claims. Because those employers control whether the workers can remain in or return to the United States, workers feel enormous pressure not to file such claims. Second, workers' compensation is an *ad hoc*, state-by-state system that is typically ill-prepared to deal with transnational workers who are required to return to their home countries at the conclusion of their visa period. As a practical matter, then, many guestworkers suffer serious injuries without any effective recourse.

The guestworker program appears to permit the systematic discrimination of workers based on age, gender and national origin. At least one court has found that age discrimination that takes place during the selection of workers outside the country is not actionable under U.S. laws.[2] Thus, according to that court, employers may evade the clear intent of Congress that they not discriminate in hiring by simply shipping their hiring operations outside the United States — even though all of the work will be performed in the United States.

Many foreign recruiters have very clear rules based on age and gender for workers they will hire. One major Mexican recruiter openly declares that he will not hire anyone over the age of 40. Many other recruiters refuse to hire women for field work. Employers can shop for specific types of guestworkers over the Internet at websites such as www.get-a-worker.com, www.labormex.com, www.landscapeworker.com or www.mexican-workers.com. One website advertises its Mexican recruits like human

[2] *Reyes-Gaona v. NCGA*, 250 F.3d 861 (4th Cir. 2001). For a discussion of this case, see Ruhe C. Wadud, *Note: Allowing Employers to Discriminate in the Hiring Process Under the Age Discrimination in Employment Act: The Case of Reyes-Gaona*, 27 N.C.J. Int'l Law & Com. Reg. 335 (2001).

commodities, touting Mexican guestworkers as "happy, agreeable people who we like a lot."

We have received repeated complaints of sexual harassment by women guestworkers. Again, because workers are dependent upon their employer to remain in, and return to, the United States, they are extremely reluctant to complain even when confronted with serious abuse.

In order to guarantee that workers remain in their employ, many employers refuse to provide workers access to their own identity documents, such as passports and Social Security cards. This leaves workers feeling both trapped and fearful. We have received repeated reports of even more serious document abuses: employers threatening to destroy passports, employers actually ripping the visas from passports, and employers threatening to report workers to the Immigration and Customs Enforcement agency if those workers do not remain in their employment.

Even when employers do not overtly threaten deportation, workers live in constant fear that any bad act or complaint on their part will result in their being sent home or not being rehired. Fear of retaliation is a deeply rooted problem in guestworker programs. It is also a wholly warranted fear, since recruiters and employers hold such inordinate power over workers, deciding whether a worker can continue working in the United States and whether he or she can return.

When the petitioner for workers is a labor recruiter or broker, rather than the true employer, workers are often even more vulnerable to abuse. These brokers typically have no assets. In fact, they have no real "jobs" available, since they generally only supply labor to employers. When these brokers are able to apply for and obtain permission to import workers, it permits the few rights that workers have to be vitiated in practice.

The lawsuit filed in March of 2008 against Signal International, LLC by workers represented by the SPLC and others illustrates many of the abuses H-2B workers face. In that case, hundreds of guestworkers from India, lured by false promises of permanent U.S. residency, paid tens of thousands of dollars each to obtain temporary jobs at Gulf Coast shipyards only to find themselves subjected to forced labor and living in overcrowded, guarded labor camps. When the workers attempted to assert their federally-protected rights, they were violently retaliated against, and almost forcibly deported to India.

Virtually No Legal Protections Exist for H-2B Workers

Although this hearing is to focus on the H-2B program in the United States, it is important to understand that the few legal protections that exist for guestworkers are applicable only to H-2A (agricultural) workers.

The H-2A Program

Before January 2009, the H-2A program provided substantial legal protections for foreign farmworkers. Unfortunately, even when those protections were law, far too many of the protections existed only on paper. Worse, in January of 2009, midnight regulations enacted by the Bush Administration eviscerated many of those protections. The Southern Poverty Law Center believes that the Bush regulations must be repealed as wholly inconsistent with DOL's statutory obligations.

Before those midnight regulations, which are currently being reviewed by this Administration, went into effect, the rules were as follows:

H-2A workers had to be paid wages that are the highest of: (a) the local labor market's "prevailing wage" for a particular crop, as determined by the DOL and state agencies; (b) the state or federal minimum wage; or (c) the "adverse effect wage rate."[3]

H-2A workers also were legally entitled to:

• Receive at least three-fourths of the total hours promised in the contract, which states the period of employment promised. (This is called the "three-quarters guarantee.")

• Receive free housing in good condition for the period of the contract.

• Receive workers' compensation benefits for medical costs and payment for lost time from work and for any permanent injury.

• Be reimbursed for the cost of travel from the worker's home to the job as soon as the worker finishes 50 percent of the contract period. The expenses include the cost of an airline or bus ticket and food during the trip. If the guestworker stays on the job until the end of the contract, the employer must pay transportation home.

• Be protected by the same health and safety regulations as other workers.

• Be eligible for federally funded legal services for matters related to their employment as H-2A workers.[4]

To protect U.S. workers in competition with H-2A workers, employers had to abide by what is known as the "fifty percent rule." This rule specifies that an H-2A employer must hire any qualified U.S. worker who applies for a job prior to the beginning of the second half of the season for which foreign workers are hired.

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[3] 20 C.F.R. § 655.102(b)(9)

[4] 45 C.F.R. § 1626.11

The H-2B Program

The basic legal protections historically afforded to H-2A workers have never applied to guestworkers under the H-2B program.

Though the H-2B program was created two decades ago by the Immigration Reform and Control Act (IRCA) of 1986, the DOL has never promulgated regulations enacting substantive labor protections for these workers.[5]

Unlike the H-2A program, the procedures governing certification for an H-2B visa were established by internal DOL memoranda (General Administrative Letter 1-95), rather than regulation. An employer need only state the nature, wage and working conditions of the job and assure the DOL that the wage and other terms meet prevailing conditions in the industry.[6] Because the H-2B wage requirement is set forth by administrative directive and not by regulation, the DOL takes the position that it lacks legal authority to enforce the H-2B prevailing wage.

While the employer is obligated to offer full-time employment that pays at least the prevailing wage rate, none of the other substantive regulatory protections of the H-2A program apply to H-2B workers. There is no free housing. There is no access to legal services. There is no "three-quarters guarantee." And the H-2B regulations do not require an employer to pay the workers' transportation to the United States.

Although H-2B workers are in the United States legally, they are generally ineligible for federally funded legal services because of their visa status. As a result, most H-2B workers have no access to lawyers or information about their legal rights at all. Because most do not speak English and are extremely isolated, it is unrealistic to expect that they would be able to take action to enforce their own legal rights.

Typically, workers will make complaints only once their work is finished or if they are so severely injured that they can no longer work. They quite rationally weigh the costs of reporting contract violations or dangerous working conditions against the potential benefits.

Historically farmworkers and other low-wage workers have benefited greatly by organizing unions to engage in collective bargaining, but guestworkers' fears of retaliation present an overwhelming obstacle to organizing unions in occupations where guestworkers are dominant.

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5 *See Martinez v. Reich,* 934 F. Supp. 232 (D. Tex. 1996)

6 GAL No. 1-95 (IV)(D) (H-2B); *See* DOL ETA Form 750

DOL Has Utterly Failed to Protect H-2B Workers

The legal rights of guestworkers can be enforced in several ways: through actions taken by government agencies (mainly the DOL) or through litigation. Neither method has proven effective at protecting workers from ongoing abuse.

Although abuses of guestworkers are routine, the government has not committed substantial resources to addressing these abuses. In general, Wage and Hour enforcement by the Department of Labor has decreased relative to the number of workers in the job market. The major agencies that might protect these vulnerable workers — the Department of Labor, the Occupational Safety and Health Administration, and state workers' compensation divisions — simply do not have sufficient resources or political will to do the job. DOL's failure to enact substantive labor protections for workers has also badly hurt workers' ability to protect themselves from abuse.

The DOL also takes the position that it cannot enforce the contractual rights of H-2B workers, and it has declined to take action against employers who confiscate passports and visas.

Government enforcement has proven largely ineffective. The DOL actively investigates only H-2A workplaces. In 2004, the DOL conducted 89 investigations into H-2A employers.[7] In that year, there were about 6,700 businesses certified to employ H-2A workers. We have been unable to obtain similar numbers for more recent years.

In 2008, there were approximately 8,900 employers certified to hire H-2B workers, but there do not appear to be any available data on how many investigations the DOL conducted of these employers. Our experience suggests it is far fewer than the number of H-2A employers investigated, something that is predictable, unfortunately, given the DOL's stance that it is not empowered to enforce the terms of an H-2B worker's contract. When a reporter asked DOL for more recent statistics about the number of inspections undertaken of guestworker employers — both H-2A and H-2B — she was told that the agency does not keep that data.[8]

Though violations of federal regulations or individual contracts are common, DOL rarely instigates enforcement actions. And when employers do violate the legal rights of workers, the DOL takes no action to stop them from importing more workers.

Even Where The DOL Conducts Inspections, It Fails To Use Available Tools Which Would Deter Future Illegal Behavior.

Our office has reviewed the files of dozens of inspections involving H-2 employers. In no case we examined were the DOL actions taken sufficient to deter an

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[7] Lornett Turnbull, "New State Import: Thai Farmworkers" *The Seattle Times*, February 20, 2005. *See also* Andrew J. Elmore, *Reconciling Liberty and Sovereignty in Nonprofessional Temporary Work Visa Programs: Toward a Non-subordination Principle in U.S. Immigration Policy* (unpublished 2007, on file with authors)

[8] Barbara Koeppel "Indentured Servants, Circa 2009," *Consortiumnews.com*, March 18, 2009.

employer from violating the law. Put differently, in every case we examined, an employer who was inspected by the DOL would reasonably conclude that it was a good business decision to simply continue to violate the law because those violations carried virtually no consequences.

In one case, for example, *Zamora v. Shores and Ruark Seafood, Inc.*[9], workers sued an employer that had been twice cited by the U.S. Department of Labor (DOL) for failing to pay minimum wage and overtime wages to its workers. Each time the company was fined by the DOL, the fines were so low that it simply continued this unlawful practice. Even so, the DOL continued to grant the company's requests to import H-2B workers to process seafood.

Finally, the company was sued in federal court by a Virginia advocacy group, and was forced to pay approximately $150,000 to settle a lawsuit filed by 51 workers.[10] A second suit ended in the settlement of claims by an additional 10 workers. These lawsuits did cause the employer to change its practices — but only after a full decade of violations by the company in which workers were not paid the minimum wage. During that entire period, the Department of Labor was aware of the violations, but failed to take reasonable actions to deter them.

In those very few cases where DOL has undertaken inspections of H-2 employers, the inspections are often cursory and inadequate. On many occasions, the employer is merely assessed a civil money penalty, and no money is ever distributed to workers. In several cases we examined, the civil money penalty was withdrawn based on the company's promise to comply with the law in the future.

Example: Eller and Sons Trees

A lawsuit currently being handled by the Southern Poverty Law Center reveals the overwhelming weaknesses of DOL's efforts to protect H-2B workers. The SPLC represent a class of several thousand forestry H-2B workers cheated of their wages under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act.

The company, Eller and Sons Trees, Inc., had actually been inspected by the Department of Labor before the filing of the lawsuit. Pursuant to the Freedom of Information Act, the SPLC obtained copies of those DOL inspection reports. The results reveal an agency that takes a very limited view about law enforcement. For example, despite the fact that the company had a workforce of approximately 1,000 workers and dozens of crews, the DOL assessed civil money penalties related to only a very small number of workers. There is no evidence to suggest that they looked at the violations on a company-wide basis. Furthermore, at no time did they seek money that would actually be paid to workers. The DOL initially assessed a civil money penalty of approximately $16,000. However, the DOL waived the entirety of the penalty, and simply accepted the

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[9] U.S. District Court for the Eastern District of Virginia C98CV:501.

[10] See Lawrence Latane III, "Fifty-One Workers Will be Paid Back Wages," *Richmond Times Dispatch*, July 10, 1999

company's representation that it would change its practices.

During the time period in question, Eller and Sons Trees was the single largest employer of H-2B workers in the nation. Despite being on notice of the company's significant violations of the law, the DOL continued to certify Eller to import literally thousands of workers.

Several years later, our office filed a class action lawsuit against the company on behalf of its H-2B workforce. That action was certified by the court as a class action, and the workers won a summary judgment decision that the company has violated the workers' rights under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act.[11] We retained an expert to evaluate the company's pay records. He found:

> "My review of Defendants' time records revealed a number of patterns and practices, time conflicts and inconsistencies, and alterations that, when taken together, leads me to conclude that the record of hours Defendants kept for the Plaintiffs and other workers is not accurate."

The expert noted indicators of inaccurate pay records that included a great variation in the number of hours worked; hour records kept largely in whole hour increments; time conflicts and inconsistencies. All of the trends cited were obvious on the face of the wage and hour records kept by the company, and would have been obvious to the Department of Labor had they conducted a company-wide review of wage and hour records.

SPLC also hired an expert witness to calculate the damages owed to the class of H-2B workers we represented for violations of the FLSA and the AWPA (both statutes that even the DOL concedes it is authorized to enforce). That expert has estimated that the workers in that class action are owed between $15 million and $25 million dollars. By comparison, the DOL's actions assessed a civil money penalty of a mere $16,000, and then waived even that modest penalty.

DOL Is Ill-equipped to Serve Transnational Migrant Workers

In addition, our substantial interactions with the DOL have revealed an agency which simply lacks the ability to deal with transnational migrant workers. Not only are agency offices difficult to access, many lack the ability to communicate with workers in languages other than English. Most are completely inaccessible to workers outside of traditional work hours. Since most guestworkers work during the day and have very limited access to phones, DOL is out of reach for the vast majority of those workers. In addition, DOL lacks the capacity to deal with workers calling internationally.

Furthermore, most migrant workers simply do not know of the existence of the Department of Labor at all. SPLC recently interviewed 500 low-wage immigrants in five locations in the South for a newly released report, *Under Siege: Life for Low-Income Latinos in the South*. SPLC found that the vast majority of workers (80%) had no idea what DOL was, and even more had no idea how to contact the agency. Those figures are

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[11] See *De Leon-Granados v. Eller and Sons Trees, Inc.*, 497 F.3d 1214 (11th Cir. 2007).

likely to be even worse for guestworkers, who are more transient and isolated than most immigrant workers. The DOL must do better in reaching out to workers and their advocates.

In our experience, the DOL's failure to protect guestworkers has not been limited to Democratic or Republican administrations. For example, the DOL's refusal to enforce the long-established principle that one-time transportation costs of migrant workers cannot reduce those workers' wages below the minimum wage was announced during the Clinton Administration[12], and apparently continues to this day.

In 2001, the 11th U.S. Circuit Court of Appeals, in *Arriaga v. Florida Pacific Farms*[13] found that guestworkers' payment of transportation and visa costs effectively brought their wages below the minimum allowed. The employer was thus obligated to reimburse workers those costs in the first week of work, to the extent that those expenditures effectively cut into the workers' receipt of the minimum wage. Despite this decision, the Department refuses to enforce the law, even within the Eleventh Circuit.

Because of the lack of government enforcement, it generally falls to the workers to take action to protect themselves from abuses. Unfortunately, filing lawsuits against abusive employers is not a realistic option in most cases. Even if guestworkers know their rights — and most do not — and even if private attorneys would take their cases — and most will not — guestworkers risk blacklisting and other forms of retaliation against themselves or their families if they sue to protect their rights. In one lawsuit the Southern Poverty Law Center filed, a labor recruiter threatened to burn down a worker's village in Guatemala if he did not drop his case.[14]

As a result of these enormous obstacles to enforcing workers' rights, far too many workers who are lured to the United States by false promises find that they have no recourse.

DOL's Historic Position That It Lacks Authority to Enforce the Requirements of the DOL Program Is Legally Untenable.

The Department of Labor has repeatedly asserted that it lacks authority to establish an enforcement process to investigate employers' compliance with H-2B requirements. Its position has been that only the Department of Homeland Security ("DHS") has such authority. Although we welcome the recent delegation of that authority from DHS to DOL, it should be noted that DOL's historic refusal to enforce the H-2B requirements was based on a flawed view of the law.

Since at least 1964, the Secretary of Labor has enjoyed, and has exercised, sweeping authority to adopt regulations concerning the terms under which H-2 workers could be employed, and governing enforcement of those terms. The Secretary of Labor

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[12] See, e.g. June 30, 1994, letter from Wage and Hour Administrator Maria Echaveste to Stan Eury, as discussed in *De Luna-Guerrero v. NCGA*, 338 F. Supp. 2d 649 (E.D.N.C. 2004).

[13] 305 F.3d 1228 (11th Cir. 2002)

[14] *Recinos-Recinos v. Express Forestry, Inc.*, 2006 U.S. Dist. LEXIS 2510 (E.D.La. 2006).

established a broad regulatory regime for the H-2 program, with major changes in 1966,[15] 1968[16] and 1978.[17] Each reform cited two sources of authority: 8 U.S.C. § 1184(c) and 8 C.F.R. Part 214.2(h).

Both the current H-2A and H-2B classifications are temporary foreign worker programs that grew out of the original H-2 program. The Immigration and Nationality Act of 1952 (INA) established the H-2 program, which provided mechanisms for the use of temporary foreign labor but did not distinguish between agricultural and non-agricultural work. More than 30 years later, the Immigration Reform and Control Act of 1986[18] (IRCA) amended the INA to establish separate visa classifications for temporary H-2A agricultural workers and H-2B non-agricultural workers.[19] While IRCA split the H-2 program into H-2A and H-2B, the original purpose of the H-2 program remained, i.e. to protect U.S. workers and prevent the depression of U.S. working conditions caused by employing foreign workers.[20]

Administrative Law Judge cases show that DOL asserted authority under the INA pre-IRCA and had inherent authority to enforce contractual obligations under the H-2 regulations. In *Foster v. Wilfred Theriault Woods Contractor*,[21] the agency found that Foster was discharged in violation of the terms of his contract. Foster was hired as a "logger all-around." While pre-IRCA Foster was classified as an H-2 worker, under IRCA, Foster would be an H-2B non-agricultural worker.

Nor did the division of the program into H-2A and H-2B in IRCA in 1986 change the Secretary's underlying authority under 8 U.S.C. § 1184(c) and 8 C.F.R. Part 214.2(h) to regulate employment of non-agricultural temporary foreign workers, now separately classified as H-2B workers. Through IRCA, Congress codified the then-existing substantive H-2 agricultural regulations that the Secretary of Labor had promulgated in the 1960s and 1970s, as well as the designation in 8 C.F.R. 214.2(h) of the Department of

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[15] Part 602—Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964); 20 C.F.R. § 610.10 (1966).

[16] 20 C.F.R. Part 621 (1968); Part 621—Certification of Temporary Foreign Labor For Industries Other Than Agriculture or Logging, Final Rules, 33 Fed. Reg. 7570 (May 22, 1968).

[17] Temporary Employment of Alien Agricultural and Logging Workers in the United States, Final Rules, 43 Fed. Reg. 10306 (Mar. 10, 1978).

[18] Immigration Reform and Control Act of 1986, Sec. 301 (codified at 8 U.S.C. 1101(a)(15)(h)(ii)(a) and (b)).

[19] INA Section 101(a)(15)(H)(ii)(A). Pub.L. 99-603, Title III, 100 Stat. 3359, (Nov. 6, 1986.).

[20] Staff of House Comm. on Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 3 (Comm. Print 1991).

[21] *Foster v. Wilfred Theriault Woods Contractor*, 1982-TAE-7 (ALJ May 16 1983).

Labor as the key agency to be consulted with respect to agricultural workers.[22] However, as it concerns non-agricultural workers, no language in IRCA diminishes the Secretary of Labor's prior authority. The structure of the H-2B program still envisioned certification of applications by the Secretary. To do that equitably and effectively, the Department would necessarily have to develop and enforce standards as to what it meant to certify an application.

The DOL has cited 8 U.S.C. § 1184(c)(1), as amended in IRCA,[23] in part, to explain its professed lack of authority to enforce H-2B contractual agreements between employers and employees. That section codifies DOL authority with respect to regulating the temporary agricultural worker program and no parallel enforcement authority is expressly delegated under 8 U.S.C. § 1184(c)(1) with respect to non-agricultural workers.

Nonetheless, the Secretary's long-standing inherent authority discussed above was not expressly revoked, either. Nor may one infer that this authority was revoked by implication. The purpose of incorporating the agricultural regulatory protections into the statute was greater protection of agricultural workers, not less protection of U.S. workers generally. After all, the underlying purpose of IRCA was to protect U.S. workers' preferential access to jobs.[24]

The Homeland Security Act of 2002, 6 U.S.C. §§101, *et seq.* (Nov. 25, 2002), transferred the prior authority of the Attorney General and the INS for administering certain immigration functions to the new Department of Homeland Security.[25] However, the savings provisions of that Act make clear that the underpinnings of the authority and duties of the Secretary of Labor to protect U.S. workers and their wages and working conditions, under 8 U.S.C. § 1184(c) and 8 C.F.R. Part 214.2(h), were unaffected by this transfer of authority.[26]

DOL has also cited the Save Our Small and Seasonal Businesses Act of 2005 as a basis for its reluctance to assert any enforcement authority with respect to the H-2B program.[27] However, nothing in that action changed the Secretary's authority to regulate or enforce. That Act gave the Secretary of Homeland Security certain administrative remedies, including penalties and debarment, if the Secretary of Homeland Security finds a substantial failure to meet any of the conditions of the petition to admit H-2B workers. While the Act does enable DHS to sanction employers for failure to comply with the

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[22] *See* 8 U.S.C. §§ 1184(c)(1), 1188 *and* 20 C.F.R. § 655 Subpart B.

[23] 8 U.S.C.A. § 1184(c)(1)(2006).

[24] *See, e.g.* Immigration Reform and Control Act of 1986, Sec. 101 (criminalizing—for the first time—the hiring of undocumented workers).

[25] 6 U.S.C. §§ 202, 236.

[26] 6 U.S.C. § 552.

[27] Save Our Small and Seasonal Business Act of 2005, P.L. 109-13, 119 Stat. 318.

terms in their H-2B petitions, the Act's narrow delegation to DHS of two types of enforcement methods — fines and debarment — does not modify DOL's pre-existing authority to protect U.S. and H-2B workers. Further, fines and debarment do not provide any direct relief to the aggrieved H-2B or U.S. worker.

Because Congress did not delegate contractual remedies to DHS, then it may be inferred that it intended that DOL continue to exercise them.[28] DHS' statutory duty to consult with appropriate agencies, including DOL, existed in the INA before and after the 2005 changes at 8 U.S.C. §1184(c). The Secretary of Labor's particular role in advising Homeland Security about the U.S. labor market was spelled out in 8 C.F.R. Part 214.2(h), before and after the 2005 Act.[29] No specific language diminished its authority to regulate employment under the H-2B program.

I have attached as Exhibit II to this written testimony the July 7, 2008 comments submitted by the Southern Poverty Law Center and other groups which lays out in far greater detail the legal analysis showing that DOL has always had the authority to enforce the H-2B protections. (See, in particular, Section III of those comments) Sadly, the Department has consistently refused to exercise its authority to protect these vulnerable workers.

The Bush Administration Changes to the Program Eviscerated the Few Protections that Existed for Guestworkers.

On January 18, 2009, the Bush Administration adopted new regulations that stripped the H-2B program of the few protections that existed for both guestworkers and U.S. workers who work in industries employing guestworkers.

The Southern Poverty Law Center is, among others, counsel for plaintiffs in a lawsuit, *CATA v. Chao,* challenging those regulations. That case is pending before the U.S. District Court for the Eastern District of Pennsylvania. The Complaint is attached to these comments as Exhibit III.

The new rules reduce oversight of the H-2B application process, where abuses of workers have been extensively and convincingly documented. In particular, acting without Congressional authorization, the Departments of Homeland Security and Labor (1) replaced agency certification of the need for H-2B workers with an employer "attestation;" (2) eliminated the role of local state workforce agencies in assisting workers to secure work in affected occupations, and (3) imposed additional burdens on United States workers competing for jobs sought by H-2B guestworkers. The reduction in

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[28] *District of Columbia Financial Responsibility and Management Authority v. Concerned Senior Citizens of the Roosevelt Tenant Ass 'n,* 129 F. Supp. 2d 13 (D.D.C. 2000) (citing canon expression exclusion rule).

[29] Both 8 C.F.R. 214.2(h)(ii)(D)(2004) and (2008), among other provisions, recognize the DOL's role in the certification process. is

oversight will increase likelihood that U.S. workers will be passed over for available jobs, and that vulnerable immigrant workers will suffer unremedied exploitation.

The rules expanded the definition of "temporary" from one year to three years. This means that relatively long-term jobs will be eligible for H-2B employment, and the abuses of both U.S. and foreign workers that are part and parcel of the program will spread.

I have attached as Exhibit IV to this written testimony a longer memorandum submitted to the Department of Labor by counsel on the CATA litigation outlining in greater details problems with the new regulations.

Substantial Changes Are Necessary to Reform These Programs

The SPLC report "Close to Slavery" offers detailed proposals for reform of the current guestworker programs. The recurring themes of those detailed recommendations are that federal laws and regulations protecting guestworkers from abuse must be strengthened; federal agency enforcement of guestworker programs must be strengthened; and Congress must provide guestworkers with meaningful access to the courts.

Specifically, the Southern Poverty Law Center recommends that the Department of Labor take the following steps:

- Repeal the harmful midnight Bush regulations which provide fewer protections for H-2B workers. The SPLC does agree that the delegation of enforcement authority from DHS, although unnecessary, is not harmful. DOL is clearly the appropriate federal agency to enforce labor protections in this program.

- DOL should move quickly to promulgate true labor protections for H-2B workers and U.S. workers laboring in industries employing H-2B workers.

- DOL should embark upon an aggressive, directed enforcement strategy to protect guestworkers and their U.S. worker counterparts. This should include hiring dedicated staff to investigate and enforce laws which would protect guestworkers. The DOL staff should prioritize hiring bilingual, culturally competent investigators, and should create systems which would make its enforcement efforts available to transnational migrant workers.

- The U.S. Department of Labor should beef up enforcement of laws protecting workers in general. Substantially more resources must be devoted to enforcing the law, by increasing the staff of the Wage and Hour Division and by increasing the number of cases being filed by the Solicitor of Labor's office. In addition, the Department must be dramatically more aggressive in seeking substantial penalties against employers who willfully break the law.

- The Department should immediately end its nonenforcement policy related to travel and other costs which bring the workers wages below the minimum wage, See *Arriaga v. Florida Pacific Farms*[30]

The SPLC recommends that Congress take the following actions:

- Congress must provide meaningful, substantive labor protections for H-2B workers. Congress should enact legislation to greatly expand the legal rights afforded H-2B workers.

- In doing so, Congress should also address the common problem of employers or persons who confiscate guestworker documents in order to hold guestworkers hostage.

- Congress should enact protections to regulate the recruitment of workers. Congress should make clear that the systematic discrimination entrenched in this program is unlawful. Congress should regulate recruitment costs and should make employers responsible for the actions of recruiters in their employ. Any such regulation has to make the employer who selects a recruiter responsible for the actions of that recruiter. Doing so is the only effective means of avoiding the severe abuses that routinely occur in recruitment. Holding employers responsible for their agents' actions is not unfair: if those hires were made in the U.S., there is no doubt that the employers would be lawfully responsible for their recruiters' promises and actions. Making the rules the same for those who recruit in other countries is fair, and it is the only way to prevent systematic abuse.

- Congress should also make H-2B workers eligible for federally funded legal services There is simply no reason that these workers – who have come to the U.S. under the auspices of this government sponsored plan – should be excluded from eligibility.

- Congress should make the H-2B visa portable to other employers, at least under some circumstances. For example, Congress should create a means by which workers may obtain visas when they need to remain in or return to the U.S. to enforce their rights. Employers control right of workers to be here. That means when workers bring suit, or file a workers compensation claim, the employers have extraordinary control over that process. In one case in which I was involved, our named plaintiff in a class action was turned down for a visa to come to the U.S. to testify at his noticed deposition — this despite the fact that he had been repeatedly approved for an H-2B visa when an employer requested it. This leads to the conclusion that there are different standards in place when employers seek workers than when workers seek justice. Congress should remedy that disparity.

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[30] 305 F.3d 1228 (11th Cir. 2002)

- Enforcement should include a private right of action to enforce workers' rights under the H-2B contract.

- Lastly, Congress should provide strong oversight of these programs. Congress should hold additional hearings on this issue related to the administration of the guestworker programs. In particular, Congress should ask DOL what actions it is taking to protect guestworkers and similarly situated U.S. workers on the job. Why are there so few inspections? Why are there no substantive labor protections for H-2B workers? In doing so, it is essential that Congress look closely both at the prevailing wages methodology and the enforcement of basic wage laws.

A review of available evidence would amply demonstrate that these programs have led to the shameful abuse of workers. Congress must not allow that abuse to continue.

Conclusion

Guestworker programs currently in existence in the United States lack worker protections and lack any real means to enforce the protections that exist. Vulnerable workers desperately need Congress to take the lead in demanding reform.

Thank you again for the opportunity to testify. I welcome your questions.

CLOSE TO SLAVERY

Guestworker Programs in the United States



a report by the
Southern Poverty Law Center



"This guestworker program's the closest thing I've ever seen to slavery." CHARLES RANGEL, HOUSE WAYS AND MEANS COMMITTEE CHAIRMAN

Bound to a single employer and without access to legal resources, guestworkers are:

- routinely cheated out of wages;
- forced to mortgage their futures to obtain low-wage, temporary jobs;
- held virtually captive by employers or labor brokers who seize their documents;
- forced to live in squalid conditions; and,
- denied medical benefits for on-the-job injuries.

House Ways and Means Committee Chairman Charles Rangel recently put it this way: "This guestworker program's the closest thing I've ever seen to slavery."[2]

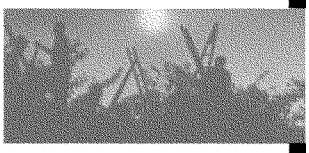
Congressman Rangel's conclusion is not mere hyperbole — and not the first time such a comparison has been made. Former Department of Labor official Lee G. Williams described the old "bracero" program — the guestworker program that brought thousands of Mexican nationals to work in the United States during and after World War II — as a system of "legalized slavery."[3] In practice, there is little difference between the bracero program and the current H-2 guestworker program.

The H-2 guestworker system also can be viewed as a modern-day system of indentured servitude. But unlike European indentured servants of old, today's guestworkers have no prospect of becoming U.S. citizens. When their work visas expire, they must leave the United States. They are, in effect, the disposable workers of the U.S. economy.

This report is based on interviews with thousands of guestworkers, a review of the research on guestworker programs, scores of legal cases and the experiences of legal experts from around the country. The abuses described here are too common to blame on a few "bad apple" employers. They are the foreseeable outcomes of a system that treats foreign workers as commodities to be imported as needed without affording them adequate legal safeguards or the protections of the free market.

The H-2 guestworker program is inherently abusive and should not be expanded in the name of immigration reform. If the current program is allowed to continue at all, it should be completely overhauled. Recommendations for doing so appear at the end of this report.

2 U.S. Representative Charles Rangel, speaking on CNN's *Lou Dobbs Tonight*, Jan. 23, 2007
3 Quoted in Majka, Theo J. and Patrick H. Mooney, *Farmers' and Farm Workers Movements* (Twayne Publishers 1995) 152.

PART 1

A Brief History of Guestworkers in America

Foreign-born workers have been significant contributors to the U.S. economy for centuries.

From the early 1800s until the outbreak of World War I, millions of European immigrants — Irish, British, Germans, Italians, Scandinavians, Russians, Hungarians and others — arrived in the United States, and their labor helped fuel the country's economic and geographic expansion. For most of this period, under the Naturalization Act of 1790, the borders were open and there were no numerical limits on immigration. The first major attempt to regulate or stem the flow of these workers came in 1882, when Congress passed the Chinese Exclusion Act to ban the employment of Chinese laborers.

During the latter half of the 1800s, following the end of the Mexican-American War in 1848, tens of thousands of migrant workers from Mexico began arriving. Unlike their European and Asian counterparts, they were able to move freely across the border to temporary jobs in ranching, farming, mining and other industries, and then, in many cases, back home again. The establishment of the U.S. Border Patrol in 1924 made access to jobs in the United States more difficult for Mexican workers, however, and for the first time they were seen as "illegal aliens."[4] But there remained no numerical limits on legal immigration from Mexico until 1965.

World War I brought migration from Europe largely to a halt and created a greater demand for Mexican labor. Soon afterward, the Great Depression arrived and Mexican workers were seen as a threat to American jobs. More than 500,000 people, including some United States citizens, were forcibly deported.

The onset of World War II created another labor shortage, and Mexican workers were again called upon to fill the void.

THE BRACEROS

In 1942, the U.S. State Department reached a bilateral agreement with Mexico creating the bracero[5] program, which Congress later approved. To assuage critics, proponents of the program asserted

4 "Migrations: A Collection of Views on Mexican Migration to the United States," Center for Latin American Studies, University of California-Berkeley, *available at* http://socrates.berkeley.edu:7001/Outreach/education/migrations2003/index.html

5 The word "bracero" is derived from the Spanish word for "arm," as in a farm hand or labor for hire. It refers both to the guestworker program operated between 1942 and 1964 and to individual, legally hired Mexican farm workers who participated in the program.



Labor organizers in the 1950s exposed widespread abuses of migrant farmworkers.

that Mexicans, who had been deported en masse just a few years earlier, were easily returnable.[6] This program was designed initially to bring in a few hundred experienced laborers to harvest sugar beets in California. Although it started as a small program, at its peak it drew more than 400,000 workers a year across the border. A total of about 4.5 million jobs had been filled by Mexican citizens by the time the bracero program was abolished in 1964.

Interestingly, the program had many significant written legal protections, providing workers with what historian Cindy Hahamovitch, an expert on guestworker programs, has called "the most comprehensive farm labor contract in the history of American agriculture."[7] Under this program:

- Employers were required to have individual contracts with workers under government supervision;
- Workers had to be provided housing that would comply with minimum standards;
- Workers had to be paid either a minimum wage or prevailing wage, whichever was higher;
- If employers failed to pay the required wages, the U.S. government would be required to support them;
- Employers had to offer at least 30 days of work; and,
- Transportation costs were to be shared by the workers, the growers and the government.

But the bracero program did not look so rosy in practice. Mexican workers, who generally did not read English, were often unaware of contractual guarantees. And there were numerous reports of employers shortchanging workers — just as in today's H-2 guestworker program.

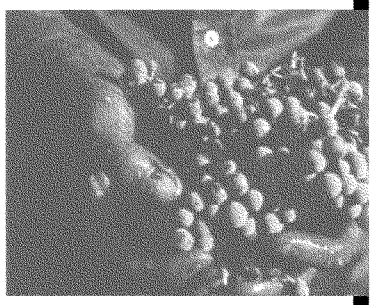
The Mexican workers, who were called braceros, also had 10 percent of their pay withheld, ostensibly to pay for a Social Security-type pension plan. The money was to be deposited into a Mexican bank on behalf of the workers. It was never paid, however. Several lawsuits have been filed to recover what is now estimated to be hundreds of millions of dollars owed to Mexican workers.

In 1956, labor organizer Ernesto Galarza's book *Stranger in Our Fields* was published, drawing attention to the conditions experienced by braceros. The book begins with this statement from a worker: "In this camp, we have no names. We are called only by numbers." The book concluded that workers were lied to, cheated and "shamefully neglected." The U.S. Department of Labor officer in charge of the program, Lee G. Williams, described the program as a system of "legalized slavery."

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6 Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America*, (Princeton University Press 2002) p. 173

7 Cindy Hahamovitch, *The Fruits of their Labor: Atlantic Coast Farmworker and the Making of Migrant Poverty, 1870-1945* (University of North Carolina Press) 168



More than 4.5 million jobs were filled by Mexican braceros between 1942 and 1964. A Department of Labor official in charge of the program called it a system of "legalized slavery."

The availability of braceros undermined the ability of U.S. workers to demand higher wages. During the 1950s, growers brought in braceros when their U.S. workers either went on strike or merely threatened to do so. In the late 1950s and early 1960s, Cesar Chavez mounted farmworker protests over the program and later said that organizing the United Farm Workers would have been impossible had the bracero program not been abolished in 1964. The grape strike in which the union was born, in fact, began the following year.[8]

The bracero program is now widely believed to have contributed greatly to patterns of unauthorized immigration from Mexico to the United States.

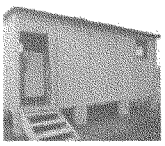
After the bracero program was dismantled in 1964, foreign workers could still be imported for agricultural work under the H-2 sections of the Immigration and Nationality Act. The H-2 program had been created in 1943 when the Florida sugar cane industry obtained permission to hire Caribbean workers to cut sugar cane on temporary visas. The appalling conditions experienced by sugar cane cutters have been well-documented.[9] In one well-publicized incident, on November 21, 1986, Caribbean H-2 sugar cane cutters stopped work on a large sugar plantation in south Florida, objecting to the work conditions. Workers reported that the company had tried to pay a rate lower than what was promised in the work contract, and more than 300 workers refused to go to work as a result. The company called in the police, who used guns and dogs to force workers onto buses, on which they were removed from the camp and deported. This incident became known as the "dog war."[10] It has come to symbolize for many people the potential for extreme abuse in a guestworker program that permits employers to control the worker's right to remain in the United States.

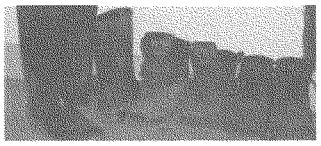
The H-2 program was revised in 1986 as part of the Immigration Reform and Control Act, which divided it into the H-2A agricultural program and the H-2B non-agricultural program. There are no annual numerical limits on H-2A visas. The annual limit on H-2B visas was 66,000 until 2005, when it was increased substantially by exempting returning workers from those limits.

In 2005, the last year for which data are available, the United States issued about 89,000 H-2B visas[11] and about 32,000 H-2A visas. The countries sending the most workers to the United States under these programs were Mexico, Jamaica and Guatemala; about three-fourths are Mexican.[12]

As will be shown in this report, this current guestworker system is plagued by some of the same problems as the discredited bracero program. ▪

8 David Bacon, *Fast Track to the Past: Is a New Bracero Program in Our Future? (and what was life like under the old one)* published at http://dbacon.igc.org/Imgrants/17FastPast.htm (2002)
9 Alex Wilkenson, *Big Sugar: Seasons in the Cane Fields of Florida* (Alfred A. Knopf) (1989)
10 David Bacon, "Be Our Guests," *The Nation*, September 27, 2004
11 This includes H-2B and H-2R (returning worker) visas.
12 Department of State, Nonimmigrant Visas Issued, 10/01/04 — 9/30/05, *available at* http://travel.state.gov/pdf/FY2005_NIV_Detail_Table.pdf





PART 2

How Guestworker Programs Operate

The United States currently has two guestworker programs under which employers can import unskilled labor for temporary or seasonal work lasting less than a year: the H-2A program for agricultural work and the H-2B program for non-agricultural work.[13]

Although the H-2A and H-2B programs offer different terms and benefits, they are similar in one significant way: Both programs permit the guestworker to work only for the employer who petitioned the Department of Labor (DOL) for his or her services. If the work situation is abusive or not what was promised, the worker has little or no recourse other than to go home. That puts the worker at a distinct disadvantage in terms of future opportunities in the United States, because his ability to return during any subsequent season depends entirely on an employer's willingness to submit a request to the U.S. government. In practical terms, it means that an employee is much less likely to complain about workplace safety or wage issues.

Under federal law, employers must obtain prior approval from the DOL to bring in guestworkers. To do that, employers must certify that:

- there are not sufficient U.S. workers who are able, willing, qualified and available to perform work at the place and time needed; and,
- the wages and working conditions of workers in the United States similarly employed will not be "adversely affected" by the importation of guestworkers.[14]

The H-2 visas used by guestworkers are for individuals only and generally do not permit them to bring their families to the United States. This means that guestworkers are separated from their families, including their minor children, for periods often lasting nearly a year.

13 There are other guestworker programs (such as the H-1B program for more highly skilled workers), but this report focuses only on H-2 workers because current congressional proposals for large-scale guestworker expansion appear most closely aimed at replicating the experiences of the H-2 program.
14 8 U.S.C. §1188(a)(1); 1101(a)(15)(H)(ii); 20 CFR Part 655

The fundamental legal protections afforded to H-2A workers do not apply to guestworkers under the H-2B program.

THE H-2A PROGRAM

The H-2A program provides significant legal protections for foreign farmworkers. Many of these safeguards are similar to those that existed under the widely discredited bracero program, which operated from 1942 until it was discontinued amid human rights abuses in 1964. Unfortunately, far too many of the protections — as in the bracero program — exist only on paper.

Federal law and DOL regulations contain several provisions that are meant to protect H-2A workers from exploitation as well as to ensure that U.S. workers are shielded from the potential adverse impacts, such as the downward pressure on wages, associated with the hiring of temporary foreign workers.

H-2A workers must be paid wages that are the highest of: (a) the local labor market's "prevailing wage" for a particular crop, as determined by the DOL and state agencies; (b) the state or federal minimum wage; or (c) the "adverse effect wage rate."[15]

H-2A workers also are legally entitled to:

- Receive at least three-fourths of the total hours promised in the contract, which states the period of employment promised. (This is called the "three-quarters guarantee.")
- Receive free housing in good condition for the period of the contract.
- Receive workers' compensation benefits for medical costs and payment for lost time from work and for any permanent injury.
- Be reimbursed for the cost of travel from the worker's home to the job as soon as the worker finishes 50 percent of the contract period. The expenses include the cost of an airline or bus ticket and food during the trip. If the guestworker stays on the job until the end of the contract the employer must pay transportation home.
- Be protected by the same health and safety regulations as other workers.
- Be eligible for federally funded legal services for matters related to their employment as H-2A workers.[16]

To protect U.S. workers in competition with H-2A workers, employers must abide by what is known as the "fifty percent rule." This rule specifies that an H-2A employer must hire any qualified U.S. worker who applies for a job prior to the beginning of the second half of the season for which foreign workers are hired.

15 20 C.F.R. § 655.102(b)(9)
16 45 C.F.R. § 1626.11

THE H-2B PROGRAM

The fundamental legal protections afforded to H-2A workers do not apply to guestworkers under the H-2B program.

Though the H-2B program was created two decades ago by the Immigration Reform and Control Act (IRCA) of 1986, the DOL has never promulgated regulations enacting substantive labor protections for these workers.[17] IRCA, in fact, does not explicitly require such regulatory safeguards, providing only the guidance that the importation of H-2B workers must not adversely affect U.S. workers' wages and working conditions.

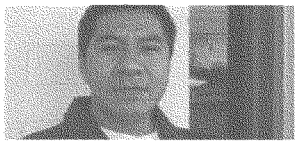
And, unlike the H-2A program, the procedures governing certification for an H-2B visa were established not by regulation but rather by internal DOL memoranda (General Administrative Letter 1-95) and therefore were not subject to the public comment and review process required when new federal regulations are adopted. An employer need only state the nature, wage and working conditions of the job and assure the DOL that the wage and other terms meet prevailing conditions in the industry.[18] Because the H-2B wage requirement is set forth by administrative directive and not by regulation, the DOL takes the position that it lacks legal authority to enforce the H-2B prevailing wage.

While the employer is obligated to offer full-time employment that pays at least the prevailing wage rate, none of the other substantive regulatory protections of the H-2A program apply to H-2B workers. There is no free housing. There is no access to legal services. There is no "three-quarters guarantee." And the H-2B regulations do not require an employer to pay the workers' transportation to the United States. •

H-2B guestworkers, who labor in non-agricultural industries such as forestry, seafood processing and tourism, do not have the same fundamental legal protections as H-2A agricultural workers.

SELECTED DIFFERENCES IN REGULATORY SAFEGUARDS FOR H-2A WORKERS AND H-2B WORKERS	H2A	H2B
50% Rule	yes	no
3/4 Guarantee	yes	no
Free Housing	yes	no
Social Security Tax Exemption	yes	no
Eligible for LSC-Funded Legal Services	yes	no

17 *See Martinez v. Reich*, 934 F. Supp. 232 (D. Tex. 1996)
18 GAL No. 1-95 (IV)(D) (H-2B); *See* DOL ETA Form 750





PART 3

Recruitment: Exploitation Begins at Home

The exploitation of H-2A and H-2B guestworkers commences long before they arrive in the United States. It begins, in fact, with the initial recruitment in their home country — a process that often leaves them in a precarious economic state and therefore extremely vulnerable to abuse by unscrupulous employers in this country.

U.S. employers almost universally rely on private agencies to find and recruit guestworkers in their home countries, mostly in Mexico and Central America.

These labor recruiters usually charge fees to the worker — sometimes thousands of dollars — to cover travel, visas and other costs, including profit for the recruiters. The workers, most of whom live in poverty, frequently must obtain high-interest loans to come up with the money to pay the fees. In addition, recruiters sometimes require them to leave collateral, such as the deed to their house or car, to ensure that they fulfill the terms of their individual labor contract.

The entirely unregulated recruiting business can be quite lucrative. With more than 121,000 such workers recruited in 2005 alone, tens of millions of dollars in recruiting fees are at stake. This financial bonanza provides a powerful incentive for recruiters and agencies to import as many workers as possible — with little or no regard to the impact on individual workers and their families.

WORKERS START OFF DEEPLY IN DEBT

Typically, guestworkers arriving in the United States face a fee-related debt ranging from $500 to well over $10,000. Many pay exorbitant interest rates on that debt. When that's the case, they have virtually no possibility of repaying the debt by performing the work offered by the employer during the term of the contract.

Overwhelming debt is a chronic problem for guestworkers. Although U.S. laws do provide some obligation for employers to reimburse workers for their travel and visa costs,[19] in practice it is rare that guestworkers are fully reimbursed. Most struggle to repay their debt, while interest accrues.

19 *See Arriaga v. Florida Pacific Farms*, 305 F. 3d 1228, 1237 (11th Cir. 2002); 20 C.F.R. § 655.102(b)(5)(i)



The U.S. forestry industry recruits many of its guestworkers from Huehuetenango in Guatemala, where many indigenous people live in extreme poverty with few opportunities to earn wages.

These obstacles are compounded when employers fail to offer as many hours of work as promised — a common occurrence.

Guatemalan guestworkers represented by the Southern Poverty Law Center paid an average of $2,000 in travel, visa and hiring fees to obtain forestry jobs in the United States. Guatemalans are recruited largely from Huehuetenango, an extremely poor region where many indigenous people live. Often illiterate, many speak Spanish as their second language, with varying degrees of proficiency. They generally work as subsistence farmers and have virtually no opportunity to earn wages in rural Guatemala. Thus, their only realistic option for raising the funds needed to secure

The Recruiting Bonanza

The recruitment of guestworkers is a lucrative business for the companies that help U.S. businesses obtain cheap foreign labor.

A deposition in a lawsuit filed by the Southern Poverty Law Center provides a glimpse into this world, in which workers pay thousands of dollars to recruiters in their countries for the right to work in low-wage jobs in the United States.[1]

The lawsuit, filed in 2006, contends that Decatur Hotels and its president, F. Patrick Quinn III, violated the Fair Labor Standards Act when the company failed to reimburse guestworkers for the exorbitant fees paid to aggressive labor recruiters working as agents of the hotel chain.

When Decatur Hotels, which owns 15 luxury hotels in New Orleans, decided to import up to 290 guestworkers to fill hotel jobs vacated by Hurricane Katrina evacuees, the company hired a Baton Rouge-based company called Accent Personnel Services Inc. Accent advertises on its website that it helps businesses obtain government approval to employ guestworkers and also recruits them.

Virginia Pickering, president and owner of the company, testified in a deposition that Accent earned $1,200 for each person recruited to work for Decatur Hotels — $300 each from Decatur Hotels and another $900 each from recruiters working in Peru, Bolivia and the Dominican Republic. That means that if Decatur imported the full 290 workers for which it was certified by the Department of Labor, Accent would have earned nearly $350,000. Accent did not have to pay for travel or visa costs out of those fees.

Each of the workers paid between $3,500 and $5,000 to cover recruiting fees, travel and visas. Like many other guestworkers, they plunged their families into debt to raise this money. For most workers, it was more than a year's salary.

The guestworkers soon found out they could not earn enough to make ends meet — much less pay back their debts. The recruiters had promised a minimum of 40 hours of work per week and plenty of overtime. Instead, they found themselves working about 25 hours a week, sometimes far less.

Even though desperate for wages, these workers are prohibited by law from seeking alternative employment.

"It is modern-day slavery," said Daniel Castellanos Contrera of Peru.

Another worker, who did not want to be identified because of the possibility of being blacklisted, said, "People came with debts and children to support — and the illusion that this would help their future. In the end, we have only bigger problems and deeper debt."

1 *Castellanos-Contreras v. Decatur Hotels, LLC*, E.D. Louisiana, Case No. 06-4340, filed August 2006



Leonel Hernandez-Lopez of Guatemala, like many other guestworkers, was required to leave the deed to his home with recruiters as "collateral."

H-2B jobs in the United States is to visit a loan shark, who will likely charge exorbitant interest rates. Many of these workers report having been charged 20 percent interest *each month*. Given that the pine tree planting season is three months long and workers often earn less than $1,000 per month, they have little hope of repaying the debt doing the work for which they were hired.

The fees paid by these Guatemalan workers amount to far more than the actual cost of travel and visas. Roundtrip airline tickets can be bought for $500 to $600. A visa typically costs $100. Assorted other fees may add several hundred. The remainder is often pocketed by the recruiter or the agency for which he works.

In addition, the majority of Guatemalan forestry workers interviewed by the Southern Poverty Law Center were required to leave some form of collateral, generally a property deed, with an agent in Guatemala to ensure that the worker will "comply" with the terms of his contract. If a worker violates the contract — as determined by the recruiter — that worker will be fined. Some workers have been required to pay as much as $1,000 to secure the return of their deed. This tactic is enormously effective at suppressing complaints about pay, working conditions or housing. U.S.-based companies deny knowledge of the abuse, but there is little doubt that they derive substantial benefit from their agents' actions. It is almost inconceivable that a worker would complain in any substantial way while a company agent holds the deed to the home where his wife and children reside.

The story told by Alvaro Hernandez-Lopez is typical of guestworkers recruited from Guatemala. In 2001, at age 45, he came to the United States to work for Express Forestry Inc. in the Southeast. He continued coming for two more planting seasons. "What I earned planting trees in the States was hardly enough to pay my debt," he said. "It was really hard for us to fight to get to the States legally and then not earn any money. We were told we had to leave our deeds to get the job. On a blank paper we had to sign our names and hand over our deeds. They said that if we didn't sign this paper they wouldn't bring us to the States to work."

Forestry worker Nelson Ramirez, also from Guatemala, describes a similar experience when he signed up to work for Eller and Sons Trees Inc. in 2001. A labor recruiter required that his wife sign a paper agreeing to be responsible if he were to break his contract. "I didn't understand exactly what this threat meant but knew that my wife would have to sign if I was going to get the visa," Ramirez said. "The work was very hard, but I worried about leaving because my wife signed this form to get me the job and I worried about her."

These tactics are not limited to any particular industry or country. Recruits in some parts of the world are required to pay even greater sums of money to obtain guestworker visas. Some Thai and Indonesian workers imported to North Carolina on H-2A visas, for example, each paid $5,000 to $10,000 or more for the right to be employed in short-term agricultural jobs at less than $10 per hour. In practice, they were not paid even that.



Guestworkers recruited from Bolivia, Peru and the Dominican Republic each paid between $3,500 and $5,000 to obtain temporary, low-wage jobs in New Orleans hotels after Hurricane Katrina. The hotel owner certified to the U.S. government that no American workers were available.

WORKERS PAY UP TO $5,000 FOR POST-KATRINA HOTEL JOBS

Following Hurricane Katrina, a major hotel company in New Orleans, Decatur Hotels LLC, decided to arrange for H-2B guestworkers to fill hotel jobs that had been vacated by employees who apparently were driven from the city by the massive destruction. In its request to the Department of Labor for permission to hire up to 290 guestworkers, the company claimed to "have offered work to hurricane evacuees" but "no one applied."[20]

Agents for the company, however, found plenty of willing workers in Peru, Bolivia and the Dominican Republic. Each recruit paid between $3,500 and $5,000 to come to the United States for hotel jobs — maintenance, housekeeping, guest services, etc. — that were scheduled to last just nine months. According to the terms of the written contract, each would have to work full-time for three to four months just to recoup the recruiting fees, not counting any interest on loans they may have taken out. When they arrived, they found they were not even able to work full-time with the hotels, making their situations even more desperate.

"Every one of us has to sell things in order to have the money to come here," said Francisco Sotelo Aparicio, who came from Peru to work for Decatur Hotels. "I sold some of my land, my belongings, and we leave our families to try to come out ahead. ... We want to keep working legally, but it is very hard to do so when we make such little money and have so much debt. We become desperate."

In many cases, the only way for guestworkers to make enough money to repay their debt is to seek additional employment — but that is illegal. The guestworker system permits them to work only for the employer who arranged with the Department of Labor to import them.

Many of the workers interviewed by the Southern Poverty Law Center know full well that they will be unable repay their recruiting debt because their pay is so low and the jobs are seasonal or temporary.

This raises the question: Why do workers choose to come to the United States under these terms?

The simple fact is that workers from Mexico, Guatemala and many other countries often have very few economic opportunities. In recent years, rural Mexicans have had an increasingly difficult time making a living at subsistence farming, and in some regions there are virtually no wage-paying jobs. Where jobs exist, the pay is extremely low; unskilled laborers can earn 10 times as much, or more, in the United States as they can at home. So even though they risk being cheated, many workers are willing to take that chance. Most perceive the guestworker program as their best chance to get to the United States and provide a better life for their families. These desperate workers are easily deceived by recruiters.

In a few cases, guestworkers have told the Southern Poverty Law Center, employers have simply

20 *Castellanos-Contreras v. Decatur Hotels, LLC*, E.D. Louisiana, Case No. 06-4340, filed August 2006

provided a backdoor for migrant workers to get to the United States. Once here, they overstay their visas, becoming unauthorized workers, or "jump" contract by going to work elsewhere. Even though expensive, the cost to the worker commonly is less than what it would cost to enter the United States illegally. Certainly it is less dangerous to enter with an H-2 visa than to attempt to cross the border unlawfully.

Some employers seek long visa periods, claiming to have eight or 10 months of work, for example, when they actually have only two to three months of work to offer. The period after which the employer has no work to offer but when the visa is still valid is referred to by many workers as the "tiempo libre" or "free period." Numerous workers have told the Southern Poverty Law Center that their employers explicitly advised them that they were free to seek work elsewhere during this period. While that clearly violates immigration law, workers often believe themselves to be in legal status, because their visa appears valid and because they were given permission by their employer. For some employers, this is the only way they are able to continue to attract a workforce year after year, since the wages are so low and the costs of recruitment so high.

One employer sued by the Southern Poverty Law Center had extensive notes showing the deposits left by workers in order to secure their jobs. Next to one worker's name was written: "he only wants the visa to travel to Florida. He must leave a 5000 deposit." Clearly, these are visas available for sale.

As long as the guestworker system relies on a series of unregulated foreign recruiters, it is subject to this sort of wanton selling of visas.

A prohibition on charging fees to workers for recruitment or transportation would help

Irla

In December 2000, Irla's husband left his small town in Guatemala for the first time to work in the United States. With an H-2B visa in hand and a job planting pines in the forests of the South, he hoped to earn enough money to make a better life for his family.

He incurred debt to pay about $1,000 in fees to a recruiter and was told to leave the deed to his house with a lawyer in town to guarantee his return when the seven-month visa expired.

He didn't earn much money planting pines. But after three months, the planting season ended and he found other jobs. He worked in a factory, harvested grapes and worked in tomato and tobacco fields. Only at this point was he able to send more money home. To some guestworkers, this is known as the "visa libre" period, and recruiters sometimes promise such opportunities even though this type of arrangement violates the rules of the guestworker system.

"We all knew the men would not earn much in the actual planting season," Irla said. "My husband and the others would work their three months with the planting company and then would find other work. My husband could not afford to send money to us or to pay his debt until he had a different job."

Irla's husband continued to go to the United States every season for the following four years. The deed to his home stayed in the hands of the lawyer in Guatemala. Many other women in Irla's community were in the same situation. They stayed at home to care for the children, waiting patiently for money that rarely arrived.

"We do this for our kids," Irla said. "We have to work so they can eat, and it is not the same when the husband is not here."

After completing his fifth three-month planting season in the United States, Irla's husband again found other work. On the way to his job, he was killed in a car accident. At 32, he left five children behind. The last time Irla saw him was in November 2004.

Even after five years, he still owed about $700.

"He should have earned a lot of money with all that time in the United States," Irla said. "There were no earnings to show. Now I am working without him for our five kids. I think it will take me about three years to pay this debt. I am the only one working for the food."

The lawyer will not give Irla back the deed to their house until she repays the debt. "If I don't pay this debt they say they will take my house."

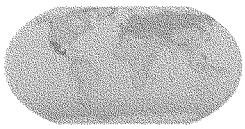
Irla now wishes he had remained in Guatemala picking coffee. "It would have been better if he had not gone and we could have just eaten greens and tortillas. I would rather have him here now."

Next to one worker's name was written: "he only wants the visa to travel to Florida. He must leave a $5000 deposit." Clearly, these are visas available for sale.

negate the financial incentive for the recruiting industry in Mexico and elsewhere to send more workers than are needed. Presumably, if the workers could not be charged, then employers would pay for recruiting, and they would recruit only the number of workers needed.

Unfortunately, it is hard to imagine enforcing such a rule. For example, until recently, one U.S. embassy in Latin America routinely asked prospective H-2 workers how much they had paid in recruitment fees, apparently out of concern that a high level of indebtedness would cause workers to overstay their visas in order to repay the debt. Workers were told by their recruiters what the "correct" — that is, false — answer should be, and workers dutifully understated the fees that they have paid.

A fundamental problem with the guestworker system is the requirement that a worker may travel to the United States on an H-2 visa only after he has a job offer from a U.S. employer. Placing this power in the hands of employer representatives operating in other countries is a recipe for worker abuse. •



	MEXICO	GUATEMALA	EUROPE
H-2A	28,563	87	323
H-2B	60,258	3,681	4,919

H-2 guestworkers come to the United States from across the globe, but about three-fourths are from Mexico, and about nine in 10 come from Latin American countries.





PART 4

Holding the "Deportation Card"

The most fundamental problem with guestworker programs, both historically and currently, is that the employer — not the worker — decides whether a worker can come to the United States and whether he can stay.

Because of this arrangement, the balance of power between employer and worker is skewed so disproportionately in favor of the employer that, for all practical purposes, the worker's rights are nullified. At any moment, the employer can fire the worker, call the government and declare the worker to be "illegal."

Otto Rafael Boton-Gonzalez, an H-2B forestry worker from Guatemala, has seen first-hand how this works. "When the supervisor would see that a person was ready to leave the job because the pay was so bad, he would take our papers from us. He would rip up our visa and say, 'You don't want to work? Get out of here then. You don't want to work? Right now I will call immigration to take your papers and deport you.'"

Many abuses, perhaps most abuses of guestworkers, flow from the fact that the employer literally holds the deportation card. One of the most chronic abuses reported by guestworkers concerns the seizure of identity documents — in particular passports and Social Security cards.[21] In many instances, workers are told that the documents are being taken in order to ensure that they do not leave in the middle of the contract.

The Southern Poverty Law Center has received dozens of reports of this practice and has, in the course of its legal representation of workers, confirmed that it is routine. While some employers state that they hold the documents for the purpose of "safekeeping," many have been quite candid in explaining that there is a great risk that workers will flee if the documents are not held. One employer sued by the Southern Poverty Law Center stated in her deposition that the company kept workers' Social Security cards in the office because "if they have their Social Security card, they'll leave."[22]

Juan, a forestry worker, said, "The boss took our passports and kept them. He took them as soon

21 Unlike H-2A workers, those with H-2B visas must pay Social Security and Medicare taxes but have no prospect of receiving benefits under the programs. They also are subject to federal income tax withholding.
22 Deposition of Sandy Thomas, page 77, *Recinos-Recinos v. Express Forestry*, E.D. Louisiana, Case No. 05-1355



Employers often confiscate visas and other documents from guestworkers, ensuring they cannot leave their jobs.

as we arrived from Mexico. We would ask for them and he would always say no. When we got paid, we would want to go cash our pay checks. The boss would say, 'Go talk to the driver and he'll change them for you.' They would not give us our passports to cash our pay checks. They would say that the higher company office ordered them to do this. My passport gives me permission to be here so no one will bother me because I am legal. I cannot prove I am legal if I do not have my passport."

There is no realistic mechanism for workers to recover their identity documents. Numerous employers have refused to return these documents even when the worker simply wanted to return to his home country. The Southern Poverty Law Center also has encountered numerous incidents where employers destroyed passports or visas in order to convert workers into undocumented status. When this happens, there is little likelihood of a worker obtaining assistance from local law enforcement officials. In many jurisdictions, lawyers representing workers advise them to avoid calling police because they are more likely to take action against complaining workers than against the employer.

LIVING IN FEAR

In other instances, employers have quite explicitly used the threat of calling the U.S. Immigration and Customs Enforcement agency as a means of asserting control over the workers. For example, in one case where workers refused to work until they received their pay after not having been paid in several weeks, the employer responded by threatening to call immigration and declare that the workers had "abandoned" their work and were thus "illegal" workers. Such threats are common and are made possible by a system under which visas are issued solely for employment with the petitioning employer.

Even when employers do not overtly threaten deportation, workers live in constant fear that any bad act or complaint on their part will result in their being sent home or not being rehired. Fear of retaliation is a deeply rooted problem in guestworker programs. In 1964, the Mexican-American labor organizer and writer Ernesto Galarza found that despite the prevalence of workers' rights violations, only one in every 4,300 braceros complained.[23]

In examining the H-2A program in North Carolina, Human Rights Watch found "widespread fear and evidence of blacklisting against workers who speak up about conditions, who seek assistance from Legal Services attorneys, or who become active in [the union]"[24] Human Rights Watch also found evidence of a "campaign of intimidation" against workers to discourage any exercise

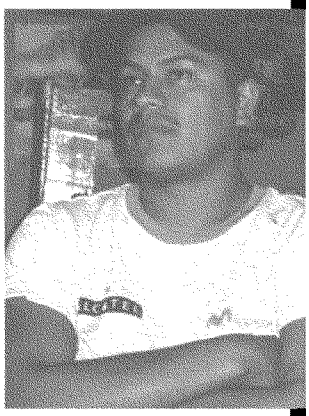
23 Ernesto Galarza, *Merchants of Labor: The Mexican Bracero Story* (Rosicrucian Press (1964) at 17; See also Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guestworkers from Enforcing Their Rights*, 18 Hofstra Lab. & Emp. L.J. 575, 585 (2001)

24 Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* (ILR Press) 2000 at 148

of freedom of association by the workers. The U.S. Government Accountability Office (formerly the General Accounting Office) similarly reported in 1997 that H-2A workers "are unlikely to complain about worker protection violations, such as the three-quarters guarantee, fearing they will lose their jobs or will not be accepted by the employer or association for future employment."[25]

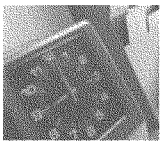
The North Carolina Growers Association blacklist has been widely publicized. The 1997 blacklist, called the "1997 NCGA Ineligible for Rehire Report" consisted of more than 1,000 names of undesirable former guestworkers.[26]

Fear of retaliation among workers is a constant concern — and one that is warranted. There is no question that many H-2 employers take full advantage of the power they hold over guestworkers. •



Workers live in constant fear that any bad act or complaint on their part will result in their being sent home or not being rehired. Fear of retaliation is a deeply rooted problem in guestworker programs.

25 *Changes Could Improve Services to Employers and Better Protect Workers.* GAO/HEHS 98-20, pp 60-61
26 David Bacon "Be Our Guests," *The Nation*, September 27, 2004





PART 5

Wage and Hour Abuses

Despite federal law requiring the payment of the Adverse Effect Wage Rate to H-2A workers and the prevailing wage rate to H-2B workers, in practice many guestworkers earn substantially less than even the federal minimum wage of $5.15 per hour.

Legal Services attorneys have represented H-2A workers in hundreds of lawsuits against their employers. And more than 20 lawsuits have been filed on behalf of H-2B workers across the nation in recent years, many by the Southern Poverty Law Center. Given that only a handful of lawyers provide free legal services to these low-wage workers, these numbers reflect a grave problem: Employers using the services of guestworkers in many industries routinely violate basic labor laws.

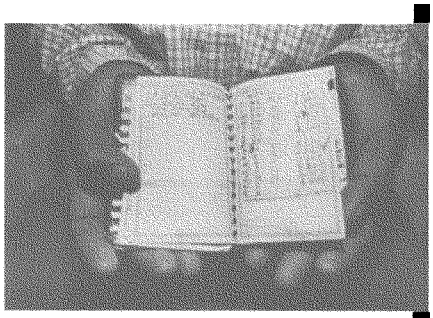
To understand the wage and hour issues faced by workers, it is useful to examine two industries — forestry and seafood processing — that have become reliant on guestworkers for the majority of their labor. It is no coincidence that in both industries wage and hour violations are the norm, rather than the exception.

FORESTRY WORKERS

Although an H-2B contract between employer and worker specifies a minimum hourly wage — the prevailing wage, which has run in recent years from approximately $6 an hour to more than $10 per hour, depending on the year and the state — tree planters are more often paid by the number of seedlings they plant. They are told that they are expected to plant at least two bags of 1,000 seedlings each in an eight-hour day, a task that is often impossible. Payment ranges from $15 to $30 per bag.

An experienced hand-planting crew can average 1,500 well-planted seedlings per person per day. On rough sites, a worker might average just 600 trees per day; in open fields, a worker might plant up to 2,000 in a day.[27] At the average rate of 1,500 trees, a worker could earn between $22.50 and $45 a day, far less than the legally required wage. By law, the employer is obligated to make up the difference between the bag rate and the prevailing wage rate. This is rarely done.

27 Clark W. Lantz, et al., *A Guide to the Care and Planting of Southern Pine Seedlings*, United States Department of Agriculture, Forest Service Southern Region, Management Bulletin R8-MB39, Revised October 1996, page 24.



Most workers report working between eight and 12 hours a day. But they rarely, if ever, earn overtime pay, despite the fact that they often work six full days a week and average well over 40 hours. In addition, they are routinely required to purchase their own work-related tools and incur other expenses and deductions, unlawfully cutting into their pay.

Guestworkers in some industries are systematically cheated out of wages they earn, even when they carefully document their hours.

Virtually every forestry company that the Southern Poverty Law Center has encountered provides workers with pay stubs showing that they have worked substantially fewer hours than they actually worked. Relying on interviews with more than 1,000 pine tree workers, the Center has concluded that this industry systematically underpays its workers.

Escolastico De Leon-Granados, an H-2B worker from Guatemala, said he was consistently underpaid while working for Eller and Sons Trees Inc. "We worked up to 12 or 13 hours and we could only plant 1,300 or 1,500 seedlings," he said. "Our pay would come out to approximately $25 for a 12-hour workday. At the end of the season, I had only saved $500 to send home to my family."

Because of the lack of enforcement by government officials and the vulnerability of guestworkers, this exploitation has continued largely unfettered for many years.

In an attempt to reform this widespread wage abuse, the Southern Poverty Law Center has filed four class action lawsuits against large forestry contractors since 2004. To date, two of those lawsuits have been settled, resulting in contractors agreeing to pay back wages to class members and change the way they do business.[28] Two other cases are pending.[29] Substantially similar allegations have been made in lawsuits filed by other advocates, several of which were settled with payment or entry of judgment.[30]

SEAFOOD WORKERS

In the seafood industry, workers in Virginia and North Carolina have filed at least 12 lawsuits against 10 companies since 1998. Most of the lawsuits contain virtually identical allegations: that workers were paid on a piece rate; that they did not earn the minimum wage; that there were unlawful deductions for tools, travel and uninhabitable housing taken from their pay; and that they were not paid overtime wages for hours worked over 40 in a week. [31]

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28 *Salinas-Rodriguez v. Alpha Services LLC*, Civil Action No. 3:05-CV-440WHB-AGN, U.S. District Court for the Southern District of Mississippi, Jackson Division; *Recinos-Recinos v. Express Forestry*, Civil Action No. 05-1355"I"(3), U.S. District Court for the Eastern District of Louisiana. As part of the settlement agreement with Express, the Southern Poverty Law Center agreed to include a statement from the company in any written material announcing the settlement. The statement says the "defendants have stated that they decided to settle this case to avoid the costs and hassles of future litigation."

29 *Leon-Granados v. Eller and Sons Trees, Inc.*, Civil Action No. 1:05-CV-1473-CC, U.S. District Court for the Northern District of Georgia, Atlanta Division and *Rosiles-Perez v. Superior Forestry*, Civil Action No. 1:06-CV-0006U.S. District Court for the Middle District of Tennessee, Columbia Division

30 *See Perez-Perez, et al, v. Progressive Forestry Services, Inc., et al*, Civ. No 98-1474-KI (D. Or.); *Moreno-Leon v. Franklin Stanley*, U.S. District Court for the Western District of Arkansas, El Dorado Division, Case No. 99-1002; *Vicente Vera-Martinez v. Grano Reforestation, Inc.*, U.S. District Court for the Western District of Arkansas; Case No. 03-6002; *Gonzalez-Sanchez v. International Paper Co.*, 346 F.3d 1017. *Martinez-Mendoza v. Champion International Corporation*, 330 F.3d 1200 (11th Cir. 2003); *Lizarraga-Ruiz v. Georgia-Pacific Corp.*, 88 Fed Appx. 382 (11th Cir. 2003)

31 *See Zamora v. Shores and Ruark Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia C98CV-501; *Maria Demesio Aboyte v. Shores*

Virtually all of these cases were settled before trial. While a few were settled on confidential terms, a number of the settlements required the payment of substantial sums of money to the workers. In one case, *Zamora v. Shores and Ruark Seafood, Inc.*, workers sued an employer that had been twice cited by the U.S. Department of Labor (DOL) for failing to pay minimum wage and overtime wages to its workers. Each time the company was fined by the DOL it continued this unlawful practice. Even so, the DOL continued to grant the company's requests to import H-2B workers to process seafood. In 1999, the company paid more than $103,000, excluding attorneys' fees and costs, to settle a lawsuit filed by 51 workers.[32] A second suit ended in the settlement of claims by an additional 10 workers.

These lawsuits and DOL enforcement actions, while limited in scope, illustrate that wage and hour abuses of guestworkers are not a question of a few "bad apple" employers. Rather, when an industry comes to largely rely upon extraordinarily vulnerable guestworkers for the bulk of its labor, there is a race to the bottom in terms of wages to be paid. This creates problems for the workers but also for employers who want to comply with the law, because they are left at a competitive disadvantage relative to employers who cheat their workers. •

Simón*

Simón was recruited in Mexico to work in the sweet pepper and jalapeño fields in Georgia. He worked long hours — up to 70 hours a week. He kept a notebook in which he wrote down the time of day when he started and stopped working so that he could compare it with his pay stub at the end of the week.

He found that the pay stubs did not include all of the hours he worked. Sometimes, as many as 30 hours per week were missing.

"I worried about this," he said. "I had left my town in Mexico to come work here because I needed the money to support my family, and they were not paying us for our work. They were not honoring the contract."

One night a Legal Services employee visited the camp where Simón and the other H-2A workers lived, and he learned that he had a right to earn the federal minimum wage for every hour worked. But when he spoke to his supervisor about the missing hours, he was told he could lose his job if he talked to Legal Services again.

He continued talking to Legal Services, though in another town. When Simón tried to come to the United States the following year, he discovered he had been blacklisted.

"When I talked with the contractor in Mexico, he said that I could not go back to work for the company. He told me it was because I had talked with Legal Services. I had other co-workers who had talked with Legal Services who had the same problem and were not allowed on the list to return to work."

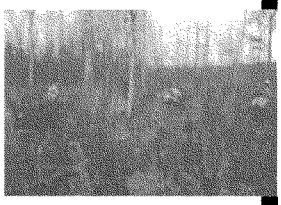
* Not real name

and Ruark Seafood, Inc., U.S. District Court for the Eastern District of Virginia; *Alcaraz-Garcia v. Gloucester Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia, 4:00CV69; *Soto-Lopez v. J& W Seafood of Virginia, Inc.*, U.S. District Court for the Eastern District of Virginia; 3:98CV792; *Perez-Sandoval v. International Seafood Distributors, Inc.*, U.S. District Court for the Eastern District of Virginia, 3:99-cv-00691; *Perez-Segura v. Bay Water Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia; *Quiroz-Losoya v. Shores And Shores, Inc. t/a Virginia Packing*, U.S. District Court for the Eastern District of Virginia, 99CV133; *Rosa Isabel Miranda Garcia v. Gloucester Seafood, Inc.*, United States District Court for The Eastern District Of Virginia, 4:03CV39; *Beltran Benitez, et al. v. Sea Safari, et al.*, U.S. District Court for the Eastern District of North Carolina, 2001; *Fonseca Aguilar, et al. v. Carolina Seafood Ventures, et al.*, U.S. District Court for the Eastern District of North Carolina. August 2002; In re Stephenson, U.S. *Bankruptcy Court for the Eastern District of Northern Carolina*, October 2002

32 See Lawrence Latane III, "Fifty-One Workers Will be Paid Back Wages", *Richmond Times Dispatch*, July 10, 1999

"Some days we had to spend much of the day clearing brush to make the land able to be planted. We were not paid at all for [this time]. We also never received overtime pay, despite the fact that we worked much more than 40 hours per week."

ARMENIO PABLO-CALMO, H-2B WORKER FROM GUATEMALA



Wages Set Too Low

Federal regulations require employers who hire H-2A workers to pay at least the highest of the state or federal minimum wage, the local "prevailing wage" for the particular job, or an "adverse effect wage rate (AEWR)."

The AEWR was created under the bracero program as a necessary protection against wage depression. The Department of Labor (DOL) issues an AEWR for each state based on U.S. Department of Agriculture (USDA) data.

The AEWR has often been criticized by farmworker advocates as being too low. Farmworker Justice explains why:

"First, the USDA survey that DOL uses for the AEWR measures the average wage rates. Employers that have a hard time finding U.S. workers should compete against other employers by offering more than the average wage to attract and retain workers. Second, the AEWR is based on the previous year's wage rates and does not reflect inflation. Third, the USDA surveys of the average wage include the 55% or more of farmworkers who are undocumented, so the wages are depressed compared to what they would be if only U.S. citizens and authorized immigrants had the job. In addition, the AEWR's, by themselves, also do not prevent employers from imposing very high productivity standards that desperate foreign workers will accept but that would cause U.S. workers to insist on higher wages."[1]

As a practical matter, the substantive wage rates set forth in the H-2 visa programs are illusory and unenforceable.[2]

H-2B workers often face an even worse situation with regard to wages than H-2A workers. Under the law, they are entitled only to the "prevailing wage" for their work; there is no adverse effect wage rate for those workers. Of course, even though these workers are entitled to payment of prevailing wages and to employment in conformity with required minimum terms and conditions as provided for in the employer's labor certifications, federal law provides no real remedy when these rights have been violated.

In the forestry industry, prevailing wages in recent years have actually fallen, not only adjusted for inflation but in real terms. For example, in 2005 the prevailing wage rate for tree planters in all counties of Alabama was $9.20 per hour; in 2006, the wage rate was only $7.29 in Dale County, Alabama; other counties had similar decreases. There are two explanations for this trend. First, the DOL has recently modified its methodology for determining the prevailing wage in a way that is extremely favorable for employers.

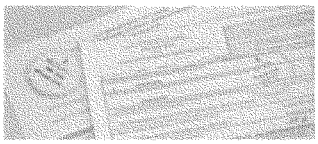
Second, when an industry relies on guestworkers for the bulk of its workforce, wages tend to fall. Guestworkers are absolutely unable to bargain for better wages and working conditions. Over time, wages fall and the jobs become increasingly undesirable to U.S. workers, creating even more of a demand for guestworkers.

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1 Bruce Goldstein, *Guestworker Policy: H-2A Program Adverse Effect Wage Rates Are Too Low*, Farmworker Justice, May 2006, *available at* www.fwjustice.org/immigration_Labor/H2abDocs/FAQAEWR.doc

2 See Michael Hoffey, *Disadvantaged by Design: How the Law Inhibits Agricultural Guestworkers from Enforcing Their Rights*, 18 Hofstra Lab. & Emp. L.J. 597-616; *see also* Andrew J. Elmore, *Reconciling Liberty and Sovereignty in Nonprofessional Temporary Work Visa Programs: Toward a Non-subordination Principle in U.S. Immigration Policy* (unpublished 2007, on file with authors)





PART 6

Contract Violations

A chronic problem faced by guestworkers is that employers recruit too many of them, a situation that leads to workers not being able to earn as much as they were promised.

Because the workers themselves, not the employers, absorb most of the costs associated with recruitment, employers often grossly exaggerate their labor needs when seeking Department of Labor (DOL) approval to import workers. To be sure, sometimes employers genuinely do not know months ahead of time exactly how many workers they will need, and they may worry that some workers will leave.

Under the H-2 program, employers are obligated to offer full-time work when they apply to import foreign workers; anything less will not be approved by the DOL. There is virtually no enforcement of this requirement in practice, however.

DOL regulations require that H-2A workers be guaranteed 75 percent of the hours promised in the contract — a provision called the "three-quarters guarantee." That does not mean employers always comply. Many of the terms in a worker's job offer are simply not honored. The DOL's inspector general found in 2004 that the North Carolina Growers Association overstated its need for workers and overstated the period of employment, factors that likely led workers to abandon their contracts early and not receive the return transportation to which they were lawfully entitled. [33]

In the H-2B program, there is no regulation of the number of hours that must be guaranteed to workers. The DOL, in fact, asserts that it has no authority to enforce the provisions of an H-2B contract under most circumstances. Thus, if a worker arrives in the United States on an H-2B visa and is offered no work for weeks on end (and this has occurred many times) that worker has virtually no recourse. He may not lawfully seek employment elsewhere. He likely has substantial debts on which he must continue to make payments. As an H-2B worker, he more than likely is obligated to pay for housing; certainly, he must pay for food.

The ramifications to the worker of being deprived of work for even short periods are enormous

33 Office of Inspector General, *Evaluation of the North Carolina Growers Association*, March 31, 2004 *See also* Leah Beth Ward *Lax Regulations Trouble Critics of Labor Pipeline, Desperate Harvest*, Charlotte Observer, November 1, 1999

"Every one of us took out a loan to come here. We had planned to pay back our debt with our job here. They told us we would have overtime, that we could get paid double for holidays, that we would have a place to live at low cost, and it was all a lie."

under these circumstances. Fundamental to the problem is that the worker is not free to shop his labor to any other employer.

It is extremely common for seafood processing employers to seek more laborers than they can use. They routinely apply for workers in their plants for periods longer than needed for their seasons, as they are unsure exactly when their season will begin or end. As a result, many guestworkers have no work for three or four weeks at the beginning or end of their visa term. For low-wage workers desperately in debt, this can be devastating.

MISCLASSIFICATION

Other contract violations are routine. One of the most common is that of misclassification. This occurs most often when workers who should be characterized as H-2A workers (because, for example, they are picking produce in the field) are instead brought in as H-2B workers (and labeled as packing shed workers, for example). This results in workers being paid substantially less than the wage rate they should lawfully be paid. It also results in the workers being denied the substantially better legal protections afforded to H-2A workers, such as free housing and eligibility for federally funded legal services.

Another common form of misclassification involves employers who simply misstate the kind of work H-2B employees will be performing, so that the prevailing wage rate is set for one kind of work, such as landscaping, when the workers actually will be doing work that warrants a higher prevailing wage rate, such as highway maintenance. Again, there is virtually no recourse for a worker in this

Angela*

Angela was studying psychology in the Dominican Republic when she decided to become a guestworker in a New Orleans hotel, in part to earn money to pay medical bills for her cancer-stricken mother.

Like most guestworkers, Angela was promised plenty of work. She would need it, because she had taken on $4,000 in debt to pay the fees necessary to obtain the job and the nine-month H-2B visa.

"Every one of us took out a loan to come here," she said. "We had planned to pay back our debt with our job here. They told us we would have overtime, that we could get paid double for holidays, that we would have a place to live at low cost, and it was all a lie."

When she arrived in New Orleans in April 2006, she was given a desk job at the hotel, earning $6 an hour. She worked full-time, with some overtime, for the first month. But then her hours started dwindling; soon she was working only 15 to 20 per week, earning an average of $120 per week. She hardly had enough money to eat three meals a day after paying for housing and transportation.

"We would just buy Chinese food because it was the cheapest. We would buy one plate a day for about $11 and share it between two or three people. Sometimes we would eat bread and cheese. Sometimes we would make rice."

Her visa did not allow her to seek other employment, not even a part-time job and she fell deeper in debt.

She felt trapped by debt and by the promise she had made: She and her mother had signed a guarantee that she would finish the contract — or pay $10,000. If she could not pay, the recruiters would take her mother's belongings.

"I felt like an animal without claws — defenseless. It is the same as slavery.

"There are some people that believe the guestworker program is a good idea, but it is not. ... You put all your savings and hope into what this work promises and you accept the small amount of hours they give, the poor working conditions, and the low pay."

Angela's plans are ruined. "I cannot even talk to my mother about all of the troubles I have been having because I don't want her to worry and feel sicker. This is the other part that I have to swallow. It's like you are in hell and you are closed in and you don't know where the exit is. It's terrible."

* Not real name



Employers violate guestworker contracts with impunity, frequently misclassifying workers to avoid paying higher wages.

circumstance, as the DOL denies that it has any enforcement authority to address these kinds of abuses and H-2B workers are ineligible for federally funded legal services. As a practical matter, the only thing that workers can do, then, is to receive far less than they are legally entitled to under the law.

Lawyers for guestworkers in North Carolina report numerous accounts of H-2A workers who were deliberately sent by their employers to work on other operations owned by employers or their relatives, operations that would have to pay U.S. workers substantially more than the Adverse Effect Wage Rate. In one case, several H-2A Christmas tree workers were assigned by their employer to work in his home construction business, where they performed skilled carpentry work at far less than the prevailing wage.[34]

This is just one more way that employers can exploit the guestworker system for profit — and the vast majority of workers can do nothing about it. •

34 Interview with Mary Lee Hall, Legal Aid of North Carolina




PART 7

Injuries without Effective Recourse

Guestworkers toil in some of the most dangerous occupations in the United States.[35] Fatality rates for the agriculture and forestry industries, both of which employ large numbers of guestworkers, are more than 10 times the national average.[36] Unfortunately, when H-2 workers suffer injuries on the job, all too often they are denied access to appropriate medical care and benefits. Those who are seriously injured face enormous, often insurmountable obstacles to obtaining workers' compensation benefits.

In most instances, guestworkers are entitled to workers' compensation benefits — on paper, at least.

The reality is that many injured guestworkers are not able to obtain the benefits to which they are entitled under this system. Because workers' compensation is a state-by-state scheme, with varying rules, some states are more accessible to transnational workers than others. And workers often lack the knowledge needed to negotiate the complex system in order to have benefits continue when they leave the United States.

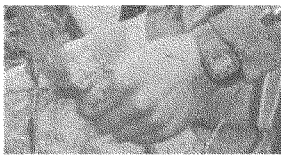
There simply are no clear rules in the H-2 regulations guaranteeing that workers' compensation benefits will continue after an injured worker returns to his home country. Indeed, the insurance carrier of one large company employing substantial numbers of guestworkers has a policy of affirmatively cutting off workers when they leave the United States, which they inevitably must do. This inhibits the workers' ability to gain access to benefits and provides a financial incentive for employers to rely on guestworkers.[37]

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35 Bureau of Labor Statistics, Census of Fatal Occupational Injuries, at 13 (2005) (Forestry, agriculture, and construction rank two, six, and ten, respectively, in the fatality rate.)

36 Id.

37 See Sarah Cleveland, Beth Lyon and Rebecca Smith, *Inter-American Court of Human Rights Amicus Brief: The United States Violates International Law When Labor Law Remedies are Restricted Based on Workers' Migrant Status*, 1 Sea of J. of Soc. Just. 795 (2003). See also Cathleen Caron, *Portable Justice and Global Workers*, 40 Clearinghouse Review 549, XX (January-February 2007)



Guestworkers perform some of the most difficult and dangerous jobs in America, but many who are injured face insurmountable obstacles to obtaining medical treatment and workers' compensation benefits.

Some states (for example, New Jersey) mandate that examining physicians be located in the state where an injury occurred. This means that injured workers have difficulty obtaining benefits while in other states and in their home countries. Some states require workers to appear in the state for hearings. And most states do not have clear rules permitting workers to participate by telephone in depositions and hearings before the workers' compensation body. These rules put guestworkers at an enormous disadvantage in obtaining benefits to which they are entitled. As a practical matter, workers also have an extremely difficult time finding a lawyer willing to accept a case for a guestworker who will be required to return to his or her home country. In 2003, a group of civil rights and immigrant rights groups filed an amicus brief with the Inter-American Court of Human Rights relating to the treatment of immigrants in the United States. Among their many complaints: the discrimination against foreign-born workers in the state-by-state workers' compensation scheme. That brief states:

> "Workers' compensation laws in many states bar the non-resident family members of workers killed on the job from receiving full benefits. In those states, whenever the family member is living outside the United States and is not a United States citizen, the family members do not receive the full death benefits award. There are several ways in which states limit compensation to nonresident alien beneficiaries. Some states limit compensation compared to the benefits a lawful resident would have received, generally 50% (Arkansas, Delaware, Florida, Georgia, Iowa, Kentucky, Pennsylvania, and South Carolina). Some states restrict the types of non-resident dependents who are eligible to receive benefits as beneficiaries (Arkansas, Delaware, Florida, Kentucky, Pennsylvania). Other states limit coverage based on: The length of time a migrant has been a citizen (Washington), or the cost of living in the alien resident beneficiary's home country (Oregon). Alabama denies benefits to all foreign beneficiaries."[38] (internal citations omitted)

Such policies obviously disproportionately impact the families of guestworkers killed on the job.

FORESTRY INJURIES COMMON

The forestry industry illustrates the problems many guestworkers face in gaining access to benefits. Getting injured on the job — either in the forest or in the van traveling to and from the forest — is a common occurrence for tree planters. They rarely receive any compensation for these injuries.

In their 2005 investigative series about guestworkers in the forestry industry, journalists from the *Sacramento Bee* wrote, "Guest forest workers are routinely subjected to conditions not tolerated elsewhere in the United States.... They are gashed by chain saws, bruised by tumbling logs and rocks, verbally abused and forced to live in squalor."[39]

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38 Cleveland, Lyon and Smith, supra, at 819
39 Tom Knudson and Hector Amezcua, "The Pineros, Part 1" *Sacramento Bee*, November 13, 2005



Enrique Napoleon Hernandez-Lopez cut his thumb while planting trees but didn't receive medical attention for seven days. He spent 14 days in the hospital for an infection and nearly lost his thumb.

Leonel Hernandez-Lopez of Guatemala was working as a tree planter in 2004 when he cut his right knee badly on the job. "I was very sick for 30 days, with six stitches on my wound," he said. "I never received any help from the company, even having to pay for my own medicine from my own pocket. All the while I had to keep paying rent on the hotel room where I was staying, even though I made no money. ... The only thing I received from the company was belittling, humiliation, mistreatment and bad pay."

Mexican forestry worker Jose Luis Macias was spraying herbicides in 2005 and took a bad fall after stepping on a branch that snapped. "I fell backwards down about five meters and my leg ended up bent underneath me," he said. "The supervisor told me, 'Get up, get up,' so that I would continue working. When he saw I did not want to get up, he said, 'Don't be a stupid wimp,' so I had to keep spraying. My leg was swollen and I asked the crew leader to take me to the doctor. He told me ... he didn't have time to be taking me to the doctor. Finally I went to the doctor on my own. I have thousands of dollars in medical bills and I have never received any money for the time I lost from work. This was more than a year ago and my leg still swells, hurts and I almost can't work."

The pressure on workers to keep injuries to themselves is tremendous. Again, this is related to employers' absolute control of the right of guestworkers to be present in, work in and return to the United States.

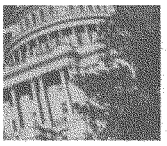
Workers who report injuries are sometimes asked to sign forms saying they are quitting. They are told that if they sign and go home, they may be allowed to come back the following year.

They also face the implied and real threat of blacklisting.

A 1999 study by the Carnegie Endowment for International Peace reported that "[b]lacklisting of H-2A workers appears to be widespread, is highly organized, and occurs at all stages of the recruitment and employment process. Workers report that the period of blacklisting now lasts three years, up from one year earlier in the decade."[40]

Filing a workers' compensation claim is often the end of the only paying employment available to a worker. Workers generally file such a claim only when they perceive that the gravity of their injury will itself interfere with their ability to work again. If the injury appears temporary and the worker believes he will recover, he often takes the chance of not filing a claim to preserve his option for future employment. •

40 See Demetrios Papademetriou and Monica Heppel, *Balancing Acts: Toward a Fair Bargain on Seasonal Agricultural Workers, International Migration Policy Program, Carnegie Endowment for International Peace* (1999) p. 13





PART 8

Lack of Government Enforcement

Government enforcement of basic labor protections has decreased for all American workers in recent decades. The number of wage and hour investigators in the Department of Labor (DOL) declined by 14 percent between 1974 and 2004, and the number of completed compliance actions declined by 36 percent. During this same period, the number of U.S. workers covered by the Fair Labor Standards Act *increased* by more than half — from about 56.6 million to about 87.7 million.[41] The Brennan Center for Justice concluded in 2005 that "these two trends indicate a significant reduction in the government's capacity to ensure that employers are complying with the most basic workplace laws."[42]

This decline in enforcement has particularly grave consequences for guestworkers, who are far more vulnerable to abuses than U.S. workers and in great need of government protection.[43]

Conspicuously absent from proposals to expand guestworker programs — including proposals to create hundreds of thousands, or millions, of new guestworker positions — is any discussion about a substantial increase in the federal budget for the DOL and the Occupational Safety and Health Administration to ensure that guestworkers are protected on their jobs.

The rights of guestworkers can be enforced in two ways: through actions taken by government agencies, mainly the DOL, and through lawsuits filed by private attorneys, federally funded Legal

41 Brennan Center for Justice, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004*, Economic Policy Brief, No. 3, September 2005
42 Id.
43 See Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C.J. Int'l L. & Com. Reg. 521, 522 (2002)



The documentary "Harvest of Shame," broadcast by CBS in 1960, called America's attention to the callousness with which U.S. agricultural giants treated migrant farmworkers.

Services (H-2A workers only) or non-profit legal organizations like the Southern Poverty Law Center.

Workers face high hurdles to obtaining justice through either method.

Government enforcement has proven largely ineffective. The DOL actively investigates only H-2A workplaces. In 2004 the DOL conducted 89 investigations into H-2A employers.[44] Today, there are about 6,700 businesses certified to employ H-2A workers.

There are currently about 8,900 employers certified to hire H-2B workers, but there do not appear to be any available data on how many investigations the DOL conducts of these employers. Evidence suggests it is far fewer than the number of H-2A employers investigated, particularly given the DOL's stance that it is not empowered to enforce the terms of an H-2B worker's contract. The Southern Poverty Law Center's extensive experience in the field suggests that there were not many.

Though violations of federal regulations or individual contracts are common, DOL rarely instigates enforcement actions. And when employers do violate the legal rights of workers, the DOL takes no action to stop them from importing more workers. The Government Accountability Office reported in 1997 that the DOL had never failed to approve an application to import H-2A workers because an employer had violated the legal rights of workers.[45]

Government officials have demonstrated a lack of will to address even the most serious abuses. For example, a forestry contractor was sued in North Carolina on behalf of a group of H-2B tree planters who were housed in a storage shed with only one cold water spigot to share between them. They cooked over fires and with a gas grill through the snowy North Carolina winter. The workers claimed that when they tried to leave, their supervisor locked the gates and refused to let them go unless they repaid money he had lent them to buy sleeping bags and fuel for the gas grill, and paid him rent for a portable toilet.[46]

The DOL's wage and hour division had earlier documented what it called "a woeful history of labor violations," including unsafe living and working conditions and wage abuses. Yet the forestry contractor continued to receive permission to import guestworkers. When the DOL's Employment and Training Administration refused to cancel guestworker services to this employer, North Carolina's monitor advocate, a state official who is supposed to enforce farmworker rights, filed a complaint with the DOL's inspector general. A year and a day after the filing of that complaint, 14

44 Lornett Turnbull, "New State Import: Thai Farmworkers" *The Seattle Times*, February 20, 2005. *See also* Andrew J. Elmore, *Reconciling Liberty and Sovereignty in Nonprofessional Temporary Work Visa Programs: Toward a Non-subordination Principle in U.S. Immigration Policy* (unpublished 2007, on file with authors)

45 See General Accounting Office, *H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers*, (December 1997)

46 Interview with Lori Elmer, Legal Aid of North Carolina

Guestworkers risk blacklisting and other forms of retaliation against themselves or their families if they sue to protect their rights. In one lawsuit, a labor recruiter threatened to burn down a worker's village in Guatemala if he did not drop his case.

Guatemalan men employed by this forestry company were killed on the way to work when their van crashed into a river in Maine.[47]

As a practical matter, the nature of the guestworker program makes DOL enforcement of some provisions unrealistic. Regulations, for instance, require employers to provide H-2A workers with a minimum of three-fourths of the hours specified in the contract and to pay for their transportation home. But there is currently no mechanism, such as a certification by the employer, that allows the DOL to effectively monitor whether employers comply with these requirements. After the contract period expires, the worker must leave the country and is therefore not in a good position to take action to protect his rights.

TRANSPORTATION COSTS

In addition, there are requirements that DOL refuses to enforce. In 2001, the 11th U.S. Circuit Court of Appeals, in *Arriaga v. Florida Pacific Farms*[48] found that guestworkers' payment of transportation and visa costs effectively brought their wages below the minimum allowed. The employer was thus obligated to reimburse workers those costs in the first week of work, to the extent that those expenditures effectively cut into the workers' receipt of the minimum wage. This is now settled law in the 11th Circuit, and other courts have followed with similar rulings.[49] However, even in the states within the 11th Circuit's jurisdiction — Alabama, Florida and Georgia — the DOL has refused to enforce the ruling and has failed to protect workers when they need it most.[50]

The DOL also takes the position that it cannot enforce the contractual rights of workers, and it has declined to take action against employers who confiscate passports and visas.

Because of the lack of government enforcement, it generally falls to the workers to take action to protect themselves from abuses. Unfortunately, filing lawsuits against abusive employers is not a realistic option in most cases. Even if guestworkers know their rights — and most do not — and even if private attorneys would take their cases — and most will not — guestworkers risk blacklisting and other forms of retaliation against themselves or their families if they sue to protect their rights. In one lawsuit the Southern Poverty Law Center filed, a labor recruiter threatened to burn down a worker's village in Guatemala if he did not drop his case.[51]

While H-2A workers are eligible for representation by federally funded Legal Services lawyers, these lawyers are prohibited from handling class actions lawsuits. Given workers' enormous fears of retaliation and blacklisting, any system that relies on workers asserting their own legal rights is unlikely to bring about systemic change. Having access to class action litigation would at least

47 Id.
48 305 F.3d 1228 (11th Cir. 2002)
49 *De Luna-Guerrero et al. v. North Carolina Grower's Ass'n.*, 338 F. Supp. 2d 649, 662 (E.D. N.C. 2004) (H-2A guestworkers); *Martinez-Bautista v. D&S Produce*, 447 F. Supp. 2d 954, 963-964 (E.D. Ark. 2006) (H-2A guestworkers)
50 *See, e.g. Luna-Guerrero v. North Carolina Grower's Association*, 370 F. Supp. 2d 386, 390 (E.D.N.C. 2005)
51 *Recinos-Recinos v. Express Forestry, Inc.*, 2006 U.S. Dist. LEXIS 2510 (D.La. 2006)

permit cases to be brought by one or two workers brave enough to challenge the system.

In addition, H-2A workers are specifically exempted from the major statute designed to protect agricultural workers in the United States from abuse and exploitation — the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). Adopted in 1983, it replaced the Farm Labor Contractors Registration Act of 1963, which was enacted in the wake of the Edward R. Murrow film about farmworkers, *Harvest of Shame*, aired by CBS during Thanksgiving in 1960. Among other things, the AWPA provides migrant farmworkers a legal mechanism to enforce the terms of the promises made to them and the other terms of their agreement in federal court. But the powerful protections of that law are not available to H-2A workers.

For H-2B workers, the situation is perhaps even more dire. Although they are in the U.S. legally and are financially eligible, they are ineligible for federally funded legal services because of their visa status. As a result, most H-2B workers have no access to lawyers or information about their legal rights at all. Because most do not speak English and are extremely isolated, usually both geographically and socially, it is unrealistic to expect that they would be able to take action to enforce their own legal rights. Moreover, many of these workers have few rights to enforce.

Typically, workers will make complaints only if they are so severely injured that they can no longer work, or once their work is finished. They quite rationally weigh the costs of reporting contract violations or dangerous working conditions against the potential benefits.

As a result, far too many workers are lured to the United States by false promises only to find that they have no recourse. •

Tobacco Workers

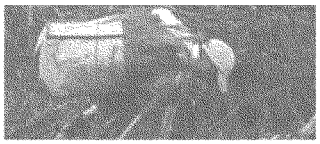
In 2005, H-2A farmworkers who had worked in Kentucky filed a complaint with the Department of Labor (DOL) about the conditions they had experienced on the job. The workers alleged that the tobacco grower illegally farmed out the workers to other growers who were not authorized to participate in the H-2A program. The workers further alleged that, after a period of heavy rains, the grower plowed under more than a third of her tobacco crop. The complaint stated that, because the grower now needed fewer laborers, she fired two of her H-2A workers on the pretext that they were doing poor work.[1]

The fired workers were lucky enough to locate a legal services organization, which assisted them in filing a detailed eight-page complaint against the grower with the DOL. The workers complained about being illegally fired and about not being paid all the wages and reimbursements owed them under the H-2A program.

When the legal services lawyer periodically called the DOL to check on the status of the investigation, he was told inconsistent things, including that the investigator had gone out to conduct an immediate investigation and that the complaint had not yet been assigned to an investigator. In fact, the DOL waited nearly six months before sending an investigator to look into the allegations. During that six-month interval, the alleged legal violations became more than two years old — and the DOL has a policy that it will not investigate claims that are more than two years old. As a result of the DOL's failure to conduct a timely investigation, the workers' theoretical rights were effectively nullified.

1 Workers' complaint and DOL response on file with the author.





PART 9

Labor Brokers

Many large employers who rely on guestworkers increasingly are attempting to avoid responsibility for unlawful practices by obtaining workers indirectly through a subcontractor. This use of labor brokers puts workers at greater risk of abuse and makes enforcement of their rights even more difficult than it is already.

A lawsuit filed by the Southern Poverty Law Center (SPLC) against the food giant Del Monte vividly illustrates this problem.

The class action lawsuit was filed in 2006 on behalf of migrant farmworkers who were systematically underpaid while working in south Georgia for Del Monte subsidiaries. The plaintiffs are Mexican guestworkers as well as domestic farmworkers who were recruited to plant and harvest vegetables at Del Monte operations.[52]

These workers were promised and were entitled to receive the Adverse Effect Wage Rate, which is established by the Department of Labor (DOL) each year to ensure that the employment of foreign workers does not drive down wages paid to U.S. workers. The plaintiffs, who are indigent farmworkers, left their homes and families and spent considerable sums of money to travel to Georgia to work for Del Monte. In their suit, the workers assert that they were consistently cheated out of the wages to which they were entitled. But despite the fact that they labored on Del Monte farms and lived in housing provided by Del Monte, the company claims none of the workers were its employees. The district court has yet to rule on the merits of the workers' wage claims.

Del Monte, in fact, accepts no responsibility for the workers because Del Monte was not the company that petitioned the government for the H-2A workers. The petitioner, rather, was a crew leader — a person with no fields, no crop, no farm, no housing and no capital.

Increasingly, the people bringing guestworkers into the United States are not the companies that end up using the labor, even though the entities applying to DOL for permission to import workers

52 *Hector Luna, et al. v. Del Monte Fresh Produce (Southeast) Inc., et al.*, U.S. District Court for the Northern District of Georgia, Atlanta Division, Case No. 1:06-cv-02000-JEC

The men had been recruited to plant pines in North Carolina, but after they arrived in the state, they were transported by van to Connecticut and forced to work nearly 80 hours a week in nursery fields. Their passports were confiscated and they were threatened with deportation and jail if they complained.

are required to prove a shortage of U.S. workers for available positions. Given that labor brokers have no actual "jobs" available, it is difficult to fathom that they are suffering from a shortage of workers. The DOL is approving these applications anyway.

In Florida, the majority of H-2A applications are now submitted through such intermediaries. This trend greatly concerns guestworker advocates because it permits the few protections provided for these workers to be vitiated in practice. Having a legal remedy against a labor contractor with no assets is no remedy at all.

Two recent lawsuits illustrate how labor brokers traffic in vulnerable foreign workers whom they hire out to a variety of different employers. These workers, who usually speak no English and have no ability to move about on their own, are completely at the mercy of these brokers for housing, food and transportation. No matter how abusive the situation, even if they are not paid and their movements are restricted, they typically have no recourse whatsoever.

GUATEMALANS HELD CAPTIVE

According to a lawsuit filed in February 2007, 12 Guatemalan guestworkers claim they were held captive by agents for Imperial Nurseries, one of the nation's largest wholesalers of plants and shrubs. The men had been recruited to plant pines in North Carolina, but after they arrived in the state, they were transported by van to Connecticut and forced to work nearly 80 hours a week in nursery fields. They were housed in a filthy apartment without beds, and instead of the $7.50 an hour they were promised, they earned what amounted to $3.75 an hour before deductions for telephone service and other costs. Their passports were confiscated, they were denied emergency medical care, and they were threatened with deportation and jail if they complained. Some of the workers escaped without their passports and soon were replaced by fresh recruits from Guatemala. Eventually, one of the workers managed to explain his situation to the congregation of a local church, which helped him find legal aid.[53]

In a statement to *The New York Times*, a lawyer representing Imperial Nurseries said the allegations "relate to the conduct of an independent farm labor contractor which was responsible for compensating its employees."[54]

In a similar case, lawyers with Legal Aid of North Carolina are representing a group of Thai workers who have filed for immigration relief as victims of trafficking. These workers also have filed a federal lawsuit against a company called Million Express Manpower Inc. They claim the company held them captive — sometimes watching over them with guns — in North Carolina and in New Orleans, where they were transported to help demolish flooded buildings after Katrina.

These cases are symptomatic of a flawed program that encourages the private trafficking of foreign workers with barely any government oversight. •

53 Nina Bernstein, "Federal Lawsuit to Accuse Nursery of Bait-and-Switch with Guatemalan Workers," *The New York Times*, Feb. 8, 2007
54 Id.




PART 10

Systematic Discrimination

Discrimination based on national origin, race, age, disability and gender is deeply entrenched in the H-2 guestworker system.

In fact, one federal appellate court has placed its stamp of approval upon such discrimination. In *Reyes-Gaona v. NCGA*,[55] the 4th U.S. Circuit Court of Appeals found that even explicit age discrimination in hiring H-2A workers was not unlawful. In that case, there was little dispute that the recruiter, Del-Al Associates, which recruits thousands of guestworkers to the United States, told Luis Reyes-Gaona, who applied in Mexico to be an H-2A worker in North Carolina that it was the policy of the North Carolina Growers Association (NCGA), for whom Del Al was recruiting, that NCGA would not accept new employees over the age of 40. The court found that because this choice had occurred outside the territory of the United States, it was not actionable under the Age Discrimination in Employment Act.

Although it is possible that other courts will reach a different conclusion on this issue, there is little doubt that such discrimination is pervasive. Indeed, the ability to choose the exact characteristics of a worker (male, age 25-40, Mexican, etc.) is one of the very factors that make guestworker programs attractive to employers.

Marcela Olvera-Morales is a Mexican woman who worked as a guestworker in 1999 and 2002. In 2002, the Equal Employment Opportunity Commission (EEOC) issued a determination finding reasonable cause to believe that she faced unlawful discrimination on the basis of gender. She alleged that a recruiter — the International Labor Management Corp., which places thousands of guestworkers in U.S. jobs — systematically placed women in H-2B jobs while placing men in H-2A jobs, which provide better pay and benefits. Statistical data showed that the likelihood the gender-based difference in the granting of visas was due to chance was less than one in 10,000. That case is pending in federal court.[56]

Similarly, clients of the Southern Poverty Law Center who worked for Decatur Hotels, a luxury hotel chain in New Orleans, in February 2007 filed a complaint with the EEOC charging systematic discrimination on the basis of national origin. In that case, the employer filed three sepa-

55 250 F.3d 861 (4th Cir. 2001). For a discussion of this case, see Ruhe C. Wadud, *Note: Allowing Employers to Discriminate in the Hiring Process Under the Age Discrimination in Employment Act: The Case of Reyes-Gaona*, 27 N.C. J. Int'l Law & Com. Reg. 335 (2001)

56 See *Olvera-Morales v. Sterling Onions*, 322 F. Supp. 211 (N.D.N.Y. 2004)



Norma and other women from Hidalgo, Mexico, took guestworker jobs harvesting tomatoes in Florida only to find they were locked up at night by their employers and not allowed to communicate with others.

rate applications with the DOL to seek workers. Each job classification in the applications was to be paid at a different wage — $6.02 per hour for Bolivians, $6.09 per hour for Dominicans and $7.79 per hour for Peruvians. The rate that workers were paid was based solely on their national origin, regardless of the kind of work they actually performed.

SEXUAL HARASSMENT

Women are particularly vulnerable to discrimination. Numerous women have reported concerns about severe sexual harassment on the job. There have been no studies that quantify this problem among guestworkers. However, in a 1993 survey of farmworker women in California, more than 90 percent reported that sexual harassment was a major problem on the job.[57]

In 1995, the EEOC met with farmworkers in Fresno, Calif., as part of an effort to develop a more vigorous enforcement program in the agricultural industry. William R. Tamayo, regional attorney for the EEOC in San Francisco, said, "We were told that hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs and/or put up with a constant barrage of grabbing and touching and propositions for sex by supervisors."[58] The farmworkers, in fact, referred to one company's field as the "fil de calzon," or "field of panties," because so many women had been raped by supervisors there.[59]

Given the acute vulnerability of guestworkers in general, one can extrapolate that women guestworkers are extraordinarily defenseless in the face of sexual harassment. Indeed, given the power imbalance between employers and their guestworkers, it is hard to imagine how a guestworker facing harassment on the job could alleviate her situation. Assuming that she, like most workers, had taken out substantial debt to obtain the job and given that she would not be permitted to work for any employer other than the offender, her options would be severely limited.

Martina*, a guestworker from Mexico, has first-hand experience with gender discrimination and sexual harassment. She came to the United States with an H-2B visa to process crabs. She knew from past work that men always process oysters and women always process crabs. And the men

* Not real name

57 Cited in *Lessons from the Fields: Female Farmworkers and the Law*, Maria Ontiveros, 55 MELR 157, 168 (2003) (study by Maria Elena Lopez Trevino, *The Needs and Problems Confronting Mexican American and Latin Women Farmworkers: A Socioeconomic and Human's Right Issue* (1995)(unpublished on file with author); Maria Elena Lopez Trevino, *A Radio Model: A Community Strategy to Address the Problems and needs of the Mexican American Women Farmworkers* (1989 MS thesis, Cal State University)

58 William R. Tamayo, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law: The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. Davis L Rev. 1075, 1080. (2000)

59 Id.

One website advertises its Mexican recruits like human commodities, touting Mexican guestworkers as "people with a strong work ethic" and "happy, agreeable people who we like a lot."

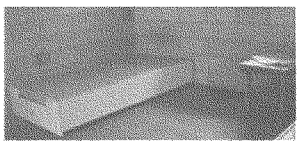
are paid higher wages than the women. One year Martina was brought in to work during oyster season. When she arrived at the airport, she was met by the plant manager who made it clear that she had been hired to be his mistress. The DOL has approved H-2B visas for this plant for years.[60]

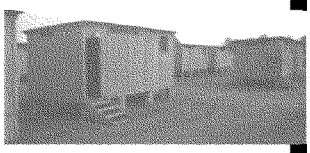
It is no coincidence that these forms of discrimination exist in guestworker programs; many of the recruiting agencies tout the great benefits of hiring workers from one country or another.

Employers can even shop for guestworkers over the Internet at websites such as www.get-a-worker.com, www.labormex.com, www.landscapeworker.com or www.mexican-workers.com. One website advertises its Mexican recruits like human commodities, touting Mexican guestworkers as "people with a strong work ethic" and "happy, agreeable people who we like a lot."

When employers are permitted to shop for workers as though they were ordering from a catalog, discrimination is the likely, perhaps inevitable result.

60 Interview with Carol Brooke, North Carolina Justice Center; settlement documents on file with author.





PART 11

Housing

When it comes to housing, guestworkers aren't treated like "guests" of the United States at all. In fact, they are frequently forced to live in squalor. Many find themselves held captive by unscrupulous employers or labor brokers who confiscate their passports, restrict their movements, extort payments from them and threaten them with arrest and deportation if they attempt to escape.

Under federal regulations, employers hiring H-2A workers must provide them with free housing. The housing must be inspected and certified in advance as complying with applicable safety and health regulations.

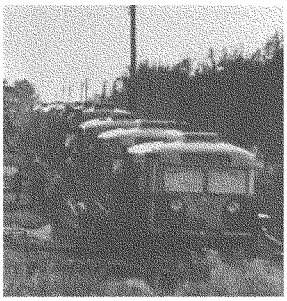
In practice, the quality of housing provided to H-2A workers varies widely and is often seriously substandard, even dangerous.

H-2B workers have even less protection. There are no general federal regulations governing the conditions of labor camps or housing for H-2B workers. State and local laws also generally do not cover housing for H-2B workers. In practice, this means that H-2B workers are often provided housing that lacks even basic necessities, such as beds and cooking facilities.

Because the Department of Labor has failed to promulgate any regulations, employers that choose to provide housing to H-2B workers (and most do, for reasons of practical necessity) are permitted to charge rent. The rent — often exorbitant — is generally deducted from the workers' pay. This often results in workers earning far less than they expected and sometimes substantially less than the minimum wage.

In addition, housing for both H-2A and H-2B workers is often located in extremely isolated rural locations, subjecting workers to other kinds of difficulties. In most instances, workers lack both vehicles and access to public transportation. As a result, they are totally dependent upon their employers for transportation to work and to places like grocery stores and banks. Some employers charge exorbitant fees for rides to the grocery store. Much of the housing provided to workers lacks telephone service, isolating workers even further.

These conditions not only create daily hardships for guestworkers, they increase employers' already formidable power over them.



Migrant workers historically have lived in squalid conditions. Here, old buses were used to house workers in the 1950s.

Hernan was one of six Mexican H-2B workers who traveled to the United States in September 2006 under a contract that called for them to work in the forestry industry in Arkansas. Upon arrival, their employer asked for their passports and visas to "make copies" but never returned them.

Instead of Arkansas, they were taken to a sweet potato farm in Louisiana and left there to work. As it turned out, they were doing H-2A work on H-2B visas and for an employer who had not applied for their visas. Under the law, H-2A workers have more rights and benefits than H-2B workers.

The Mexicans lived in an abandoned two-story house with no door on the hinges and no glass, except for a few broken shards, in the windows.

NO ELECTRICITY

"There was no electricity when we first lived there," Hernan said. "There was no heat. There were a few mattresses but no blankets. There were only a few pieces of furniture. At night we would push them against the window frames to keep the air out because there was no glass. We told the company we could not sleep well enough at night to even work. When it rained the house leaked. We had to find corners in the house to hide so we would not get wet.

"We were picking sweet potatoes and were paid by the bucket. The first week we were not paid. The second week we were paid $70. We had been working every day from 5 a.m. to 5 p.m., with 30 minutes for lunch. We had to find a ride to Wal-Mart to get bedding. We hardly had enough money."

Eventually, the original contractor returned to Louisiana because he heard the workers were complaining about low wages and wanted their passports back so they could go home. The contractor told them that anyone who didn't like the work could give him $1,600 and he would return their passports. The workers did not have the money, so they left without telling the contractor — without money and without their passports. Their wives in Mexico began receiving threats from the contractor, who has left messages at a community phone saying that their husbands must each pay him $2,000 or he will report them to immigration for deportation or incarceration. These six workers are now trying to find a way to get their legal documents returned to them.

A group of about 20 guestworkers from Thailand recently faced an equally desperate situation. According to a lawsuit filed on their behalf by Legal Aid of North Carolina in February 2007, they each paid $11,000 to obtain agricultural jobs. Recruiters told them, falsely, that they would have employment for three years earning $8.24 an hour.[61] When they arrived in August 2005, one of the men acting as a labor broker confiscated their passports, visas and return airplane tickets.

61 *Muangmol Asanok, et. al. vs. Million Express Manpower Inc. et. al.*, filed Feb. 12, 2007 in the U.S. District Court for the Eastern District of North Carolina



Guestworkers who had jobs picking tomatoes in South Carolina lived in this "house" in 2005.

Initially, they were housed in a local hotel, three men to a room. After a few weeks, the number of rooms was reduced, so that they were living five to a room. Eventually, they were moved to buildings behind the house of the labor broker, where they shared one bath. Some workers had to sleep on the floor. After a few more weeks, their employer began to reduce their food rations, leaving them hungry.

Throughout their stay, the Thai workers were told they would be arrested and deported if they escaped. On several occasions, according to the lawsuit, the labor broker and his son displayed guns to the workers.

WATCHED BY GUARDS

Less than two months after their arrival, some of the workers were taken to New Orleans, where they were put to work demolishing the interiors of hotels and restaurants ruined by the flooding from Hurricane Katrina. They lived in several storm-damaged hotels during their stay, including one that had no electricity or hot water and was filled with debris and mold. It had no potable water, so the workers were forced to use contaminated water for cooking.

During their stay in New Orleans, the workers were guarded by a man with a gun. They also were not paid for the work, so they had no money to buy food. Some were eventually taken back to North Carolina. The men who remained in New Orleans managed to escape with the help of local people who learned of their plight. The other workers also escaped after their return trip.

In 2003, a group of women from Hidalgo, Mexico, traveled to Cocoa, Fla., on H-2A visas to harvest tomatoes. They did not know they would be locked up. "El patron would put a lock on the gate where our trailers were, and he or a trusted worker were the only ones who could open it," one of the women told the *Palm Beach Post.* Another said, "After a time, they would not let us communicate with other people. Everything was locked up with a key."[62]

The Hidalgo women were lucky enough to find lawyers who could help them hold their employer accountable through a class action lawsuit (the settlement of which is confidential). But too often, workers do not have access to legal assistance and must choose between continuing to endure such deplorable abuses or attempting to escape into a foreign land without passports, money, contacts or tickets home.

These are not isolated cases. Time and again, advocates for guestworkers hear these stories. •

62 Christine Evans, "Cocoa Farm Imprisoned Women, Suit Says," *Palm Beach Post,* Dec. 7, 2003

PART 12

Recommendations

As this report shows, the H-2 guestworker program is fundamentally flawed. Because guestworkers are tied to a single employer and have little or no ability to enforce their rights, they are routinely exploited. The guestworker program should not be expanded or used as a model for immigration reform. If this program is permitted to continue at all, it should be radically altered to address the vast disparity in power between guestworkers and their employers.

I. Federal laws and regulations protecting guestworkers from abuse must be strengthened:

- Guestworkers should be able to obtain visas that do not tie them to a specific employer. The current restriction denies guestworkers the most fundamental protection of a free labor market and is at the heart of many abuses they face.

- Congress should provide a process allowing guestworkers to gain permanent residency, with their families, over time. Large-scale, long-term guestworker programs that treat workers as short-term commodities are inconsistent with our society's core values of democracy and fairness.

- Employers should be required to bear all the costs of recruiting and transporting guestworkers to this country. Federal regulations should be consistent with the 11th U.S. Circuit Court of Appeals decision in *Arriaga v. Florida Pacific Farms*. Requiring guestworkers to pay these fees encourages the over-recruitment of guestworkers and puts them in a position of debt peonage that leads to abuse.

- Entities acting as labor brokers for employers that actually use the guestworkers should not be allowed to obtain certification from the Department of Labor to bring them in. Allowing these middlemen to obtain certification shields the true employer from responsibility for the mistreatment of guestworkers.

- Congress should require the Department of Labor to promulgate labor regulations for H-2B workers that are comparable to the H-2A regulations. It is unconscionable that H-2B workers do not have even the minimal protections available to H-2A workers.

- Congress should require employers to pay at least the "adverse effect wage rate" in all guestworker programs to protect against the downward pressure on wages. Guestworker programs should not be a mechanism to drive wages down to the minimum wage.

- Congress should eliminate the barriers that prevent guestworkers from receiving workers' compensation benefits. Workers currently must navigate a bewildering state-by-state system that effectively blocks many injured workers from obtaining benefits.

- Guestworkers should be protected from discrimination on the same terms as workers hired in the United States. Permitting employers to "shop" for workers with certain characteristics outside of the United States is offensive to our system of justice and nondiscrimination.

II. Federal agency enforcement of guestworker protections must be strengthened:

- Congress should require that all employers report to the Department of Labor, at the conclusion of a guestworker's term of employment and under penalty of perjury, on their compliance with the terms of the law and the guestworker's contract. There currently is no mechanism allowing the government to ensure that employers comply with guestworker contracts.

- Employers using guestworkers should be required to post a bond that is at least sufficient in value to cover the workers' legal wages. A system should be created to permit workers to make claims against the bond. Guestworkers, who must return to their country when their visas expire, typically have no way of recovering earned wages that are not paid by employers.

- There should be a massive increase in funding for federal agency enforcement of guestworker protections. Guestworkers are the most vulnerable workers in this country, but there is scant government enforcement of their rights.

- The Department of Labor should be authorized to enforce all guestworker agreements. The DOL takes the position that it does not have legal authority to enforce H-2B guestworker contracts.

- The Department of Labor should create a streamlined process to deny guestworker applications from employers that have violated the rights of guestworkers. Employers who abuse guestworkers continue to be granted certification by the DOL to bring in new workers.

III. Congress must provide guestworkers with meaningful access to the courts:

- Congress should make all guestworkers eligible for federally funded legal services. H-2B workers are currently not eligible for legal aid services.
- Because of the unique challenges faced by guestworkers, the restriction on federally funded legal services that prohibits class action representation should be lifted.
- Congress should provide a civil cause of action and criminal penalties for employers or persons who confiscate or hold guestworker documents. This common tactic is designed to hold guestworkers hostage.
- Congress should provide a federal cause of action allowing all guestworkers to enforce their contracts.

These reforms are overdue. For too long, our country has benefited from the labor provided by guestworkers but has failed to provide a fair system that respects their human rights and upholds the most basic values of our democracy. The time has come for Congress to overhaul our shamefully abusive guestworker system. ▪

Acknowledgements

The Southern Poverty Law Center would like to thank the many people who contributed to this report, in particular the guestworkers who told their stories. Organizations that provided valuable assistance include: the Farmworker Unit of Legal Aid of North Carolina, the North Carolina Justice Center, Florida Legal Services, the Migrant Farmworker Justice Project and Southern Migrant Legal Services.

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CLOSE TO SLAVERY

Guestworker Programs in the United States

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July 7, 2008

Secretary of Labor Elaine L. Chao
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Statement in Opposition to RIN 1205-AB54, DOL Proposed Regulations Labor Certification Process and Enforcement for Temporary Employment in Occupation Other than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes

Dear Secretary Chao:

We strongly oppose the Department of Labor's proposed regulatory changes to the H-2B temporary foreign worker program. We request that the Department of Labor ("DOL") withdraw these proposed regulations. If the agency does not withdraw the proposals, they should be revised substantially and submitted for additional public comment before implementation. We also propose several changes that should be made to the current H-2B program to fulfill the law's requirements.

These comments are submitted on behalf of the following organizations that seek sensible policy and just treatment both for U.S. workers who must survive in an increasingly competitive global economy and for those workers who are brought into the United States to labor in some of the most difficult and demanding work in our economy:

Low Wage Worker Legal Network (Member organizations)
- Centro de los Derechos del Migrante, Inc.
- Equal Justice Center, Austin, Texas
- Friends of Farmworkers, Inc.
- Global Workers Justice Alliance
- North Carolina Justice Center
- Northwest Workers' Justice Project
- Southern Poverty Law Center
- Working Hands Legal Clinic
- Workers Rights Law Center of New York

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
International Brotherhood of Teamsters
United Food and Commercial Workers International Union (UFCW)
Center for Community Change
Interfaith Worker Justice
Jobs with Justice
National Council of La Raza
National Employment Project (NELP)

National Immigration Law Project (NILC)
National Lawyers Guild Labor & Employment Committee
National Lawyers Guild International Labor Justice Working Group
National Network for Immigrant and Refugee Rights
Mexican American Legal Defense and Education Fund
Alliance of Forest Workers and Harvesters
CAUSA Immigrants Rights Network (Oregon)
Centro Presente (MA)
Chicago Workers Collaborative
Comite de Apoyo a los Trabajadores Agricolas (CATA The Farmworkers Support Committee)(NJ / PA/ MD)
Labor Council for Latin American Advancement, Massachusetts Chapter
Pineros y Campesinos Unidos del Noroeste (PCUN)

These organizations are leading advocacy groups for H-2B and other workers including immigrant workers. Together, they have extensive experience fighting for the rights of H-2B and other immigrant workers in the courts, before administrative agencies, and in Congress.

I. Introduction

DOL was granted original authority to develop and enforce H-2 regulations, including non-agricultural temporary work visas, under the Immigration and Nationality Act of 1952 (INA) and implementing regulations. However, in its Notice of Proposed Rulemaking (NPRM) the DOL states that it has no enforcement authority or process to ensure that non-agricultural workers, or H-2B workers, are employed in compliance with the H-2B certification requirements. DOL states that Congress vested the Department of Homeland Security ("DHS") with enforcement authority in 2005.[1] While DHS was vested with the authority to enforce matters of immigration, DHS was not explicitly vested with the authority to enforce labor contracts. DHS and DOL serve unique enforcement functions, and DHS is not suited to be the sole enforcer of employment contracts.

DOL argues that current DOL H-2B regulations provide no mechanisms by which it can ensure that employers fulfill their obligations concerning the terms and conditions of employment once the H-2B workers are employed.[2] DOL is the governmental agency most suited to enforce H-2 temporary employment contracts in the United States and has authority to do so because: (1) DOL was granted original authority to do so under INA; (2) DOL's authority has not been expressly revoked; (3) DOL maintains authority to certify H-2 labor contracts and therefore should also have authority to enforce labor contracts; and (4) for DOL to fulfill its mandate to

[1] 8 U.S.C. 1184, Public Law 109-13, 119 Stat. 231, 318. (PL 109-13, 2005 HR 1268 refers to the Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 2005. (f) CLARIFICATION OF DISCRETION — Section 242(a)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1252(a)(2)(B)) is amended— (1) by inserting "or the Secretary of Homeland Security" after "Attorney General" each place such term appears.), *see also* Labor Certification Process and Enforcement (H-2B Workers), Notice of Proposed Rulemaking, 73 Fed. Reg. 29942, 29943 (May 22, 2008).

[2] Labor Certification Process and Enforcement (H-2B Workers), Notice of Proposed Rulemaking, 73 Fed. Reg. 29942, 29945 (May 22, 2008).

protect U.S. workers it must also protect foreign workers working temporarily in the United States or the ability to exploit such unprotected workers will encourage unscrupulous employers to prefer to hire such workers over U.S. workers and adversely affect the wages and working conditions of U.S. workers.

Additionally, aside from this authority with respect to the H-2B program, DOL has broad regulatory power to implement and enforce the Wagner-Peyser Act. Since employers must use the job service referral system established by the Wagner-Peyser Act, and since DOL has authority to regulate abusive or illegal practices in that system, this authority is available to ensure compliance with H-2B regulatory requirements.

DOL's Office of Inspector General also has investigative and enforcement authority to enforce H-2B contracts because the agency has authority under federal labor laws such as the Wagner-Peyser Act and Fair Labor Standards Act to investigate and sanction H-2B employers. The Inspector General has, in fact, identified the integrity of the foreign labor certification programs as a high priority for the agency.[3]

One aspect of the proposed regulations which we would support in revised proposed regulations is for the Secretary of Labor to designate the DOL's Employment Standards Administration (ESA) Wage and Hour Division as the primary administrative subdivision within DOL to

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[3] See, Office of Inspector General - U.S. Department of Labor, Semiannual Report to Congress, October 1, 2007–March 31, 2008, available at: http://www.oig.dol.gov/SAR-59-FINAL.pdf. The introduction to that report notes:

> "OIG investigations revealed that the foreign labor certification process continues to be compromised by unscrupulous attorneys, labor brokers, employers, and others."

The reports summary of significant concerns noted:

> "... defendants also took advantage of the devastation caused by Hurricane Katrina by fraudulently obtaining certification from the Department for nearly 250 H-2B temporary foreign workers, purportedly on behalf of four New Orleans hotels. We will continue to aggressively pursue those who seek to defraud the Department's foreign labor certification programs."

Id at p. 4.

The same OIG annual report has an article "Conspirators of Florida Labor Leasing Company Sentenced to Pay $1 Million" discussing DOL OIG joint investigation with DOS Diplomatic Security Service (DSS) and the U.S. Immigration and Customs Enforcement (ICE). *United States v. Anna Czerwien and United States v. Aleksander Berman et al.* (N.D. Florida). See also, *Id* at p. 24.

The OIG annual report makes a legislative recommendation in relationship to the H-1B program, "Provide Authority to Ensure the Integrity of the Foreign Labor Certification Process." *Id* at p. 39. That recommendation states:

> "If DOL is to have a meaningful role in the H-1B specialty occupations foreign labor certification process, it must have the statutory authority to ensure the integrity of that process, including the ability to verify the accuracy of information provided on labor condition applications. Currently, DOL is statutorily required to certify such applications unless it determines them to be "incomplete or obviously inaccurate." Our concern with the Department's limited ability to ensure the integrity of the certification process is heightened by the results of OIG analysis and investigations that show the program is susceptible to significant fraud and abuse, particularly by employers and attorneys. The OIG also recommends that ETA should seek the authority to bar employers and others who submit fraudulent applications to the foreign labor certification program."

Id at 39.

investigate violations of rights of employees (both U.S. workers and foreign H-2B workers) recruited for employment in jobs for which an employer has filed an application for H-2B workers. Although the Wage and Hour Division has been grossly underfunded and understaffed, it is the only administrative subdivision within DOL which has the experience in investigating complaints of workers and violation of the rights of workers.[4] As will be discussed further below the Wage and Hour Division should be authorized to recover any unpaid wages which are due to such workers.

As signatories to ILO's Labor Administration Convention and to the North American Agreement on Labor Cooperation (the NAFTA labor side agreement), the United States is obligated to offer appropriate adjudication and enforcement of labor laws. At present, DOL claims that DHS has enforcement authority with respect to H-2B rights and obligations. However, the DHS asserts that DOL has authority, [5] and in the end, thus nobody enforces the law, in violation of our international treaty obligations.[6]

The Secretary of Labor has ample authority to regulate and enforce standards in the H-2B program that should be used to protect the working conditions under which U.S. and H-2B workers labor. Rather than exercise its authority to regulate the serious abuses occurring in the H-2B program, DOL proposes in these rules to abandon its longstanding statutory mandate to protect the jobs and working conditions of U.S. workers. It does this in four fundamental ways: (1) It abandons any effort to certify that the conditions for admission of H-2B workers have been met, instead allowing employers to "attest" that they will follow program requirements; (2) It eliminates the role traditionally played by state workforce agencies in upholding program standards in favor of an expedited "federalized" system; (3) it lowers even the existing paltry standards contained in the current system; and (4) it fails even to consider available regulatory strategies that would truly assist in meeting the longstanding objectives of the H-2B program. For these reasons, the Department should withdraw the proposed regulations, rework them and propose regulations that protect U. S. workers, wages and working conditions.

II. The Underlying Regulatory Mandates of the H-2 Programs Have Long Been to Assure that Work is First Available to U.S. Workers and to Protect U.S. Wages and Working Conditions.

Although it had been in existence since the Immigration and Nationality Act of 1952 the H-2

[4] Limited experience with the DOL Office of Inspector General to date in relationship to the H-2B program does not indicate that the OIG has effective procedures for working with worker complainants or their representatives.

[5] FOIA response of T. Diane Cejka, Director, United States Citizenship and Immigration Services, Department of Homeland Security to Ivy Hernandez, Correspondence ID # NRC2008024085 (April 21, 2008). Filed by D. Michael Dale on behalf of Low Wage Worker Legal Network, July 7, 2008 submission (Regulations.gov comment tracking number 8065b65e), "Responses to Freedom of Information Act Requests," Exhibit 5. See text discussion accompanying footnote 54 below.

[6] It should also be noted that the Department of State, Consular offices actually issue visas for H-2B workers and should be involved in effective interagency agreements for enforcement of the rights of H-2B workers. In particular, violations of local laws in the place of recruitment of prospective H-2B workers and imposition of recruitment fees on H-2B workers are issues in which DOL should establish inter-agency protocols for working with Consular offices.

program was revised in 1964 to provide for temporary workers after the "Bracero" program ended.[7] From this inception, the underlying policy goals of the program have been: (1) to preserve work opportunities in the United States for willing, available, qualified U.S. workers; and (2) protecting U.S. wages and working conditions from depression due to the use of foreign workers under substandard conditions.[8]

III. The Department of Labor has Ample Authority to Meet the Goals of the INA.

A. The Secretary Exercised Broad Regulatory and Enforcement Authority Under the H-2 Program which has not been Reallocated or Revoked.

Since at least 1964, the Secretary of Labor has enjoyed, and has exercised, sweeping authority to adopt regulations concerning the terms under which H-2 workers could be employed, and governing enforcement of those terms. The Secretary of Labor established a broad regulatory regime for the H-2 program, with major changes in 1966,[9] 1968[10] and 1978.[11] Each reform cited two sources of authority: 8 U.S.C. § 1184(c) and 8 C.F.R. Part 214.2(h).

Both the current H-2A and H-2B classifications are temporary foreign worker programs that grew out of the original H-2 program. The Immigration and Nationality Act of 1952 (INA) established the H-2 program, which provided mechanisms for the use of temporary foreign labor but did not distinguish between agricultural and non-agricultural work.[12] More than 30 years later, the Immigration Reform and Control Act of 1986[13] (IRCA) amended the INA to establish separate visa classifications for temporary H-2A agricultural workers and H-2B non-agricultural workers.[14] While IRCA split the H-2 program into H-2A and H-2B, the original purpose of the H-2 program remained, i.e. to protect U.S. workers and prevent the depression of U.S. working

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[7] Aliens Performing Temporary Service, Criteria for Clearance Order, Notice of Proposed Rule Making, 29 Fed. Reg. 15191 (Nov. 10, 1964); Part 602— Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964).

[8] Part 602—Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964); 20 C.F.R. § 655.0 (2008); 8 U.S.C. 1188(a)(H-2A program); 8 C.F.R. Part 214.2(h)(6)(2008)(H-2B program); 8 U.S.C. §§ 1101(a)(15)(h)(ii)(a) and (b) (2008).

[9] Part 602—Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964); 20 C.F.R. § 610.10 (1966).

[10] 20 C.F.R. Part 621 (1968); Part 621—Certification of Temporary Foreign Labor For Industries Other Than Agriculture or Logging, Final Rules, 33 Fed. Reg. 7570 (May 22, 1968).

[11] Temporary Employment of Alien Agricultural and Logging Workers in the United States, Final Rules, 43 Fed. Reg. 10306 (Mar. 10, 1978).

[12] INA, Pub.L. 99-603, Title III, 100 Stat. 3359, November 6, 1986, *see also* Labor Certification Process and Enforcement (H-2A Workers), Notice of Proposed Rulemaking, 73 Fed. Reg. 8230, 8235 (February 13, 2008).

[13] Immigration Reform and Control Act of 1986, Sec. 301 (codified at 8 U.S.C. 1101(a)(15)(h)(ii)(a) and (b)).

[14] INA Section 101(a)(15)(H)(ii)(A). Pub.L. 99-603, Title III, 100 Stat. 3359, November 6, 1986.

conditions caused by employing foreign workers.[15]

ALJ cases show that DOL asserted authority under the INA pre-IRCA and had inherent authority to enforce contractual obligations under the H-2 regulations. In *Foster v. Wilfred Theriault Woods Contractor*,[16] the agency found that Foster was discharged in violation of the terms of his contract. Foster was hired as a "logger all-around." While pre-IRCA Foster was classified as an H-2 worker, under IRCA, Foster would be an H-2B non-agricultural worker.

Nor did the division of the program into H-2A and H-2B in IRCA in 1986 change the Secretary's underlying authority under 8 U.S.C. § 1184(c) and 8 C.F.R. Part 214.2(h) to regulate employment of non-agricultural temporary foreign workers, now separately classified as H-2B workers. Through IRCA, Congress codified the then-existing substantive H-2 agricultural regulations that the Secretary of Labor had promulgated in the 1960s and 1970s, as well as the designation in 8 C.F.R. 214.2(h) of the Department of Labor as the key agency to be consulted with respect to agricultural workers.[17] However, as concerns non-agricultural workers, no language in IRCA diminishes the Secretary of Labor's prior authority. The structure of the H-2B program still envisioned certification of applications by the Secretary. To do that equitably and effectively, the Department would necessarily have to develop and enforce standards as to what it meant to certify an application.

DOL cites 8 U.S.C. § 1184(c)(1), as amended in IRCA, [18] in part, to explain its professed lack of authority to enforce H-2B contractual agreements between employers and employees. [19] While that section codifies DOL authority with respect to regulating the temporary agricultural worker program and no parallel enforcement authority is expressly delegated under 8 U.S.C. § 1184(c)(1) with respect to non-agricultural workers, nonetheless, the Secretary's long-standing inherent authority discussed above was not expressly revoked, either. Nor may one infer that

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[15] Staff of House Comm. on Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 3 (Comm. Print 1991).

[16] *Foster v. Wilfred Theriault Woods Contractor*, 1982-TAE-7 (ALJ May 16 1983).

[17] *See* 8 U.S.C. §§ 1184(c)(1), 1188 *and* 20 C.F.R. § 655 Subpart B.

[18] 8 U.S.C.A. § 1184(c)(1)(2006).

> (c) Petition of importing employer; involvement of Departments of Labor and Agriculture
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> (1) The question of importing any alien as a nonimmigrant under section subparagraph (H), (L), (O), or (P)(i) of section 1101(a)(15) of this title (excluding nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition, shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant. For purposes of this subsection with respect to nonimmigrants described in section 1101(a)(15)(H)(ii)(a) of this title, the term "appropriate agencies of Government" means the Department of Labor and includes the Department of Agriculture. The provisions of section 1188 of this title shall apply to the question of importing any alien as a nonimmigrant under section 1101(a)(15)(H)(ii)(a) of this title.

[19] Labor Certification Process and Enforcement (H-2B Workers), Notice of Proposed Rulemaking, 73 Fed. Reg. 29942 (May 22, 2008)

this authority was revoked by implication. The purpose of incorporating the agricultural regulatory protections into the statute was greater protection of agricultural workers, not less protection of U.S. workers generally. After all, the underlying purpose of IRCA was to protect U.S. workers' preferential access to jobs.[20]

The Homeland Security Act of 2002, 6 U.S.C. §§101, *et seq.* (Nov. 25, 2002) transferred the prior authority of the Attorney General and the INS for administering certain immigration functions to the new Department of Homeland Security. 6 U.S.C. §§ 202, 236. However, the savings provisions of that Act make clear that the underpinnings of the authority and duties of the Secretary of Labor to protect U.S. workers and their wages and working conditions, under 8 U.S.C. § 1184(c) and 8 C.F.R. Part 214.2(h), were unaffected by this transfer of authority. 6 U.S.C. § 552.

Nor did the Save Our Small and Seasonal Business Act of 2005[21] change the Secretary of Labor's authority to regulate or enforce. DOL also cites the Save Our Small and Seasonal Businesses Act of 2005 as a basis for its reluctance to assert any enforcement authority with respect to the H-2B program.[22] That Act gave the Secretary of Homeland Security certain administrative remedies, including penalties and debarment, if the Secretary of Homeland Security finds a substantial failure to meet any of the conditions of the petition to admit H-2B workers. While the Act does enable DHS to sanction employers for failure to comply with the terms in their H-2B petitions, the Act's narrow delegation to DHS of two types of enforcement methods—fines and debarment—does not modify DOL's pre-existing authority to protect U.S. and H-2B workers. Further, fines and debarment do not provide any direct relief to the aggrieved H-2B or U.S. worker. Because Congress did not delegate contractual remedies to DHS, then it intended that DOL continue to exercise them.[23] DHS's statutory duty to consult with appropriate agencies, including DOL, existed in the INA before and after the 2005 changes at 8 U.S.C. §1184(c). The Secretary of Labor's particular role in advising Homeland Security about the U.S. labor market was spelled out in 8 C.F.R. Part 214.2(h), before and after the 2005 Act.[24] No specific language diminished its authority to regulate employment under the H-2B program.

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[20] *See, e.g.* Immigration Reform and Control Act of 1986, Sec. 101 (criminalizing—for the first time—the hiring of undocumented workers).

[21] Save Our Small and Seasonal Business Act of 2005, P.L. 109-13, 119 Stat. 318.

[22] Labor Certification Process and Enforcement (H-2B Workers), Notice of Proposed Rulemaking, 73 Fed. Reg. 29942 (May 22, 2008) (citing Save Our Small... Sec.404 [codified at 8 U.S.C. § 1184(c)(14)]).

[23] District of Columbia Financial Responsibility and Management Authority v. Concerned Senior Citizens of the Roosevelt Tenant Ass 'n, 129 F. Supp. 2d 13 (D.D.C. 2000) (Lamberth, J,) (citing cannon expression exclusion rule).

[24] Both 8 C.F.R. 214.2(h)(ii)(D)(2004) and (2008), among other provisions, recognizes the DOL's role in the certification process.

> (D) An H-2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, if unemployed persons capable of performing such service or labor cannot be found in this country. . . This classification requires a temporary labor certification issued by the Secretary of Labor or the Governor of Guam, or a notice from one of these individuals that such a certification cannot be made, prior to the filing of a petition with the Service.

B. DOL's Power to Regulate and Enforce is Inherent in its Role in the Certification Process.

Because of DOL's special role requiring that it certify whether unemployed persons capable of performing the work can be found in the United States,[25] DOL must have policies with respect to when, and under what conditions, it will issue such a certification. Inherent in that duty is the authority to issue regulations defining those circumstances under which it will certify—or not certify. Inherently, it has the power, and indeed, the duty, to determine when, and under what circumstances, certification should be denied, or conditioned upon an applicant's making good upon past representations. DOL maintains authority to certify and should therefore enforce the contractual obligations that arise out of the certification process.

Under the pre-IRCA H-2 program, certification authority was delegated to the Secretary of Labor from the Commissioner of Immigration and Naturalization, who had been delegated authority from the Attorney General. In other words, the Attorney General was initially charged with determining when unemployed persons capable of performing such labor could be found in the country.[26] The Attorney General delegated the responsibility to the Commissioner of Immigration and Naturalization,[27] who, in turn, delegated the determination to the Secretary of Labor.[28] Pursuant to INS regulations, DOL promulgated regulations for the certification of temporary employment in the United States.[29]

As has been demonstrated above, although the H-2B program has been separated from the agricultural worker program, and although DHS has taken the place of the Attorney General and the Commissioner of Immigration and Naturalization, nothing has changed in the structure of the program, or the delegated authority. Because DOL must certify that (1) there are not enough able and qualified U.S. workers available for the position sought to be filled and (2) that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers, it must be able to decide, in a principled way, what that means, and when it will deny certification. As DOL maintains authority to certify employers, it follows that DOL should likewise enforce the contractual obligations created by the certification. DOL is the governmental agency most capable of ensuring that employers comply with the very agreements that DOL has certified. Without authority to enforce, the DOL's power to certify employers is, in effect, only a gesture and has no teeth.

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[25] *Id.*

[26] 8 U.S.C. §1184(c)

[27] 8 C.F.R. 2.1.

[28] 8 C.F.R. § 214.2(h)(3), *see also Foster v. Wilfred Theriault Woods Contractor*, (ALJ May 16 1983).

[29] *See, e.g.* Aliens Performing Temporary Service, Criteria for Clearance Order, Notice of Proposed Rule Making, 29 Fed. Reg. 15191 (Nov. 10, 1964); Part 602— Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964); Part 621—Certification of Temporary Foreign Labor For Industries Other Than Agriculture or Logging, Final Rules, 33 Fed. Reg. 7570 (May 22, 1968).

C. DOL'S Mandate to Protect U.S. Workers Depends on Ample Protections for Temporary Foreign Workers, as Well.

In order to comply with the original purpose of IRCA, which was to address wage depression and job displacement caused by foreign workers,[30] DOL must enforce the contractual obligations of employers of temporary foreign workers.[31] A staff report prepared for the Committee on Education and Labor of the House of Representatives summarized the objectives of INA as follows: "In creating the H-2 program, Congress attempted to address the problems that DOL had documented pertaining to wage depression and job displacement caused by foreign agricultural workers. An explicit intent of the law, therefore, was to reserve American jobs for American workers. Thus the H-2 program allowed the admission of nonimmigrant workers into the U.S. to perform temporary services only if willing, able and qualified U.S. workers could not be found. Further to offset the adverse impact of foreign labor on the domestic agricultural labor market, the regulations required H-2 agricultural employers to pay an enhanced wage rate, known as the "adverse effect wage rate."[32]

D. DOL has Recognized the Inherent Authority Left it by Congress in Other Contexts, but Would Selectively Reject Parts of Its Mandate to Administer the Certification Process.

DOL argues that the narrow delegation of enforcement authority to DHS in 8 U.S.C. § 1184(c)(14) totally precludes DOL from any enforcement action.[33] DOL has selectively rejected part of its statutory mandate when it chooses not to consider needed H-2B protections or enforce H-2B contracts while continuing to certify employers' applications that give rise to the contracts. This selective rejection of authority is irrational in light of the INA's underlying goal to protect U.S. workers and DOL's purpose to enforce labor laws.[34] Further, it is inconsistent with the position DOL has taken in other contexts.

After suffering unlawful rejection by H-2B employers, twenty U.S. workers sued DOL regarding

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[30] Part 602—Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964); 20 C.F.R. § 655.0 (2008); 8 U.S.C. 1188(a)(H-2A program); 8 C.F.R. Part 214.2(h)(6)(2008)(H-2B program); 8 U.S.C. §§ 1101(a)(15)(h)(ii)(a) and (b) (2008).

[31] Office of Inspector General. Top Management Issues at the U.S. Department of Labor, January 2003.

[32] Part 602—Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964); 20 C.F.R. § 655.0 (2008); 8 U.S.C. 1188(a)(H-2A program); 8 C.F.R. Part 214.2(h)(6)(2008)(H-2B program); 8 U.S.C. §§ 1101(a)(15)(h)(ii)(a) and (b) (2008).

[33] Labor Certification Process and Enforcement (H-2B Workers), Notice of Proposed Rulemaking, 73 Fed. Reg. 29942 (May 22, 2008).

[34] Part 602 — Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964); 20 C.F.R. § 655.0 (2008); 8 U.S.C. 1188(a)(H-2A program); 8 C.F.R. Part 214.2(h)(6)(2008)(H-2B program); 8 U.S.C. §§ 1101(a)(15)(h)(ii)(a) and (b) (2008). *see also* Office of Inspector General. Top Management Issues at the U.S. Department of Labor, January 2003.

the agency's lax administration of the H-2B program.[35] In the ongoing litigation, DOL contends it enjoys broad discretion to administer the H-2B program because of Congressional silence in IRCA, in juxtaposition to the detailed statutory provisions for the H-2A program.[36] DOL acknowledges it has prescribed fewer H-2B benefits and protections than the H-2A program, but maintains that the agency has complete power to do so because of this Congressional silence.[37] Based on this reasoning, DOL could prescribe more benefits and protections, and also enforce them.

In addition, DOL made the following argument in its motion to dismiss the U.S. workers' lawsuit:

> Many courts have given considerable deference to DOL on questions arising under the temporary labor certification program. Due to the complex nature of the statutory and regulatory scheme, such considerable weight should be given to the expertise of DOL. *See Florida Sugar Cane League, Inc. v. Usery*, 531 F.2d 299, 303-304 (5th Cir. 1976) ("the Secretary might have utilized any of a number of reasonable formulas...."); *Florida Fruit & Vegetable Association v. Donovan*, 583 F. Supp. 268, 272 (S.D. Fla. 1984) (deference accorded in "setting of rates"), *aff'd sub nom, Florida Fruit & Vegetable Association v. Brock*, 771 F.2d 1455 (11th Cir. 1985; *Shoreham Cooperative Apple Producers Association, Inc. v. Donovan*, 764 F.2d 135, 141 (2d Cir. 1985)("the agency enjoys considerable discretion in ensuring that importation of H-2 workers does not adversely affect domestic workers' jobs."); *Virginia Agricultural Growers' Association, Inc. v. Donovan*, 74 F.2d 89 (4th Cir. 1985)(deferring to DOL's determination of Adverse Effect Wage Rate); *Rowland v. Marshall*, 650 F.2d 28 (4th Cir. 1981) (*per curiam*)(same); *Williams v. Usery*, 531 F.2d 305, 306 (5th Cir. 1976)(same).[38]

All of the cases that DOL cites predate IRCA, and thus apply to DOL's authority to regulate the H-2 program—including non-agricultural temporary workers. As demonstrated above, Congress did not revoke this authority when it created the H-2B program.

DOL selectively interprets its statutory mandate—including Congressional silence in IRCA and the narrow delegation of enforcement authority to DHS in the Save Our Small and Seasonal Business Act—to reach an irrational result that fails to protect U.S. workers. Thus, according to the agency, DOL has total discretion to prescribe fewer H-2B protections but zero discretion to enforce them. This is arbitrary and capricious.

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[35] *Riojas, et al. v. Chao, et al.*, No. 07-CV-058, Pls.' Compl. (W.D.Tex. filed Oct. 9, 2007).

[36] *Riojas, et al. v. Chao, et al.*, No. 07-CV-058, Def.'s Mot. To Dismiss at 7, (W.D.Tex. filed Feb. 25, 2008).

[37] *Riojas, et al. v. Chao, et al.*, No. 07-CV-058, Def.'s Mot. To Dismiss at 7, 9, 10 n.4 (W.D.Tex. filed Feb. 25, 2008).

[38] *Riojas, et al. v. Chao, et al.*, No. 07-CV-058, Def.'s Mot. To Dismiss at 10 n.4 (W.D.Tex. filed Feb. 25, 2008).

E. DOL's Office of Inspector General has Investigative and Enforcement Authority over the H-2B Program.

DOL's Inspector General is authorized "to conduct and supervise audits and investigations relating to programs and operations of the... Department of Labor."[39] DOL's OIG has authority over all "DOL programs" including foreign labor certifications.[40] The Inspector General Act of 1978 states "the Inspector General should not be prevented or prohibited from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation."[41] In a 2003 report, DOL's Office of Inspector General (OIG) listed "Integrity of Foreign Labor Certification Programs" among the top ten challenges facing DOL. The report includes fixing the H-2B program as a top governmental priority and asserts that DOL must enforce certifications that it grants instead of simply giving employers a "rubber stamp" to abuse certifications. DOL should acknowledge OIG's authority to enforce and to initiate, carry out, and complete audits and investigations.[42]

F. DOL Has Authority to Enforce H-2B Contracts because the Agency has Authority under the Wagner-Peyser Act to Investigate and Sanction H-2B Employers.

DOL has broad authority under the Wagner-Peyser Act to regulate and police the job service system. 29 U.S.C. § 49; 20 C.F.R. § 658; *NAACP, Western Region v. Brennan*, 360 F. Supp. 1006, 1009 (D.D.C. 1973). DOL has the authority to investigate complaints against employers and to discontinue job referral services, or delegate this power to the state workforce agencies. 20 C.F.R. §§ 658.501, 658.503, 658.420, and 658.602. Thus, DOL can bar employers from the job service system and refuse to circulate job orders.

DOL requires H-2B employers to circulate local job orders for ten days in order to receive labor certification. TEGL 21-06 (IV)(C). DOL has authority to bar an H-2B employer who has not complied with his representations to the department from the job system. Unable to post a job order, such an employer could not comply with the conditions for obtaining a labor certification, and DOL would deny labor certification.

If DOL can deny an employer the ability to obtain job referral services, and hence, labor certification, surely it could also condition access to the Wagner-Peyser job service and labor certification on compliance with the terms of past representations the employer has made to the department about the terms of employment of workers in job opportunities

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[39] Inspector General Act of 1978. Pub. L. 95-452, § 1, Oct. 12, 1978, 92 Stat. 1101, *as amended by* 1988--Pub. L. 100-504.

[40] 20 CFR Ch. V (4--1--07 Edition)

[41] Inspector General Act of 1978. Pub. L. 95-452, § 1, Oct. 12, 1978, 92 Stat. 1101, *as amended by* 1988--Pub. L. 100-504.

[42] As noted above, we would support the Secretary of Labor designating the Employment Standards Administration (ESA) Wage and Hour Division as the primary entity within DOL with responsibility for investigating worker complaints about violations of workers rights under the H-2B system.

for which the employer sought H-2B workers.

G. As a Signatory to the ILO'S Labor Administration Convention and the North American Agreement on Labor Cooperation (the NAFTA Labor Side Agreement), the United States is Obligated to Offer Appropriate Adjudication and Enforcement of Labor Laws.

The United States has ratified the ILO's Labor Administration Convention and North American Agreement on Labor Cooperation (NAALC) language obligating the United States to enforce its labor laws. Article 4 of NAALC is meant to ensure H-2B workers have appropriate access to enforcement of labor laws.[43] ILO's Labor Administration Convention ensures that H-2B workers have access to the most competent bodies within the system of labor administration, which in the United States is DOL, in order to implement labor laws and regulations.[44] DOL is the agency most directly charged with administering Federal labor laws.[45] Because of its charge and experience, DOL is the most competent agency to administer and enforce labor laws under the language of both the ILO's Labor Administration Convention and NAFTA.

1. DHS and DOL Serve Unique Enforcement Functions, and DHS is not Suited to be the Sole Enforcer of Employment Contracts.

The DHS' narrow charge to enforce immigration, and not employment, laws is expressed in The Powers and Duties of the Secretary, the Under Secretary, and the Attorney General Statute. The Secretary of Homeland Security is charged with enforcement of all laws relating to the immigration and naturalization of aliens, and has no mandate to enforce employer-employee contractual obligations.[46] In fact, DOL maintains authority to enforce employer-employee contractual obligations under H-2A regulations, despite the above Act. The protections for U.S. workers under H-2 were meant to apply to both H-2A and H-2B. DOL is clearly authorized to impose sanctions and seek appropriate injunctive relief and specific performance of contractual obligations as may be necessary to assure employer compliance with terms and conditions of H-2A employment under this section.[47]

DOL's Wage and Hour Division is dedicated to the enforcement of labor laws, including the enforcement of H-2A contracts.[48] Consequently, DOL has extensive experience and expertise

[43] NAALC, Art. 4, § 1

[44] C150 Labor Administration Convention

[45] See: www.dol.gov/opa/aboutdol/mission.htm.

[46] The Secretary of Homeland Security is charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service. 8 U.S.C. § 1103(a)(6).

[47] 8 U.S.C. § 1188.

[48] 8 U.S.C. § 1188 Admission of temporary H-2A workers: (2) The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and

enforcing labor laws and contracts. DHS has no equivalent subdivision or expertise. Although the statute could clearly delegate enforcement authority to DOL as it does for the H-2A program, the fact that the statute is silent is not dispositive.

When the Department of Homeland Security (DHS) replaced INS in 2002, DHS was charged with carrying out the immigration enforcement functions vested by statute to the Commissioner of Immigration and Naturalization and establishing national immigration enforcement policies and priorities.[49] According to the Department of Labor, the Secretary of Homeland Security is charged with the administration and enforcement of all laws relating to the immigration and naturalization of aliens, but is authorized to confer its powers upon DOL.[50] Greater, not less, enforcement of these requirements is appropriate given the abuses demonstrated in recent H-2B applications.[51] This is more likely to happen if the agency most appropriate to enforce employment law exercises that authority.

2. Currently, No Agency in the United States Accepts Any Responsibility for Enforcing Compliance with H-2B Standards, in Violation of the Binding International Obligations of the United States.

Once an employer has been certified as an H-2B employer, there is no federal agency that investigates whether the employer is in fact complying with the terms of the H-2B program, including the right to receive the prevailing wage, or respond to complaints regarding an employer's lack of compliance. The U.S. Department of Labor does not do so.[52] Nor does the

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specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section; 29 C.F.R. Part 501 (2007). The president delegated power to the concerning the H-2A conditions set out in the 8 U.S.C. § 1188 statute: Executive Order 12789 Delegation of Reporting Functions Under the Immigration Reform and Control Act of 1986, February 10, 1992. *see also* Staff of House Comm. on Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 3 (Comm. Print 1991).

[49] Homeland Security Act of 2002, 6 U.S.C. §101 (Nov. 25, 2002).

[50] 8 U.S.C. § 1103(a)(6).

[51] *See, e.g. Riojas, et al. v. Chao, et al.*, No. 07-CV-058 (W.D.Tex. filed Oct. 9, 2007)(involving fraudulent visa applications that misclassified agricultural work as nonagricultural to qualify for H-2B visas. Despite DOL Wage & Hour inspections revealing the violations, DOL took no enforcement action and continued to grant subsequent labor certifications for two years); *David, et al v. Signal Int'l LLC, et al.*, No. 08-1220 (E.D.La. filed Mar. 7, 2008)(involving human trafficking claims by H-2B workers); *Castellano-Contreras, et al. v. Decatur Hotels*, No. 06-4340 (E.D.La. filed Aug. 16, 2006)(involving H-2B workers deprived of wages, and approved to work in New Orleans hotel that housed unemployed victims of Hurricane Katrina); *Chellen, et al. v. John Pickle Co., Inc.*, 344 F. Supp. 2d 1278 (N.D.Okla. 2004)(involving misclassified Indian guestworkers treated like indentured servants in poor conditions); L.M. Sixel, Congressman, Union question effort for 6,000 unskilled [H-2B] workers, *Houston Chronicle*, Dec. 1, 2007 (detailing fraudulent applications for non-existent companies). Such abuses have led experts to conclude that the H-2 programs, as currently administered by DOL, encourages a form of modern-day slavery. Mary Bauer, Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* 1-2 (2007), *available at* http://www.splcenter.org/pdf/static/SPLCguestworker.pdf.

[52] U.S. Department of Labor, Employment Standards Administration, Wage & Hour Division, Field Assistance Bulletin No. 2007-1: Enforcement Provisions Applicable to H-2B Workers (May 2, 2007) (stating that DOL will take the prevailing wage into account for purposes of calculating overtime and compliance with the Migrant and Seasonal Agricultural Worker Protection Act, but not for purposes of considering whether an employer is complying with its obligations under the H-2B program).

Department of Homeland Security. This is evident from the agencies' responses to Freedom of Information Act requests filed in 2008 for records of complaints filed, investigations conducted, or penalties imposed from January 2003 to date regarding employers' noncompliance with the terms of the H-2B program: the Department of Labor referred the requestors to the Department of Homeland Security ("I regret to inform you that in fact this agency does not have jurisdiction over the H2B visa program under the Immigration Reform and Control Act of 1986. Your request should have been directed to Department of Homeland Security. You may submit your request to the Department of Homeland Security . . .")[53] and the Department of Homeland Security referred petitioners to the Department of Labor ("We recommend that you redirect your request to the following government agency: Department of Labor, Office of the Solicitor . . . If you should have additional questions on the above subject, please direct your inquiries to the Department of Labor.").[54]

Because these regulations begin from an anemic view of the power at the disposal of the Secretary, they are deeply and fundamentally flawed. The Secretary should withdraw these regulatory proposals, consider means at its disposal to meet its obligations to protect workers in the United States and U.S. working conditions, and propose a more robust regulatory regime to remedy the severe problems that are occurring in this program. At a bare minimum, if the Department remains unconvinced of its broad regulatory authority, nonetheless, any regulations are premature until it obtains a clear delegation of its authority to regulate and enforce program requirements.

IV. Changing from a Certification Program to an Attestation Program is Inconsistent with the Secretary's Duty to Assure that there are No U.S. Workers Available and that the Work is Being Offered at Wages and Working Conditions that Will Not Depress The Wages and Working Conditions of U.S. Workers.

The proposed regulation justifies converting the current system, under which a prospective employer must demonstrate that the basic prerequisites of the program will be met – that the job opportunity is temporary, no qualified U.S. workers are available at the time and date of need, and the wages and conditions offered will not undermine prevailing conditions – with a system in which the employer simply attests that it will be so.

DOL's comments on the proposed regulations demonstrates that DOL is well aware that submissions in opposition to the 2005 regulatory changes strongly opposed the switch to an attestation based system.[55]

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[53] FOIA response of Connie Klipsch, Regional Administrator, Employment Standards Administration, Atlanta Regional Office, USDOL to Ivy Hernandez, Correspondence ID # 519146 (January 9, 2008). Filed by D. Michael Dale on behalf of Low Wage Worker Legal Network, July 7, 2008 submission (Regulations.gov comment tracking number 8065b65e),"Responses to Freedom of Information Act Requests," Exhibit 5.

[54] FOIA response of T. Diane Cejka, Director, United States Citizenship and Immigration Services, Department of Homeland Security to Ivy Hernandez, Correspondence ID # NRC2008024085 (April 21, 2008). Filed by D. Michael Dale on behalf of Low Wage Worker Legal Network, July 7, 2008 submission (Regulations.gov comment tracking number 8065b65e), "Responses to Freedom of Information Act Requests," Exhibit 5.

[55] The Federal Register notice for this proposed regulation noted:

B. Earlier Efforts to Reform the H-2B Regulatory Process

The justification offered for this change is to speed up the processing of applications, but this will come at significant cost and without real benefit. Under the current system a very

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On January 27, 2005, DHS and the Department issued companion NPRMs to significantly alter H-2B procedures. 70 FR 3984, Jan. 27, 2005, 70 FR 3993, Jan. 27, 2005. As proposed, combined changes to both sets of regulations would have eliminated in whole the Department's adjudicatory role, ending the current labor certification process for most H-2B occupations and permitting employers to submit labor-related attestations directly to USCIS as part of a revised Supplement accompanying the H-2B petition. The Department's proposed rule would have authorized the Department to conduct random or selected audits of labor attestations approved by USCIS and to recommend debarment of employers from participation in the H-2B Program upon findings of misrepresentation or violations of those attestations. The Department would have established a new audit and debarment process at the Department, and USCIS would have established its own procedures to debar employers based on independent information. DHS regulations, as proposed in 2005, also would have required filing directly by employers, disallowing the filing of H-2B petitions by agents. Id.

The two agencies received numerous comments on the joint NPRMs. *Most commenters opposed the proposals to move the program to a USCIS-based attestation system and to eliminate the Department's role in reviewing the need of employers and the recruitment of U.S. workers except in the context of a post-adjudication audit. These concerns focused in part on the loss of the Department's experience in* ***adjudicating issues of temporary need*** *and the potential adverse impact on U.S. workers.* Based on the significant concerns posed in these comments, and after further deliberation within each agency, the Department and DHS have not pursued their original proposal to streamline the program in the manner suggested by the two companion NPRMs. Consequently, that NPRM published by the Department on January 27, 2005 (RIN 1205-AB36) was withdrawn in the Department of Labor Fall 2007 Regulatory Agenda. See http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=221117.

A review of regulations.gov record of comments submitted on the 2005 proposed regulations does indeed confirm that there were extensive comments submitted opposing the proposed changes. The record for DHS-2004-0033 reflects the filing of 124 comments in 2004. The record for DOL RIN 1205–AB36 (2004) reflects an additional 10 documents. See, for example, the comments submitted in 2004 by:

1. The AFL-CIO, Farmworker Justice Fund, National Employment Law Project, Southern Poverty Law Center, Interfaith Worker Justice, Rochester Labor-Religion Coalition (Rochester, NY), East Tennessee Interfaith Worker Justice (Knoxville, TN), Diocesan Office of Justice, Peace and Integrity of Creation (Knoxville, TN), Faith Community Church (North Carolina), Capitol District Labor Religion Coalition (Albany, NY), Equal Justice Center (Austin, TX), Northwest Justice Project (Portland, OR), Central Texas Immigrant Worker Rights Center (Austin, TX), Mississippi Poultry Workers' Center (Morton, MS), and Cross Border Network for Justice and Solidarity (Kansas City, MO). [Document ID: USCIS-2004-0011-0121]
2. The United Food and Commercial Workers. [Document ID: USCIS-2004-0011-0117]

Remarkably despite the Federal Register acknowledgment that the 2005 comments *"focused in part on the loss of the Department's experience in adjudicating issues of temporary need and the potential adverse impact on U.S. workers"* the proposed regulation provides no adequate explanation of how this problem will be avoided with the proposed shift to employer self-attestation.

DOL's regulatory proposal further fails to acknowledge that Congress by appropriation rider had barred it and the Department of Homeland Security from implementing the proposed 2005 regulations changes. See:

CONSOLIDATED APPROPRIATIONS ACT, 2008, PUBLIC LAW 110–161—DEC. 26, 2007 121 STAT. 2083, at SEC. 559. None of the funds made available in this Act may be used by the Secretary of Homeland Security or any delegate of the Secretary to issue any rule or regulation which implements the Notice of Proposed Rulemaking related to Petitions for Aliens To Perform Temporary Nonagricultural Services or Labor (H–2B) set out beginning on 70 Fed. Reg. 3984 (January 27, 2005).

significant number of applications for H-2B certifications of applications are being rejected as inadequate in some way. In FY07 certification was denied for 105,532 positions (29.3%) for which H-2B certification was sought.[56] Presumably, under an attestation system, those employers who are being rejected now will "attest" that they are compliant with program requirements, when they, in fact, are not.

Although the amount of time for preparation of these comments makes it difficult to detail the multiple examples[57] where this has occurred, it is the experience of advocates for workers that the existing ETA-750 certifications[58] are often not complied with.[59] Continuing the existing

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[56] See, Friends of Farmworkers, Inc., July 1, 2008 submission (Regulations.gov comment tracking number 8065032c), "Data Relevant to Public Comments on Proposed Regulations" at pages 1-5 and Attachments A and B. That submission which is incorporated herein notes:

> "The scope of these denials of applications for H-2B workers becomes apparent when the number of workers denied certification is compared with the number of workers for whom certification was requested. Analysis of the data establishes that DOL denied **29.3%** of the number of workers sought in employer applications for H-2B workers.

	NBR Workers Requested	NBR Workers Certified	Calculated Workers Not Certified	% Not Certified
Total FY07 Number (NBR) Workers Certified and Denied	360,147	254,615	105,532	29.3%

> "The sheer number of occupational classifications by Dictionary of Occupational Classification (DOT) codes for which employers sought H-2B labor certifications is stunning. In FY07 H-2B applications were filed for workers in 978 different DOT occupational classifications (9 digit coding). Annexed [t]hereto is a summary by 3 digit occupational group of the numbers of H-2B workers for whom certification was sought, the number of workers certified, and the number of certifications denied. [Attachment A]. Annexed [t]hereto is also the detail by 9 digit DOT coding is the number of H-2B workers for whom certification was sought, the number of workers certified, and the number of certifications denied. [Attachment B]."

Friends of Farmworkers, Data Relevant to Public Comments on Proposed Regulations.

[57] One example of the scope of employer misrepresentations on current ETA 750's that could readily be documented by DOL would be to compare employer assertions as to the number of workers needed on a temporary basis with actual information as to the number of temporary (U.S. or H-2B) workers actually hired. It is the experience of many advocates with concrete knowledge of particular employer applications that the number of job vacancies asserted to require H-2B workers is routinely stated as far greater than the number of H-2B workers hired even where the employer receives certification of the number of workers sought.

Much more serious misrepresentations, including promises to pay overtime that is not paid or to page wage rates which differ from those actually offered can be documented.

[58] See: http://www.foreignlaborcert.doleta.gov/pdf/eta750a.pdf.

[59] Employers are currently required to certify by declaration pursuant to 28 U.S.C. 1746, under penalty of perjury that information submitted in support of their applications is true and correct and:

> EMPLOYER CERTIFICATIONS
>
> By virtue of my signature below, I HEREBY CERTIFY the following conditions of employment.
>
> a. I have enough funds available to pay the wage or salary offered the alien.
>
> b. The wage offered equal or exceeds the prevailing wage and I guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work.

system of certification and assigning the Wage and Hour Division with authority to investigate compliance with the existing system, rather than scraping the existing system would make far more sense.

Although the Department proposes to do auditing of employers who have used the program after the fact, it does not say how many audits it will be able to do, or what staff resources can be committed to auditing. At best, this approach offers the prospect that some violations of program requirements may be discovered, after the harm is done. It will not be able to undo the depression of wages that will have resulted, or give employment to those U.S. workers who have lost the job opportunity. The department says that it lacks authority even to assure that the workers who did the work will be compensated according to the requirements of the program. Given the abysmal record of the Department with respect to eliminating abusive employers from the H-2B system, it is very unlikely that an auditing regime will be at all effective in preventing widespread abuse of this program.

The Department hopes to receive some delegation of authority from the Department of Homeland Security at least to be able to sanction the employers that it finds have violated program rules. However, the terms of this delegation have not been worked out, and may never even happen. It is wholly premature to make such a fundamental change in approach without even knowing whether any of the promised enforcement can occur.

The Department should abandon this attestation approach to administering the program.

The proposed change from a labor certification system to an attestation system is not explained in the proposed regulations, and is not good policy. In fact, H-2B workers need more protection by the government, not less. The proposed rule eliminates the ability of the administration to review and reject problem applications before they are approved. Employers simply have to attest that they attempted to recruit U.S. workers, that none were available, and that the conditions of employment will not adversely affect U.S. workers. Attestations will only be rejected if they are incomplete or obviously inaccurate. As long as employers check the correct boxes on the form, their application will be approved.

There are numerous examples in which the current labor certification system has resulted in the denial of H-2B applications to employers, on the basis that they did not fulfill statutory requirements regarding the temporary nature of the work to be performed, the availability of U.S. workers, or prevailing wages and working conditions. Despite these cases of certification

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c. The wage offered is not based on commissions, bonuses, or other incentives, unless I guarantee a wage paid on a weekly, bi-weekly, or monthly basis.

d. I will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States.

e. The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship.

f. The job opportunity is not: (1) Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute involving a work stoppage. (2) At issue in a labor dispute involving a work stoppage.

g. The job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law.

h. The job opportunity has been and is clearly open to any qualified U.S. worker.

denials, the unfortunate fact is that the present H-2B labor certification system is far from perfect.

The present proposal would not address any of these shortcomings. To the contrary, it would completely eliminate the entire labor certification process, and largely remove the Department of Labor as the gatekeepers of the H-2B visa program. In their place, the current proposal would create a labor attestation system, and relegate the DOL's involvement in the H-2B visa program to the administration of a very limited *ex post facto* audit for H-2B employers. This evisceration of the minimal administrative safeguards that exist in the H-2B program will severely limit the ability of the administration to ensure that the law is complied with, thus opening up the program to wholesale abuse by employers, subjecting H-2B workers to further exploitation, depriving U.S. workers of gainful employment, and degrading wages and working conditions within the domestic labor market.

A. An Attestation System does not Comply with the Department's Regulatory Mandate that it *Certify* Compliance with H-2B Requirements.

As noted above, the role of the Department of Labor in administrating the H-2B program derives, in significant part, from the delegation to it of authority to make labor supply determinations contained in 8 C.F.R. § 214.2(h)(ii)(D).

> (D) An H-2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, if unemployed persons capable of performing such service or labor cannot be found in this country. . . *This classification requires a temporary labor certification issued by the Secretary of Labor* or the Governor of Guam, or a notice from one of these individuals that such a certification cannot be made, prior to the filing of a petition with the Service. (emphasis added).

The concept of a labor certification is well-established in immigration law. It involves a prior testing of the labor market, and a prior determination of the agency that the terms being certified are met. This is very different from attestation, the approach the Department is proposing to use. Under that system, the only thing the Department would be in a position to certify is that the employer filled out the forms correctly. It could not certify, in any principled way, that the employer was offering employment on terms that would not undermine U.S. wages and working conditions, or that U.S. workers are not available to do the work. It could only say that the employer so represented. This pallid gesture would not pass muster as a "labor certification" as required by regulation.

B. Despite the Weaknesses of the Current System, the Labor Certification Process Does Prevent Some Abuses.

In 2007 the U.S. Department of Labor approved only between 80 and 85% of all applications. The vast majority of applications that were denied were denied for one of several reasons: the job and the employer's need was not one time, seasonal, peak load or intermittent; the length of the job assignment was not less than one year; or the employer could not demonstrate that there

were no qualified and willing U.S. workers available for the job. UIC Center for Urban Economic Development, February 17, 2005.

For example, an Orlando, Florida cleaning service business applied for permission to import H-2B workers to clean hotel rooms in the Orlando hospitality industry. The business contended that there were five "peak seasons" in the Orlando area hospitality industry. The Department of Labor denied the application, finding that the employer had a year-round need for workers that it was trying to fill with H-2B workers.[60] Similarly, the Department of Labor denied the labor certification request to a fast food restaurant that sought to augment its staff with H-2B workers. Again, the Department found that the business had failed to show that the need was temporary or seasonal. Office of Administrative Appeals, Immigration and Naturalization Services, File EAC 02 146 52598. The Department has denied applications by employers in a wide variety of industries on these grounds. See e.g. Office of Administrative Appeals, Immigration and Naturalization Services, File EAC 03 021 52270, May 13, 2003 (commercial health care laundry); Office of Administrative Appeals, Immigration and Naturalization Services, File EAC 03 009 52801, June 25, 2003 (Indian restaurant); Office of Administrative Appeals, Immigration and Naturalization Services, File LIN 03 059 53268, May 13, 2003 (landscaping business); Office of Administrative Appeals, Immigration and Naturalization Services, File LIN 02 133 54397, June 25, 2003 (building and landscape stone quarrying fabrication and packaging); Office of Administrative Appeals, Immigration and Naturalization Services, File SRC 001 276 50535, April 1, 2003 (modular manufacturer of single family homes); Office of Administrative Appeals, Immigration and Naturalization Services, File EAC 02 265 53684, April 10, 2003 (recycling material company) .

In another case, a trucking agency attempted to secure permission to bring in H-2B workers in order to lease tractor-trailer rigs to those workers. The company's application was denied by the U.S. Department of Labor because the company was unable to provide sufficient evidence to even establish that they were an employer, since the company paid no wage and had no employees. The company also failed to establish that the work was temporary or seasonal. Office of Administrative Appeals, Immigration and Naturalization Services, File LIN 02 261 52886, August 5, 2003.

As these cases demonstrate, the labor certification process does protect U.S. workers from the issuance of H-2B visas for employers inappropriately and illegally seeking to obtain a year-round workforce. If the Department abandons labor certifications, one of the few mechanisms for the protections of workers against the erosion of wages and working conditions will be lost.

C. Under the Proposed Regulations DOL Would Lack a Procedure to Gather Essential Extrinsic Evidence.

Attestations are particularly problematic given the proposed reduced role of the state workforce agencies (SWAs) in the certification process and the intent to centralize that process in the proposed regulations.

[60] Office of Administrative Appeals, Immigration and Naturalization Services, File SRC 03 008 50028, February 28, 2003.

Since one of the primary responsibilities of the SWAs is to assist employers with their labor needs, SWA local offices are well acquainted with the employers. The regulations should require the prospective employer to file the application with the SWA as well as the DOL Office of Foreign Labor Certification (OFLC) so that the SWA can timely advise the DOL if the application does not appear to be legitimate. In light of the still active congressional mandate at 8 U.S.C. §1188(a)(1)(B) that the employment of H-2A workers not adversely affect the wages and working conditions of U.S. workers, SWAs, upon the filing of either a job order or an application that raises labor needs which seem greatly inconsistent with prior patterns or that contains terms and conditions which are not the norm, should be required to investigate the matter. The rise of labor contractor-based applications, which may or may not be submitted by individuals with experience, necessitates trained SWA professionals acting as a reality check upon officials in a remote national processing center.

ESA's Wage and Hour Division is another source of valuable information that should be available to the OFLC in making a determination upon an application. The new regulations do not mandate that the Wage and Hour Division and OFLC share any prior or pending investigations involving the employer, any outstanding civil money penalties or unpaid wages, any unpaid judgments relating to employment-related claims, or any failure to cure violations. ESA should uniformly and regularly report to ETA and to OFLC in particular the names of any employers who are the subjects of investigations. OFLC should share with ESA promptly the names of all interested parties on any H-2B application for certification, so that ESA can be sure that the OFLC has timely information about any history of violations of the Fair Labor Standards Act or other laws.

One egregious example of the importance of this oversight involves Evergreen Forestry Services, Inc. This labor contractor brought in H-2B workers from Mexico and Central America. For many years, Wage-Hour routinely investigated the company and found wage and safety violations. Wage-Hour's fines were generally reduced with an employer promise of future compliance. The same cycle of violations, investigation, fines, reduction of fines, more violations, new investigations, etc. occurred again and again. Despite a Wage-Hour investigator's statement that Evergreen had "a woeful history" of labor violations, and despite a requirement that Wage-Hour and ETA communicate, Evergreen nonetheless continued to obtain H-2B workers. This tragic situation finally ended in September, 2002, when fourteen (14) Evergreen workers drowned when their vehicle veered off the road in Maine. Some of the same safety violations previously cited may have contributed to the accident.[61]

Another example occurred when the DOL ETA OFLC office in Chicago ignored evidence of a Wage and Hour investigation finding that H-2B workers were employed by a Colorado employer in agriculture and certified the employer again for H-2B workers. The were once again employed in agriculture without receiving the benefits to which they were entitled as H-2A agricultural workers. Given the dismal failure of the "coordinated enforcement" mechanism between ETA and Wage-Hour, this cooperation should not be assumed and should be mandated in the regulations.

[61] See, Exhibit B hereto, Correspondence Relating to Evergreen Forestry Services.

V. The Proposed Changes in the Role of the State Workforce Agencies in Administering the H-2B Program are Ill-conceived and Should be Abandoned.

1. Role of State Workforce Agencies

The Department proposes to eliminate any role for the State Workforce Agencies ("SWAs") in the application process, aside from receiving a brief job order to refer workers, and mandatory screening of job referrals for employment eligibility.

The proposed regulations for the H-2B program would totally eliminate the role of the SWA in making prevailing wage determinations as to local labor markets. It is significant to note that since the 2005 comment period on the previous proposed changes to the H-2B program DOL has totally dismantled the historical role of DOL Regional offices in evaluating H-2B applications. The loss of that experienced staff in processing of applications for temporary employment when [62]the National Processing Centers were opened placed a far greater responsibility for familiarity with local employment market considerations on State Workforce Agencies.

The significant expertise and experience of state agencies concerning local job markets would be eliminated in favor of a federalized, one-size-fits-all approach. Of course, local conditions do vary, and the knowledge and experience of local agencies in administering program requirements provides one of the few sources of protection for U.S. and H-2B workers under the current system. Many of the applications that are currently being found to be inadequate are determined to be so based upon this expertise.

We are unaware of any publicly available data that would allow a determination of the respective roles of DOL National Processing Center staff and SWA. It is possible to examine the frequency with which employer petitions for H-2B workers have been denied in particular states. It is critical to note that a switch to "attestation" by employers will eliminate the program oversight functions of both DOL ETA and SWA agencies in relationship to pre-approval review of H-2B applications.

Annexed as Attachment D to the July 1, 2008 submission by Friends of Farmworkers "Data Relevant to Public Comments on Proposed Regulations" was "States Certification H-2B FY07" summarizing for each state the following categories of information from DOL Public Disclosure data.

WORK AREA	Total Wrks Requested	Total Workers Denied	% Workers Denied	FY07 Workers Certified	Number H-2B Cases	Nmbr Cases Certified	% Cases Certified	Cases Denied	Cases Partial Certified	Cases Remand to SWA
United States	360,147	105,532	29.3%	254,583	14,565	10,127	69.5%	3,714	670	54

The following states had H-2B applications denied for more than 1,000 workers in FY07.

[62] See, July 2, 2008 Low Wage Worker Legal Network, "Documentation of Abuses of H-2B Workers," (Regulations.gov comment tracking number is 80652bd0) Part II, Attachment 5 "Packet of materials from Colorado Legal Services showing CO grower using 100s H-2Bs in the field.".

WORK AREA	Total Wrks Requested	Total Workers Denied	% Workers Denied	FY07 Workers Certified	Number H-2B Cases	Nmbr Cases Certified	% Cases Certified	Cases Denied	Cases Partial Certified	Cases Remand to SWA
LOUISIANA	39,372	21,046	53.5%	18,326	673	380	56.5%	261	30	2
TEXAS	53,831	18,744	34.8%	35,087	1,598	1,103	69.0%	437	57	1
FLORIDA	31,893	8,307	26.0%	23,586	1,333	953	71.5%	323	49	8
ALABAMA	12,399	6,563	52.9%	5,836	152	60	39.5%	78	14	
COLORADO	19,584	3,951	20.2%	15,633	803	608	75.7%	173	20	2
MICHIGAN	7,921	3,448	43.5%	4,473	309	155	50.2%	119	35	
MISSISSIPPI	12,225	3,432	28.1%	8,793	143	83	58.0%	40	20	
MARYLAND	12,339	2,717	22.0%	9,622	429	293	68.3%	115	19	2
ARKANSAS	10,116	2,669	26.4%	7,447	114	66	57.9%	26	18	4
NEW YORK	8,574	2,482	28.9%	6,092	857	569	66.4%	287	1	
GEORGIA	9,465	2,303	24.3%	7,162	253	121	47.8%	89	37	6
MISSOURI	10,308	2,034	19.7%	8,274	336	265	78.9%	48	23	
ARIZONA	7,036	1,983	28.2%	5,053	258	164	63.6%	81	13	
UTAH	7,001	1,817	26.0%	5,184	346	261	75.4%	84	1	
VIRGINIA	11,889	1,789	15.0%	10,100	514	367	71.4%	112	34	1
ILLINOIS	5,404	1,784	33.0%	3,620	180	117	65.0%	51	8	4
OHIO	5,328	1,734	32.5%	3,594	306	180	58.8%	110	16	
MASSACHUSETTS	7,458	1,595	21.4%	5,863	734	561	76.4%	163	9	1
CALIFORNIA	8,300	1,550	18.7%	6,750	815	659	80.9%	131	23	2
SOUTH CAROLINA	4,729	1,362	28.8%	3,367	124	80	64.5%	26	18	
NORTH CAROLINA *	7,271	1,351	18.6%	5,920	278	182	65.5%	59	36	1
PENNSYLVANIA	10,210	1,337	13.1%	8,873	650	549	84.5%	75	18	8
NEW JERSEY	9,388	1,310	14.0%	8,078	640	518	80.9%	96	26	
WYOMING	3,595	1,065	29.6%	2,530	271	184	67.9%	81	2	4

2. SWA I-9 Verification Only Interferes With U.S. Worker Recruitment

On the other hand, the regulation proposes to require that states conduct mandatory screening and I-9 verification for employment eligibility for all applicants who are referred to jobs that are posted as part of an H-2B order. In IRCA, states were given the option to do such screening, but they were also clearly allowed to opt not to do so. Many states have decided against undertaking this burden, given available levels of staffing. It would be legally problematic to do I-9 verification only with respect some applicants but not others, so the increase in work load for SWAs that is being imposed is quite significant. The proposal that this increase in state administrative burden can be eliminated by simply using the e-verify system is factually dubious, and presents a whole other set of problems, given the serious, documented deficiencies in the e-verify data bases.

The Department of Labor should withdraw the proposal to change the role of the SWAs in the manner proposed.

VI. Information About H-2B Applications Needs to Be Publicly Available

The dismantling of the DOL ETA Regional offices, the proposed removal of SWA's from the process of certification, and the complete breakdown of DOL ETA's capacity to respond timely to Freedom of Information Act (FOIA) requests relating to the H-2B system collectively deny workers and their advocates any ability to obtain information about the terms of H-2B applications and certifications.

Currently DOL ETA's responses to FOIA requests relating to the H-2B program are so slow that they provide no adequate basis for obtaining information about H-2B job orders. Although some state SWA's recognize that it is consistent with the purpose of protecting wages and working conditions of U.S. workers to readily make information about applications for H-2B applications publicly available, other state agencies have refused to make that information available.

It is critical that DOL make information about all H-2B applications for labor certification available on a routine and timely basis.

VII. The Proposed Regulation Diminishes the Minimal Worker Protections that are Contained in the Existing H-2B Program.

The problems occurring in the H-2B program are well-documented. *See Close to Slavery: Guestworker Programs in the United States,* Southern Poverty Law Center (March 2007), and separately filed, Comment Tracking Numbers 8065440 and 8065b65e. Dozens of lawsuits have alleged wage and hour violations, gender and race discrimination, and human trafficking, among other abuses.[63] Annexed hereto as Exhibit C is a declaration from an H-2B working giving

[63] See, for example, Nolasco Saldana v. Torre & Bruglio, Inc., E.D. Michigan, Case No. 02-73496. (Workers brought by H-2B visas to do landscaping work in Michigan. The workers allege minimum wage violations, were housed in substandard housing, and were illegally charged fees for setup, sheets, mattresses, uniforms, boots, tools, furniture, hats and utilities); *Olvera-Morales v. Int'l Labor Mgmt. Corp.*, 2007 U.S. Dist. LEXIS 83235 (M.D.N.C. 2007) (A worker filed a class action sex discrimination suit against International Labor Management Corp., Inc. for hiring women under the H-2B system in order to avoid the higher worker protections provided in the H-2B; *Perez-Perez, et al, v. Progressive Forestry Services, Inc., et al,* Civ. No 98- 474-KI (D. Or.); (H-2B workers paid $1,000 to employer agents to secure employment and pay for transportation, housing, and other expenses. They were then housed in overcrowded housing and paid less than they were promised. When they complained about the conditions, the employers abandoned them in Mississippi without money, food, or access to transportation.); *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355, 2006 WL 2349459, at *1 (E.D.La Aug. 11, 2006). (Forestry company hired H-2B workers from Mexico and Guatemala. The company failed to reimburse its workers for recruitment and travel expenses to the job, charges. Threats of violence occurred after suit filed to pressure Plaintiffs to drop lawsuit) *Rivera v. Brickman Group, Ltd.*, 2008 U.S. Dist. LEXIS 1167, 155 Lab. Cas. (CCH) P35,388, 13 Wage & Hour Cas. 2d (BNA) 275 (E.D. Pa. Jan. 7, 2008) (U.S. landscaping company recruited and hired thousands of workers to work on H-2B visas. The company did not reimburse workers for recruitment and transportation costs or visa fees. The workers won summary judgment against the company for the unpaid expenses under the Federal Labor Standards Act.) Peña Ortega v. Saenz, 07-civ-01408 (D. Colo. Jul 5, 2007). (Several hundred H-2B workers were hired to pick sweet corn, an H-2A agricultural position, on H-2B visas and forced to pay for all transportation and housing costs. Local legal services could not initially offer representation because of their H-2B status.); *Aguilar v. Imperial Nurseries*, Case No. 3:07-cv-0193, (D. Conn. March 14, 2007). (A plant wholesaler holds captive twelve Guatemalan guestworkers. The men were recruited to plant pines in North Carolina and were forced to pay all related transportation and visa expenses. Upon their arrival, they were transported to Connecticut and forced to work nearly 80 hours a week in nursery fields, housed in substandard housing, and received less than the federal minimum wage. Their passports were confiscated and they were threatened with

examples of the kinds of abuse faced by such workers.[64]

Yet, rather than strengthen the protection of U.S. and foreign workers under the program, the proposed regulation would weaken some of the few significant protections that are currently in place. Among the most serious:

A. The Proposed Regulation Would Gut the Requirement that H-2B Workers be Hired Only into Temporary, Full-time Job Opportunities, thereby Opening up Many More U.S. Workers to Unfair Competition for Work.

The INA requires that the H-2B visa only be available to employers seeking foreign workers to come "temporarily to the United States" to perform "temporary service or labor." *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (1999). DOL has codified this mandate to require that employer H-2B applications only be certified if it can be shown that the employer's need for the services or labor at issue is:

- a one-time occurrence;
- a seasonal need;
- a peakload need; or
- an intermittent need.

Specific criteria must be met to establish each category of temporary need, and these criteria are separate from and in addition to the requirement that an H-2B visa be initially granted for no longer than one year. *See* 8 C.F.R. § 214.2(h)(6)(ii)(B) and TEGL 27-06 (June 25, 2007), 72 FR 38621, July 3, 2007.

The statutory and administrative requirements regarding the temporary nature of the employer's need are central to avoiding employer abuse of the H-2B program. If employers are able to evade this requirement, they could employ workers on H-2B visas in positions in which the employer has a permanent or regular need, rather than a temporary need. Employers experiencing a long-term need for a larger workforce could completely avoid the demands of the domestic labor market by serially employing H-2B workers, on temporary visas, to meet this long-term need. Employers thus abusing the system could undermine those competitors who do try to meet their long-term labor needs through the normal channels of the domestic labor market, dragging down wages and working conditions for workers in the industry or region as a whole. Such exploitation of the H-2B visa to meet regular and long-term employment needs clearly violates

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deportation.) ; Beltran *Benitez v. Sea Safari, Ltd.*, 180 F.Supp. 2d 772 (E.D.N.C. 2001) (Employer admitted that he confiscated passports and social security cards of workers. If the worker left the company, the employer would stamp "void" on the visa before returning it. Workers needed permission to leave the housing and to have visitors.) *Chellen v. John Pickle Co., Inc.*, 344 F. Supp. 2d 1278 (N. D. Okla. 2004). (Indian workers come to the U.S. on H-2B visas to work with John Pickle Co. in Oklahoma in 2001. Workers were forced to work for less than the minimum wage. The company also required the workers to sleep and eat in the factory facility and placed armed guards around the worksite.) *David v. Signal International LLC*, Civ. No. 08-1220 (E.D. La. Apr. 28, 2008). (U.S. oil rig manufacturer recruits 500 workers from India to work in the United States on H-2B visas under false promises of green cards. The workers paid around $20,000 to recruiters and for visa fees, were not paid their promised wages and were forced to live in substandard housing.)

[64] See, Declaration of Francisco Javier Navarro Herrera annexed hereto as Exhibit C.

both the letter and the spirit of the law establishing the H-2B program, and thus prevention of such abuse has been a key focus of the current labor certification system. The current certification process has successfully prevented at least some employers seeking fast food workers, janitors, launderers, and other services for which they had a permanent or long-term need from accessing H-2B workers.

In many seasonal industries in which many U.S. workers are or once were employed, like tourism, landscaping, food processing, construction, forestry, permanent workers would have steady employment for much of the year, but would face seasonal layoffs of a few months in each year, during which they would have to find other means to survive. Increasingly, many of these jobs are now being filled with H-2B workers because DOL recognizes a need of up to ten months out of the year as being "temporary." A more stringent definition would be more in keeping with the objectives of the program, and more protective of U.S. workers. Worse, however, the proposed regulation, would allow for a "temporary" one time need of up to 3 years. It is hard to imagine many construction jobs, for example, that would not be "temporary" under this standard. See proposed § 655.6(b)(1).

The existing regulations do not appear on their face to anticipate repeal by the Department of Homeland Security (DHS) of existing DHS regulations, including those that remain in effect from the former Department of Justice, Immigration and Naturalization Service (INS) at 8 CFR. However, a preliminary review of the new proposed DOL regulations suggest that DOL proposed definitions would not only change existing DOL practice and procedure, but also conflict with the established DHS regulations with the existing DHS regulations on temporary employment.

Existing 8 C.F.R. § 214.2(h)(6)(ii) "Temporary services or labor" provides

> (B) *Nature of petitioner's need.* As a general rule, the period of the petitioner's need must be *a year or less*, although there may be extraordinary circumstances where the temporary services or labor might last *longer than one year*.
>
> . . .
>
> (*1*) *One-time occurence.* The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a *temporary event of* **short duration** has created the need for a temporary worker.

By comparison the proposed DOL regulation would provide:

> 20 CFR § 655.6 Temporary need.
>
> (a) To utilize the H-2B Program, the employer's need for non-agricultural services or labor described in an Application for Temporary Employment Certification must be temporary. *Temporary employment is full-time employment that is not permanent in nature.* A job opportunity is considered temporary under this subpart if the employer's need for the duties to be performed is temporary, regardless of whether the underlying job is permanent or temporary.

(b) The temporary need must be justified to the Secretary under one of the following standards:

(1) One-Time Occurrence. The employer must establish that either it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, *or* it has an employment situation that is otherwise permanent, but a temporary event of less than **3 years** in duration has created the need for a temporary worker(s);

. . .

(c) Except in the case of a One-Time Occurrence, an employer's need cannot exceed 10 months.

(d) The temporary nature of the work or services to be performed in applications filed by **job contractors** will be determined by examining the *job contractor's own need for the services or labor to be performed, rather than the needs of each individual employer with whom the job contractor has agreed to provide workers as part of a signed work contract or labor services agreement.*

The "3 years in duration" language of proposed 20 CFR § 655.6(b)(1) *conflicts* with the parallel DHS regulation requiring that "temporary event of short duration" 8 CFR § 214.2(h)(6)(ii)(B)(1). The conflict between the established DHS regulation and the grossly different DOL proposal for what constitutes a temporary need as a result of a "One-Time Occurrence" is not a minor semantic difference. Data from the Bureau of Labor Standards establishes that for workers ages 25 to 34 years of age the median job tenure is 2.9 years.[65]

Further, DOL is ignoring the obligation to treat "job contractors" and the joint "employer" to whom they are providing the workers as each having a responsibility to convince the Secretary of Labor that each of them has a responsibility to establish that they have a temporary need for workers and that they have sought to advertise and recruit for the employment vacancy. Instead DOL in an effort to avoid phantom job contractors from seeking H-2B workers, allows the joint employers to avoid recruiting workers for their job. Where the "job contractor" is supplying workers to existing employers for work at that employer's job site, the fixed site employment opportunity should be disclosed to U.S. workers and such workers should be actively recruited for such employment. DOL should be requiring (and it is not) such joint employers to sign all certifications (ETA-750 currently) for such employment.

This is a critical problem with existing DOL procedures and the practice should be changed not enshrined in regulation. The combination of the "one-time" need with the opportunity to use Job Contractors as employers makes virtually all jobs potentially "temporary" and will only accelerate the huge expansion of the temporary H-2B program. In reality this program has the danger of perverting existing immigration law by forcing Congress to respond to increasing asserted shortages of H-2B visas as more and more existing jobs get classified as "temporary" in order to qualify for the H-2B program.

[65] See Bureau of Labor Studies Job Tenure "Table 1. Median years of tenure with current employer for employed wage and salary workers by age and sex, selected years, 1996-2006" available at: http://www.bls.gov/news.release/tenure.t01.htm

Although DOL promises to continue to scrutinize whether the need for workers in temporary, its only basis for doing so will be the information provided by the employer. There is no provision allowing workers to contest this information, and the SWAs would not be able to bring their expertise about local job market conditions to bear on the determination, either.

Employer applications for temporary workers to fill a permanent need – whether for fast food cooks, hotel maids, or launderers – that have been rightfully rejected under the administration's existing regulations would be automatically accepted in the future, with absolutely no recourse for those workers injured as a consequence. An ever-greater universe of employers seeking to fill regular and permanent labor needs outside of the domestic labor market would be able to freely take advantage of the H-2B program. The statutory mandate that H-2B workers be employed to perform "temporary" labor or services would be rendered meaningless. This result is unacceptable as a matter of policy and untenable as a matter of law.

Under current standards, H-2B workers can be sought only for work that is full time. Full time work is important to attract U.S. workers to the positions. It is far less likely that workers can make themselves available for a limited work schedule. Full time work is vital to H-2B workers who incur significant costs in getting to the United States to work, and must recoup those costs during the temporary employment period they are allowed to work here. The proposed regulation significantly dilutes this standard by defining "full time" to mean 35 or more hours per week; and where an established practice in an industry has developed a definition of full-time that is less than 35 hours, that definition shall have precedence. Proposed §§655.4, 655.6(a). DOL should require full time work that is truly full-time—a forty hour work week.

B. The Proposed Regulations are Inadequate with Respect to the Limited Recruitment Required to Test the Availability of U.S. Workers.

A critical factor in the ability of U.S. workers to access jobs that are proposed for the H-2B program is the nature of recruitment that is required of employers using the system. The law requires that H-2B visas be available to employers only when "unemployed persons capable of performing such service or labor cannot be found in this country." *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (1999).

The proposed rules would weaken the protections for workers in a system that has already proven to be woefully inadequate. Even under the current rules, employers have been able to manipulate the rules and procedures in order to be able to avoid recruiting and hiring available U.S. workers.

For example, in *Riojas, et al. v. Chao, et al.*, No. DR-07-CV-058 (W.D.Tex. filed Oct. 9,2007) the employers acquired over 400 Mexican H-2B workers from 2001 to 2007 to work mainly harvesting watermelons and onions in their fields in Edinburg, Quemado, and other areas in Texas. The Texas and Arkansas workforce agencies referred about 720 U.S. workers for the H-2 jobs. Almost all of them were rejected outright or received the "run-around." The few U.S. workers who were hired suffered abusive treatment and received lower pay and fewer benefits

than the H-2 workers. Year after year, DOL continued to approve the employers' fraudulent applications despite mounting evidence of visa fraud and U.S. worker discrimination.[66]

Perhaps, then, it is not so surprising that the catastrophic labor shortage predicted when the lifting of the cap on visa numbers was not extended has not occurred. Instead, e.g., jobs at the New Jersey shore that had been filled in the past by H-2B workers have gone this summer to U.S. workers who have suddenly materialized when petitioning employers were forced to recruit U.S. workers. [67]

Despite these problems, and despite regulatory preference for U.S. workers, DOL proposes to weaken recruitment protections for U.S. workers, rather than adopting more robust requirements comparable to those in place for H-2A employers.

It appears that the proposed regulations would not affect 20 C.F.R. § 655.0. That regulation at 20 C.F.R. § 655.0(a) relates generally to subpart A (H-2B Workers), subpart B - Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), and subpart C (Labor Certification Process for Logging Employment and Non-H- 2A Agricultural Employment).

20 C.F.R. § 655.0(a)(2) contains a requirement that the Secretary's existing procedures and proposed regulations have consistently failed to address and that is affirmative recruitment of U.S. workers. That regulation (which would be unchanged, but not implemented) states:

> . . . the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher.

H-2B employers (unlike in theory H-2A employers) have never been required by DOL ETA to engage in positive recruitment efforts beyond passive advertising and brief (10 day) local job service postings. No interstate clearance orders have been circulated for H-2B workers, even though the employers arrange to recruit foreign workers from thousands of miles away. With rising unemployment rates, particularly in some areas of the country, more intensive recruitment of U.S. workers should be required before workers are brought from other countries for U.S. jobs.

The DOL does require employers, as a condition of obtaining labor certification, to submit the job offer to the SWA for recruitment through the job service system and to advertise in a newspaper three times. Only upon demonstrating these two forms of recruitment were incapable of producing qualified job applications may an employer obtain the certification necessary to hire temporary foreign workers.

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[66] Exhibits "Documentation of Abuses of H-2B Workers" filed July 2, 2007 on behalf of Low Wage Worker Legal Network from Texas Rural Legal Aid, Regulations.gov Comment Tracking Number 80652bd0. Attachments 1, 2 and 3.

[67] Jacqueline L. Urgo, "Hard-hit locals fill job need at shore," Philadelphia Inquirer (Jul. 6, 2008), http://www.philly.com/philly/hp/news_update/Hard-hit_locals_fill_job_need_at_shore.html?adString=ph.news/news_update;!category=news_update

Current regulations lay out a theoretically rational process for the processing of H-2B labor certifications by SWAs – a large part of this process is designed to ensure that reasonable efforts are made to find available and qualified U.S. workers for open positions before they can be filled by H-2B workers. The current process has many flaws of its own, but it represents at least a minimal effort to meet the statutory mandates on recruitment of U.S. workers that apply to the H-2B program:

- Regulations require that employers include documentation of any efforts to recruit U.S. workers that may have been made before filing a labor certification application with the application sent to the relevant SWA.
- Applications must be filed 60 days before certification is required to enable the SWA to recruit available U.S. workers for the relevant positions.
- The SWA is required to order corrections to the employer's job offer if it contains "unduly restrictive job requirements, or terms and conditions of employment which otherwise inhibit the effective recruitment and consideration of U.S. workers for the job."
- The SWA is also required to prepare a job order for the open positions and place the job order in the regular state employment system for ten days.
- The SWA is also required to refer qualified applicants from its files and general intake system to the employer.
- In addition to these recruitment activities on the part of the SWA, the employer is required to advertise the job opportunity in an appropriate publication for three consecutive days, the advertisement must meet the guidelines of DOL regulations, and the employer must provide daily "tearsheets" from the publication in which the advertisement appeared.
- The employer must document that unions and other appropriate recruitment sources were unable to refer qualified U.S. workers.
- Current regulations contain additional rules for specific occupations. Employers seeking aerospace engineers must first offer re-employment to laid-off engineers and meet other requirements. Employers seeking construction workers must first try to recruit U.S. workers through building trades unions and/or the AFL-CIO. Employers seeking boilermakers on an emergency basis may apply directly to the national DOL.
- For all recruitment methods, the employer must provide the SWA with the identity of the recruitment source, information about each U.S. worker who applied for the job, and the lawful, job-related reasons for not hiring each applicant.

Finally, with the information resulting from these recruitment efforts, the certifying officer is required to determine if other recruitment sources should have been used and if U.S. workers are available who were improperly rejected by the employer. If the certifying officer finds that the employer did not comply with the above requirements, the H-2B labor certification must be denied. *See* TEGL 27-06 (June 25, 2007), 72 FR 38621, July 3, 2007

The basic gate-keeping procedures performed by the SWAs are eliminated under the proposed regulations. The proposed regulations would completely remove SWAs from the H-2B process, aside from posting a job order. In the place of the labor certification and SWA recruitment procedures, the proposed regulations would simply require that employers attest to the fact that they tried to recruit U.S. workers using the specified minimal steps required by the regulation.

H-2B employers currently are expected to do very little in terms of recruiting U.S. workers, but this problem is made even worse by the changes being proposed. Under present procedures, an employer files an H-2B application between 60 and 120 days before the workers are needed. Recruitment is conducted at some time after that, after the application has been screened by the SWA. Under the proposed regulation, applications would be filed between 60 and 120 days before workers are needed, but all of the recruitment must have been completed before the application is filed. This will have the effect of moving the recruitment of U.S. workers even earlier before the date of need. Few U.S. workers are able to commit to a temporary job so far in advance. This has the net effect of causing a false conclusion that no U.S. workers are available, since, unlike the H-2A program, an employer is not required to continue active recruitment or hire U.S. workers who later become available. See proposed § 655.15(a).

• Instead of requiring the employer to document that unions and other appropriate sources were unable to refer workers, new regulations would only require the employer to attest that it contacted unions, "if it is appropriate for the occupation and customary to the industry and area of intended employment." *See* proposed §655.15(d)(2). No guidance is provided about when it would, or would not be, "appropriate for the occupation," what level of union density makes it "customary," or how to treat sectors, such as the cleaning industry or meat processing, where levels of unionization are in flux. It isn't even clear who decides these questions, though it is clear that the local expertise of the SWAs would not be available. Nor is there any opportunity for workers or their advocates to express a view.

Though the prescribed content of the published advertisement in the proposed regulations is similar to that in existing guidelines, there is no ability for the DOL or SWA to order an employer to revise its job posting if it contains, "unduly restrictive job requirements, or terms and conditions of employment which otherwise inhibit the effective recruitment and consideration of U.S. workers for the job."

Rather than having an experienced and knowledgeable SWA decide which newspaper would best reach possibly available U.S. workers, this choice is left to "good faith" belief of the employer. Proposed §655.15(f)(1). It is unfathomable how ETA would propose, after the fact, to evaluate the good faith of the employer, and federal certifying officers in two cities in the country cannot possibly know how to reach workers in hundreds of local job markets in this highly diverse country. This is an invitation to employer manipulation and abuse of the program,

to the detriment of U.S. workers.

The narrow definition of "United States worker" proposed in § 655.4 lists six limited categories of citizenship or immigration status that would be recognized as U.S. workers entitled to preferred treatment in the H-2B program. There are many other persons in the United States who are legally entitled to work. Perhaps this represents a value judgment as to which classes of aliens ought to be accorded preferential treatment as U.S. workers. It is not the function of DOL to make this judgment; DOL's charge is to certify whether "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). *Any* worker in the United States with authorization to work who is qualified and available is a U.S. worker for purposes of the H-2B program. Failure to recruit and hire any such worker will adversely affect all U.S. workers, since all employment-authorized workers are competing in the same job market. To the extent that some job opportunities are filled be foreign temporary workers, the demand for remaining U.S. workers is lowered.

Finally, while the employer is required to maintain records regarding the results of recruitment that are similar to those required to be produced under current regulations, there is no opportunity for DOL or the SWAs to examine these records before an H-2B petition is granted.

Even if an employer honestly attests to each requirement and fully meets those requirements in good faith, the proposed regulations will result in fewer U.S. workers having the opportunity to become aware of and apply for open positions than under current administration procedures. There will be no prior review of job postings to ensure they are not written (intentionally or unintentionally) to discourage U.S. applicants. There will be no opportunity for SWAs to actively match willing workers in their systems with open positions. There will be no meaningful required consultation with unions in those industries in which they have traditionally served as recruitment sources for U.S. workers – "contact" is all that is required, and there are no specific guidelines on the sectors in which such consultation is appropriate. And there will be no independent review of U.S. job applicants who were turned away before an employer is allowed to access H-2B workers.

The proposed system will significantly hamper the ability of the administration to ensure that H-2B applications are not granted for job opportunities for which qualified U.S. workers are available. If DHS or DOL do discover, after the fact, that an employer misrepresented its recruiting efforts in its labor attestation, the only enforcement action that could be taken under the proposed regulations would not remedy the harm already done to unemployed U.S. workers. By the time DHS revokes a petition or DOL recommends debarment of an employer, the job opportunity will have already been filled by an H-2B worker and no longer be available, and no compensation will be available to U.S. workers harmed as a result. Revocation and debarment would also fail to remedy the broader negative impacts on the domestic labor market by allowing employers to refuse to consider U.S. workers for H-2B positions until their violation is discovered. In fact, an employer could fire its U.S. workforce and seek to hire H-2B workers in their place, misrepresent its recruitment efforts in the labor attestation, and suffer no consequences until after the H-2B visas have been granted. This stands in stark contrast to the current procedures, which are designed to prevent harm to U.S. workers and the domestic labor market from ever occurring in the first place by denying certification to employers who cannot

demonstrate that no U.S. workers are available.

Finally, if revocation and debarment procedures fail to account for the ability of employers to manipulate their legal identities, employers will easily be able to circumvent even the most effective debarment and revocation procedures to continue to exploit the H-2B visa system to avoid recruiting and employing U.S. workers. When companies retain labor contractors or temp agencies to serve as the "employer" for a group of foreign workers at the companies' work site, there will undoubtedly be cases where the companies deny that they are the "employer" and then take advantage, in the
form of lower labor costs, of the labor contractors' false claim that no domestic workers could be found. If the labor contractor is ultimately debarred, the same companies could simply hire another labor contractor to repeat the same abuses. The lack of an advance process for examining employment relationships during the H-2B application process will result in abuses that will go uncured.

The proposed regulations add no new safeguards for U.S. workers to ensure that they will have a fair opportunity to apply for open positions posted by employers before an H-2B visa is granted. To the contrary, the new regulations would eliminate the few minimal safeguards that currently exist. The result is likely to be more frequent and flagrant violations of the law that created the H-2B program, to the severe detriment of unemployed U.S. workers and the domestic labor market as a whole. For these reasons, the proposed recruitment procedures are unreasonable and contrary to law.

C. The Proposed Changes Will Undermine the Wages and Working Conditions of Similarly Situated U.S. Workers.

1. H-2B Employers Must be Required to Offer Wages and Working Conditions that do not Adversely Affect the Wages and Working Conditions of U.S. Workers.

The H-2B statutory obligations have always been understood to prohibit employees from offering job terms that would "adversely affect the wages and working conditions of workers in the United States similarly employed." 20 C.F.R. § 655.3. See *Alfred L. Snapp & Sons. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 597 (1982), describing the "obvious point" of the pre-1987 H-2 system as "to provide two assurances to United States workers, including the citizens of Puerto Rico. This is evidenced by the Congressional policy that domestic jobs are to be protected and temporary workers are to be admitted only when their admission tends to serve the national economy, the cultural interests, and the welfare of the United States." H. Rept 1365, 82d Cong.2d Sess., 2 U.S. Code Cong & Admin. News, 1952, p. 1705.

The history of the H-2B program demonstrates that DOL, in its duty of certifying temporary labor applications, has failed to live up to the statutory obligation and congressional policy. The current prevailing wage scheme for the H-2B program does not ensure that the wages of similarly situated U.S. workers are not adversely affected. Rather than remedy the flaws in the current procedures, the proposed regulations further undermine DOL's ability to ensure that this temporary worker program operates in compliance with the statutory mandate by failing to correct the flawed prevailing wage methodology, continuing to allow employer provided wage

surveys with very little oversight, and by centralizing the prevailing wage determinations in one distance office.

2. Backpay Should be Available.

DOL should give ESA the same authority to enforce employment contracts for both U.S. workers and H-2B workers that it currently has for H-2B workers. See 29 CFR Part 501. This should include the authority to collect backpay.[68]

3. Methodology for Determining Prevailing Wages is Flawed.

a. The Nature of the H-2B Program Inherently Depresses Wage Rates.

A basic understanding of supply and demand leads to the conclusion that allowing employers to import temporary foreign workers will have a depressing effect on wages. Theoretically, in a free market if there is a shortage of people available to do certain jobs, then the employers looking to fill those jobs will have to increase their wage offer until it reaches the level where it appeals to that group of available workers. As employers compete over laborers, the wages and working conditions at those jobs should be improving. Bringing in foreign workers to fill those jobs increases the number of available workers and decreases the ability of U.S. workers to bargain for better wages and working conditions, especially in those industries that are almost completely dominated by H-2B workers, like seafood, forestry and landscaping in various parts of the country.

To prevent adverse effect, DOL under the Bracero Program began to require employers to offer at least the "prevailing wage rate paid to domestic workers," and that prevailing wage was to be determined in a manner that avoided wage depression cause by adding certified alien workers to the farm labor supply. Ernesto Galarza, *Merchants of Labor* (1964) at 135. During the sixty years since the inception of the Bracero program DOL appears to have forgotten that wisdom. Current prevailing wage methodology fails to recognize that when foreign workers are admitted in large numbers to fill jobs, they depress the wages in those jobs. Any prevailing wage calculation that does not take into account the presence of foreign workers is not ensuring that there is no adverse affect on U.S. workers. In the H-2A program employers are required to pay the Adverse Effect Wage Rate (AEWR), a rate that is higher than the prevailing wage and that takes into account the depressing effect foreign temporary workers have on wages. Advocates for H-2A workers and U.S. farm workers argue that the methodology of the AEWR does not actually achieve its goal of ensuring that H-2A workers do not have an adverse effect on the wages of local U.S. workers. In the H-2B program, where DOL claims to have the same goal, employers are not required to pay the AEWR. Furthermore, employers are virtually allowed to pick their own wage.

Employers in the H-2B program recruit workers almost exclusively from poor nations and from

[68] DOL Wage and Hour has issued an Opinion letter that it has authority to enforce as a protected minimum wage the wage for H-2A workers and that deductions which would violate the Fair Labor Standards Act at Section 3(m) are also impermissible from such a required wage. See Exhibit D annexed hereto, U.S. DOL Wage and Hour Memorandum No. 99-03, February 11, 1999.

populations within those nations whose earnings are substantially less than those working in unskilled or seasonal work in the United States. Almost any wage in the U.S. can be attractive to the foreign citizens recruited for these jobs due to the imbalance between the economies of the United States and sending nations. In 2006 the top four sending nations for the H-2B program were Mexico, Jamaica, Guatemala and Romania.[69] A wage rate that is mediocre or poor in the U.S. may not only be attractive but can induce high productivity among impoverished citizens of poor countries because their earnings opportunities and cost of living in the foreign countries are so low. The H-2B program allows U.S. employers to exploit international wage discrepancies.

In addition, the fact that H-2B workers are not allowed to move from job to job contributes to workers' inability to cause improvements in wages and working conditions at their H-2B employers. H-2B workers lack the economic freedom that workers in this country ordinarily hold. Under the current and proposed regulations, an H-2B worker may only work for the one employer that obtained the visa and must leave the country when the job ends. 8 C.F.R. § 214.2(h)(2)(i)(D). The worker is dependent on the employer for the visa not only for the current season but for all subsequent seasons as well. Therefore, very few workers find it in their interest to make demands for better wages or working conditions. Fear of lost jobs is a powerful force not only for the individual workers and their families, but also for the foreign workers' governments, which believe they are competing with other developing nations for the valuable economic opportunity to send their citizens to the United States. In these circumstances, rather than exert pressure on the market for improved wages and working conditions, their presence dilutes the economic power of the already low-paid U.S. workers who would otherwise fill those jobs. U.S. workers at an H-2B employer have difficulty making demands for higher wages when their foreign co-workers would rather endure those wages than risk losing their jobs.

The H-2B regulations require that an employer offer at least the required prevailing wage under the H-2B program to U.S. workers, but need not offer more than the required minimum even where there are U.S. workers available to accept the job if the wage rates were higher. 20 CFR §656.40(a). A worker who asks for a higher wage rate can be deemed to be "unavailable for work" and the available job can be filled with a guest worker at the minimum required wage. See, *Hernandez Flecha v. Quiros*, 567 F.2d 1154 (1st Cir. 1977). This legal framework causes further harm to U.S. workers.

In a recent article Ross Eisenbrey of the Economic Policy Institute observed that "in 2007, 130,000 [H-2B visas] were issued, even though more than 7 million Americans were unemployed and millions more had part-time jobs but wanted full-time work." He went on to ask why the foreign temporary worker program is so popular among businesses and concluded that it is "because the U.S. government lets them pay poverty-level wages." [70]

It is clear that employers prefer H-2B workers over U.S. workers, not only because of the lower

[69] Department of Homeland Security, Office of Immigration Statistics, Yearbook of Immigration Statistics: 2006, Table 33.

[70] Ross Eisenbrey, "Guest, Local Workers Suffer at Employer's Will," National Wage and Hour Clearinghouse, May 9, 2008, Copy annexed hereto as Exhibit E. Also available at: http://www.just-pay.org/news/article.194089-Guest_Local_Workers_Suffer_at_Employers_Will?print=1 .

possible wages, but also because they need not pay Social Security contributions or unemployment tax on the foreign workers' wages. Hiring U.S. workers is often seen by H-2B employers as increasing payroll costs and motivating employers to place more downward pressure on U.S. workers' wages or to avoid hiring them at all. During the three years that the cap on H-2B visas available was lifted, the number of employers seeking H-2B workers increased dramatically. One taste of the H-2B program and those employers were hooked; now they are claiming that they can't operate without temporary foreign workers and are pleading with Congress to allow them to obtain these workers this year.

For these and other reasons, the "minimum" standards under the H-2B program often become the maximum that the workers at an H-2B employer can hope to be paid. Because there is an endless supply of citizens of foreign countries willing to work in the United States, and these jobs are generally classified as unskilled, the employers' access to that foreign labor supply means that employers have little or no economic incentive to meet the economic demands of a U.S. worker who demands a better wage. Against this backdrop, it is a fiction to claim that any wage that results from a survey of H-2B employers would be the prevailing wage in that industry in the absence of temporary foreign workers or that the wage actually protects the interests of U.S. workers.

b. <u>The BLS OES System Causes Depression of Wages and the Prevailing Wage Should Be Replaced by an Adverse Effect Wage Rate</u>.

It appears that the current Bureau of Labor Statistics Occupational Employment Survey (BLS OES) wage-setting process does not correspond to the Foreign Labor Certification Data Center's procedure for assigning wage levels. DOL sets the Level 1 wage based on the average of the wages paid to the workers earning in the bottom one-third of the wage distribution range of wages in an occupation and geographic area (for example, if there are 99 forestry workers in a region, Level 1 is the average of the lowest-paid 33 workers). The Level IV wage is the average wage paid to the workers earning in the top two-thirds of the distribution (not the top one-third). The two intermediate levels are created by dividing the difference between the first and fourth levels by three, and adding the quotient to the first level and subtracting it from the fourth level. Level 3 is equivalent to the average wage.

This arithmetic formula for setting the wage levels is not appropriate in setting the prevailing wage to choose a wage that is lower than the average. It is especially inappropriate to allow an employer claiming a labor shortage to offer a wage rate (such as Level 1 and Level 2) that is at or just above the average of the lowest one-third of workers. Difficulty attracting job applicants should be solved by competing for workers through better job terms, not by offering wage levels that are paid to the lowest group of workers in the occupation.

In any event, the wages listed by the BLS OES are two years out of date. The BLS apparently uses a six "panel" time period that it adjusts for inflation but apparently is not capable of preparing the survey results fast enough to be issued for the coming year. H-2B employers should not be offering wage rates that are two years out of date, particularly when wage rates have been increasing modestly overall during the past decade, and especially during a period of increasing inflation in the cost of living. A wage rate that is two years out of date is

inappropriate because it allows employers to offer a non-competitive wage that many U.S. workers will reject. Workers from poor countries will accept such wage rates and displace U.S. workers, increasingly causing the U.S. workers to experience the same low wage rates.

An adverse effect wage rate (AEWR) would better accomplish the goal of protecting U.S. workers from the harmful effects of a foreign temporary worker program. DOL has a regulatory obligation to require H-2B employers to offer wages that have not been depressed by the presence of temporary foreign workers in the workforce.[71] . In many industries, as explained above, the accepted H-2B prevailing wage is close to, or slightly above, the minimum wage, clearly too low to attract available U.S. workers to these positions. If a U.S. worker applies and requests a higher wage, the employer is allowed to reject him or her as unavailable.

This problem is exemplified by the landscaping industry. In 2007, landscape laborer was the job category most often certified for H-2B employment. Despite this, the prevailing wage for 47 of 49 companies employing H-2B landscape laborers in two counties in New York was more than four dollars less per hour than the average hourly rate for landscaping workers in those counties. *See* Ross Eisenbrey, *H-2B and the U.S. Labor Market*, Economic Policy Institute (June 24, 2008, attached as Exhibit F. In an unpublished analysis of prevailing wage rates for 98 occupations in nine states and 27 different cities of employment, chosen randomly, all but three determinations set the prevailing wage rate below both the median hourly wage and the mean hourly wage prevailing in the area, sometimes by as much as 50%. *See* **Exhibit** G Ross Eisenbrey Unpublished Research Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage.

Even where the prevailing wage exceeds minimum wage or the average hourly wage, it is typically much lower than the AEWR. For example, in Imperial County, California, the rates are as follows for crop workers:

Area Code: 20940
Area Title: EL CENTRO, CA
OES/SOC Code: 45-2092
OES/SOC Title: Farmworkers and Laborers, Crop, Nursery, and Greenhouse
Level 1 Wage: $7.41 hour
Level 2 Wage: $7.77 hour
Level 3 Wage: $8.13 hour
Level 4 Wage: $8.49 hour

Not one of the four wage levels reaches the current California H-2A AEWR of $9.72 per hour, or even the 2008 rate of $9.20 per hour. In fact, two of the wage rates fall below the state minimum wage of $8.00 per hour.

[71] Part 602—Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964); 20 C.F.R. § 655.0 (2008); 8 C.F.R. Part 214.2(h)(6)(2008)(H-2B program); 8 U.S.C. §§ 1101(a)(15)(h)(ii) (b) (2008).

In FY 2007, USDOL certified 184,660 H-2B positions at rates lower than the applicable H-2A AEWR. See Attachment E to July 1, 2008 Comments by Friends of Farmworkers, Regulations.gov comment tracking number 8065032c. H2-B Certified Below AEWR FY07: summarizing for each state the total number of workers approved for H-2B jobs at prevailing wage rates lower than the Adverse Effect Wage Rate for that state, the number of H-2B workers approved by DOT Code at wage rates lower than the AEWR nationally and for each state, and the lowest wage rate approved nationally for that job classification

c. Piece Rate Pay Depresses Wage Rates.

The current and proposed prevailing wage methodology fail to recognize that piece rate systems have depressed wages and that the use of piece rates has adversely affected U.S. workers. The prevailing wage is expressed as an hourly rate (or, if applicable, a weekly or monthly salary), but never as a piece rate. Forestry and seafood, which are two of the dominant H-2B industries, traditionally pay by the piece. Many H-2B employers offer such low piece rates that their workers' earnings must be supplemented with "build-up" or "make-up" pay, so that they are paid at least the prevailing wage. In the seafood industry, H-2B workers arrive long before the crab or oysters that they will be picking are prevalent. Therefore, even a swift and experienced worker will often not be able to pick enough to earn the prevailing wage without make-up pay.

Piece rates may be lawful, but they are also known for being associated with labor abuses. The concept of a piece rate system is an economic incentive that induces workers to higher levels of productivity for the benefit of the employer based on the opportunity to earn more than the worker would earn on an hourly rate. The foreign temporary labor system undermines this concept, however, because H-2 workers cannot command significant improvements in the piece rates, for the reasons identified above. They are often willing to work at high productivity levels for piece rates that are perceived by U.S. workers to be low and the U.S. workers must accept that wage or be displaced by foreign workers.

Employers often use piece rates to stagnate wage levels when wages in the labor market are increasing. When the hourly rate increases but piece rates do not increase at a corresponding rate, workers who were once able to exceed their hourly pay through higher production see a relative decrease in their pay. In the North Carolina crab industry, for example, when the prevailing wage increased from $5.17 to $6.16 (because of an increase in the minimum wage), the piece rate per pound of crab meat stayed at $1.70/pound for most employers. Prior to the increase in the prevailing wage, an average crab picker who could pick 4 pounds per hour made about 30% more than the prevailing wage ($6.80 as opposed to $5.17/hour). After the wage increase, however, picking 4 pounds per hour would only yield about 10% more per hour than the prevailing hourly wage ($6.80 as opposed to $6.16). What was actually a 23% increase in the prevailing wage, led to no change in the money the crab pickers could actually make.[72]

Advocates have also observed that some applications in industries which pay the piece rate have been certified at the minimum wage. For example, certifications of seafood processing have

[72] To make matters worse, in recent years the number of crabs available has been decreasing so that crab pickers are unlikely to have the opportunity to average 4 pounds per hour except during a few weeks during the high season.

been repeatedly made in Virginia at $5.15 per hour (when the minimum wage was $5.15), even though virtually all workers were to be paid per pound of seafood processed. It is impossible that the minimum wage could reflect the reality of a median wage in a piece-rate industry unless serious wage and hour violations were occurring. In piece-rate work, workers earn widely varying wages based on their productivity. If $5.15 was really the prevailing wage rate, many workers had to be earning **less** than the minimum wage. See, for example, 2001 certification of Gloucester Seafood by U.S. DOL, available at http://www.flcdatacenter.com/CaseH2B.aspx. In fact, Gloucester Seafood has been repeatedly sued for violations of wage and hour laws by H-2B workers. See U.S. District Court for the Eastern District of Virginia, *Alcaraz-Garcia v. Gloucester Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia, 4:00CV69; *Rosa Isabel Miranda Garcia v. Gloucester Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia, 4:03CV39.

The stagnation in piece rates when average wage rates and legal minimum wage rates are rising also results in escalating productivity standards without compensation. As the productivity demands get harder and harder without a real pay increase. U.S. workers with any other options are less likely to accept the jobs that desperate foreign workers will reluctantly accept. Many H-2B workers understand the disparity between increasing minimum wage requirements and their normal piece rate as a reflection of their failure to produce more rather than a failure of the piece rates to keep up with increases in the required wage.

4. Employer-Provided Surveys are Inherently Flawed.

DOL has repeatedly espoused consistency of prevailing wage determinations as an important objective, *see* DOL General Administrative Letter, No. 2-98, and the proposed regulations are no exception. However, if DOL really hopes to achieve any consistency in PWDs, then the employer surveys need to be eliminated. Rather than making wage determinations any more consistent, they allow for a wider range of wages than the OES wage surveys and allow employers to come up with whatever wage is most desirable to them with very little oversight.

a. More Oversight of Employer-Provided Surveys is Necessary to Ensure Accurate Prevailing Wage Determinations.

Originally, employers wishing to substitute their own wage information for the wage provided by DOL had to demonstrate that the DOL survey was inappropriate for the particular job opportunity and show that its own data indicated that the salary being offered by the employer met the prevailing wage standard. *See Matter of John Lehne & Sons*, 89 –INA- 267, 1992 WL 100030 (1992) (en banc). In addition, employers had to show that its alternative wage source was superior to the SWA's survey. *See Matter of PPX Enterprises, Inc.*, 88 –INA- 25, 1989 WL 250333 (1989) (en banc). In other words, there used to be some minimal scrutiny of employer provided wage data. That minimal burden of persuasion on employers was replaced by strong deference for employer provided wage information through DOL guidance in 1997[73]. The proposed regulations maintain that deference and fail to strengthen the requirements for employer-provided surveys in any meaningful way.

[73] General Administrative Letter, No, 2-98 (1997).

Common sense dictates that employers who are providing their own wage data are motivated by an incentive to come up with lowest prevailing wage possible, yet the regulations governing these surveys do not encourage any real scrutiny of them nor do they require employers to persuade the NPC that their wage is superior to the OES wage. Under the current regime, which is unchanged by the proposed regulations, "if an employer provided published survey or an employer-conducted survey complies with all the methodology requirements, it must be used by the SWA in lieu of the OES wage as the prevailing wage for that particular request. It will not be compared to the OES survey in that case . . . the OES survey will be off the table when the employer presents its own survey." [74]

Using employer-provided surveys as a source of prevailing wage determinations is antithetical to DOL's own stated policy. The DOL regulations direct NPCs to determine whether the employment of foreign temporary workers will adversely affect the wages and working conditions of similarly employed U.S. workers. A crucial part of that determination is to consider the prevailing wage for the occupation in the area of intended employment. Employers participating in the H-2B program have no responsibility to ensure that their wage offer does not have an adverse affect on similarly situated U.S. workers. Rather, those employers often have the opposite concern because their objective is to employ foreign workers as opposed to domestic workers. Therefore, DOL violates its own regulations, its stated objective, and Congressional policy by allowing NPCs to defer to the wage information provided by employers with very little scrutiny.

b. The Criteria for Accepting/Rejecting an Employer-Provided Survey are Too Vague.

If employer-provided surveys cannot be eliminated as a source for prevailing wage determinations, then at the very least the criteria for accepting them need to be enhanced. Currently and according to the proposed regulations, the only requirement is that employers provide enough information about the survey methodology to allow the SWA/NPC "to make a determination about the adequacy of the data provided and validity of the statistical methodology."[75] Just how much information is enough to make that determination—or rather, how little information is not enough-- is fatally omitted. In a scheme where the agencies are instructed to accept the employer's wage information without comparing it to the OES wage or other wages in that area or industry as long as that employer provides "enough information," the phrase "enough information" is far too vague.

For example, nowhere are employers conducting surveys instructed to include their year round employees if those employees are doing the same kind of work or work that requires the same skill level. There is no provision that if an industry is dominated by H-2B workers that the survey find comparable jobs of U.S. workers and use those wages instead. In addition, the survey results are not required to include a certain percentage of employers in a given industry or a certain number of employers across industries. There is simply no clear way to know whether

[74] Labor Certif. Handbook 6:13 (2007) pp.3

[75] Labor Certif. Handbook 6:13 (2007) pp.3

an employer-provided survey should be deemed unacceptable or not.

Furthermore, the guidance that does exist is confusing. According to current ETA guidance[76], the job description applicable to wage data submitted by an employer must be adequate to determine that the data represents workers who are similarly employed,[77] but the definition of similarly employed is not simply having the same job with a different employer. Rather, according to DOL's regulations, similarly employed means having substantially comparable jobs in the occupational category in the area of intended employment; if that does not apply, then having jobs requiring a substantially similar level of skills within the area of intended employment; or, if neither of those apply, then having substantially comparable jobs with employers outside of the area of intended employment.[78] With a definition that is that complex, it is difficult to comprehend what kind of job description would be sufficient to demonstrate that the employees in the survey are similarly employed. Furthermore, the regulations and ETA guidance clearly contemplate that wage data should be collected across industries, but there is no clear way to ensure that is happening in the survey requirements. The employer-provided wage information in the North Carolina crab industry illustrates this flaw (along with several other flaws) in the system.

Example: NC Crab Industry

For more than ten years, the prevailing wage in the crab industry has been within two cents of the minimum wage. This wage has been determined through employer-provided surveys, specifically through surveys conducted by the North Carolina Fisheries Association ("NCFA"),[79] **[Exhibits H, I, K]** which have consistently been deemed acceptable according to the regulations and guidance though they are clearly flawed.

In 1998 the NCFA gathered information from 31 respondents, 30 of whom reported that the wage for entry level crab pickers was the newly established minimum wage of $5.15/ hour. **[Exhibit H]** Because one lone employer actually paid their workers $6/hour, the prevailing wage was set at $5.16. Seven years later the survey was again conducted by the NCFA and according to their results the prevailing wage had increased an incredible 1 cent per hour. **[Exhibit I]** This increase is due to the fact that the majority of the 15 respondents were paying their employees the current minimum wage of $5.16 rather than the Federal minimum wage at that time. After the state minimum wage was increased to $6.15 in 1007, the prevailing wage for crab pickers was determined, according to another NCFA survey, to be $6.16 (the only reason it was above the state minimum wage is likely because employers were confused about what they were supposed to be paying). **[Exhibit J].**

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[76] Proposed 20 CFR 656.40(g)(2) says that employer-provided wage information must be collected in accordance with ETA guidance.

[77] Employment and Training Administration, Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs (Rev. May 9, 2005)

[78] Defined at current 20 CFR 656.40(b) and proposed 20 CFR 655.10(c)

[79] See annexed Exhibit F, G, and H prevailing wage surveys prepared by NCFA for North Carolina Employment Security Commission.

These surveys illustrate several of the ways employer-provided surveys are fundamentally flawed. The law requires that H-2B visas be available to employers only when "unemployed persons capable of performing such labor cannot be found in this country," *see* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (1999), and in order to comply with the law DOL is to certify that the wage being offered will not adversely affect the wages and working conditions of similarly employed U.S. workers. Consistently offering a prevailing wage that is barely above minimum wage violates the law and DOL's mandate, but because there is so little oversight of employer-provided surveys that wage has been accepted over and over again. Up until the early 1990s, crabs were picked in North Carolina by mostly local African American women. These women were slowly displaced by temporary foreign workers until the industry became almost completely dominated by H-2B workers. During the transition, NC seafood employers claimed that they could not find any available U.S. workers to take these jobs at the wage they were offering even though unemployment was high in the poor coastal counties where their seafood plants are located. This is not surprising, however, since the prevailing wage for entry level crab pickers, as determined by employer-provided surveys, has remained more or less pegged to the minimum wage for over the past 10 years.

Additionally, the NCFA surveys only reflect the 'universe of crab pickers' in North Carolina as opposed to surveying across industries as the ETA guidance instructs. The occupational category that includes crab pickers is meat, poultry and fish cutters, but the wage surveys do not include any of those occupations. Interestingly, the OES wage for meat, poultry and fish cutters has steadily increased while the prevailing wage for NC crab pickers has stayed virtually the same. Because the crab industry in North Carolina is almost completely dominated by H-2B workers the only wages reflected in the NCFA surveys are those of H-2B workers. They are not an accurate reflection of what the prevailing wage in the occupation would be if it were complying with the law.

The 2007 NCFA survey is based on results from 5 of the 9 employers contacted, all of whom employed H-2B workers. **[Exhibit J].** If the regulations clearly suggested that 5 was not enough or that 5 of 9 was insufficient, then DOL could have required that data come from more than just those people having the exact same job but for different employers. In order to accept the results, the processing officer could have required that data come, as the definition suggests, from employees in jobs with substantially similar level of skill to entry level crab picking in that area, or from employees outside of that area but in substantially comparable jobs. The fact is that none of those meaningful requirements are part of the current or proposed regulations for employer-provided surveys.

Despite all of these problems with the data provided by the NCFA, their surveys have continuously met the basic requirements and have been accepted by the North Carolina Employment Security Commission (NCESC). Interestingly, in 2005, the Applicant Services Manager at NCESC noticed that the prevailing wage had not increased for crab pickers in many years and that it was substantially lower than the OES wage ($5.17 as opposed to $7). **[Exhibit K annexed hereto]** Without more rigorous standards, however, the NCESC had no choice but to accept the wage survey.

5. State Workforce Agencies are in a Better Position to Evaluate Prevailing Wage Determinations than a National Processing Center.

In the proposed regulations DOL claims that by "federalizing the prevailing wage application component [they] can institute a high level of efficiency and consistency in the determination and provision of prevailing wages which has been a past problem." (p.20) While we agree that the current system of determining prevailing wages is inconsistent and riddled with problems, centralizing the determination process in one distant office will not solve those problems. Past experience indicates that the best way to "ensure more accurate wage determinations, which result in improved protections for U.S. workers" *id.* is to allow SWAs to continue making those determinations. This is true for two reasons.

First, SWAs are inherently more familiar with the employment conditions and practices across their states than a centralized NPC can ever be by virtue of the fact that they are a state, rather than a federal agency. Current regulations require that an employer seeking an H-2B labor certification submit a copy of Form ETA 750 Part A to the SWA, describing the offer of employment that will be made to the H-2B worker, the hours and wages, and a declaration that the wage meets or exceeds the prevailing wage. *See* TEGL 27-06 (June 25, 2007), 72 FR 38621, July 3, 2007. Before certifying the application, the certifying officer must determine that the employment of an H-2B worker will not adversely affect U.S. wages and working conditions. In making this determination, the certifying officer is instructed to consider not only the statements of the employer and prevailing wage data, but also "labor market information, special circumstances of the industry, organization, and/or occupation ... and prevailing working conditions, such as hours of work." TEGL 27-06 (June 25, 2007), 72 FR 38621, July 3, 2007. The current process ensures that agencies with the most expertise on local labor markets – SWAs – play the primary role in preventing abuse of the H-2B program to undermine domestic wages and working conditions. SWAs are more likely to know what a normal commuting distance is for employees within that state and, therefore, notice if an employer is being over or under inclusive when it looks at wages and working conditions within the area of intended employment. SWAs will know if some environmental or social conditions within the state have caused the season for a certain type of employment to be different that year than in years past. By enabling SWAs to consider additional information and special circumstances in their determination, the current rules allow for state agencies to guard against improper use of centralized prevailing wage data that may be outdated or inappropriate for a particular organization or occupation. Current regulations are designed to ensure that potential harm to the domestic labor market, and to U.S. and immigrant workers, resulting from the underpayment of wages or downgrading of working conditions is, as much as possible, prevented from occurring before an H-2B visa is granted.

Second, SWAs are better able to give each prevailing wage application component more thorough attention than one centralized NPC would be. In 2005, for example, the Applicant Services Manager at the Employment Security Commission of North Carolina (that state's SWA) noticed a glaring inconsistency with the prevailing wage determination for crab pickers in the state. The current prevailing wage was the result of an employer provided wage survey which

had remained virtually unchanged since 1998[80]. That wage, $5.17, was in her words "so much lower" than the OES wage of $7.21 **(Exhibit K).** That kind of attention to industry patterns and wage discrepancies cannot be expected from a centralized office. Rather than strengthening the current certification process to address these weaknesses, the proposed regulations would do away with the certification process regarding wages and working conditions altogether. SWAs would be completely removed from the process of reviewing employer applications to ensure that H-2B employment will not adversely affect domestic wages and working conditions.

6. Failure to Allow Employees to Challenge Employer-Provided Wage Information Guarantees Skewed Results.

The proposed regulations provide for the Chicago NPC to make PWDs according to the OES wage component unless an employer applicant provides its own wage information. If the NPC uses the OES wage and the employer is not satisfied with that wage, the employer can then provide its own wage information. If the employer's wage information is rejected, the employer then has other options to challenge that determination, but the workers who will be paid this wage have absolutely no way to challenge the employer-provided wage information.

In theory, U.S. workers can express their disagreement with the prevailing wage being offered by refusing to accept a job at that wage. Their ability to "vote with their feet" is rendered meaningless, however, through competition with H-2B workers. They cannot simply ask for a higher wage because H-2B employers are only required to pay them the prevailing wage. Any U.S. worker who applies for a job but tries to negotiate for a more appropriate wage will be sent away and marked as "unavailable" for work.

The foreign H-2B workers have even less options. They cannot decide a wage is inappropriate and seek work elsewhere. Their options are to accept the wage without complaint or to return to their homes. The latter is usually not a real option, however, because H-2B workers often go into debt in order to travel to their place of employment and obtain an H-2B job. They cannot risk losing their job until they have made a dent in the money they owe. If an H-2B worker leaves a job for his or her own reasons, there is no requirement that the employer provide return transportation. Furthermore, there is no requirement that the wage rate be disclosed to the H-2B worker before they begin working.

Advocates for low-wage U.S. workers and for H-2B workers also have no administrative avenue to challenge employer-provided surveys. If certifying officers were required actually to analyze employer-provided wage information and employer-conducted surveys, then perhaps there would be no need for advocates or concerned citizens to be allowed to challenge the results. But since the wage surveys are essentially accepted without scrutiny, some sort of oversight is necessary. Perhaps if there were an avenue for challenging these surveys, then the North Carolina Fisheries Association surveys, which have consistently concluded that the prevailing wage for crab pickers is just a hair over minimum wage, would have been rejected long ago for failing to look at actual pay or at the higher wages paid to year round workers with the same job

[80] The wage changed from $4.25 to $5.15 in 1997 because of an increase in the federal minimum wage. Between 1997 and 2007, when the North Carolina minimum wage increased to $6.15, the prevailing wage was either $5.15, $5.16 or $5.17.

description.

Even where DOL or DHS notices that an employer is paying the wrong prevailing wage and the case against that employer for revocation and debarment is clear, neither enforcement action would be sufficient to remedy the harm caused by the employer's failure to pay the true prevailing wage. Revocation and debarment would result in the termination of an H-2B visa or the prohibition of access to future H-2B visas. These mechanisms would do nothing to make the underpaid H-2B worker whole by raising her wages to the proper level or requiring back pay. These enforcement mechanisms would also be insufficient to repair the adverse impact on domestic wages that has already been caused by the failure to pay the prevailing wage. Once an employer is able to circumvent the domestic labor market and pay H-2B workers less than the prevailing wage, the harm is done, both to the immigrant worker and to the domestic labor force. Failure fully to compensate for that harm will ensure that employers continue to profit from abuse of the system, and will eventually lead to a backsliding in domestic wages and working conditions, in direct violation of the spirit and the letter of the law. Indeed, employers who are sued by workers for underpayment may very well defend themselves on the basis that the wage promises in the labor attestation were approved.

7. Piece Rates and Productivity Standards Should Be Disclosed and Must Keep Up With the Prevailing Wage.

Many industries, such as seafood and forestry, which employ large numbers of H-2B workers pay their employees on a piece rate basis. However, USDOL does not currently require disclosure of the piece rate on the clearance order and only those workers who will be performing agricultural work are entitled to advance written disclosures under the Migrant and Seasonal Agricultural Worker Protection Act. 29 U.S.C. §§ 1821(a) and 1831(a); 29 C.F.R. §§ 500.75(b)(2) and 600.76(b)(2). The summary to the proposed regulations states, "[t]he U.S. worker and the foreign worker are both entitled to know and rely on the wage to be paid for the entire period of temporary employment . . ." Fed. Reg. 73, No. 100, p. 29947. Despite this, under both the current and proposed regime, both H-2B and U.S. workers will remain in the dark about applicable piece rates and any productivity standards until they begin working.

The requirements are quite different for H-2A employers. The piece rate, the basis for the piece rate (e.g., the size of the bucket, bushel, or flat), and the productivity standard must be disclosed in the job offer. 655.102(b)(9); ETA Handbook No. 398, pp. I-34-35. Furthermore, the piece rate must also be a prevailing rate. *Id.* at I-35. Productivity standards can be "no more than those normally required by other employers *of U.S. workers* in the area" [emphasis added]. *Id.* at II-11.

The productivity standards set by H-2B employers are often unachievable. The Southern Poverty Law Center reports that H-2B forestry workers are expected to plant at least 2,000 seedlings in an eight hour day, a task that is impossible under less than ideal working conditions. Close to Slavery, p. 18. Disclosure of these productivity standards and requiring that the piece rate be a prevailing rate would allow USDOL to reject clearance orders with unrealistic standards and insufficient rates.

The failure to require proper piece rates also leads to cheating. An employer who pays by a low prevailing piece rate which yields substandard wages has an incentive to lie. The employer will illegally understate the number of hours worked by its employees to give the appearance of a higher hourly average wage. There have been numerous lawsuits aimed at these abuses. In the seafood industry, workers in Virginia and North Carolina have filed at least 12 lawsuits against ten separate companies since 1998. Each of the lawsuits contained virtually identical allegations: that workers were paid on a piece rate; that they did not earn the minimum wage; that there were unlawful deductions for tools, travel and uninhabitable housing taken from their pay; and that they were not paid overtime wages for hours worked over 40 in a week. *See Zamora v. Shores and Ruark Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia, C98CV501; *Maria Demesia Aboyte v. Shores and Ruark Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia, *Alcaraz-Garcia v. Gloucester Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia, 4:00CV69; *Soto-Lopez v. J&W Seafood of Virginia, Inc.*, U.S. District Court for the Eastern District of Virginia, 3:98CV792; *Perez-Sandoval v. International Seafood Distributors, Inc.*, U.S. District Court for the Eastern District of Virginia, 3:99CV00691; *Perez-Segura v. Bay Water Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia; *Quiroz Losoya v. Shores and Shores, Inc. t/a Virginia Packing*, U.S. District Court for the Eastern District of Virginia, 99CV133, *Rosa Isabel Miranda Garcia v. Gloucester Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia, 4:03CV39; *Beltrán Benitez, et al. v. Sea Safari, et al.*, U.S. District Court for the Eastern District of North Carolina, 2001; *Fonseca Aguilar, et al. v. Carolina Seafood Ventures, et al.*, U.S. District Court for the Eastern District of North Carolina, August 2002; *In re Stephenson*, U.S. Bankruptcy Court for the Eastern District of North Carolina, October 2002.

Virtually all of these cases settled without going to trial. While a few settled on confidential terms, many settled upon payment of substantial sums of money for the workers. In one case, *Zamora v. Shores and Ruark Seafood, Inc.*, workers sued an employer who had been twice cited by the U.S. Department of Labor for failing to pay minimum wage and overtime wages to its workers. Each time it was fined by the U.S. DOL, the company continued its unlawful practices of failing to pay minimum wage and overtime. The company also continued to successfully request and receive approval to import H-2B workers to perform seafood processing while failing to pay the minimum wages and overtime. In 1999, the company paid over $103,000, excluding attorney's fees and costs, to settle 51 workers' claims. *See* Lawrence Latane III, *Fifty-One Workers Will be Paid Back Wages*, Richmond Times Dispatch, July 10, 1999. A second suit ended in settlement of an additional ten workers' claims.

In the tree-planting industry, very large timber companies rely on a large number of contractors to import H-2B workers to plant pines, particularly in the southeastern United States. A 2005 investigative report by the Sacramento Bee documented widespread wage and hour abuses in the forestry industry, including incorrect recording of pieces and hours. Tom Knudson and Hector Amezcua, Sacramento Bee, *The Pineros: Men of the Pines*, November 13, 2005. Workers in this industry are routinely paid by the piece (by 1,000 trees planted). There is no build-up pay to raise workers' hourly rate to the required rate. The violations of law routinely include: failure to pay the minimum wage; failure to pay the (higher) prevailing wage; failure to pay overtime wages; deductions for tools, travel, and visa. *See Perez-Perez, et al. v. Progressive Forestry Services, Inc., et al.*, Civ. No 98-1474-KI (D.Or.); *Moreno-Leon v. Franklin Stanley*, U.S.

District Court for the Western District of Arkansas, El Dorado Division, Case No. 99-1002; *Vicente Vera-Martinez v. Grano Reforestation, Inc.*, U.S. District Court for the Western District of Arkansas, Case No. 03-6002; *Gonzalez-Sanchez v. International Paper Co.*, 346 F.3d 1017, *Martinez-Mendoza v. Champion International Corporation*, 340 F.3d 1200 (11th Cir. 2003); *Lizarraga-Ruiz v. Georgia-Pacific Corp.*, 88 Fed.Appx. 382 (11th Cir. 2003). *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355, 2006 WL 2349459, at *1 (E.D.La Aug. 11, 2006) Several of these cases settled with payment of money or entry of judgment.

In a group of three cases filed against the timber companies, the Eleventh Circuit Court of Appeals declined to find the timber companies responsible for the legal violations. *Gonzalez-Sanchez v. International Paper Co.*, 346 F.3d 1017, *Martinez-Mendoza v. Champion International Corporation*, 340 F.3d 1200 (11th Cir. 2003); *Lizarraga-Ruiz v. Georgia-Pacific Corp.*, 88 Fed.Appx. 382 (11th Cir. 2003). However, the sworn testimony of workers in those cases shows the recurrent nature of the violations in that industry. Over 600 individuals participated as plaintiffs in those three lawsuits. Those individuals had labored in at least thirteen states across the United States and worked for at least seventeen different labor contractors. The workers were not routinely paid minimum wage, much less the higher prevailing wage. They had deductions taken from their pay for work-related tools, travel, and visa processing. They were not paid overtime for the hours over 40 in a week, though most routinely worked over 60 hours per week.

Landscaping workers who come to the U.S. on H-2B visas have also been the subject of underpayment and exploitation. In a class action suit brought by H-2B landscapers in Michigan, the workers alleged minimum wage and overtime violations. They were also housed in substandard housing and unlawfully charged for that housing. In addition to the housing, workers were illegally charged fees for setup, sheets, mattresses, uniforms, boots, tools, furniture, hats and utilities. *Nolasco Saldana v. Torre & Bruglio, Inc.*, E.D. Michigan, Case No. 02-73496. In a Virginia case, landscaping workers alleged that they were not paid the prevailing wage, that they were not reimbursed for their travel costs, and that they were housed in an uninhabitable warehouse for which they were charged excessive prices. See Pamela Stallsmith, Lawsuits Allege Shoddy Treatment, Work Conditions, Richmond Times Dispatch, May 11, 2003.

DOL now has years of experience with irrational, backward and inappropriate piece-rate systems. The agency should adopt for the H-2B program the requirement it had for H-2A piece rates until 1987, which stated that the piece rates paid to H-2B workers must be designed to produce average hourly earnings of at least the prevailing wage. 20 C.F.R. § 655.202(b)(9)(ii)(1987). The previous regulations also stated:

> In any year in which the applicable . . . wage rate increases to the point where the employer's previous year's piece rate . . . will not enable the average U.S. worker's hourly earnings to equal or exceed the new applicable . . . wage rate without requiring the U.S. worker to increase productivity over the previous year, the employer shall increase the piece rate to a level at which the average U.S. worker would earn at least the . . . [applicable] wage rate. 20 C.F.R. § 655.207(c)(1987).

These provisions, adopted in 1978 (43 Fed. Reg. 10306, 10308-09), revised earlier provisions under the Bracero and H-2 programs which required employers to adjust piece rates as the required wage rate changed so that they were "designed to yield" earnings that would avoid stagnation and adverse effect.[81] These provisions, DOL recognized, responded to the concern that employers would increase productivity demands in a piece-rate-paid occupation rather than provide wage increases required by law. With its long history on this topic, DOL now has the evidence to know that guestworker programs require such protection.

DOL should also be investigating virtually every piece rate system under the H-2B program and should massively increase its enforcement to remedy and deter abuses.

VIII. Proposed Protections In The Attestation Process Do Not Adequately Protect U.S. And Foreign Workers Against Abuses By Employers, Labor Contractors And International Recruiters

A. The current system of international recruitment leaves workers indebted and subject to abuse.

The H-2B recruitment process involves a series of fees that employers, labor contractors, and recruiters often pass on to workers. Many workers liquidate life savings and incur substantial debt in order to pay visa, travel, and recruitment fees. This system makes foreign workers highly vulnerable to exploitation.

International recruiters and other employer representatives frequently charge workers exorbitant fees. In a class action now pending in the Eastern District of Louisiana against Signal International,[82] workers from the United Arab Emirates and India paid total fees ranging from $12,000 to $20,000 each.[83] The recruiters lied to workers about visa opportunities available through the program, claiming they would be eligible to become permanent residents. Recruiters also commonly mislead workers about earnings opportunities and working conditions. Last year, 20 temporary workers from Thailand paid $11,000 to recruiters who falsely promised them three years of guaranteed agricultural work at $8.24 an hour.[84] Upon arrival, workers' passports and other documents were confiscated, they were forced to live in squalid conditions without even potable water, and they were never paid for many hours of work.

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[81] Howard N. Dellon, Foreign Agricultural Workers and the Prevention of Adverse Effect, 17 *Labor L.J.* 739, 744-45, 747 (1966).

[82] According to the Southern Poverty Law Center who filed the suit on workers' behalf, Signal is a subcontractor for global defense contractor Northrop Grumman Corp. Southern Poverty Law Center, Legal Action: David, et al. v. Signal International LLC. *available at* http://www.splcenter.org/legal/docket/files.jsp?cdrID=72&sortID=0. Accessed July 2, 2008.

[83] See Complaint ¶ 85 in David, et al. v. Signal International LLC, No. 2:2008cv01220 (E.D. La. filed Mar. 10, 2008) *available at* http://www.splcenter.org/pdf/dynamic/legal/Signal_Complaint_080321.pdf.

[84] See Muangmol Asanok, et. al. vs. Million Express Manpower Inc. et. al., No. 5:2007cv00048 (E.D. N.C. filed Feb. 2, 2007)(Cited in Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (2007) p.38, *available at* http://www.splcenter.org/pdf/static/SPLCguestworker.pdf).

Still, many workers are too scared to complain. H-2B workers typically arrive in the United States with program-related debt ranging from $500 to well over $10,000.[85] Because most are extremely poor, the bulk of this is financed through high-interest loans. At risk of losing family homes and businesses used to guarantee their loans, foreign workers become highly dependent on their U.S. employers for compensation. This is particularly so in the H-2B context, where workers are tied to a single employer who may deport them if they complain.

Employers often exploit this vulnerability. Plaintiffs in the recent Decatur Hotel case paid between $3500 and $5000 in fees to work in 15 luxury New Orleans Hotels following hurricane Katrina.[86] While the workers were promised a minimum of 40 hours week plus overtime, Decatur offered only 25 hours per week or less. Because Decatur also refused to reimburse plaintiffs' recruitment fees, workers received wages well below the minimum wage. Yet they had no legal means to supplement their income.[87] In another recent case, Pro Tree Forestry workers from Guatemala paid up to $6,000 each in fees to acquire the H-2B visas. On arrival, they were paid only half of the $7.50 per hour promised by recruiters.[88]

In what has become an all too common scenario, many H-2B workers arrive to find little or no work. As DOL notes in the proposed regulation changes,[89] "benching" of workers is a common practice, especially among labor contractors. Employers recruit far more workers than necessary and often bring them in months before full-time employment is available.[90] Because employers tend not to pay visa and travel fees, they have little incentive to avoid overestimating their labor needs in this way.[91] Moreover, the system of kickbacks from international recruiters on a per-worker basis encourages employers to overstate their need. Desperate workers are legally bound to their employers and unable to seek employment elsewhere.

This combination of circumstances makes H-2B workers unlikely to assert their rights no matter how low their wages or how poor their working conditions. Because most could not earn enough to pay their debts in their home country, workers do not complain for fear of deportation, blacklisting, and even physical retaliation. Moreover, filing claims for compensation from

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[85] See Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (2007) p.10, *available at* http://www.splcenter.org/pdf/static/SPLCguestworker.pdf.

[86] See Complaint ¶ 1.4 in Daniel Castellanos-Contreras, et al. v. Decatur Hotels, LLC et al., No. 06-4340 E.D. La. Filed Aug. 16, 2006) *available at* http://www.splcenter.org/pdf/dynamic/legal/Decatur_Amended_Complaint.pdf; See also Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (2007) p.10, *available at* http://www.splcenter.org/pdf/static/SPLCguestworker.pdf.

[87] See Complaint ¶ 1.4 in Daniel Castellanos-Contreras, et al. v. Decatur Hotels, LLC et al., No. 06-4340 E.D. La. Filed Aug. 16, 2006) *available at* http://www.splcenter.org/pdf/dynamic/legal/Decatur_Amended_Complaint.pdf.

[88] *H-2A, H-2B Programs.* Rural Migration News. April 2007 Volume 13 Number 2. Available at: http://migration.ucdavis.edu/rmn/more.php?id=1204_0_4_0. Accessed June 25, 2008.

[89] Federal Register Vol. 73, No. 100, May 22, 2008 p. 29956.

[90] *H-2B Guestworkers Face Rampant Abuse*, Testimony of Mary Bauer, Director, Immigrant Justice Project at the Southern Poverty Law Center, before the U.S. House of Representatives Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law. April 16, 2008, *available at* http://www.splcenter.org/news/item.jsp?aid=309.

[91] Id.

abroad is exceedingly difficult due to in-presence requirements and the lack of transnational legal representation. Employers thus feel free to cut corners on health and safety and force workers to accept wages substantially less than the minimum wage. At its worst, this scenario has resulted in such poor treatment of workers that DHS declared them victims of human trafficking.

B. DOL's Proposed Regulations Do Little To Remedy The Situation. § 655.22(H) And § 655.22(L) Must Be Clarified And Expanded To Hold Employers Accountable And Protect Workers From Exploitation.

DOL's proposed regulations contain many loopholes that allow employers to shift recruitment and other costs to workers. Holding employers responsible will reduce worker debt and help stop the system of abuses. It could also help stem the resulting downward pull on U.S. worker wages and working conditions. Finally, it will reduce the necessity many workers feel to seek illegal employment elsewhere when promised H-2B jobs are unacceptable or unavailable. While DOL appears to take a step forward in § 655.22(h) and § 655.22(l), the proposed regulations must be expanded significantly to protect H-2B workers.

Proposed § 655.22(h) appears to prohibit employers from making deductions for expenses that benefit the employer if deductions would bring the actual wage below the offered wage. Similarly, under the new § 655.22(l), an employer must attest that it has not shifted the costs of preparing or filing the application to the temporary worker. In theory, this means employers cannot pass costs such as attorneys' fees and costs related to labor certification and recruitment onto the worker. However, the regulation does not clearly hold employers responsible for recruiting and other fees if and when they are charged. Whether DOL interprets such costs as *de facto* deductions remains unclear. Absent such an interpretation, the protections in theory are useless in practice.

Fees are embedded in the recruitment systems in countries from which H-2B workers come. In addition to third-party recruiter fees, there are administrative, processing, and other real costs associated with recruiting workers overseas. Manpower of the Americas, Mexico's largest H-2 recruiter, estimates that it costs on average $1,000 to transport a worker from Mexico to the United States. In addition to Manpower's fee, the company charges $150 per worker to process their visas.[92] If these expenses are not covered by benefiting employers, the burden will shift to H-2B workers.

Employers also rely on recruiters to administer industry-specific tasks involved in the hiring process. Workers often foot the bill. For example, H-2B workers hired by Signal Operations were required to test welding and fitting skills in preparation for their employment in the United States. While Signal helped organize, plan, and coordinate the logistics, the workers were required to pay for these tests, as well as subsequent travel costs. Because they paid through recruiters and legal facilitators,[93] this clear example of cost shifting would nonetheless appear to

[92] Mattson, Sean. "Guest Worker Obstacles." *San Antonio Express-News,* June 25th 2007.

[93] See Complaint ¶ 169-173 in David, et al. v. Signal International LLC, No. 2:2008cv01220 (E.D. La. filed Mar. 10, 2008) *available at* http://www.splcenter.org/pdf/dynamic/legal/Signal_Complaint_080321.pdf.

comply with proposed § 655.22(h) and § 655.22(l). Employers need only choose international recruiters that charge workers directly to gain the benefit of H-2B labor while making workers pay the price. Moreover, by allowing employers to disclaim liability for the acts of their agents, attestation serves as legal defense that deprives workers of a remedy.

Section 655.22(h) should clarify that costs paid directly by workers are *de facto* deductions for the purpose of calculating compliance with the offered wage, even if employers do not directly deduct them. Employers are therefore responsible for reimbursing workers if deductions bring the actual wage below the offered wage. DOL should also clarify its position on which costs are considered to benefit employers and thus require reimbursement. Similar language contained in FLSA[94] is a subject of constant dispute among parties and has been a source of confusion in US courts.[95] Section 655.22(h) should provide specific examples of expenses, including: required training and supplies; the cost of travel to and from the home country; and food and accommodation in transit, among others.

Section 655.22(l) should be similarly clarified. DOL should add specific examples of recruiting costs for which an employer may not seek reimbursement regardless of compliance with the offered wage. These include: visa fees, attorneys and application expenses, and third-party recruitment fees. Providing examples will help preempt disputes, reduce litigation and provide for more consistent rulings. Section 655.22(l) should also specify that these fees are *de facto* deductions even if paid directly by workers. Furthermore, employers should be held strictly liable for fees charged by their agents. This will deter employers that might otherwise opt for recruiters that charge workers directly, resulting in the same system of abuse employer attestations are meant to remedy.

Court decisions in at least three U.S. circuits support these changes. Beginning in 2002, the 11th Circuit ruled in *Arriaga* that recruitment fees and travel expenses are costs incurred primarily for the employer's benefit.[96] H-2A employers must therefore repay them at the beginning of employment to the extent that they reduce wages below the minimum wage. The court argued that these expenses arise out of employers' decision to recruit workers in foreign countries. Unlike daily food and lodging, these are not ordinary living expenses that a worker would pay regardless of employment.[97] The 11th Circuit reasoning resonated among civil society groups and courts alike. In 2006 the Middle District of Florida echoed *Arriaga* in *Avila-Gonzalez v. Barajas*.[98] The court required that the defendant reimburse H-2A workers for recruitment fees, visa application and issuance fees, travel expenses, and the I-94 border crossing fee, to the level of the AEWR. The Eastern District of Pennsylvania recently extended these rulings to H-2B

[94] See 29 C.F.R. § 531.3(d)(1); 29 C.F.R. § 531.35.

[95] See, *Rivera v. Brickman Group, Ltd.*, 2008 U.S. Dist. LEXIS 1167, 155 Lab. Cas. (CCH) P35,388, 13 Wage & Hour Cas. 2d (BNA) 275 (E.D. Pa. Jan. 7, 2008).

[96] *Arriaga v. Fla. Pac. Farms*, 305 F.3d 1228, 1231 (11th Cir. 2002).

[97] Id. at 1241.

[98] *Avila-Gonzalez v. Barajas*, 2006 U.S. Dist. LEXIS 9727 (M.D. Fla. Mar. 2, 2006)(A worker must be reimbursed for any costs incurred primarily for the employer's benefit which serve to reduce the employee's net earnings during the first week of work below the mandated wage rate).

workers in *Lemus v. Brickman*.[99]

Finally, § 655.22(l) contains what appears to be an oversight. While DOL states that employers must attest that they have not and *will not* shift the costs of preparing or filing the application,[100] the actual text of the proposed regulation does not incorporate "will not".[101] The regulation should be changed to close this loophole. We respectfully propose: "The employer has not and will not seek or receive payment of any kind..." to cover future actions.

C. DOL Should Ensure U.S. Employers Comply With Local Laws In Worker Home Countries By Clarifying § 655.22(e).

Many countries that supply workers for the H-2B program have laws that apply to foreign employers recruiting citizens for employment abroad. For example, Article 28 of Mexico's Federal Labor Law requires that employers register with the applicable Board of Conciliation and Arbitration; submit the employment contract to the Board; post a bond to ensure a fund to compensate workers for illegal employment practices; and pay the workers' visa and transportation fees in advance. Similar laws are found in other countries, including Guatemala,[102] Costa Rica,[103] El Salvador.[104]

However, U.S. employers habitually violate the laws of countries in which they recruit. Such actions may violate proposed § 655.22(e), which require companies to abide by all Federal, State and local laws during the entire period of employment.[105] However, DOL does not clearly define the "period of employment." While a logical reading of the regulation would encompass the period of recruitment by employer agents and thus the local laws of worker home countries, § 655.22(e) should be clarified to ensure compliance. U.S. obligations under the North American Agreement on Labor Cooperation make compliance with Mexican Article 28 particularly important. NAALC requires each nation to cooperate to ensure compliance with all labor laws and improve conditions for workers in the three nations.

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[99] See, *Rivera v. Brickman Group, Ltd.*, 2008 U.S. Dist. LEXIS 1167, 155 Lab. Cas. (CCH) P35,388, 13 Wage & Hour Cas. 2d (BNA) 275 (E.D. Pa. Jan. 7, 2008).

[100] See Federal Register, Vol. 73, No. 100, May 22, 2008, p.29952.

[101] See text of 655.22(l): "The employer has not sought or received payment of any kind for any activity related to obtaining the labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in recruiting the foreign worker or in preparing or filing the application, from the employee or any other party. For purposes of this paragraph (l), payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor."

[102] The Congress of the Republic of Guatemala, Decree Number 14-41, Guatemalan Labor Code, Title 2, Chapter 1, Article 34.

[103] Ley No. 2 de 26 de agosto de 1943. Código de Reforma y sus reformas. Titulo Segundo de los Contratos y de las Convenciones de Trabajo. Capitulo Primero, Articulo 41-45.

[104] Ley de Organizacion y Funciones del Sector Trabajo y Prevision Social, Tiulo IV, Capitulo Unico. De las Contrataciones para Prestar Servicios Fuera del Pais. Art 74.

[105] See text of 655.22(e), requiring employers to attest that: "During the entire period of employment that is the subject of the labor certification application, it will comply with all Federal, State or local laws applicable to the employment opportunity."

In order fully to protect workers, the regulation should state that the period of employment applies to the entire duration of an employer's relationship with the worker. This includes the recruitment period before the worker has left for the United States. Many workers pay hundreds of dollars to have their names included on employers' recruitment lists for jobs that don't materialize. Others pay high recruiting fees only to find that employers no longer need them. Holding employers accountable for their actions throughout the relationship both ensures U.S. compliance with local laws and prevents abuses of workers in their home countries.

D. Additional Recommendations.

[I don't think DOL can create a private right of action.]To ensure a remedy for workers when abuses occur, the regulations should also be amended to provide for enforcement authority for DOL or DHS to collect fees on behalf of workers. In addition, we recommend the following specific changes:

- Section 655.22(h) should clarify that costs paid directly by workers (e.g. fees paid to 3rd parties or visa/travel fees) are *de facto* deductions even though they are not directly deducted by employers.

- Section 655.22(h) should provide specific examples of expenses, including: required training and supplies; the cost of travel to and from the home country; and food and accommodation in transit, among others.

- Section 655.22(l) should include specific examples of costs incurred in recruiting for which an employer may not seek reimbursement (e.g. visa fees, attorneys and application expenses, and third-party recruitment fees).

- Section 655.22(l) should specify that fees are *de facto* deductions even if paid directly by workers.

- Section 655.22(l) should specify that employers will be held strictly liable for fees charged by their agents in US courts.

- Section 655.22(l) must incorporate future cost-shifting by employers. It should be changed to state: "The employer has not and *will not* seek or receive payment of any kind..." (emphasis added).

- Section 655.22(e) should be clarified to ensure that the "period of employment" includes the recruitment period and thus incorporates the local laws of worker home countries. Alternatively, "period of employment" should be changed to "duration of relationship" in order to include international recruitment.

- DOL regulations should include of a private right of action for workers to sue employers and/or enforcement authority for DOL or DHS to collect fees on behalf of workers.

IX. The Conditions Experienced By H-2B Workers in the U.S. Implicate International Human Rights Law; the Proposed Regulatory Changes Would Worsen Those Unlawful Conditions.

The conditions that H2B workers face prior to entry and during their stay in the United States raise serious human rights questions. These include payment of astronomically high "recruitment fees" to recruiters acting as the agents of U.S. companies, which sometimes include rendering to the recruiter the mortgage of family homes and property, and being subject to threats to induce them to pay this debt. Once in the United States, workers often find out that the promises made to them were illusory – wages are not paid and terms of entry are not as promised. Some are traded away to other employers and taken to states they've never heard of. Some are subject to confiscation of their passports, housed in isolated towns and labor camps, all under the perfectly legal threat that if they abandon the job, they are instantly deportable. These conditions have been well-documented in reports, litigation, Congressional hearings. They raise substantial questions, at the least, of discrimination under international law. At their worst, they lead to slavery, debt-bondage and forced labor. Yet the H-2B system as operated by DOL and DHS seems designed to lead inevitably to these violations of human rights and human dignity.

The proposed regulations exacerbate the problems inherent in the program and evidence a continued insouciance by the Department of Labor towards protection of these workers' labor rights. DOL continues to state that it has no direct authority to enforce the terms of the H-2B contract for the benefit of these workers, and proposes to engage in even less day to day oversight of the program than it now exercises, by using an "employer attestation" process, where employers essentially self-certify their H-2B applications, and removing the vital role of state agencies as on-the-ground watchdogs in the system.

A. The H-2B program and International Human Rights

As noted above, the current context of the H-2B program in the U.S. raises a number of questions regarding our nation's commitment to protect the human rights of migrant workers. The U.S. is bound to a number of international and regional instruments which it has ratified, including the International Covenant on Civil and Political Rights (ICCPR),[106] the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[107] and the North American Agreement on Labor Cooperation (NAALC). It is further bound by its very membership in the United Nations, the Organization of American States and the International Labour Organization to international human rights norms articulated by those bodies (discussed further below).

Recently, the United Nations, International Labour Organization and a number of international human rights and migration bodies have turned their attention to the ill treatment that migrant workers are routinely subjected to in the global economy. The Global Commission on

[106] The U.S. became a signatory to the ICCPR in 1977, and the United States then ratified the Convention June 8, 1992. http://www2.ohchr.org/english/bodies/ratification/4.htm.

[107] The U.S. became a signatory to the ICERD in 1976, and the United States ratified the Convention on October 21, 1994. http://www2.ohchr.org/english/bodies/ratification/2.htm.

International Migration called for the intensification of efforts to ensure the human rights commitments nations have entered into are implemented effectively and without discrimination.[108] As the largest migrant-receiving nation in the world, the United States has a special obligation to adopt the best possible practices with respect to the human and labor rights of migrants. This analysis will summarize the provisions of international human rights law that apply to the H-2B program as it now exists and highlight the potential of the proposed regulations to exacerbate these rights violations, rather than to correct them.

Core labor rights form a well-established body of international human rights law. Of particular relevance to the H-2B program, the campaign in the 1800s to eliminate slavery was the first subject of international law and human rights.[109] The U.S. is bound by several legal instruments that protect these core rights, five of which are outlined here.[110]

The Universal Declaration of Human Rights ("Universal Declaration") was adopted unanimously by the United Nations General Assembly in 1948.[111] While itself not a binding treaty, many of the principles contained in the Universal Declaration have achieved the level of customary international law and are therefore binding on all countries. [112] Among those binding norms are the prohibition of slavery and forced labor, articulated in Article 4 of the Universal Declaration the principles of equality before the law and nondiscrimination enumerated in Articles 2 and 7, and the right to freedom of association and the rights to form and join trade unions, provided for in Articles 20.1 and 23.4 respectively.

The United States is directly bound by the International Covenant on Civil and Political Rights (ICCPR), having ratified the treaty in 1992. Together with the Universal Declaration and the International Covenant on Social, Cultural and Economic Rights (which the US has signed, but to date has not ratified), these documents comprise the International Bill of Human Rights. Of specific relevance to migrant workers, the ICCPR protects equality before the law in Articles 2 and 26, freedom of association and trade union rights in Article 22, and prohibits slavery and

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[108] Global Commision on International Migration, Chapter 5: Migration in an Interconnected World, Oct. 2005, at http://www.gcim.org/en/finalreport.html. Similar recommendations have been made in the context of the state-controlled Global Forum on Migration and Development, a follow-up process to the U.N.'s High Level Dialogue on International Migration and Development in New York in September 2006. See Cholewinski at 207-208 and n. 161.

[109] Jennifer S. Martinez, ANTISLAVERY COURTS AND THE DAWN OF INTERNATIONAL HUMAN RIGHTS LAW, 117 Yale L. J. 550 (2008).

[110] *See*, generally, Sarah Cleveland, Beth Lyon & Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status,* 1 SEA. J. OF SOC. JUST. 795 (2003); Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers' Rights in the United States, in* HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS: ESSAYS IN HONOR OF JOAN FITZPATRICK AND ARTHUR HELTON (Anne F. Bayefsky, ed., 2005), *reprinted in* 3 HASTINGS RACE & POVERTY L.J. 35 (Fall 2005).

[111] *See*, Id.,Cleveland, et.al., at 858 & n. 102. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, *available at* http://www.un.org/Overview/rights.html.

[112] Universal Declaration of Human Rights, G.A. Res 217 (iii), U.N. GAOR, 3d Sess., at 71, U.N. Doc A/810 (1948), *available at* http://www.un.org/Overview/rights.html.

forced labor in Article 8.[113] The rights contained in the ICCPR apply to all persons under the jurisdiction of the country of ratification, regardless of national origin or citizenship status.[114]

Similarly, the U.S. has also signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[115] ICERD prohibits both laws with discriminatory intent and discriminatory or disparate impact in Article 2, a higher standard than most U.S. civil rights laws. It further requires that parties the Convention take affirmative measures to guard against private discrimination. With regard to the rights of migrant workers, Article 5 specifically prohibits discrimination in the right to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration, and to form and join trade unions.[116]

The International Labor Organization (ILO) is a specialized agency within the United Nations system formed in 1919. It is focused on achieving tripartite (government, workers and employers) solutions to major employment issues worldwide. While the U.S. has ratified only two of the ILO's 179 Conventions (Convention Number 105 on the Abolition of Forced Labor and Convention 182 on the Abolition of the Worst Forms of Child Labor), it is nonetheless bound, by virtue of its membership in the ILO, to protect the four fundamental principles included in the 1998 Declaration on the Fundamental Principles and Rights at Work.[117] These include freedom of association and the right to bargain collectively, the abolition of forced labor, the abolition of child labor, and equal opportunity and treatment in employment.

As a member of the Organization of American States, the United States is also bound by the Charter of the Organization of American States ("OAS Charter") and the American Declaration of the Rights and Duties of Man ("American Declaration"). Signatories to the OAS Charter are

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[113] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by G. A. resolution 2200A (XXI) of 16 December 1966, *entered into force* 23 March 1976, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

[114] Art. 2 of the ICCPR specifically provides:

> (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> (2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

[115] International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), *entered into force* Jan. 4, 1969, *available at* http://www.unhchr.ch/html/menu3/b/d_icerd.htm.

[116] While the United States has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (1990), *entered into force* Jul. 1 2003, *available at* http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm, that Convention also directly covers labor rights of migrant workers, both documented and undocumented, in Art. 25.

[117] Declaration on the Fundamental Principles and Rights at Work , *available at* http://www-old.itcilo.org/actrav/actrav-english/telearn/global/ilo/law/idec.htm.

bound by its provisions,[118] and the General Assembly of the OAS has repeatedly recognized the American Declaration as a source of international legal obligation for OAS member States (including specifically the United States).[119]The American Declaration protects freedom of association in Article XXII. It protects equality before the law in Art. II, the right to fair pay and working conditions and a suitable standard of living in Article XIV, and preservation of health in Article XI. The OAS Charter protects freedom of association in Articles 45(c) and (g); fair wages, employment opportunities and acceptable working conditions are protected in Article 34(g).

The North American Agreement on Labor Cooperation (NAALC) is a supplement to NAFTA that creates a foundation for Canada, the United States and Mexico to resolve labor issues and promote improved labor conditions for workers in each of the three nations, as well as for migrant workers. The NAALC's Labor Principles specifically protect migrant workers, and require countries to comply with standards on health and safety, including access to workers' compensation, implementation of employment standards and protection of workers' rights to organize.[120]

B. Freedom From Discrimination

Like United States law, international law prohibits discrimination on the basis of such distinctions as race, color, sex, or other status. However, international law, including instruments signed and ratified by the United States, generally offers additional protection from discrimination. First, most instruments, either explicitly or through interpretation, make no distinction between the rights of migrants in either regular or irregular situation, on the one hand, and nationals of a country, on the other. Second, international instruments such as the ICERD prohibit both intentional discrimination and laws that have discriminatory impacts.

With respect to the rights of citizens versus those of non-citizens, in September 2003, the Inter-American Court of Human Rights issued a landmark Advisory Opinion on the juridical condition and rights of undocumented immigrants. That decision is applicable to the treatment of H2B

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[118] Charter of the Organization of American States, 119 U.N.T.S. 3, *entered into force* Dec. 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* January 29, 1996. *See also James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R., Res. 3/87, 147 OES/Ser.L/VII/71, doc. 9, rev. 1, ¶ 46 (1987). *See also* Cleveland et.al., *supra* n. 60 at 856 & n. 97.

[119] *See, e.g.*, OAS General Assembly Resolution 314 (VII-0/77) (June 22, 1977) (charging the Inter-American Commission with the preparation of a study to "set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man). This principle has been affirmed by the Inter-American Court, which has found that the "Declaration contains and defines the fundamental human rights referred to in the Charter." *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 43, 45 (July 14, 1989). The United States takes the position that the Declaration is aspirational, and creates no binding treaty obligations.

[120] North American Agreement on Labor Cooperation, Annex 1, *available at* http://www.naalc.org/naalc/naalc-full-text.htm.

workers, as well as undocumented workers. The Court held that "the migratory status of persons can never constitute a justification in depriving them of the enjoyment and exercise of their human rights, including those related to work."[121] The Court found that international principles of equal protection and non-discrimination, including those contained in the American Declaration, the American Convention, the OAS Charter, and ICCPR prohibit discrimination, in that case against undocumented immigrants, with respect to their labor rights.[122]

Likewise, in its General Recommendation No. 30 on Discrimination Against Non-Citizens (2004), the Committee on the Elimination of Racial Discrimination (CERD) addresses the meaning of Article 1(2) of the ICERD, which allows for distinctions based on citizenship, so long as those distinctions do not result in prohibited discrimination. The CERD stated that Article 1(2) allowing for distinctions must not be interpreted in a manner that undermines the basic prohibition of discrimination and detracts from rights and freedoms provided under any other international human rights instruments.[123] Further, the CERD observes that the state obligation in Article 5 of the ICERD--to guarantee a range of civil, political, economic, social, and cultural rights to all persons without discrimination-- includes the obligation to guarantee equal treatment between citizens and non-citizens, with limited exceptions allowed for some political rights such as the right to vote and stand for election.[124] In general, states may not discriminate between citizens and non-citizens unless the distinction serves a legitimate state objective and is proportional to achievement of that objective.

The European Court of Human Rights has interpreted the non-discrimination principle to require "very weighty reasons" to justify differential treatment of third-country nationals by European Union Countries.[125] An English House of Lords judgment relied as well on the non-discrimination principles of the ICERD and ICCPR in finding unlawful discrimination in the UK's racial profiling of Roma immigrants at Prague Airport.[126]

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[121] Juridical Condition and Rights of the Undocumented Migrants, C.H.R. Advisory Opinion, Report No. 18/03, OEA/Ser.A., doc. 18 (2003), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf

[122] Id. The Court cited as antecedents the Durban Declaration and Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance urged all States to "[t]o review and, where necessary, revise their immigration laws, policies and procedures with a view to eliminating any element of racial discrimination and make them consistent with State obligations by virtue of international human rights instruments." Likewise, in paragraph 9 of the Commission on Human Rights resolution 2001/5 on racism, racial discrimination, xenophobia and related intolerance, "States were asked to review and, where necessary, revise any immigration policies which are inconsistent with international human rights instruments, with a view to eliminating all discriminatory policies and practices against migrants." Id., at para 164.

[123] CERD Committee, General Recommendation No. 30, at ¶ 2.

[124] ICERD, at art. 1(2) ("This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a state party to this Convention between citizens and non-citizens."). See also, the NAALC, which makes no such distinction. The ICCPR applies with equal force to citizens and to nationals, according to the UN Human Rights Committee that enforces it. U.N. Human Rights Comm'n, General Comment 15, The Position of Aliens under the Covenant, at para. 1-2, 27th Sess., U.N. Doc. A/41/40 (Nov. 4, 1986)

[125] *See Gayguzuz v. Austira* (relating to social security benefits to a Turkish national), and *Poirrez v. France,* concerning disability benefits to an Ivory Coast national in France), both cited in Cholewinski, Ryszard, The Human and Labor Rights of Migrants: Visions of Equality, 22 Geo. Immigr. L.J. 177, 215 (2008).

[126] *R. v. Immig. Officer at Prague Airport, ex parte European Roma Rights Center,* cited in Ryszard Cholewinski, The Human and Labor Rights of Migrants: Visions of Eqauality, 22 Geo. Immigr. L.J. 177, 216-217 and n. 199. (2008).

As stated above, both discriminatory impact and discriminatory intent are prohibited under international law, and the ICERD has elaborated on this principle further in its decisions and General Recommendations.[127] In General Recommendation 20, the CERD noted states must take special caution to ensure that any restriction on the rights listed in Article 5 of the ICERD is "**neither in purpose nor effect**...incompatible with Article 1 of the Convention." Article 5 enumerates a list of civil, political, economic, social, and cultural rights, including the right to form and join trade unions, the right to free choice of employment, to just and favorable conditions of work and to just and favorable remuneration.[128]

Thus, under instruments that bind the U.S., the nation must both protect the labor rights of temporary foreign workers on equal footing with those of U.S. nationals, and guard against facially neutral policies that have a discriminatory impact on non-nationals.

In apparent violation of international law, in its current operation of the H-2B program, the U.S. engages in substantial discrimination. H-2B workers are explicitly discriminated against in that they have no ability to change employers, unlike other workers, in violation of non-discrimination principles and in apparent violation of the ICERD's explicit guarantee of the right to free choice of employment.[129] While courts have ruled that H-2A and H-2B workers are entitled to the protection of the Fair Labor Standards Act, and that recruitment fees and travel costs must be repaid by employers at the beginning of employment to the extent that they reduce wages below the minimum wage,[130] U.S. DOL has refused to enforce the rulings.[131] Except in the context of H2B reforestation workers, H2B workers are explicitly denied the right to representation by no-cost lawyers under the Legal Services Corporation Act. H-2B workers are not entitled to social benefits such as unemployment compensation or Social Security benefits. Unlike other workers, H-2B workers have no right to DOL enforcement of the terms of their contract, since DOL takes the view that it cannot do so.[132]

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[127] CERD Committee, General Recommendation 14 on Definition of discrimination (art.1, para.1). (Forty-second session, 1993), U.N. Doc. A/48/18.

[128] CERD Committee, General Recommendation 20 (Forty-eighth session, 1996), U.N. Doc. A/51/18.

[129] To our knowledge, no international body has ruled in the specific issue of discrimination with respect to free choice of employment for migrant workers. However, it has been argued that this limitation is not compatible with general standards of international human rights law. Cholewinski, 203.

[130] *Arriaga v. Fla. Pac. Farms,* 305 F.3d 1228, 1231 (11th Cir. 2002).

[131] *Close to Slavery*, at 30.

[132] These common (and in many cases, legal) practices, have implications for exercise of collective bargaining rights as well. Although H2B workers are not specifically excluded from the National Labour Relations Act, both the terms of their admission and the dynamics described above create staggering obstacles to exercise of their rights to organize. Nearly every human rights treaty, covenant or declaration includes a guarantee of the right to freedom of Association, including the right to form and join a trade union. The ILO Fundamental Principles, the NAALC, and the ICERD all refer explicitly to trade union rights, while the Universal and American Declarations of Human Rights and the OAS Charter refer to rights of freedom of association. NAALC, Annex 1, Art. 1; ICERD, Art. 5(e)(ii); UDHR, Art. 20; ICCPR, Art. 22. See also, Migrant Workers Convention, Art. 26.

Rather than making efforts either legislatively or administratively to address this prohibited discrimination, DOL's proposed rules would reaffirm and exacerbate it. In one salient example, the Department, rather than asserting its ability to protect both U.S. and H-2B workers, explicitly denies that it has the authority to enforce H-2B contracts, states tentatively that it is "discussing" whether authority to protect H-2B workers might be delegated to it by DHS. DOL proposes that it seek reinstatement of U.S. workers who are illegally displaced from their jobs, but not H-2B workers, and affirms that the highest fines in its enforcement scheme will be reserved for violations that harm US workers.

C. Forced Labor

A number of factors built in to the H-2B system make it ripe for instances of forced labor. For example, the requirement that a H-2B worker be employed by and remain with a single employer has meant that many workers, especially those who have paid a high price for the chance to work in the United States, continue to be employed against their will. The common practice of withholding of passports and other travel documents, though illegal, serve to ensure that workers don't leave their employer. Threats of retaliation or of physical harm, and sometimes actual physical harm, keep workers on the job. Workers face loss of actual or potential earnings, and sometimes loss of the title to family lands, if they complain about abusive conditions on the job. These features of the current H-2B system lead inevitably to forced labor and trafficking under international law.

As noted above, slavery and forced labor were the first subjects of international human rights law in the 1800s. In view of the absolute, universal character of the prohibition of slavery and its deeply rooted acceptance by the international community of states as a whole, the prohibition of slavery ranks as *jus cogens* under international law.[133] States are obliged, either alone or in cooperation with other states, to undertake all measures to prevent slavery and slave-trade.[134]

The UDHR, the ILO Forced Labor Convention, and the ILO Worst Forms of Child Labor Convention are the principal sources of international law that define and prohibit these practices,[135] but they are also prohibited in the ICCPR and the ILO Declaration on Fundamental Rights.[136]

According to ILO Convention on Forced Labor, Number 29, forced or compulsory labor "shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[137] Labor contractors and

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[133] Manfred Nowak, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (N.P. Engel, 1993) p.146.

[134] Nowak. p.148.

[135] UDHR, art. 4; ICCPR, art. 8, Trafficking Protocol, CEDAW, art. 6; ILO Forced Labor Convention 29; Convention to Suppress the Slave Trade and Slavery, 60 L.N.T.S. 253, September 25, 1926, Article 1(1); and the Worst Forms of Child Labour Convention, art. 3(a). Although the US has not ratified the eight core conventions of the ILO, it is bound to respect the prohibition on forced labor under the Declaration on Fundamental Principles and Rights at Work, which includes a condemnation of forced labor, by virtue of its membership in the ILO.

[136] While the Declaration does not refer to migrant workers in particular, it underscores to need to devote "special attention" to vulnerable workers, including migrants.

[137] ILO Convention on Forced Labour, 1930 (No. 29).

employers engage in practices that create this "menace of penalties," including threats; confiscation of passports; and withholding of wages.

In international law, trafficking in persons is viewed as a violation of the prohibition of slavery, servitude and forced labour. For example, in its General Comment No. 28 the UN Human Rights Committee discussed anti-trafficking measures as an obligation for member states under article 8 of the ICCPR, concerning slavery and forced labour.[138]

In its most recent report to this Committee, the U.S. acknowledged that abolition of the institution of slavery in the United States dates from the early 1800s, finally abolished throughout the United States and territories by the Thirteenth Amendment in 1865.[139] Its recent report neatly describes, without referring to U.S. temporary foreign labor systems, the potential for trafficking raised by the programs:

> Trafficking cases involve coercion, sometimes following an initial recruitment through false promises, in order to obtain or maintain the victims' labor or services. Many of the defendants in these cases prey on the vulnerabilities of children or immigrant populations. While the means of isolation and coercion are often similar, victims are placed into various exploitative situations in a number of different industries. Sometimes, the underlying labor is legitimate, such as agricultural labor or domestic service. Other times, the victims are forced into illegal activities, such as prostitution or other commercial sexual activity. All of the victims of these severe forms of trafficking are held through coercive forces that deny them their essential freedom.[140]

The United States views itself as an anti-trafficking champion in the world, and each year issues a report rating other countries' response to trafficking. Its most recent report identifies debt bondage for foreign temporary workers as a form of trafficking, and confiscation of documents as a trafficking tool.[141] It criticizes countries that focus on the voluntary nature of transnational movement and that do not see undocumented workers as victims of transnational organized crime.[142] And it identifies the crucial role that labor inspectors must play in identifying victims of trafficking.[143]

There is a disconnect between the Department's proposed rules and our government's championing of anti-trafficking policies internationally. The Department's disavowal of an enforcement role for itself means that labor abuses will go undetected. The enforcement scheme that it proposes, which eschews a certification process in favor of an employer attestation process, its continued acceptance of prevailing wage studies generated by industry, its

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[138] General Comment No. 28. (Human Rights Committee). 2000. para.12.

[139] Second and Third Periodic Report of the United States of America, CCPR/C/USA/3, (November 2005) para. 150, at http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b

[140] Id at para. 156.

[141] U.S. Department of State, Trafficking in Persons Report 2007 (June 2007), pp. 21 and 24.

[142] State Department Report, pp. 33, 74.

[143] State Department Report, p. 84.

abandonment of state-level oversight, and its adoption of an audit scheme that has not been described in any level of detail – all will contribute to an increase in forced labor and trafficking.

As noted above, there is substantial evidence that the labor contractors and recruiters under the temporary foreign worker programs are imposing significant fees on workers as a condition of gaining access to the job-applicant pool in the foreign country, charging high interest rates for lending the money to pay those fees, threatening that family members in the home country will be harmed if the participating worker does not comply with the recruiters' demands, and threatening the worker inside the U.S. with dire consequences if the worker challenges unfair or illegal conduct during the employment.

While employers are required to attest that they will not shift fees to workers, the regulations do not prohibit employers from using agents that charge such fees. This encourages employers to choose international recruiters and labor contractors that charge workers directly. Not only will the system of indebtedness that leads to indentured servitude continue, attestation by employers may even serve as a legal defense that could deprive workers of a remedy.

D. Fair Pay And Terms And Conditions Of Employment

Apart from guarantees of rights of association and organization, and apart from prohibitions on forced labor, a number of treaties and declarations include specific protection for fair conditions on the job. The ICERD contains provisions for just and fair remuneration, as do the American Declaration and the NAALC Labor Principles.[144] The right to just and fair remuneration without discrimination on the basis of citizenship status is further articulated in the Inter-American Court Advisory Opinion OC_18, in which the Court specifically references fair pay as a core right which is frequently violated vis-à-vis migrant workers.[145]

Apart from the inability to demand just compensation caused by their isolation and the implied (and sometimes explicit) threat of deportation, H-2B workers' rights to decent working conditions is implicated by the Department's acceptance of employer-sponsored, employer-generated surveys in order to establish prevailing wages.

E. The Right To A Remedy

Perhaps the most significant issue raised by the regulations as proposed is its failure to address the serious obstacles to enforcement of labor rights within the current temporary foreign labor system, its active disavowal of a role for the Department of Labor in enforcement of H-2B workers' rights, and its proposed abolition of an oversight role for either state agencies or the federal Department of Labor, through the certification process. The right to an appropriate remedy may be viewed as a corollary to the substantive rights outlined above, such as the principles of non-discrimination and the abolition of forced labor and the protection of the rights to freedom of association, to just and favorable conditions of work, and to health and safety on the job. In addition, a number of treaties by which the U.S. is bound provide specifically for a suitable enforcement scheme.

[144] ICERD, Art. 5; American Declaration Art. XIV, NAALC, Annex 1, Art. 6.

[145] OC-18, Para. 157.

The U.S. is obligated by its membership in the OAS and NAFTA to provide effective enforcement of labor laws. NAALC Labor Principle Article 4 requires the United States to ensure that workers have recourse to procedures to enforce US labor laws, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers."[146] Workers must also have access to administrative, quasi-judicial, judicial or labor tribunals.[147]

The OAS OC-18 advisory opinion emphasizes that migrant workers have a right to due process and unrestricted access to effective judicial remedies for violations of workplace rights. The opinion says that American States are obliged to guarantee the basic protection of human rights to all persons subject to their authority, regardless of citizenship or migratory status. The State's obligation to ensure these rights signifies more than a duty to pass law. The State must also ensure effective protection of the law. Effective protection of the law means that a truly effective process for "establishing whether there has been a violation of human rights and in providing redress" is made available to each person.[148] The decision warns against illusory remedies. To fulfill its obligation to provide effective protection of the law, the State is required to ensure that migrants are able to enforce their workplace rights. And, they must be able to do so without fear of immigration-related retaliation. The right to judicial protection is violated when fear of deportation prevents a worker from asserting his or her rights.

First, migrants cannot effectively enforce their rights and claim remedies because they lack access to Legal Services. The United States has barred organizations that receive any funds from the Legal Services Corporation (LSC) from providing legal assistance "for or on behalf of any alien unless the alien is present in the United States and is [among the categories specified as eligible for assistance]."[149] This broad language precludes H-2B workers from receiving legal services funded by state and local governments, charitable foundations, and other private donors that receive LSC funding.[150] Because LSC-funded organizations are often the largest, if not only, no-cost legal services providers in their areas, migrant workers are effectively left without access to counsel. The Inter-American Court's Advisory Opinion OC-18 speaks directly to the issue of legal representation as raised by the lack of free legal services for this class of workers.[151]

Second, while the NAALC requires that proceedings not be unnecessarily complicated and do not entail unreasonable charges, time limits or unwarranted delays,[152] court and attorneys' costs can be prohibitively expensive. Similarly, despite requirements that parties be provided with the

[146] NAALC, Art. 4, § 2.a.

[147] NAALC, Art. 4, § 1.

[148] OC-18 Para. 108.

[149] *See* 45 C.F.R. § 1626.

[150] Brennan Center, "MEMORANDUM IN SUPPORT OF PETITION on LABOR LAW MATTERS ARISING IN THE UNITED STATES". April 13, 2005, http://brennan.3cdn.net/7ff231f5bf30ae03e3_o1m6bhyhg.pdf.

[151] OC-18, para. 126.

[152] NAALC, Art. 5, § 1(d).

opportunity to support or defend their respective positions and to present information or evidence,[153] many do not have this option. Because H-2B workers are tied to a single employer and must return to their home country when their employment ends, "in-person" requirements in many states prevent workers from bringing suit. These requirements prevent workers from bringing suit even if they've been wrongfully fired. Given these procedural challenges, many private attorneys won't take otherwise valid cases.

Third, rather than provide workers with a meaningful opportunity to remain in the United States current and proposed regulations rely on DOL audits to address violations. There are few reasons to believe workers can rely on these audits to protect them. The audit system does not provide the migrant worker an individual means of speedy enforcement of his or her workplace rights. Rather, the worker must wait until the DOL decides to audit the employer. Not only might the audit never happen, but it could also be a lengthy process, and it does not guarantee the worker any individual remedy for workplace abuse.

Finally, DOL's abrogation of its duty to oversee the H2B program has serious, and specific, human rights implications. Congress ratified the ILO's Labor Administration Convention and NAFTA's treaty language obligating the most appropriate agency to enforce labor laws, therefore intending DOL to enforce workers' rights. Article 4 of the NAALC Labor Principles is meant to ensure that workers, both migrant and nationals, have appropriate access to enforcement of labor laws.[154] ILO's Labour Administration Convention ensures that workers, including H-2B workers, have access to the most competent bodies within the system of labor administration, (which in the United States is DOL), in order to implement labor laws and regulations.[155] DOL is the agency most directly charged with administering Federal labor laws.[156] Because of its charge and experience, DOL is the most competent agency to administer and enforce labor laws under the language of both the ILO's Labour Administration Convention and the NAALC.

As noted, in its Notice of Proposed Rulemaking, DOL states that it has no enforcement authority or process to ensure that non-agricultural workers, or H-2B workers, are employed in compliance with the H-2B certification requirements. DOL states that Congress vested DHS with enforcement authority in 2005.[157] However, neither DHS nor DOL have taken the lead in enforcement of H2B contracts, and consequentially, workplace abuses are not given proper remedy.

The current H-2B program does not provide sufficient remedies to H-2B workers to meet US

[153] NAALC, Art. 5, § 1(c).

[154] NAALC, Art. 4, § 1

[155] C150 Labor Administration Convention

[156] www.dol.gov/opa/aboutdol/mission.htm

[157] 8 U.S.C. 1184, Public Law 109-13, 119 Stat. 231, 318. (PL 109-13, 2005 HR 1268 refers to the Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 2005. (f) CLARIFICATION OF DISCRETION — Section 242(a)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1252(a)(2)(B)) is amended— (1) by inserting "or the Secretary of Homeland Security" after "Attorney General" each place such term appears.), *see also* Labor Certification Process and Enforcement (H-2B Workers), Notice of Proposed Rulemaking, 73 Fed. Reg. 29942, 29943 (May 22, 2008).

obligations under NAALC. The new regulations do not address these failures. Worse still, by relying on an attestation and audit system, the new regulations make government enforcement of basic labor protections and international standards even less probable.

X. The Department Should Withdraw its Proposed Regulations in Order to Consider Available Strategies that would Contribute to Meeting the Underlying Goals of the H-2B Program.

As has been demonstrated above, the Secretary of Labor has continuing authority to craft the kinds of protections that were implemented by the Department in agriculture at the inception of the modern H-2 program. While some aspects of the protections of the H-2A program may prove to be unsuitable in non-agricultural employment, most would be beneficial. Among the concepts that should be considered carefully by the Department before adopting a permanent regulation are the following:

1. **Adoption of an Adverse Effect Wage Rate.** The wage rate methodology used by the Department to set the prevailing wage rate has the effect of depressing U.S. wages, largely because jobs are advertised at entry level, and more experienced workers need to be able to earn more.

2. **Require More Extensive Recruitment.** In the H-2A program, employers are required to engage in the kinds of affirmative strategies that would be expected actually to locate and attract employees to the work. H-2B employers need only run three newspaper ads and list the job with the local SWA for ten days, many weeks before the job will actually become available.

3. **Require Recruitment in Areas of Labor Surplus.** With U.S. unemployment rates rising in many parts of the country, efforts should be made to connect U.S. workers with job opportunities through interstate recruitment. This has been a staple of the H-2A program for many years.

4. **Require Employers to Provide Free Housing and Reimbursement of Transportation Expenses.** Again, this is a requirement in agriculture.

5. **Adoption of the "50 % Rule."** The Department has found that requiring employers to hire qualified U.S. workers who become available at any time up to 50% of the period of the job opportunity helps to locate available U.S. workers, and serves as an incentive to avoid over-recruitment of foreign workers and wrongful rejection of U.S. workers.

CONCLUSION

For the foregoing reasons, we urge that the Secretary withdraw the proposed regulations and begin a process to restudy the proposals above. At the very least, far greater time should be permitted for the submission of comments.

Previous Submissions Related to these Comments

Item	Attach-ment	Date	Description	Submited By	Pgs	Comment Tracking Number
1		June 30, 2008	Request for an Extension of the Comment Period to 90 Days Regulations.Gov	Friends of Farmworkers, Inc. - Arthur N. Read		8064d135
	1	June 30, 2008	Request for an Extension of the Comment Period to 90 Days Letter	Friends of Farmworkers, Inc. - Arthur N. Read	12	
	2	June 12, 2008	Public Submission ETA-2008-0002-0014	Committee on Education and Labor - Miller, George Chair		80622747
	3	June 4, 2008	Committee on Education and Labor - Miller, George Chair Letter		3	
	4	6/24/2008	Request for Extension of Time Brennan Center for Justice at NYU School of Law	Laura Abel Brennan Center for Justice at NYU School of Law		8063c181
	5	6/24/2008	Letter Request for Extension of Time Brennan Center for Justice at NYU School of Law		4	
	6	March 28, 2008	FOIA Request March 28, 2008		3	
	7	April 8, 2005	Comments 2004 on DHS-2004-0033		29	
	8	April 8, 2005	Comments 2004 on DOL RIN 1205–AB36		3	
	9	April 8, 2005	Comments April 8, 2005. Submitted by Ana Avendano on behalf of the AFL-CIO, Farmworker Justice Fund, National Employment Law Project, Southern Poverty Law Center, Interfaith Worker Justice, Rochester Labor-Religion Coalition (Rochester, NY), East Tennessee Interfaith Worker Justice (Knoxville, TN), Diocesan Office of Justice, Peace and Integrity of Creation (Knoxville, TN), Faith Community Church (North Carolina), Capitol District Labor Religion Coalition (Albany, NY), Equal Justice Center (Austin, TX), Northwest Justice Project (Portland, OR), Central Texas Immigrant Worker Rights Center (Austin, TX), Mississippi Poultry Workers' Center (Morton, MS), and Cross Border Network for Justice and Solidarity (Kansas City, MO). [Document ID: USCIS-2004-0011-0121]		22	Document ID: USCIS-2004-0011-0121
	10	April 8, 2005	Press Clippings Attachments to USCIS-2004-0011-0121 Available at: http://friendsfw.org/h-2b/2005_H2B_Comments_Attachments.pdf		30	
	11	April 8, 2005	Comments United Food and commercial Workers April 8, 2005	Michael J. Wilson	6	Document ID: USCIS-2004-0011-0116
2		July 1, 2008	Letter Discussing Data Relevant to Public Comments on Proposed Regulations	Friends of Farmworkers, Inc. - Arthur N. Read	12	8065032c
	A		FY07 H-2b Occ Group Denials: summary by 3 digit occupational group of the numbers of H-2B workers for whom certification was sought, the number of workers certified, and the number of certifications denied		11	
	B		DOL H-2B FY07 Certifications: detail by 9 digit DOT coding is the number of H-2B workers for whom certification was sought, the number of workers certified, and the number of certifications denied		21	
	C		H-2B DOL Certified FY02-07: Number of H-2B Workers Certified by DOL by year by state		2	
	D		States Certification H-2B FY07 showing :Total Workers Requested, Total Workers Denied, % Workers Denied, FY07 Workers Certified, Number H-2B Cases, Number Cases Certified, % Cases Certified, Cases Denied, Cases Partial Certified, Cases Remand to SWA		2	

Previous Submissions Related to these Comments

Item	Attach-ment	Date	Description	Submited By	Pgs	Comment Tracking Number
	E		H2-B Certified Below AEWR FY07: summarizing for each state the total number of workers approved for H-2B jobs at prevailing wage rates lower than the Adverse Effect Wage Rate for that state, the number of H-2B workers approved by DOT Code at wage rates lower than the AEWR nationally and for each state, and the lowest wage rate approved nationally for that job classification		39	
	F		FY 07 H-2B Weekly Certified Below $320.40 Per Week			
	G	April 8, 2005	Comments on behalf of Comite de Apoyo a los Trabajadores Agricolas ("CATA," or the "Farmworkers Support Committee") and Friends of Farmworkers April 8, 2005			Document ID: USCIS-2004-0011-0126.
	H	August 9, 2006	Testimony H2-B_ Committee on Education and Workforce August 9, 2006	Friends of Farmworkers, Inc. - Arthur N. Read		
3		July 2, 2008	Documentation of Abuses of H-2B Workers	Low Wage Worker Legal Network - Arthur N. Read		80652bd0
	Part One		Part One			
	1		Javier Riojas' Congressional Testimony re Riojas v. Chao, including worker affidavits and exhibits			
	2		Complaint from Riojas v. Chao			
	3		Two newspaper articles about Riojas v. Chao			
	4		Internal Memo describing incidents where TRLA denied legal services to H-2B workers, and other incidents			
	Part Two		Part Two			
	5		Packet of materials from Colorado Legal Services showing CO grower using 100s H-2Bs in the field: letters to DOL and USCIS, multiple worker declarations, newspaper article.			
	6		Two newspaper articles about H-2B visa fraud involving 6000 visas in east Texas			
	7		Newspaper article re police assisting grower to detain Mexican H-2Bs			
	8		Complaint from Olvera-Morales v. ILMC re steering women into H-2B jobs, not H-2A			
	9		Opinion from Chellen v. Pickle			
4		July 3, 2007	Close to Slavery: Guestworker Programs in the United States, Southern Poverty Law Center (March 2007), and separately filed, Comment Tracking Numbers	Mary Bauer - Southern Poverty Law Center		80654f40

Previous Submissions Related to these Comments

Item	Attach-ment	Date	Description	Submited By	Pgs	Comment Tracking Number
5		July 7, 2008	Filings and related documents in connection with a public communication to the National Administrative Office of Mexico under the North American Agreement on Labor Cooperation. They outline a number of abuses visited upon petitioner H-2B workers during their work in the United States, and discuss the obligations of the United States to afford workers in the United States protection under U.S. labor laws	Low Wage Workers Legal Network - D. Michael Dale		8065b65e
	Ex. 1		Exhibit 1, Petition to the National Administrative Office of Mexico			
	Ex. 2		Exhibit 2, Memorandum in Support of Petition			
	Ex. 3		Exhibit 3, Addendum to Petition			
	Ex. 4		Exhibit 4, Draft Response to Interrogatories of the National Administrative Office			
	Ex. 5		Exhibit 5, Responses to Freedom of Information Act Requests			

Listing of Exhibits Attached to these Comments

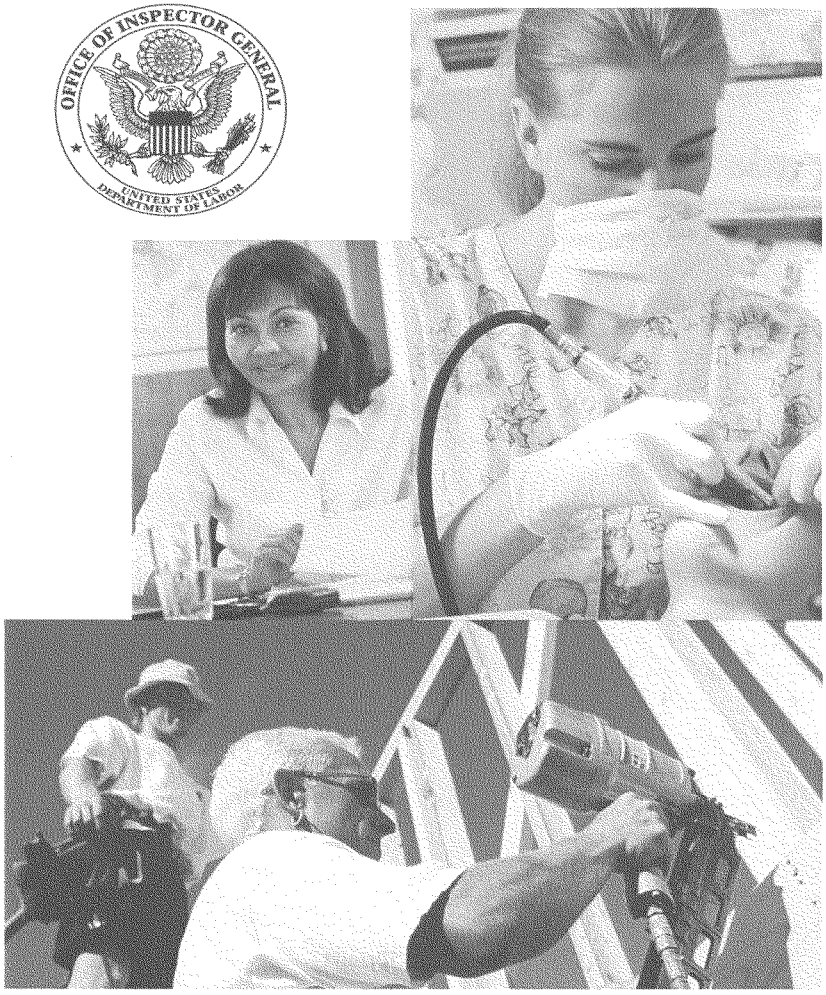
Exhibit	Description	Pages
A	Excerpt DOL Office of the Inspector General, March 31, 2008 Semi-Annual Report to Congress	4
B	Correspondence related to Evergreen Forestry Services	21
C	Declaration of H-2B worker Francisco Javier Navarro Herrera	7
D	U.S. DOL Wage and Hour Memorandum No. 99-03, February 11, 1999	5
E	Ross Eisenbrey "Guest, Local Workers Suffer at Employer's Will" Published in National Wage and Hour Clearinghouse	2
F	Ross Eisenbrey "H-2B and the U.S. Labor Market" published by the Economic Policy Institute (June 24, 2008)	2
G	Ross Eisenbrey Unpublished Research Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage	9
H	1998 North Carolina Fisheries Association, Inc. Prevailing Wage Survey	2
I	2005 North Carolina Fisheries Association, Inc. Prevailing Wage Survey	4
J	2007 North Carolina Fisheries Association, Inc. Prevailing Wage Survey	3
K	February 3, 2005 letter from Employment Security Commission of North Carolina to U.S. Department of Labor	1

Exhibit A

Excerpt DOL Office of the Inspector General,
March 31, 2008 Semi-Annual Report to Congress

Extract from: http://www.oig.dol.gov/SAR-59-FINAL.pdf

Semiannual Report to Congress



Office of Inspector General - U.S. Department of Labor

Volume 59 October 1, 2007–March 31, 2008

A MESSAGE FROM THE INSPECTOR GENERAL

I am pleased to submit this Semiannual Report to Congress, which highlights the most significant activities and accomplishments of the Department of Labor (DOL), Office of Inspector General (OIG), for the six-month period ending March 31, 2008. During this reporting period, our investigative work led to 406 indictments, 253 convictions, and $32 million in monetary accomplishments. In addition, we issued 39 audits and other reports and questioned $133.9 million in costs.

OIG audits continue to disclose a pattern of weakness in the Mine Safety and Health Administration's (MSHA's) oversight in DOL's programs to ensure miner safety. For example, we found that MSHA failed to conduct all required safety inspections at 107 underground coal mines where approximately 7,500 miners worked. Furthermore, an OIG audit of MSHA's review and approval of the roof control plan at Utah's Crandall Canyon Mine found that MSHA did not have a rigorous, transparent review and approval process for roof control plans and could not show that its process was free from undue influence by the mine operator.

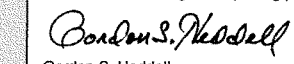
We also identified problems in the Department's grant management. An OIG audit found that DOL non-competitively awarded 133 high growth job training grants, totaling $235 million. The Department could not demonstrate that it followed proper procedures in awarding 35, or 90 percent, of the high growth grants we reviewed, totaling $57 million. An OIG audit of a $32.5 million earmark grant to provide employment services overstated the number of participants in the program and could not demonstrate that participants received employment services funded by the grant. We questioned more than $11 million in inappropriate costs charged to that grant.

Our investigations continue to combat labor racketeering involving the monies in union-sponsored benefit plans, internal union affairs, and labor-management relations. A major OIG organized crime investigation led to the high-profile indictments of 62 members and associates of the Gambino Organized Crime Family on charges that included racketeering conspiracy, theft of union benefits, loan sharking, and murder conspiracy. Both construction industry and union officials were among those charged for crimes spanning more than three decades.

We continue to investigate instances of corruption in which officers of labor organizations embezzle money from union and member benefit plan accounts and defraud members of their right to honest services. An OIG investigation led to the guilty plea of a former New York State assemblyman who also served as a high-ranking union official. The defendant admitted to 21 specific acts of racketeering and pleaded guilty to Racketeer Influenced and Corrupt Organizations Act (RICO) forfeiture.

OIG investigations revealed that the foreign labor certification process continues to be compromised by unscrupulous attorneys, labor brokers, employers, and others. In one case, four conspirators who operated a labor leasing company were sentenced to jail and a $1 million judgment for their roles in providing fraudulent documentation that enabled more than 200 foreign nationals to illegally enter the United States. We will continue to work with the Department to safeguard the integrity of the foreign labor certification process.

The OIG remains committed to promoting the economy, integrity, effectiveness, and efficiency of DOL. I would like to express my sincere gratitude to a professional and dedicated OIG staff for its significant achievements during this reporting period.



Gordon S. Heddell
Inspector General

FOREIGN LABOR CERTIFICATION PROGRAMS

The Department's foreign labor certification programs allow U.S. employers to employ foreign labor to meet worker shortages. OIG investigations have revealed that the foreign labor certification process continues to be compromised by unscrupulous attorneys, labor brokers, employers, and others.

Conspirators of Florida Labor Leasing Company Sentenced to Pay $1 Million

Between December 2007 and February 2008, four conspirators who operated a Florida-based labor leasing company, Eurohouse Inc., were sentenced for their roles in defrauding the foreign labor certification program by submitting fraudulent H-2B labor certification applications. In addition to jail time, Justin King, Vyacheslav Finkel, Aleksander Berman, and Anna Czerwien are jointly and severally responsible for a $1 million judgment. Czerwien, president of Woland Inc. (formerly Eurohouse Inc.), also forfeited a residence and three vehicles.

In addition to defrauding DOL's foreign labor certification program, Eurohouse Inc. defrauded the U.S. Department of Homeland Security (DHS) and the U.S. Department of State (DOS) from 2003 to 2007 by preparing and submitting fraudulent ETA-750 applications for H-2B temporary foreign workers and nonimmigrant visa petitions for alien beneficiaries. As a result of the fraud, approximately 200 H-2B temporary alien workers illegally entered the United States and were leased as contract employees to various businesses in various unspecified hourly job positions. Furthermore, the alien workers were charged excessive rent and transportation costs by Eurohouse for its services. The defendants also took advantage of the devastation caused by Hurricane Katrina by fraudulently requesting and obtaining certification from DOL for approximately 240 H-2B temporary foreign workers, purportedly on behalf of four New Orleans hotels. The defendants perpetrated the fraud without authorization or knowledge of the hotel entities listed as requesting the workers.

This was a joint investigation with DOS-Diplomatic Security Service (DSS) and the U.S. Immigration and Customs Enforcement (ICE). *United States v. Anna Czerwien and United States v. Aleksander Berman et al.* (N.D. Florida)

Family Conspiracy Yields a Guilty Plea and Sentencing of Two Brothers

John Chikwon Hwang, owner and vice president of Brothers Construction Company (BCC), pled guilty on January 23, 2008, for his role in a conspiracy with his brothers, Chichan Hwang and Charlie Chiwon Hwang, and others to submit fraudulent labor certification applications and related documents to DOL and other government agencies. The brothers submitted these fraudulent immigration-related documents in an effort to obtain green cards for foreign nationals. The Hwangs charged the individuals more than $27,000 to submit their visa applications. The brothers then arranged for BCC to provide paychecks to the individuals to fraudulently demonstrate to DHS and other Federal agencies purported employment with BCC. To this end, BCC generated more than $1.1 million in fictitious payroll. For his involvement in the scheme, Charlie Chiwon Hwang was sentenced on November 8, 2007, to 21 months of imprisonment and 2 years of probation and was ordered to forfeit $250,000. This is a joint investigation with DOS-OIG, DOS-DSS, DHS, FBI, and the Fairfax County (VA) Police Department. *United States* v. *Charlie Chiwon Hwang* (E.D. Virginia)

Require direct reporting of ERISA violations to DOL. Under current law, a pension plan auditor who finds a potential ERISA violation is responsible for reporting it to the plan administrator, but not directly to DOL. To ensure that improprieties are addressed, we recommend that plan administrators or auditors be required to report potential ERISA violations directly to DOL. This would ensure the timely reporting of violations and would more actively involve accountants in safeguarding pension assets, providing a first line of defense against the abuse of workers' pension plans.

Strengthen criminal penalties in Title 18 of the U.S. Code. Three sections of Title 18 serve as the primary criminal enforcement tools for protecting pension plans covered by ERISA. Embezzlement or theft from employee pension and welfare plans is prohibited by Section 664, making false statements in documents required by ERISA is prohibited by Section 1027, and giving or accepting bribes related to the operation of ERISA-covered plans is outlawed by Section 1954. Sections 664 and 1027 subject violators to 5 years' imprisonment, while Section 1954 calls for up to 3 years' imprisonment. We believe that raising the maximum penalties to 10 years for all three violations would serve as a greater deterrent and would further protect employee pension plans.

Provide Authority to Ensure the Integrity of the Foreign Labor Certification Process

If DOL is to have a meaningful role in the H-1B specialty occupations foreign labor certification process, it must have the statutory authority to ensure the integrity of that process, including the ability to verify the accuracy of information provided on labor condition applications. Currently, DOL is statutorily required to certify such applications unless it determines them to be "incomplete or obviously inaccurate."

Our concern with the Department's limited ability to ensure the integrity of the certification process is heightened by the results of OIG analysis and investigations that show the program is susceptible to significant fraud and abuse, particularly by employers and attorneys.

The OIG also recommends that ETA should seek the authority to bar employers and others who submit fraudulent applications to the foreign labor certification program.

The OIG recommends that DOL consider, in conjunction with USCIS, a legislative proposal that would require foreign nationals to have their eligibility determined by USCIS before the employer's labor certification application is reviewed by DOL.

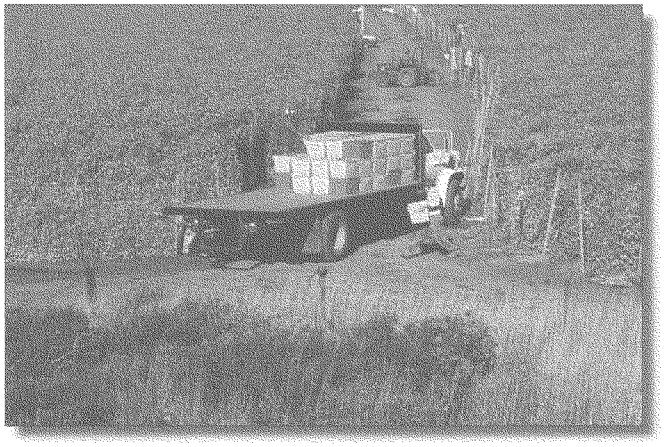


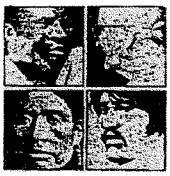
Exhibit B

Correspondence related to Evergreen Forestry Services

Legal Services of North Carolina, Inc.
Farmworker Unit

224 S. Dawson Street
P.O. Box 26626
Raleigh, North Carolina 27611

919/856-2180
FAX 919/856-2187
1-800-777-5869



Justice For Poor People

March 13, 2001

Floyd Goodman
U.S. Department of Labor
Employment and Training Administration
61 Forsyth St., S.W. Room 6M12
Atlanta Federal Center
Atlanta, GA 30303

Dear Mr. Goodman:

I am writing to confirm our conversation from last Friday. You were informed that several H-2B forestry workers and a U.S. worker, our client, had been living in "housing" provided by their employer that lacked a stove, heat, or even beds. Some of the workers had been living in tents throughout this winter. Among other problems, these workers were not provided a toilet other than a port-a-john that they were charged money to use.

You stated that the Department of Labor (DOL) had "no control" over the housing provided to H-2B workers. You stated that an H-2B employer had "no housing requirements in general" and that the DOL had no enforcement responsibilities over H-2B housing, although MSPA action may be taken against a crewleader, but "only to the extent" the crewleader was not authorized to provide housing.

I believe you are mistaken. While it is true that an H-2B employer has no general requirement to provide housing, once the employer undertakes to provide housing, the employer creates for himself a duty to comply with all applicable substantive Federal and State safety and health standards. 29 C.F.R. §500.130. The ETA has set forth such standards under 20 C.F.R. §654.404 for employers who, as in the case of an H-2B employer, utilize the U.S. Employment Service. Moreover, the DOL is responsible for the enforcement of these protections. 29 C.F.R. §§ 500.140 through 500.146.

My purpose in calling was to obtain the employer's application form so that my U.S. worker client could ascertain the identity of his employer. You claimed that the H-2B application, which has been submitted to and approved by the DOL, is the "property of the employer", and added that the employee has no right to see the very application under which he found employment except through a Freedom of Information Act request available to the general public.

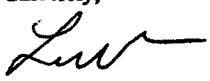
You did not cite any authority for your position. What is your authority? H-2B workers often travel from work site to work site such that the application may be the best method

for them to learn the identity of their employer, particularly if the employer has not complied with disclosure requirements. If an employee has not been provided the necessary disclosures, that gives rise to a MSPA claim, but how can the employee bring a MSPA claim without knowing the identity of the employer?

Is seems that, by refusing to make the application available to the employee who has problems under his or her H-2B contract, the ETA is placing unjustifiable obstacles in the path of the employee's efforts to enforce his or her contractual rights.

If I have misrepresented our conversation in any way, please let me know. Thank you for your attention.

Sincerely,



Lori J. Elmer
Attorney at Law



NORTH CAROLINA JUSTICE and COMMUNITY DEVELOPMENT CENTER

Terry Way, Director
U.S. Immigration and Naturalization Service
Nebraska Service Center
P.O. Box 82521
Lincoln, NE 68501-2521

January 23, 2002

INS Approval of Evergreen Forestry Services H2B Application

Dear Ms. Way

I am writing to request that the U.S. Immigration and Naturalization Service deny any pending or future petition and/or revoke any approved application by Evergreen Forestry Services, an Idaho company, for H2B workers. This employer, which has H2B workers nationwide, has repeatedly shown its disregard for federal labor laws.

Evergreen Forestry Services (EFS) has a long history of violations of both the Migrant and Agricultural Workers Protection Act (MSPA) and the Fair Labor Standards Act (FLSA) dating from 1982. These violations have occurred across the country and EFS has been cited in several U.S. Department of Labor regions. The violations include:

FLSA overtime violations. Evergreen agreed to future compliance.

1988: SCA violations and non-payment of CWHSSA Overtime. Untimely payment and non-payment to several employees. Evergreen agreed to future compliance. MSPA violations (no MSPA poster, employees not paid at least semi-monthly, foreman conducting named activity without farm labor contractor registration).

1990: FLSA Minimum Wage and Overtime violations and not recording all hours worked. SCA violation. Evergreen agreed to future compliance.

MSPA violations, civil money penalties in amount of $1,750.00

MSPA violations, civil money penalties in amount of $700.00.

1993 - 1995: FLSA back wages totaling $8,300.00 for failure to pay overtime (regardless of hours worked, the workers were paid for forty hours). MSPA violations. Evergreen agreed to future compliance.

1996-1997: Numerous MSPA violations. FLSA minimum wage violations with back wages amounting to $17, 924.89. FLSA overtime violations resulted in back wages

P. Box 28068
14 S. Dawson Street
Raleigh, North Carolina
27611-8068

(919)856-2570 ph
(919)856-2175 fax
info@ncjustice.org
www.ncjustice.org

amounting to $139,693.54. Civil money penalty of $12,600.00 assessed and paid Evergreen agreed to future compliance.

1999-2000: Numerous MSPA violations. FLSA minimum wage and overtime violations.

2001: There is an ongoing investigation for 2001

Please see the attached copy of U.S. DOL investigation reports for further details related to these violations.

Also in 2001, the North Carolina Department of Labor cited EFS for housing workers in a tent during the winter months (see attached citations). EFS failed to provide even the most basic of services. There was no stove, refrigerator, or sink; the outhouse and Port-a-John facilities were not cleaned regularly and were unhygienic; the workers who lived indoors had no heat and no beds; there was no running water other than from garden hoses; and there was not adequate hot water for all of the workers to bathe. Perhaps most dangerous of all were the electrical extension cords running along the bare ground and plugged in outdoors approximately 6 inches below a water faucet. These cords were used to power space heaters the workers had purchased to protect themselves from the cold. Evergreen Forestry Services has contested these citations and a hearing is scheduled for February 21, 2002.

It seems clear from this lengthy list of violations that EFS should no longer be approved to bring vulnerable foreign workers to the U.S. via the H2B program. Under 8 C.F.R. § 214.2(h)(11)(iii)(A)(3), the director must send to the petitioner a notice of intent to revoke the petition if he/she discovers that the petitioner violated terms and conditions of the approved petition. The petition approved by ETA's Atlanta office in 2000 (for work performed in 2000 and 2001) included a certification by EFS President Peter J. Smith, III that "the job opportunity's terms, conditions and occupational environment are not contrary to Federal, State, or local law." Certainly, EFS has not complied with this certification.

Under 8 C.F.R. § 214.2(h)(10)(ii), it also appears that the director has discretion to deny an H2B petition on the basis of "derogatory evidence." The director "shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication." 8 C.F.R. § 214.2(h)(9). I request that you consider the evidence submitted to you with this letter and that you revoke any current EFS H2B certification and deny any pending or future applications from this company.

Given the gravity of this situation, I look forward to hearing from you in writing at your earliest convenience. Please also feel free to call me at (919) 856-2144 if you would like to discuss this further.

Sincerely,

Carol Brooke

Carol Brooke
Attorney

cc: Carmelo Ortiz, Acting Director (with enclosures)
USINS Texas Service Center
P.O. Box 851488
Mesquite, TX 75185-1488

Rosemary Melville, District Director (with enclosures)
USINS Atlanta District Office
77 Forsyth Street SW
Atlanta, GA 30303

Anna Goddard, Regional Administrator (with enclosures)
USDOL ETA
61 Forsyth St., SW
Atlanta Federal Center, Rm. 6M12
Atlanta, GA 30303



IERIE K. BERRY
MMISSIONER

REGINA C. LUGINBUHL
BUREAU CHIEF
AGRICULTURAL SAFETY AND HEALTH BUREAU

February 18, 2002

Mr. Floyd Goodman, Certifying Officer
U.S. Department of Labor, E.T.A.
Atlanta Federal Center
61 Forsyth Street, SW
Room 6M-12
Atlanta, Georgia 30303

RE: NC OSH Inspection 304256035

Dear Mr. Goodman:

I would like to share with you the events of a recent case. I think it will be of interest to you.

We received a complaint on March 9, 2001 concerning migrant housing provided by Mr. Peter J Smith III, President of Evergreen Forestry Services, Inc. The home office of this enterprise is located in Sandpoint, Idaho. At the time of our investigation, on March 9, 2001, Mr. Smith was housing H2B workers in very substandard housing. He and his managers provided this substandard housing, and apparently had done so at this location for several years in the past.

The workers are employed by Evergreen to plant trees, and had moved through several Southeastern states while thus employed. When we issued the citations, on June 8, 2001 Mr. Smith protested, indicating that he had informed the job applicants prior to their employment that he did not provide housing. Since these workers come from Mexico and may not be fluent in English, do not have means of transport, and are not familiar with the communities where they will work, they in fact do not find their own accommodations but rely on the will of Mr. Smith and his direct reports.

4 WEST EDENTON STREET • RALEIGH, NORTH CAROLINA 27601-1092
(919) 807-2923 • FAX: (919) 807-2924 • RLUGINBUHL@MAIL.DOL.STATE.NC.US

As of this date, we have been unable to reach a settlement with Mr. Smith. We have a court date scheduled for later this month. In preparing for hearing, we have learned of many past violations incurred by Mr. Smith, President of Evergreen Forestry Services and/or For Ever Green Forestry. The offices of the U.S. Department of Labor in various states have cited him for MSPA violations, field sanitation violations, and housing violations. Some of the violations were incurred as long ago as 1984. You may refer to Atlanta files (1997) 418-06141; (1998) 418-05249; (1998) 418-05250 for recent citations in your region.

Due to the long history of violations and his apparent unwillingness to adhere to the law, I am questioning why you would again honor his request for alien certification. May I suggest that you review the files you have on Mr. Peter Smith, and reconsider his current request for alien certification.

If you should have any questions, you may contact me at (919) 807-2926.

Sincerely,

Regina C. Luginbuhl

cc: Marion Dansby, ESC Raleigh

NORTH
CAROLINA
JUSTICE
and
COMMUNITY
DEVELOPMENT
CENTER

Terry Way, Director
U.S. Immigration and Naturalization Service
Nebraska Service Center
P.O. Box 82521
Lincoln, NE 68501-2521

September 23, 2002

Re: INS approval of Evergreen Forestry Services H2B Application/ 14 workers killed in Maine

Dear Director Way:

This is the second time I write to you regarding the need to deny any pending or future petition and/or revoke any approved application by Evergreen Forestry Services, an Idaho company, for H2B workers. In January 2002, I wrote asking that the INS discontinue services to Evergreen based on its lengthy history of serious labor violations. A copy of that letter is attached. Regina Luginbuhl of the North Carolina Department of Labor also wrote to Floyd Goodman, Certifying Officer for H2B workers at the U.S. Department of Labor's Employment and Training Administration division on February 18, 2002, informing the ETA about Evergreen's poor record in North Carolina and nationwide (see enclosed letter).

You have provided no response and now the matter has turned deadly. On September 12, 2002, fourteen workers from Honduras and Guatemala were killed in a tragic van accident in Maine. All were employees of Evergreen Forestry Services brought to this nation with H2B visas.

With my initial letter, I sent several U.S. Department of Labor narratives setting forth Evergreen's lengthy history of labor violations as well as citations issued by the North Carolina Department of Labor. Under 8 C.F.R. § 214.2(h)(11)(iii)(A)(3), the director must send to the petitioner a notice of intent to revoke the petition if he/she discovers that the petitioner violated the terms and conditions of the approved petition.

Evergreen certified in his petition that "the job opportunity's terms, conditions, and occupational environment are not contrary to Federal, state, or local law." As supported by the documents provided to you in the previous letter, Evergreen violated this certification repeatedly.

Further, I have been informed that Evergreen has yet to pay citations or otherwise comply with a settlement agreement reached with the N.C. Department of Justice.

O. Box 28068
24 S. Dawson Street
Raleigh, North Carolina
7611-8068

19856-2570 ph
19856-2175 fax
fe@ncjustice.org
www.ncjustice.org

In light of the tragic accident in Maine, please send to Evergreen a notice of intent to revoke all pending or outstanding petitions as per your obligations under 8 C.F.R. § 214.2(h)(11)(iii)(A)(3).

Thank you for your prompt attention.

Sincerely,

Carol Brooke

Carol Brooke
Attorney at Law

Enclosures

CC: Carmelo Ortiz, Acting Director (with enclosures)
USINS Texas Service Center
P.O. Box 851488
Mesquite, TX 75185-1488

Rosemary Melville, District Director (with enclosures)
USINS Atlanta District Office
77 Forsyth Street SW
Atlanta, GA 30303

Anna Goddard, Regional Administrator (with enclosures)
USDOL ETA
61 Forsyth St., SW
Atlanta Federal Center, RM. 6M12
Atlanta, GA 30303

NORTH CAROLINA JUSTICE and COMMUNITY DEVELOPMENT CENTER

Dennis Grabast
Adjudication Officer
U.S. Immigration and Naturalization Service
Nebraska Service Center
P.O. Box 82521
Lincoln, NE 68501-2521

October 1, 2002

Re: INS Approval of Evergreen Forestry Services H2B Application

Dear Mr. Grabast

I wrote to Terry Way of your office on January 23, 2002 regarding the H2B application of Evergreen Forestry Services. I did not receive a response to my letter. Recently, on September 23, 2002, I wrote to Director Way again, reiterating my request that your office revoke Evergreen's current certification and deny any future applications in light of their 18 year history of labor law violations and the recent deaths of 14 Evergreen workers in Maine. I am enclosing a copy of those letters, along with a letter that Regina Luginbuhl of the North Carolina Department of Labor sent to the U.S. Department of Labor regarding Evergreen's certification.

With this letter, I am resending a copy of the U.S. Department of Labor investigations history for Evergreen Forestry in the southeast and northeast regions. I believe, from conversations with the Department of Labor's southwest regional office, that Evergreen has been investigated there as well. I am also enclosing a number of articles detailing the working conditions of the Maine H2B workers who died.

If you have any questions, you may reach me at (919) 856-2144. I certainly hope that your office will take the appropriate action under 8 C.F.R. § 214.2(h)(11)(iii)(A)(3) and 8 C.F.R. § 214.2(h)(10)(ii) and end certification of Evergreen Forestry Services.

Thank you for your attention to this important matter

Sincerely,

Carol Brooke

Carol Brooke
Attorney at Law

Enclosures

P.O. Box 28068
224 S. Dawson Street
Raleigh, North Carolina
27611-8068

919/856-2570 ph
919/856-2175 fax
info@ncjustice.org
www.ncjustice.org

NC Department of Labor
Division of Occupational Safety and Health

Inspection Number: 304256035
Inspection Dates: 03/09/2001 - 03/09/2001
Issuance Date: 06/08/2001

Citation and Notification of Penalty

Company Name: Evergreen Forestry Services
Inspection Site: Pleasant Grove Church Rd., Mt. Gilead, NC 27306

Citation 1 Item 1 Type of Violation: Serious

29 CFR 1910.142(b)(11): All heating, cooking, and water heating equipment used in the temporary labor campsite was not installed in accordance with State and local ordinances, codes, and regulations governing such installations:

1) Temporary labor camp site twenty foot travel trailer supplied to migrant tree planters by Evergreen Forestry Services crewleaders Kevin Roy Becker and Janet Becker, failed to have equipment used in the temporary labor camp site energized in an approved manner. All electrical outlets, lights and electrical space heaters were energized through the use of electrical extension cords run along the bare soil of the temporary labor camp grounds. Additionally the electrical outlet from which the extension cords were used to energize all electrical equipment was located approximately 6 inches below the camps only water source a single exterior cold water tap. [Reference NCGS 95-129(1), NFPA (National Fire Protection), NEC (National Electrical Code)]

Date By Which Violation Must Be Abated:	06/15/2001
Proposed Penalty:	$ 750.00

Citation 1 Item 2 Type of Violation: Serious

29 CFR 1910.142(d)(10): Temporary labor campsite privies and toilet rooms were not kept in a sanitary condition and cleaned at least daily:

1) Employer Evergreen Forestry Services failed to provided temporary labor camp site with privies that were maintained in sanitary condition and cleaned at least daily. During the compliance inspection both the portable chemical toilet and the wooden on site privy had extremely unsanitary conditions including but not limited too, used toilet paper on surrounding grounds as well as on floor of privies, and untreated solid human waste in both privies.

Date By Which Violation Must Be Abated:	06/15/2001
Proposed Penalty:	$ 750.00

NC Department of Labor
Division of Occupational Safety and Health

Inspection Number: 304256035
Inspection Dates: 03/09/2001 - 03/09/2001
Issuance Date: 06/08/2001

Citation and Notification of Penalty

Company Name: Evergreen Forestry Services
Inspection Site: Pleasant Grove Church Rd., Mt. Gilead, NC 27306

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident.

Citation 2 Item 1a Type of Violation: Nonserious

29 CFR 1910.142(f)(3): Temporary labor campsite was not provided with an adequate supply of hot and cold water for bathing and laundry purposes:

1) Employer Evergreen Forestry Services failed to provide a temporary labor camp site with adequate supply of hot and cold water. Water supplied to temporary labor camp site was through an exterior water faucet which migrant tree planters had hooked up with vinyl water hoses. This was the only supply of water to camp. Hot water was heated through the use of a propane hot water heater installed in a 20 foot travel trailer however was not adequate for the 17 migrant tree planters at the temporary labor camp site.

Date By Which Violation Must be Abated: 06/15/2001
Proposed Penalty: $ 150.00

Citation 2 Item 1b Type of Violation: Nonserious

29 CFR 1910.142(f)(1)(i): Temporary labor campsite was not provided with handwash basin in the ratio of a handwash basin per family shelter or per six persons in shared facilities:

1) Employer Evergreen Forestry Services failed to provided temporary labor camp site with adequate number of hand wash basins in that the only water supplied to the temporary labor camp site was through an exterior water faucet and the use of vinyl water hoses. Hot water for washing hands was only available in the 20 foot trailer bath room.

Date By Which Violation Must be Abated: 06/15/2001

NC Department of Labor
Division of Occupational Safety and Health

Inspection Number: 304256035
Inspection Dates: 03/09/2001 - 03/09/2001
Issuance Date: 06/08/2001

Citation and Notification of Penalty

Company Name: Evergreen Forestry Services
Inspection Site: Pleasant Grove Church Rd., Mt. Gilead, NC 27306

Citation 2 Item 1c Type of Violation: Nonserious

29 CFR 1910.142(f)(1)(ii): Temporary labor campsite was not provided with shower head in the ratio of a shower head for every 10 persons:

1) Employer Evergreen Forestry Services failed to provide a temporary labor camp site with an adequate number of shower heads for the 17 migrant tree planters living at the temporary labor camp site. Workers had supply of running water only through use of an exterior water faucet and vinyl water hoses and hot water only through the one shower located in a 20 foot travel trailer.

Date By Which Violation Must be Abated: 06/15/2001

Citation 2 Item 2 Type of Violation: Nonserious

29 CFR 1910.142(b)(1): Temporary labor campsite shelter was not constructed in a manner which would provide protection against the elements:

1) Employer Evergreen Forestry Services failed to provide temporary labor camp site shelter constructed in a manner as to protect migrant tree planters from adverse weather conditions. Temporary labor camp site consisted of a camping tent and single story wood frame house unit without proper construction to protect migrant tree planters in that migrant tree planters were exposed to cold temperatures, winds, and rain.

Date By Which Violation Must be Abated: 06/15/2001
Proposed Penalty: $ 0.00

NC Department of Labor
Division of Occupational Safety and Health

Inspection Number: 304256035
Inspection Dates: 03/09/2001 - 03/09/2001
Issuance Date: 06/08/2001

Citation and Notification of Penalty

Company Name: Evergreen Forestry Services
Inspection Site: Pleasant Grove Church Rd., Mt. Gilead, NC 27306

Citation 2 Item 3 Type of Violation: Nonserious

29 CFR 1910.142(b)(3): Every room used for sleeping purposes in the temporary labor camp shelter was not provided with beds, cots, or bunks:

1) Employer Evergreen Forestry Services failed to provide a temporary labor camp site with an adequate number of beds and storage facilities. Migrant tree planters had no beds or bunks to sleep on in the temporary labor camp site and instead had to purchase their own sleeping bags for their use.

Date By Which Violation Must be Abated		06/15/2001
Proposed Penalty	$	0.00

District Supervisor
Acting for the Director

FILED
APR 11 2006
OSHA REVIEW BOARD

BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

COMPLAINANT,

v.

EVERGREEN FORESTRY SERVICES,

RESPONDENT.

FINAL ORDER

OSHANC NO. 2005-4046
INSPECTION NO. 304284856
CSHO ID NO. p1752

RECEIVED
APR 5 2006
NC DEPARTMENT OF JUSTICE
LABOR SECTION

THIS MATTER is before the undersigned on the motion of the complainant for issuance of a final order, which motion is dated and filed March 14, 2006.

The complainant is represented by Linda Kimball, Assistant Attorney General; the respondent has appeared through its president Peter J. Smith, III.

The complainant's motion contains a certificate of service that indicates that a copy of the motion was served on the respondent by first class mail on March 14, 2006. The Review Board file indicates no response from the respondent. The undersigned has not received any communication from the respondent and notes parenthetically that the respondent knows his contact information because Mr. Smith has contacted him directly in the past on this matter.

From reviewing the file and the complainant's motion, it appears to the undersigned that the respondent has violated Review Board Rule of Procedure .0107(e) by failing to certify to the Review Board that it posted the settlement agreement in this matter. Subsequently, the complainant mailed copies of the settlement agreement to the migrant workers who were granted party status in this matter. No objection to the abatement dates in the settlement agreement has been received by the Review Board or the complainant.

Based on the foregoing, IT IS ORDERED as follows:

1. Affected employees of the respondent have been notified of the settlement agreement of February 18, 2002 by the complainant as recited in the motion and there has been no objection by the employees of respondent to any abatement date in the settlement agreement; and

2. The settlement agreement of February 18, 2002 is approved and is entered as a final order of the Review Board.

This 4th day of April, 2006.

RICHARD M. KOCH
HEARING EXAMINER

DATABASE
4/11/06

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

PETER J. SMITH
EVERGREEN FORESTRY SERVICES INC
1400 PINECREST ROAD
SANDPOINT IDAHO 83864

by depositing same in the United States Mail, Certified Mail, postage prepaid at Raleigh,

No

NC DEPARTMENT OF JUSTICE
9001 Mail Service Center/Labor Section
Raleigh, North Carolina 27699-9001

by depositing same in the First Class Mail, postage prepaid at Raleigh,

No

NC DEPARTMENT OF LABOR
Legal Affairs Division
1101 Mail Service Center
Raleigh, NC 27699-1101

by

THIS THE 11TH DAY OF APRIL, 2005.

Doris S. Hinton
Administrative Assistant,
Safety and Health Review Board
1101 Mail Service Center
Raleigh, NC 27699-1101
(919) 733-3589 FAX: (919)

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

DEC 21 2006

Ms. Lori J. Elmer
Legal Aid of North Carolina, Inc.
Farmworker Unit
P.O. Box 26626
Raleigh, North Carolina 27611

Dear Ms. Elmer:

This responds to your letter to Assistant Secretary Victoria A. Lipnic, on behalf of the Farmworker Advocacy Network. Your letter was forwarded to me for response, as the Employment Standards Administration (ESA), Wage and Hour Division (WHD), is responsible for enforcing those Federal labor laws that most directly impact the working conditions of agricultural workers.

In your letter, you request that the Department of Labor (the Department) comply with its regulations at 29 C.F.R. Part 42. Specifically, you request that the Department fulfill its "duty to maintain a National Farm Labor Coordinated Enforcement Committee (National Committee), as well as a Regional Farm Labor Coordinated Enforcement Committee (Regional Committee)." You cite two issues as examples of consequences suffered by workers attributable to a lack of coordination among agencies within the Department. The first involves a reforestation contractor with a history of violative behavior whose fourteen workers died in a tragic accident in Maine. The second issue involves travel (and related) costs and whether such costs should be borne by the employer.

As a result of a negotiated settlement agreement in 1980, the Department implemented 29 C.F.R Part 42 to coordinate the activities of ESA, the Occupational Safety and Health Administration (OSHA), and the Employment and Training Administration (ETA), in order to ensure effective enforcement under the protective statutes applicable to covered agricultural workers.[1] The Department considers its obligations for the health and welfare of agricultural workers to be important and is currently evaluating methods of ensuring the efficient enforcement of those responsibilities under 29 C.F.R. Part 42.

With respect to the issues surrounding the reforestation contractor and the tragic accident in Maine, it is important to note that the Immigration and Nationality Act (INA) governs ETA's scope of authority regarding requests for H-2B workers. Unlike the procedures that exist in the H-2A context, the INA does not provide the Department with authority to debar contractors in the H-2B program. Moreover, the Department has no direct enforcement authority for the H-2B provisions. The INA, as amended by the Save Our Small and Seasonal Businesses Act of 2005,

[1] For purposes of 29 C.F.R. Part 42, the term "protective statutes" refers to the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801, *et seq.*, the Fair Labor Standards Act, as Amended, 29 U.S.C. § 201 *et seq* and the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.*

Pub. L. No. 109-13, 119 Stat. 318, provides the Department of Homeland Security with authority to impose sanctions on employers, including civil money penalties and debarment from the program, for certain types of violations of the H-2B petition attestations. In addition, ETA proposed a rule last year to provide for post-adjudication audits of H-2B petition attestations, ~~among other things~~.

The Department's enforcement authority with respect to farm labor contractors participating in the H-2B program comes from section 103(a) of the Migrant and Seasonal Agricultural Worker Protection Act, which states that "[i]n accordance with regulations, the Secretary may refuse to issue or renew, or may suspend or revoke, a certificate of registration (including a certificate of registration as an employee of a farm labor contractor) if the applicant or holder" has committed any of the specified transgressions. 29 U.S.C. § 1813(a).

Your letter states that, according to recent news media accounts, the reforestation contractor in question continues to be certified by ETA to recruit and to hire H-2B guest-workers, despite his history of violating labor laws. The relationship among the parties in this particular situation is complex and involves two separate companies. The farm labor contractor's (FLC) certificate of registration for the first company had expired, so, in that case, there was no certificate for the Department to revoke. When this company subsequently applied for an FLC certificate, the Department refused to issue a certificate. The person who was in control of this first company then applied for a Farm Labor Contractor Employee (FLCE) certificate in order to perform farm labor contracting activities as an *employee* of a second company that had held an FLC certificate for some time. The Department then refused to issue an FLCE certificate to this person. The individual against whom the Department took these actions has requested a hearing, and the matter is pending before the Department's Office of Administrative Law Judges.

Finally, with regard to the many issues involving transportation (and related) costs in the H-2A program and whether such costs should be borne by the employer, the Department is aware of the recent court decisions regarding these issues. As we are in the process of studying the potential impact of these decisions, the Department is not in a position to comment further at this time.

We share your concern for the physical and economic well-being of agricultural workers, and if I may be of further assistance please do not hesitate to contact me or a member of my staff.

Sincerely,

Paul DeCamp

Paul DeCamp
Administrator

April 6, 2006

Asst. Sec. Victoria A. Lipnic
Employment Standards Administration
U.S. Department of Labor
South 2321
200 Constitution Avenue, NW
Washington, DC 20210

Re: The National Farm Labor Coordinated Enforcement Committee
29 C.F.R. 42.3

Assistant Secretary Lipnic:

The Farmworker Advocacy Network (FAN) is a coalition of organizations that advocate for improved living and working conditions for migrant and seasonal farmworkers.

On behalf of the FAN, I am writing to renew our request for interagency reporting between the Employment Standards Administration (ESA) and other named agencies, and specifically to fulfill your duty to maintain a National Farm Labor Coordinated Enforcement Committee (National Committee), as well as a Regional Farm Labor Coordinated Enforcement Committee (Regional Committee).

As you know, 29 C.F.R. 42.3 mandates a National Committee. The need for such a committee was made all too clear by the events which preceded the deaths of fourteen H2B workers in Maine. (*attachment A*) The appalling lack of communication between agencies was a "but for" cause of the fourteen deaths where an employer which ESA had so frequently found in violation of even basic labor laws (Evergreen Forestry Services) was allowed to continue to receive approval by Employment and Training Administration (ETA) for H2B visas – with disastrous ends.

Astoundingly, recent news media (*attachment B*) confirmed that ETA continues STILL (14 deaths later) to approve H2B petitions for Evergreen Forestry Services' president Peter Smith despite his long being in contempt of court in North Carolina on

labor related charges. I have sent the Contempt Order to the National Monitor Advocate, Erik Lang. Better interagency reporting would deter such glaring errors and protect workers from the most dangerous of employers.

29 C.F.R. 42.4 requires that the National Committee consist of the Under Secretary of Labor, the Solicitor of Labor, and the Assistant Secretaries for the ESA, the Occupational Safety and Health Administration (OSHA) and the ETA.

The named agencies are required to:

- Meet on a quarterly basis;
- Prepare a written coordinated enforcement strategy;
- Maintain a staff level working group with monthly meetings;
- Maintain contact with farm labor groups, state agencies & other interested parties.

FAN respectfully reminds your agency of the importance of these rules, which did not result out of a vacuum, but out of the recognition that workers would be better protected through improved and coordinated communication between the agencies that most greatly effect labor.

Example: Failed agency follow up to recent court decisions regarding the Fair Labor Standards Act (FLSA). The Eastern District of North Carolina has joined the Eleventh Circuit in its finding, *(Attachment C)*, that travel costs fronted by H2A workers in traveling to their employer are for the benefit of the employer and thus act a deduction from the first week's wage. ESA is or should be aware of these decisions and their significant ramifications for H2A workers. Certainly, farm labor groups are aware of these significant decisions. However, FAN has recently learned that ETA continues to approve North Carolina-based H2A applications which falsely state that transportation is to be paid upon completing 50% of the contract period, instead of requiring compliance with the FLSA minimum wage law, which would require an earlier payment for virtually all H2A workers.

Consider: Incoming expenses are naturally accrued prior to the first week of employment. The amount spent on said expenses acts as deduction. In other words, if Worker A earns $8.51/hour (the 2006 North Carolina Adverse Effect Wage Rate) and works 40 hours that first week: $8.51/hour x 40 hours = $340.40

However, Worker A spent $150.00 in incoming transportation expenses from his hometown in Michoacan, Mexico. His pay, considering the deduction, is actually $190.40. In order to meet the minimum wage, he would need to have been paid $206.00. ($5.15 x 40 hours) Without some employer payment to offset the deduction, the employer has violated the minimum wage.

We understand the clearance orders continue to state that workers will paid incoming transportation upon completion of 50% of the contract period. Given this standard, **NO North Carolina worker who works the contractual workweek at the**

contractual wage will earn the minimum wage during the first week of employment Not only will the inaccurate clearance order lead to H2A employers violating H2A workers' basic rights, but U.S. workers will also be misled and possibly deterred from taking the employment.

It is exactly this type of absurdity that the National and Regional Committees were designed to deter.

Example: (Evergreen Forestry Services) 29 C.F.R. 42.20 requires that the Regional Committee maintain contacts with state agencies. Had the Regional Committee been functioning, Peter's Smith's 2005 approval for additional H2B workers would not have been approved, placing additional workers at significant risk. Had the Regional Committee been functioning in 2002, the deaths in Maine would not have occurred.

We request that your agency comply with federal regulation through the formation of National and Regional Committees consistent with the regulations.

Sincerely,

Lori J. Elmer
Legal Aid of North Carolina
Farmworkers Unit
On Behalf of FAN

Enclosures

Cc Steven J. Law, Deputy Secretary of Labor
Howard M. Radzely, Office of the Solicitor
Emily Stover DeRocco, Assistant Secretary of Labor, ETA
William Green, North Carolina State Monitor Advocate
Erik Lang, National Monitor Advocate

Exhibit C

Declaration of H-2B worker Francisco Javier Navarro Herrera

Declaration of Francisco Javier Navarro Herrera

I, Francisco Javier Navarro Herrera, hereby swear to the following:

1. My name is Francisco Javier Navarro Herrera, I am over 21 years of age, of sound mind, and fully qualified and competent in all respects to make this Declaration. The facts set forth in this Declaration are based upon my personal knowledge and are true and correct.
2. I am a resident of Zacatecas, Mexico, and I am a Mexican citizen.
3. I worked as an employee of Geren Rides from approximately the end of May 2007 to approximately the beginning of August 2007 on an H-2B visa. Although I was contracted to work from May to November, I returned to Mexico after approximately two months of employment because of the poor work conditions.
4. While I was employed with Geren Rides, I worked in the states of Georgia, Mississippi, and Alabama. In general, we operated various fairs in each state. My job responsibilities included operating rides, taking down the fair attractions, traveling to the next location on route, and assembling them again. I worked with approximately 60 other workers with similar job responsibilities.
5. I was recruited to work for Geren Rides in Mexico through the *Servicio Nacional de Empleo* (National Service of Employment) ("SNE"), an agency that recruits Mexican workers for employment in the United States under the H2 program. The recruitment process involves multiple layers of paper work processing, which require various visits to the SNE. During this application period, I was not told what type of work I would have or where I would be working. I did not discover that I would be working at a traveling amusement park until I arrived in Monterrey, Mexico, to process my immigration documents at the U.S. Consulate office, the last step in the application process before entering the U.S. When I arrived in Monterrey, a representative of the SNE told me that Geren Rides had contracted me to set up, take down, and operate rides, and that they would pay me $250 per week and provide free housing.
6. A contractor of Geren Rides accompanied me and several other Mexican H-2B workers who had been contracted to work for Geren Rides on the bus from Monterrey to the United States. The bus dropped off the workers in different states

throughout the southern U.S. to run fairs in different locations. About eight workers in total were dropped off with me to begin work in Georgia. The other workers continued on to North Carolina and New York. On the bus, the Geren Rides contractor told us that in addition to our weekly payment, we would receive a $20 bonus for each week worked to be paid at the end of the season if we completed the season.

Visa and Passport

7. While in route from Monterrey to the U.S., the contractor from Geren Rides took my passport and I saw him take the passports of all the other H-2B workers riding with me. He returned the passports to us only to hold during the time it took us to go through U.S. customs at the border. He took the passports again after we had crossed the border.
8. I did not want to give my passport to the Geren Rides contractor because without a passport, if I were questioned in the U.S. about my immigration status, I would not have had a way to convince immigration officials that I was authorized to work in the U.S. Also, it is difficult to cross the border between the United States and Mexico without a passport. For example, if I had needed to return to Mexico, it would have been nearly impossible to do so without my passport. Furthermore, if I did return to Mexico without my passport, it would be difficult for me to find work under the H2 program with a U.S. company other than Geren Rides if they still had my passport. I could not work legally for another company if I did not have my passport.
9. For these reasons, my coworkers and I complained to the Geren Rides contractor and requested that he return our passports. It took him ten days to return our passports, and I believe he returned them because of our constant complaints.

Work Hours

10. My duties while I worked for Geren Rides mainly consisted of operating the rides, traveling from location to location, and assembling and taking down the rides each time we arrived to a new location. Generally, all of the H-2B workers shared the

same job responsibilities, which were identical to my own duties.

11. The fair was open to the public in a single location for approximately eight days. I worked about 11 hours on each of these days. The fair was open to the public from 4pm until 12am midnight. I worked in the mornings from 10am until 12 or 1pm cleaning, and then again from 4pm until 12am operating rides. During my work hours, I was not permitted to take breaks to rest or to eat. There was only one occasion when I asked for a break that I was given the break.
12. It took us approximately 3 days to take down the fair in each location. When 12am came on the last day of the fair in any given location, I continued working from about 12am until 5am taking down the rides. Then, I was permitted to sleep two or three hours before I had to work again around 8am or 9am. This schedule of working all day and night except for two or three hours of sleep continued for the next two days until the rides were taken down. I was not allowed breaks during this time. On these days, I worked between 20 and 22 hours.
13. After the rides were taken down, we traveled to the next location. We usually traveled for two or three hours, and sometimes up to six hours. We traveled in vans that seated 20 people. There was a seat for everyone, but there vans did not have seatbelts. We could not sleep in the van because the conditions were not comfortable. There was a woman who was in charge of driving the workers from location to location. When the fair was open to the public she was also ran a hamburger stand. And she had other work duties around the fair prior to driving us to the next location, so I imagine she was often tired. Sometimes she would have to go back to the last fair ground site to make other pickups after she had dropped us off at the new location.
14. When we arrived at the new location, we spent three days setting up the rides. During this time I worked the same schedule as when I was taking the rides down: approximately 20 to 22 hours a day with no breaks.
15. At the end of the period of taking down, transporting, and setting up the rides, I had usually worked approximately 132 hours in six days.
16. I never had a full day off during my employment at Geren Rides.

Payment

17. From May 2007 until June 2007, representing the entire length of time I worked for Geren Rides, the company paid me $250 a week. I did not finish the season, therefore, I was never paid the $20 weekly bonus.
18. My supervisor paid me in cash each day. I was given $20 each of the six days from Friday through Wednesday. Then I was given $130 each Thursday. The cash came in an envelope with my name written on the front. I was never asked for identification or documentation to relieve my payment.
19. I was never given a pay stub or receipt of payment.
20. Geren Rides never asked me for my social security number, and they never gave me tax forms to complete.
21. Geren Rides provided me with housing. However, the conditions were squalid and I was made to share with between ten and twelve workers.
22. Geren Rides did not reimburse my costs associated with applying for the H-2B visa or travel to the U.S. I paid a total of approximately $500.00USD application, visa, and travel costs. This includes approximately $130.00USD for my visa appointment in Monterrey, approximately $100.00USD for my visa, and approximately $270.00USD in traveling expenses to Monterrey and to the U.S. I did not have to pay for a passport because I already had one. Again, I was not reimbursed for any of these costs.
23. I had to buy a uniform from Geren Rides. The uniform included a shirt that cost approximately $8.00USD and a hat that cost approximately $5.00USD. Additionally, I was required to buy a pair of black pants. These costs may seem low, but represented a significant percentage of my first paycheck, particularly when I arrived with so much debt.
24. I was not able to send money home to my family because I did not earn enough money to send them. I would have left the job sooner than I did, except that I did not have enough money to leave.
25. In Mexico, my family lives on approximately $800.00USD a month. I was not able to support both my family in Mexico and my own costs in the U.S. on the money I earned at Geren Rides.

Housing

26. In Monterrey, Geren Rides provided me with an overnight hotel stay while I processed my visa application. The hotel room was overcrowded and dirty.
27. Together with the other employees of Geren Rides, I lived in a small trailer during my term of employment. The trailers had ten or twelve small bedrooms with individual entrances from the outside. Each person slept in a room that fit nothing more than a small bed. The rooms were dirty and old. The floors, mattresses, and sheets all had stains. There was not adequate ventilation in the trailer, and the rooms were very muggy and hot. Many of the rooms did not have air conditioning. Because we were working in the south of the United States during the summer months, it was very uncomfortable and hot without air conditioning. There were two small bathrooms in the trailer that ten to twelve people shared. Some of the bathrooms did not have a toilet. If the bathrooms did have toilets, they were broken. Sometimes the hot water was turned off in the shower and we had to take cold showers.
28. There were two portable toilets outside the trailers for the workers to use. Because there were about 60 workers, the toilets got very full and would overflow. The toilets would not be emptied for many days, at which point they would be brimming with feces and maggots. We had to go to a store to ask to use the bathroom.
29. There was not a kitchen in the trailer. I shared a crock pot with two other workers that we had borrowed. Geren Rides took us to Wal-Mart each Thursday so that we could buy food with our own money. They took us to Wal-Mart after work at approximately 12 midnight.
30. They took us to do our laundry once a week after we were done working at about 12 midnight. At this time, I was allowed to do laundry with my own money.

Training and Safety

31. I did not receive any training the entire time I worked for Geren Rides. Except for the first day on the job when our employers showed us how to operate three buttons on the rides, I was never instructed how to set up, take down, or operate the rides.

We watched the American workers to figure out how to put the rides together and take them down. None of the supervisors spoke Spanish, so I could not ask them questions.

32. There were several dangerous work conditions at Geren Rides. There were large cables connected to the power generator that we had to move. They were very hot from the sun, and we were not given any gloves or protective clothing. We were never given instruction on how to handle these cables, and I was afraid of getting burned. My fear was confirmed when other workers told me about a former employee who had been burnt badly by the cables.
33. In addition, we were made to work outside when it rained. Although I never got sick during the time I worked, other workers who had flu like symptoms (head aches, throat aches, fevers, etc.) on the job were not allowed to take time off to recuperate. They just bought a pain reliever and continued to work.
34. I believe that the US Department of Labor should monitor the conditions of H-2B employment and housing. I believe this because my experience working with a traveling amusement park was so difficult. Again, I often worked over 100 hours a week for $250 a week, was not given breaks, the conditions I lived in was squalid, and I was not reimbursed for the expenses I accrued getting to the United States. I know other people from Zacatecas that worked in amusement parks and they also suffered these exploitative labor practices.

I attest under penalty of perjury that the forgoing information is true and correct to the best of my knowledge.



Francisco Javier Navarro Herrera

Signed this 7th day of July, 2008.

DECLARACIÓN DEL INTÉRPRETE

Victoria I. Gavito, habiendo prestado el debido juramento, declaro y manifiesto que domino tanto la lengua española como la inglesa, y que he traducido en forma correcta y exacta la declaración jurada de **Francisco Javier Navarro Herrera** que antecede, y que esta persona me ha asegurado que comprende todo el contenido de la misma, y que dicho contenido es verdadero.

Intérprete español

Exhibit D

U.S. DOL Wage and Hour Memorandum No. 99-03, February 11, 1999

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division

FEB 1 1 1999

WAGE AND HOUR MEMORANDUM NO. 99 - 03

MEMORANDUM FOR REGIONAL ADMINISTRATORS FOR WAGE AND HOUR
NATIONAL OFFICE EXECUTIVE TEAM

FROM: JOHN R. FRASER
Deputy Administrator

SUBJECT: Deductions from Wages

This memorandum re-states, in order to clarify, the Wage and Hour Division's interpretation of the legal requirements for deductions from wages. It addresses both OT and non-OT workweeks. The stated principles apply to all covered, nonexempt employees regardless of whether wages are paid on a piece rate, hourly rate, or salary basis.

In summary,

- Deductions for items ***other than*** "board, lodging, or other facilities" as defined in section 3(m) of the Fair Labor Standards Act (FLSA) are illegal if they cut into the ***highest*** applicable MW enforced by WH ***unless*** the law establishing that MW allows the particular deductions; and
- The same monetary amount that may lawfully be deducted for a 40-hour week may lawfully be deducted in an OT week over 40 hours, *if*:
  - the deduction is *bona fide*, and
  - made for particular items under a prior agreement, and
  - the purpose is not to evade statutory overtime requirements or other laws.

BACKGROUND

Employers must pay employees statutorily-required MW and OT premium pay finally and unconditionally, or "free and clear." To determine if an employer may legally deduct amounts from employees' statutory wage entitlements, we look to section 3(m) of the FLSA and its implementing Regulations, 29 CFR Part 531 (Reg 531). FLSA section 3(m) allows an employer to count as part of wages the reasonable cost to the employer of furnishing an employee with "board, lodging, or other facilities" when the employer customarily furnishes the items to employees, unless a bona fide collective bargaining agreement excludes such costs from wages. An employer may either claim a credit towards its MW and OT obligations for the reasonable cost or fair value of furnishing qualifying section 3(m) facilities, or deduct the amounts from the compensation due, even if the qualifying section 3(m) deductions reduce an employee's pay below the statutorily-required minimum.

The cost of furnishing items to employees that are primarily for the benefit or convenience of the employer are not recognized as "reasonable." They can never qualify as "section 3(m) facilities" and may not, therefore, be counted as a part of wages statutorily due. Consequently, if an employee

returns to the employer, or to someone else on the employer's behalf, any part of his or her wage entitlements due (whether returned in cash or in other than cash – *e.g.*, tools or equipment), violations result. Violations occur in two ways: (1) directly, when an employer deducts from an employee's pay the cost of furnishing the employee a non-3(m) item; or (2) indirectly, when the employee must incur out-of-pocket expenses to buy the item and the employer fails to reimburse the employee for the outlay. See Reg 531.3(d)(1) and (3), 531.32(c), and 531.35.

It makes no difference whether an employer requires an employee to purchase a tool of a trade before the employee begins work or during the course of the work – both situations present potential violations if the employee acquires the item in connection with the employment relationship. As we have stated for uniforms and their maintenance, if wearing a uniform is required by law, by the nature of a business, or by an employer, the cost of the uniform (and maintaining it) is a business expense of the employer that may not be borne by the employee if it reduces the employee's wages below the MW or cuts into required OT pay. If an employer requires a prospective employee to purchase a uniform before starting work, the employer must reimburse the employee no later than the next regular payday to the extent that the uniform costs cut into statutory MW or OT premium pay. These same principles apply to the costs of furnishing any tools or equipment required by other law (e.g., State law), by the nature of the work, or by the employer.

Under these principles, an employer may not lawfully require an employee to pay for an expense of the employer's business if doing so reduces the employee's pay below any statutorily-required MW or OT premium pay.[1] For example, tools of the trade and other materials or equipment incidental to carrying on the employer's business, and the cost of uniforms or other equipment where the nature of the business or work requires the employee to have them, are considered business expenses of the employer that do not qualify as "section 3(m) facilities." An employer may not require employees to incur costs for such non-3(m) items if doing so cuts into their MW or OT premium pay. As stated in Reg 531.35,

> ... if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid ... under the Act.

Deductions in Non-OT Workweeks

Reg 531.36(b) contains our interpretations on deductions from wages for non-3(m) items in non-OT workweeks. Deductions for articles that do not qualify as "board, lodging, or other facilities" under

---

[1] As you know, WH enforcement authority in *non*-OT workweeks is limited to the highest applicable MW enforced by WH, which includes WH-enforced prevailing wages when they apply (*e.g.*, DBRA; SCA; H-1B; etc.). If no OT has been worked in a particular week, WH will not enforce any other State or local MW that is higher than the highest MW applicable under the laws enforced by WH; the Investigator will advise the employer of the apparent violation of such other higher State or local MW standards and notify the appropriate authorities of the employer's deduction policies and possible underpayments that may have occurred, as provided in FOH 30b10.

FLSA section 3(m) may be made in non-OT workweeks (*i.e.*, workweeks of 40 hours or less, and workweeks in which statutory OT does not apply) *provided* the employee continues to receive, after the deductions are made, any required MW, free and clear, for all compensable hours worked in the week (*i.e.*, the employee's average hourly earnings for the workweek, after deductions, are not less than the highest applicable MW enforced by WH – *see* footnote 1). Deductions that cut into the highest applicable MW enforced by WH are illegal unless the law establishing that MW allows the particular deductions. In other words, if an employer is legally required to pay a MW higher than the FLSA MW, then deductions are permitted only to the extent that they do not reduce the employee's pay to an effective hourly rate lower than the highest applicable required wage rate enforced by WH.

For example –

- If a **Davis-Bacon and Related Acts (DBRA)** prevailing wage determination applies, only those payroll deductions permitted by 29 CFR §§ 3.5 and 3.6 are allowed to reduce the employee's effective hourly rate below the DBRA prevailing rate.
- If a **Service Contract Act (SCA)** prevailing wage determination applies, authorized deductions from the SCA rate are limited to: those required by law or court order; for the reasonable cost or fair value of board, lodging and facilities furnished (*see* 29 CFR § 4.157); and for amounts authorized for payment to third parties for the employee's account and benefit under a voluntary assignment or collective bargaining agreement. Deductions that are not so authorized or are contrary to law or from which the employer or any affiliated person derives any payment or benefit (directly or indirectly) are prohibited if they cut into the SCA-required wage determination rate (*see* 29 CFR § 4.168).
- Under **H-2A**, deductions (other than those required by law) are allowed **only** if the employer discloses them to the worker in the job offer/work contract and they are **"reasonable."** We interpret **"reasonable"** to require that the deduction be voluntary on the worker's part, and the deduction may not benefit the employer (*see* FOH 58e07 and 20 CFR §§ 655.102(b) (3) and (13)).
- Under **MSPA**, if the contract specifically discloses that the employer will make certain particularized deductions not otherwise prohibited by other law, those deductions would be permitted, *e.g.*, if a MSPA-covered employer disclosed an $8.00/hour wage rate and fully disclosed in writing at the time of recruitment that $1.50/hour would be deducted for non-3(m) items, and the deductions are otherwise legal and not prohibited by other applicable laws, then those fully-disclosed deductions may reduce the hourly wage rate to below the $8.00/hour contracted "promised wage" (i.e., to $6.50/hour in this example).
- Under **H-1B**, deductions not authorized by 20 CFR § 655.731(c)(7) are illegal.

Various other Federal, State and local laws regulate payment of wages, prohibit or restrict payment of wages in services or facilities, outlaw "kickbacks," restrain assignments, and otherwise govern the calculation of wages and the frequency and manner of paying them. Nothing in the FLSA or other WH-administered statutes, regulations, or interpretations overrides or nullifies any higher standards or more-stringent provisions of these other laws. See Reg 531.26 ***and*** FOH 30b10.

Deductions in OT Workweeks

Reg 531.37 contains our interpretations on deductions from wages for non-3(m) items in OT workweeks. Deductions for articles that do not qualify as "board, lodging, or other facilities" under

FLSA section 3(m) may be made in an OT workweek to the same extent as in a non-OT workweek, if their purpose and effect are not to evade the OT requirements of the FLSA ***or other law***, and provided the situation involves ***bona fide*** deductions that are made for ***particular items*** according to an ***agreement or understanding*** between the employer and the employee (Reg 531.37(a)). If all these conditions are met, the total amount that an employer may deduct from an employee covered by OT in an OT workweek may not exceed the amount that it could deduct if the employee had only worked a 40-hour week.

If an employer makes deductions from the stipulated wage of an employee, the employee's regular rate for calculating statutory time-and-one-half OT pay is the stipulated wage before the deductions are made (Reg 531.37(b)). Note, too, that under Reg 778.315, an employer must pay an employee all of the straight time compensation ***due under an express or implied contract or under any applicable statute*** for the non-OT hours worked before it can be said that the employer has paid proper time-and-one-half OT compensation for the OT hours worked. This statement reinforces two principles that apply in an OT workweek: (1) only an express or implied contract addressing deductions would authorize an employer to make any deductions that reduce earnings below the regular rate for the straight time hours; and (2) the minimum amount that must be paid "free and clear" for the straight time hours may never be less than the highest applicable statutory MW ("... all the straight time compensation due ... for the nonovertime hours ... ***under any applicable statute,...*** " (Reg 778.315)). (See, also, FOH 32j01: if OT has been worked, the regular rate for OT purposes may never be lower than the ***highest*** applicable State, Territorial, or Federal MW, which includes a Federal prevailing wage (if applicable).) Finally, as noted above, Reg 531.37(a) authorizes only "bona fide deductions" that "are made for particular items in accordance with the agreement or understanding of the parties," and declares manipulations that evade statutory OT requirements to be illegal.

Accordingly, if an employer has an express or implied agreement with an employee over a deduction policy for particular items, then ***bona fide*** deductions pursuant to the policy will be allowed during OT workweeks to the extent that they would be allowed in non-OT workweeks, ***provided that*** the deductions do not violate other applicable laws, the employee receives "free and clear" the highest applicable MW (including prevailing wages) required by any Federal, State or local law for the non-OT hours, and the employee receives proper time-and-one-half the regular rate of pay based on the stipulated wage, before any deductions are made, for all the OT hours. Where no express or implied agreement exists as to deductions for particular items, or if the employer reduces an employee's wages for a reason not addressed in the contractual arrangement or for no legitimate reason, the deductions will be considered illegal and will not be allowed during OT workweeks. The following standards must be met:

> ***Deductions must be for particular items according to an agreement or understanding between the parties:*** The agreement must be reached before the employee performs the work that becomes subject to the deductions. The agreement must be specific concerning the particular items for which the deductions will be made, and the employee must know how the amount of the deductions will be determined that are included in the agreement. The employee must affirmatively agree or assent to the employer's deduction policy. While the employee's assent to the policy may be written or unwritten, the burden of proof that an employee has agreed to the deduction policy rests on the employer.

Only bona fide deductions, made for particular items, are permitted: Deductions which evade other laws (Federal, State *or* local) or which are otherwise prohibited by other authority are not *bona fide* (*e.g.*, if a State law prohibits *any* deductions from employee wages for tools and similar items or equipment that are business expenses of the employer, WH would not allow any such deductions in that State in an OT workweek, regardless of whether the highest WH-enforced MW was paid (net) after the deductions). Deductions for amounts above the reasonable cost to the employer of furnishing a particular item to an employee are also not *bona fide* (e.g., furnishing items to employees "at a profit"). Deductions from wages where no prior agreement exists as to particular items are never permitted in an OT workweek.

The regular rate of pay is based on the stipulated wage before any deductions are made: Deductions for non-3(m) items that reduce an employee's hourly rate of pay below the highest applicable legally-required MW are illegal ***unless*** the law establishing that MW allows the particular deductions. If OT is worked by a nonexempt employee entitled to OT, deductions may be made according to an agreement that reduce the effective hourly rate down to the highest required MW, but only from the non-OT hours (first 40 hours in the week), and proper time-and-one-half the full regular rate (pre-deductions) must be paid for all statutory OT hours.

The purpose and effect of the deductions are not to evade the OT requirements or other laws: Deductions made only in OT workweeks, or increases in prices charged during OT workweeks compared to non-OT workweeks, will be considered manipulations to evade statutory OT requirements which are prohibited. Deductions that violate other applicable laws are prohibited in an OT workweek.

Please ensure that all enforcement staff receive copies of, and follow closely, this re-statement of our interpretations on permissible and impermissible deductions. Because this memorandum sets forth existing interpretations of the applicable legal requirements under current laws and current regulations, it applies to all ongoing enforcement actions. Appropriate clarifications will be issued to supplement pertinent sections of the FOH to make sure that this policy is consistently applied.

Exhibit E

Ross Eisenbrey "Guest, Local Workers Suffer at Employer's Will"
Published in National Wage and Hour Clearinghouse

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NATIONAL WAGE & HOUR CLEARINGHOUSE
Hosted by The National Employment Law Project

Guest, Local Workers Suffer at Employer's Will

Friday, May 09

By: Ross Eisenbrey

Organization: Newsday.com

Newsday.com
Guest, local workers suffer at employers' will
BY ROSS EISENBREY

Ross Eisenbrey is vice president of the Economic Policy Institute in Washington, D.C., which researches the impact of economic trends and policies on working people in the United States and around the

May 9, 2008

Unemployment is rising, hundreds of thousands of families are facing foreclosures on their homes, and wages are flat-lining (especially for workers without college degrees). Yet a noisy group of Long Island businesses claims the nation needs ... more workers willing to accept low wages and less likely to organize or otherwise assert their rights.

The businesses, part of a national coalition with well-connected lobbyists, are badgering Congress to allow more indentured workers into the United States. Not surprisingly, given that low-wage workers have no lobbyists of their own, many members of the U.S. House and Senate - including Rep. Tim Bishop (D-Southampton) - are listening attentively and getting ready to give these low-wage employers just what they want.

These special-interest lobbyists have been all over Capitol Hill demanding that Congress allow tens of thousands of additional "guest workers" into the country as dishwashers, hotel maids, crab pickers, landscape laborers and workers in other low-wage jobs. That would be bad news for the region's and the nation's low-wage workers, whether immigrant or native-born.

Current law permits a maximum of 66,000 foreign nationals to enter this country each year under a special visa program known as H-2B, if employers fail to find qualified U.S. workers. But employers are required to advertise for workers for only three days. If you're skeptical that dishwashers and landscape workers are so hard to find in a sinking economy, you're right. But because the law allows the businesses to advertise so briefly - and four months before the jobs become vacant - more employers each year somehow manage not to find anyone to do the work. That's because the whole process is designed to obscure this simple fact: There isn't a shortage of workers willing to do these jobs. There's a shortage of employers willing to pay a decent wage.

Ten years ago, only 20,000 H-2B visas were issued. In 2007, 130,000 were issued, even though more than 7

million Americans were unemployed and millions more had part-time jobs but wanted full-time work. Why are so many more businesses turning to foreign workers? Because the U.S. government lets them pay poverty-level wages.

Almost all H-2B employers pay less than a living wage, including most of the New York landscape businesses that use these visas. Some of the worst abusers are in the toniest areas. Out of 49 landscape businesses in the Hamptons certified to import "guest workers" last year, all but two paid less than $8.40 an hour. Yet the average wage for landscape laborers statewide was $12.56 in 2006.

Despite the loss of 260,000 jobs in the first four months of this year, more than 150 House members, including Rep. Bishop, have signed on to legislation to lift the 66,000 visa cap and allow all the foreign workers who used H-2B visas in the past three years to enter, in addition to the current 66,000, for a potential total of more than 200,000 visas in all.

But the obvious questions aren't being asked: These businesses managed to succeed until 2003 without needing even 66,000 H-2Bs. So what changed, except that the number of Americans seeking jobs has increased? Why is the cap on visas a crisis now, when it wasn't in 2000, when unemployment was under 4 percent?

And what will happen if the cap remains at 66,000?

The last question is being answered already. Lawn and Landscape magazine reports that employers are (grudgingly) beginning to raise wages to attract more U.S. workers. Nationally, the average landscape worker without a college education earns only $10.67 an hour - less than in 2000, after adjusting for inflation. The unemployment rate among such laborers is above 9 percent - also worse than in 2000. So there's plenty of room to raise wages, and plenty of unemployed U.S. workers to do the work.

The problem isn't limited to landscapers. The Economic Policy Institute examined wages and unemployment in the seven occupations with the most H-2B workers, which include hotel and restaurant workers.

In these occupations, unemployment was higher and had risen faster since 2000 than the national average, while wages were lower and had risen more slowly than the national average.

The obvious answer to Long Island's so-called labor shortage is to offer local workers a decent wage. The answer is not to pay poverty-level wages and look overseas for workers willing to accept them.

Businessmen usually claim to love the magic of the marketplace. Congress should let the labor market work its wonders and get hard-working, low-paid Americans of every background the raises they need and deserve.

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Exhibit F

Ross Eisenbrey "H-2B and the U.S. Labor Market" published by the Economic Policy Institute (June 24, 2008)

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H-2B and the U.S. Labor Market

BY ROSS EISENBREY

The premise that there are labor shortages in unskilled occupations and that growing numbers of U.S. employers need to import workers from abroad to fill these jobs is not supported by the evidence.

1. Unemployment is on the rise across the United States, and 1.6 million more Americans are unemployed than one year ago. Even if employers had trouble finding workers one year ago or two years ago, the labor market is worse today.

2. Unemployment rates in the occupations involved in the H-2B program, including those accounting for a large majority of admissions to the United States, were never low and almost all are higher today than six years ago.

3. Wages should be increasing in shortage occupations as employers are forced to compete to attract the workers they need. Yet in inflation-adjusted terms, wages are stagnant or lower in six of the seven occupations most involved in the H-2B program.

4. "Extraction occupations" is the exception, thanks to the boom in the mining industry.

5. The so-called prevailing wage that the Department of Labor (DOL) requires employers to offer to U.S. workers and pay to H-2B workers is usually far lower than the average hourly wage paid in the locality. This has the combined effect of discouraging U.S. workers from applying and pushing down the locally prevailing wage. The more employers use H-2B workers, the greater the depressing effect on U.S. wages.

   In 2007, for example, the occupation most often certified was landscape laborer, an unskilled job usually held by people with a high school education or less. About 930,000 people work as landscape laborers across the nation, earning an average hourly wage of about $11.53 an hour. In Nassau and Suffolk county on Long Island, the average wage is higher – $12.91 an hour. Yet in the wealthy resort area of the Hamptons, 47 of 49 companies employing

H2B WAGES TABLE

		2000-01 (in 2007 dollars)		2006-07 (in 2007 dollars)	
Education	*Occupation*	*Unemployment rate*	*Hourly wage*	*Unemployment rate*	*Hourly wage*
All	All	6.9%	$11.31	7.4%	$11.07
	Food prep. related services	7.3	8.80	7.7	8.73
	Lodging related services	9.6	9.97	9.8	9.64
	Construction	6.0	17.66	6.7	17.47
	Motor freight	4.2	15.79	4.3	15.31
	Packing and material handling	8.9	12.17	9.7	11.87
	Extraction occupation	5.8	17.83	4.0	19.51
	Grounds maintenance workers	8.0	11.07	9.4	11.19
HS or less	All	7.6	11.13	8.0	10.87
	Food prep related services	8.1	8.70	8.3	8.54
	Lodging related services	10.2	9.80	10.2	9.29
	Construction	4.9	17.75	8.7	17.47
	Motor freight	4.3	15.58	4.5	15.16
	Packing and material handling	9.7	11.73	10.6	11.35
	Extraction occupation	6.4	17.21	4.3	19.06
	Grounds maintenance workers	8.9	10.81	9.6	10.67

H-2B workers were certified to pay less than $8.50 an hour. Somehow, the U.S. Department of Labor accepted the employers' assertion that the prevailing wage in one of New York's toniest communities was more than $4.00 an hour lower than the wage for that occupation in the surrounding county.

In the Philadelphia metropolitan area, the same thing happened. Even though Bureau of Labor Statistics (BLS) reported the prevailing wage for landscape laborers to be $13.33 an hour in 2007, most of the landscaping companies in and around Philadelphia that applied were certified to hire H-2B workers at $8.46 an hour. In Lancaster, Pa. the average hourly wage for landscapers was $12.05, yet BLS certified several companies for H-2B landscapers at $8.16 an hour.

In Maryland, the most sympathetic user of H-2B guest workers is the crab processing industry, which has convinced politicians it would fail if not for the H-2B program. Yet 12 of 14 crab processors certified for H-2B workers in 2007 were required by U.S. DOL to offer only $5.36 an hour to the U.S. workers they were required to attempt to recruit—less than the state minimum wage. In fact, skilled crab pickers are paid a piece rate and can earn $12.00 or more an hour, yet if companies advertise at wages less than $6 an hour, the chances of recruiting U.S. workers on the Eastern Shore of Maryland are slim.

Even worse, crab pickers who were certified at $8.64 an hour in 2006 were certified for the same restaurant in Frederick, Md. at $6.76 an hour in 2007.

6. Clearly, the wage-setting system is broken. To keep the prevailing wage from being undercut or driven down, DOL should be required to use a higher wage than the average. I recommend the 75th percentile wage for the occupation.

Exhibit G

Ross Eisenbrey Unpublished Research Comparison Prevailing Wage
FY07 to Median Hourly Wage and Mean Hourly Wage

From: Ross Eisenbrey [mailto:reisenbrey@epi.org]
Sent: Wednesday, July 02, 2008 6:27 PM
To: Art Read; Ana Avendano; McFerran, Lauren (HELP Committee); mbauer@splcenter.org
Subject: [Prevailing Wage] and OES comparison

... a quick review reveals that in 98 occupations in 9 states and 27 different cities of employment, chosen randomly, all but three determinations set the wage rate below both the median hourly wage and the mean hourly wage prevailing in the area, sometimes by as much as 50%.

If this is useful, please cite it as unpublished research.

Ross

Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage

State	City	Occupation H-2B	Occupation OES	prevailing wage 07	median hourly wage 07	mean hourly wage 07
		food prep related services				
California	La Quinta, Riverside County	Dining Room Attendant	Dining Room and Cafeteria Attendants and Bartender Helpers	$7.44	$8.16	$8.52
California	Palm Desert, Riverside	Kitchen Helper	Food Preparation Workers	$7.44	$9.02	$9.72
California	La Quinta, Riverside County	Waiter/Waitress	Waiters and Waitresses	$7.38	$8.23	$9.15
		lodging related services				
California	Palm Desert	Hotel Clerk	Hotel, Motel, and Resort Desk Clerks	$8.03	$9.31	$9.75
		construction				
California	Fremont	construction Worker I	Construction Laborers	$11.78	$20.41	$20.28
California	San Francisco	Pipe Fitter	Plumbers, pipefitters, and Steamfitters	$26.09	$28.20	$29.08
California	Sonoma	Crushing Machine Operator	no area of sonoma			
		motor freight				
California	San Francisco	Bus Driver	Bus Drivers, School	$13.52	$15.82	$15.82
California	San Francisco	Taxi Driver	Taxi Drivers and Chauffeurs	$13.52	$12.47	$13.52
California						
		grounds maintenance workers				
California	Iriwindale, Los Angeles	Laborer, Landscape	Landscaping and Grounskeeping Workers	$8.13	$10.59	$11.83
California	Long Beach	Cleaner, Housekeeping	Cleaner, Housekeeping	$7.66	$9.51	$10.17
California						
		food prep related services				
Mississippi	Biloxi	Dining Room Attendant	Dining Room and Cafeteria Attendants and Bartender Helpers	$5.92	$7.31	$7.89
Mississippi	Biloxi	Kitchen Helper	Food Preparation Workers	$5.89	$7.49	$7.74
Mississippi	Biloxi	Waiter/Waitress, Bar	Waiters and Waitresses	$5.89	$6.85	$7.69
		lodging related services				
		construction				
Mississippi	Biloxi	Construction Worker I	Construction Laborers	$8.12	$11.28	$11.29
Mississippi	Gulfport	Carpenter	Carpenters	$11.14	$15.82	$16.32
Mississippi	Gulfport	Cement Mason	Cement Masons and Concrete Finishers	$9.65	$13.87	$13.92

Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage

State	City	Occupation H-2B	Occupation OES	prevailing wage 07	median hourly wage 07	mean hourly wage 07
Mississippi	Gulfport	Pipe Fitter	Plumbers, Pipefitters, and Steamfitters	$13.84	$16.63	$17.40
Mississippi						
		grounds maintenance workers				
Mississippi	Biloxi	Cleaner, Housekeeping	Maids and Housekeeping Cleaners	$5.93	$8.42	$8.41
Mississippi	Silver Creek	Laborer, Landscape	Landscaping and Groundskeeping Workers	$5.95	$8.17	$8.26
Mississippi						
		food prep related services				
Arizona	Phoenix	Dining Room Attendant	Dining Room and Cafeteria Attendants and Bartender Helpers	$7.26	$7.35	$8.06
Arizona	Scottdale	Waiter/Waitress, Formal	Waiters and Waitresses	$6.75	$7.30	$8.86
Arizona	Tucson	Kitchen Helper	Food Preparation Workers	$6.75	$9.19	$10.96
		lodging related services				
Arizona	Phoenix	Hotel Clerk	Hotel, Motel, and Resort Desk Clerks	$8.37	$9.63	$9.91
		construction				
Arizona	Phoenix	Construction Worker I	Construction Laborer	$8.40	$13.02	$14.29
Arizona	Tucson	Maintenane Repairer, Building	Maintenance and Repair Workers, General	$7.98	$13.45	$14.02
Arizona	Scottdale	Dry Wall Applicator	Drywall and Ceiling Tile Installers	$11.06	$14.49	$14.98
Arizona	Scottdale	Reinforcing Metal Workers	Reinforcing Iron and Rebar Workers	$7.38	$16.05	$18.43
		motor freight				
Arizona	Phoenix	Tractor Trailer Truck Driver	Truck Drivers, Heavy and Tractor-Trailer	$15.50	$17.97	$18.68
		grounds maintenance workers				
Arizona	Flagstaff	Laborer, Landscape	Landscaping and Groundskeeping Workers	$6.93	$11.05	$11.20
Arizona	Phoenix	Cleaner, Housekeeping	Maids and Housekeeping Cleaners	$6.75	$8.81	$9.13
Arizona						

Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage

State	City	Occupation H-2B	Occupation OES	prevailing wage 07	median hourly wage 07	mean hourly wage 07
		food prep related services				
Michigan	ACME, Northwest of Lower Peninsula of nonmetropolitan	Dining Room Attendant	Dining Room and Cafeteria Attendants and Bartender Helpers	$6.95	$7.46	$8.12
Michigan	Boyne Falls, Northwest of nonmetro lower Peninsula	Kitchen Helper	Food Preperation Workers	$6.95	$9.18	$9.68
Michigan	Glen Arbor, Northwest of nonmetropolitan lower peninsula	Waiter/Waitress, Informal	Waiters and Waitresses	$6.95	$7.56	$8.54
		lodging related services				
Michigan	Hotel Clerk, Northwest Lower Peninsula nonmetropolitan are	Mickinaw City	Hotel, Motel, and Resort Desk Clerks	$6.95	$8.81	$9.00
Michigan						
Michigan						
		construction				
Michigan	Auburn, Bay City	Construction Worker I	Construction Laborers	$11.69	$14.82	$16.42
Michigan	Detroit	Roofer	Roofers	$6.95	$18.65	$18.83
Michigan						
		motor freight				
Michigan	Warren	Tractor Trailer Truck Driver	Truck Drivers, Heavy and Tractor-Trailer	$19.41	$18.93	$19.72
Michigan	Westland, Near Livonia	Truck Driver, Light	Truck Drivers, Light or Delivery Services	$22.42	$15.10	$16.05
Michigan						
		grounds maintenance workers				
Michigan	Ann Arbor	Cleaner, Housekeeping	Maids and Housekeeping Cleaners	$6.95	$9.39	$9.94
Michigan	East Lansing	Laborer, Landscape	Landscaping and Groundskeeping Workers	$8.48	$10.37	$11.69
Michigan	Mackinac Island, Upper Peninsula nonmetropolitan	Groundskeeper, Industrial	Landscaping and Groundskeeping Workers	$6.95	$8.63	$10.22
		food prep related services				

Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage

State	City	Occupation H-2B	Occupation OES	prevailing wage 07	median hourly wage 07	mean hourly wage 07
Illinois	Chicago	Fast Food Worker	Cooks, Fast Food	$6.71	$7.76	$8.34
Illinois	Chicago	Laborers, Landscape	Landscaping and Groundskeeping Workers	$7.71	$11.06	$12.06
Illinois						
		lodging related services				
		construction				
Illinois	Springfield	Construction Worker I	Construction Laborers	11.14/9.27/1	$17.78	$20.29
Illinois	Villa Grove, nonmetro area of east central	Roofers	Roofers	$8.03	$10.87	$14.06
Illinois	Empire, nonmetro of East Central	Welder, Combination	Welders, cutters, solderers, brazers	$16.05	$14.54	$14.73
		motor freight				
Illinois	Chicago	Tractor Trailer Truck Driver	Truck Drivers, Heavy and Tractor-Trailer	$13.81	$20.47	$21.21
Illinois	Chicago	Truck Driver, Heavy	Truck Drivers, Heavy and Tractor-Trailer	$13.68	$20.47	$21.21
Illinois						
		grounds maintenance workers				
Illinois	Joliet	Laborers, Landscape	Landscaping and Groundskeeping Workers	$7.71	$11.06	$12.06
		food prep related services				
New York	Fisher Island, Suffolk Count	Waiter/Waitress, Formal	Waiters and Waitresses	$6.91	$10.23	$10.99
New York	Montauk, Suffolk County	Dining Room Attendant	Dining Room and Cafeteria Attendants and Bartender Helpers	$6.48	$8.61	$9.08
New York	Inwood, Nassau County	Kitchen Helper	Food Preperation Workers	$7.22	$10.12	$10.89
		construction				
New York	Albany	Construction Worker II	Construction Laborers	$7.59	$16.83	$18.05
New York	Farmingville, Suffolk County	Cement Mason	Cement Masons and Concrete Finishers	$14.91	$23.18	$24.71
New York	Flushing, Central nonmetropolitan	Welder Fitter	Welders, Cutters, Solderers, and Brazers	$16.19	$15.40	$15.52
New York	Patchogue, Suffolk County	Carpenter	Carpenters	$13.45	$24.41	$25.71

Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage

State	City	Occupation H-2B	Occupation OES	prevailing wage 07	median hourly wage 07	mean hourly wage 07
		packing and material handling				
New York	Auburn, Central nonmetropolitan	Material Handler	Laborers and Freight, Stock, and Material Movers, Hand	$7.25	$9.57	$10.38
New York	Cutchogue, Suffolk County	Material Handler	Laborers and Freight, Stock, and Material Movers, Hand	$7.60	$11.62	$12.64
New York						
		grounds maintenance workers				
New York	Brooklyn, New York-Long Island	Laborer, Landscape	Landscaping and Groundskeeping Workers	8.21/9.13	$12.01	$13.32
New York	Montauk, Suffolk County	Cleaner, Housekeeping	Maids and Housekeeping Cleaners	$8.44	$13.01	$13.09
New York						
		food prep related services				
Virginia	Hot Springs, Northwestern nonmetropolitan	Waiter/Waitress, Formal	Waiters and Waitresses	$7.79	$7.06	$7.40
Virginia						
		construction				
Virginia	Fredericksburg, Northerneastern nonmetropolitan	Cement Mason	Cement Masons and Concrete Finishers	$11.42	$16.50	$15.84
Virginia	Fredericksburg, Northerneastern nonmetropolitan	Construction Worker I	Construction Laborers	6.74/8.31/9.	$11.77	$11.77
Virginia	Newsport News	Pipe Fitter Helper	Helpers--Plumbers, Pipefitters, and Steamfitters	$7.76	$10.57	$10.54
		packing and material handling				
Virginia	Newsport News	Material Handler	Laborers and Freight, Stock, and Material Movers, Hand	$7.11	$10.33	$12.97
		grounds and maintenance workers				
Virginia	Alexandria	Laborer, Landscape	Landscaping and Groundskeeping Workers	$8.25	$11.14	$11.80

Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage

State	City	Occupation H-2B	Occupation OES	prevailing wage 07	median hourly wage 07	mean hourly wage 07
Virginia	Richmond	Cleaner, Housekeeping	Maids and Housekeeping Cleaners	$5.90	$8.60	$8.65
Virginia	Newsport News	Janitor	Janitors and Cleaners, Except Maids and Housekeeping Cleaners	5.07/9.67	$8.22	$8.39
		food prep related services				
Massachusetts	Brewster, Barnstable	Kitchen Helper	Food Preparation Workers	$7.49	$10.27	$10.67
Massachusetts	Brewster, Barnstable	Waiter/Waitress	Waiters and Waitresses	$7.57	$12.33	$12.18
Massachusetts	Centerville, Barnstable	Fast Foods Worker	Cooks, Fast Food	$7.67	$9.81	$9.95
Massachusetts	Chatam, Barnstable	Dining Room Attendant	Dinning Room and Cafeteria Attendants and Bartender Helpers	$7.93	$9.07	$9.63
Massachusetts						
		lodging related services				
Massachusetts	Hyannis, Barnstable	Hotel Clerk	Hotel, Motel, and Resort Desk Clerks	$9.92	$11.65	$11.78
Massachusetts						
Massachusetts						
		construction				
Massachusetts	Boston	Welder Fitter	Welders, Cutters, Solderers, and brazers	$15.02	$18.79	$19.79
Massachusetts	Marstons Mills, Barstable	Stonemason	Stonemasons	$19.49	$24.01	$24.03
Massachusetts	Hyannis, Barnstable	Carpenter	Carpenters	$16.39	$22.84	$24.70
		motor freight				
Massachusetts	Edgartown, Nantucket Island and Martha's Vineyard nonmetropolitan area	Bus Driver	Truck Drivers, Light or Delivery Services	$12.79	$15.34	$15.99
Massachusetts						
Massachusetts						
		packing and material handling				
Massachusetts	Brighton, near Boston	Material Handler	Material Moving Workers, All Other	$11.37	$18.92	$19.24
Massachusetts		Stock Control Clerk				

Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage

State	City	Occupation H-2B	Occupation OES	prevailing wage 07	median hourly wage 07	mean hourly wage 07
		grounds maintenance workers				
Massachusetts	Barnstable	Laborer, Landscape	Landscaping and Groundskeeping Workers	$9.83	$13.62	$13.82
Massachusetts	Brewster, Barnstable	Cleaner, Housekeeping	Maids and Housekeeping Cleaners	$8.44	$13.15	$13.75
Massachusetts	Hyanis, Barstable	Janitor	Janitors and Cleaners, Except Maids and Housekeeping Cleaners	$9.26	$13.15	$13.75
Massachusetts	Nuntecket	Groundskeepers, Industrial	Landscaping and Groundskeeping Workers	$11.10	$17.39	$18.20
		food prep related services				
Florida	Boynton Beach	Dining Room Attendant	Dining Room and Cafeteria Attendants and Bartender Helpers	$6.67	$7.47	$8.21
Florida	Boca Raton	Host/Hostess, Restaurant	Hosts and Hostesses, Restaurants, Lounge, and Coffee Shop	$7.61	$8.45	$9.31
Florida	Boca Raton	Waiter/Watress, Forma	Waiters and Waitresses	$7.28	$9.51	$10.29
Florida	Fort Lauderdale	Kitchen Helper	Food Preparation Workers	$6.48	$9.28	$9.79
		lodging related services				
Florida	Boca Raton	Hotel Clerk	Hotel, Motel, and Resort Desk Clerks	$7.46	$10.45	$10.57
Florida	Naples	Guard, Security	Security Guards	$9.87	$11.53	$12.00
Florida	Naples	Parking Lot Attendant	Parking Lot Attendant	$6.67	$8.06	$9.69
		construction				
Florida	Fort Myers	Carpenter	Carpenters	$14.65	$16.26	$18.06
Florida	Ft. Lauderdale	Roofer	Roofers	$15.23	$15.97	$16.41
Florida	Fort Myers	Pipe Fitter Helper	Helpers--pipelayers, plumbers, pipefitters, and Steamfitters	$9.99	$11.38	$11.54
Florida	Jacksonville	Cement Mason	Cement Masons and Concrete Finisherrs	$13.38	$16.97	$17.38
Florida	North Miami Beach	Pipe Fitter	Plumbers, Pipefitters, and Steamfitters	$18.07	$18.61	$19.34
Florida	Miami	Construction Worker I	Construction Laborers	$9.95	$11.03	$11.46

Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage

State	City	Occupation H-2B	Occupation OES	prevailing wage 07	median hourly wage 07	mean hourly wage 07
Florida	North Miami Beach	Plumber	Plumbers, Pipefitters, and Steamfitters	$18.07	$18.61	$19.34
		motor freight				
Florida	Ocala	Tractor Trailer Truck Driver	Truck Drivers, Heavy and Tractor-Trailer	$12.35	$14.50	$14.89
Florida	Panama City	Driver	Taxi Drivers and Chauffeurs	$7.58	$8.48	$10.44
Florida						
		packing and material handling				
Florida	Jacksonville	packer	Packers and Packages, Hand	$6.53	$8.87	$10.01
Florida	Panama City	Machinist	Machinists	$12.13	$17.02	$17.76
		grounds maintenance workers				
Florida	Boca Raton	Cleaner, Housekeeping	Maids and Housekeeping Cleaners	$7.02	$8.74	$9.11
Florida	Boca Raton	Laborer, Landscape	landscaping and groundskeeping workers	$7.21	$9.36	$10.33
Florida	Naples	Janitor	Janitors and Cleaners, Except Maids and Housekeeping Cleaners	$7.70	$10.73	$10.99

Exhibit H

1998 North Carolina Fisheries Association, Inc. Prevailing Wage Survey



North Carolina Fisheries Association, Inc.



P.O. Box 12303
New Bern, N.C. 28561
Phone: (919) 633-2288
Fax: (919) 633-9616

"Do Not Give This info out (to nobody) per Marion 2-13-98

February 10, 1998

Results of survey

of North Carolina crab processors conducted February 6 - 9, 1998
to determine entry-level prevailing wage for crab pickers

Summary of results

	A Number of respondents	B Number of employees	C Hourly rate of pay for entry-level worker	D Column B X Column C
	30	1478	$ 5.15	$7,611.70
	1	20	$ 6.00	$ 120.00
TOTALS	31	1498		$7,731.70

Column (D) divided by Column (B) ($7,731.70 / 1498) = $5.16 per hour (Average wage)

Note: Individual survey sheets for each company contacted are attached.

Supporting documentation

1. **Respondents** - Companies included in the survey are holders of appropriate North Carolina certification to purchase, process and sell crabs. These companies hire entry-level workers to pick the cooked crabs and package into containers for sale.

2. **Job description** - Under direct supervision, crab pickers remove the meat from cooked crabs and sort into catagories (backfin, claw, etc.) for packaging and sale. While a few of the companies surveyed retain crab pickers for the entire year, most workers are seasonal (approximately May through December).

3. **How survey was conducted** - Based on a list received from the NC Shellfish Sanitation Branch, attempts were made via phone to contact all certified crab processors. Of the 35 listed, 3 had gone out of business, 1 could not be reached and 31 responded to the survey. The survey represents 1,498 workers during peak season.

Approved by NC ESC Labor Certification Specialist A Kris Howe Jr Date 2-11-98

DOT CODE: 525.687-126

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
P. O. Box 25903, Raleigh, NC 27611-5903

February 13, 1998

Mr. Jerry Schill
North Carolina Fisheries Association, Inc.
P. O. Box 12303
New Bern, North Carolina 28561

Dear Mr. Schill:

The prevailing wage rate of $5.16 per hour for the position of *entry-level crab picker*, determined as the result of a survey conducted by the North Carolina Fisheries Association February 6 –9, 1998 of the universe of crabmeat processors in eastern North Carolina, has been accepted. The information provided adhered to the requirements in the standard criteria setforth in the US Department of Labor, Employment and Training Administration's (ETA) General Administration Letter No. 2-98 (dated October 31, 1997).

Criteria included the following:

- the survey was based upon data collected within the previous 24 months
- the wage reflects the rate of pay for the majority of the workers employed in the *entry level crab picker* occupation in the area of intended employment in eastern North Carolina.
- the job description for the survey adequately matches the job description as contained in the employer's request for acceptance of the survey for prevailing wage rate purposes
- workers in this occupation are employed only in a single industry, therefore the wage data was collected within only one industry for the occupation that will be used exclusively by crab processing companies
- the survey represented all licensed establishments in this industry (35 establishments with 31 responding; three were "out of business" and one was not open at the time of the survey)
- an arithmetic mean (weighted average) was determined from the survey wage data on all employees in this occupation for all participating employers
- the methodology used to determine the prevailing wage provided by the North Carolina Fisheries Association adhered to recognized statistical standards and principles.

Thank you for your assistance in this effort. If we can be of further assistance, please call me or the division's Alien Wage Certification Specialist, King Howe, at (919) 733-2936.

Sincerely,

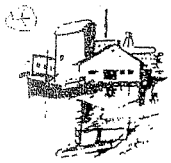
Robert A. Cottrell, Jr.

Robert A. Cottrell, Jr., Director
Labor Market Information Division

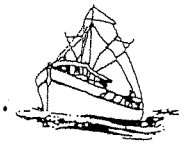
c: Toussaint Hayes, Regional Administrator, ETA

Exhibit I

2005 North Carolina Fisheries Association, Inc. Prevailing Wage Survey



North Carolina Fisheries Association, Inc.



Website:
www.ncfish.org

P.O. Box 12303
New Bern, N.C. 28561
Phone: (252) 633-2288
Fax: (252) 633-9616

Email:
ncfa@ncfish.org



January 17, 2005

Diane Smith
Manager of Applicant Services
N.C. Employment Security Commission
700 Wade Ave.
Raleigh, NC 27611

Dear Diane:

Enclosed please find the wage survey conducted by the North Carolina Fisheries Association on behalf of our state's crab processing facilities.

The survey was conducted during the weeks of January 3rd and 10th, 2005.

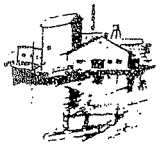
We had 15 responses of 16 contacted via mail, fax or phone.

In addition to the "Results of Survey" form, copies of all of the informational forms with information provided by the facilities is enclosed.

Thanks for your assistance.

Yours truly,

Jerry Schill
President



North Carolina Fisheries Association, Inc.



P.O. Box 12303
New Bern, N.C. 28561
Phone: (252) 633-2288
Fax: (252) 633-9616

Website:
www.ncfish.org

Email:
ncfa@ncfish.org

January 17, 2005

Results of Survey

of North Carolina crab processors conducted January 6 - 14, 2005
to determine entry-level prevailing wage for crab pickers

Summary of results

	A Number of respondents	B Number of employees	C Hourly rate of pay for entry-level worker	D Column B X Column C
	3	80	$5.15	$412.00
	11	848	$5.17	$4,384.16
	1	80	$5.25	$420.00
TOTALS	15	1008		$5,216.16

Column (D) divided by Column (B)
.= $ 5.17 per hour (Average wage)

Note: Individual survey sheets for each company are attached.

Supporting documentation

1. Respondents - Companies included in the survey are holders of appropriate North Carolina certification to purchase, process and sell crabs. These companies hire entry-level workers to pick the cooked crabs and package into containers for sale.

2. Job description - Under direct supervision, crab pickers remove the meat from cooked crabs and sort into catagories (backfin, claw, etc.) for packaging and sale. While a few of the companies surveyed retain crab pickers for the entire year, most workers are seasonal (approximately May through December).

3. How survey was conducted - Based on a list received from the NC Shellfish Sanitation Branch, attempts were made via phone/fax to contact all certified crab processors. Of the 17 listed, 1 is presently not picking crabs, 1 could not be reached and 15 responded to the survey. The survey represents 1,008 workers during peak season.

Approved by NC ESC Labor Certification Specialist

Employment Security Commission of North Carolina
P. O. Box 25903, Raleigh, NC 27611-5903 (919) 733-2936

Michael F. Easley
Governor

Harry E. Payne, Jr.
Chairman

February 3, 2005

Mr. Jerry Schill, President
North Carolina Fisheries Association, Inc.
P. O. Box 12303
New Bern, NC 28561

Dear Mr. Schill:

The prevailing wage rate of $5.17 per hour for the position of *entry-level crab picker*, determined as the result of a wage survey conducted by the North Carolina Fisheries Association from January 6 through January 14, 2005 (published January 17, 2005) of the universe of crabmeat processors in eastern North Carolina, has been accepted. The information provided adhered to the requirements in the standard criteria set forth in the US Department of Labor, Employment and Training Administration's (ETA) General Administration Letter No. 2-98 (dated October 31, 1997).

Criteria included the following:

- the survey was based upon data collected and published within the previous 24 months
- the wage reflects the rate of pay for the majority of workers employed in the *entry-level crab picker* occupation in the area of intended employment in eastern North Carolina
- the job description for the survey adequately matches the job description as contained in the employer's request for acceptance of the survey for prevailing wage rate purposes
- workers in this occupation are employed only in a single industry; therefore the wage data was collected within only one industry for the occupation that will be used exclusively by crab processing companies
- the survey represented all licensed establishments in this industry (17 establishment with 15 responding; one was not open at the time of the survey and one could not be reached)
- an arithmetical mean (weighted average) was determined from the survey wage data for all employees in this occupation for all participating employers
- the methodology used to determine the prevailing wage provided by the North Carolina Fisheries Association adhered to recognized statistical standards and principles.

Please note that acceptance of employer-provided wage data for this specific job opportunity does not supercede the OES wage rate for any subsequent request for prevailing wage data in that occupation.

If we can be of further assistance, please call the division's Foreign Labor Certification Specialist, King Howe, at (919) 733-2936.

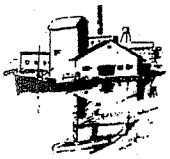
Sincerely,

Peter A. Neenan by ckh

Peter A. Neenan, Ph.D., Director
Labor Market Information Division

Exhibit J

2007 North Carolina Fisheries Association, Inc. Prevailing Wage Survey



North Carolina Fisheries Association, Inc.



P.O. Box 12303
New Bern, N.C. 28561
Phone: (252) 633-2288
Fax: (252) 633-9616

Website:
www.ncfish.org

Email:
ncfa@ncfish.org



Ms. Diane Smith
Employment Security Commission of North Carolina
700 Wade Avenue
Raleigh, NC 27605

October 22, 2007

Dear Ms. Smith,

Enclosed please find the results of the North Carolina Fisheries Association's (NCFA) recent survey regarding the prevailing wage in the crab processor industry.

We took the survey on Thursday and Friday of last week; October 18th and 19th.

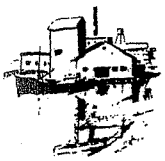
You will note the number of processors considerably smaller than in times past, for that reason our survey included 14 processors, some of which did not pick crabs last year and, therefore, did not respond to the survey. I contacted 9 processors, reaching seven and received 5 responses. These responses represent the bulk of the industry in North Carolina.

Also enclosed you will find a letter sent to Pamlico Packing showing a different prevailing wage after the letter was received from Manfred Emmrich from the ESC of NC.

Please call me if you have any questions or need additional information.

Thank you.

Sean McKeon
President



North Carolina Fisheries Association, Inc.



P.O. Box 12303
New Bern, N.C. 28561
Phone: (252) 633-2288
Fax: (252) 633-9616

Website:
www.ncfish.org

Email:
ncfa@ncfish.org

RECEIVED
NOV 2007
APPLICANT SERVICES

November 5th, 2007

Results of Survey

of North Carolina crab processors conducted October 19th – 23rd, 2007
to determine entry level prevailing wage for crab pickers

Summary of Results

A Number of Respondents	B Number of Employees	C Hourly rate/ entry level	D Column B x Column C
3	238	6.15	1463.70
3	125	6.17	771.00
Total 6	Total 363		Total 2234.70

Column D divided by Column B = 6.16 per hour (Average Wage)

Supporting Documentation:

1. **Respondents-** Companies included in the survey are holders of appropriate North Carolina certification to purchase, process and sell crabs. These companies hire entry-level workers to pick the cooked crabs and package into containers for sale.

2. **Job description-** Under direct supervision, crab pickers remove the meat from cooked crabs and sort into categories (backfin, claw, etc.) for packaging and sale. While a few companies surveyed retain crab pickers for the entire year, most workers are seasonal *approximately May through December*

3. **How survey was conducted-** Based on a list received from the NC Shellfish Sanitation Branch attempts were made via phone or fax to contact all certified crab processors. Of the 14 listed, 8 could not be reached and 6 responded to the survey. The survey represents 363 workers during peak season.

Approved by NC ESC Labor Certification Specialist

Employment Security Commission of North Carolina
Post Office Box 27625, Raleigh, North Carolina 27611

Michael F. Easley
Governor

Harry E. Payne, Jr.
Chairman

November 27, 2007

Mr. Sean McKeon, President
North Carolina Fisheries Association, Inc.
P.O. Box 12303
New Bern, North Carolina 28561

Re: North Carolina Fisheries Association Wage Survey

Dear Mr. McKeon:

We received the Employer-Provided Wage Survey Report from your company on November 7, 2007. This wage survey which was conducted from October 18 through October 23, 2007 has been reviewed and validated for the position of entry-level Crab Picker. The information provided adhered to the requirements in the standard criteria set forth in the US Department of Labor, Employment and Training Administration's Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (revised May 9, 2005). The approved salary amount is $6.16 per hour.

If you have any questions, please direct them to Louise Joyner at (919) 733-4896.

Sincerely,

Diane G. Smith

Diane G. Smith, Manager
Applicant Services Unit

Exhibit K

February 3, 2005 letter from Employment Security Commission of North Carolina to U.S. Department of Labor

Employment Security Commission of North Carolina
Post Office Box 27625, Raleigh, North Carolina 27611

Michael F. Easley
Governor

Harry E. Payne, Jr.
Chairman

February 3, 2005

Mr. Floyd Goodman, Certifying Officer
U.S. Department of Labor/E&T Administration
Harris Tower
233 Peachtree Street, Suite 410
Atlanta, Georgia 30303

Re: Prevailing wage survey from North Carolina Fisheries Association and
Letter of acceptance for Employment Security Commission of NC

Dear Mr. Goodman:

The North Carolina Fisheries Association disagreed with the prevailing wage for entry-level crab pickers as determined by OES and therefore conducted a wage survey. Copies of their surveys, the results, and a letter of acceptance from the Employment Security Commission of North Carolina are enclosed for your review. Our assessment indicates that the Labor Market Information Division reviewed and accepted the survey results according to the regulations however, since the Fisheries Association survey results are so much lower that OES ($5.17 vs. $7.21) and their survey results have remained relatively the same since 1998 we thought this warranted a review from your office.

Should you have any questions, please contact me or Virginia Terrell at (919) 733-4896.

Sincerely,

Diane Smith, Manager
Applicant Services

Enclosure

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Comité de Apoyo a los Trabajadores Agrícolas, Pineros y Campesinos Unidos del Noroeste, Alliance of Forest Workers and Harvesters, and Salvador Martinez Barrera,	:	
Plaintiffs	:	Civil No. 09-CV-240
v.	:	
Elaine L. Chao, in her official capacity as United States Secretary of Labor; United States Department of Labor; Alexander J. Passantino, in his official capacity as Acting Administrator of the Wage and Hour Division of the United States Department of Labor; Michael B. Chertoff, in his official capacity as United States Secretary of Homeland Security; and United States Department of Homeland Security,	:	
Defendants	:	

COMPLAINT

Plaintiffs Comité de Apoyo a los Trabajadores Agrícolas ("CATA"), Pineros y Campesinos Unidos del Noroeste ("PCUN"), Alliance of Forest Workers and Harvesters ("Alliance"), and Salvador Martinez Barrera for their Complaint against defendant Elaine L. Chao in her official capacity as United States Secretary of Labor, defendant United States Department of Labor, defendant Alexander J. Passantino in his official capacity as Acting Administrator of the Wage and Hour Division of the United States Department of Labor, defendant Michael B. Chertoff in his official capacity as United States Secretary of Homeland

Security, and defendant United States Department of Homeland Security hereby allege as follows:

INTRODUCTION

1. This proceeding relates to the regulation and administration of the H-2B temporary non-agricultural worker program. The H-2 temporary labor program was initially created by the Immigration and Nationality Act (INA) of 1952. Prior to the Immigration Reform and Control Act of 1986 (IRCA), there were no separate H-2B non-agricultural temporary worker provisions in the Immigration and Nationality Act. Rather, there was simply one temporary worker program, the H-2 program. IRCA divided that program into a temporary agricultural worker program, designated H-2A, and a temporary non-agricultural worker program, designated H-2B.

2. The Secretary of Labor is required by 8 U.S.C. §1101 (a) (15)(H)(ii)(b) to determine prior to an employer being permitted to bring temporary H-2B workers into the country that "...unemployed persons capable of performing ... service or labor cannot be found in this country."

3. The Secretary of Labor is required to establish effective procedures to determine and certify that: (1) there are not sufficient workers who are able, willing, qualified and available to perform labor for which foreign temporary non-agricultural H-2B workers are requested; and (2) that the employment of such foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. See, 8 U.S.C. §1182(a)(5)(A)(i), 8 U.S.C. §1184(c)(1), 8 CFR 214.2(h)(6), 20 CFR 655.0(a), and 73 Fed. Reg. 29942.

4. The Department of Labor (DOL) own Office of Inspector General's last annual report through March 31, 2008 noted that: "OIG investigations revealed that the foreign labor

certification process continues to be compromised by unscrupulous attorneys, labor brokers, employers, and others..." Other reports, investigations and Congressional testimony have documented increasing abuse of H-2B workers.

5. Despite explosive growth in employer demand for the H-2B program and documented abuse of H-2B workers, Secretary of Labor Chao has consistently failed to fulfill her duties to require employers seeking to employ H-2B workers to actively attempt to identify U.S. workers able willing and qualified to accept employment on terms that did not adversely affect the wages and working conditions of similarly employed workers.

6. Instead over the past years, in a series of regulatory actions particular since early in 2005 and culminating in Final Regulations taking effect on Sunday, January 18, 2009 (literally on the eve of the inauguration of a new President), the Secretary of Labor has arbitrarily, capriciously and contrary to law dismantled requirements and procedures previously established in order to lessen the adverse impact of a temporary guestworker program on the employment opportunities for U.S. workers and on the wages and working conditions of U.S. workers. The principal effect and intent of the January 2009 Final Regulations is, to a significant degree, to hamper the ability of a new Secretary of Labor to promulgate regulations and procedures which will effectively protect against adverse impact on employment, wages and working conditions of U.S. workers.

7. This case challenges the Secretary of Labor's promulgation of regulations and administrative procedures which violate the Secretary of Labor's legal duty to "determine and certify" that: (1) there are not sufficient workers who are able, willing, qualified and available to perform labor for which foreign temporary non-agricultural H-2B workers are requested; and (2)

that the employment of such foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8. This case challenges the Department of Labor's ("DOL") and the Secretary of Labor's procedures implemented in March 2005 without an opportunity for notice and comment which establish "prevailing" wage rates which are so low that they adversely affect the wages and working conditions of workers in the United States.

9. This case also challenges the Department of Labor's ("DOL") revised regulations of the H-2B non-agricultural guestworker program, which were promulgated on December 19, 2008, and go into effect on January 18, 2009. See, 73 Fed. Reg. 78020 – 78069 (December 19, 2008).

10. This case also challenges the related revised regulations promulgated by the Department of Homeland Security ("DHS") on December 19, 2008 and which will be effective January 18, 2009. Specifically, the new DHS regulations arbitrarily and contrary to law drastically change the long established definition of the "temporary" employment eligible for the H-2B temporary non-agricultural worker program, and thus significantly expand the scope of the H-2B program. See specifically, 8 CFR 214.2(h)(6)(ii)(B), as modified at 73 Fed. Reg. 78104 at 78120 (December 19, 2008).

11. Finally, this case challenges an arbitrary, capricious, and drastic change without any opportunity for prior notice or comment by Defendants DOL, the Acting Wage and Hour Administrator, DOL and the Secretary of Labor (the "DOL Defendants") to the long-established policy under the Fair Labor Standards Act (FLSA) at 29 U.S.C. Sec. 203(m) and related regulations announced as part of the December 19, 2008 rule making and as part of the discussion of separate rule making for the H-2A program on December 18, 2008. See, 73 Fed.

Reg. 78020 at 78039–78041, 78059 (December 19, 2008) and H-2B final rule at 20 CFR 655.22(g)(2). See also, 73 Fed. Reg. 77110 at 77148-77151 (December 18, 2008). The DOL Defendants arbitrarily and contrary to law used the opportunity of the publication in the Federal Register of the H-2B regulations and the H-2A regulations to reverse longstanding DOL policy under the FLSA relating to reductions in required minimum wages as a result of pre-employment expenses for the "convenience of the employer."

12. The DOL Defendants specifically stated disapproval of the application of the FLSA to pre-employment expenses incurred by workers traveling to accept employment with H-2B employers, as examined by this Court in a January 7, 2008 opinion by the Honorable Louis Pollak, in *Rivera v. Brickman Group, Ltd.*, United States District Court, Eastern District of Pennsylvania, Civil No. 05-1518. See, DOL Defendants citation to "*Rivera v. Brickman Group*, 208 WL 81570 (E.D. Pa. Jan. 7, 2008)" at 73 Fed. Reg. 78039. This Court in *Rivera v. Brickman Group* ruled that such pre-employment transportation costs (and other pre-employment expenses for the "convenience of the employer") were required to be repaid at the time of payment of the first week of wages by H-2B employers to the extent that such costs reduced wages below the minimum wage.

13. Unlike the H-2A program, neither DOL nor DHS has promulgated regulations relating to repayment of pre-employment transportation costs to workers employed through H-2B employers. In enunciating the new policy related to pre-employment transportation costs, the Secretary of Labor and DOL arbitrarily, capriciously, and in violation of law failed to appropriately determine if the application of this policy to H-2B employers would have an adverse impact on the wages and working conditions of U.S. workers, which was the appropriate purpose of the H-2B rulemaking proceeding for which DOL published final rules on December

19, 2008. The DOL Defendants' policy will have immediate adverse impact on the Plaintiffs and their members. This policy further has an adverse impact generally on the wages of U.S. workers prepared to travel from places of permanent residence to accept temporary employment with H-2B employers.

JURISDICTION AND VENUE

14. This Court has jurisdiction pursuant to 28 U.S.C. §1331 over this suit for review of final agency action under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1946), and 28 U.S.C. §2201 (declaratory relief).

15. This Court has venue pursuant to 28 U.S.C. §1391(e).

PARTIES

PLAINTIFFS

16. Plaintiff Comité de Apoyo a los Trabajadores Agrícolas ("CATA"), known in English as the "Farmworkers Support Committee," is a membership organization open to farmworkers, members of the immigrant worker community, and their supporters. Members live and work primarily in southeastern Pennsylvania, southern New Jersey, and eastern Maryland. Members include U.S. landscaping workers and construction workers, and in the recent past have also included H-2B workers in those industries. Through its work, CATA strives to improve the working and living conditions of its members and member communities. The challenged changes to the H-2B program would adversely affect CATA members' wages, their working conditions, and their ability to obtain and retain jobs. CATA seeks to protect its members' interests by challenging these regulations. CATA has members, an office and staff in the Eastern District of Pennsylvania.

17. Plaintiff Pineros y Campesinos Unidos del Noroeste ("PCUN") is a union of farmworkers, nursery, agricultural food processing and reforestation workers in Oregon. PCUN has more than 5,000 registered members. PCUN's mission is to empower its membership to recognize and take action against worker exploitation. Reforestation workers are subject to regulation under the H-2B program and the regulation under that program affect PCUN's members' wages, their working conditions, and their ability to obtain and retain jobs. PCUN seeks to protect its members' interests by challenging these regulations.

18. The Alliance of Forest Workers and Harvesters (the "Alliance") is a multicultural membership organization promoting social, environmental, and economic justice for forest workers in the Pacific Northwest. Its membership consists of both U.S. workers and H-2B workers who labor in the forests. The Alliance's mission is to advocate for and improve the lives of forest workers. Forestry workers may be subject to the H-2B regulations and the regulations under that program affect the Alliance's members' wages, their working conditions, and their ability to obtain and retain jobs. The Alliance seeks to protect its members' interests by challenging these regulations.

19. Plaintiff Salvador Martinez Barrera is a citizen of the Republic of Mexico with his permanent residence in Acambaro, Guanajuato, Mexico. He has been employed as an H-2B worker in the Eastern District of Pennsylvania in each of the years 2003, 2004, 2005, 2006, and 2007. He was employed as an H-2B worker outside of Pennsylvania in 2008. He is seeking re-employment as an H-2B worker for 2009. In July 2008 Plaintiff Martinez Barrera was certified as one of the class representatives for a F.R.C.P. Rule 23(b)(3) settlement class in *Rivera, et al. v. The Brickman Group, Ltd. et al.*, United States District Court, Eastern District of Pennsylvania, Civil No. 05-1518. That class action settled claims for a nation wide class of approximately

2,500 persons employed through an H-2B employer that had failed to comply with requirements of the Fair Labor Standards Act to repay pre-employment costs that took wages below minimum wage. Plaintiff Barrera is directly affected by the regulations governing the employment of H-2B workers.

DEFENDANTS

20. Defendant Chao is the United States Secretary of Labor. The Secretary is responsible for all functions of DOL, including administration of the H-2B program. Secretary Chao is sued in her official capacity, pursuant to 5 U.S.C. §703.

21. Defendant Passantino is the Acting Administrator of the Wage and Hour Division of the United States Department of Labor. The Acting Wage and Hour Administrator is sued in his official capacity, pursuant to 5 U.S.C. §703.

22. Defendant Chertoff is the United States Secretary of Homeland Security. The Secretary is responsible for all functions of DHS and its component organizations, including the issuance of visas for H-2B workers. Secretary Chertoff is sued in his official capacity, pursuant to 5 U.S.C. §703.

23. Defendant United States Department of Labor is responsible for administration of the H-2B program.

24. Defendant United States Department of Homeland Security is responsible for the issuance of visas for H-2B workers.

ALLEGATIONS

THE DOL DEFENDANTS' NEW FLSA POLICY IS CONTRARY TO LAW AND WAS ISSUED CONTARY TO THE ADMINISTRATIVE PROCEDURE ACT

25. Plaintiffs repeat and reallege ¶¶1-24 above.

26. The minimum wage provisions of the FLSA forbid employers from making certain deductions from workers' wages that would bring those wages below the minimum hourly wage mandated by the FLSA. 29 U.S.C. 203(m). In the preamble to the December 18, 2008 Federal Register promulgation of the H-2B regulations, DOL acknowledges that under the FLSA, "employment expenses incurred by the workers that are primarily for the employer's benefit cannot be counted as wages under 29 U.S.C. §203(m). 73 Fed. Reg. 78040. In the preamble, DOL further states that:

> " [u]nder the FLSA, pre-employment expenses incurred by workers that are properly business expenses of the employer and primarily for the benefit of the employer are considered ``kick-backs'' of wages to the employer and are treated as deductions from the employees' wages during the first workweek. 29 CFR 531.35. Such deductions must be reimbursed by the employer during the first workweek to the extent that they effectively result in workers' weekly wages being below the minimum wage.

29 CFR 531.36." 73 Fed. Reg. 78039.

27. The DOL language as stated above is consistent with the long-standing policy of the Department of Labor and a substantial long body of case law regarding pre-employment expenses. See: *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002), (holding that growers violated the minimum wage provisions of the FLSA by failing to reimburse farmworkers during their first workweek for travel expenses and visa and immigration fees paid by the workers employed by the growers under the H-2A program.); *Rivera v. Brickman Group*, 2008 WL 81570 (E.D. Pa. Jan. 7, 2008); *De Leon-Granados v. Eller & Sons Trees Inc.*, 2008 WL 4531813 (N.D. Ga., Oct. 7, 2008); *Rosales v. Hispanic Employee Leasing Program*, 2008 WL 363479 (W.D. Mich. Feb. 11, 2008); *Castellanos-Contreras v. Decatur Hotels, LLC*, 488 F. Supp. 2d 565 (E.D. La. 2007); *Recinos-Recinos v. Express Forestry Inc.*, 2006 WL 197030 (E.D. La. Jan. 24, 2006).

28. However, the preamble to the Final Rule actively seeks to undermine the minimum wage requirement by overriding the application of the FLSA wage provision to H-2B workers. The preamble to the Final Rule sets forth a final "interpretation" of 29 U.S.C. 203(m) and the regulations promulgated thereunder that conflicts with both the FLSA and the DOL's regulations implementing the law.

29. The preamble provides that the Department believes that 'the costs of relocation to the site of the job opportunity generally is not an ``incident'' of an H-2B worker's employment within the meaning of 29 CFR 531.32, and is not primarily for the benefit of the H-2B employer. The Department states this as a definitive interpretation of its own regulations and expects that courts will defer to that interpretation.' 73 Fed. Reg. 78041

30. The DOL's new policy as enunciated in the preamble to the Final Rule is contrary to law and is arbitrary and capricious because it conflicts both with (1) the FLSA and DOL's own regulations implementing the FLSA and (2) with the statutory requirement that DOL regulate the H-2B program to ensure that the wages and working conditions of similarly employed U.S. workers are not adversely affected.

31. The DOL's statement in the preamble is also arbitrary and capricious because it was a legislative rule which was a substantial change to and repudiation of a longstanding rule and policy, and it was issued without notice or comment. The DOL failed to include notice that this issue would be addressed in its proposed regulation. The commentators submitting comments generally did not address this issue at all because they were not on notice that the DOL was considering a modification of its longstanding policy. However, in the preamble to the Final Rule, DOL issued a lengthy discussion of this issue, proposing a substantial change in its

own policy and deviating from the judgment of a substantial body of federal law without providing any opportunity for notice and comment.

DOL'S FINAL RULEMAKING IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW

32. The H-2B program is designed to allow employers to bring foreign workers into the United States on temporary work visas when the DOL certifies that the employer will experience a labor shortage, that United States workers will not be displaced, and that the job terms offered will not negatively affect the wages and working conditions of U.S. workers.

33. After the creation of the H-2B program through the IRCA in 1986, the Secretary of Labor carried forward previously existing limited general regulations of prior H-2 workers in 20 CFR Part 655, Subpart A. See, 20 CFR 655.2 and 655.3. Similarly, prior regulations for forestry H-2 workers were carried forward in 20 CFR Part 655, Subpart C.

34. The Secretary of Labor has engaged in no further significant rulemaking following notice and comment for the H-2B program after creation of the H-2B program in 1986 until the published DOL regulations for H-2B workers with an effective date of January 18, 2009.

35. Since 1986, the Department of Labor has failed to promulgate substantive regulations beyond the minimal general provisions under the previous H-2 program for non-agricultural workers in order to protect U.S. workers and the H-2B temporary workers, ("guestworkers") despite a huge growth in that program in recent years. See, 20 CFR Part 655, Subpart A (December 2008).

36. At the time of the creation of the separate H-2B program and throughout the first ten years of the program, demand for the program was relatively low. The H-2B program was capped by statute at 66,000 persons (INA §214(g)(1)(B)) and was very small in the 1980's and

early 1990's. Between 1992 and 1996 there were only approximately 12,000 H-2B workers a year. However, beginning in the late 1990's the program exploded. See, Andorra Bruno, Congressional Research Service, Immigration: Policy Considerations Related to Guest Worker Programs, January 26, 2006, Order Code RL32044, at CRS-5. The CRS report notes:

> "... the number of H-2B visas issued by DOS [Department of State] dipped from 12,552 in FY1992 to 9,691 in FY1993 and then began to increase steadily."

See, ETA-2008-0002-0022.

37. The comparative scope of recent employer demand for H-2B workers in recent years is demonstrated by a historical review of DOL disclosure data for the period FY02 through FY07 which reveals the following.

	FY02 Certified	FY03 Certified	FY04 Certified	FY05 Certified	FY06 Certified	FY07 Certified	Increase 02 -07	Increase 04 -07
Number Workers	121,665	144,333	168,471	134,837	199,732	254,583	132,918	86,112

See, ETA-2008-0002-0022.

38. As the H-2B temporary worker program has grown in recent years, guestworkers have been subjected to increasingly well-documented abuses by their employers. The failure to prevent these abuses adversely affects the wages and working conditions of U.S. workers.

39. The policies established by DOL for the administration of the H-2B program over the past six years have, contrary to law, had an increasingly adverse impact on the wages and working conditions of U.S., and have interfered with employment opportunities for U.S. workers.

40. Virtually all internal procedures for administration of the H-2B system have been set forth by DOL without opportunity for public notice and comment through Employment and Training Administration "General Administration Letters" ("GAL"), "Field Memorandum", "Employment Service Program Letters," and "Training and Administration Guidance Letters

("TEGL") including: General Administration Letter No. 01-95 "Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations" (November 10, 1994) which superseded GAL's predating the establishment of the separate H-2B program; General Administration Letter No. 2-98 "Prevailing Wage Policy for Nonagricultural Immigration Programs" (October 31, 1997); Field Memorandum No. 25-98, "H-2B Temporary Non-Agricultural Labor Certification Program Requirements" (April 27, 1998).

41. Beginning in 2005, the Secretary of Labor and DOL sought to escape and evade their legal responsibility to protect the wages, working conditions, and employment opportunities for U.S. workers where employers sought to employ H-2B workers by changing the methodology for calculating the wages to be paid to those workers. .

March 2005 Changes in Determination of Wage Rates for H-2B Employment

42. By policies adopted without notice and comment, effective March 2005, Defendants Chao and DOL arbitrarily and capriciously and without providing an opportunity for public notice and comment changed the established procedures for determining wages required to be paid by employer's seeking H-2B workers in a manner that has had, and continues to have, a severe adverse impact on the wages and working conditions of U.S. workers, in violation of the requirements of law and the Secretary of Labor's duties in relationship to the H-2B program.

43. In policy guidances with an effective date of March, 2005, the Defendant DOL changed the methodology for calculating the required prevailing wage rate. This policy guidance superseded prior procedures for determining "prevailing" wage rates and was applied to H-2B workers. See Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised May 9, 2005, available at: http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

44. These changes in methodology resulted in the drastic and continuing reduction in wages required to be paid to H-2B workers in many industries.

45. Among other things, that policy removed the requirement that Davis Bacon Act and/or McNamara-O'Hara Service Contract Act prevailing wage requirements should be applied when possible. Those wage rates were consistently higher than those under the new methodology adopted by DOL and the Secretary of Labor. DOL and the Secretary arbitrarily, capriciously and contrary to law failed to consider the adverse impact on wages of U.S. workers in jobs for which employers sought to utilize H-2B workers.

46. Since March 2005 the "prevailing wage" has been calculated using wage data calculated at local levels using an Occupational Employment Statistics (OES) survey performed by the DOL's Bureau of Labor Statistics (BLS) and the four "skill levels" artificially created by DOL rather than average or median "prevailing" wages. Under the formula used to calculate the skill levels, Level I is the average wage paid to the lowest one-third of workers in an occupation in a local area, or the 16.5th percentile. Level IV is the average wage paid to the remaining two-thirds, or the 66.66th percentile. Levels II and III are derived from the Level I and IV wages. The formula takes the difference between the Level IV wage and the Level I wage and divides that number by three. The Level II wage is determined by taking this result and adding it to the Level I wage. The Level III wage is determined by taking this result and subtracting it from the IV wage. Thus, in this formula, the Level III wage is also equal to the average wage. As a result, Level III and IV wage rates will be the only wages at or above the average wage in a local area. The Level I wage has been the most common wage level offered by H-2B employers and thus H-2B employers have been permitted to pay wage rates lower than those currently received by 84% of workers in the job classification.

47. The result of the prevailing wage determination policy implemented for H-2B applications submitted for federal FY06 and thereafter has been that the approved "prevailing wage" for an employer seeking H-2B workers is usually far lower than the average hourly wage paid in the locality for that kind of work. See, Ross Eisenbrey Exhibits E, F, and G annexed to comment ETA-2008-0002-0088 (submitted July 7, 2008).

48. This problem is exemplified by the landscaping industry. In 2007, landscape laborer was the job category most often certified for H-2B employment. Despite this, the prevailing wage for 47 of 49 companies employing H-2B landscape laborers in two counties in New York was more than four dollars less per hour than the average hourly rate for landscaping workers in those counties. See Ross Eisenbrey, H-2B and the U.S. Labor Market, Economic Policy Institute (June 24, 2008, attached as Exhibit F to ETA-2008-0002-0088).

49. In an unpublished analysis of prevailing wage rates for 98 occupations in nine states and 27 different cities of employment, chosen randomly, all but three determinations set the prevailing wage rate below both the median hourly wage and the mean hourly wage prevailing in the area, sometimes by as much as 50%. See Exhibit G attached to ETA-2008-0002-0088, Ross Eisenbrey Unpublished Research Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage.

50. This policy change was arbitrary and capricious and contrary to law in that it was inconsistent with the requirements of 8 U.S.C. §1182, which requires that "[a]ny alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that . . .there are not sufficient workers who are able willing, qualified. . . and available at the time of application for a visa and admission to the United States and at the place

where the alien is to perform such skilled or unskilled labor, and . . .the employment of such alien will not adversely affect the wages and working conditions in the United States similarly employed." 8 U.S.C. §1182(5)(A).

51. The policy change is also inconsistent with the regulations (initially of the Department of Justice and subsequently of the Department of Homeland Security) which impose upon employers the obligation to prove that H-2B workers are not displacing U.S. workers and that H-2B workers are not "adversely affecting the wages and working conditions of United States workers." 8 CFR 214.2(h)(6). Those regulations at 8 CFR 214.2(h)(6) require the Secretary of Labor to issue a certification "...stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers." 8 CFR 214.2(h)(6)(iv)(A)(1).

52. The policy change is also in conflict with the long established requirements of 20 CFR 655.0(a), which mandate:

> (1) . . . procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (i) Whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (ii) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required to carry out the policies of the Immigration and Nationality Act (INA), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.
>
> (2) The Secretary's determinations. Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S.

workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Usery, 531 F. 2d 299 (5th Cir. 1976).*

53. The March 2005 policy change has resulted in devastating wage reductions for H-2B workers in a manner contrary to law. In addition, contrary to law, U.S. workers in industries employing H-2B workers have been adversely affected by these wage reductions.

DOL 2008 Regulatory Action

54. DOL issued a Notice of Proposed Rulemaking ("NPRM"), publishing proposed rules on the Labor Certification Process and Enforcement for Temporary Employment in Occupations Other than Agriculture or Registered Nursing in the United States (H-2B Workers) and Other Technical Changes on May 22, 2008, with a Notice and Comment period ending July 7, 2008.

55. The record before the agency of comments and actions related to that proposed rulemaking has been posted under ETA-2008-0002 Docket at:

http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=ETA-2008-0002.

56. On June 4, 2008, the Honorable George Miller, Chair of the U.S. House Education and Labor Committee, submitted a request for more information and a request for an extension of the forty-five day Notice and Comment period. See: ETA-2008-0002-0014.

57. On June 17, 2008, the Southern Poverty Law Center requested that DOL extend its Notice and Comment period forty-five additional days. See: ETA-2008-0002-0036.

58. On June 24, 2008, the Brennan Center for Public Justice requested that DOL extend its Notice and Comment period forty-five additional days. See: ETA-2008-0002-0086.

59. On June 30, 2008, Friends of Farmworkers, Inc. requested that DOL extend its Notice and Comment period for an additional forty-five days. See: ETA-2008-0002-0087.

60. On July 2, 2008, Change to Win, a partnership of seven unions with six million members, requested that DOL extend its Notice and Comment period for an additional forty-five days. See: ETA-2008-0002-0023.

61. DOL abused its discretion and acted arbitrarily when it denied these requests for an extension of the public comment period. See: ETA-2008-0002-0092.

62. One hundred thirty-four (134) individuals and organizations submitted comments, of which "88 were unique and another 46 were duplicate form comments." 73 Fed. Reg. at 78023.

63. On December 18, 2008, DOL issued its final rule. 73 Fed. Reg. 78019-78069. The regulations go into effect on January 18, 2009.

64. The December 18, 2008 actions by DOL in promulgating its final rules are arbitrary and capricious and contrary to DOL's statutory obligations to protect workers. They further run contrary to the evidence before DOL in the administrative record, and are not explained and justified. In some cases, new policies were adopted without notice and comment.

65. These regulations will cause devastating harm to U.S. workers and to H-2B guestworkers by causing an adverse effect on U.S. workers' wages and working conditions and by eliminating labor protections.

Wages

66. Federal law requires the Secretary of Labor to establish effective procedures to "determine and certify" that the employment of H-2B workers foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.

67. The Secretary of Labor's changes in policies for determination of H-2B prevailing wages beginning in March 2005 had a particularly devastating impact on the wages and working

conditions of U.S. workers beginning with applications for federal FY06 and FY07 because the H-2B program was temporarily expanded beginning in May 2005 through the creation of a "returning worker" exemption to the general statutory cap on the number of H-2B workers permitted to enter the country annually.

68. As the H-2B program has expanded its role in certain industries such as landscaping and into an increasing breadth of job classifications, the adverse impact of the DOL's establishment of lower required wage rates for H-2B employment has had an adverse economic impact on the wages and working conditions of U.S. workers, in violation of the Secretary of Labor's duties under the H-2B program.

69. Although the 2008 DOL NPRM offered the public its first opportunity to comment on the procedures to be utilized by DOL for determination of "prevailing wages," DOL and the Secretary of Labor arbitrarily and contrary to law continued in the final rule to use procedures for determination of "prevailing wages" which have a severe adverse impact on the wages of U.S. workers.

70. Despite the continuing failure of the Secretary of Labor to promulgate regulations for the H-2B program to establish a system for determining wage rates which will not adversely affect the wages and working conditions of U.S. workers, DOL arbitrarily and contrary to law rejected without good cause comments in response to its May 2008 NPRM addressing the failure of the existing prevailing wage rate policies to meet the statutory duties of the Secretary of Labor. See, for example, ETA-2008-0002-0022 at pp. 9-11 and Attachments E and F; ETA-2008-0002-0088 at pp. 31-337 and annexed Ross Eisenbrey Exhibits E, F, and G annexed to comment ETA-2008-0002-0088.

71. In its preamble to the December 19, 2008 promulgation of H-2B rules DOL acknowledged:

> Some commenters raised concerns about the integrity of the data currently being used for prevailing wage determinations and recommended changes to the OES survey itself. Others commented on different aspects of the methodology and procedures. One commenter suggested that the Department set the minimum wage rate for H-2B workers at or above the wage (presumably the adverse effect wage rate) for H-2A workers in that State. Another commenter suggested the Department require employers in the construction industry to use, first, the Davis-Bacon Act (DBA) survey wage rate; second, if no DBA wage existed, the collective bargaining agreement rate; and as a last resort, the OES rate, if neither of the other rates was available. Another commenter suggested that the provision regarding when an employer may utilize a wage determination under the Davis-Bacon Act also cover when an employer can choose not to utilize that wage rate. One commenter believed that the proposal did not correct what they claimed was a problem with the Department's Bureau of Labor Statistics (BLS) wage rates being 2 years out of date and also expressed concerns that piece rate policies have led to depressed wages and suggested that the Department should require advance written disclosure of piece rates on the job orders.
>
> The Department appreciates these suggestions and concerns. However, the Department did not propose changes to the sources of data to be used for prevailing wage determinations and, therefore, these comments are beyond the scope of the current rulemaking. The Department notes that the proposed procedures that were retained in the Final Rule already cover the use of wages specified in a collective bargaining agreement. Similarly, these procedures provide that an employer may use the Davis-Bacon wage and that such use is at the employer's option unless the employer is a Federal construction contractor. There is a similar provision that applies to Service Contract Act wage rates.
>
> Some commenters suggested that employers should not be allowed to submit their own wage surveys. The Department, however, believes that employers should continue to have the flexibility to submit pertinent wage information and therefore, the Final Rule continues the Department's policy of permitting employers to provide an independent wage survey under certain guidelines. It also continues to provide for an appeal process in the event of a dispute over the applicable prevailing wage.

73 Fed. Reg. at 78031.

72. In the face of the overwhelming evidence that the March 2005 changes to the DOL prevailing wage rate system for H-2B workers had failed to meet the statutory duty of the Secretary of Labor to prevent adverse impact on wages and working conditions of U.S. workers,

the arbitrary refusal of DOL to reconsider its system for determination of prevailing wages was arbitrary and capricious and contrary to law.

73. The record before DOL reflected evidence of considerable reasons to be concerned about existing policies of accepting employer wage surveys to reduce the already low prevailing wage rates established by DOL for most H-2B workers. DOL arbitrarily and capriciously and without justification permitted employer surveys to be used for determining required prevailing wage rates without establishing procedures to safeguard against an adverse impact on the wages of U.S. workers.

Elimination of Role of State Workforce Agencies

74. During 2005, DOL and the Secretary of Labor, by administrative orders issued without an opportunity for public comment, dismantled the established structure for ETA Regional offices to review H-2B applications for their regions in consultation with the State Workforce Agencies (SWAs) within their region. The interaction of Regional Staff with local SWA staff over a period of years had created a shared level of expertise in reviewing employer applications for H-2B workers.

75. Comments submitted to DOL during the 2008 NPRM noted the effectiveness of the Philadelphia Regional Office in reviewing the wage and working conditions terms of applications for H-2B workers with that Region. ETA-2008-0002-0022 at p. 8. Those offices in conjunction with the SWAs also were able to evaluate what local publications might most effectively disseminate information about job opportunities, including whether Spanish language media should be required to be utilized for certain jobs. By mid-2005, those offices and their local expertise had been eliminated. The 2005 decision by the Secretary of Labor to eliminate those Regional offices role in the H-2B was arbitrary and capricious.

76. Under the existing regulations, SWAs are responsible for processing employer's application and job offer, which includes ensuring that the offered wage equals or exceeds the prevailing wage, that the applicant's need falls into one of the four categories for temporary need, supervising U.S. worker recruitment, and forwarding the completed applications to ETA for a final determination. In the new rule, DOL has eliminated the role of SWAs in accepting and reviewing H-2B labor certification applications. 73 Fed. Reg. 78034.

77. Data in the record before DOL established that the level of SWA activity in relationship to the H-2B program. See, ETA-2008-0002-0022, Attachment D. For example, the date for the Pennsylvania SWA reflected the following for federal FY07:

WORK AREA	Total Wrks Requested	Total Workers Denied	% Workers Denied	FY07 Workers Certified	Number H-2b Cases	Nmbr Cases Certified	% Cases Certified	Cases Denied	Cases Partial Certified	Cases Remand to SWA
PENNSYLVANIA	10,210	1,337	13.1%	8,873	650	549	84.5%	75	18	8

Other SWAs that processed applications for more than 10,000 H-2B workers during FY07 included the following:

WORK AREA	Total Wrks Requested	Total Workers Denied	% Workers Denied	FY07 Workers Certified	Number H-2b Cases	Nmbr Cases Certified	% Cases Certified	Cases Denied	Cases Partial Certified	Cases Remand to SWA
TEXAS	53,831	18,744	34.8%	35,087	1,598	1,103	69.0%	437	57	1
LOUISIANA	39,372	21,046	53.5%	18,326	673	380	56.5%	261	30	2
FLORIDA	31,893	8,307	26.0%	23,586	1,333	953	71.5%	323	49	8
COLORADO	19,584	3,951	20.2%	15,633	803	608	75.7%	173	20	2
ALABAMA	12,399	6,563	52.9%	5,836	152	60	39.5%	78	14	
MARYLAND	12,339	2,717	22.0%	9,622	429	293	68.3%	115	19	2
MISSISSIPPI	12,225	3,432	28.1%	8,793	143	83	58.0%	40	20	
VIRGINIA	11,889	1,789	15.0%	10,100	514	367	71.4%	112	34	1
MISSOURI	10,308	2,034	19.7%	8,274	336	265	78.9%	48	23	
ARKANSAS	10,116	2,669	26.4%	7,447	114	66	57.9%	26	18	4

See: ETA-2008-0002-0022, Attachment D.

78. The record before DOL reflects that numerous SWAs and other respondents to the NPRM submitted statements to DOL in opposition to the elimination of the role of the SWAs in reviewing H-2B applications submitted by employers. A preliminary review of the record before DOL in the NPRM indicates comments in opposition to the elimination of the role of SWAs as proposed by DOL were submitted by the following commentators:

Document ID	Commenter
ETA-2008-0002-0009	private citizen - BADGER, KEITH
ETA-2008-0002-0014	Committee on Education and Labor - Miller, George Chair
ETA-2008-0002-0018	Law Office of Michelle Skole retired from NJ Alien Certification - Skole, Michelle
ETA-2008-0002-0019	State of Oregon Employment Department - Johnson, Andrew
ETA-2008-0002-0024	Mount Washington Resort - Gruenfelder, Claire
ETA-2008-0002-0028	Ohio Vicinity Regional Council of Carpenters - Galea, Mark
ETA-2008-0002-0029	Arizona Department of Economic Security - Ufford, C.
ETA-2008-0002-0030	Outdoor Amusement Business Association - Johnson, Robert
ETA-2008-0002-0035	Virginia Employment Commission - Esser, Dolores
ETA-2008-0002-0037	Federation of Employers and Workers of America (FEWA) - Evans, Scott
ETA-2008-0002-0038	Vermont Department of Labor - Seckler, Cynthia
ETA-2008-0002-0039	PA Department of Labor and Industry - Mead, Andrea
ETA-2008-0002-0041	President/Save Small Business - Lavery, Hank (representative form letter, 41)
ETA-2008-0002-0045	American Federation of State, County & Municipal Employees, (AFSCME) - Korpi, Kerry
ETA-2008-0002-0046	Maine Department of Labor - Fortman, Laura A.
ETA-2008-0002-0047	Sharp's Landscaping, Inc. - Sanborn, Tina
ETA-2008-0002-0048	American Hotel & Lodging Association - McBurney, Shawn
ETA-2008-0002-0049	Emory University - Eiesland, Terry
ETA-2008-0002-0050	H-2B Workforce Coalition - McBurney, Shawn
ETA-2008-0002-0052	International Union of Bricklayers & Allied Craftworkers - Flynn, John
ETA-2008-0002-0053	University of Wisconsin-Madison - Ahlstedt, Deborah
ETA-2008-0002-0055	Building and Construction Trades Department, AFL-CIO - Ayers, Mark
ETA-2008-0002-0058	Massachusetts Executive Office of Labor and Workforce Development - James, Jennifer
ETA-2008-0002-0062	Olathe Corn Company, LLC - Fishering, Nancy
ETA-2008-0002-0063	Maryland Department of Labor, Licensing and Regulation - Perez, Thomas
ETA-2008-0002-0067	U.S. Senate - Kennedy, Sen. Edward M.
ETA-2008-0002-0068	private individual - Lang, Erik
ETA-2008-0002-0069	California State Government Agency - Marquez, Jose Luis
ETA-2008-0002-0073	Alliance of Forest Workers and Harvesters - Smith, Denise
ETA-2008-0002-0075	National Employment Law Project - Smith, Rebecca
ETA-2008-0002-0076	Oversight and Government Reform - Domestic Policy, Subcommittee
ETA-2008-0002-0077	Beaver Run Resort and Conference Center - Brennan, Stephanie
ETA-2008-0002-0078	State of Nevada, Department of Employment training and Rehabilitation - Jones, Cynthia
ETA-2008-0002-0083	The Law Office of Robert Kershaw, P.C. - Kershaw, Robert

Document ID	Commenter
ETA-2008-0002-0084	Amigos Labor Solutions - Wingfield, Bob
ETA-2008-0002-0088	Low Wage Worker Legal Network and Other Co-Signers
ETA-2008-0002-0090	Texas Workforce Commission
ETA-2008-0002-0091	Laborers' International Union of North America

79. DOL's final rule arbitrarily assumes that the only function which SWAs perform apart from referral of workers in response to local job orders is the ministerial calculation of required prevailing wage rates. The record before DOL reflected that SWAs have a broader role in the review of applications of applications submitted by prospective H-2B employers. In the absence of effective DOL Regional office review of terms and conditions of employment apart from the calculation of wage rates, the SWAs have been forced to assume that role by default.

80. DOL's justification for eliminating SWAs from the H-2B application process is arbitrary, capricious, and contrary to law in that it elevates its "commit[ment] to modernizing the application process" over the statutory mandate that it protect the wages *and working conditions* of U.S. workers. 73 Fed. Reg. 78034.

81. DOL relied on past complaints that it has allegedly received from employers that the existing system is "complicated, time-consuming, inefficient, and dependent upon the expenditures of considerable resources by employers," 73 Fed. Reg. 78022, and arbitrarily ignored arguments by the commenters that eliminating the SWAs from the application and certification process "would result in the loss of local labor market and prevailing practice expertise in the review process. . . would increase the potential for fraud," and that "the knowledge and expertise of local staff in reviewing and processing applications was essential to the integrity of the H-2B certification process." 73 Fed. Reg. 78034. See also: ETA-2008-0002-0022 at pp 1-5 and Attachments A and B thereto (as to the scope of denial of H-2B employer applications); ETA-2008-0002-0088 at pp. 16-21.

82. DOL asserts that the elimination of SWAs is necessary because, "[t]he increasing workload of the Department and SWAs poses a growing challenge to the efficient and timely processing of applications," 73 Fed. Reg. 78022, but they provide no authority for this assertion. To the contrary, many of the SWAs that commented expressed their desire to continue processing and reviewing H-2B applications. See, e.g., ETA-2008-0002-0039 (Pennsylvania), ETA-0002-0040 (North Carolina), ETA-002-0063 (Maryland), ETA-0002-0078 (Nevada), ETA-0002-0090 (Texas), ETA-2008-0002-0019 (Oregon), ETA-2008-0002-0025 (Washington), ETA-2008-0002-0029 (Arizona), ETA-2008-0002-0038 (Vermont), and ETA-2008-0002-0046 (Maine). DOL's assumption that this change will help SWAs, despite the fact that all of the SWAs that commented on this issue were opposed to the change, is arbitrary and capricious.

Definition of Full-time

83. Under the prior regulations, employers have a dual obligation to prove that H-2B workers are not displacing U.S. workers and that H-2B workers are not "adversely affecting the wages and working conditions of United States workers." 8 CFR 214.2(h)(6). The Secretary of Labor must certify that these two requirements have been met. 8 CFR 214.2(h)(6)(iv)(1).

84. Since at least 1994, DOL has directed State Workforce Agencies not to accept, and DOL would not certify, Clearance Orders that do not provide for full-time employment. See General Administration Letter I-95 (November 10, 1994); Training and Employment Guidance Letter 21-06 (April 4, 2007); Training and Employment Guidance Letter 21-06, Change 1 (June 25, 2007).

85. In the preamble of its Notice of Proposed Rulemaking, DOL acknowledged that it has "always required that the positions offered be . . . *full-time* in nature." 73 Fed. Reg. at 29951 (emphasis added).

86. The definition of full-time which was published for Notice and Comment was "35 or more hours per week, except where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 35 hours per week, that definition shall have precedence." Proposed 20 CFR 655.4. The proposed rule also specifically required that an employer establish a need for full-time employees, as part of the showing of temporary need. Proposed 20 CFR 655.6(a).

87. As the commentators on the proposed rule made clear, this proposal, which effectively shortened the length of time that DOL would consider full-time, would have adversely affected U.S. workers by making it substantially less likely that U.S. workers, who need full time employment, could compete for the jobs. At the same time, the proposal would allow employers access to foreign workers to fill less-than-full-time-jobs because the lower costs and standards of living in foreign countries make it easier for foreign workers to accept part-time jobs. See Comments of Low Wage Worker Legal Network, ETA-2008-0002-0088 (p. 27); former National Monitor Advocate Erik Lang, ETA-2008-0002-0068; Alliance of Forest Workers and Harvesters, ETA-2008-0002-0073; National Employment Law Project, ETA-2008-0002-0075 .

88. The Final Rule changes the proposed definition of full-time employment from 35 or more hours per week (with exceptions) to 30 hours or more per week (with exceptions). 20 CFR 655.22(h); 655.4. It no longer includes a requirement that an employer establish a need for full-time employees as part of the showing of temporary need. 20 CFR 655.6.

89. In the preamble to the Final Rule, DOL states that the definition of full-time "should not be construed to establish an actual obligation of the number of hours that must be guaranteed each week" and that "the parameters set forth in the definition of 'full-time' . . . are not a requirement that an employer offer a certain number of hours ..." 73 Fed. Reg. at 78024.

90. This new definition of full-time, coupled with the disclaimer that the employer does not even need to guarantee the 30 hour minimum, is a major, and wholly unexplained, change from the proposed rule and from the existing regulations

91. DOL has provided no empirical data, and no such data was submitted to DOL, to support its assertion that its new definition of full-time employment "reflects [its] experience in the administration of this program." 73 Fed. Reg. at 78038.

92. The definition of full-time as 30 hours per week is arbitrary, capricious and contrary to law in that it will materially adversely affect U.S. workers.

93. DOL's interpretation of the definition is also a major change from the existing interpretation, and represents a new policy. *See* Comments of Mid-Atlantic Solutions LLC, ETA-2008-0002-0071 (noting that some State Workforce Agencies have rejected applications offering fewer than 40 hours of work per week).

94. DOL's new interpretation of the full-time definition as not establishing a contractual obligation to actually provide a certain number of hours of work per week was not subject to notice and comment, as this interpretation did not appear in the proposed regulation when it was published in the Federal Register. See Notice of Proposed Rulemaking.

95. DOL has offered no basis for its interpretation of the full-time requirement as not establishing a contractual obligation.

RECRUITMENT OF U.S. WORKERS

96. The Secretary of Labor is required by law to establish effective procedures to "determine and certify" that there are not sufficient workers who are able, willing, qualified and available to perform labor for which foreign temporary non-agricultural H-2B workers are requested.

Historical Regulatory Requirements for H-2A Temporary Agricultural Employers

97. On December 18, 2008, the Secretary of Labor promulgated drastically revised regulations for the H-2A program which would strip the program of many of its important provisions. Those changes are being challenged in *United Farm Workers, et al. v. Chao*, United States District Court, District of Columbia, Case No. 1:09-cv-00062-RMU.

98. Prior to the December 18, 2008 changes to the H-2A program, the H-2A agricultural worker regulations required recruitment of U.S. workers for agricultural labor and to protect such U.S. workers from adverse impact have included requirements that:

(a) employers must recruit U.S. workers through both the interstate job clearance order process and through "positive recruitment," which is the active recruitment by the employer in areas of potential labor supply and in the area where the employer's establishment is located;

(b) U.S. workers who apply for work with an H-2A employer in the first half of the H-2A contract period must be hired if they are qualified and accept the DOL-approved job terms (this is the so-called "50 percent" rule);

(c) employers may not fire or refuse to hire a U.S. worker for other than a lawful job-related reason and may not discriminate against U.S. workers by providing wages or benefits to H-2A workers that the employer does not provide also to the U.S.

workers;

(d) employers must abide by the terms of the job offer they have submitted and that have been approved by DOL, which become an enforceable work contract between the employer and the workers;

(e) employers must pay workers the highest of one of three DOL-mandated wages including an "adverse effect" wage rate;

(f) employers must provide workers with an opportunity to work at least three-fourths of the workdays in the season or must reimburse the workers (absent an Act of God) (this is the so-called "3/4 guarantee");

(g) employers must provide free housing that meets substantive health and safety standards to H-2A workers and migrating U.S. workers;

(h) employers must reimburse inbound transportation costs for workers who work at least one-half of the season and provide return transportation costs for workers who work the entire season; and

(i) H-2A program employers may not discriminate against U.S. workers in hiring or job terms.

(j) Employers must comply with all federal, state and local laws including the Fair Labor Standards Act.

99. Under the previously established regulations for H-2A employers, recruitment efforts for U.S. workers are required to be "no less than (1) the recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers." 20 CFR 655.105(a).

100. Each employer who intends to hire H-2A workers have been required to prepare a written "positive recruitment plan" that provides both "a description of recruitment efforts (if any) made prior to the actual submittal of the application," and a description of how "the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment." Id. §655.102(d). Those regulations required employers to take whatever specific actions are prescribed by the OFLC Administrator and to cooperate with the Employment Services ("ES") System in actively recruiting U.S. workers. Id. §655.103(d). The ES System comprises federal and state entities responsible for administration of the H-2A program, including SWAs, the DOL's Employment and Training Administration, which includes two National Processing Centers ("NPCs") and the DOL's Office of Foreign Labor Certification ("OFLC"). Id. §655.100.

101. In addition to the requirements of the individualized recruitment plans, all H-2A employers have been required to:

a. Assist the ES in preparing job orders for posting locally and in the interstate system, *Id.* §655.103(d)(1);

b. Place advertisements (in a language other than English, where the OFLC Administrator deemed appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the OFLC Administrator, *Id.* §655.103(d)(2);

c. Contact labor contractors, migrant workers, and other potential workers in other areas by letter and/or telephone, *Id.* §655.103(d)(3); and

d. Contact schools, business and labor organizations, fraternal and veterans'

organizations, and nonprofit organizations and public agencies throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers, *Id.* §655.103(d)(4).

102. The OFLC Administrator, in evaluating H-2A applications and determining whether a labor shortage exists, will "ascertain the normal recruitment practices of non-H-2A agricultural employers in the area and the kind of recruitment efforts which the potential H-2A worker made to obtain H-2A workers" in order to ensure that the effort to recruit non-H-2A employees reflects an equal or greater effort. Id. §655.105(a). The OFLC is also directed to "provide overall direction to the employer and the SWA with respect to the recruitment of U.S. workers." Id. §655.105(b).

103. Each employer who intends to hire H-2A workers must prepare a written "positive recruitment plan" that provides both "a description of recruitment efforts (if any) made prior to the actual submittal of the application," and a description of how "the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment." Id. §655.102(d). The plan must also describe how the employer will utilize farm labor contractors where it is the prevailing practice to do so. See Id. The prior regulations require employers to take whatever specific actions are prescribed by the OFLC Administrator and to cooperate with the Employment Services ("ES") System in actively recruiting U.S. workers. Id. §655.103(d). The ES System comprises federal and state entities responsible for administration of the H-2A program, including SWAs, the DOL's Employment and Training Administration, which includes two National Processing Centers ("NPCs") and the DOL's Office of Foreign Labor Certification ("OFLC"). Id. §655.100.

104. In addition to the requirements of the individualized recruitment plans, all employers are also required to:

a. Assist the ES in preparing job orders for posting locally and in the interstate system, *Id.* §655.103(d)(1);

b. Place advertisements (in a language other than English, where the OFLC Administrator deemed appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the OFLC Administrator, *Id.* §655.103(d)(2);

c. Contact farm labor contractors, migrant workers, and other potential workers in other areas by letter and/or telephone, *Id.* §655.103(d)(3); and

d. Contact schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers, *Id.* §655.103(d)(4).

105. The OFLC Administrator, in evaluating H-2A applications and determining whether a labor shortage exists, will "ascertain the normal recruitment practices of non-H-2A agricultural employers in the area and the kind of recruitment efforts which the potential H-2A worker made to obtain H-2A workers" in order to ensure that the effort to recruit non-H-2A employees reflects an equal or greater effort. Id. §655.105(a). The OFLC is also directed to "provide overall direction to the employer and the SWA with respect to the recruitment of U.S. workers." *Id.* §655.105(b).

Requirements for Recruitment of U.S. Workers for H-2B Positions

106. The May 2008 NPRM was the first occasion since the inception of the H-2B program in 1986 in which DOL and the Secretary of Labor sought input through notice and

comment on the appropriateness of measures to be required from employers for the recruitment of H-2B temporary workers.

107. The existing procedures for recruitment of U.S. workers for the H-2B program have never paralleled procedures for recruitment of H-2A workers and the limited extent of recruitment requirements under the existing H-2B procedures have not been adequate to meet the responsibilities of the Secretary of Labor pursuant to 8 U.S.C. §1182(a)(5)(A)(i).

108. DOL's December 19, 2008 provisions for recruitment of H-2B workers do nothing to overcome the historical failure of the Secretary of Labor to have met requirements of law for insuring that U.S. workers have access to job opportunities with H-2B employers. The new regulations provide as to recruitment as follows:

> Sec. 655.15 Required pre-filing recruitment.
>
> * * *
>
> (d) Recruitment Steps. An employer filing an application must:
>
> (1) Obtain a prevailing wage determination from the NPC in accordance with procedures in Sec. 655.10;
>
> (2) Submit a job order to the SWA serving the area of intended employment;
>
> (3) Publish two print advertisements (one of which must be on a Sunday, except as provided in paragraph (f)(4) of this section); and
>
> (4) Where the employer is a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application, the employer must formally contact the local union that is party to the collective bargaining agreement as a recruitment source for able, willing, qualified, and available U.S. workers.
>
> (e) Job Order.
>
> (1) The employer must place an active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer's date of need for H-2B workers, identifying it as a job order to be placed in connection with a future application for H-2B workers. Unless otherwise directed by the CO, the SWA must keep the job order open for a period of not less than 10 calendar days. Documentation of this step shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting. If the

job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State, the employer shall place a job order with the SWA having jurisdiction over the place where the work has been identified to begin. Upon placing a job order, the SWA receiving the job order under this paragraph shall promptly transmit, on behalf of the employer, a copy of the active job order to all States listed in the application as anticipated worksites.

(2) The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in Sec. 655.17.

(f) Newspaper Advertisements.

(1) During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, the employer must publish an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday advertisement (except as provided in paragraph (f)(2) of this section), in a newspaper of general circulation serving the area of intended employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity. Both newspaper advertisements must be published only after the job order is placed for active recruitment by the SWA.

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer must, in place of a Sunday edition advertisement, advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

(3) The newspaper advertisements must satisfy the requirements contained in Sec. 655.17. The employer must maintain copies of newspaper pages (with date of publication and full copy of advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper.

(4) If a professional, trade or ethnic publication is more appropriate for the occupation and the workers likely to apply for the job opportunity than a general circulation newspaper, and is the most likely source to bring responses from able, willing, qualified, and available U.S. workers, then the employer may use a professional, trade or ethnic publication in place of one of the newspaper advertisements, but may not replace the Sunday advertisement (or the substitute permitted by paragraph (f)(2) of this section).

(g) Labor Organizations. During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, an employer that is already a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application must formally contact by U.S. Mail or other effective means the local union that is party to the collective bargaining agreement. An employer governed by this paragraph must maintain dated logs demonstrating that such organizations were contacted and notified of the

position openings and whether they referred qualified U.S. worker(s), including number of referrals, or were non-responsive to the employer's request.

(h) Layoff. If there has been a layoff of U.S. workers by the applicant employer in the occupation in the area of intended employment within 120 days of the first date on which an H-2B worker is needed as indicated on the submitted Application for Temporary Employment Certification, the employer must document it has notified or will notify each laid-off worker of the job opportunity involved in the application and has considered or will consider each laid-off worker who expresses interest in the opportunity, and the result of the notification and consideration.

(i) Referral of U.S. workers. SWAs may only refer for employment individuals for whom they have verified identity and employment authorization through the process for employment verification of all workers that is established by INA sec. 274A(b). SWAs must provide documentation certifying the employment verification that satisfies the standards of INA sec. 274A(a)(5) and its implementing regulations at 8 CFR 274a.6.

(j) Recruitment Report.

(1) No fewer than 2 calendar days after the last date on which the job order was posted and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign, and date a written recruitment report. The employer may not submit the H-2B application until the recruitment report is completed. The recruitment report must be submitted to the NPC with the application. The employer must retain a copy of the recruitment report for a period of 3 years.

(2) The recruitment report must:

(i) Identify each recruitment source by name;

(ii) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers;

(iii) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position.

(3) The employer must retain resumes (if available) of, and evidence of contact with (which may be in the form of an attestation), each U.S. worker who applied or was referred to the job opportunity. Such resumes and evidence of contact must be retained along with the recruitment report for a period of no less than 3 years, and must be provided in response to an RFI or in the event of an audit or an investigation.

73 Fed. Reg. at 78057-78058

109. In its December 19, 2008 preamble to the adoption of the proposed regulations, DOL acknowledged that it had received comments opposing its proposed system for recruitment of U.S. workers by prospective H-2B employers. DOL acknowledged:

> The Department received a number of comments about the proposed timeframe for pre-filing recruitment; some opposing recruitment so far in advance of the date of need and others suggesting the timeframe be lengthened. The commenters who were opposed to the proposal generally believed that U.S. workers would not be able or willing to commit to temporary jobs so far ahead of the actual start date or would indicate they would accept the jobs but then fail to report on the actual start date. These commenters believed this would result in delays, additional costs to employers and the Department, and the late arrival of H-2B workers because new applications would have to be filed. One commenter opposed the early pre-filing recruitment and believed the result would be a false indication that no U.S. workers were available. Another commenter opined that employer compliance would be reduced due to the pre-filing recruitment. One SWA recommended that the period for recruitment be shortened because 120 days in advance is not suitable when serious job seekers are looking for temporary employment and stating their view that those U.S. workers who apply are rarely offered employment because the employer knows foreign workers are available. The commenter was further concerned that the U.S. workers who are hired that far in advance of the date of need are not reliable and will not report for work.

73 Fed. Reg. at 78031-78032

110. DOL arbitrarily failed without good cause to discuss or examine proposals for more effective recruitment of H-2B workers, including proposals that it:

> Require More Extensive Recruitment. In the H-2A program, employers are required to engage in the kinds of affirmative strategies that would be expected actually to locate and attract employees to the work. H-2B employers need only run three newspaper ads and list the job with the local SWA for ten days, many weeks before the job will actually become available.
>
> Require Recruitment in Areas of Labor Surplus. With U.S. unemployment rates rising in many parts of the country, efforts should be made to connect U.S. workers with job opportunities through interstate recruitment. This has been a staple of the H-2A program for many years.
>
> Require Employers to Provide Free Housing and Reimbursement of Transportation Expenses. Again, this is a requirement in agriculture.
>
> Adoption of the "50 % Rule." The Department has found that requiring employers to hire qualified U.S. workers who become available at any time up to 50% of the period of the job opportunity helps to locate available U.S. workers, and serves as an incentive to avoid over-recruitment of foreign workers and wrongful rejection of U.S. workers.

See, ETA-2008-0002-0088 at pages 27-32, and 64.

Impact of Requirements for SWAs to Complete I-9 Before Referral of Workers

111. DOL acknowledged considerable criticism by State Workforce Agencies (SWAs) of the new regulatory provision requiring that SWA staff would have to complete I-9 verifications of the employment status of U.S. workers before referring such workers to jobs with employers seeking H-2B workers. See 73 Fed. Reg. at 78033. DOL also failed to acknowledge statements of Congressional opposition to this proposal. ETA-2008-0002-0067. Opposition to this rule included comments from the following states:

Document ID	Commenter
ETA-2008-0002-0029	Arizona
ETA-2008-0002-0069	California
ETA-2008-0002-0046	Maine
ETA-2008-0002-0063	Maryland
ETA-2008-0002-0058	Massachusetts
ETA-2008-0002-0078	Nevada
ETA-2008-0002-0040	North Carolina
ETA-2008-0002-0019	Oregon
ETA-2008-0002-0039	Pennsylvania
ETA-2008-0002-0090	Texas
ETA-2008-0002-0035	Virginia
ETA-2008-0002-0025	Washington

112. At least some of the SWAs comments raise issues as to the legality of requiring SWAs to complete I-9's before referral of prospective U.S. workers to positions for which employers seek to bring I-9's. These included the potential that SWAs could be liable for discrimination in the application of such requirements only to certain referrals as well as the impact of other laws on such requirements. Amongst the states raising concerns about the legal appropriateness of requiring them to complete I-9's or e-verify employment was the Pennsylvania Department of Labor and Industry.

113. DOL arbitrarily failed to consider the adverse impact of such a rule on U.S. workers seeking employment and the Secretary of Labor's obligation to establish effective

procedures to "determine and certify" that there are not sufficient workers who are able, willing, qualified and available to perform labor for which foreign temporary non-agricultural H-2B workers are requested.

114. Instead of requiring employers to widely disseminate information about potential H-2B jobs, DOL arbitrarily, capriciously, and contrary to law removed a requirement which had been in the NPRM for employers to notify unions in areas of employment about H-2B positions. See 73 Fed. Reg. 78032-78033.

115. The final regulations arbitrarily, capriciously, and contrary to law fail to require employers seeking to utilize H-2B workers to actively recruit able, willing and qualified workers to jobs for which foreign temporary non-agricultural H-2B workers are requested.

Attestation Provisions

116. In the new regulations, DOL replaces the existing pre-hiring certification process required by regulation with a process based entirely on attestation. In so doing, DOL has transformed the process from one requiring meaningful review and approval by DOL to a *post hoc* system that dramatically weakens DOL oversight of the H-2A program. Fed Reg. 78060 and 780540 (to be codified at 20 C.F.R. §655.22 and 20 C.F.R. 655.24) This proposed transformation is arbitrary and capricious.

117. An attestation system does not comply with the DOL's statutory and regulatory mandate that it certify compliance with H-2B requirements. Congress has stated that labor certification is required for workers entering the U.S. to perform unskilled labor. "Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that . . .there are not sufficient workers who are able willing, qualified.

. . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and . . .the employment of such alien will not adversely affect the wages and working conditions in the United States similarly employed." 8 U.S.C. 1182(a)(5)(A)(i) (emphasis added).

118. Other regulations specifically require certification and not attestation. 8 C.F.R. §214.2(h)(ii)(D) ("An H-2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, if unemployed persons capable of performing such service or labor cannot be found in this country. . .This classification requires a temporary labor *certification* issued by the Secretary of Labor or the Governor of Guam, or a notice from one of these individuals that such a certification cannot be made, prior to the filing of a petition with the Service.") (emphasis added).

119. DOL failed to consider substantial empirical evidence that the certification process had, in fact, resulted in the denial of a substantial number of H-2B applications which likely would be inappropriately approved under an attestation system. Analysis of data for FY07 that establishes that DOL denied certification of 105,532 positions which was 29.3% of the number of workers sought in employer applications for H-2B workers. See ETA-2008-0002-0022 at pp. 1-5 and Attachment A .

120. Significantly, under an attestation system, the Department will no longer review the recruitment system utilized by employers to ensure that there actually are no U.S. workers available to do the work prior to approving the applications for H-2B workers. 73 Fed Reg. 78057 (to be codified at 20 C.F.R. §655.15).

121. DOL failed to explain how a post hoc attestation system is consistent with its legal obligations to protect U.S. workers. In fact, empirical evidence submitted to DOL clearly

demonstrated that under the former certification regime, DOL did reject a large number of applications for H-2B certification. Under an attestation system, those employers would simply be approved by DOL, causing potentially enormous adverse effect to wages and working conditions of U.S. workers.

122. The arbitrariness of the DOL final rule in assuming that it can effectively satisfy its duties to determine and certify that there is a need for H-2B workers solely on the basis of employer attestations is demonstrated by the recent annual report of the DOL Office of Inspector General which was in the record before DOL pursuant to its NPRM. See, ETA-2008-0002-0088, Attachment A, Office of Inspector General - U.S. Department of Labor, Semiannual Report to Congress, October 1, 2007–March 31, 2008, available at: http://www.oig.dol.gov/SAR-59-FINAL.pdf. The OIG annual report makes a legislative recommendation in relationship to the H-1B program, "Provide Authority to Ensure the Integrity of the Foreign Labor Certification Process." *Id* at p. 39. That recommendation states:

> "If DOL is to have a meaningful role in the H-1B specialty occupations foreign labor certification process, it must have the statutory authority to ensure the integrity of that process, including the ability to verify the accuracy of information provided on labor condition applications. Currently, DOL is statutorily required to certify such applications unless it determines them to be "incomplete or obviously inaccurate." Our concern with the Department's limited ability to ensure the integrity of the certification process is heightened by the results of OIG analysis and investigations that show the program is susceptible to significant fraud and abuse, particularly by employers and attorneys. The OIG also recommends that ETA should seek the authority to bar employers and others who submit fraudulent applications to the foreign labor certification program."

Id at 39. See, ETA-2008-0002-0088

DEFINITIONS ADOPTED IN DHS AND DOL FINAL RULEMAKING ARE ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW

123. The DOL and DHS regulations arbitrarily, capriciously, and without adequate justification change definitions of terms relating to the administration of the H-2B program in

ways that are serious and consequential and, contrary to law, are likely to result in an adverse effect on wages, working conditions, or employment opportunities for U.S. workers.

DHS 2008 Regulatory Action

124. Defendants Secretary of Homeland Security and DHS and issued a Notice of Proposed Rulemaking, publishing proposed rules on Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers on August 20, 2008, with a Notice and Comment period ending September 19, 2008. 73 Fed. Reg. 49109-49122.

125. One hundred nineteen individuals and organizations submitted comments.

126. The record before the agency of comments and actions related to that proposed rulemaking has been posted under USCIS-2007-0058 Docket at:

http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=USCIS-2007-0058.

127. On December 19, 2009, USDHS issued its final rule entitled Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers. 73 Fed. Reg. 78104-78130. The rule goes into effect on January 18, 2009.

Definition of Temporary

128. Current DHS regulations define temporary need in relationship to H-2B employment as follows:

> 8 CFR 214.2(h)(6)(ii) Temporary services or labor —
>
> (A) Definition. Temporary services or labor under the H–2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.
>
> (B) Nature of petitioner's need. As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need:

> (1) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.
>
> (2) Seasonal need. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.
>
> (3) Peakload need. The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.
>
> (4) Intermittent need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

129. Available evidence in response to the DOL and DHS NPRMs indicated that a high number of applications for temporary H-2B labor certifications are likely denied because of a determination that such positions are not temporary. See, ETA-2008-0002-0022 at pp. 1-5, Attachments A and B (analyzing by occupational code those jobs for which certification was denied); ETA-2008-0002-0088 at pp. 17-19, 24-27).

130. Both the May 2008 DOL NPRM and the August 2008 DHS NPRM proposed to significantly change this definition so as to permit a "one-time" occurrence to include "temporary" employment of up to three years.

131. In the December 19, 2008 preamble to the DOL regulations, DOL states that:

> ... the Department will consider a position to be temporary as long as the employer's need for the duties to be performed is temporary or finite, regardless of whether the underlying job is temporary or permanent in nature, and as long as that temporary need--

> as demonstrated by the employer's attestations, temporary need narrative, and other relevant information--is less than 3 consecutive years.

73 Fed. Reg. at 78025-78026.

132. DOL accomplishes this by reference to the December 19, 2008 change to 8 CFR 214.2(h)(6)(ii) in the new DHS regulations.

133. Defendant DHS substantially changes the definition of 8 CFR 214.2(h)(6)(ii)(B) to provide:

> (B) Nature of petitioner's need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a onetime occurrence, a seasonal need, a peak load need, or an intermittent need.

73 Fed. Reg. 78104 at 78129.

134. In conjunction with the creation of a new definition in the revised DOL regulations definitions of a "job contractor" (discussed below), the new definition of "temporary" is arbitrary, capricious and contrary to law.

Definitions of Job Contractor and Employ

135. The definitions section of the DOL regulations at 20 CFR 655.4 as published on December 19, 2008 add a provision for a "Job Contractor" defined as follows:

> Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor, and where the job contractor will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

73 Fed. Reg. at 78054.

136. The record before DOL reflected that such labor brokers have been identified by the DOL Office of Inspector General as a source of potential serious abuse. ETA-2008-0002-

0088, Exhibit A, Office of Inspector General - U.S. Department of Labor, Semiannual Report to Congress, October 1, 2007–March 31, 2008, available at: http://www.oig.dol.gov/SAR-59-FINAL.pdf. The introduction to that report notes:

> "OIG investigations revealed that the foreign labor certification process continues to be compromised by unscrupulous attorneys, labor brokers, employers, and others."

The reports summary of significant concerns noted:

> "... defendants also took advantage of the devastation caused by Hurricane Katrina by fraudulently obtaining certification from the Department for nearly 250 H-2B temporary foreign workers, purportedly on behalf of four New Orleans hotels. We will continue to aggressively pursue those who seek to defraud the Department's foreign labor certification programs."

Id at p. 4. The same OIG annual report has an article "Conspirators of Florida Labor Leasing Company Sentenced to Pay $1 Million" discussing DOL OIG joint investigation with DOS Diplomatic Security Service (DSS) and the U.S. Immigration and Customs Enforcement (ICE). *United States v. Anna Czerwien* and *United States v. Aleksander Berman et al.* (N.D. Florida). See also, I*d* at p. 24. See, ETA-2008-0002-0088, Exhibit A.

137. By adopting its definition of a labor broker as eligible to apply for H-2B temporary foreign workers, DOL arbitrarily and capriciously authorizes "job contractors" to obtain H-2A visas in direct violation of its statutory mandate to protect U.S. workers.

138. As structured by the new regulations, there is no guarantee that the employer with whom the job contractor will place workers has any obligation to abide by the regulatory controls designed to protect U.S. workers' wages and working conditions. Nor is there any mechanism to evaluate the employer's statement that the job contractor's workers will not displace U.S. workers. See 73 Fed. Reg. at 78042.

139. The DOL regulations are contrary to law in that they reflect a narrow restriction on "displacing" current U.S. workers rather than a broad commitment to positive recruitment of U.S. workers for all positions for which employers seek H-2B workers.

140. The DOL regulations arbitrarily fail to bind the "employer" to whom the "job contactor" supplies workers as a joint employer through usage of a narrow common law definition of "employee" rather than a broader protective definition such as used by the FLSA.

141. The DOL regulation at 20 CFR 655.4 of "employee" states:

> Employee means employee as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors should be considered and no one factor is dispositive.

73 Fed. Reg. at 78054.

142. DOL arbitrarily and without justification specifically declined to include a broader definition "employ" which would more adequately operate to protect U.S. workers against job brokers and others claiming to need temporary H-2B workers without regard to the recruitment efforts of the joint employer to whom the workers are assigned. See. 73 Fed. Reg. at 78024.

143. DOL further arbitrarily defined "agent" for an H-2B employer in order to permit persons to file H-2B applications for employers without any licensing or other qualifications for such persons. Doing so despite a demonstrated history of abuse by many such agents is arbitrary and capricious and contrary to law. See, ETA-2008-0002-0088, Exhibit A. See also, ETA-2008-0002-0074 at pp. 5-8 reflecting comments of American Immigration Lawyers Association (AILA) at

144. The actions of DOL and DHS as described above are arbitrary and capricious and contrary to law.

CAUSES OF ACTION

FIRST COUNT
VIOLATION BY DOL DEFENDANTS OF 5 U.S.C. §706(2)

145. Plaintiffs re-allege and incorporate by reference all preceding paragraphs of this Complaint as though fully set forth herein.

146. The actions by the DOL Defendants as set forth above are in violation of the Administrative Procedure Act in violation of 5 U.S.C. §706(2).

147. The actions of the DOL Defendants as set forth above are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in accordance with 5 U.S.C. §706(2)(a).

SECOND COUNT
VIOLATION BY DEFENDANTS SECRETARY OF HOMELAND SECURITY AND DHS OF 5 U.S.C. §706(2)

148. Plaintiffs re-allege and incorporate by reference all preceding paragraphs of this Complaint as though fully set forth herein.

149. The actions by the Defendants Secretary of Homeland Security and DHS as set forth above are in violation of the Administrative Procedure Act in violation of 5 U.S.C. §706(2).

150. The actions by the Defendants Secretary of Homeland Security and DHS as set forth above are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in accordance with 5 U.S.C. §706(2)(a).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(a) Enter a declaratory judgment that prevailing wage policies effective March 2005 are arbitrary, capricious, and contrary to law and therefore null and void;

(b) Enter a declaratory judgment that the final policy declaration interpreting the Fair Labor Standards Act, 29 U.S.C. §203(m) announced in 73 Fed. Reg. at 78039–78041, 78059 and 73 Fed. Reg. at 77148-77151 is arbitrary, capricious, and contrary to law and therefore null and void;

(c) Enter a declaratory judgment that the Final Rule promulgated by DOL effective January 18, 2009 is invalid as challenged herein under the Administrative Procedure Act and therefore null and void;

(d) Enter a declaratory judgment that the Final Rule promulgated by DHS effective January 18, 2009, is invalid as challenged herein under the Administrative Procedure Act and therefore null and void;

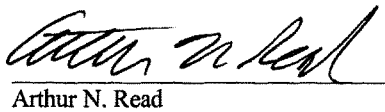
(e) Permanently enjoin the Secretary of Labor and the Secretary of Homeland Security, and the Department of Homeland Security and the Department of Labor from implementing the Final Rules as challenged herein;

(f) Award Plaintiffs their costs and expenses, including reasonable attorney's fees and expert witness fees; and

(g) Grant such further and additional relief as this Court may deem just and proper.

Dated: January 18, 2009

Respectfully submitted,



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MEMORANDUM

To: **Hon. Hilda Solis, Secretary of Labor**

From: **Arthur N. Read, Mary Bauer, Michael Dale, Clermont Fraser, Rachel Micah-Jones**

Date: **March 19, 2009**

Re: **Memorandum on Suspension of January 2009 H-2B Regulations**

The Department of Labor should temporarily suspend the implementation of the January 17, 2009-H-2B regulations pending review and reform of the program.

Abuses in the H-2B program are well-documented. *See* DeFede: "Giving Away American Jobs" http://cbs4.com/local/defede.economy.jobs.2.936589.html, http://cbs4.com/video/?id=71339@wfor.dayport.com, http://cbs4.com/video/?id=71412@wfor.dayport.com, http://cbs4.com/video/id=71517@wfor.dayport.com; "Close to Slavery," http://www.splcenter.org/pdf/static/SPLCguestworker.pdf. The DOL Office of Inspector General's last annual report through March 31, 2008 noted: "OIG investigations revealed that the foreign labor certification process continues to be compromised by unscrupulous attorneys, labor brokers, employers, and others...." Serious legislative reform efforts are underway that may well result in the enactment of significant changes in the way the H-2B program operates. Since becoming Secretary of Labor you have publicly stated that you intend to evaluate the program, and may well decide to make significant regulatory changes. http://blog.aflcio.org/2009/03/04/solis-investigating-guest-worker-visas-on-florida-hotel-project/.

Under these circumstances, it makes very little sense to implement the drastic changes envisioned by the Bush administration regulations. In particular, two major aspects of the regulations will work changes in the program that will be very difficult to undo, once fully implemented. This will seriously limit the options available to Congress and to the Secretary to fix the program.

First, the H-2B program has historically been a federal/state partnership, with state workforce agenciesplaying a major role in assuring that applications that did not comply with program regulations were denied. While that effort has been uneven, and should be improved through reform, the fact is that most of the expertise about temporary employment programs in the United States resides in the state workforce agencies. Because the new rules essentially cut the states out of any significant role in administration of the program, this expertise will soon be dissipated, as experienced staff are transferred to other functions or leave the agencies altogether. It would take years to recreate.

Second, the Bush rules would replace the current system with a centralized federal office in Chicago that would adjudicate all of the H-2B certification petitions in the country. This could be accomplished, it is argued, because the department would shift the program from "certification" by the department to "attestation" by petitioning employers. In other words, rather than assuring that the issuance of H-2B visas will not undermine U.S. wages and working conditions before visas are issued, the department would approve the applications so long as the employer makes all of the right promises. Enforcement would come, it is asserted, in the form of audits after the fact.

Of course, the department's mandate is to "certify" that U.S. workers are not available and that the admission of foreign workers will not hurt U.S. wages and working conditions—not that the employer has made the right promises. Also, after the fact, it will be difficult to compensate workers who were underpaid, and impossible to put U.S. workers in jobs they were entitled to hold. For these, and other, reasons, a shift to attestation will only make a bad situation worse. In any Congressional or administrative review of the functioning of the program, we urge in the strongest terms that this step not be taken, at least in the absence of important countervailing concessions by employers.

If the Bush rules are allowed to take full effect, as a practical matter, it will be impossible to reverse course and preserve a certification program for H-2B. Without the army of experienced state employees who know about local job markets and labor forces, it would be futile to try to evaluate local labor shortages prior to the issuance of visas with the small staff available to the department in the Chicago office. DOLwill be hard-pressed to meet time constraints on approving or denying approval even under the attestation scheme. Any attempt to do more would be beyond the department's capacity. But the states will no longer have the capacity to perform the certification function either, since those units will soon be dismantled if the Bush regulations are fully implemented now.

Even if it were possible to reorient the program after the Secretary and Congress have had the opportunity to review and reform it, the administrative cost and confusion that would result from the reorientation argue for not implementing the Bush regulations at all. The cost and confusion of training states, the department's employees, and the public - first to convert to the Bush system, and then to the reformed program - will be substantial. It would be far more prudent to follow past practice until the new administration and Congress has had the opportunity to examine and reform this deeply flawed program.

Substantive Flaws of the January H-2B Regulations

Attached to this Memorandum are brief discussions of some of the major substantive policy problems with the January 2009 Regulations. Since many of these concerns are addressed at length in the federal Court complaint in *CATA v. Chao,* U.S. District Court E.D. PA, Civil No. 09-CV-240, the annexed chart correlated to specific sections of the regulations references the specific paragraphs of the Complaint which addressed many of these concerns in detail.

One of the serious effects of the January 2009 regulations is the enshrinement in regulation (20 CFR §655.10 (b)) of the March 2005 actions by the previous Secretary of Labor in drastically reduced the "prevailing wages" required to be paid to U.S. workers and H-2B workers at a wage rate which in practice is far below the median wage for the jobs for which H-2B workers are being recruited. *See* annexed analysis by Ross Eisenbrey, Economic Policy Institute, Washington, D.C.

Notes on Sections of January 2009 Regulations Raising Particular Concerns	
20 CFR §655.4 Definitions of terms used in this subpart.	**Notes on Concerns**
Agent means a legal entity or person authorized to act on behalf of the employer for temporary non-agricultural labor certification purposes that is not itself an employer as defined in this subpart. The term "agent"' specifically excludes associations or other organizations of employers.	Unauthorized Practice of Law. Complaint ¶143
Employ [No Definition, but restricted common law definition of employee]	Complaint ¶¶140-142
Employee means employee as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors should be considered and no one factor is dispositive.	Complaint ¶¶140-142
Employer means: (1) A person, firm, corporation or other association or organization: (i) Has a place of business (physical location) in the U.S. and a means by which it may be contacted; (ii) Has an employer relationship with respect to H–2B employees or related U.S. workers under this part; and (iii) Possesses, for purposes of the filing of an application, a valid Federal Employer Identification Number (FEIN). (2) Where two or more employers each have the definitional indicia of employment with respect to an employee, those employers may be considered to jointly employ that employee.	Complaint ¶¶140-142
Full-time , for purposes of temporary labor certification employment, means 30 or more hours per week, except that where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 30 hours per week, that definition shall have precedence.	Complaint ¶¶83-95. See attached comment.
Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor, and where the job contractor will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.	Complaint ¶¶135-138. See attached comment.

Notes on Sections of January 2009 Regulations Raising Particular Concerns	
20 CFR §655.5 Application Filing Transition.	Major Changes effective May – June 2009
20 CFR §655.5. [Discontinuance of role of State Workforce Agencies in review of applications and determination of prevailing wages.]	Complaint ¶¶74-82
20 CFR §655.6 Temporary need & 8 CFR 214.2(h)(6)(ii)(B) 20 CFR §655.6 (c) *Except where the employer's need is based on a one-time occurrence*, the Secretary will, absent unusual circumstances, deny an Application for Temporary Employment Certification where the employer has a recurring, seasonal or peakload need lasting more than 10 months.	Complaint ¶¶123-134
8 CFR 214.2(h)(6)(ii)((B) Nature of petitioner's need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years.	
20 CFR §655.10 Determination of prevailing wage for temporary labor certification purposes.	Complaint ¶¶42-53, 66-73
20 CFR §655.10 (b) Determinations. **Prevailing wages** shall be determined as follows: … (2) ….the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(4) of this section, of the wages of workers similarly employed at the skill level in the area of intended employment. [Under the formula used to calculate the skill levels, Level I is the average wage paid to the lowest one-third of workers in an occupation in a local area, or the 16.5th percentile. The approved "prevailing wage" for an employer seeking H-2B workers is usually far lower than the average hourly wage paid in the locality for that kind of work.]	Complaint ¶¶46-49. See, Ross Eisenbrey, Economic Policy Institute attachments.
20 CFR §655.10 (f) Employer-provided wage information.	Complaint ¶73 and attached comments
20 CFR §655.15 Required pre-filing recruitment. **20 CFR §655.17 Advertising requirements.**	Absence of effective provisions for Positive Recruitment U.S. Workers Complaint ¶¶96-110

Notes on Sections of January 2009 Regulations Raising Particular Concerns	
20 CFR §655.15(i)--Referral of U.S. Workers and SWA Employment Verification (i) Referral of U.S. workers. SWAs may only refer for employment individuals for whom they have verified identity and employment authorization through the process for employment verification of all workers that is established by INA sec. 274A(b). SWAs must provide documentation certifying the employment verification that satisfies the standards of INA sec. 274A(a)(5) and its implementing regulations at 8 CFR § 274a.6.	Complaint ¶¶111-115
20 CFR §655.20 Applications for temporary employment certification. [Shift from Certification to Attestation System]	Complaint ¶¶116-122

Employer Attestations Are Inappropriate for the H-2B Program

The change from a labor certification system to an attestation system was not explained in the prior Administration's proposed regulations, and is simply not good policy. In fact, H-2B workers need more protection by the government, not less. The new rule has eliminated the ability of the administration to review and reject problem applications before they are approved. Employers now simply have to attest that when they attempted to recruit U.S. workers, none were available, and that the conditions of employment will not adversely affect U.S. workers. Attestations will only be rejected if they are incomplete or obviously inaccurate. As long as employers check the correct boxes on the form, their applications will be approved.

There are numerous examples in which the old labor certification system resulted in the denial of H-2B applications to employers, on the basis that they did not fulfill statutory requirements regarding the temporary nature of the work to be performed, the availability of U.S. workers, or prevailing wages and working conditions. Despite these cases of certification denials, the former H-2B labor certification system was far from perfect.

The attestation system created by the new regulations does not address any of the shortcomings of the old system. To the contrary, it completely eliminates the entire labor certification process, and largely removes the Department of Labor as the gatekeepers of the H-2B visa program. The creation of the labor attestation system has relegated the DOL's involvement in the H-2B visa program to the administration of a very limited *ex post facto* audit for H-2B employers. This evisceration of the minimal administrative safeguards in the H-2B program will severely limit the ability of the administration to ensure that the law is complied with, thus opening up the program to wholesale abuse by employers, subjecting H-2B workers to further exploitation, depriving U.S. workers of gainful employment, and degrading wages and working conditions within the domestic labor market.

DOL's Removal of State Workforce Agencies (SWAs) from Employer Oversight while Requiring the SWAs to Verify U.S. Applicants' I-9 Work Authorization Will Harm the Integrity of the H-2B Program and Deter U.S. Worker Recruitment

The selective elimination of the State Workforce Agencies' (SWA) role in reviewing employers' H-2B applications and determining prevailing wages, when combined with the new requirement for the SWAs to verify U.S. workers' I-9 work eligibility, will negatively impact the integrity of the H-2B program by: 1) removing the SWAs' expert customer support for employer-applicants; 2) increasing employer potential for errors and fraud because of less oversight (especially with the new employer attestation system); 3) adversely affecting local wages and conditions because the OES prevailing wage adopted by DOL in 2005 is less accurate than SWA prevailing wage determinations, and the SWAs possess local job market expertise for U.S. recruitment purposes, and; 4) increasing obstacles to U.S. worker referrals on H-2B jobs because the I-9 requirement for SWAs forces U.S. workers to prematurely produce identification—before they are hired—by coming in-person to workforce centers instead of selecting jobs over the phone or via the internet—as many workforce centers allow on non-H-2B job orders.

Previously, many SWAs accepted U.S. workers' "self-attestations" that they were authorized to work, and the employer had the statutory duty to verify eligibility after hiring them. Under the new regulations, ironically, U.S. workers have more difficulty being referred on H-2B jobs than non-H-2B jobs despite the H-2B statutory mandate that they be hired first. Many SWAs commented that the requirement to verify I-9 eligibility for only a subset of U.S. job seekers—those seeking H-2A and H-2B jobs—subjected the SWAs to potential liability for discrimination and other violations. SWAs also commented that the I-9 requirement was an unfunded mandate that would place a burden on the states. Moreover the Social Security Administration database used for e-verify does not have current information, especially for recently adjusted legal permanent residents, and produces many "no-match letters" in error.

The New Rules for U.S. Worker Recruitment for H-2B Jobs Are Totally Ineffective Because of the Advance Timeline with a Short Window, Removal of Union Notice, and Partial Certification

The new H-2B regulations adopt the previous administrative procedures for U.S. worker recruitment, which were totally ineffective. The main problem with the H-2B program's U.S. recruitment is the 120-day, pre-start-date timeline with its short 10-day recruiting window when the employer must circulate a local job order only in the local area of intended employment and place two local newspaper advertisements. If a U.S. worker does not 1) learn about the H-2B job during those 10-days—plus 5-days—and then 2) commit to starting a job that will begin in 105 days, then the employer may submit a recruitment report to DOL to receive labor certification to acquire an H-2B worker instead. Most U.S. workers, especially poor workers, are unable to commit 105 days in advance to a low-wage, temporary job without free housing, transportation, workers compensation or any of the other benefits of the H-2A program. In fact, doing so would be economically irrational when the worker might find a better permanent position during those 105 days. Most U.S. job seekers want a job soon or immediately, especially low-wage earners. The previous H-2A program solved this problem by requiring employers to actively recruit U.S.

workers from 45 days before the start date until the date of need, and then hire U.S. workers until 50 percent of the contract period had elapsed. The H-2A program also required interstate job orders to be circulated to labor surplus states. The H-2B program includes no such requirements. In addition, the new regulations removed the administrative requirement—and proposal in the NPRM—for employers to notify unions in areas of employment about H-2B positions. See 73 Fed. Reg. 78032-78033.

Ironically, the Department of Homeland Security explicitly acknowledged in its NPRM that the H-2B program's long 120-day timeline deterred *foreign* workers' advance commitment to the jobs. The agency then promulgated a final rule that allowed employers to apply for "unnamed" H-2B workers because many H-2B applicants find other opportunities in their countries, and it is easier for employers to fill the job openings nearer to the job's start date with any foreign worker rather than with specific workers that were named over 100 days in advance.

Another problem with the H-2B program's U.S. recruitment is "partial certification" or "one-to-one" certification. Under the previous H-2B program, an employer was explicitly allowed to unlawfully reject U.S. applicants and the only consequence to its application was an H-2B application denial for each U.S. applicant unlawfully rejected. TEGL 21-06, Change 1, Sec. V.E, June 25, 2007. Thus, an employer could apply for 100 H-2B workers, unlawfully reject 50 U.S. workers, and then receive approval for 50 H-2B workersThis is totally contrary to the statutory mandate to test the domestic labor market because in such a situation, the employer receives foreign certification for the same number of U.S. workers who were ready to work. In an actual H-2A case, the employer applied for 40 H-2A workers, unlawfully rejected 37 U.S. applicants and still received DOL approval for 3 H-2A workers. The practice also encourages employers to over-apply for H-2B workers and then reject all U.S. applicants. The new rules continue the practice of partial certification, though not so explicitly.

H-2B Employers Should be Required to Actually Provide True Full-Time Work.

H-2B workers can be sought only for work that is full time. Full time work is important to attract U.S. workers to the positions. Full time work is also vital to H-2B workers who incur significant costs in getting to the United States to work, and must recoup those costs during the temporary period they are allowed to work here. Prior to the promulgation of the new regulations, DOL's interpretation of the full-time requirement appeared to be 40 hours or more per week. *See* Comments of Mid-Atlantic Solutions LLC, ETA-2008-0002-0071 (noting that some State Workforce Agencies have rejected applications offering fewer than 40 hours of work per week).

The definition of full-time which was published for Notice and Comment was "35 or more hours per week, except where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 35 hours per week, that definition shall have precedence." Proposed 20 CFR § 655.4. The proposed rule also specifically required that an employer establish a need for full-time employees, as part of the showing of temporary need. Proposed 20 CFR § 655.6(a).

The final regulation significantly dilutes the already-weak proposed standard by defining "full time" as 30 hours or more per week (with exceptions). 20 CFR §§ 655.22(h); 655.4. It also no longer includes a requirement that an employer establish a need for full-time employees as part of the showing of temporary need. 20 CFR § 655.6.

In the preamble to the Final Rule, DOL stated that the definition of full-time "should not be construed to establish an actual obligation of the number of hours that must be guaranteed each week" and that "the parameters set forth in the definition of 'full-time' . . . are not a requirement that an employer offer a certain number of hours ..." 73 Fed. Reg. at 78024. This new definition of full-time, coupled with the disclaimer that the employer does not even need to guarantee the 30 hour minimum, is a major, and wholly unexplained, change from the proposed rule and from the existing regulations.

Requiring that H-2B positions only provide 30 hours per week of work, with no ability to even enforce that requirement, will result in even fewer U.S. workers applying for, or staying in, these positions.

DOL's new interpretation of the full-time definition as not establishing a contractual obligation to actually provide a certain number of hours of work per week was not subject to notice and comment, as this interpretation did not appear in the proposed regulation when it was published in the Federal Register. While it is reasonable to provide some leeway for employers in this regard, there should be protections for workers whose employers promise the number of hours DOL has determined to be full-time in order that their applications be approved, but who consistently provide far less work. This is a recurring problem in the crab industry, and has been the subject of federal court litigation for many years. *See, e.g., Hernandez v. Frog Island Seafood,* 2:06-cv-46 (EDNC); *Rubio Gaxiola v. Williams Seafood,* 4:08-cv-134 (EDNC).

Employer-Provided Wage Surveys are Inherently Flawed.

The record before DOL reflected evidence of many reasons to be concerned about existing policies of accepting employer wage surveys to reduce the already low prevailing wage rates established by DOL for most H-2B workers. DOL has repeatedly espoused consistency of prevailing wage determinations as an important objective. *See* DOL General Administrative Letter, No. 2-98. However, if DOL really hopes to achieve any consistency in prevailing wage determinations, then the employer surveys need to be eliminated. Rather than making wage determinations any more consistent, they allow for a wider range of wages than the OES wage surveys and allow employers to set whatever wage is most desirable to them with very little oversight.

a. More Oversight of Employer-Provided Surveys is Necessary to Ensure Accurate Prevailing Wage Determinations.

Originally, employers wishing to substitute their own wage information for the wage provided by DOL had to demonstrate that the DOL survey was inappropriate for the particular job opportunity and show that its own data indicated that the salary being offered by the employer

met the prevailing wage standard. *See Matter of John Lehne & Sons*, 89 –INA- 267, 1992 WL 100030 (1992) (en banc). In addition, employers had to show that their alternative wage source was superior to the SWA's survey. *See Matter of PPX Enterprises, Inc.*, 88 –INA- 25, 1989 WL 250333 (1989) (en banc). In other words, there used to be some minimal scrutiny of employer provided wage data. That minimal burden of persuasion on employers was replaced by strong deference for employer provided wage information through DOL guidance in 1997.[1] The new regulations maintain that deference and fail to strengthen the requirements for employer-provided surveys in any meaningful way.

Common sense dictates that employers who are providing their own wage data are motivated by an incentive to come up with lowest prevailing wage possible, yet the regulations governing these surveys do not encourage any real scrutiny of them, nor do they require employers to persuade the NPC that their wage is superior to the OES wage. Under the regulations, "if an employer provided published survey or an employer-conducted survey complies with all the methodology requirements, it must be used by the SWA in lieu of the OES wage as the prevailing wage for that particular request. It will not be compared to the OES survey in that case . . . the OES survey will be off the table when the employer presents its own survey." [2]

Using employer-provided surveys as a source of prevailing wage determinations is antithetical to DOL's own stated policy. The DOL regulations direct NPCs to determine whether the employment of foreign temporary workers will adversely affect the wages and working conditions of similarly employed U.S. workers. A crucial part of that determination is to consider the prevailing wage for the occupation in the area of intended employment. Employers participating in the H-2B program have no responsibility to ensure that their wage offer does not have an adverse affect on similarly employed U.S. workers. Rather, those employers often have the opposite concern because their objective is to employ foreign workers as opposed to domestic workers. Therefore, DOL violates its own regulations, its stated objective, and Congressional policy by allowing NPCs to defer to the wage information provided by employers with very little scrutiny.

b. The Criteria for Accepting/Rejecting an Employer-Provided Survey are Too Vague.

Under the regulations, the only requirement is that employers provide enough information about the survey methodology to allow the SWA/NPC "to make a determination about the adequacy of the data provided and validity of the statistical methodology."[3] Just how much information is enough to make that determination—or rather, how little information is not enough—is fatally omitted. In a scheme where the agencies are instructed to accept the employer's wage information without comparing it to the OES wage or other wages in that area or industry as long as that employer provides "enough information," the phrase "enough information" is far too vague.

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[1] General Administrative Letter, No, 2-98 (1997).

[2] Labor Certif. Handbook 6:13 (2007) pp.3

[3] Labor Certif. Handbook 6:13 (2007) pp.3

For example, nowhere are employers conducting surveys instructed to include their year round employees if those employees are doing the same kind of work or work that requires the same skill level. There is no provision that if an industry is dominated by H-2B workers that the survey find comparable jobs of U.S. workers and use those wages instead. In addition, the survey results are not required to include a certain percentage of employers in a given industry or a certain number of employers across industries. There is simply no clear way to know whether an employer-provided survey should be deemed unacceptable or not.

Furthermore, the guidance that does exist is confusing. According to current ETA guidance,[4] the job description applicable to wage data submitted by an employer must be adequate to determine that the data represents workers who are similarly employed,[5] but the definition of "similarly employed" is not simply having the same job with a different employer. Rather, according to DOL's regulations, "similarly employed" means having substantially comparable jobs in the occupational category in the area of intended employment; if that does not apply, then having jobs requiring a substantially similar level of skills within the area of intended employment; or, if neither of those apply, then having substantially comparable jobs with employers outside of the area of intended employment.[6] With a definition that complex, it is difficult to comprehend what kind of job description would be sufficient to demonstrate that the employees in the survey are similarly employed. Furthermore, the regulations and ETA guidance clearly contemplate that wage data should be collected across industries, but there is no clear way to ensure that is happening in the survey requirements.

c. Failure to Allow Employees to Challenge Employer-Provided Wage Information Guarantees Skewed Results.

If the employer's wage information is rejected, the employer may challenge that determination, but the workers who will be paid this wage have absolutely no way to challenge the employer-provided wage information. Advocates for low-wage U.S. workers and for H-2B workers also have no administrative avenue to challenge employer-provided surveys.

Even where DOL or DHS notices that an employer is paying the wrong prevailing wage and the case against that employer for revocation and debarment is clear, neither enforcement action would be sufficient to remedy the harm caused by the employer's failure to pay the true prevailing wage. Revocation and debarment would result in the termination of an H-2B visa or the prohibition of access to future H-2B visas. These mechanisms do nothing to make the underpaid H-2B worker whole by raising her wages to the proper level or requiring back pay. These enforcement mechanisms would also be insufficient to repair the adverse impact on domestic wages that has already been caused by the failure to pay the prevailing wage. Once an

[4] Proposed 20 CFR 656.40(g)(2) says that employer-provided wage information must be collected in accordance with ETA guidance.

[5] Employment and Training Administration, Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs (Rev. May 9, 2005)

[6] Defined at current 20 CFR 656.40(b) and proposed 20 CFR 655.10(c)

employer is able to circumvent the domestic labor market and pay H-2B workers less than the prevailing wage, the harm is done, both to the immigrant worker and to the domestic labor force. Failure to fully compensate for that harm will ensure that employers continue to profit from abuse of the system, and will eventually lead to a backsliding in domestic wages and working conditions, in direct violation of the spirit and the letter of the law. Indeed, employers who are sued by workers for underpayment may very well defend themselves on the basis that the wage promises in the labor attestation were approved.

Definition of Job Contractor and Employ

The definition of job contractor (20 CFR § 655.4, 73 Fed. Reg. at 78054) is problematic because it makes labor brokers eligible to apply for H-2B visas as employers. In the new regulations, DOL ignores the obligation to treat job contractors and the joint employer to whom they are providing the workers as each having a responsibility to convince the Secretary of Labor that they have a legitimate temporary need for workers, they have adequately advertised and recruited for the employment vacancy, and that employment of guestworkers will not adversely affect the wages and working conditions of similarly situated U.S. workers. Without recruiting by employers, there is no way to test the employer's statement that the job contractor's workers will not displace the U.S. workers. See 73. Fed. Reg. at 78042. Where the job contractor is supplying workers to existing employers for work at that employer's job site, the fixed site employment opportunity must be disclosed to U.S. workers and such workers must be actively recruited for such employment to adequately test the labor market.

Job contractors are notorious for fraudulently obtaining H-2B visas and mistreating those H-2B guestworkers. The DOL Office of Inspector General has identified labor brokers as a source of potential serious abuse. *See* Office of Inspector General- U.S. Department of Labor, Semiannual Report to Congress, October 1, 2007- March 31, 2008. In order to protect both U.S. workers and H-2B guestworkers, job contractors cannot be permitted to submit guestworker applications independent of the employers with whom they intend to place workers.

> Under the new regulations there is no guarantee that the employer with whom the job contractor places workers has any obligation to abide by the regulatory controls designed to protect U.S. workers wages and working conditions. By adopting a narrow common law definition of employee rather than a broader protective definition such as used by the FLSA, The DOL regulations fail to bind the employer to whom the job contactor supplies workers as a joint employer.

DOL also declined to include a broader definition of "employ" in the final regulations, which would have more adequately operated to protect U.S. workers against job brokers and others claiming to need temporary H-2B workers without regard to the recruitment efforts of the joint employer to whom the workers are assigned.

The practical implication of these changes is that workers who are harmed through violations of the H-2B regulations and/or violations of the FLSA and state wage laws will have greater difficulty proving who is responsible for those violations. If employers cannot be held liable for

the actions of their agents, the job contractors, then there is little incentive for those employers to ensure that the job contractors are following the law. Conversely, if job contractors can wash their hands of the law and regulations once they have placed guestworkers in employment in the U.S., they have no reason to ensure that the employment will not harm or displace U.S. workers. As DOL is well aware, there are many unscrupulous labor brokers who participate in the H-2B program. DOL should do all that is possible to protect both foreign workers who come to the U.S. on H-2B visas and the U.S. workers who accept these temporary low-paying jobs by making it easier for the workers to enforce their rights.

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H-2B and the U.S. Labor Market

BY ROSS EISENBREY

The premise that there are labor shortages in unskilled occupations and that growing numbers of U.S. employers need to import workers from abroad to fill these jobs is not supported by the evidence.

1. Unemployment is on the rise across the United States, and 1.6 million more Americans are unemployed than one year ago. Even if employers had trouble finding workers one year ago or two years ago, the labor market is worse today.

2. Unemployment rates in the occupations involved in the H-2B program, including those accounting for a large majority of admissions to the United States, were never low and almost all are higher today than six years ago.

3. Wages should be increasing in shortage occupations as employers are forced to compete to attract the workers they need. Yet in inflation-adjusted terms, wages are stagnant or lower in six of the seven occupations most involved in the H-2B program.

4. "Extraction occupations" is the exception, thanks to the boom in the mining industry.

5. The so-called prevailing wage that the Department of Labor (DOL) requires employers to offer to U.S. workers and pay to H-2B workers is usually far lower than the average hourly wage paid in the locality. This has the combined effect of discouraging U.S. workers from applying and pushing down the locally prevailing wage. The more employers use H-2B workers, the greater the depressing effect on U.S. wages.

   In 2007, for example, the occupation most often certified was landscape laborer, an unskilled job usually held by people with a high school education or less. About 930,000 people work as landscape laborers across the nation, earning an average hourly wage of about $11.53 an hour. In Nassau and Suffolk county on Long Island, the average wage is higher – $12.91 an hour. Yet in the wealthy resort area of the Hamptons, 47 of 49 companies employing

H2B WAGES TABLE

		2000-01 (in 2007 dollars)		2006-07 (in 2007 dollars)	
Education	*Occupation*	*Unemployment rate*	*Hourly wage*	*Unemployment rate*	*Hourly wage*
All	All	6.9%	$11.31	7.4%	$11.07
	Food prep. related services	7.3	8.80	7.7	8.73
	Lodging related services	9.6	9.97	9.8	9.64
	Construction	6.0	17.66	6.7	17.47
	Motor freight	4.2	15.79	4.3	15.31
	Packing and material handling	8.9	12.17	9.7	11.87
	Extraction occupation	5.8	17.83	4.0	19.51
	Grounds maintenance workers	8.0	11.07	9.4	11.19
HS or less	All	7.6	11.13	8.0	10.87
	Food prep related services	8.1	8.70	8.3	8.54
	Lodging related services	10.2	9.80	10.2	9.29
	Construction	4.9	17.75	8.7	17.47
	Motor freight	4.3	15.58	4.5	15.16
	Packing and material handling	9.7	11.73	10.6	11.35
	Extraction occupation	6.4	17.21	4.3	19.06
	Grounds maintenance workers	8.9	10.81	9.6	10.67

H-2B workers were certified to pay less than $8.50 an hour. Somehow, the U.S. Department of Labor accepted the employers' assertion that the prevailing wage in one of New York's toniest communities was more than $4.00 an hour lower than the wage for that occupation in the surrounding county.

In the Philadelphia metropolitan area, the same thing happened. Even though Bureau of Labor Statistics (BLS) reported the prevailing wage for landscape laborers to be $13.33 an hour in 2007, most of the landscaping companies in and around Philadelphia that applied were certified to hire H-2B workers at $8.46 an hour. In Lancaster, Pa. the average hourly wage for landscapers was $12.05, yet BLS certified several companies for H-2B landscapers at $8.16 an hour.

In Maryland, the most sympathetic user of H-2B guest workers is the crab processing industry, which has convinced politicians it would fail if not for the H-2B program. Yet 12 of 14 crab processors certified for H-2B workers in 2007 were required by U.S. DOL to offer only $5.36 an hour to the U.S. workers they were required to attempt to recruit—less than the state minimum wage. In fact, skilled crab pickers are paid a piece rate and can earn $12.00 or more an hour, yet if companies advertise at wages less than $6 an hour, the chances of recruiting U.S. workers on the Eastern Shore of Maryland are slim.

Even worse, crab pickers who were certified at $8.64 an hour in 2006 were certified for the same restaurant in Frederick, Md. at $6.76 an hour in 2007.

6. Clearly, the wage-setting system is broken. To keep the prevailing wage from being undercut or driven down, DOL should be required to use a higher wage than the average. I recommend the 75th percentile wage for the occupation.

test

NATIONAL WAGE & HOUR CLEARINGHOUSE
Hosted by The National Employment Law Project

Guest, Local Workers Suffer at Employer's Will

Friday, May 09

By: Ross Eisenbrey

Organization: Newsday.com

Newsday.com
Guest, local workers suffer at employers' will
BY ROSS EISENBREY

Ross Eisenbrey is vice president of the Economic Policy Institute in Washington, D.C., which researches the impact of economic trends and policies on working people in the United States and around the

May 9, 2008

Unemployment is rising, hundreds of thousands of families are facing foreclosures on their homes, and wages are flat-lining (especially for workers without college degrees). Yet a noisy group of Long Island businesses claims the nation needs ... more workers willing to accept low wages and less likely to organize or otherwise assert their rights.

The businesses, part of a national coalition with well-connected lobbyists, are badgering Congress to allow more indentured workers into the United States. Not surprisingly, given that low-wage workers have no lobbyists of their own, many members of the U.S. House and Senate - including Rep. Tim Bishop (D-Southampton) - are listening attentively and getting ready to give these low-wage employers just what they want.

These special-interest lobbyists have been all over Capitol Hill demanding that Congress allow tens of thousands of additional "guest workers" into the country as dishwashers, hotel maids, crab pickers, landscape laborers and workers in other low-wage jobs. That would be bad news for the region's and the nation's low-wage workers, whether immigrant or native-born.

Current law permits a maximum of 66,000 foreign nationals to enter this country each year under a special visa program known as H-2B, if employers fail to find qualified U.S. workers. But employers are required to advertise for workers for only three days. If you're skeptical that dishwashers and landscape workers are so hard to find in a sinking economy, you're right. But because the law allows the businesses to advertise so briefly - and four months before the jobs become vacant - more employers each year somehow manage not to find anyone to do the work. That's because the whole process is designed to obscure this simple fact: There isn't a shortage of workers willing to do these jobs. There's a shortage of employers willing to pay a decent wage.

Ten years ago, only 20,000 H-2B visas were issued. In 2007, 130,000 were issued, even though more than 7

million Americans were unemployed and millions more had part-time jobs but wanted full-time work. Why are so many more businesses turning to foreign workers? Because the U.S. government lets them pay poverty-level wages.

Almost all H-2B employers pay less than a living wage, including most of the New York landscape businesses that use these visas. Some of the worst abusers are in the toniest areas. Out of 49 landscape businesses in the Hamptons certified to import "guest workers" last year, all but two paid less than $8.40 an hour. Yet the average wage for landscape laborers statewide was $12.56 in 2006.

Despite the loss of 260,000 jobs in the first four months of this year, more than 150 House members, including Rep. Bishop, have signed on to legislation to lift the 66,000 visa cap and allow all the foreign workers who used H-2B visas in the past three years to enter, in addition to the current 66,000, for a potential total of more than 200,000 visas in all.

But the obvious questions aren't being asked: These businesses managed to succeed until 2003 without needing even 66,000 H-2Bs. So what changed, except that the number of Americans seeking jobs has increased? Why is the cap on visas a crisis now, when it wasn't in 2000, when unemployment was under 4 percent?

And what will happen if the cap remains at 66,000?

The last question is being answered already. Lawn and Landscape magazine reports that employers are (grudgingly) beginning to raise wages to attract more U.S. workers. Nationally, the average landscape worker without a college education earns only $10.67 an hour - less than in 2000, after adjusting for inflation. The unemployment rate among such laborers is above 9 percent - also worse than in 2000. So there's plenty of room to raise wages, and plenty of unemployed U.S. workers to do the work.

The problem isn't limited to landscapers. The Economic Policy Institute examined wages and unemployment in the seven occupations with the most H-2B workers, which include hotel and restaurant workers.

In these occupations, unemployment was higher and had risen faster since 2000 than the national average, while wages were lower and had risen more slowly than the national average.

The obvious answer to Long Island's so-called labor shortage is to offer local workers a decent wage. The answer is not to pay poverty-level wages and look overseas for workers willing to accept them.

Businessmen usually claim to love the magic of the marketplace. Congress should let the labor market work its wonders and get hard-working, low-paid Americans of every background the raises they need and deserve.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Comité de Apoyo a los Trabajadores Agrícolas, et al.,	:	
Plaintiffs	:	
v.	:	Civil No. 09-CV-240
Elaine L. Chao, et al	:	
Defendants	:	

SELECTED EXTRACTS COMPLAINT

* * *

March 2005 Changes in Determination of Wage Rates for H-2B Employment

42. By policies adopted without notice and comment, effective March 2005, Defendants Chao and DOL arbitrarily and capriciously and without providing an opportunity for public notice and comment changed the established procedures for determining wages required to be paid by employer's seeking H-2B workers in a manner that has had, and continues to have, a severe adverse impact on the wages and working conditions of U.S. workers, in violation of the requirements of law and the Secretary of Labor's duties in relationship to the H-2B program.

43. In policy guidances with an effective date of March, 2005, the Defendant DOL changed the methodology for calculating the required prevailing wage rate. This policy guidance superseded prior procedures for determining "prevailing" wage rates and was applied to H-2B workers. See Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised May 9, 2005, available at: http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

44. These changes in methodology resulted in the drastic and continuing reduction in wages required to be paid to H-2B workers in many industries.

45. Among other things, that policy removed the requirement that Davis Bacon Act and/or McNamara-O'Hara Service Contract Act prevailing wage requirements should be applied when possible. Those wage rates were consistently higher than those under the new methodology adopted by DOL and the Secretary of Labor. DOL and the Secretary arbitrarily, capriciously and contrary to law failed to consider the adverse impact on wages of U.S. workers in jobs for which employers sought to utilize H-2B workers.

46. Since March 2005 the "prevailing wage" has been calculated using wage data calculated at local levels using an Occupational Employment Statistics (OES) survey performed by the DOL's Bureau of Labor Statistics (BLS) and the four "skill levels" artificially created by DOL rather than average or median "prevailing" wages. Under the formula used to calculate the skill levels, Level I is the average wage paid to the lowest one-third of workers in an occupation in a local area, or the 16.5th percentile. Level IV is the average wage paid to the remaining two-thirds, or the 66.66th percentile. Levels II and III are derived from the Level I and IV wages. The formula takes the difference between the Level IV wage and the Level I wage and divides that number by three. The Level II wage is determined by taking this result and adding it to the Level I wage. The Level III wage is determined by taking this result and subtracting it from the IV wage. Thus, in this formula, the Level III wage is also equal to the average wage. As a result, Level III and IV wage rates will be the only wages at or above the average wage in a local area. The Level I wage has been the most common wage level offered by H-2B employers and thus H-2B employers have been permitted to pay wage rates lower than those currently received by 84% of workers in the job classification.

47. The result of the prevailing wage determination policy implemented for H-2B applications submitted for federal FY06 and thereafter has been that the approved "prevailing wage" for an employer seeking H-2B workers is usually far lower than the average hourly wage paid in the locality for that kind of work. See, Ross Eisenbrey Exhibits E, F, and G annexed to comment ETA-2008-0002-0088 (submitted July 7, 2008).

48. This problem is exemplified by the landscaping industry. In 2007, landscape laborer was the job category most often certified for H-2B employment. Despite this, the prevailing wage for 47 of 49 companies employing H-2B landscape laborers in two counties in New York was more than four dollars less per hour than the average hourly rate for landscaping workers in those counties. See Ross Eisenbrey, H-2B and the U.S. Labor Market, Economic Policy Institute (June 24, 2008, attached as Exhibit F to ETA-2008-0002-0088).

49. In an unpublished analysis of prevailing wage rates for 98 occupations in nine states and 27 different cities of employment, chosen randomly, all but three determinations set the prevailing wage rate below both the median hourly wage and the mean hourly wage prevailing in the area, sometimes by as much as 50%. See Exhibit G attached to ETA-2008-0002-0088, Ross Eisenbrey Unpublished Research Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage.

50. This policy change was arbitrary and capricious and contrary to law in that it was inconsistent with the requirements of 8 U.S.C. §1182, which requires that "[a]ny alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that . . .there are not sufficient workers who are able willing, qualified. . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and . . .the employment of such alien will not adversely affect the wages and working conditions in the United States similarly employed." 8 U.S.C. §1182(5)(A).

51. The policy change is also inconsistent with the regulations (initially of the Department of Justice and subsequently of the Department of Homeland Security) which impose upon employers the obligation to prove that H-2B workers are not displacing U.S. workers and

that H-2B workers are not "adversely affecting the wages and working conditions of United States workers." 8 CFR 214.2(h)(6). Those regulations at 8 CFR 214.2(h)(6) require the Secretary of Labor to issue a certification "...stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers." 8 CFR 214.2(h)(6)(iv)(A)(1).

52. The policy change is also in conflict with the long established requirements of 20 CFR 655.0(a), which mandate:

> (1) . . . procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (i) Whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (ii) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required to carry out the policies of the Immigration and Nationality Act (INA), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.
>
> (2) The Secretary's determinations. Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. Florida Sugar Cane League, Inc. v. Usery, 531 F. 2d 299 (5th Cir. 1976).

53. The March 2005 policy change has resulted in devastating wage reductions for H-2B workers in a manner contrary to law. In addition, contrary to law, U.S. workers in industries employing H-2B workers have been adversely affected by these wage reductions.

DOL 2008 Regulatory Action

54. DOL issued a Notice of Proposed Rulemaking ("NPRM"), publishing proposed rules on the Labor Certification Process and Enforcement for Temporary Employment in Occupations Other than Agriculture or Registered Nursing in the United States (H-2B Workers) and Other Technical Changes on May 22, 2008, with a Notice and Comment period ending July 7, 2008.

* * *

Wages

66. Federal law requires the Secretary of Labor to establish effective procedures to "determine and certify" that the employment of H-2B workers foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.

67. The Secretary of Labor's changes in policies for determination of H-2B prevailing wages beginning in March 2005 had a particularly devastating impact on the wages and working conditions of U.S. workers beginning with applications for federal FY06 and FY07 because the H-2B program was temporarily expanded beginning in May 2005 through the creation of a "returning worker" exemption to the general statutory cap on the number of H-2B workers permitted to enter the country annually.

68. As the H-2B program has expanded its role in certain industries such as landscaping and into an increasing breadth of job classifications, the adverse impact of the DOL's establishment of lower required wage rates for H-2B employment has had an adverse economic impact on the wages and working conditions of U.S. workers, in violation of the Secretary of Labor's duties under the H-2B program.

69. Although the 2008 DOL NPRM offered the public its first opportunity to comment on the procedures to be utilized by DOL for determination of "prevailing wages," DOL and the Secretary of Labor arbitrarily and contrary to law continued in the final rule to use procedures for determination of "prevailing wages" which have a severe adverse impact on the wages of U.S. workers.

70. Despite the continuing failure of the Secretary of Labor to promulgate regulations for the H-2B program to establish a system for determining wage rates which will not adversely affect the wages and working conditions of U.S. workers, DOL arbitrarily and contrary to law rejected without good cause comments in response to its May 2008 NPRM addressing the failure of the existing prevailing wage rate policies to meet the statutory duties of the Secretary of Labor. See, for example, ETA-2008-0002-0022 at pp. 9-11 and Attachments E and F; ETA-2008-0002-0088 at pp. 31-337 and annexed Ross Eisenbrey Exhibits E, F, and G annexed to comment ETA-2008-0002-0088.

71. In its preamble to the December 19, 2008 promulgation of H-2B rules DOL acknowledged:

> Some commenters raised concerns about the integrity of the data currently being used for prevailing wage determinations and recommended changes to the OES survey itself. Others commented on different aspects of the methodology and procedures. One commenter suggested that the Department set the minimum wage rate for H-2B workers at or above the wage (presumably the adverse effect wage rate) for H-2A workers in that State. Another commenter suggested the Department require employers in the construction industry to use, first, the Davis-Bacon Act (DBA) survey wage rate; second, if no DBA wage existed, the collective bargaining agreement rate; and as a last resort, the OES rate, if neither of the other rates was available. Another commenter suggested that the provision regarding when an employer may utilize a wage determination under the Davis-Bacon Act also cover when an employer can choose not to utilize that wage rate. One commenter believed that the proposal did not correct what

they claimed was a problem with the Department's Bureau of Labor Statistics (BLS) wage rates being 2 years out of date and also expressed concerns that piece rate policies have led to depressed wages and suggested that the Department should require advance written disclosure of piece rates on the job orders.

The Department appreciates these suggestions and concerns. However, the Department did not propose changes to the sources of data to be used for prevailing wage determinations and, therefore, these comments are beyond the scope of the current rulemaking. The Department notes that the proposed procedures that were retained in the Final Rule already cover the use of wages specified in a collective bargaining agreement. Similarly, these procedures provide that an employer may use the Davis-Bacon wage and that such use is at the employer's option unless the employer is a Federal construction contractor. There is a similar provision that applies to Service Contract Act wage rates.

Some commenters suggested that employers should not be allowed to submit their own wage surveys. The Department, however, believes that employers should continue to have the flexibility to submit pertinent wage information and therefore, the Final Rule continues the Department's policy of permitting employers to provide an independent wage survey under certain guidelines. It also continues to provide for an appeal process in the event of a dispute over the applicable prevailing wage.

73 Fed. Reg. at 78031.

72. In the face of the overwhelming evidence that the March 2005 changes to the DOL prevailing wage rate system for H-2B workers had failed to meet the statutory duty of the Secretary of Labor to prevent adverse impact on wages and working conditions of U.S. workers, the arbitrary refusal of DOL to reconsider its system for determination of prevailing wages was arbitrary and capricious and contrary to law.

73. The record before DOL reflected evidence of considerable reasons to be concerned about existing policies of accepting employer wage surveys to reduce the already low prevailing wage rates established by DOL for most H-2B workers. DOL arbitrarily and capriciously and without justification permitted employer surveys to be used for determining required prevailing wage rates without establishing procedures to safeguard against an adverse impact on the wages of U.S. workers.

Elimination of Role of State Workforce Agencies

74. During 2005, DOL and the Secretary of Labor, by administrative orders issued without an opportunity for public comment, dismantled the established structure for ETA Regional offices to review H-2B applications for their regions in consultation with the State Workforce Agencies (SWAs) within their region. The interaction of Regional Staff with local SWA staff over a period of years had created a shared level of expertise in reviewing employer applications for H-2B workers.

75. Comments submitted to DOL during the 2008 NPRM noted the effectiveness of the Philadelphia Regional Office in reviewing the wage and working conditions terms of applications for H-2B workers with that Region. ETA-2008-0002-0022 at p. 8. Those offices in

conjunction with the SWAs also were able to evaluate what local publications might most effectively disseminate information about job opportunities, including whether Spanish language media should be required to be utilized for certain jobs. By mid-2005, those offices and their local expertise had been eliminated. The 2005 decision by the Secretary of Labor to eliminate those Regional offices role in the H-2B was arbitrary and capricious.

76. Under the existing regulations, SWAs are responsible for processing employer's application and job offer, which includes ensuring that the offered wage equals or exceeds the prevailing wage, that the applicant's need falls into one of the four categories for temporary need, supervising U.S. worker recruitment, and forwarding the completed applications to ETA for a final determination. In the new rule, DOL has eliminated the role of SWAs in accepting and reviewing H-2B labor certification applications. 73 Fed. Reg. 78034.

77. Data in the record before DOL established that the level of SWA activity in relationship to the H-2B program. See, ETA-2008-0002-0022, Attachment D. For example, the date for the Pennsylvania SWA reflected the following for federal FY07:

WORK AREA	Total Wrks Requested	Total Workers Denied	% Workers Denied	FY07 Workers Certified	Number H-2b Cases	Nmbr Cases Certified	% Cases Certified	Cases Denied	Cases Partial Certified	Cases Remand to SWA
PENNSYLVANIA	10,210	1,337	13.1%	8,873	650	549	84.5%	75	18	8

Other SWAs that processed applications for more than 10,000 H-2B workers during FY07 included the following:

WORK AREA	Total Wrks Requested	Total Workers Denied	% Workers Denied	FY07 Workers Certified	Number H-2b Cases	Nmbr Cases Certified	% Cases Certified	Cases Denied	Cases Partial Certified	Cases Remand to SWA
TEXAS	53,831	18,744	34.8%	35,087	1,598	1,103	69.0%	437	57	1
LOUISIANA	39,372	21,046	53.5%	18,326	673	380	56.5%	261	30	2
FLORIDA	31,893	8,307	26.0%	23,586	1,333	953	71.5%	323	49	8
COLORADO	19,584	3,951	20.2%	15,633	803	608	75.7%	173	20	2
ALABAMA	12,399	6,563	52.9%	5,836	152	60	39.5%	78	14	
MARYLAND	12,339	2,717	22.0%	9,622	429	293	68.3%	115	19	2
MISSISSIPPI	12,225	3,432	28.1%	8,793	143	83	58.0%	40	20	
VIRGINIA	11,889	1,789	15.0%	10,100	514	367	71.4%	112	34	1
MISSOURI	10,308	2,034	19.7%	8,274	336	265	78.9%	48	23	
ARKANSAS	10,116	2,669	26.4%	7,447	114	66	57.9%	26	18	4

See: ETA-2008-0002-0022, Attachment D.

78. The record before DOL reflects that numerous SWAs and other respondents to the NPRM submitted statements to DOL in opposition to the elimination of the role of the SWAs in reviewing H-2B applications submitted by employers. A preliminary review of the record before DOL in the NPRM indicates comments in opposition to the elimination of the role of SWAs as proposed by DOL were submitted by the following commentators:

Document ID	Commenter
ETA-2008-0002-0009	private citizen - BADGER, KEITH
ETA-2008-0002-0014	Committee on Education and Labor - Miller, George Chair
ETA-2008-0002-0018	Law Office of Michelle Skole retired from NJ Alien Certification - Skole, Michelle
ETA-2008-0002-0019	State of Oregon Employment Department - Johnson, Andrew
ETA-2008-0002-0024	Mount Washington Resort - Gruenfelder, Claire
ETA-2008-0002-0028	Ohio Vicinity Regional Council of Carpenters - Galea, Mark
ETA-2008-0002-0029	Arizona Department of Economic Security - Ufford, C.
ETA-2008-0002-0030	Outdoor Amusement Business Association - Johnson, Robert
ETA-2008-0002-0035	Virginia Employment Commission - Esser, Dolores
ETA-2008-0002-0037	Federation of Employers and Workers of America (FEWA) - Evans, Scott
ETA-2008-0002-0038	Vermont Department of Labor - Seckler, Cynthia
ETA-2008-0002-0039	PA Department of Labor and Industry - Mead, Andrea
ETA-2008-0002-0041	President/Save Small Business - Lavery, Hank (representative form letter, 41)
ETA-2008-0002-0045	American Federation of State, County & Municipal Employees, (AFSCME) - Korpi, Kerry
ETA-2008-0002-0046	Maine Department of Labor - Fortman, Laura A.
ETA-2008-0002-0047	Sharp's Landscaping, Inc. - Sanborn, Tina
ETA-2008-0002-0048	American Hotel & Lodging Association - McBurney, Shawn
ETA-2008-0002-0049	Emory University - Eiesland, Terry
ETA-2008-0002-0050	H-2B Workforce Coalition - McBurney, Shawn
ETA-2008-0002-0052	International Union of Bricklayers & Allied Craftworkers - Flynn, John
ETA-2008-0002-0053	University of Wisconsin-Madison - Ahlstedt, Deborah
ETA-2008-0002-0055	Building and Construction Trades Department, AFL-CIO - Ayers, Mark
ETA-2008-0002-0058	Massachusetts Executive Office of Labor and Workforce Development - James, Jennifer
ETA-2008-0002-0062	Olathe Corn Company, LLC - Fishering, Nancy
ETA-2008-0002-0063	Maryland Department of Labor, Licensing and Regulation - Perez, Thomas
ETA-2008-0002-0067	U.S. Senate - Kennedy, Sen. Edward M.
ETA-2008-0002-0068	private individual - Lang, Erik
ETA-2008-0002-0069	California State Government Agency - Marquez, Jose Luis
ETA-2008-0002-0073	Alliance of Forest Workers and Harvesters - Smith, Denise
ETA-2008-0002-0075	National Employment Law Project - Smith, Rebecca
ETA-2008-0002-0076	Oversight and Government Reform - Domestic Policy, Subcommittee
ETA-2008-0002-0077	Beaver Run Resort and Conference Center - Brennan, Stephanie
ETA-2008-0002-0078	State of Nevada, Department of Employment training and Rehabilitation - Jones, Cynthia
ETA-2008-0002-0083	The Law Office of Robert Kershaw, P.C. - Kershaw, Robert
ETA-2008-0002-0084	Amigos Labor Solutions - Wingfield, Bob
ETA-2008-0002-0088	Low Wage Worker Legal Network and Other Co-Signers
ETA-2008-0002-0090	Texas Workforce Commission
ETA-2008-0002-0091	Laborers' International Union of North America

79. DOL's final rule arbitrarily assumes that the only function which SWAs perform apart from referral of workers in response to local job orders is the ministerial calculation of required prevailing wage rates. The record before DOL reflected that SWAs have a broader role in the review of applications of applications submitted by prospective H-2B employers. In the

absence of effective DOL Regional office review of terms and conditions of employment apart from the calculation of wage rates, the SWAs have been forced to assume that role by default.

80. DOL's justification for eliminating SWAs from the H-2B application process is arbitrary, capricious, and contrary to law in that it elevates its "commit[ment] to modernizing the application process" over the statutory mandate that it protect the wages and working conditions of U.S. workers. 73 Fed. Reg. 78034.

81. DOL relied on past complaints that it has allegedly received from employers that the existing system is "complicated, time-consuming, inefficient, and dependent upon the expenditures of considerable resources by employers," 73 Fed. Reg. 78022, and arbitrarily ignored arguments by the commenters that eliminating the SWAs from the application and certification process "would result in the loss of local labor market and prevailing practice expertise in the review process. . . would increase the potential for fraud," and that "the knowledge and expertise of local staff in reviewing and processing applications was essential to the integrity of the H-2B certification process." 73 Fed. Reg. 78034. See also: ETA-2008-0002-0022 at pp 1-5 and Attachments A and B thereto (as to the scope of denial of H-2B employer applications); ETA-2008-0002-0088 at pp. 16-21.

82. DOL asserts that the elimination of SWAs is necessary because, "[t]he increasing workload of the Department and SWAs poses a growing challenge to the efficient and timely processing of applications," 73 Fed. Reg. 78022, but they provide no authority for this assertion. To the contrary, many of the SWAs that commented expressed their desire to continue processing and reviewing H-2B applications. See, e.g., ETA-2008-0002-0039 (Pennsylvania), ETA-0002-0040 (North Carolina), ETA-002-0063 (Maryland), ETA-0002-0078 (Nevada), ETA-0002-0090 (Texas), ETA-2008-0002-0019 (Oregon), ETA-2008-0002-0025 (Washington), ETA-2008-0002-0029 (Arizona), ETA-2008-0002-0038 (Vermont), and ETA-2008-0002-0046 (Maine). DOL's assumption that this change will help SWAs, despite the fact that all of the SWAs that commented on this issue were opposed to the change, is arbitrary and capricious.

Definition of Full-time

83. Under the prior regulations, employers have a dual obligation to prove that H-2B workers are not displacing U.S. workers and that H-2B workers are not "adversely affecting the wages and working conditions of United States workers." 8 CFR 214.2(h)(6). The Secretary of Labor must certify that these two requirements have been met. 8 CFR 214.2(h)(6)(iv)(1).

84. Since at least 1994, DOL has directed State Workforce Agencies not to accept, and DOL would not certify, Clearance Orders that do not provide for full-time employment. See General Administration Letter I-95 (November 10, 1994); Training and Employment Guidance Letter 21-06 (April 4, 2007); Training and Employment Guidance Letter 21-06, Change 1 (June 25, 2007).

85. In the preamble of its Notice of Proposed Rulemaking, DOL acknowledged that it has "always required that the positions offered be . . . full-time in nature." 73 Fed. Reg. at 29951 (emphasis added).

86. The definition of full-time which was published for Notice and Comment was "35 or more hours per week, except where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 35 hours per

week, that definition shall have precedence." Proposed 20 CFR 655.4. The proposed rule also specifically required that an employer establish a need for full-time employees, as part of the showing of temporary need. Proposed 20 CFR 655.6(a).

87. As the commentators on the proposed rule made clear, this proposal, which effectively shortened the length of time that DOL would consider full-time, would have adversely affected U.S. workers by making it substantially less likely that U.S. workers, who need full time employment, could compete for the jobs. At the same time, the proposal would allow employers access to foreign workers to fill less-than-full-time-jobs because the lower costs and standards of living in foreign countries make it easier for foreign workers to accept part-time jobs. See Comments of Low Wage Worker Legal Network, ETA-2008-0002-0088 (p. 27); former National Monitor Advocate Erik Lang, ETA-2008-0002-0068; Alliance of Forest Workers and Harvesters, ETA-2008-0002-0073; National Employment Law Project, ETA-2008-0002-0075 .

88. The Final Rule changes the proposed definition of full-time employment from 35 or more hours per week (with exceptions) to 30 hours or more per week (with exceptions). 20 CFR 655.22(h); 655.4. It no longer includes a requirement that an employer establish a need for full-time employees as part of the showing of temporary need. 20 CFR 655.6.

89. In the preamble to the Final Rule, DOL states that the definition of full-time "should not be construed to establish an actual obligation of the number of hours that must be guaranteed each week" and that "the parameters set forth in the definition of 'full-time' . . . are not a requirement that an employer offer a certain number of hours ..." 73 Fed. Reg. at 78024.

90. This new definition of full-time, coupled with the disclaimer that the employer does not even need to guarantee the 30 hour minimum, is a major, and wholly unexplained, change from the proposed rule and from the existing regulations

91. DOL has provided no empirical data, and no such data was submitted to DOL, to support its assertion that its new definition of full-time employment "reflects [its] experience in the administration of this program." 73 Fed. Reg. at 78038.

92. The definition of full-time as 30 hours per week is arbitrary, capricious and contrary to law in that it will materially adversely affect U.S. workers.

93. DOL's interpretation of the definition is also a major change from the existing interpretation, and represents a new policy. See Comments of Mid-Atlantic Solutions LLC, ETA-2008-0002-0071 (noting that some State Workforce Agencies have rejected applications offering fewer than 40 hours of work per week).

94. DOL's new interpretation of the full-time definition as not establishing a contractual obligation to actually provide a certain number of hours of work per week was not subject to notice and comment, as this interpretation did not appear in the proposed regulation when it was published in the Federal Register. See Notice of Proposed Rulemaking.

95. DOL has offered no basis for its interpretation of the full-time requirement as not establishing a contractual obligation.

RECRUITMENT OF U.S. WORKERS

96. The Secretary of Labor is required by law to establish effective procedures to "determine and certify" that there are not sufficient workers who are able, willing, qualified and

available to perform labor for which foreign temporary non-agricultural H-2B workers are requested.

Historical Regulatory Requirements for H-2A Temporary Agricultural Employers

97. On December 18, 2008, the Secretary of Labor promulgated drastically revised regulations for the H-2A program which would strip the program of many of its important provisions. Those changes are being challenged in United Farm Workers, et al. v. Chao, United States District Court, District of Columbia, Case No. 1:09-cv-00062-RMU.

98. Prior to the December 18, 2008 changes to the H-2A program, the H-2A agricultural worker regulations required recruitment of U.S. workers for agricultural labor and to protect such U.S. workers from adverse impact have included requirements that:

(a) employers must recruit U.S. workers through both the interstate job clearance order process and through "positive recruitment," which is the active recruitment by the employer in areas of potential labor supply and in the area where the employer's establishment is located;

(b) U.S. workers who apply for work with an H-2A employer in the first half of the H-2A contract period must be hired if they are qualified and accept the DOL-approved job terms (this is the so-called "50 percent" rule);

(c) employers may not fire or refuse to hire a U.S. worker for other than a lawful job-related reason and may not discriminate against U.S. workers by providing wages or benefits to H-2A workers that the employer does not provide also to the U.S. workers;

(d) employers must abide by the terms of the job offer they have submitted and that have been approved by DOL, which become an enforceable work contract between the employer and the workers;

(e) employers must pay workers the highest of one of three DOL-mandated wages including an "adverse effect" wage rate;

(f) employers must provide workers with an opportunity to work at least three-fourths of the workdays in the season or must reimburse the workers (absent an Act of God) (this is the so-called "3/4 guarantee");

(g) employers must provide free housing that meets substantive health and safety standards to H-2A workers and migrating U.S. workers;

(h) employers must reimburse inbound transportation costs for workers who work at least one-half of the season and provide return transportation costs for workers who work the entire season; and

(i) H-2A program employers may not discriminate against U.S. workers in hiring or job terms.

(j) Employers must comply with all federal, state and local laws including the Fair Labor Standards Act.

99. Under the previously established regulations for H-2A employers, recruitment efforts for U.S. workers are required to be "no less than (1) the recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers." 20 CFR 655.105(a).

100. Each employer who intends to hire H-2A workers have been required to prepare a written "positive recruitment plan" that provides both "a description of recruitment efforts (if any) made prior to the actual submittal of the application," and a description of how "the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment." Id. §655.102(d). Those regulations required employers to take whatever specific actions are prescribed by the OFLC Administrator and to cooperate with the Employment Services ("ES") System in actively recruiting U.S. workers. Id. §655.103(d). The ES System comprises federal and state entities responsible for administration of the H-2A program, including SWAs, the DOL's Employment and Training Administration, which includes two National Processing Centers ("NPCs") and the DOL's Office of Foreign Labor Certification ("OFLC"). Id. §655.100.

101. In addition to the requirements of the individualized recruitment plans, all H-2A employers have been required to:

a. Assist the ES in preparing job orders for posting locally and in the interstate system, Id. §655.103(d)(1);

b. Place advertisements (in a language other than English, where the OFLC Administrator deemed appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the OFLC Administrator, Id. §655.103(d)(2);

c. Contact labor contractors, migrant workers, and other potential workers in other areas by letter and/or telephone, Id. §655.103(d)(3); and

d. Contact schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers, Id. §655.103(d)(4).

102. The OFLC Administrator, in evaluating H-2A applications and determining whether a labor shortage exists, will "ascertain the normal recruitment practices of non-H-2A agricultural employers in the area and the kind of recruitment efforts which the potential H-2A worker made to obtain H-2A workers" in order to ensure that the effort to recruit non-H-2A employees reflects an equal or greater effort. Id. §655.105(a). The OFLC is also directed to "provide overall direction to the employer and the SWA with respect to the recruitment of U.S. workers." Id. §655.105(b).

103. Each employer who intends to hire H-2A workers must prepare a written "positive recruitment plan" that provides both "a description of recruitment efforts (if any) made prior to the actual submittal of the application," and a description of how "the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment." Id. §655.102(d). The plan must also describe how the employer will utilize farm labor contractors where it is the prevailing practice to do so. See Id. The prior regulations require employers to take whatever specific actions are prescribed by the OFLC Administrator and to cooperate with the Employment Services ("ES") System in actively recruiting U.S. workers. Id. §655.103(d). The ES System comprises federal and state entities

responsible for administration of the H-2A program, including SWAs, the DOL's Employment and Training Administration, which includes two National Processing Centers ("NPCs") and the DOL's Office of Foreign Labor Certification ("OFLC"). Id. §655.100.

104. In addition to the requirements of the individualized recruitment plans, all employers are also required to:

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b. Place advertisements (in a language other than English, where the OFLC Administrator deemed appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the OFLC Administrator, Id. §655.103(d)(2);

c. Contact farm labor contractors, migrant workers, and other potential workers in other areas by letter and/or telephone, Id. §655.103(d)(3); and

d. Contact schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers, Id. §655.103(d)(4).

105. The OFLC Administrator, in evaluating H-2A applications and determining whether a labor shortage exists, will "ascertain the normal recruitment practices of non-H-2A agricultural employers in the area and the kind of recruitment efforts which the potential H-2A worker made to obtain H-2A workers" in order to ensure that the effort to recruit non-H-2A employees reflects an equal or greater effort. Id. §655.105(a). The OFLC is also directed to "provide overall direction to the employer and the SWA with respect to the recruitment of U.S. workers." Id. §655.105(b).

Requirements for Recruitment of U.S. Workers for H-2B Positions

106. The May 2008 NPRM was the first occasion since the inception of the H-2B program in 1986 in which DOL and the Secretary of Labor sought input through notice and comment on the appropriateness of measures to be required from employers for the recruitment of H-2B temporary workers.

107. The existing procedures for recruitment of U.S. workers for the H-2B program have never paralleled procedures for recruitment of H-2A workers and the limited extent of recruitment requirements under the existing H-2B procedures have not been adequate to meet the responsibilities of the Secretary of Labor pursuant to 8 U.S.C. §1182(a)(5)(A)(i).

108. DOL's December 19, 2008 provisions for recruitment of H-2B workers do nothing to overcome the historical failure of the Secretary of Labor to have met requirements of law for insuring that U.S. workers have access to job opportunities with H-2B employers. The new regulations provide as to recruitment as follows:

Sec. 655.15 Required pre-filing recruitment.

* * *

(d) Recruitment Steps. An employer filing an application must:

(1) Obtain a prevailing wage determination from the NPC in accordance with procedures in Sec. 655.10;

(2) Submit a job order to the SWA serving the area of intended employment;

(3) Publish two print advertisements (one of which must be on a Sunday, except as provided in paragraph (f)(4) of this section); and

(4) Where the employer is a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application, the employer must formally contact the local union that is party to the collective bargaining agreement as a recruitment source for able, willing, qualified, and available U.S. workers.

(e) Job Order.

(1) The employer must place an active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer's date of need for H-2B workers, identifying it as a job order to be placed in connection with a future application for H-2B workers. Unless otherwise directed by the CO, the SWA must keep the job order open for a period of not less than 10 calendar days. Documentation of this step shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting. If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State, the employer shall place a job order with the SWA having jurisdiction over the place where the work has been identified to begin. Upon placing a job order, the SWA receiving the job order under this paragraph shall promptly transmit, on behalf of the employer, a copy of the active job order to all States listed in the application as anticipated worksites.

(2) The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in Sec. 655.17.

(f) Newspaper Advertisements.

(1) During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, the employer must publish an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday advertisement (except as provided in paragraph (f)(2) of this section), in a newspaper of general circulation serving the area of intended employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity. Both newspaper advertisements must be published only after the job order is placed for active recruitment by the SWA.

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer must, in place of a Sunday edition advertisement, advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

(3) The newspaper advertisements must satisfy the requirements contained in Sec. 655.17. The employer must maintain copies of newspaper pages (with date of publication and full copy of advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper.

(4) If a professional, trade or ethnic publication is more appropriate for the occupation and the workers likely to apply for the job opportunity than a general circulation newspaper, and is the most likely source to bring responses from able, willing, qualified, and available U.S. workers, then the employer may use a professional, trade or ethnic publication in place of one of the newspaper advertisements, but may not replace the Sunday advertisement (or the substitute permitted by paragraph (f)(2) of this section).

(g) Labor Organizations. During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, an employer that is already a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application must formally contact by U.S. Mail or other effective means the local union that is party to the collective bargaining agreement. An employer governed by this paragraph must maintain dated logs demonstrating that such organizations were contacted and notified of the position openings and whether they referred qualified U.S. worker(s), including number of referrals, or were non-responsive to the employer's request.

(h) Layoff. If there has been a layoff of U.S. workers by the applicant employer in the occupation in the area of intended employment within 120 days of the first date on which an H-2B worker is needed as indicated on the submitted Application for Temporary Employment Certification, the employer must document it has notified or will notify each laid-off worker of the job opportunity involved in the application and has considered or will consider each laid-off worker who expresses interest in the opportunity, and the result of the notification and consideration.

(i) Referral of U.S. workers. SWAs may only refer for employment individuals for whom they have verified identity and employment authorization through the process for employment verification of all workers that is established by INA sec. 274A(b). SWAs must provide documentation certifying the employment verification that satisfies the standards of INA sec. 274A(a)(5) and its implementing regulations at 8 CFR 274a.6.

(j) Recruitment Report.

(1) No fewer than 2 calendar days after the last date on which the job order was posted and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign, and date a written recruitment report. The employer may not submit the H-2B application until the recruitment report is completed. The recruitment report must be submitted to the NPC with the application. The employer must retain a copy of the recruitment report for a period of 3 years.

(2) The recruitment report must:

(i) Identify each recruitment source by name;

(ii) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers;

(iii) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position.

(3) The employer must retain resumes (if available) of, and evidence of contact with (which may be in the form of an attestation), each U.S. worker who applied or was referred to the job opportunity. Such resumes and evidence of contact must be retained along with the recruitment report for a period of no less than 3 years, and must be provided in response to an RFI or in the event of an audit or an investigation.

73 Fed. Reg. at 78057-78058

109. In its December 19, 2008 preamble to the adoption of the proposed regulations, DOL acknowledged that it had received comments opposing its proposed system for recruitment of U.S. workers by prospective H-2B employers. DOL acknowledged:

The Department received a number of comments about the proposed timeframe for pre-filing recruitment; some opposing recruitment so far in advance of the date of need and others suggesting the timeframe be lengthened. The commenters who were opposed to the proposal generally believed that U.S. workers would not be able or willing to commit to temporary jobs so far ahead of the actual start date or would indicate they would accept the jobs but then fail to report on the actual start date. These commenters believed this would result in delays, additional costs to employers and the Department, and the late arrival of H-2B workers because new applications would have to be filed. One commenter opposed the early pre-filing recruitment and believed the result would be a false indication that no U.S. workers were available. Another commenter opined that employer compliance would be reduced due to the pre-filing recruitment. One SWA recommended that the period for recruitment be shortened because 120 days in advance is not suitable when serious job seekers are looking for temporary employment and stating their view that those U.S. workers who apply are rarely offered employment because the employer knows foreign workers are available. The commenter was further concerned that the U.S. workers who are hired that far in advance of the date of need are not reliable and will not report for work.

73 Fed. Reg. at 78031-78032

110. DOL arbitrarily failed without good cause to discuss or examine proposals for more effective recruitment of H-2B workers, including proposals that it:

Require More Extensive Recruitment. In the H-2A program, employers are required to engage in the kinds of affirmative strategies that would be expected actually to locate and attract employees to the work. H-2B employers need only run three newspaper ads and list the job with the local SWA for ten days, many weeks before the job will actually become available.

Require Recruitment in Areas of Labor Surplus. With U.S. unemployment rates rising in many parts of the country, efforts should be made to connect U.S. workers with job opportunities through interstate recruitment. This has been a staple of the H-2A program for many years.

Require Employers to Provide Free Housing and Reimbursement of Transportation Expenses. Again, this is a requirement in agriculture.

Adoption of the "50 % Rule." The Department has found that requiring employers to hire qualified U.S. workers who become available at any time up to 50% of the period of the job opportunity helps to locate available U.S. workers, and serves as an incentive to avoid over-recruitment of foreign workers and wrongful rejection of U.S. workers.

See, ETA-2008-0002-0088 at pages 27-32, and 64.

Impact of Requirements for SWAs to Complete I-9 Before Referral of Workers

111. DOL acknowledged considerable criticism by State Workforce Agencies (SWAs) of the new regulatory provision requiring that SWA staff would have to complete I-9 verifications of the employment status of U.S. workers before referring such workers to jobs with employers seeking H-2B workers. See 73 Fed. Reg. at 78033. DOL also failed to acknowledge statements of Congressional opposition to this proposal. ETA-2008-0002-0067. Opposition to this rule included comments from the following states:

Document ID	Commenter
ETA-2008-0002-0029	Arizona
ETA-2008-0002-0069	California
ETA-2008-0002-0046	Maine
ETA-2008-0002-0063	Maryland
ETA-2008-0002-0058	Massachusetts
ETA-2008-0002-0078	Nevada
ETA-2008-0002-0040	North Carolina
ETA-2008-0002-0019	Oregon
ETA-2008-0002-0039	Pennsylvania
ETA-2008-0002-0090	Texas
ETA-2008-0002-0035	Virginia
ETA-2008-0002-0025	Washington

112. At least some of the SWAs comments raise issues as to the legality of requiring SWAs to complete I-9's before referral of prospective U.S. workers to positions for which employers seek to bring I-9's. These included the potential that SWAs could be liable for discrimination in the application of such requirements only to certain referrals as well as the impact of other laws on such requirements. Amongst the states raising concerns about the legal appropriateness of requiring them to complete I-9's or e-verify employment was the Pennsylvania Department of Labor and Industry.

113. DOL arbitrarily failed to consider the adverse impact of such a rule on U.S. workers seeking employment and the Secretary of Labor's obligation to establish effective procedures to "determine and certify" that there are not sufficient workers who are able, willing,

qualified and available to perform labor for which foreign temporary non-agricultural H-2B workers are requested.

114. Instead of requiring employers to widely disseminate information about potential H-2B jobs, DOL arbitrarily, capriciously, and contrary to law removed a requirement which had been in the NPRM for employers to notify unions in areas of employment about H-2B positions. See 73 Fed. Reg. 78032-78033.

115. The final regulations arbitrarily, capriciously, and contrary to law fail to require employers seeking to utilize H-2B workers to actively recruit able, willing and qualified workers to jobs for which foreign temporary non-agricultural H-2B workers are requested.

Attestation Provisions

116. In the new regulations, DOL replaces the existing pre-hiring certification process required by regulation with a process based entirely on attestation. In so doing, DOL has transformed the process from one requiring meaningful review and approval by DOL to a post hoc system that dramatically weakens DOL oversight of the H-2A program. Fed Reg. 78060 and 780540 (to be codified at 20 C.F.R. §655.22 and 20 C.F.R. 655.24) This proposed transformation is arbitrary and capricious.

117. An attestation system does not comply with the DOL's statutory and regulatory mandate that it certify compliance with H-2B requirements. Congress has stated that labor certification is required for workers entering the U.S. to perform unskilled labor. "Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that . . .there are not sufficient workers who are able willing, qualified. . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and . . .the employment of such alien will not adversely affect the wages and working conditions in the United States similarly employed." 8 U.S.C. 1182(a)(5)(A)(i) (emphasis added).

118. Other regulations specifically require certification and not attestation. 8 C.F.R. §214.2(h)(ii)(D) ("An H-2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, if unemployed persons capable of performing such service or labor cannot be found in this country. . .This classification requires a temporary labor certification issued by the Secretary of Labor or the Governor of Guam, or a notice from one of these individuals that such a certification cannot be made, prior to the filing of a petition with the Service.") (emphasis added).

119. DOL failed to consider substantial empirical evidence that the certification process had, in fact, resulted in the denial of a substantial number of H-2B applications which likely would be inappropriately approved under an attestation system. Analysis of data for FY07 that establishes that DOL denied certification of 105,532 positions which was 29.3% of the number of workers sought in employer applications for H-2B workers. See ETA-2008-0002-0022 at pp. 1-5 and Attachment A .

120. Significantly, under an attestation system, the Department will no longer review the recruitment system utilized by employers to ensure that there actually are no U.S. workers available to do the work prior to approving the applications for H-2B workers. 73 Fed Reg. 78057 (to be codified at 20 C.F.R. §655.15).

121. DOL failed to explain how a post hoc attestation system is consistent with its legal obligations to protect U.S. workers. In fact, empirical evidence submitted to DOL clearly demonstrated that under the former certification regime, DOL did reject a large number of applications for H-2B certification. Under an attestation system, those employers would simply be approved by DOL, causing potentially enormous adverse effect to wages and working conditions of U.S. workers.

122. The arbitrariness of the DOL final rule in assuming that it can effectively satisfy its duties to determine and certify that there is a need for H-2B workers solely on the basis of employer attestations is demonstrated by the recent annual report of the DOL Office of Inspector General which was in the record before DOL pursuant to its NPRM. See, ETA-2008-0002-0088, Attachment A, Office of Inspector General - U.S. Department of Labor, Semiannual Report to Congress, October 1, 2007–March 31, 2008, available at: http://www.oig.dol.gov/SAR-59-FINAL.pdf. The OIG annual report makes a legislative recommendation in relationship to the H-1B program, "Provide Authority to Ensure the Integrity of the Foreign Labor Certification Process." Id at p. 39. That recommendation states:

> "If DOL is to have a meaningful role in the H-1B specialty occupations foreign labor certification process, it must have the statutory authority to ensure the integrity of that process, including the ability to verify the accuracy of information provided on labor condition applications. Currently, DOL is statutorily required to certify such applications unless it determines them to be "incomplete or obviously inaccurate." Our concern with the Department's limited ability to ensure the integrity of the certification process is heightened by the results of OIG analysis and investigations that show the program is susceptible to significant fraud and abuse, particularly by employers and attorneys. The OIG also recommends that ETA should seek the authority to bar employers and others who submit fraudulent applications to the foreign labor certification program."

Id at 39. See, ETA-2008-0002-0088

DEFINITIONS ADOPTED IN DHS AND DOL FINAL RULEMAKING ARE ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW

123. The DOL and DHS regulations arbitrarily, capriciously, and without adequate justification change definitions of terms relating to the administration of the H-2B program in ways that are serious and consequential and, contrary to law, are likely to result in an adverse effect on wages, working conditions, or employment opportunities for U.S. workers.

DHS 2008 Regulatory Action

124. Defendants Secretary of Homeland Security and DHS and issued a Notice of Proposed Rulemaking, publishing proposed rules on Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers on August 20, 2008, with a Notice and Comment period ending September 19, 2008. 73 Fed. Reg. 49109-49122.

125. One hundred nineteen individuals and organizations submitted comments.

126. The record before the agency of comments and actions related to that proposed rulemaking has been posted under USCIS-2007-0058 Docket at: http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=USCIS-2007-0058.

127. On December 19, 2009, USDHS issued its final rule entitled Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers. 73 Fed. Reg. 78104-78130. The rule goes into effect on January 18, 2009.

Definition of Temporary

128. Current DHS regulations define temporary need in relationship to H-2B employment as follows:

8 CFR 214.2(h)(6)(ii) Temporary services or labor —

(A) Definition. Temporary services or labor under the H–2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) Nature of petitioner's need. As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need:

(1) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

(2) Seasonal need. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

(3) Peakload need. The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.

(4) Intermittent need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

129. Available evidence in response to the DOL and DHS NPRMs indicated that a high number of applications for temporary H-2B labor certifications are likely denied because of a determination that such positions are not temporary. See, ETA-2008-0002-0022 at pp. 1-5, Attachments A and B (analyzing by occupational code those jobs for which certification was denied); ETA-2008-0002-0088 at pp. 17-19, 24-27).

130. Both the May 2008 DOL NPRM and the August 2008 DHS NPRM proposed to significantly change this definition so as to permit a "one-time" occurrence to include "temporary" employment of up to three years.

131. In the December 19, 2008 preamble to the DOL regulations, DOL states that:

> ... the Department will consider a position to be temporary as long as the employer's need for the duties to be performed is temporary or finite, regardless of whether the underlying job is temporary or permanent in nature, and as long as that temporary need--as demonstrated by the employer's attestations, temporary need narrative, and other relevant information--is less than 3 consecutive years.

73 Fed. Reg. at 78025-78026.

132. DOL accomplishes this by reference to the December 19, 2008 change to 8 CFR 214.2(h)(6)(ii) in the new DHS regulations.

133. Defendant DHS substantially changes the definition of 8 CFR 214.2(h)(6)(ii)(B) to provide:

> (B) Nature of petitioner's need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a onetime occurrence, a seasonal need, a peak load need, or an intermittent need.

73 Fed. Reg. 78104 at 78129.

134. In conjunction with the creation of a new definition in the revised DOL regulations definitions of a "job contractor" (discussed below), the new definition of "temporary" is arbitrary, capricious and contrary to law.

Definitions of Job Contractor and Employ

135. The definitions section of the DOL regulations at 20 CFR 655.4 as published on December 19, 2008 add a provision for a "Job Contractor" defined as follows:

> Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor, and where the job contractor will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

73 Fed. Reg. at 78054.

136. The record before DOL reflected that such labor brokers have been identified by the DOL Office of Inspector General as a source of potential serious abuse. ETA-2008-0002-0088, Exhibit A, Office of Inspector General - U.S. Department of Labor, Semiannual Report to Congress, October 1, 2007–March 31, 2008, available at: http://www.oig.dol.gov/SAR-59-FINAL.pdf. The introduction to that report notes:

> "OIG investigations revealed that the foreign labor certification process continues to be compromised by unscrupulous attorneys, labor brokers, employers, and others."

The reports summary of significant concerns noted:

> "... defendants also took advantage of the devastation caused by Hurricane Katrina by fraudulently obtaining certification from the Department for nearly 250 H-2B temporary foreign workers, purportedly on behalf of four New Orleans hotels. We will continue to aggressively pursue those who seek to defraud the Department's foreign labor certification programs."

Id at p. 4. The same OIG annual report has an article "Conspirators of Florida Labor Leasing Company Sentenced to Pay $1 Million" discussing DOL OIG joint investigation with DOS Diplomatic Security Service (DSS) and the U.S. Immigration and Customs Enforcement (ICE). United States v. Anna Czerwien and United States v. Aleksander Berman et al. (N.D. Florida). See also, Id at p. 24. See, ETA-2008-0002-0088, Exhibit A.

137. By adopting its definition of a labor broker as eligible to apply for H-2B temporary foreign workers, DOL arbitrarily and capriciously authorizes "job contractors" to obtain H-2A visas in direct violation of its statutory mandate to protect U.S. workers.

138. As structured by the new regulations, there is no guarantee that the employer with whom the job contractor will place workers has any obligation to abide by the regulatory controls designed to protect U.S. workers' wages and working conditions. Nor is there any mechanism to evaluate the employer's statement that the job contractor's workers will not displace U.S. workers. See 73 Fed. Reg. at 78042.

139. The DOL regulations are contrary to law in that they reflect a narrow restriction on "displacing" current U.S. workers rather than a broad commitment to positive recruitment of U.S. workers for all positions for which employers seek H-2B workers.

140. The DOL regulations arbitrarily fail to bind the "employer" to whom the "job contactor" supplies workers as a joint employer through usage of a narrow common law definition of "employee" rather than a broader protective definition such as used by the FLSA.

141. The DOL regulation at 20 CFR 655.4 of "employee" states:

> Employee means employee as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors should be considered and no one factor is dispositive.

73 Fed. Reg. at 78054.

142. DOL arbitrarily and without justification specifically declined to include a broader definition "employ" which would more adequately operate to protect U.S. workers against job brokers and others claiming to need temporary H-2B workers without regard to the recruitment efforts of the joint employer to whom the workers are assigned. See. 73 Fed. Reg. at 78024.

143. DOL further arbitrarily defined "agent" for an H-2B employer in order to permit persons to file H-2B applications for employers without any licensing or other qualifications for such persons. Doing so despite a demonstrated history of abuse by many such agents is arbitrary and capricious and contrary to law. See, ETA-2008-0002-0088, Exhibit A. See also, ETA-2008-0002-0074 at pp. 5-8 reflecting comments of American Immigration Lawyers Association (AILA) at

Mr. KUCINICH. Thank you very much, Ms. Bauer.
Ms. Ruckelshaus.

STATEMENT OF CATHERINE RUCKELSHAUS

Ms. RUCKELSHAUS. Thank you, Mr. Chairman and members of the committee. I appreciate the opportunity to speak today and thank you for holding this hearing. My name is Cathy Ruckelshaus. I am the legal director at the National Employment Law Project. We are a nonprofit that specializes in access to and keeping good jobs for all workers. We work closely with low wage and immigrant workers, community-based organizations and their advocates, in addition to State labor departments to promote good models for enforcement of labor standards.

In our basic work, two trends have emerged recently which touch upon my recommendations today. First, in light of the moribund Federal Department of Labor Enforcement, State departments of labor and State attorneys general have stepped into the void. They have launched innovative and effective enforcement programs, including State departments from both Ohio and Illinois, and the models they have enacted I think are good models for us to tap into for Federal reforms.

Second, following the virulent last 18 months of the Bush administration's workplace immigration raids, immigrant workers and other low wage workers have virtually stopped coming forward to complain. There is so much fear out there that the complaints simply aren't coming in. Because we have a complaint-driven system in our society, that means enforcement cannot happen because workers are not coming forward to complain.

My brief remarks this morning are in more detail in the written prepared testimony, but they will reflect these two trends.

For 20 years, I have worked with communities of low income workers in dozens of job categories to ensure that they get the basics. More and more, immigrant workers are not coming forward to complain, and there is no one to complain to.

The testimony we have heard this morning is just a handful of examples of a larger trend that affects not only the guestworkers and their families, but other workers in the same job categories, and other employers who have to compete with these same employers who are perpetuating these sub-par jobs.

The problem is so deep-seated, it touches jobs you see everyday: the janitors who clean this building; the housekeepers, home care and child care workers who tend our homes and our loved ones; servers in the cafeteria in this building; housekeeping staff in hotels; construction workers who build and repair these buildings; and the landscapers I passed this morning on my way to the hearing. These jobs do not have to be bad jobs with low pay. They are growth service sector jobs that could be helping create a new middle class, with good pay and benefits. We can restore the promise of economic opportunity for these workers and their families by making sure these jobs pay.

The Department of Labor. Three GAO reports in less than 1 year make the point loud and clear the Wage and Hour Department of the U.S. Department of Labor is not effective. A decade of declining resources has not, surprisingly, resulted in a decrease in enforce-

ment by one-third, while the number of covered businesses has increased to over 8 million. Wage and Hour Division has recently relied almost exclusively on worker complaints to conduct its enforcement. When this strategy exists in the context of immigration raids in the workplace, it comes as no surprise to us that the complaints didn't come and enforcement didn't happen.

Some other highlights from these recent GAO reports I think are worth noting. These are basic problems. The Wage and Hour Division did not consistently log in worker complaints, in some regions didn't even log in a complaint until there was a successful resolution of a complaint. There is no way to measure progress or hold the Department accountable if that information is not available. Delays for workers who did manage to come forward and complain were common and sometimes lasted as long as 6 months. Some offices only had voice mail, and some didn't even have voice mail. These are all detailed in the GAO reports that have come out in the last year.

Another problem is that the Wage and Hour Division did not seek any liquidated damages or extra penalties, so that if it did capture a complaint and get an employer to pay, the employer just paid what it would have paid the employee had it paid her correctly in the beginning.

So now what about a DOL renaissance? If only employers were as afraid of the DOL as we are of the IRS, then we would get some traction. Much of the reform proposals listed in my prepared testimony have been enacted by the Department of Labor in the past. They are very simple and they can send an important and strong message. Secretary Solis recently noted there is a new sheriff in town. Well, here is how we think she can enact that message to employers:

First, don't just rely on worker complaints. Department of Labor has done this before; it has targeted problem industries with audits and investigations. Department of Labor had a salad bowl initiative that looked at agriculture; it looked at nursing homes, affirmatively auditing and investigating. This was very effective and it can do it again easily.

It should use its joint employer powers to go up the food chain when there are multiple subcontractors, as there are in guestworker programs, and it has done it in the past in agriculture and garment cases, where it holds other employers and subcontractors accountable for the abuses.

It can share information on violations with State and Federal partner agencies, including the Internal Revenue Service, who cares about independent contractor and off-the-books payments. It also can share with State Departments of Labor. Maryland, Illinois, Ohio, and New York are among some of the States that are already doing this. Any sharing of this information has to include a firewall between the ICE, the Immigration Service and Department of Labor. We heard this morning that——

Mr. KUCINICH. The gentlelady's time has expired, but what I would like to do is if you would just wrap it up in a couple of sentences.

Ms. RUCKELSHAUS. OK, sorry. OK, sure.

I have a long list and I am not through it, but what I will just say is that guestworkers and other immigrant workers cannot police their work forces alone. The Department of Labor is the front-line agency charged with making work pay, and together we can work to make this happen. Thank you.

[The prepared statement of Ms. Ruckelshaus follows:]

Testimony of
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"The H-2B Guestworker Program and Improving The Department of Labor's Enforcement of the Rights of Guestworkers"

Domestic Policy Subcommittee
Oversight and Government Reform Committee
Thursday April 23, 2009
2154 Rayburn House Office Building
10:00 a.m.

My name is Cathy Ruckelshaus, and I am the Legal Co-Director of the National Employment Law Project (NELP), a non-profit organization that promotes access to and keeping good jobs for low-income workers. I submit my testimony today to urge that we redirect the Wage and Hour Division (WHD) of the United States Department of Labor (DOL) back to its roots, and reinvigorate its commitment to workers' rights, paying special attention to the barriers to enforcement faced by low-wage and immigrant guestworkers in this country.

In the last half of my twenty years of working with low-wage workers and advocates around the country, we have lost a partner in the DOL. Once a potent ally when it intervened to crack down on sub-par jobs, DOL has become at best a nonentity and at worst a pariah in low-wage workers' worlds. It was not always so. During the Clinton years and before, DOL initiated affirmative and strategic programs aimed at combating the worst workplace abuses, and tracked its impact on working people. With the new Administration and the Secretary of Labor's assertion of support for workers' rights, I am hopeful that the WHD will once again resume that role.

For the third time in less than a year, the U.S. Government Accountability Office (GAO) reports that protections guaranteed by the wage-and-hour laws are non-existent for many low-wage workers in this country, due in large part to failings of the DOL in recent years. In testimony to the House Education and Labor Committee last month, the GAO announced the results of its undercover investigation into the DOL's enforcement of wage and hour protections for these workers, and the news is disturbing.[1]

[1] U.S. Government Accountability Office, *Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low-Wage Workers Vulnerable to Wage Theft*, GAO-09-458T, March 25, 2009.

Introduction and Summary of Recommendations.

Labor-intensive jobs in our increasingly dominant service sectors have long been fertile terrain for employers bent on cheating workers of their wages, but now the nose-diving economy is impelling even more firms into desperate cost-cutting modes. Some employers simply don't pay their workers. Others use schemes that obstruct enforcement, like calling employees "independent contractors," inserting fly-by-night subcontractors, and using payrolling or leasing companies in an attempt to shield themselves from liability and confuse the workers. Some employers seek out and hire guestworkers and undocumented workers, knowing they will not complain of underpayments. Competing firms feel pressured to adopt similar practices to stay in the game. As the recent GAO undercover investigation reveals, there's very little risk that these employers will be held accountable.

Guestworkers are "Exhibit A" in the thick of these trends, and face extra barriers to enforcing their rights to fair pay and safe working conditions because of their indebtedness to, and reliance for work status and often housing on the sponsoring employer.

This is bad for workers and their families -- and for the economy. Without a solid wage floor and strong wage protections, our janitorial, hospitality, retail, home health care, restaurant and construction jobs will not boost the economy in any way.

Last summer, the GAO issued two reports lambasting DOL's WHD for its abject failure in the preceding years to enforce basic minimum wage, overtime, and child labor rules. One of these reports was a devastating set of case studies, highlighting the agency's failure to pursue worker complaints and its utter disregard for deadlines and employer evasions. Now we learn that with its report to be released in May, GAO will document that those most vulnerable to underpayment of wages -- low wage workers -- found little solace at the Department of Labor.

Thankfully, though, the tide is turning, with the new Secretary of Labor, Hilda Solis, declaring at her swearing-in ceremony, "there's a new sheriff in town!" Secretary Solis has emphatically stressed that enforcing our wage and hour laws is a top priority, and President Obama's 2010 budget proposes the first real increase in Wage and Hour Division funding in nearly a decade. Secretary Solis has already taken a strong stand in favor of guestworkers by rescinding some of the more punitive new regulations issued by the Bush Administration under the H2A guestworker program.

Meanwhile, during a period of relative inaction at the federal level, several state labor departments and related agencies picked up the mantle and enacted innovative enforcement strategies aimed at the most persistent sweatshops, including those found in guestworker sectors, like agriculture, hospitality, and construction. Community workers centers and unions often joined these efforts, providing the "eyes and ears" for the agencies, and in some cases bringing lawsuits against scofflaw employers. In janitorial and construction jobs, creative labor-management partnerships resulted in employer-

funded efforts to ensure wage compliance by all firms, by leveraging enforcement by state agencies and private actors.

This kind of redundancy in enforcement brings needed reinforcement to law-abiding firms in industries that have operated with impunity for too long. And these public and private initiatives provide solid models for reinvigorated federal enforcement.

But there is much to do. The newly re-energized DOL should use the full array of tools and penalties at its disposal to crack down on problem industries, repeat violators, companies that brazenly abuse our guestworker programs, and firms that perpetrate "independent contractor" scams costing the government billions each year in tax theft. Congress can aid this effort by fully funding the Administration's 2010 budget request for DOL, urging it to reform its enforcement policies to ensure enhanced compliance, and enacting common-sense improvements to the Fair Labor Standards Act that will better enable workers to pursue their legal remedies.

Any comprehensive immigration reform proposals must include robust labor standards enforcement for all workers, to take away perverse economic incentives to seek out and exploit foreign labor, and to shore up the wage floor for all workers in this country.

At times like these, when workers are at their most vulnerable and economic pressures create incentives to cut corners among even the best of employers, it is critical that the Department aggressively embrace and advance its mission of promoting opportunities for all workers, including guestworkers. That means making sure that law-breaking employers fear the DOL as much as an IRS audit. When that happens, the wage floor will mean something to low-wage workers, their families, and our economy.

I. Guestworkers: Low-Wage Workers with Much to Fear.

For more than seventy years, our country has permitted U.S.-based employers to recruit and hire temporary foreign workers to labor in certain jobs in the U.S. Other immigrants migrate here without work authorization, and work in low-paying and dangerous jobs as undocumented workers. Both sets of workers face barriers to enforcing their legal rights to be paid minimum wage and overtime and to other workplace-based protections.

Guestworkers often face abuse before they ever leave home at the hands of labor contractors and recruiters. These intermediaries can impose significant recruitment fees and high interest rates on loans as a condition to entry into the job-applicant pool in the foreign country.[2]

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[2] Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (2007), available at http://www.splcenter.org/legal/guestreport/index.jsp.

Once arriving in the United States, employers' promises of steady work at lucrative wages frequently go unmet, with many workers kept idle or stranded here. Guestworkers are not entitled to unemployment compensation or Social Security benefits, and any workers' compensation benefits flowing from an injury at work are often cut off when they return to their home countries.

Guestworkers are reluctant to seek remedies for their illegal working conditions for a number of reasons. Because a guestworker is only allowed to work for the employer who sponsors the work visa, if an employer decides to fire a complaining worker, that worker loses the right to remain in the United States. Moreover, as with many low-wage workers, the threat of reprisals keeps guestworkers from complaining. Our labor standards complaint-driven system means that rampant violations go unheard.

Further, there is frequently no one to complain to: U.S. DOL until recently took the position that it cannot legally enforce the contractual rights of H2B guestworkers; this may change. Private non-profit and for-profit lawyers cannot meet the need and sometimes will not take the case if the damages are too low. Many legal services organizations are not permitted to represent guestworkers under explicit restrictions in the federal Legal Services Corporation Act.

In sum, guestworkers face the same labor standards enforcement barriers that other U.S. workers do, plus some. Guestworkers are dependent on the employer for both housing and employment, are isolated by language and geography, and sometimes kept working by the implicit or explicit threat of deportation. Because many guestworker programs prohibit employees from taking their work visa to another job, employers have control of workers' immigration status. Employer exploitation and lack of accountability of the employers' recruiters and subcontractors put workers in extremely vulnerable situations.

II. Holding up the Wage Floor for Workers and Their Families

A. No Minimum Wage Floor in Too Many Jobs

In the bottom half of our economy, almost every growing sector—health care, child care, retail, building services, construction and hospitality—is plagued by bad jobs. In addition to providing paltry benefits, if any, employers in these sectors routinely violate bedrock employment rights like the right to be paid fully for work and the right to a safe workplace.

Recent government and private studies show many of our fastest-growing service jobs have appalling minimum wage and overtime compliance rates:[3]

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[3] For more statistics and information on the numbers of workers in the growing job sectors, *see* NELP, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* (2006), http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf.

- A majority of restaurants in New York City are out of compliance;[4]
- 60% of nursing homes are out of compliance;[5]
- Poultry processing has a 100% noncompliance rate;[6]
- Garment manufacturing has a 50% noncompliance rate.[7]

Additionally, in many sectors, including construction and day labor, employers misclassify employees as "independent contractors," to avoid responsibilities under labor standards laws. If an employer is successful in characterizing an employee as an "independent contractor," the worker has no rights to labor and employment protections, including the right to be paid the minimum wage and overtime or the right to form a union.[8] Jobs where independent contractor abuses are common routinely violate basic fair pay and other workplace rules.[9]

What does all of this mean? It means we have an underclass of hard-working men and women who cannot make ends meet for their families. In 2004, 7.8 million people in our country were classified as "working poor," working at least twenty-seven hours a week but still making below the federal poverty level.[10] Two million workers make at or below the minimum wage, according to the Bureau of Labor Statistics, and the Urban Institute found that 2.2 million immigrant workers make less than the minimum wage.[11] The employer-backed Employer Policy Foundation estimated that workers would receive an additional $19 billion annually if employers obeyed workplace laws.[12]

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[4] Restaurant Opportunities Center of New York and New York City Restaurant Industry Coalition, *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry*, p. 2, Jan. 25, 2005.

[5] Employment Standards Administration, U.S. Department of Labor, *Nursing Home 2000 Compliance Fact Sheet*, available at http://www.dol.gov/esa/healthcare/surveys/nursing2000.htm

[6] U.S. Department of Labor, *FY 2000 Poultry Processing Compliance Report* (2000).

[7] Bureau of National Affairs, Daily Labor Report 87 (May 6, 1996) U.S. Department of Labor, *Labor Department: Close to Half of Garment Contractors Violating Fair Labor Standards Act*.

[8] *See* Testimony of Catherine K. Ruckelshaus, National Employment Law Project, before the House Committee on Education and Labor, Subcommittee on Workforce Protections, March 27, 2007, available at http://edlabor.house.gov/testimony/032707CatherineRuckelshaustestimony.pdf

[9] *Id.*

[10] Bureau of Labor Statistics, U.S. Department of Labor, *A Profile of the Working Poor, 2004* (2006), available at http://www.bls.gov/cps/cpswp2004.pdf.

[11] U.S. Department of Labor, Bureau of Labor Statistics, *Characteristics of Minimum Wage Workers: 2002*, Aug. 8, 2003; Randolph Capps, Michael E. Fix, Jeffrey S. Passel, Jason Ost, & Dan Perez-Lopez, *Profile of Low-Wage Immigrant Workforce*, Urban Institute, Oct. 27, 2003.

[12] Suzanne M. Crampton and Jitendra N. Mishra, FLSA and Overtime Pay, 32 Public Personnel Mgmt., 331 (2003), available at ww.findarticles.com/p/articles/mi_qa3779/is_200310/ai_n9309306.

Our economy is hurt, too, by rampant workplace violations. Sub-par wages below even the minimum wage fail to drive our economy, and independent contractor abuses result in billions of dollars in lost tax and payroll revenues for our federal and state governments.[13]

B. U.S. DOL Has Failed to Enforce its Laws.

A lack of a strong public enforcement presence on workplace standards has certainly contributed to these dismal conditions. But even in the face of persistent and seemingly intractable sub-par jobs that have persisted for years, the DOL has not made it a priority to stem these abuses. Three GAO reports in the last year alone make this point.

The WHD enforces many laws, including the Fair Labor Standards Act (FLSA), which sets the minimum wage and overtime rules, prohibits retaliation against complaining workers, and restricts child labor.[14] WHD also enforces the Davis-Bacon Act and Service Contract Act, the Family & Medical Leave Act and the Migrant and Seasonal Agricultural Worker Protection Act, among others.

The GAO found that over 130 million workers are covered under labor laws enforced by the WHD.[15] DOL has 5 regional offices, 74 district and field offices with approximately 730 investigators in the summer 2008.[16] While public agencies are by their nature underfunded and understaffed, DOL has been particularly under-subsidized in recent years. In addition, it has failed to use its resources strategically, as it has in the past, to have the broadest impact.

From 1975-2004, the budget for DOL Wage and Hour investigators decreased by 14% (to a total of only 788 individuals nationwide), and enforcement actions decreased by 36%, while the number of businesses covered by wage and hour law increased from

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[13] *See* Testimony of Catherine K. Ruckelshaus, National Employment Law Project, before the House Committee on Education and Labor, Subcommittee on Workforce Protections, March 27, 2007, available at http://edlabor.house.gov/testimony/032707CatherineRuckelshaustestimony.pdf (citing a 2000 national study commissioned by the DOL showing decreased unemployment tax receipts by $200 million over the period 1990-1998, and state studies in NY and MA finding that noncompliance with payroll tax laws resulted in losses as large as $1 billion each year in NY workers compensation taxes, and annual losses of up to $278 million in uncollected income taxes, unemployment insurance taxes, and worker's compensation premiums in MA).

[14] 29 U.S.C. 201 *et seq.*

[15] U.S. GAO, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, GAO-08-962T, July 15, 2008.

[16] GAO-08-962T at 6. The WHD was just allotted approximately $21 million in additional stimulus provisions, providing a much-needed boost, but these positions are for wage determinations and Davis-Bacon enforcement related to the infrastructure investments in the Recovery Act .

7.8 million to 8.3 million.[17] The GAO's 2008 report found that from 1997-2007, the number of WHD enforcement actions decreased by more than a third.[18]

WHD has focused its attention on employer compliance and education over the last eight years,[19] and has deemphasized audits and affirmative investigations. DOL's wage and hour law enforcement is nearly wholly conducted based on worker complaints, and low-wage and immigrant workers face serious barriers to enforcement.[20] In 2001, WHD conducted as many as 55% of its investigations by fax or phone, even though it is five times more likely to find violations of recordkeeping requirements when it visits a workplace.[21] Workers are afraid to come forward to complain.[22] Workers fear retaliation (including termination) by their employers, which may cause them to quietly accept substandard conditions.[23]

Undocumented workers and guestworkers are particularly vulnerable to workplace abuse, discrimination, and exploitation as well as the fear of being turned over to immigration authorities.[24] Recent ICE raids on workplaces with pending workplace violation investigations creates confusion and fear among workers, and sends a message that the U.S. government will enforce immigration laws against workers, but not labor standards laws against employers.[25]

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[17] Annete Bernhardt and Siobhan McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004* (September 2003).

[18] GAO-08-962T, at p. 1.

[19] *See, e.g.* DOL Officials Travel to Provide Compliance Assistance on New Overtime Rules, http://www.dol/gov/opa/media/press/esa/ESA20041081.htm

[20] For example, in 2004, 74% of all WHD enforcement was from worker complaints. David Weil and Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, Comp. 27 Labor Law & Policy Journal 59, 60 (2006).

[21] United States General Accounting Office (GAO), *Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance*, GAO 02-925, September 2002, at p. 18-19.

[22] The GAO observed in a report on day labor in the U.S. that government agencies are unable to do their job with respect to day laborers because they do not find out about violations. U.S. General Accounting Office, *Worker Protection: Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance*, GAO 02-925, 14 (September 2002).

[23] *See, e.g. Mitchell v. Robert de Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1058-59 (N.D. Cal. 1998).

[24] *See., e.g. Rivera v. NIBCO*, 364 F.3d 1057, 1064 (9th Cir. 2004), cert. denied, 125 S.Ct. 1603 (2005).

[25] *See* The Oregonian, *Fresh Del Monte Subject of Worker Safety Probes*, June 13, 2007 (describing an ICE raid on a Del Monte plant that had two pending OSHA investigations underway, where workers where rounded up and detained.) http://blog.oregonlive.com/business/2007/06/fresh_del_monte_subject_of_wor.html. For

Unions are an important protective buffer for workers seeking to improve their jobs, and a lack of union presence in the workplace causes workplace standards to decline.[26] Ninety percent of workers in this country are unrepresented by a union, even though most workers (57%) would vote for a union if an election was held at their worksite.[27]

C. GAO Reports Paint a Dire Picture

Last July, the GAO issued two reports, delivering a one-two punch to the WHD's enforcement practices, depicting an agency that was almost wholly ineffective.[28]

Last month's GAO's testimony describes its follow-up undercover work, where GAO sent individuals posing as aggrieved employees and violating employers to the WHD over an eight-month period.[29] The testimony described delays in investigating complaints, a failure to record complaints in the WHD database, a failure to use enforcement tools, and a general failure to follow-up with workers and non-responsive employers.

In particular, the GAO reports found that:

- Half of the complaints GAO representatives filed with USDOL field offices were never recorded in the WHD database at all, and some were not recorded until and unless the conciliation with the employer was successful;[30]

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a catalogue of recent ICE raids connected to labor standards enforcement, *see* National Employment Law Project, *The Politics of Immigration: Has ICE Abandoned Its Practice of Staying Out of Labor Disputes?*, available at: http://thepoliticsofimmigration.blogspot.com/2008/09/has-ice-abandoned-its-practice-of.html.

[26] *See e.g.* David Weil, Enforcing OSHA: The Role of Labor Unions, 30 INDUS. REL. 21, 22 (1) (Winter 1991); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 362 and passim (describing the important role unions play in monitoring worksite conditions in today's era of "chronic under enforcement" of workplace standards) (March 2005).

[27] *See* Frank Swoboda, *Labor Unions See Membership Gains*, Washington Post, p. E2, January 20, 2000; Peter D. Hart Research Associates, The Public View of Unions (2005).

[28] *Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, GAO-08-962T, July 15, 2008, and *Case Studies from Ongoing Work Show Examples in Which Wage and Hour Division Did not Adequately Pursue Labor Violations*, GAO-08-973T, July 15, 2008.

[29] GAO, *Department of Labor: Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft,* GAO-09-458T, March 25, 2009.

[30] GAO-09-458T, at p. 8-9; GAO-08-962T at 14.

- The WHD's database did not have information on basic details of complaints, including amount of back wages claimed, and DOL does not require all complaints to be recorded, making it impossible to determine how effective it is;[31]
- DOL often changed how it measured its progress, making it impossible to determine its effectiveness;[32]
- DOL failed to use available information and tools, including external collaboration with groups, to inform its planning and enforcement strategies;[33]
- DOL failed to pursue liquidated damages and penalties in its investigations;[34]
- DOL failed to pursue claims further after the employer refused to pay admitted monies due;
- DOL failed to follow-up with employees to make sure they got paid when the employer promised to pay. In some cases, the employee never got paid, but the DOL logged the complaint in as having been resolved;
- DOL's complaint procedures were confusing and difficult, with voicemail-only available in 76% of the calls, and no voicemail at all in 2 of the offices;
- Potential claimants were screened out at the initial call phase, and discouraged from filing a complaint, sometimes getting wrong information about their employer's coverage;[35]
- Delays were common; some as long as 6 months. This is particularly troubling because the statute of limitations is running and the workers are losing potential backpay while the investigation is ongoing.[36]

When the risk of enforcement is small, systemic violations of wage and hour laws become the norm in these sectors, and sweatshop conditions prevail.[37]

III. A DOL Renaissance.

When the DOL does enforce its workplace laws, it makes a difference in the wage levels of more than just the workplaces it chooses to target.[38] Workplace enforcement of basic fair pay laws should be at a level to send a message that America will not

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[31] GAO-09-962T at 11, 14.
[32] GAO-08-962T at 1.
[33] GAO-08-962T at 1.
[34] GAO-08-962T at 11.
[35] *Id.* At p. 10.
[36] *Shandelman v. Schuman*, 92 F.Supp. 334 (E.D. Pa. 1950); GAO-09-458T at 23.
[37] David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & LAB. REL. REV. No. 2, 238-257 (January 2005).
[38] *See* David Weil, *Compliance with the Minimum Wage: Can Government Make a Difference?*, May 2004.

tolerate non-payment and underpayment for work, and that all workers should feel free to come forward.

While the list of possible DOL reforms is long, in this testimony I emphasize strategies that have been done before, either at DOL itself, or at innovative state departments of labor.[39]

A. Administration & Organization of WHD Enforcement.

1. Provide WHD with more resources for its enforcement efforts.
2. Use new resources – stimulus funds, increased budget, and future resources – to recruit new investigators, including those with a commitment to worker protection; experience in law enforcement; language skills, and cultural proficiency.
3. Make the WHD investigation process more transparent, provide workers with clear information about the status of their claims, their right to bring a private action, and attorney referrals.
4. Provide information to workers regarding the statute of limitations for making formal wage complaints. *See* GAO-09-458T at 23.
5. Keep detailed data on incoming complaints and their resolution, including wages and hours claimed by each worker, regardless of whether DOL "takes the case," and keep data on results obtained by DOL, in case of enforcement. *See* GAO-09-458T at 18. In addition, establish metrics for success, and report regularly on results.
6. Designate staff to act as liaisons to immigrant worker groups to build relationships with the department, like the New York State DOL's Bureau of Immigrant Workers' Rights.

B. WHD Enforcement Discretion and Strategic Initiatives

1. Proactively target and investigate employers in high-violation industries to send a strong signal across the labor market that employment and labor laws will be vigorously enforced. DOL has done this in the past, with initiatives in garment, agriculture, health care, and other low-wage jobs. In its *1999-2000 Report on Initiatives*, the DOL's WHD outlined a comprehensive compliance strategy for collecting data and ensuring future compliance.[40] DOL also launched a "No Sweat" Campaign, for which DOL had more

[39] For a broader list of proposed DOL reforms, *see* NELP, *Rebuilding a Good Jobs Economy: A Blueprint for Recovery and Reform* (November 2008), available at: http://www.nelp.org/page/-/Federal/NELP_federal_agenda.pdf?nocdn=1

[40] U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, *1999-2000 Report on Initiatives*. (hereafter "1999-2000 DOL Report") *See* attached report in Word format.

than 100 garment firms sign its Compliance Monitoring Agreement, and it developed partnerships with community groups.[41] It also launched health care[42] and "Salad Bowl"[43] initiatives.

2. Seek all remedies available to address workers' claims – including liquidated damages and civil money penalties. See GAO-08-962T at 17.
3. Hold subcontracting employers (joint employers) accountable for wage-and-hour violations of their subcontractors.[44]
4. Identify employers who misclassify workers as independent contractors or pay them off-the-books, and hold them accountable for employment law violations.
5. Use the agency's authority to pursue immediate and emergency injunctive relief in situations where complaining workers are fired or otherwise subject to retaliation.
6. Make better use of hot goods remedies to further strengthen subcontractor accountability.

C. Coordination with Workers' Advocates and Other Partners.

1. Consult and partner with community groups, worker centers, unions, state departments of labor, and other worker advocacy organizations to leverage their expertise and relationships with workers and to target proactive enforcement resources – perhaps through a formal task force.[45] See GAO-08-962T at 114, 18.
2. Create a regional Gulf Coast task force, and perhaps task forces in other regions of the country with little or no public enforcement partners, including those states in the southeastern U.S. with no state minimum wage acts. See GAO-08-962T at 15.
3. Institute an inter-agency enforcement task force, combining workplace standards oversight with the IRS and state department of labor analogs, as several states have implemented in independent contractor reforms, including MA, OH, NY and IL.

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[41] http://www.dol.gov/wb/info_about_wb/sub2000.pdf
[42] http://www.dol.gov/esa/media/press/esa/esa98185.htm
[43] http://www.dol.gov/opa/media/press/esa/archive/esa99073.htm
[44] *See, e.g.* DOL Report on agricultural initiatives, including FYI 1998 strategy to vigorously apply the joint employment standard under the AWPA and the FLSA (1998), http://www.dol.gov/wb/info_about_wb/sub2000.pdf.
[45] One example of this is the Employment Education and Outreach (EMPLEO) partnership. EMPLEO is an alliance of organizations and government agencies that assist Spanish-speaking workers and employers with work-related concerns in California.

4. Promote private enforcement of wage-and-hour laws by partnering with private attorneys and groups with the capacity to bring litigation – especially around well-chosen strategic cases on contested issues.
5. Set up private attorney referral lists for workers needing private counsel.

D. Strengthening Worker Protections

1. Strengthen policies and procedures to protect workers asserting their rights under wage and hour laws from retaliation – whether such retaliation is employment- or immigration-related.
2. Reinforce the firewall between the USDOL and the Department of Homeland Security / ICE.[46]
3. Clarify that FLSA recordkeeping requirements apply to independent contractors and enhance damages for employers who misclassify workers as non-employees.[47]
4. Toll the statute of limitations for all similarly-situated employees as of the date an investigation is opened (through an employee complaint or proactive investigation). GAO-09-458T at 23.
5. Amend the FLSA to permit class actions, so complaining workers are protected from virulent employer retaliation.

Conclusion

Immigrant guestworkers are among the most vulnerable workers in our society. Our nation's immigration system permits employers to sponsor them when necessary, and it is incumbent upon us, for policy and humane reasons, to treat them with the respect and dignity they deserve. The U.S. Department of Labor is the frontline agency charged with ensuring that fair pay standards are met for all workers, and it must step in to fulfill its charge. With the community and state partners across the country ready to work with the DOL, we can make our country's jobs good jobs again.

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[46] *See* U.S. Department of Labor, *Memorandum of Understanding*, http://www.dol.gov/esa/whatsnew/whd/mou/nov98mou.htm.

[47] *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 33, 35. Legislation has been introduced to amend the FLSA's recordkeeping rules to require employers to keep records of independent contractors. *See, e.g.,* Woolsey-Andrews bill.

Mr. KUCINICH. I thank the gentlelady. Your entire testimony will be included in the record. Also, staff is going to take note of your suggestions, and we are preparing a memo to the Department of Labor, which will include not just the suggestions, but some suggestions from our staff about how we can be more effective in protection of the rights of guestworkers.

Ms. RUCKELSHAUS. Thank you.

Mr. KUCINICH. The Chair recognizes Professor McLaughlin for 5 minutes. Thank you for being here, and you may proceed.

STATEMENT OF PATRICK A. MCLAUGHLIN

Mr. MCLAUGHLIN. Chairman Kucinich, Ranking Member Jordan, and distinguished members of the committee, it is a privilege to be asked to testify in this forum today regarding the H–2B guestworker program and consideration of the Department of Labor's enforcement of policies related to guestworkers.

My name is Patrick McLaughlin, and I am a research fellow at the Mercatus Center at George Mason University. I have been invited to share my opinion of what economic effects we should expect if the United States mandated that employers must pay certain employee benefits for H–2B workers.

I have two main points to make on this topic. First, mandating benefits for H–2B workers, while well intended, will have unintended consequences. Second, if the goal is to help H–2B workers avoid possible exploitation, then a free agent model that empowers H–2B workers to switch employers can accomplish this goal while avoiding those unintended consequences.

Consider the possibility of mandating that employers pay some benefits for H–2B workers. Regardless of the specific nature of the mandated benefit, the effect is always that employers are forced to pay more for each worker they hire. Some or all of these costs may be shifted onto the employee in the form of lower wages. There are two possible scenarios that could result from mandating benefits for H–2B workers that I will discuss. To make these scenarios somewhat more concrete, suppose that the mandated benefit in question is inbound transport costs, that is, what would occur if employers were required to pay the cost for the employee to travel to the work site.

First consider those employees being paid more than minimum wage or the required prevailing wage. The papers I examined on mandated benefits consistently present the same message: the beneficiaries of the mandated benefits mostly end up paying for the benefits in the form of lower wages. This scenario can only occur, of course, if wages can't be lowered. Minimum wage or prevailing wage requirements may prevent this.

The second scenario is this: employers are legally prevented from offering lower wages to H–2B workers. If minimum wage or prevailing wage requirements mean that wages cannot be lowered, then the results are fairly straightforward from an economic perspective: firms will seek out workers with lower benefit costs. Wage rigidity such as minimum wage decrease the ability of the firm to pass along the cost of mandated benefits to employees and can lead to greater unemployment.

As Larry Summers put it, "Suppose that there is a binding minimum wage. In this case, wages cannot fall to offset employers' costs of providing a mandated benefit, so it is likely to create unemployment." In the second scenario, the effect would be that potential employees that are geographically distant would be less likely to be hired compared to potential employees that are physically closer or compared to employees who circumvent legally mandated benefits, such as illegal immigrants. This suggests two implications of mandating benefits.

First, while those workers who receive the mandated benefits will be made better off, some employers may opt to hire fewer H–2B workers because they now cost more. As a group, it is not clear that H–2B workers are made better off. While those lucky enough to get jobs with benefits may be better off, there will be less jobs to go around. Second, employers may choose to replace them with native workers or illegal immigrant workers. So while one consequence of mandating benefits for H–2B workers may be to make native workers relatively more competitive, another presumably unintended consequence would be to increase demand for illegal immigrant workers.

Finally, if the goal is to extend more benefits for H–2B workers or to at least avoid exploitation, one other policy that should be explored is the free agent model, that is, allowing H–2B workers to transfer their H–2B visa from one employer to another. This would encourage employers to compete for their services.

If demand for H–2B workers is greater than the available supply which is constrained by the H–2B visa cap, a free agent model would allow employers to bid for employees' services so that employees will end up in the job that is highest value to the economy and highest paying to the employee.

I thank you again for inviting me here today.

[The prepared statement of Mr. McLaughlin follows:]

MERCATUS CENTER
GEORGE MASON UNIVERSITY

The Economics of Mandating Benefits for H-2B Workers

TESTIMONY

Before the Domestic Policy Subcommittee of the
House Oversight and Government Reform Committee

For the hearing entitled
The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers

Patrick A. McLaughlin
Mercatus Center Research Fellow, Regulatory Studies Program
The Mercatus Center at George Mason University

Thursday, April 23, 2009, at 10:00 a.m.
Room 2154 of the Rayburn House Building

Chairman Kucinich, Ranking Member Jordan, and Distinguished Members of the Subcommittee:

It is a privilege to be asked to testify in this forum today regarding the H-2B guest worker program and consideration of the Department of Labor's enforcement of policies related to guest workers. My name is Patrick McLaughlin, and I am a research fellow at the Mercatus Center at George Mason University. The Mercatus Center is a university-based research, education, and outreach organization affiliated with George Mason University and located on the Arlington, Virginia, campus. A core mission of the Mercatus Center is to provide a public service by conducting research in law, economics, and other social sciences that is directly relevant to the issues being considered by policymakers. My research covers a broad spectrum of policy issues, but one particular research focus of mine is the economic effects of federal immigration policies.

I have been invited to share my opinion of what economic effects we should expect if the US mandated that employers must pay certain employee benefits for H-2B workers. In order to understand what the effects of mandated benefits will be, it is useful to understand what the existing body of economic research on immigration has to tell us that is relevant to this H-2B worker conversation.

Much attention is given to possible adverse effects of immigration on the labor market outcomes of native workers – wage rates and employment rates. It is true that immigrants may compete with some native workers in labor markets, possibly driving down wages or increasing unemployment levels for particular native workers that are in

direct competition with immigrants.[1] Additionally, some research has indicated that less-skilled immigrants are more likely to qualify for and participate in public assistance programs, which are disproportionately paid for by native workers.[2] At the same time, immigrant workers convey benefits to consumers of goods in the receiving country. Particularly, immigrant workers may offer skills and abilities that complement the abilities of native workers and reduce the overall costs of production.[3] Both through offering different skills and because they increase the supply of labor (lowering the cost of labor) low-skilled immigrants reduce the prices of goods that require relatively high amounts of low-skilled labor to produce.[4] In addition, high-skilled immigrant workers have been shown to contribute substantially to the production of new ideas as measured by the amount of patents they generate.[5] Overall, there are both costs to native workers as well as benefits to consumers from immigration that can affect policymaking choices regarding H-2B workers.

Economic theory on the effects of immigration on the wages and employment levels of native workers is ambiguous. On the negative side, there is a possible decrease in wages and increase in unemployment for substitutable native workers (native workers whose skill set is the same as immigrants). Let us consider the case of low-skilled immigrant workers specifically to understand this. Suppose there is a sudden influx of low-skilled immigrants to the US. If these immigrant workers are perfect substitutes for some native workers, then economic theory predicts a decrease in the wage rate for these native, substitutable workers, because the overall supply of workers of this type has increased.[6] The magnitude of this decrease in wages is an empirical question which many economists have tried to answer.

If there is a negative wage effect, it appears to be small and focused on native substitutable workers. One influential review of the literature published in 1995 concluded that "[d]espite the popular belief that immigrants have a large adverse impact on the wages and employment opportunities of the native-born population, the literature on this question does not provide much support for this conclusion."[7] Another review, published a decade later, reconsidered the question of low-skilled immigrant impacts on native labor markets outcomes in light of the increasing low-skilled composition of immigrant inflows to the US. Again, the conclusion was that the "evidence that immigrants harm native opportunities is slight."[8] The National Academy of Sciences concluded that the economic impact of immigration on the wages of competing native workers is relatively small.[9] What does small mean for these authors? Of those studies published in peer-reviewed economics journals that have found negative wage effects, the

[1] Friedburg and Hunt (1995) and Card (2005) offer somewhat broad reviews of the economics literature on the immigration effects on labor outcomes of native workers.
[2] Borjas (1994).
[3] Ibid.
[4] Cortes (2008); Lach (2007).
[5] Chellaraj et al (2005); Kerr and Lincoln (2008).
[6] Friedberg and Hunt (1995).
[7] Ibid., p. 42.
[8] Card (2005).
[9] Smith and Edmonston (1997).

most negative conclude that a 10 percent increase in the proportion of low-skilled immigrants in the labor force leads to somewhere between a 0.25 and 4 percent decrease in the wages of the substitutable native workers.[10] Examining particular subgroups can increase the magnitude of that figure, as the impact appears to differ fairly dramatically across education groups. For example, one study estimated that low-skilled immigration between 1980 and 2000 led to no change in wage rates for male native workers with some college education but an 8.9 percent wage decrease for native male high school dropouts.[11]

Counteracting negative labor market outcomes is the benefit native consumers may receive from decreased prices for low-skilled-labor-intensive goods. The net impact on the welfare of natives' depends on changes in purchasing power – the amount of goods an individual can buy. While decreases in wages represent decreases in purchasing power, a decrease in prices leads to an increase in purchasing power. Only a handful of papers so far have empirically assessed immigration's impact on the prices of goods and services, and I am only familiar with one that specifically looks at low-skilled immigration's impact on US prices. That study concluded that a 10 percent increase in the share of low-skilled immigrants in the labor force leads to a 2 percent decrease in the price of immigrant-intensively produced goods and services.[12]

Thus, there may be a net positive or negative effect on the purchasing power of natives, but that net effect is difficult to estimate and will be different for different types of workers and consumers.

I have been asked to consider the economic effects of mandating that some benefits be paid by employers to H-2B employees. There is also an extensive economics literature on the topic of mandated benefits, including both theoretical and empirical work on topics such as mandating that employers pay maternity benefits, unemployment insurance, and Workman's Compensation.[13] Regardless of the specific nature of the mandated benefit, the effect is always that employers are forced to pay more for each worker they hire who receives mandated benefits. Some or all of these costs may be shifted onto the employee in the form of lower wages.[14] To whatever degree the employee values the mandated benefit, this amounts to a transfer of wealth from the employer to the employee, just like the payment of wages – only, in this case, it is a non-voluntary transfer.[15] There are two possible scenarios that could result from mandating benefits for H-2B workers that I would like to discuss, one for H-2B workers who are paid the minimum wage or the required prevailing wage, and one for H-2B workers who are paid more than minimum wage or the required prevailing wage.

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[10] Altonji and Card (1991); Borjas (2003 and 2006). Card (1990), Card (2001), LaLonde and Topel (1991).
[11] Borjas (2003).
[12] Cortes (2008). See also Lach (2007), who examines immigration's impact on prices in Israel and finds that a 1 percentage point increase in the proportion of immigrants in the labor force causes a 0.5 percentage decrease in prices on average.
[13] Anderson and Meyer (1997); Anderson and Meyer (2000); Gruber (1994); Gruber and Krueger (1991); Summers (1989).
[14] Summers (1989); Gruber (1994).
[15] Summers (1989).

To make these scenarios somewhat more concrete, suppose that the mandated benefit in question is inbound transport costs. What would occur if employers were required by law to pay inbound transport costs for all temporary employees – in other words, if employers must pay the costs for the employee to travel to the worksite?

First, consider those employees being paid more than minimum wage or the required prevailing wage. The papers I examined that address the distribution of the burden of paying for mandated benefits consistently present the same message: the beneficiaries of the mandated benefits mostly end up paying for the benefits with lower wages. For example, one study on the implementation of the Pregnancy Discrimination Act and how it affected wages, hours worked, and employment of married women of child-bearing ages, found results that "consistently suggest shifting of the costs of the mandates on the order of 100 percent" to those women.[16] When the cost of mandated benefits can be passed along entirely to their beneficiaries, theoretically there should be little to no change in employment levels.[17] This result is confirmed empirically in many studies.[18] This leads to one possible outcome: if transport costs are passed along to H-2B workers in the form of lower wages, then the number of H-2B workers likely will not change and their effective wages (their wages plus their benefits) will not change. This scenario can only occur, of course, if wages can be lowered. Minimum wage or prevailing wage requirements may prevent this for low-skilled workers, making this scenario somewhat unlikely.

This second scenario seems more likely: employers are prevented because of some legal mechanism from offering lower wages to H-2B workers. If minimum wage, prevailing wage requirements, or some other factor means that wages cannot be lowered to compensate for employers paying transport costs, then the results are fairly straightforward from an economic perspective. Firms will seek out workers with lower benefit costs.[19] In this scenario, that means companies are less likely to hire workers whose costs employers must bear to transport them to their new jobs. This implies that, overall, those industries that rely heavily on this type of worker, such as the landscaping and tourism industries, will have higher labor costs and higher consumer prices for the goods they produce. Consider, for example, a theme park where the total number of employees needed each summer may exceed the number of local workers available each summer in the geographical vicinity. If all non-local employees (i.e., those for whom the company would have to pay transport costs) suddenly cost more to the company, then that company would become less profitable, hire fewer employees, or both. Hiring fewer employees would reduce the supply of some of the services offered by these firms, possibly leading to shorter operating hours or longer waiting lines in the case of theme parks.

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[16] Gruber (1994), p. 623.
[17] Summers (1989).
[18] Anderson and Meyer (1997); Anderson and Meyer (2000); Gruber (1994); Gruber and Krueger (1991).
[19] Summers (1989).

In the economics literature, minimum wage and prevailing wage requirements are referred to as wage rigidities.[20] Wage rigidities decrease the ability of the firm to pass along the costs of mandated benefits to employees. If this leads to scenarios where the cost of an employee would be greater than the benefit that employee provides to the employer, then one would expect that the employer would choose not to hire that employee. As Larry Summers puts it, "Suppose... that there is a binding minimum wage. In this case, wages cannot fall to offset employers' cost of providing a mandated benefit, so it is likely to create unemployment."[21] In the case where employees must pay transport costs, the effect would be that potential employees that are geographically distant (such as immigrants) would be less likely to be hired compared to potential employees that are physically closer to the job location or compared to employees who circumvent legally mandated benefits, such as illegal immigrants.

While the exact effects of mandating benefits for H-2B workers are not obvious, the literature referenced here suggests two qualitative economic implications of such a policy. First, while those workers who receive the mandated benefits would be made better off, some employers may opt to hire fewer H-2B workers or may choose to replace them with native low-skilled workers or illegal immigrant workers instead. It is not clear whether immigrant workers, both legal and illegal, would be made better off as a group. Second, it is also relevant to consider whether mandating H-2B benefits would help or harm native workers and consumers. The answer depends on a number of factors. The resulting decrease in the use of H-2B workers would imply an increase in the price of consumer goods produced with their labor, harming natives who consume those goods. At the same time, the negative wage effects of immigration on native workers may be reduced somewhat, helping substitutable native workers. The net effect on natives overall is ambiguous.

Finally, if the goal is to extend more benefits to H-2B workers, one other policy option that might be explored is allowing H-2B workers to be "free agents" – that is, giving them the ability to transfer their H-2B visa from one employer to another. This would encourage employers to compete for their services. If demand for H-2B workers is greater than the available supply, which is constrained by the H-2B visa cap, a "free agent" model would allow employers to bid for employees' services so that employees will end up in the job that is highest value to the economy and highest paying to the employee.

I thank you again for inviting me here today.

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[20] Ibid.
[21] Ibid., p. 181.

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Mr. KUCINICH. We thank you very much for being here.

We are going to move to questions of our second panel. I would like to start with Mr. Soni. Have you seen any improvement in the amount of staff and resources available to the Department of Labor's New Orleans office and Gulf Coast region since our hearings in 2007?

Mr. SONI. We have not seen any significant increase or improvement in staff capacity, and we have certainly not seen any improvement in staff outreach or staff contact with the community since the last hearing, Mr. Chairman.

Mr. KUCINICH. Ms. Bauer, given your work on guestworker issues nationally, the testimony that you heard today, do you think that it reflects the problems in the guestworker program nationally or are these aberrations and just sensational stories that do not really reflect the conditions that are going on?

Ms. BAUER. I think there is no doubt that these are problems that are the product of the structure of this program. The cases we have been involved in, many of them are national class actions, workers working not just in the south, but the northwest, all over the country, and they report the identical kinds of problems that flow from this program.

Mr. KUCINICH. In your testimony, you attached as an exhibit an article and study by the Economy Policy Institute which found that in seven occupations with the most H–2B workers, unemployment was higher and had risen faster than the national average, while wages were lower and risen more slowly than the national average. Now, the Institute attributes this to the H–2B program, allowing employers to look overseas for workers who are willing to take lower wages.

Do you agree with this conclusion and what are the steps that the Department of Labor needs to take in its certification process to ensure that the H–2B program does not lower wages for U.S. workers?

Ms. BAUER. I do agree with that conclusion, and I think EPI did an excellent job in showing very concrete examples where workers were being paid and getting certified at dramatically less than the prevailing wage rate. One of the problems I think that we are looking at is that, in 2005, the Department of Labor changed the methodology for determining the prevailing wage rate and wages plummeted $2 to $3 per hour, sort of in a typical case, as a result of that change in methodology.

The Department of Labor needs to look at the way—and I would suggest Congress needs to provide oversight for that process—at the way the prevailing wage is being calculated. We have seen many examples where people are earning significantly less than the minimum wage, and the jobs are getting certified just at the minimum wage when workers are being paid on a piece rate system.

Mr. KUCINICH. Thank you.

Ms. Ruckelshaus, do you believe the lack of enforcement of rights of guestworkers had contributed to low wages?

Ms. RUCKELSHAUS. I think the lack of enforcement generally has contributed to low wages. I think guestworkers are a microcosm of the problem that are endemic in all of these low wage service sec-

tor jobs where there just isn't any enforcement. So I guess the answer is yes, but it is not specific to guestworker problems.

Mr. KUCINICH. Well, in your written testimony you state that the abuse of guestworkers is bad for the economy at this moment in time. Certainly, everyone here is concerned with improving the economy. Can you explain this statement and give us a better understanding of how improving the treatment of guestworkers helps all workers?

Ms. RUCKELSHAUS. Yes. What I meant by that statement was that if we don't have a wage floor, it means that employers have to compete against other employers with sub-par jobs. That hurts other workers in the same sector, and even in related sectors. It is bad for the workers and their families because they can't make ends meet.

The minimum wage in this country is ridiculously low and the annual income that it generates simply isn't enough to live on. Third, it hurts our State and Federal coffers because there are payroll taxes not being paid, there are all sorts of other insurance not being paid. So it is a vicious cycle. It is not bringing anybody out of poverty.

Mr. KUCINICH. Thank you.

Just a final question to Professor McLaughlin. I noted that you sat here and heard the testimony of the previous panel. Do you have any opinion on the Department of Labor's failure to curb the abuses of guestworkers that we have heard testimony about today? How does that sound to you as you were just sitting there in the audience? Does it make you feel one way or another about the plight of these workers?

Mr. MCLAUGHLIN. I am sure that everyone in the audience, including myself, felt some sympathy for the plights of the workers. However, I am not certain whether the fundamental problem here is the Department of Labor's enforcement or lack of enforcement. What I think is the fundamental problem is the inability of the H–2B worker to be able to quit one work when he is in a situation he doesn't like and go work for another employer.

Mr. KUCINICH. Well, we appreciate your being here to testify. We really do.

I am going to now turn to Mr. Jordan, the ranking member, for 5 minutes of questioning. You may proceed, Mr. Jordan.

Mr. JORDAN. Mr. Soni, one of the things I want to get clear from your testimony that I thought was interesting, you talked about, after Katrina, many displaced residents at the hotel, and yet the Department of Labor approved the owner of the hotel bringing in guestworkers when there were lots of unemployed people—I think that was maybe your exact words—right there in the facility that the individual owned. To your knowledge, was the Department of Labor even asked the question why don't we start employing the folks who are right here, displaced people? Was that even brought up?

Mr. SONI. Well, to my knowledge, the Department of Labor did not really play a role for 3 years post-Katrina, and from enforcing the most basic wage and hour violation laws to asking the bigger questions that you are pointing to, why is one group of workers being locked out of post-Katrina New Orleans jobs while another

group of workers is brought in and exploited. That was certainly not a question that was asked by the Department of Labor. It was certainly a question asked by hundreds of workers living unemployed in the hotels, as well as a question asked by hundreds of guestworkers brought to those hotels.

Mr. JORDAN. I think you have all testified, and the first panel certainly, about the failure—the chairman's words in his opening statement were utter failure—of the Department of Labor. I think Ms. Ruckelshaus talked about over 10 years. So we are talking about the Clinton administration, the Bush administration, and the current administration, at least for 3 months. Yet, some of you say you think it is a good move that DHS is moving that portion of the program to the Department of Labor. Do you really think, at the Department of Labor, things are going to get better?

Ms. RUCKELSHAUS. I will start. I think what we need to do is smart enforcement. So assuming there is always going to be not enough resources to do enforcement, the strategies have to be smart and make an impact. So collaboration, partnering, leveraging what we have, that is what I think has to change; and it seems there is a glimmer of hope in this administration that can start to happen.

Mr. JORDAN. Let me go quickly to one other thing. I want to bring up the professor's point, the free agent concept. To me, that does seem like, when you talk about worker empowerment, putting aside the problems that have been outlined here and experienced with the recruiters and the lack of enforcement from the Department of Labor, your thoughts on that concept, the free agent concept that the professor has brought up.

Mr. SONI. Well, I would say that there are four levels at which intervention has to be made in order to empower guestworkers and make the Department of Labor relevant to the lives of guestworkers. First of all, there has to be an intervention at the level of debt. Whether or not workers are a free agent, if they come to the United States indentured to a large debt, it will not help them move from one shipyard to another.

Second, there has to be intervention at the level of workers being tied to one employer, which is what the gentleman is addressing. That, however, can easily break down in the present state that shipyards, the service industry, and other industries across the south exist. There would have to be a real compliance with that rule.

The third thing I would say is that workers at the moment are very clear that their legal status is tied to their employment. During periods of unemployment, for example, what is a worker to do? He can't come forward and report labor abuse if he doesn't have the next employer to go to.

Mr. JORDAN. Obviously, if there was a change, there would have to be an education component involved.

Ms. Bauer, you haven't spoken yet. Go ahead.

Ms. BAUER. Well, we agree that having a visa be portable to another employer would be an incredible improvement in this program, and if that is coupled with a serious regulation of recruitment and travel costs, that would make an enormous difference.

Mr. JORDAN. Do you really think we can get at the recruitment issue? Because it strikes me as we can say the individual seeking to come here can't—someone can't collect a fee from them, but there is going to be that incentive, it seems like to me, for folks in their native country wanting to unfortunately exploit them and take some money.

Ms. BAUER. Well, that happens. There is no doubt that happens. The question is is the employer who chooses that recruiter responsible. If that happened in the United States, there is no doubt that if an employer's workers are demanding kickbacks from other employees, that the employer is going to be on the hook for that.

Mr. JORDAN. Let me ask one other quick question. I have 30 seconds. And any of you can grab this. This is just a general I don't know kind of thing. What kind of background check is done on the H–2B applicants? Because in the earlier panel we heard that one—and I forget, maybe it was Mr. Lopez—worked on a military base. So what kind of background checks are done for these individuals, how extensive?

Ms. BAUER. It is very minimal. People have to submit—the thing that the State Department is largely concerned about is to make sure that people do not overstay visas. That is the level of inquiry. So the question is have you overstayed visas in the past. That is the inquiry that is going on.

Mr. JORDAN. OK. Thank you.

Mr. KUCINICH. If I may, to my colleague, it seems that the only qualification is someone's willingness to work for cheap wages, or maybe to put themselves in a position where they are not even going to get paid, which is abhorrent.

The Chair recognizes Mr. Foster.

Mr. FOSTER. When I listen to the descriptions of the problems with the wage nonpayment and cheating, as well as tax fraud and minimum wage violations, this sort of stuff, I wonder if there is any merit or if it has ever been considered to have a third party hold the wages in escrow or perhaps post a bond so you know the wages will be actually there, or maybe have a third party perform the payments so that actually there is some record of this.

Are there any initiatives along those lines that would at least guarantee—it seems to me that would have two merits, one of which would be it would prevent a deal from getting struck which relied on the employer's intention to not really pay these people properly, that would just discourage it from the start. I wonder if there are any sort of initiatives along those lines that have been contemplated. Anyone.

Ms. BAUER. I do not believe such initiatives exist. We suggested in our report that employers should be required to post a substantial bond to guarantee that there would be money to pay workers. I know of no serious proposals at the national level that would make that happen.

Mr. FOSTER. OK. In regards to this discussion of the free agent model, is there a way that any of you see to prevent an abuse from having people basically have some determination that there is a shortage of workers in some area, in some region, and then if you really have free agents, they will immediately jump to some other region, some other industry, and it won't be two equivalent ship-

yards interchanging. Isn't that a real complication with this? That when you said, OK, I want to go to this other employer, you would have to say, OK, now, is this employer in a similarly situated labor market.

Ms. RUCKELSHAUS. I think if you do have visa portability, you have to change some of the fundamental premises of the program, because then it is not necessarily no longer this employer who needs guestworkers who can't find other workers here in this country.

Mr. SONI. There really needs to be an industry assessment and a geographic assessment of industry sectors and geographies that need temporary workers. There would probably be a way to construct the ability of workers to move back and forth within those sectors. The thing that hundreds of members of our organization will testify to, though, is that without the ability to change from one employer to the other, they have no ability to negotiate and they have no leverage with their employers.

Ms. BAUER. If I might, former Secretary of Labor Ray Marshall has suggested the creation of a kind of independent agency to determine need in just this kind of circumstance. That would not be an employer-driven agency, but that would be a U.S. agency that would evaluate whether seasonal workers were really required and where.

Mr. MCLAUGHLIN. If I may also comment on that briefly. It seems like it is fundamentally an engineering and information problem that you are addressing. The incentives for both the employers and employees are obviously well addressed when the free agent model is adopted. Now, the complications of adopting that model I think have been, to some degree, addressed previously, how do you get the information about where free agent employees are to potential employers. But I don't think that changes the fundamental incentives.

Mr. FOSTER. Well, I must say I found your attraction for this free market concept, that somehow we have agents with perfect information and perfect language skills and everything else that would be necessary for that to happen sort of interesting.

I was wondering, in terms of the—I was disturbed by the failure to even log in complaints that was mentioned, I guess, by Ms. Ruckelshaus, and I was wondering if some sort of daylight or public scrutiny is relevant there. I don't know if these have to be private complaints, or would it be all right with the typical complainee if they actually just sat there and dumped it on the Internet so that this was visible to everyone that this was an unresolved complaint?

Ms. RUCKELSHAUS. I think it is deeper than that because there is nothing even there to post up on the Internet right now, because the offices aren't collecting the most basic intake information. That is the first step, is just to get them to log in what the complaint is and what the claim is. Then there would be a question of how much—there are proposals to put employers scoff law employers up on the Web so that employees can see, oh, I am owed money or he has already paid money for me. So I think there are privacy concerns, but those can be dealt with. Government agencies get data. Your offices have constituency data coming in all the time from

calls from constituents. We are talking about really basic simple stuff that I think shouldn't be a problem.

Mr. FOSTER. Do you know if the Department of Labor maintains a publicly searchable data base of debarred employers or people who have abused or defrauded employees?

Ms. RUCKELSHAUS. The prevailing wage section of it does, but the other parts do not because the data is not there.

Mr. FOSTER. OK. Thank you.

I yield back.

Mr. KUCINICH. I want to thank the witnesses on this panel. Your testimony is something that each member of this subcommittee will take careful note of. Our staff will pore over it to come up with recommendations to the Department of Labor. I want to thank each and every member of this panel for their presence here and for their thoughtful testimony. I would like you to know that this subcommittee will retain jurisdiction over this.

I have talked to the ranking member, and we are going to look for ways that we might be able to make joint recommendations to the Department of Labor. I also want to say, as the chairman of this subcommittee, the people who were involved in the offenses, who have apparently not yet been called to legal accounting, this subcommittee will continue to look at the process that has caused them to escape accountability.

I am Dennis Kucinich, chairman of the Domestic Policy Subcommittee of the Oversight and Government Reform Committee. I am joined by the ranking member of the committee, Representative Jordan of Ohio, and, of course, we are with Mr. Foster from Illinois, who has been here throughout this hearing. This has been a hearing of the subcommittee on the H–2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers. This is one of a series of hearings by this subcommittee on this subject.

I want to thank each and every one of the members of the panel and the previous panel for their testimony. I thank you very much for your presence here today. This subcommittee stands adjourned.

[Whereupon, at 12:04 p.m., the subcommittee was adjourned.]

[The prepared statement of Hon. Elijah E. Cummings follows:]

OPENING STATEMENT
OF
CONGRESSMAN ELIJAH E. CUMMINGS

"THE H-2B GUEST WORKER PROGRAM AND IMPROVING THE DEPARTMENT OF LABOR'S ENFORCEMENT OF THE RIGHTS OF GUEST WORKERS"

DOMESTIC POLICY SUBCOMMITTEE
OVERSIGHT AND GOVERNMENT REFORM COMMITTEE

THURSDAY, APRIL 23, 2009

Chairman Kucinich, thank you for holding this vitally important hearing to examine the Department of Labor's (DOL) role in overseeing and enforcing labor rights for the H-2B Guest Workers Program.

When this Subcommittee began investigating the adequacy of labor laws during the aftermath of Hurricane Katrina several years ago, there were serious problems uncovered which have transformed into the abuse practices that we are hearing about in the H-2B Guest Worker Program.

At the time, President George W. Bush asserted that because of the state of national emergency, the enforcement of labor laws would impose an undue burden on the reconstruction efforts.

I understood the urgency with which we needed to rebuild New Orleans; however, I was not convinced then nor am I convinced now that we needed to do away with labor laws and affirmative action to help recover the area.

It is unreal to hear that it took the Department of Labor two years to even acknowledge the fact that they had jurisdiction to enforce minimum wage requirements and labor protections.

While DOL has wasted valuable time trying to figure out their role, it has been the H-2B workers who have continued to suffer from our lack of oversight.

The Government Accountability Office reported in July 2008 that from fiscal years 1997 to 2007, the number of enforcement actions by the Wage and Labor Division of the Employment Standards Administration of DOL decreased by more than a third (from 47,000 to 30,000).

President Barack Obama has stated that "the time to fix our broken immigration system is now." It is also time for DOL to accept responsibility for overseeing the Guest Worker program, commit to investigating cases of abuse, and prosecute those employees that knowingly violate the laws.

We have the responsibility to ensure that DOL builds the required capacity to conduct effective investigations. Their past performance record reflects badly on the reputation of our nation. We must enforce and comply with labor laws to protect both domestic and foreign workers in our country.

I welcome the opportunity to discuss legislation that can fix the problem and look forward to the testimonies of today's witnesses. I yield back the remainder of my time.

ELIJAH E. CUMMINGS
Member of Congress