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EXAMINING THE ROLE OF LOWER-SKILLED GUEST WORKER PROGRAMS IN TODAY'S ECONOMY

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, MARCH 14, 2013

Serial No. 113–10

Printed for the use of the Committee on Education and the Workforce

Available via the World Wide Web:
www.gpo.gov/fdsys/browse/committee.action?chamber=house&committee=education
or
Committee address: *http://edworkforce.house.gov*

U.S. GOVERNMENT PRINTING OFFICE

79–739 PDF WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
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EXAMINING THE ROLE OF LOWER–SKILLED GUEST WORKER PROGRAMS IN TODAY'S ECONOMY

Thursday, March 14, 2013
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:03 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, DesJarlais, Rokita, Courtney, Andrews, Bishop, Sablan, and Bonamici.

Staff present: Owen Caine, Legislative Assistant; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Nancy Locke, Chief Clerk/Assistant to the General Counsel; Donald McIntosh, Professional Staff Member; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Nicole Sizemore, Deputy Press Secretary; Alex Sollberger, Communications Director; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Mary Alfred, Minority Fellow, Labor; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; John D'Elia, Minority Labor Policy Associate; Brian Levin, Minority Deputy Press Secretary/New Media Coordinator; Celine McNicholas, Minority Senior Labor Counsel; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; and Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director.

Chairman WALBERG. Well, good morning. A quorum being present, the subcommittee will come to order. Other committee members will be arriving, but it is time to begin so we might as well begin.

I would like to welcome our members and thank our witnesses for being here this morning.

Legal immigration is a hallmark of this great country, my family included. Families and individuals from around the world have come to our shores in pursuit of freedom and opportunity.

President Reagan often referred to our nation as a "shining city on a hill." For those who have followed its light we have tried to provide a legal framework for entering and residing inside the United States.

Such a framework is critical to protecting our national interests and security. However, our immigration system is no longer as strong and effective as it should be and reform is complex and controversial, to say the least.

The Education and the Workforce Committee has long played an important role in that debate overseeing policies such as employment verification and temporary guest work programs. The current debate is even more complicated due to the ongoing jobs crisis plaguing our nation: 12 million Americans are searching for work.

In my home state of Michigan nearly 9 percent of the state's working population is without a job. It is an improvement from where we were a few short years ago, but we still have a long way to go before families and small businesses fully recover from a recession.

To help our economy move forward we must ensure, first of all, all American workers have the tools they need to compete for good-paying jobs here at home. I am pleased the House will consider this afternoon comprehensive job training reform legislation which will help workers and job-seekers access to the skills and education they need to get back to work.

Additionally, we must do all that is reasonably possible to ensure employers are searching far and wide for American workers. Guest worker programs include a number of provisions intended to protect domestic workers. We can debate whether those policies go too far or not far enough, but it is imperative we continue to support our fellow citizens struggling to find work.

We do realize, however, there are times when the supply of domestic labor falls short of demand. For a variety of reasons and despite their best efforts, some employers simply cannot hire the workforce necessary to run their businesses. Guest workers help fill that void.

The Immigration Nationality Act currently includes several guest worker visa programs, such as the H-1B program for highly skilled workers and the H-2B program for temporary non-agricultural workers. The law allows foreign workers to be admitted for a specific period of time and purpose. Under the H-2B program specifically, guest workers can enter the United States for up to 10 months and their stay can be extended up to 3 consecutive years.

An employer petitioning for guest workers must certify that domestic workers are unavailable as well as demonstrate the hiring of foreign workers will not harm the wages and employment of Americans.

We will examine today whether these programs serve the best interests of workers and employers. No doubt, that is a large undertaking for one hearing and involves a number of important questions.

For example, do limits on the number of visas issued each year undermine the success of these programs? Will regulatory proposals put forward by the administration make it easier or more difficult for employers to obtain foreign labor?

Do we have the right tools in place to ensure protections for American workers are adequately enforced? Do the current temporary visa programs meet the long-term needs of employers seeking lower-skilled workers?

It is difficult for any federal program or law to keep pace with our dynamic economy. Shifting demographics can alter the landscape of America's workplaces. New industries and technologies constantly change how businesses provide goods and services to consumers.

While such developments often improve our lives, they also raise difficult questions that need to be addressed by policymakers. I hope our hearing today will inform the debate that is taking place nationwide.

Again, I would like to thank our witnesses for joining us.

And I will now recognize my distinguished colleague, Joe Courtney, the senior Democratic member of the subcommittee, for his openingremarks.

[The statement of Chairman Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections

Good morning. I'd like to welcome our members and thank our witnesses for being with us today.

Legal immigration is a hallmark of this great country. Families and individuals from around the world have come to our shores in pursuit of freedom and opportunity. President Reagan often referred to our nation as "a shining city upon a hill." For those who have followed its light, we have tried to provide a legal framework for entering and residing inside the United States. Such a framework is critical to protecting our national interests and security.

However, our immigration system is no longer as strong and effective as it should be, and reform is complex and controversial. The Education and the Workforce Committee has long played an important role in that debate, overseeing policies such as employment verification and temporary guest worker programs.

The current debate is even more complicated due to the ongoing jobs crisis plaguing the nation. Twelve million Americans are searching for work. In my home state of Michigan, nearly 9 percent of the state's working population is without a job. It is an improvement from where we were a few short years ago, but we still have a long way to go before families and small businesses fully recover from the recession.

To help our economy move forward, we must first ensure all American workers have the tools they need to compete for good paying jobs here at home. I am pleased the House will consider this afternoon comprehensive job training reform legislation, which will help workers and job seekers access to the skills and education they need to get back to work.

Additionally, we must do all that is reasonably possible to ensure employers are searching far and wide for American workers. Guest worker programs include a number of provisions intended to protect domestic workers. We can debate whether those policies go too far or not far enough, but it is imperative we continue to support our fellow citizens struggling to find work.

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While such developments often improve our lives, they also raise difficult questions that need to be addressed by policymakers. I hope our hearing today will inform the debate that is taking place nationwide.

Again, I'd like to thank our witnesses for joining us, and I will now recognize my distinguished colleague Joe Courtney, the senior Democratic member of the subcommittee, for his opening remarks.

Mr. COURTNEY. Well thank you, Mr. Chairman. And I particularly want to compliment you for organizing this hearing early in this Congress because there is no question that since the election last November this issue has suddenly gotten a lot more political momentum, and obviously we want to make sure this subcommittee and our full committee are active and full participants in any legislative efforts.

Mr. Chairman, we are meeting today to discuss the role of low-skilled guest worker programs in our country. As I said, this discussion comes at an important moment as we consider a framework for comprehensive immigration reform.

Prior to the 2012 election, real, meaningful reform of our nation's immigration policy seemed completely out of the political realm of the possible. Sadly, the last major effort, the DREAM Act, which was passed in the lame duck session in 2010, seemed to be the high watermark for this era. But nonetheless, the election has really changed the political dynamics surrounding this whole issue.

And we are seeing encouraging bipartisan agreements among our Senate colleagues and an agreement on a set of shared principles for reform between the U.S. Chamber of Commerce and the AFL-CIO. I am deeply encouraged by this progress and agree with the joint statement released by the chamber and the AFL that today's effort at comprehensive immigration reform present a historic opportunity for U.S. workers and businesses to work together to fix a broken system.

I don't think there is a single member of Congress who has casework in their district offices that cannot say that this has just become an overwhelming volume of work, whether it is family unification, whether it is work visas, tourist visas, J-1, you name it. Again, the folks that work for us in our district office feel every single day the dysfunctional system that we have in place and it is time to fix it.

But the basic principles which have been issued, I think, are important to state at the outset, which is first and foremost, any work-based visa program for foreign workers must protect employment opportunities for U.S. workers. It must also prevent the exploitation of guest workers.

Today the national unemployment rate stands at 7.7 percent; 12 million U.S. workers are looking for jobs. And that is probably understated, in terms of people who have just sort of left the marketplace.

The unemployment rate in many of the industries that utilize the largest number of H-2B visa guest workers programs is even bigger. The February 2013 unemployment rate in the construction trades was 15.7 percent; leisure and hospitality, 11.2 percent. That is almost 3 million U.S. workers just in those two sectors alone looking for a job. We must ensure that those workers have a meaningful chance at the jobs that are available in these industries.

This morning we have the chance to examine the role of lower-skilled temporary foreign worker program in our nation. I hope that we consider what impact guest worker programs have on wages and working conditions.

Are employers and industries that rely heavily on H-2B workers paying a fair and competitive wage? Are there some jobs that U.S. workers are simply unwilling or unavailable to perform, or does reliance on guest worker programs create a situation whereby the wages and demands of an industry make it nearly impossible for American workers to take on those jobs and put food on their family's table?

Earlier this week the Bureau of Labor Statistics determined that the personal care home health aides are the fastest-growing job classification in our country. On average, DOL found that full-time workers in this field earn about $20,000 a year. The hours are long, the work is physically and emotionally challenging. That makes it difficult to maintain a stable workforce.

The question to consider today is, will opening this type of work to guest workers address any workforce shortage in a way that is good for our nation's economy, good for U.S. workers, and fair to the guest workers who end up in these jobs?

Mr. Chairman, we have a responsibility to ensure that our nation's immigration laws meet the needs of our country's workers and employers. We also have a responsibility to our nation's guest workers.

The reality is is that these workers perform difficult work and enjoy few workplace protections. During the Bush administration, DOL loosened the rules governing the H-2B program. Employers merely had to attest that they have attempted to recruit U.S. workers for open positions; they no longer were required, in many instances, to demonstrate that their recruitment efforts—their recruitment efforts or coordinate with the state workforce agency.

The administration also adjusted the wage requirements, putting downward pressure on wages in H-2B programs. Under the common sense rules proposed by the Obama administration many of these damaging changes were addressed.

Specifically, the wage rate reform rule would have increased the wages paid to H-2B workers and similarly employed U.S. workers by an average of $4.83 an hour. There is no question that better wages would attract more U.S. workers to these jobs and enable them to stay in these jobs. However, the regulations remain tied up in litigation or are delayed by appropriation riders.

I hope today's discussion is the start of a productive debate on immigration reform—one that seeks to serve this nation's workers and employers. What we don't need is a race to the bottom here at home, with workers forced to compete for lower and lower-wage jobs.

We need to be careful about how we administer any temporary guest worker program to ensure that foreign workers are not exploited and that U.S. workers have a shot at available jobs. Anything less will undermine the jobs, wages, and working conditions of U.S. workers and the guest workers laboring with them.

I look forward to exploring these issues and hearing from the witnesses.

Thank you, Mr. Chairman. I yield back.

[The statement of Mr. Courtney follows:]

Prepared Statement of Hon. Joe Courtney, Ranking Member, Subcommittee on Workforce Protections

Mr. Chairman, today we are meeting to discuss the role of lower-skilled guest worker programs in our economy. This discussion comes at an important moment, as we consider a framework for comprehensive immigration reform. Prior to the 2012 election, real, meaningful reform of our nation's immigration policy seemed unlikely. However, today's hearing comes in the wake of encouraging bipartisan agreements among our Senate colleagues and an agreement on a set of shared principles for reform between the Chamber of Commerce and the AFL-CIO. I am deeply encouraged by this progress and agree with the joint statement released by the Chamber and the AFL that today's efforts at comprehensive immigration reform present a historic opportunity for U.S. workers and businesses to work together to fix a broken system.

First and foremost, any work-based visa program for foreign workers must protect employment opportunities for U.S. workers. It must also prevent the exploitation of guest workers. Mr. Chairman, today the national unemployment rate stands at 7.7 percent—12 million U.S. workers are looking for a job. The unemployment rate in many of the industries that utilize the largest number of H-2B guest workers is even higher. The February 2013 unemployment rate for the construction industry was 15.7 percent and in leisure and hospitality the unemployment rate was 11.2 percent—that is almost 3 million U.S. workers looking for a job. We must ensure that these workers have a meaningful chance at the jobs that are available in these industries.

This morning, we have the chance to examine the role of a lower-skilled temporary foreign worker program in our nation. I hope that we consider what impact guest worker programs have on wages and working conditions. Are employers in the industries that rely heavily on H-2B workers paying a fair, competitive wage? Are there some jobs that U.S. workers are simply unwilling or unavailable to perform? Or, does reliance on guest worker programs help create a situation whereby the wages and demands of an industry make it nearly impossible for American workers to take those jobs and put food on their family's table? Earlier this week, the Bureau of Labor Statistics determined that personal care aides/home health aides are the fastest growing job classifications in this country. On average, DOL found that full-time workers in this field earn around $20,000 a year. The hours are long and the work is physically and emotionally challenging. That makes it difficult to maintain a stable workforce. The question to consider today is, will opening this type of work to guest workers address any workforce shortage in a way that is good for our nation's economy, good for U.S. workers, and fair to the guest workers who may end up in those jobs.

Mr. Chairman, we have a responsibility to ensure that our nation's immigration laws meet the needs of our country's workers and employers. We also have a responsibility to our nation's guest workers. The reality is that these workers perform difficult work and enjoy few workplace protections. During the George W. Bush Administration, the Department of Labor loosened the rules governing the H-2B program. Employers merely had to attest that they have attempted to recruit U.S. workers for open positions, they no longer were required to demonstrate their recruitment efforts or coordinate with state workforce agencies. The Bush Administration also adjusted the wage requirements, putting downward pressure on wages in the H-2B program. Under common sense rules issued by the Obama Administration, many of the damaging changes the Bush Administration made to the H-2B program were addressed. Specifically, the wage rate reform rule would have increased the wages paid to H-2B workers and similarly employed U.S. workers by an average of $4.83 per hour. There is no question that better wages would help attract more U.S. workers to those jobs and enable them to stay in those jobs. However, the regulations remain tied up in litigation or delayed by appropriations riders.

I hope today's discussion is the start of a productive debate on immigration reform—one that seeks to serve this nation's workers and employers. What we don't need is a race to the bottom here at home, with workers forced to compete for lower and lower wage jobs. We need to be careful about how we administer any temporary guest worker program to ensure that foreign workers are not exploited and U.S. workers have a shot at available jobs. Anything less will undermine the jobs, wages, and working conditions of U.S. workers and the guest workers laboring with them. I look forward to exploring these issues and hearing from the witnesses. Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record, and without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted into the official record.

It is a privilege to introduce our witness panel this morning. First, Ms. Laura Reiff is a co-managing shareholder of the Greenberg Traurig law firm of McLean, Virginia. She is testifying on behalf of the Essential Worker Immigration Coalition.

Welcome.

Our second witness is Mr. Fred Benjamin, who is chief operating officer at Medicalodges, Inc., in Coffeyville, Kansas. Could use some coffee right now, maybe. That works. Mr. Benjamin is testifying on behalf of the American Health Care Association.

Thank you for being here.

Ms. Mary Bauer is the legal director at the Southern Poverty Law Center in Montgomery, Alabama.

Thank you for joining us again.

And then it is a special privilege for me to introduce Mr. Dan Musser, who is the president of the Grand Hotel in Mackinac Island, Michigan.

Allowing personal privilege here, I certainly give a very easy recommendation and advertisement for the Grand Hotel. If you have not been there you haven't lived, to sit on the longest porch in the world looking at some of the greatest scenery in the Straits of Mackinac, on an island where the only sound you will basically hear other than happy voices is the clippety-clop of horses and carriages, since those are the only transportation sources on the island. If you have missed it, you have missed it and it is about time to take care of that.

Welcome.

Mr. Chairman? When you sit this——

Mr. KLINE. [Off mike.]

Chairman WALBERG. Oh, gee whiz. Don't you wish. [Laughter.]

Before I recognize each of you to provide your testimony let me briefly explain our simple lighting system—much like traffic lights. I am sure you understand that you will have 5 minutes to present your testimony.

When you begin the light in front of you will turn green; when 1 minute is left, caution, a light yellow comes on; when your time is expired the light will turn red, at which point I ask that you would wrap up as quickly as possible to allow the questions that

will come that will allow you to expand on what you have said, I am certain.

After you have testified members will each have 5 minutes to ask questions of the panel with the same light source available to them.

And so at this time I would recognize Ms. Reiff for your presentation. Thank you.

STATEMENT OF LAURA FOOTE REIFF, CO–MANAGING SHAREHOLDER, GREENBERG TRAURIG LLP, TESTYFYING ON BEHALF OF THE ESSENTIAL WORKER IMMIGRATION COALITION

Ms. REIFF. Thank you, Chairman Walberg, and Ranking Member Courtney, and distinguished members of the committee. Good morning and thank you for the opportunity to testify before the committee today.

My name is Laura Reiff and I am a partner at the law firm of Greenberg Traurig. I also run the national immigration practice for the firm, and I have been involved in immigration legislative issues for the past 20-plus years.

I am also one of the founders and on the leadership team of the Essential Worker Immigration Coalition, the business coalition that has been put together on immigration reform. And we have been working together to help effect immigration change since 1999.

It is a privilege for me to be here today to discuss the role of lesser-skilled worker programs as Congress wrestles with comprehensive immigration reform issues.

It is very important to note that an overhaul of the immigration policy to meet our national security and economic needs is long overdue. It has been more than 26 years since the last reform. It is really time for good public policy to take center stage.

The Immigration Reform and Control Act was passed in 1986 when I was still in law school. It was designed to be a solution to the broken immigration system.

The law included a new immigration legal program that brought more than 3 million people out of the shadows and granted them lawful status. There was also a plan to hold employers accountable for hiring workers by asking them to check the identity and work authorization of new hires, and as a counterbalance to employer verification there were antidiscrimination requirements passed to ensure that employers didn't discriminate in hiring based upon citizenship or national origin. This was supposed to be the solution in 1986.

The idea was good but things went dreadfully wrong over the past two decades. The programs didn't work the way they were envisioned.

Millions of foreign workers entered the U.S. in questionable status and took jobs with U.S. employers. Most employers did go through all the employment verification processes but the new workers had documents to satisfy those requirements.

Why didn't these foreign workers enter the U.S. legally or why did they overstay their status and take jobs without authorization? The answer is very simple: There was no immigration program

available to those foreign workers that wanted to enter the U.S. lawfully.

What is needed now to correct this employment-based immigration, this broken employment-based immigration system, is a workable employment eligibility verification program for employers, a functional temporary worker program that allows employers to hire foreign workers when U.S. workers are not available, and some sort of stabilization of the existing foreign workforce that is embedded in the U.S. economy over the last two decades.

Current visa programs don't address the problem, as the chairman stated. We have an H-1B program, which is for highlyskilled individuals with at least a bachelor's degree. We have an H-2A program, which is for seasonal agricultural workers. We have an H-2B program, which is for seasonal non-agricultural workers. And then some other extraneous visa programs, like the TN, Trade NAFTA program, which is for professionals from Canada or Mexico.

These current visa programs—the H-1B has kind of been seen as the model of a temporary worker program that should be used for a new worker program. It is a program that is limited to 6 years.

Again, it has to—the individual must come in and be sponsored by an employer. The employer must have a position that requires an individual with a university degree. And the program is capped at 65,000 numbers per year.

It is an arbitrary cap. That cap has been reached every year over the past 10 years and it is anticipated that that cap will be reached on April 1 of 2013 for the next fiscal year 2014 number of H-1B visas. That cap is the filing date is coming up imminently.

The H-2B program has been a program for seasonal non-agricultural workers, and you will hear from Mr. Musser today about how that program works. It is not a program that fits the needs of our economy. And it is not a program that deals with full-time permanent employment.

H-2B visas are used in industries such as landscaping, seasonal hospitality, fish processing and there is a cap on that program as well—an arbitrary cap of 66,000.

These existing types of temporary worker programs do not begin to meet all the needs of our complex U.S. economy. There is no temporary worker program that addresses the huge gulf between these programs and the complexities of the many different kinds of jobs and skills that are out there. Employers need a way to recruit foreign workers when they cannot find a U.S. worker after rigorous recruitment, and currently there are very few realistic mechanisms to accomplish that.

Employers are experiencing persistent and recurring job openings despite the downturn in the economy. Many positions remain unfilled despite extensive recruitment efforts of U.S. workers.

Some industries that have expressed concern: meat processing, specialty construction employers, manufacturing, restaurant and food service, hospitals, and you will hear today about hotels and resorts and senior care medical facilities—nursing homes.

We need to fill the program gap that was left in 1986. The Essential Worker Immigration Coalition has worked together with

other advocates to come up with a new model, a model that we think actually can work for a new worker program.

In contrast with other existing U.S. temporary worker programs, under this new proposal employers would not sponsor workers for visas and workers would not be tied to specific jobs or specific employers. But workers would, rather, be able to change jobs and work for any employer who is registered to participate in a program.

I have put the full details in the testimony, but here are a few quick highlights: it would be a two-track program; employers would register for slots after doing rigorous recruitment; employees would then be able to register for a slot.

There would be complete portability. Employees would be able to move between registered employers.

The cap would not be arbitrary; it would be flexible and market-based, based on demand so that when employers needed workers after testing the U.S. market they would be able to bring workers in.

Wages would be the wages that would be paid to actually—to similarly-situated U.S. worker or the prevailing wage, whichever is higher. And we actually propose having a pretty detailed monitoring system to make sure that employees that are here are monitored while they are here and that their status is checked so that there is a workable employment eligibility verification system and a way to track employees when they are here.

Chairman WALBERG. We will look forward to plumbing the depths further, but——

Ms. REIFF. So I thank you for allowing me to testify today, and I am looking forward to answering questions.

[The statement of Ms. Reiff follows:]

Prepared Statement of Laura Reiff, Principal Shareholder, Greenberg Traurig; Chair, Business Immigration and Compliance Group on behalf of the Essential Worker Immigration Coalition

Chairman Walberg, Ranking Member Courtney, and distinguished members of the Committee, good morning, and thank you for the opportunity to testify today before the Committee. I am Laura Reiff, the Co-Managing Shareholder of Greenberg Traurig, LLP's ("GT") Tysons Corner Office and Co-Chair of GT's Business Immigration and Compliance Group. I focus my practice on business immigration laws and regulations affecting U.S. and foreign companies, as well as related employment compliance and legislative issues.

I am also one of the founders and a member of the leadership team of the Essential Worker Immigration Coalition. The Essential Worker Immigration Coalition (EWIC) is a coalition of businesses, trade associations, and other organizations from across the industry spectrum that support reform of U.S. immigration policy to facilitate a sustainable workforce for the American economy while ensuring our national security and prosperity.

Overview

It is a privilege for me to be here today discussing the role of lower-skilled guest worker programs as Congress wrestles with comprehensive immigration reform issues. It is very important to note that an overhaul of our immigration policy to meet our national security and economic needs is long overdue—it has been more than twenty-six years since the last reform—it is time for good public policy to take center stage.

The Immigration Reform and Control Act of 1986 was designed to be a solution to a broken immigration system of the day. The law included a new legal immigration program that brought more than 3 million people out of the shadows and granted them lawful status. There was also a plan to hold employers accountable for hiring workers by asking them to check the identity and work authorization of new

hires. As a counter balance to employer verification, there were antidiscrimination requirements passed to ensure that employers didn't discriminate in hiring based upon citizenship and national origin.

This was to be the solution. The idea was good, but many things went dreadfully wrong over the past two plus decades. The programs didn't work the way they were envisioned. Millions of foreign workers entered the U.S. in questionable status and took jobs with U.S. employers. Most employers did go through an employment verification process, but the new workers had documents to satisfy the requirements. Why didn't these foreign workers enter the U.S. legally or overstay their status and take jobs without authorization? The answer is simple—there was no immigration program available to foreign workers who wanted to enter the U.S. lawfully. What is needed to correct this broken employment based immigration system is (1) a workable employment eligibility verification program; (2) a functional temporary worker program that allows employers to hire foreign workers when U.S. workers are not available and (3) some sort of stabilization of the existing foreign workforce that is embedded in the U.S. economy.

Current Visa Programs for Lesser Skilled Workers

Most foreign workers entering the U.S. to work enter under one of the following categories: professionals, and executives or managers; agricultural workers or seasonal non-agricultural workers. Traditionally, the visa status used for technical professionals is the H-1B. Canadian and Mexican professionals are eligible for expedited visa and admission procedures pursuant to the North American Free Trade Agreement (NAFTA) under a TN visa. An employer may sponsor an unskilled worker for permanent residence, or greencard status, but this is category is restricted to 10,000 visa numbers per year. Due to backlogs in this category, it can take 10—15 years to actually enter the U.S. in this category and for most employers that is not a realistic or timely method to bring in workers.

The commonly used temporary worker programs in existence today are the H-1B, the H-2B, TN and the H-2A programs. The H-2A agricultural visa program has proven to be difficult to use and not responsive to the realities of the agricultural workplace.

H-1B Visa—Temporary Specialty Worker Visa

The H-1B visa is available to nonimmigrants who are temporarily employed in professional positions that qualify as "specialty occupations." A "specialty occupation" requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree—or its foreign equivalent—or higher in a specific specialty as a minimum for entry into the occupation in the United States.

The position to which the individual is transferred must be professional. Professional positions include positions such as engineer, computer systems analyst, financial analyst, attorney, accountant, and many others; these are considered occupations for which a bachelor's degree is the minimum requirement for entry. If the employee has the equivalent of a U.S. bachelor's degree and an employer requires his/her services in a professional position, the employee should qualify for an H-1B temporary worker visa. H-1Bs visas are employer and location-specific. The initial period of stay granted to H-1B beneficiaries is three (3) years, with the option to extend their status in three (3) year increments. At the end of the six (6) year term, beneficiaries must spend one (1) full year outside the United States before being permitted to re-enter in H-1B status.

All H-1B petitions must be filed by the employer. Prior to filing an H-1B petition with the USCIS, the employer must first attest to the Department of Labor that the alien will receive a salary commensurate with the prevailing wage for U.S. workers in the same job category. The employer must also make certain attestations to show that U.S. workers are in no way disadvantaged by the hiring of the foreign national. The employer must also attest that it offers its U.S. and H-1B workers the same benefits. A notice of the filing and the attestations must be posted internally along with the offered salary and the prevailing wage for ten (10) consecutive days in two (2) conspicuous locations. The employer is also required to obtain and maintain documentation to support each of the Labor Condition Statements made on the Labor Condition Application ("LCA").

An employer must maintain a Public Access File (PAF) that is accessible to interested and aggrieved parties, and kept separate from personnel records. The PAF must be available at either the employer's principal place of business or at the worksite within one (1) day after the LCA is filed with supporting documentation

There is currently 65,000 H-1B visas allocated every fiscal year. The cap has been reached well before the end of the fiscal year for the past several years, meaning

that new H-1B petitions are not available until the next federal fiscal year (starting October 1). There are also 20,000 available visas per year for nonimmigrants who have earned a Master's degree or higher from a U.S. institution.

Trade NAFTA "TN" Status

NAFTA has special provisions for Canadian and Mexican citizen professionals who are offered a position in the U.S. The professional visa status under NAFTA is called Trade NAFTA status or TN status. The person must be coming to work in an occupation on the NAFTA list. A Canadian citizen who fits within one of the TN occupational categories may present documentation at the border in order to obtain a TN. If a Canadian national does not fit within one of the given professions identified in the NAFTA, he/she still may qualify for the standard H-1B category for specialty occupations. Mexican nationals may qualify for TN status. However, there is a limit of 5,500 Mexican TN visas per year. In addition, Mexican nationals must first obtain a labor condition attestation from the Department of Labor and be pre-approved by the USCIS within the U.S. The process is similar to the process for H-1B status.

H-2B—Seasonal Non-Agricultural Temporary Worker

The other major temporary worker program is the H-2B program. This program is designed specifically to allow foreign nationals to work for a sponsoring employer in a job that is only temporary in nature; for example, to fill a seasonal job (but not in agriculture), to meet a one-time project or need, to add additional staff during a time of exceptionally high peak load, or to fill a position that is intermittently used in the business. H-2B visas are used in industries such as landscaping, seasonal hospitality (such as resort hotels, restaurants and attractions), and seasonal construction, as well as to meet specific needs in manufacturing, retail and other industries. The cap on H-2B visas is 66,000 annually. The H-2B program helps supplement the native-born workforce, but it cannot be used to fill all types of jobs because of the seasonal nature of the visa. A company has to first recruit and advertise for the opening in the U.S. The employer must then obtain a temporary labor certification from the Department of Labor, receive approval from the Department of Homeland Security, and then request that the visa be issued through consular process of the Department of State.

The existing types of temporary worker programs do not begin to meet all of the complex needs of the U.S. economy. In sum, the H-1B program is focused on higher-skilled immigrant workers, while the H-2B program is limited to short-term, seasonal types of work, although it allows for recruitment of lower-skilled workers. Furthermore, particularly when viewed against a domestic economy of over 154 million workers, the caps are simply unrealistic. There is no temporary worker program that addresses the huge gulf between these programs and the complexities of the many different kinds of jobs and skill levels. Employers need a way to recruit foreign workers when they cannot find a U.S. worker, and currently there are few realistic mechanisms to accomplish that.

What are the Needs of our Economy and Business

The population of the U.S. as a whole will increase over the next several decades. However, this population is aging, more educated and participating at lower rates in the workforce. The demographic changes caused by our aging workforce and the lower participation of the baby boomers will have long lasting effects on our labor market.[1] The Bureau of Labor Statistics also has projected job growth, both in low-skilled and high-skilled occupations. The BLS expects that between 2010 and 2020 the number of U.S. jobs will increase by 20 million.[2]

Employers are experiencing persistent and recurring job openings. Many positions remain unfilled despite extensive efforts to recruit and retain U.S. workers. Some of the industries that have expressed concern include: Meat Processing, Specialty Construction Employers; Manufacturing; Restaurants and Food Service; Hospitals; and as you have heard here today, Hotels and Resorts and Senior Care Medical Facilities. Here is a short list of some of the positions that I am aware of that are in need of workers.

Industry/Positions with Identified Needs:

Landscaping Industry

- Landscape Laborer
- Irrigation Technician

[1] Bureau of Labor Statistics, Projection of the Labor Force to 2050. Monthly Labor Review, October 2012.

[2] Bureau of Labor Statistics, Labor Force Projections to 2020. January 2012.

• Crew Leader
• Tree Surgeon Assistant
Manufacturing
Welders
Electricians
Health Care
• Nurses
• Certified Nursing Assistants
• Licensed Practical Nurses
Construction Industry
• First Line Supervisor/ Managers of Construction
• Steel Workers and Structural Iron Workers
• Brick mason and Block masons
• Cement Mason and Concrete Finishers
• Roofers
Hotel Industry
• Baggage Porters and Bellhops
• Hotel, Motel, and Resort Desk Clerks
• Maids and Housekeeping Cleaners
Restaurant Industry
• Food Service Manger
• Chefs and Head Cooks
• First-line Supervisors/ Managers of Food Prep & Servers
• Cooks/Restaurants
• Dishwasher
• Cooks/Fast Food/Crew Member (non-managerial)
Other Positions
• Carpenter
—Helper-Carpenter
• Plumbers, Pipefitters and Steamfitters
—Helper-Plumber
• Meat Processor
• Housekeeping Cleaner
• Truck Driver

EWIC Proposal for a Temporary Worker Program

We need to fill the program gap that was left in 1986 with a supplemental worker program that can be used when U.S. workers cannot be found. A visa program that allows employers from across the spectrum to obtain workers from abroad should be established so that all employers with worker needs that can't be filed by U.S. workers can bring workers to this country through legal channels. Since 1999, EWIC has supported new worker programs that meet business needs. EWIC has worked with businesses and other advocates to develop a program that fills this critical gap in our legal immigration system.

A critical element of a program is to supply the U.S. economy with the workers it needs to recover from the downturn and grow in years ahead. This visa program must give employers, not the government, the primary say in which workers they need to staff their businesses and give the labor market the primary say in how many workers enter the country annually in a legal program. The marketplace can best make these determinations. The most accurate way to measure whether immigrant workers are needed is for employers to try—and either succeed or fail—to hire U.S. workers. The enclosed Exhibit is the most recent proposal for a new worker program.

As described above, of the many inadequacies of the existing legal immigration system, few are as damaging—with worse consequences for immigrants or for the U.S. economy—than the lack of a visa program for less skilled immigrants seeking to enter the country legally and work in the United States. EWIC developed a proposal to fill this void: a provisional visa program designed to reflect market dynamics, expanding in good times when U.S. labor needs intensify and contracting in downturns when U.S. labor needs subside.

In contrast with other existing U.S. temporary worker programs, under this proposal, employers would not sponsor workers for visas, and workers would not be tied to specific jobs or specific employers, but rather would be free to change jobs at will, working for any employer who is registered to participate in the program. The following is a short synopsis of the key program points:

TWO APPLICATION TRACKS. One track is for employers who demonstrate they have tried and failed to find U.S. workers and are given permission to hire less-skilled foreign workers for specific, "registered jobs." The other track is for foreign

workers who are granted visas based on initial job offers, but then are free to change jobs in the U.S., accepting work from any employer who has demonstrated a labor need and been registered with the program.

COMPLETE PORTABILITY. The foreign worker is not tied to a specific job for a specific employer but rather is free to work for any employer who has tested the market and been registered with the program.

OCCUPATIONS COVERED. Any nonfarm, low-skilled job that does not require a college degree as standard preparation, including year-round employment.

DUAL INTENT. The initial visa is temporary: two years, renewable twice. But just as high-skilled H-1B temporary visa holders can eventually transition to permanent visas, so low-skilled workers in this program can eventually earn the right to get in line for a green card. Who can make the transition will be determined by an evaluation of the newcomer's rootedness, assimilation and personal success in the U.S.

LABOR MARKET TEST. Attestation-based with back-end audits. Before they can be registered, employers must test the labor market, making a good faith effort to recruit U.S. workers, and every two years, they must reapply, demonstrating their continued labor need and keeping their registration current.

NUMBER OF VISAS AVAILABLE. The number of visas issued each year will float up and down in response to U.S. labor needs—need demonstrated and quantified by the employer attestation process. Employers who have tried and failed to find U.S. workers will attest to their job openings and recruitment efforts. The government will approve a given number of registered job openings, and the annual visa quota will be adjusted to meet this demand using a mathematical formula.

WAGES. Participating foreign workers will receive the actual wage paid to similarly situated U.S. workers in the same location OR an agreed upon prevailing wage, whichever is greater. The prevailing wage will be determined by any relevant collective bargaining agreement, applicable Davis-Bacon and Services Contract Act requirements, the Bureau of Labor Statistics-determined wage for that occupational classification or a private wage survey that meets standards specified by the Secretary of Homeland Security.

E-VERIFY and an ELLIS MONITORING SYSTEM. Movement of workers from job to job will be tracked electronically by a government monitoring system and through E-Verify, and the two systems will be coordinated.

A new temporary worker program to meet the needs of an expanding economy will also enhance our national security and control over our borders. When available jobs are filled (after recruitment in the domestic labor pool) by legal foreign workers, there will no longer be jobs to be filled by those who may come here illegally and thus, the magnet that drives much illegal immigration will be eliminated. A successful temporary worker program should bring these economic migrants through lawful channels allowing the Border Patrol to focus on the real threats coming across our border.

Conclusion

What is needed, and the challenge you face as legislators, is an immigration system that reflects the needs of the economy. Picking an arbitrary number of immigrants to be allowed into the U. S. and only allowing some industries the workers needed at the expense of other industries is not in our national interest. If we want the economy to grow, we will need workers. When we can't find U.S. workers we need to be able to hire foreign workers.

Immigration is a complex, complicated problem. It deserves more than piecemeal solutions, more than a patchwork of regulation at various levels of government. It deserves a thoughtfully reasoned solution from the people who have true responsibility for immigration law: Congress and the President. Thank you.

Chairman WALBERG. Thank you. Your Swedish heritage gave you a little less extra time there. I ask for forgiveness on that one.

Mr. Benjamin, we recognize you for your 5 minutes of testimony.

STATEMENT OF FRED BENJAMIN, CHIEF OPERATING OFFICER, MEDICALODGES, INC., TESTIFYING ON BEHALF OF THE AMERICAN HEALTH CARE ASSOCIATION

Mr. BENJAMIN. Good morning, Chairman Walberg, Ranking Member Courtney, and distinguished members of the subcommittee. I would like to thank you for holding this hearing to explore the labor shortage facing our country and I especially appreciate the opportunity to appear before you here today.

My name is Fred Benjamin and I am chief operating officer of Medicalodges, a company that offers a continuum of health care services and options which include skilled nursing care, rehabilitation, assisted living, services for people with developmental disabilities, intellectual disabilities, and more. Medicalodges is a member of the American Health Care Association, which in turn is a member of the Essential Worker Immigration Coalition.

We are an employee-owned company and operate over 30 facilities in Kansas, Missouri, and Oklahoma and employ over 2,200 people. We have critical staffing needs. There are chronic shortages throughout the nursing home community. It is a daily struggle to find enough dedicated caregivers, yet we are responsible for the lives of 1.5 million frail and elderly citizens nationwide, and this is the fastest-growing segment of our population.

The general causes of the shortage have been explored, but we in the nursing industry are also confronted with chronic underfunding through Medicare and Medicaid, which prevents us from offering higher wages to—being paid to our workers; a newly altered regulatory system that focuses on fines and penalties; dramatically increased competition for caregivers from all variety of health care delivery systems; annual turnover rates nearing 100 percent; and an aging workforce.

We are almost completely dependent on the government for payment for our services and do not have the ability to raise our prices. Nearly 80 percent of our residents are beneficiaries of the Medicare or Medicaid programs.

And while we do not have the ability to raise our prices, we also have little ability to reduce our expenditures. The government inspectsnursing homes every year to look for errors in compliance with several hundred regulations and accompanied by fines of up to $10,000 per day for noncompliance.

Dedicated caregiving staff that work in our facilities are the unsung heroes of the American workforce. The job of caring for the elderly and disabled is very demanding.

Because of the difficulty of the job and our inability to increase wages or prices, long-term care has always been a high-turnover industry. My company's turnover rate in the lower-skilled categories is approximately 60 percent annually, and that is significantly lower than most companies in the industry.

For many the first reaction is, "You are not paying enough." That is simply not true.

At Medicalodges certified nurse's aides presently receive an average of $11.50 per hour plus benefits, and these include health insurance, participation in the company employee stock ownership program, 401k, tuition reimbursement, vision, dental, and more. We regularly review wage rates for competitiveness.

We need certified nurse's aides, licensed practical nurses, and registered nurses to provide skilled services around the clock in every facility. Vacancy rates for CNAs can approach 20 percent; for LPNs, 10 percent; and for RNs, 10 percent as well.

So what have we done to address these vacancies and shortages? Well, historically I have hired extensively from the welfare rolls. The nursing home industry in general has hired over 50,000 welfare recipients in the last 3 years.

We have offered signing bonuses; we have set up tables in grocery stores to recruit new employees; sent direct mail; posted job openings in newspapers, communities, schools, and even laundromats. We offer multiple incentives for recruitment, yet it is still not enough.

So in conclusion, our labor shortage is our most pressing operating problem. If we are to meet the expectations set for us policymakers must act now and expand the pool of new staff.

I would like to present some solution options for you. First, we need to increase the staff supply, and there are many talented immigrants who are anxious to enter the caregiving field yet are faced with insurmountable odds. Please give special consideration to permitting new entry for immigrants with skilled—with nursing skills, as well as increasing the pool of unskilled labor.

We need a new immigration system—one that serves the economic needs of the U.S. economy. If an American employer is offering a job that an American citizen is not willing to take we ought to welcome into our country a person who will fill that job.

We struggle every day to ensure that the labor shortage does not negatively affect the quality of care delivered in our facilities. This is a difficult and highly complex balancing act.

I urge you to take a broader look at the staffing crisis and think about the frail and elderly populations we serve—our parents, our grandparents, aunts, uncles, our neighbors and yours—those special people who have given so much to us and our country. We owe it to them to provide the best possible care, don't we?

I am here to ask you: Who will care for them if this critical situation is not addressed immediately?

Thank you. I am happy to answer any questions.

[The statement of Mr. Benjamin follows:]

Prepared Statement of Fred Benjamin, Chief Operating Officer, Medicalodges, Inc.

Good Morning Chairman Walberg, Ranking Member Courtney, and distinguished members of the Subcommittee. I'd like to thank you for holding this hearing to explore the labor shortages facing our Country, and I especially appreciate the opportunity to appear before you here today. My name is Fred Benjamin, and I am the Chief Operating Officer of Medicalodges, Inc., a company that offers a continuum of health care options which include independent living, skilled nursing home care, rehabilitation, assisted living, specialized care, outpatient therapies, adult day care, in-home services, as well as services and living assistance to those with developmental disabilities. Medicalodges is a member of the American Health Care Association (AHCA) which is a member of the Essential Worker Immigration Coalition (EWIC)—a broad-based national coalition of businesses and trade associations concerned about the shortage of semi-skilled and unskilled labor.

Medicalodges was launched in 1961 when its first nursing home, Golden Age Lodge, was opened in Coffeyville, Kansas by founding owners Mr. and Mrs. S.A. Hann. The company grew through the 1960's with the addition of eight nursing facilities. In 1969, Golden Age Lodges was renamed Medicalodges, Inc. As new care centers were built or purchased, the company expanded its products and services

to include a continuum of health care. In February, 1998 the employees of Medicalodges acquired the company from its previous owners in a 100% Employee Stock Ownership Trust transaction. Today, the company owns and operates over 30 facilities with operations in Kansas, Missouri and Oklahoma and employs over 2200 people in the communities it serves.

I have served as the Company's Chief Operating Officer since May, 2009. I am honored to have served 30-years in this industry that includes senior management roles in skilled and sub-acute care, hospitals and other for-profit and not-for-profit ventures. I am also currently serving as Chairman of the Board of the Kansas Health Care Association, the leading provider advocacy group for seniors in Kansas.

Worker Needs are Critical and The Impact is More Profound in Skilled Nursing Facilities

We have critical staffing needs. There are chronic shortages throughout the nursing home industry. If you are in the business of caring for our nations' elderly, whether you are for-profit, non-profit, or government managed, it is a daily struggle to find enough dedicated caregivers to care for the people in your charge. Let me tell you a little about the state of nursing homes today.

We are different from other employers in many ways. We are responsible for the lives of 1.5 million frail and elderly citizens nationwide. And this is the fastest-growing segment of our population.

The general causes of the shortage have been explored. In addition to the causes that affect employers of all types, the nursing home industry is confronted with the following:

- Chronic underfunding through Medicare and Medicaid which prevents higher wages from being paid to our workers;
- A newly altered regulatory system that focuses on fines and penalties (often for failing to provide adequate personnel) instead of the previous system where government employees were encouraged to help centers meet the challenges they face;
- Dramatically increased competition for caregivers from assisted living centers, independent housing for the elderly, home care centers and hospital based nursing homes—all of which seek the workers we traditionally employed;
- Annualized turnover rates of nearly 100% in our industry among staff personnel, and now excessively high turnover rates among our managers who are increasingly frustrated with overwhelming paperwork, regulation, and underfunding;
- Challenge of caring for infirm and often difficult residents;
- Mandated training and certification of most employees;
- Need for dedicated and caring personalities;
- Increasing age of workforce—with fewer young workers entering long term care; this means that these young workers are increasingly not choosing long term care as a profession of choice, which is alarming as baby boomers age in greater numbers.

Government Dependence

We are almost completely dependent on the government for payment of our services, and do not have the ability to raise our prices. Nearly 80% of the residents in our facilities are beneficiaries of the Medicaid or Medicare Program. Of the remaining 20%, 17% are spending their life savings until they are poor enough to qualify for Medicaid, and only 3% have private insurance.

While we do not have the ability to raise our prices, we also have little ability to reduce our expenditures. The government inspects every nursing home every year to look for errors in compliance with several hundred regulations. These measures by the government are intended to root out providers of poor care—but as designed and implemented, only focuses on fines and paperwork, and not on patient care or quality measurement. If we are found lacking in any small way, we can be subject to fines up to $10,000 per day or closure. Furthermore, I would never reduce expenditures in a way that would have a negative impact on quality of care. This puts me, and every other nursing home operator, in a squeeze, and we are asking you for understanding of our challenges and relief.

The Role of Caregiver

Dedicated caregiving staff that work in our facilities every day and every night are the unsung heroes of the American workforce. The job of caring for the elderly and disabled is one of the most demanding jobs on many levels.

It is difficult physically to lift, turn, transport, position, and keep up with our residents' care day and night. It is psychologically demanding to work with our Alzheimer's residents who are often confused, angry, scared, or lonely, and to make their days rewarding and productive. It is emotionally draining to care for those in the twilight of their lives, share their frustration and fears, and still assure that

they are getting the very best medical care we can provide. Their needs must come first, and staff must learn to put their own needs second to their residents. These are the residents that hospitals cannot care for, whose families cannot care for them, and who are dealing with multiple chronic illnesses.

Our dedicated staff do a very hard job for a wage that is as much as we can pay, but never enough, in my opinion, for the service they provide. Without these caregivers, our seniors will suffer.

The shortage of labor and difficulty in finding adequate levels of staff on a daily basis, 24-hours each and every day of the year, is cited as the number one reason prompting many of our existing workers to leave our company and seek alternative employment. We lose some of our best managers during this period of time when their skills and compassion are crucially needed.

Because of the difficulty of the job, and our inability to increase wages or prices, long term care has always been a high turnover industry. My company's turnover rate in lower skilled categories is approximately 60% annually—significantly lower than most companies in the industry. We do focus on retention initiatives and employee recognition and involvement. We have implemented dozens of programs, and empowered our facilities to implement their own initiatives. We are active in implementing total quality management techniques successfully used by the best companies in America. Indeed, four of our facilities were recently identified by US News and World Report as among the "Best in America".

How to Retain Workers

For many, the first reaction is "You aren't paying enough." Let's address that perception first. Most people think of nursing homes as a minimum wage employer. This is simply not true. At Medicalodges, certified nurse aides presently receive an average of $11.50 per hour, plus benefits, which include health insurance, participation in the company Employee Stock Ownership Program, 401k programs, vision, and dental care. We regularly review wage rates to ensure that they are competitive.

We are limited in our ability to compete with other employers because of our inability to set the prices for the vast majority of our services. Congress and our nation's Governors do that when establishing Medicare and Medicaid rates. In this regard, the State of Kansas, like many others has recently implemented a Managed Care approach to Medicaid. What many Americans fail to realize is that Medicaid pays for the long term care services received by 2 out of every 3 skilled nursing patients.

In fact, national data underscores the tight margins within which skilled nursing facilities operate. Recent data show that out of every health care dollar earned, only 1.5 cents is profit. For Medicalodges, after we pay property and real estate taxes, whatever is left goes to only two places; our ESOP (employee pension fund) or back into our facilities.

Secondly, our nursing centers are not factories. We cannot stop the assembly line or reduce the services we provide to accommodate budget cuts. The elderly we care for depend on us 24-hours, everyday, weekends and holidays. If we have a staff vacancy, we must fill that vacancy. Ms. Johnson will still need help getting dressed and eating in the morning. Mr. Smith will need therapy to help him swallow and learn to walk after a stroke. These services are not optional. We need certified nurse aides (CNAs), licensed practical nurses (LPNs) and registered nurses (RNs) to provide skilled services around the clock in every facility. We provide services in both rural and urban locations. Vacancy rates for CNA's can approach 20% for LPN's 10% and RN's 10%.

Addressing the Recruitment Problem

What has Medicalodges done to address the vacancies and shortages?

Historically, I have hired extensively from the welfare rolls. The nursing home industry in general has hired over 50,000 welfare recipients in the last three years. Most of them are single mothers whom we train to become certified nurse aides, and put on a career path in health care. This is the only career path that I know of that can help take people from economically disadvantaged situations to the middle class. Unfortunately, all too often they will complete their training with us, and then be hired away by hospitals or other providers who do not have to deal with our heavy reliance on government-set payment rates.

• Several states, including Wisconsin and Florida, have taken steps to use federal funds to help support training programs specifically targeted on meeting the labor needs of the long term care industry.

• In our profession, the residents' welfare must be top priority. Hence, we perform criminal background checks on each potential employee. This process significantly

adds to costs, but eliminates an estimated 10% of applicants from eligibility for hire, and appropriately so.

• We have offered signing bonuses of $1,500 for certified nursing assistants—and even higher for licensed personnel.

• We have set up tables in grocery stores to recruit new employees, sent direct mail, posted job openings in communities, schools, and even laundromats.

• We offer multiple incentives for recruitment. We have flexible scheduling, good benefits, recruitment bonuses, shift differentials, float incentives, pay in-lieu of benefits, and many other programs to attract the dedicated caregivers we need.

• Every one of my facilities has a substantial recruitment and retention function. We make great efforts to reduce turnover and maintain a stable workforce through flexible scheduling, employee appreciation efforts, mentoring programs, and much more. We even involve our residents in interviewing candidates. Yet it is still not enough.

Conclusion

Our labor shortage is our most pressing operating problem. The labor shortage deprives us of the most valuable resource we have, our caregivers. If we are to meet the expectations set for us, policymakers must act now to expand access to new pools of staff and take steps to encourage employment in long term care.

I would like to present solutions to you that will address our staffing crisis:

• Of course, I would like to increase staffing, and increase wages. As I mentioned earlier, I am not able to do so, because Medicaid and Medicare reimbursement levels do not allow me to. It is truly a national shame that we invest so little in the care of our elder population. These programs pay for more than 3 of 4 of all my residents. And that ratio is fairly consistent throughout the field. Please urge your colleagues in Congress to invest more in our nation's elderly and fix these broken and underfunded programs. Enacting a wage pass-through for Medicaid will assist providers to increase wages.

• We need to increase staff supply, and there are many talented immigrants who are anxious to enter the caregiving field, yet are faced with insurmountable roadblocks. These talented caregivers should be given the opportunity to make a living and make a difference in their own lives and the lives of others. To increase the supply of labor, please give special consideration to permitting new entry for immigrants with nursing skills as well as increasing the pool of unskilled labor. We need a new immigration system that serves the economic needs of the U.S. economy. If an American employer is offering a job that American citizens are not willing to take, we ought to welcome into our country a person who will fill that job—especially a job that has the capacity to improve the health and well being of a vulnerable senior, or person with disabilities.

We struggle every day to ensure that the labor shortage does not negatively affect the quality of care delivered in our facilities. This is a difficult and highly complex balancing act that is currently taking place in nursing centers across the country. I urge you to take a broader look at this staffing crisis and think about the frail and elderly population we serve—our parents, our grandparents, our aunts, our uncles, our neighbors and yours—those special people who have given so much to us and our country. We owe it to them to provide the best possible care, don't we? I am here to ask you who will care for them if this critical situation is not addressed immediately. Thank You. I am happy to answer any questions that you may have.

Chairman WALBERG. Thank you, Mr. Benjamin.

Ms. Bauer, we now recognize you for your 5 minutes of testimony.

STATEMENT OF MARY BAUER, LEGAL DIRECTOR, SOUTHERN POVERTY LAW CENTER

Ms. BAUER. Good morning, and thank you for inviting me to speak about guest worker programs in the United States. My employer, the Southern Poverty Law Center, recently reissued our report about the H-2 program. The report is entitled "Close to Slavery" and it is based upon the interviews with thousands of guest workers and our experience representing tens of thousands of these workers.

Put simply, the H-2B program has led to the systematic exploitation of workers in the United States. This abuse and exploitation has had a deleterious effect on the wages and working conditions of U.S. workers laboring in industries that employ H-2B workers.

Because of the many abuses in the H-2B program, this program absolutely must not be the model for any new temporary worker program in the future.

Guest workers are systematically exploited because the very structure of the program places them at the mercy of a single employer and provides them no realistic means for exercising the few rights they have. Guest workers are typically required to borrow large sums of money—as much as $20,000—to obtain their jobs. They are forced to mortgage their futures to obtain low-wage temporary jobs.

They are routinely cheated of wages. They are held virtually captive by employers or labor brokers who seize their documents. And they are often housed in squalid conditions.

H-2 workers can work only for the employer who filed a petition for them to enter the country. The employer decides if he can come; the employer decides how long he can stay; and the employer holds all of the power over the most important aspects of a worker's life.

As long as employers in low-wage industries can rely on an endless supply of vulnerable guest workers who lack basic labor protections they have little incentive to hire U.S. workers or to make the jobs more appealing to domestic workers by improving wages and working conditions.

A 2008 review of seven occupations using H-2B workers by the Economic Policy Institute found that 98 percent of H-2B jobs were set below the average wage rate in that occupation. Astonishingly, the program does not prohibit the importation of guest workers during periods of high unemployment. Indeed, the unemployment rate in a locality or industry is not a consideration for the Department of Labor in determining whether to certify an H-2B application.

Under the program, employers are required to pay a prevailing wage rate. The purpose of this wage is to ensure that U.S. workers' wages are not depressed by an influx of foreign workers but the current methodology for calculating the prevailing wage rate is doing exactly the opposite by setting the prevailing wage rate $4 to $5 lower than the average wage for those occupations.

The Department of Labor itself determined that the current wage rule degrades the wages of U.S. workers and in response proposed a new rule that would better protect U.S. workers. This new rule has been attacked by employers in the courts and its implementation has been effectively blocked by Congress. A more comprehensive set of regulations, designed to protect H-2B and U.S. workers, has been enjoined by the courts as well.

The legal requirements for recruiting U.S. workers are abysmally weak. In practice, recruiters and employers pay only lip service, in many cases, to those requirements, preferring to hire H-2B workers—workers who will be effectively indentured to one employer during the term of their visa.

We have a more comprehensive set of recommendations in our written comments and in our report than I can cover here in my

remarks. But at a minimum, Congress should insist that the DOL regulations promulgated to protect workers be allowed finally to go into effect.

The exploitative recruitment process that traps workers in overwhelming debt must be reformed. And workers should be permitted the right that all other workers have in our free society—the right to walk away and find another job. Workers must be given the opportunity to become permanent members of our community over time and not be trapped, instead, as permanent guests.

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

I thank you for the opportunity and wait for any questions you might have.

[The statement of Ms. Bauer follows:]

Prepared Statement of Mary Bauer, Southern Poverty Law Center

Thank you for the opportunity to speak about guestworkers who come to the United States as part of the H-2B program and about the U.S. workers whose wages and working conditions are affected by the program.

My name is Mary Bauer. I am a Senior Fellow at 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. The SPLC has represented tens of thousands of H-2A and H-2B guestworkers in class action lawsuits. We also published a report in 2013 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.[1]

The report discusses in further detail the abuses suffered by H-2 guestworkers. It is based upon thousands of interviews with workers as well as 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 for both their job and continued presence in the United States. It permits workers to enter the United States. encumbered with overwhelming debt—debt that they paid to get short-term, low paid work. It provides no realistic means for workers to exercise the few rights they have.

Just as importantly, the appalling wages and working conditions experienced by H-2B workers have a demonstrably depressive effect on the wages and working conditions of U.S. workers in industries employing H-2B workers. As long as employers in low-wage industries can rely on an endless stream of workers, we should expect wages and working conditions in those industries to drop. Our market economy is premised on the idea that a shortage of workers will push the market to increase wages to attract workers from other parts of the economy. Introducing guestworkers undermines these market mechanisms, artificially preventing wage increases that we would expect to see in a healthy market sector. This problem is particularly acute when the workers being introduced into the labor market are vulnerable guestworkers who lack the basic labor protections available to U.S. workers.

The government's H-2B program undercuts employers' incentive to hire U.S. workers or make jobs more appealing to domestic workers by improving wages and working conditions. Not surprisingly, many H-2 employers discriminate against U.S. workers, preferring to hire guestworkers, even though they are required to certify that no domestic workers are available to fill their jobs. It is well-documented that wages for

U.S. workers are depressed in industries that rely heavily on guestworkers. Astonishingly, the H-2B program does not prohibit the importation of guestworkers during periods of high unemployment. Indeed, the unemployment rate in a locality or an industry is not a consideration for DOL in determining whether to certify an

H-2B application. The H-2B program allowed for the importation of 50,009 workers in 2012.[2] In December 2012, there were 12.2 million Americans looking for work.[3]

The H-2B (non-agricultural) guestworker program permits U.S. employers to import human beings on a temporary basis from other nations to perform work only 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 similarly employed U.S. workers.[4]

Prospective H-2B employers must apply to DOL for a temporary labor certification confirming that American workers capable of performing the work are not available and that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed American workers. The H-2B program requires the employer to attest to DOL that it will offer a wage that equals or exceeds the highest of the prevailing wage, the applicable federal minimum wage, the state minimum wage, or the local minimum wage to the H-2B worker. The employer also must agree to offer terms and working conditions typical to U.S. workers in the same geographical area.

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. A guestworker's visa is good only so long as he works for the employer who sponsored him. 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 substantially reformed to address the vast disparity in power between guestworkers and their employers.

In the past several years, the DOL has proposed two sets of regulations to better protect nonagricultural H-2 workers—one related to wage rate guarantees and one more comprehensive set of regulations. These regulations also would better protect the jobs and wages of U.S. workers. Unfortunately for workers, neither set of regulations has gone into effect; employers have filed multiple lawsuits challenging them and Congress has effectively blocked implementation of the new wage regulations. For workers, then, the abuses continue unabated.

It is virtually impossible to create a guestworker program for low-wage workers that does not involve systemic abuse and thus erode the wages and working conditions of U.S. workers. The H-2 guestworker program should not be expanded in the name of immigration reform and should not be the model for the future flow of workers to this country. If the current H-2 program is allowed to continue, it should be completely overhauled.

I. The H-2B Program Depresses Wages and Working Conditions for U.S. Workers

As laid out in greater detail in Section II, the H-2B program creates abuse and exploitation for H-2B workers—not because the program attracts "bad apple" employers, but because the very structure of the program lends itself to abuse. Because workers arrive desperately in debt, can work only for their petitioning employer, and are dependent upon that employer for their very right to enter or remain in the United States, H-2B workers are incredibly vulnerable. The abuses suffered by H-2B workers also have an impact beyond that experienced by the guestworkers: they put profound downward pressure on the wages and working conditions experienced by U.S. workers in industries employing H-2B workers.

A. Wages for H-2B Workers Are Set Far Too Low, Driving Down Wages for U.S. Workers

It is well documented that there are chronic wage and hour abuses involving H-2B workers.[5] Since 2004, SPLC has represented guestworkers in obtaining settlements and judgments of approximately $20,000,000. There can be no doubt that the impact of such pervasive wage and hour violations is to depress wages in those industries. Furthermore, since at least 2005, the prevailing wages paid to H-2B workers has been set far below the median wages that are paid in the applicable industries—again something that indisputably serves to depress wages.

Under the law, H-2B workers are entitled only to the "prevailing wage" for their work; there is no adverse effect wage rate for those workers, as there is with H-2A workers. Of course, even though H-2B 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 due to anemic staffing at fed-

eral workplace enforcement agencies. For example, 1,100 DOL investigators have the Sisyphean task of protecting a workforce of 135 million.[6]

The purpose of the prevailing wage is to ensure U.S. worker wages are not depressed by the influx of foreign workers to the U.S. labor market, but the current methodology for calculating the H-2B prevailing wage rate is doing the exact opposite. In fact, under the current methodology, the wages of H-2B workers are in some industries almost $4 to $5 lower than the average wage for those occupations, a situation that inevitably places downward pressure on U.S. worker wages. A 2008 review of seven occupations using H-2B workers by the Economic Policy Institute (EPI) found that 98% of H-2B jobs were set below the mean (average) wage rate and that 64% of jobs were set below 75% of the mean. EPI concluded that this would clearly adversely affect the wages and working conditions of U.S. workers.[7] Another EPI study looked at crab picking and landscaping industries in Maryland and concluded that "employers have been using the H-2B program as a way to degrade the wages of U.S. workers."[8] It found that H-2B crab-pickers and landscapers were underpaid by $4.82 and $3.35 per hour, respectively.

DOL has also determined that the current H-2B wage rule degraded the wages of U.S. workers, and a federal court ruled the 2008 wage rule invalid.[9] In response, DOL proposed a new rule that would better protect U.S. worker wages. As discussed in Section IV, this new rule has been attacked by employers in the courts, and its implementation has been effectively blocked by Congress, largely due to the efforts of a few vocal senators and representatives from states with industries that rely heavily on H-2B workers.

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

B. Recruitment of U.S. Workers Is Weak at Best, and Often A Sham

Theoretically, employers are allowed to hire H-2B workers only when U.S. workers are not available for the job. In fact, the legal requirements for recruiting U.S. workers are abysmally weak. In practice, recruiters and employers often pay only lip service to those requirements, preferring to hire H-2B workers—workers who will be effectively indentured to one employer during the term of their visa.

The legal requirements for recruiting U.S. workers are few. Employers are required to publish advertisements for two days in a newspaper. They must also contact the local union as a recruitment source if 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. Employers must not reject U.S. applicants for the job opportunity for which the labor certification is sought for reasons other than ones that are lawful and job-related.

In practice, employers and recruiters make little effort in most instances to locate U.S. workers. By the time they have decided to apply for H-2B workers, they have typically made a business decision to employ those H-2B workers rather than to employ U.S. workers. In a recent report, the U.S. General Accounting Office (GAO) documented instances of recruiters actively counseling prospective employers on how to make jobs unattractive or unavailable to U.S. workers.[10] In one case reported by the GAO, a Texas recruiter suggested conducting interviews before 7:00 a.m. and requiring drug testing prior to the interview to weed out qualified American applicants. The recruiter also suggested that current employees be fired for cause or induced to quit prior to the employer filing a petition for U.S. workers to avoid arousing DOL's suspicion. Another recruiter offered to provide "good excuses" to help "weed out" prospective U.S. workers who might apply for housekeeping jobs.[11]

H-2B workers are not eligible for unemployment compensation, making them cheaper to employ than U.S. workers. Employers of H-2B workers also save by not having to pay for benefits such as health care. In addition to the lower wages employers pay H-2B workers, they have powerful financial reasons to prefer foreign workers to Americans. And they do.

The Palm Beach Post conducted an investigation into claims by Florida employers that they had been unable to find U.S. workers to take hospitality jobs even in localities where the unemployment rate was well over 10% and higher still for unskilled labor.[12] In the Palm Beach Post investigations, an employer claimed to have worked with the local government agency that helps Floridians file jobs, but that agency denied any knowledge of the employer. That employer, Workaway Staffing, was approved to bring in 810 H-2B employers. Its president, William Mayville said H-2B workers were necessary because "you don't see Americans wanting to get into the hospitality industry."[13]

II. 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 may, 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. Unregulated foreign labor recruiters in home countries make false promises to workers about the H-2B jobs and visas. Only after the workers have paid high recruiting fees and arrive in the United States do they learn the less rosy truth.

Because most workers who seek H-2 jobs are indigent, they 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 labor 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. Public wage and hour enforcement has minimal practical impact because overstretched labor standards enforcement agencies can follow up on only a small fraction of violations.

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 when 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.[14] 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.labormex.com, www.maslabor.com, www.mexicanworkers.biz,*

or *www.mexican-workers.com.* One website advertises its Mexican recruits like human commodities, touting Mexican guestworkers as people with "a good old fashioned work ethic" who are "very friendly and easy to work with." [15]

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 Immigration and Customs Enforcement 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 because 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 forcibly almost deported to India.

III. 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

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 discredited 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."

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 (the "three-quarters guarantee");
- Receive free housing in good condition and meals or access to a cooking facility 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% 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 or is terminated without cause, the employer must pay transportation and subsistence costs for returning home; and

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

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.

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, prior to 2008, DOL had not promulgated substantive labor regulations for the H-2B program.[16] As discussed in Section IV below, DOL promulgated new regulations in 2011 and 2012 that better protect workers, but those regulations have been enjoined by the courts and subject to Congressional action prohibiting their enforcement.

While the employer is obligated to offer full-time employment (currently defined as only 30 hours per week) 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.

IV. DOL's Efforts to Better Protect U.S. and H-2B Workers Have Been Stymied by Employers Seeking to Maintain the H-2B Program as a Source of Cheap, Unregulated Labor

In 2011 and 2012, DOL proposed new regulations for the H-2B program that provide increased protections for U.S. and H-2B workers. These regulations would better shield U.S. worker wages from the depressive effect of foreign labor, preserve U.S. workers' job opportunities, and protect H-2B workers from the severe exploitation that is so prevalent in the program. Unfortunately, due to efforts by business interest groups, H-2B employers, and the Chamber of Commerce none of these critical protections have ever been implemented.

A. The 2008 H-2B Regulations

Prior to 2008, DOL had not promulgated regulations that provided substantive labor protections for H-2B workers and their U.S. worker counterparts.[17] In December 2008, President Bush's Department of Labor published "midnight" regulations for the H-2B program.[18] These regulations provided only minimal protections for H-2B workers and lacked many of the fundamental legal protections afforded to H-2A workers, such as reimbursement of the H-2B workers' transportation costs to the United States and the "three-quarters guarantee." The 2008 regulations also established a methodology for calculating the wage that employers must pay to their H-2B workers (the prevailing wage) that causes the very depressive effect on U.S. worker wages Congress intended to avoid in requiring the H-2B prevailing wage.

In issuing the 2008 regulations, DOL failed to consider many of the comments presented by migrant worker advocacy groups. In response, shortly after the rules were implemented in January 2009, a coalition of H-2B workers, U.S. workers, and worker advocacy organizations filed a lawsuit in federal court (CATA v. Solis) challenging the 2008 H-2B rules, alleging that DOL promulgated the rules in violation of the Administrative Procedure Act (APA).[19] On August 30, 2010, the court in the Eastern District of Pennsylvania granted partial summary judgment for the plaintiffs, ruling that several of the Bush Administration DOL's H-2B regulations violated the APA. In order to avoid a regulatory gap, however, the court chose not to

vacate the 2008 rules. Rather, it ordered DOL to promptly promulgate new rules in compliance with the APA.

Nearly three years after the court's order, however, the invalidated 2008 regulations still govern the H-2B program today.

B. The 2011 H-2B Wage Rule

On January 19, 2011, DOL issued a new prevailing wage rule for the H-2B program ("2011 wage rule") in response to the CATA court order, but also because DOL found the 2008 wage rule was adversely affecting the wages of U.S. workers.[20] Given that DOL's statutory and regulatory mandate is to certify that an employer's importation of H-2B workers will not adversely affect the wages and working conditions of U.S. workers, DOL rightfully sought to replace a wage rule that was doing exactly the opposite.[21] Indeed, DOL found that the 2008 wage rule sets a wage "below what the average similarly employed worker is paid,"[22] and, as a result, leads to underpayment of wages in nearly 96% of cases.[23] In practical terms, this means that U.S. workers would be less likely to take those jobs or would be required to accept a job at a wage well below what the market has determined is the prevailing wage for that occupation.

Shortly before the wage rule was set to go into effect in September 2011, H-2B employers and trade associations representing H-2B employers filed lawsuits in federal courts in Florida and Louisiana (later transferred to Pennsylvania) challenging the rule. The lawsuits both allege that DOL issued the rule in violation of the APA and the Regulatory Flexibility Act (RFA) and DOL lacks authority from Congress to issue any legislative rules for the H-2B program.[24] H-2B employers also galvanized a group of vocal Senators and Representatives from states with industries that rely heavily on H-2B workers to ensure the new wage rule would not be implemented. This effort led to Congress passing a series of appropriations bans and continuing resolutions that effectively blocked the 2011 wage rule by prohibiting DOL from using funds towards its implementation.[25]

In August 2012, the Louisiana Forestry court granted DOL's motion for summary judgment, upholding the 2011 wage rule and ruling that DOL has authority to issue rules for the H-2B program.[26] Yet, because the current Congressional ban on the new wage rule's implementation is in effect until March 27, 2013, and employers have appealed the lower court's decision to the Third Circuit Court of Appeals, the rule is still not in effect and likely will not be implemented in the near future. As a result, a wage rule that directly contravenes its purpose—to protect U.S. worker wages—is still operative today, resulting in the gross underpayment of wages to hundreds of thousands of H-2B and U.S. workers with no end in sight.

C. The 2012 Comprehensive H-2B Rule

On February 21, 2012, DOL published new comprehensive regulations for the H-2B program ("2012 Final Rule") that would provide much needed protections to U.S. and H-2B workers. The 2012 Final Rule requires employers seeking to import H-2B workers to first engage in more protracted and aggressive recruitment of U.S. workers, such as posting the open jobs on a national job registry and giving U.S. workers more time to apply for open positions. The new regulations also prevent the exploitation of H-2B workers by providing important protections to prevent human trafficking, debt servitude, fraud, and charging of exorbitant fees by overseas recruiters. Unlike the 2011 wage rule, the majority of the 2012 Final Rule's provisions will have little or no economic impact on employers that participate in the program.

In April 2012, just days before the new regulations were scheduled to go into effect, business interest groups, including the Chamber of Commerce, and a few H-2B employers sought and won a nationwide injunction in federal court in Florida that blocked DOL from implementing the 2012 Final Rule.[27] Similar to the employers' challenges to the 2011 wage rule, this lawsuit alleges that DOL did not comply with the APA and RFA when issuing the 2012 Final Rule and that DOL does not have authority to issue any rules for the H-2B program. DOL appealed the injunction to the Eleventh Circuit Court of Appeals, and several amici submitted briefs in support of DOL's rulemaking authority and the new rules, including Representative Peter DeFazio and Senator Jeffrey A. Merkley, and labor unions UNITE HERE and PCUN. The Eleventh Circuit's decision is pending. In the meantime, as a result of the district court's injunction, the critical worker protections provided by the 2012 Final Rule did not go into effect as planned and may never go into effect.

While the employer-driven attacks on DOL's new H-2B regulations have completely derailed the implementation of long overdue protections for U.S. and H-2B workers, the real implication of this litigation is more concerning. The gravamen of the employers' claims in all three lawsuits is that DOL lacks authority to issue any regulations for the H-2B program. Given that DOL has been regulating the H-2

guestworker programs for over forty years, the employers' sudden challenge to DOL's authority is particularly transparent. Indeed, not until DOL proposed a wage rule that will lead to fair wages that better approximate the market wage for U.S. and H-2B workers across the country did DOL's rulemaking authority become an issue for the employers. Clearly, the H-2B employers do not just want less onerous regulation—they want no regulation or regulations—like the 2008 Bush-era rules—that overwhelmingly favor employers, even if those regulations do not adequately effectuate the protections for U.S. workers that Congress intended when creating the H-2B program.

V. 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.

The SPLC recommends that Congress take the following actions:

• Congress must finally allow the protective regulations promulgated by DOL in 2011 and 2012 to go into effect. In doing so, it should also make clear that DOL does have rulemaking authority under the H-2B program.

• 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 must 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 fully portable to other employers, at least under some circumstances. For example, at a minimum, Congress should create a means by which workers may obtain visas when they need to remain in or return to the United States to enforce their rights. Employers currently control workers' right to be here. That means when workers bring suit, or file a workers compensation claim, the employers have extraordinary control over that process.

• Congress should provide a pathway to permanent residency for guestworkers who would choose to become full members of our community.

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

• Lastly, Congress should provide strong oversight of the H-2B program. Congress should hold additional hearings on this issue related to the administration of the guestworker programs.

A review of available evidence would amply demonstrate that this program has led to the shameful abuse of H-2B workers and has put downward pressure on the wages and working conditions offered to U.S. workers. Congress must not allow that abuse to continue.

Conclusion

The H-2B program as it currently exists lacks worker protections and any real means to enforce the few protections that do exist. Vulnerable workers desperately need Congress to take the lead in demanding reform. The goal of this subcommittee should be to make effective protections for the wages and working conditions of American workers that Congress intended in creating the H-2 program. Continuation or expansion of the H-2B program thwarts that intention.

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

ENDNOTES

[1] Close to Slavery was originally released in 2007, but was updated and re-released in 2013.

[2] Nonimmigrant Visas Issued by Classification FY 2008-2012, available at *http://www.travel.state.gov/pdf/FY12AnnualReport-TableXVIB.pdf*

[3] Bureau of Labor Statistics, Economic News Release (2012), available at *http://www.bls.gov/news.release/empsit.t01.htm.*

[4] 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. §214.2(h)(6)(iv)(A); 20 CFR Part 655.

[5] See Close to Slavery, Chapter 5.

[6] See Congressional Budget Justification, Wage and Hour Division, FY 2013, available at *http://222.dol.gov/dol/budget/2013/PDF/CBJ-2013-V2-09.pdf.*

[7] Denise Velez, "Wages for H-2B Workers Set Lower than the Prevailing Wage", available at *http://www.epi.org/publication/webfeatures—snapshots—20080813/* (last visited Aug. 13, 2008).

[8] Daniel Costa, "H-2B Employers and their Congressional Allies Are Fighting Hard to Keep Wages Low for Immigrant and American Workers", available at *http://www.epi.org/publication/2b-employers-congressional-allies-fighting/* (last visited Mar. 11, 2013).

[9] See Comite de Apoyo a los Trabajadores Agrícolas, et al., v. Solis, et al., No. 09-240, 2010 WL 3431761, at *2 (E.D. Pa. Aug. 30, 2010) ("CATA"); 76 Fed. Reg. 3452 (Jan. 19, 2011).

[10] U.S. General Accounting Office, Closed Civil and Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse, available at *http://www.gao.gov/products/GAO-10-1053,* September 30, 2010.

[11] Supra n.10, at 11.

[12] John Lantigua, "Use of Guest Workers in Palm Beach County Draws Fire" Palm Beach Post, July 11, 2011.

[13] Id.

[14] 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).

[15] See, e.g., Mexican Workers, www.mexican-workers.com/why-foreign-workers.htm (last visited Jan. 28, 2013).

[16] See Martinez v. Reich, 934 F. Supp. 232 (D. Tex. 1996)

[17] Prior to 2008, the procedures governing certification for an H-2B visa were established by internal DOL memoranda (General Administrative Letter 1-95), rather than regulation.

[18] 77 Fed. Reg. 78,020-01 (Dec. 19, 2008).

[19] See CATA, 2010 WL 3431761 at *2, supra n. 8.

[20] 76 Fed. Reg. 3452 (Jan. 19, 2011).

[21] 8 U.S.C. § 1101(a)(15)(H)(ii); 8 U.S.C. 1184(c)(1); 8 C.F.R. § 214.2(h)(6)(iv)(A).

[22] Id.; see also 75 Fed. Reg. 61,578, 61,580-81 (Oct. 5, 2010) ("2010 NPRM").

[23] 76 Fed. Reg. at 3463.

[24] See Louisiana Forestry Ass'n, Inc., et al. v. Solis, No. 11-01623 (W.D. La. Sept. 7, 2011); Bayou Lawn & Landscape Servs., et al. v. Solis, 3:11 cv445 (N.D. Fla. Filed Sept. 21, 2011).

[25] Continuing Appropriations Resolution, 2013, H.J. Res. 117, Public Law No. 112-175 (Sept. 28, 2012); Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. 112-55, Div. B, Title V, § 546 (Nov. 18, 2011); Consolidated Appropriations Act of 2012, Pub. L. No.112-74, Div. F, Title I § 110, 125 Stat. 786 (2011).

[26] See Louisiana Forestry Ass'n, Inc., et al. v. Solis, No. 11-7687, 2012 WL 3562451 (Aug. 20, 2012).

[27] Bayou Lawn & Landscape Servs., et al. v. Solis, et al., No. 3:12-cv-00183 (N.D. Fla. filed Apr. 16, 2012).

Chairman WALBERG. Ms. Bauer, thank you, as well.

I recognize Mr. Musser for your 5 minutes of testimony.

STATEMENT OF DAN MUSSER, PRESIDENT, GRAND HOTEL

Mr. MUSSER. Thank you, Mr. Chairman and members of the subcommittee. I appreciate the invitation today to talk about the critical need for foreign temporary seasonal H-2B worker program for Grand Hotel and other seasonal businesses throughout the country.

My name is Dan Musser. I am president at Grand Hotel on Mackinac Island, Michigan. I am the third generation in my family to own and operate this historic, seasonal, 385-room summer resort.

We are known nationally and internationally as the world's largest summer hotel. We are known for the beauty of our location on Mackinac Island, our dramatic 660-foot front porch that the chairman eloquently discussed earlier, and more importantly, our friendly and unique hospitality.

Our exceptional service is widely recognized by many national rating guides. For example, National Geographic Traveler selected us as one of 150 properties that—with location-inspired architec-

ture, ambiance, amenities, eco-stewardship, and an ethic of giving back to the community.

Grand Hotel is the largest employer of U.S. workers on Mackinac Island. We employ 60 U.S. workers annually on a year-round basis and 260 on a seasonal basis.

For many decades Grand Hotel's entire staff had U.S. workers. Increasing opportunities for year-round hospitality workers has made it impossible to fill all of our positions with ready, willing, and able American workers. Without the H-2B seasonal temporary workers we employ to supplement our U.S. workforce we would eventually not be in business.

Since Grand Hotel first opened in 1887 it has been a continuing challenge to find a stable, dependable workforce to fill the 620 jobs required to maintain the high level of service for which we are known. We are only open 6 months a year. We are in an isolated location 300 miles north of Detroit.

Operating year-round is not an option. There is no good way to get to our island in the winter and very little to do there if you were able to get across the frozen lake.

We are and always have been committed to staffing Grand Hotel with U.S. workers. Each year we take a number of steps to recruit U.S. workers for Grand Hotel, including running ads in major papers in Michigan, the Great Lakes region; advertising in seasonal resort areas that dovetail with ours; attending as many job fairs; visiting culinary institutes around the country; and partnering with Job Corps centers.

We are able to hire some college students, but increased summer enrichment opportunities and the extended school year at many colleges preclude them from remaining with us for the entire season.

We have also tried several innovative programs, including a service academy through which we worked with the state of Michigan and the Educational Institute of the American Hotel and Lodging Association, where we hired unemployed Michigan citizens, guaranteed them a job the next summer, provided them college-level hospitality courses throughout the summer. We found that after helping them find jobs in resorts in another part of the country in the winter and the additional college-level classes that they did not return to us.

While these programs have not provided us the workforce we need to provide Grand Hotel's service, we continue and will continue to do everything in our power to find, recruit, and maintain an American labor force.

About 40 years ago Grand Hotel began to look to foreign workers to fill positions which we were finding no U.S. citizens were available. Many of our H-2B workers—for example, those from Jamaica—hold seasonal hospitality jobs in their home countries. Some of them return year after year to Grand Hotel because of the pay and working conditions that we offer to all of our staff.

Most of the subsidizing housing we provide to our staff are single rooms—some with private baths, some with shared baths, and others are dormitory style. But we are proud of the condition of our employee housing. And over the last 3 years we have spent in excess of $1 million on improvements. We provide three meals a day

in our employee cafeteria and assist all of our staff in many ways, including through the Mackinac Island Community Foundation.

We are one of 70 Northern Michigan resorts and hotels that utilize temporary seasonal foreign workers on the H-2B visa for specific jobs. Our workforce during the summer is made up of our U.S. workers and 300 or so temporary foreign workers.

Our American jobs depend on our H-2B workers. It would be extremely difficult if not impossible for us to continue to operate successfully without the H-2B worker. They are the lifeblood of our seasonal business.

The potential closure of Grand Hotel would have a devastating impact on Mackinac Island, Northern Michigan, and the tourism industry in the state of Michigan. For example, in the last 15 years we have reinvested in excess of $32 million in capital expenditures that have created jobs for hundreds of Michigan workers.

Grand Hotel is not that much different from the thousands of small and seasonal businesses throughout the U.S. who have been forced to turn to the H-2B program as a result of lack of available Americans willing and able to work in temporary seasonal positions. Like all business, Grand Hotel suffered during the recent recession. The uncertainty about whether and when the H-2B visa program could be dramatically changed by the accommodation of the recent Department of Labor rules and H-2B wage rates and new H-2B programmatic rules have created an untenable climate for business planning.

Comprehensive immigration reform must maintain a viable non-agricultural seasonal worker program along the lines of existing H-2B program. The program should maintain current protections for Americans and H-2B workers and not impose costly burdensome requirements on employers who use the program. The federal government should enforce the existing protections.

The number of participants in the program should be market-based so it can fluctuate based on need and the returning worker exemption should be reinstated.

Comprehensive immigration reform should provide sufficient resources for federal agencies to process H-2B applications in a timely manner.

Thank you, Mr. Chairman.

[The statement of Mr. Musser follows:]

Prepared Statement of R. Daniel Musser III, President, Grand Hotel, Mackinac Island, MI

Mr. Chairman and Members of the Subcommittee, I appreciate your invitation to testify today about the critical need for a foreign temporary, seasonal H-2B worker program for Grand Hotel and other seasonal businesses throughout the U.S. My name is Dan Musser, I am President of Grand Hotel on Mackinac Island, Michigan. I am the third generation of my family to own and operate this historic, seasonal, 385-room summer resort. This is the 80th year that the hotel has been under our stewardship and on July 10, 2012 we celebrated our 125th birthday.

Grand Hotel is known nationally and internationally as the world's largest summer hotel. We are known for the beauty of our location on Mackinac Island, for our dramatic 660-foot front porch and, more importantly, for our friendly and unique hospitality.

Our exceptional service is widely recognized by many national rating guides; I have attached a brief listing of recent awards that reflect our commitment to quality.

To give just a few examples:

• The April 2008 issue of National Geographic Traveler selected us as one of 150 properties in the U.S., Canada, Mexico and the Caribbean Region with location inspired architecture, ambiance, and amenities, eco-stewardship, and an ethic of giving back to the community.

• Travel & Leisure magazine annually lists us as one of the 500 best hotels in the world and their readers selected us as one of the top 50 family friendly resorts in the U.S. and Canada.

• Conde Nast Traveler rated us one of the top 100 resorts in the United States and the number 4 northern resort in their list of top 125 golf resorts in the United States.

• In honor of our anniversary, Michigan Governor Rick Snyder proclaimed July 8-14 Grand Hotel week in the state of Michigan noting our designation as a National Historic Landmark by the U.S. Department of Interior and the "world-class hospitality" the Musser family and Grand Hotel has provided over the past 125 years.

Grand Hotel is the largest employer of U.S. workers on Mackinac Island. We employ 60 U.S. workers annually on a year round basis and 260 on a seasonal basis. For many decades, Grand Hotel's entire staff was U.S. workers. Increasing opportunities for year-round hospitality workers and other factors have made it impossible to fill all of our positions with ready, willing, and able American workers. Without the H-2B seasonal temporary workers we employ to supplement our U.S. work force, we eventually would not be in business.

Since Grand Hotel first opened in 1887, it has been a continuing challenge to find a stable, dependable work force to fill the 620 jobs required to maintain the high level of service for which we are known. The fact we are open only six months, our isolated location 300 miles north of Detroit, and other factors make it difficult to develop a work force needed to provide Grand Hotel level hospitality.

Operating year round is not an option. We are a seasonal summer hotel. There is no good way to get to our island in the winter and very little to do there if you were able to get across the frozen lake.

We are and always have been committed to staffing Grand Hotel with U.S. workers. Each year we take a number of steps to recruit U.S. workers for Grand Hotel.

• We run ads in major papers in Michigan and the Great Lakes region.

• We advertise in seasonal resort areas that dovetail with ours such as ski resorts in Colorado and Utah and warm weather resorts such as Florida and Arizona.

• We attend as many job fairs in as many colleges and universities in Michigan and the Great Lakes region as we can.

• We visit culinary institutions around the country.

• We attend Michigan Works job fairs.

• We list jobs on major Internet sites.

• We promote on major media outlets in Michigan (radio, print, electronics)

• We have partnered with Job Corps Centers in Flint, Grand Rapids and Detroit, Michigan and Golconda, Illinois.

We are able to hire some college students, but increased opportunities for summer educational and enrichment activities for college students has reduced the pool of available students. Further, most college students' school schedules preclude them from remaining with us for the entire season, which runs from April through mid-November.

We have also tried several innovative programs. We created a service academy through which we worked with the Michigan Employment Security Commission to find unemployed Michigan Citizens who expressed an interest in the hospitality field. We provided employment for the summer and rotated them through different departments in the Hotel during the course of the season. They also received college-level classroom instruction provided by the Educational Institute of the American Hotel and Lodging Association.

At the end of the season, they received accreditation from the Institute, a guaranteed job the next summer with us, and with the State's assistance found winter jobs at various resorts in Colorado, Utah, Arizona and Florida. Unfortunately for us, those resorts offered year-round employment. We found that after we had provided them an education and experience in the hospitality industry and then found positions for them with other resorts in other parts of the country that offered year-round employment, we had virtually no returning graduates.

We even tried a program where we recruited workers from homeless shelters in metropolitan areas in southern Michigan. That was not successful.

We had a somewhat successful program with the State with individuals with certain limited physical and mental disabilities. We hired a qualified full-time supervisor specially trained to work with and live with these individuals to ensure integration to our working community. In recent years, the State's role has diminished

in this regard and, therefore, our program as well. I am pleased to say that our program enabled six of these individuals to become capable of living on their own and several worked with us for over 20 years.

While these programs have not provided us with the work force we need, we continue and will continue to do everything in our power to find, recruit and retain as many U.S. workers as possible. In the meantime, the quality of service we provide requires that we supplement our professional, trained and dependable U.S. work force.

For many years, we recruited workers from Florida. But as Florida turned into a year round vacation destination, those workers no longer were available. The situation was particularly critical in the hotel dining room, which is a key part of hotel operations.

About 40 years ago, Grand Hotel began to look to foreign workers to fill positions for which we could not, despite extensive efforts, find U.S. workers. Our H-2B workers come from several different countries. Many of these workers hold seasonal hospitality jobs in their home countries. For example, the Jamaican tourist season dovetails perfectly with ours and Jamaica is an important source of H-2B workers for us. Some of them return year after year to Grand Hotel because of the pay and working conditions we offer to all staff, both domestic and foreign. In 2012, of the 280 H-2B staff that worked with us, approximately 250 or 90% were returning staff.

Under federal law, our wage rates are approved by both the Michigan Employment Security Commission and the U.S. Department of Labor. Our wage rates are based on Detroit-area wages.

We provide a variety of housing in communities on the island that we subsidize for all staff. Most are single rooms; some with private baths; some with shared baths with one other room and some dormitory style. We are proud of the condition of our employee housing. In the past 3 years, we have spent in excess of $1.1 million on improvements. In addition to housing, we also provide three meals a day in our employee cafeteria. It is important to note that our H-2B workers enjoy workers compensation, just as our American workers. We also assist our U.S. and H-2B workers in many ways. For example, in September of 1988, Hurricane Gilbert caused $4 billion of damages to homes and crops in Jamaica. It is estimated that 80% of the homes on the Island lost their roofs. Several staff members returned to Jamaica early to take care of their property and family and also report back to staff members who stayed on Mackinac. Grand Hotel gathered food and supplies and sent a trailer of these supplies to Jamaica to assist with the clean up.

In November of 2006, shortly after returning home to Jamaica, 11 year Waiter Garfield Slowly was seriously injured in an automobile accident and his child was killed in the same accident. News of the tragedy traveled quickly to Mackinac and Grand Hotel partnered with the Mackinac Island Community Foundation to provide monetary help and medical supplies.

$19,500 in aid was sent to support Garfield and his family over a 4-year period. This is one of many partnerships with the Mackinac Island Community Foundation. My wife, Marlee, was on the founding Board of Trustees for the Foundation and I still serve on the Board. Grand Hotel provides office space free of charge and also paid the Directors salary and benefits for 15 years. The Foundation is a resource for all staff, U.S. and H-2B workers, and provides financial assistance for medical and family emergencies, natural disasters and serious illness.

Grand Hotel makes special efforts to help its workers in other ways. Each year, all staff is allowed to order bulk food items and cleaning supplies through the hotel at a great discount.

These items are shipped within the U.S. or to their home countries and used to support their extended families for the entire year. At the beginning of each season, clothing donations are accepted from staff and Mackinac Island residents and redistributed to the staff coming to work in April. Much of our staff comes from a climate where warm clothing and boots are not readily accessible. This program has provided our staff with free clothing and boots for the past 8 years.

Grand Hotel also conducts activities to celebrate our multicultural staff. Each year we recognize Mexican, Jamaican and Filipino Independence Days through activities in our Employee Cafeteria and through the entertainment offered in our outside restaurants. We also help to sponsor football, soccer and cricket matches for the staff to participate in and challenge each other. The staff appreciates the recognition and everyone appreciates the opportunity to learn more about the culture and customs of their co-workers.

We are one of 70 northern Michigan resorts and hotels that utilize temporary, seasonal foreign workers on H-2B visas for specific jobs. Our workforce during the summer is made up of our U.S. workers and 300 or so temporary foreign workers. Our American jobs depend on our H-2B workers. It would be extremely difficult, if

not impossible, for us to continue to operate successfully without H-2B workers—they are the lifeblood of our seasonal business.

The potential closure of Grand Hotel would have a devastating impact on Mackinac Island, Northern Michigan and the tourist industry in general.

Some relevant facts to consider are:

• Grand Hotel has reinvested in excess of $32 million in the past 15 years on capital expenditures. All construction was performed by Michigan contractors.

• During the past 15 years, an additional $25 million was spent on normal and major repairs to the Hotel's properties.

• On average, 600 individuals are employed at the Hotel each year, with an annual payroll in excess of $14 million.

• Grand Hotel spends in excess of $1.4 million annually for State and Federal unemployment and FICA taxes.

• The Hotel spends in excess of $1.4 million annually in Michigan for professional services such as advertising, accounting and other outside services.

Grand Hotel is not much different from the thousands of small and seasonal businesses throughout the U.S. who have been forced to turn to the H-2B program as a result of a lack of available Americans willing and able to work in temporary seasonal positions. And it is not just the hotel and resort industry that needs these workers.

Nearly every corner of the country uses seasonal temporary workers. The industries include:

• Seafood processors, shrimpers, crabbers, and fishermen throughout the Gulf, Carolinas, Alaska, Northwest and Mid-Atlantic states;

• Hotels, restaurants, ski resorts and other important tourist destinations throughout New England, the Mid-West and the Rockies;

• Quarries from New England to Colorado;

• National Parks, including Grand Canyon, Sequoia, Yosemite and others;

• Forest industry in New England and the Southeast;

• Theme parks and swimming pools in virtually every state; and

• Landscapers and landscape contractors across America.

Each year these employers go through great expense and trouble to follow the law. The H-2B process consists of applications to four separate Government agencies (State Workforce Agency, U.S. Department of Labor, U.S. Department of Homeland Security and U.S. Department of State), legal fees, Government filing fees and many other expenses. Employers pay wages at levels that have been certified by the U.S. Government to be high enough so that they will not adversely affect the wages of similarly employed Americans. Employers are obligated to pay transportation expenses to and from the property (according to DOL guidance), and they must comply with the myriad rules and regulations that govern the worksite of U.S. and foreign workers alike.

For seasonal employers, the H-2B returning worker exemption worked well. Employers still willingly searched high and low for every American they could find. But when they could not find Americans, the fact that they could turn to workers who have worked for them in the past ensured that they could stay in business. Most importantly, since returning workers had already undergone extensive background security checks (and have to undergo similar cheeks each time they apply to enter the U.S.), employers could feel confident that they have helped protect the security of our homeland. Moreover, in deciding to return to work with the same seasonal employer, these H-2B workers signaled that they were pleased with their working conditions and the wages they were paid. The returning worker exemption was one of those rare "win-win-win-win" situations: a win for workers (American and foreign); a win for employers; a win for the United States of America; and a win for the communities we serve. The returning worker exemption from the annual cap on H-2B visas should be re-instated.

Like all businesses, Grand Hotel suffered during the recent recession. Our recovery has been threatened by the recent U.S. Department of Labor rules on H-2B wage rates and new H-2B programmatic rules. Fortunately, Congress and the federal courts have so far blocked implementation of these rules, but the uncertainty about whether and when the H-2B visa program could be dramatically changed by Administration action creates an untenable climate for business planning.

Grand Hotel did not comment on the Department of Labor (DOL) proposed wage rule issued on October 5, 2010. Although the proposed rule was of concern to us, we determined that we could survive with the new rule. DOL issued the final rule on January 19, 2011. It artificially increases H-2B hourly wages by more than 50%. For many seasonal employers who operate on thin profit margins, such a dramatic increase in labor costs will drive them out of business or into bankruptcy. This rule was slated to go into effect last year, but DOL moved the implementation date to

March 27, 2013 after Congress prohibited DOL from spending any appropriations funding to implement the rule.

According to DOL's own estimates, the rule will increase H-2B wages by the following:

- Landscaping services, $4.32;
- Janitorial services, $5.81;
- Food services and drinking places, $2.59;
- Amusement, gambling, and recreation, $6.61;
- Construction, $9.12; and
- Forestry support, $1.23.

The actual cost to H-2B users is far greater than DOL's estimates because DOL does not account for labor increases for similarly employed American workers or more experienced American workers whose pay should reflect the greater skill or experience level and be proportional to the hourly wage earned by lesser skilled workers. It also does not include additional payroll costs, workers compensation insurance, overtime costs and other associated increases.

On February 21, 2012, DOL issued a final H-2B program rule that would make the H-2B program more complicated for small seasonal employers. The combination of the H-2B wage rule and the H-2B program rule will make the H-2B program virtually unusable for many seasonal businesses. The rules are based on the mistaken assumption that the H-2B program is fraught with abuse. While this is not the case, DOL and the Department of Homeland Security already have significant authority to enforce against any employers that are not meeting their obligations to their H-2B and U.S. workers. The DOL is currently enjoined by a federal court from implementing the program rule.

I will highlight a few of the provisions in the Department of Labor programmatic rule that are particularly burdensome:

- Additional Recruitment Time

Increasing the amount of time during which U.S. workers must be recruited from ten (10) days before filing the ETA-9142 to twenty-one (21) days before the H-2B employer's need for the worker, is too short.

The end of the recruitment period must leave more time to shift from the use of human resources manpower hours for recruitment and compliance with H-2B rules to the use of manpower hours to actually open the business. Typically, Grand Hotel's goal in recruiting H-2B workers (to supplement the employment of the U.S. workers we are able to recruit to fill various positions in our organization including housekeepers, wait staff, kitchen helpers, and bellhops) is to have the majority of recruitment completed by March 1. Our plan is to have workers begin to arrive at the Hotel on April 1. The Hotel opens on May 1. We need time between completion of the long and expensive hiring and recruitment process and the arrival of staff to begin the operational side of our business, that is, to prepare training plans, housing, uniforms, and scheduling. Our guests expect to experience Grand Hotel's high level of service on our opening day.

- Areas of Substantial Unemployment Definition

An ASU is defined in the rules as "a contiguous area with a population of at least 10,000 in which there is an average unemployment rate equal to or exceeding 6.5% for the twelve (12) months preceding the determination of such areas made by the ETA." We believe that the benchmark for an ASU, for purposes of requiring additional recruitment, should not be based on the annual unemployment rate, but the timeframe of need. For example, Grand Hotel is located in Mackinac County, which has an annual unemployment rate of 11.5%, but this is to be expected in a summer vacation area when during the summer months the unemployment rate for all but one month is lower than the national average as delineated below:

Annual–2012	11.5%
January	23%
February	23.5%
March	21.6%
April	14.1%
May	6.1%
June	4.5%
July	4.2%
August	3.8%
September	3.6%
October	4.3%
November	11.9%
December	17.9%

We also believe that the ASU threshold should not be an arbitrary figure of 6.5%, but should be based on the national employment rate, which is currently 7.7%.

• Additional Recruitment Required for an ASU is Unreasonable and may be Counterproductive

The DOL's regulation would require employers to engage in additional recruitment activities, including but not limited to contacting community-based organizations in ASUs to ensure that unemployed U.S. workers, who may be capable of (and desirous of) performing the job duties, are afforded maximum access to those opportunities, is unreasonable in many circumstances and based on faulty logic. The DOL's intention of requiring additional recruitment is predicated on its belief that more recruitment will result in more opportunities for U.S. workers.

It is our view that this position is based on faulty reasoning because many employers, including Grand Hotel, already conduct significant recruitment far above that which is required under previous DOL regulations, and which has absolutely not resulted in the hiring of additional U.S. workers, even during the last few years of increased nation-wide unemployment. The requirement by the DOL to have employers conduct additional recruitment if employers are located in an ASU, could actually result in employers conducting only the DOL-ordered additional recruitment, which might actually result in the placement of fewer advertisements. Grand Hotel is located in an ASU, but because we are committed to hiring as many U.S. workers as possible, we are already placing many more advertisements than could be required by the DOL under its rules.

For example, in 2012, Grand Hotel conducted the following recruitment in order to find staff in the U.S. for our available positions:

Advertisements

Lansing State Journal; Detroit News

Detroit Free Press; Grand Rapids Press; Sault Evening News; St. Ignace News

Mackinac Island Town Crier; Traverse City Record; Eagle Petoskey News Review

Job Fairs (to which Grand Hotel sends recruiters)

Michigan State University; Northwestern Michigan College; Northern Michigan University

Advertisements in the following College Areas

Grand Rapids Community College; Henry Ford Community College; Schoolcraft College

Northwood University; Kent State University

Electronic Media

Craig's List; Monster.com

Michigan Talent Bank, also known as Pure Michigan Talent Connect (which is used by Grand Hotel throughout the 7 month period during which the hotel is in operation, which in turns makes referrals from local Michigan employment offices in St. Ignace and Cheboygan)

Grand Hotel Website found at *www.grandhotel.com* (on which job openings are listed year round. When the website became operational, the number of applications jumped from 600 to 1,600, and did not result in the hiring of more U.S. workers who could work the entire contract period.)

Other Recruitment

At various seasonal resorts in Utah, Colorado and Florida

Cheboygan & Presque Isle Annual Job Fair hosted by Michigan Works; Gerald R. Ford, Flint, Detroit, and Golconda Job Corps Center

Ubuntu Institute (founded by Nelson Mandela's grandson)

We are very excited about our new relationship with the Outbound Programme of the Ubuntu Institute. The Outbound programme is designed for youth and adults from Southern Africa (SADC) and provides internships, learnerships, and training opportunities for unemployed graduates from disadvantaged communities in Southern Africa for a period of 6-12 months. The programme is largely focused on Tourism and Hospitality, one of the fastest growing economic sectors in most Southern African countries. The participants of this programme, referred to as "Ubuntu Institute fellows" travel to the United States and Canada to gain work experience at some of the most distinguished companies in the world. We have not yet been approved for Ubuntu Institute Fellows for this season and we are hopeful some of these Fellows will be joining us on Mackinac Island this summer.

As a result of our sustained recruitment efforts in 2012, we received 1,665 applications from U.S. workers for various positions at the Hotel, including but not lim-

ited to the positions for which we sought H-2B workers, and of these 1,665 applications, only 358 or 21% were available for our full season.

Finally, we believe that permitting the DOL to require employers to contact community-based organizations based on a determination that a particular employer is located in an ASU places an undue burden on the DOL, which would have to become familiar with the area's community-based organizations. This might result in hasty and un-researched determinations by the DOL, and ultimately will not result in the net hiring of additional U.S. workers. Grand Hotel is familiar with community-based organizations on the Island and in surrounding areas, including St. lgnace, Mackinaw City and Cheboygan, and advertisements with and referrals from those organizations have not proven to be very fruitful. In addition, the rule gives the DOL far too much discretion in supplanting its wisdom for the wisdom of an employer that has been in existence in Mackinac County for over 120 years and which fully understands the local labor market.

Recommendations for Comprehensive Immigration Reform:

• Comprehensive immigration reform must maintain a viable non-agricultural seasonal worker program along the lines of the existing H-2B program.

• The program should maintain current protections for American and H-2B workers and not impose costly burdensome requirements on employers who use the H-2B program. The federal government should enforce existing protections.

• The number of participants in the program should be market-based, so it can fluctuate based on need, and the returning worker exemption should be re-instated. Returning workers have demonstrated that they will comply with the rules of the program. The number of workers desiring to return confirms that most employers treat their H-2B workers fairly.

• The current H-2B requirement that an H-2B worker cannot leave a sponsoring employer until the successor employer's USCIS petition has been approved should be maintained. Sponsorship of an H-2B worker is a costly and time-consuming process for a short season.

H-2B employers should not be vulnerable to losing a worker the day before the date of need.

• Immigration reform should provide sufficient resources for federal agencies to process H-2B applications in a timely manner.

Thank you, Mr. Chairman.

Grand Hotel Recent Awards

AAA Four Diamond Rating

Rated by a AAA field inspector as an excellent property displaying a high level of service and hospitality.

The Greatest Hotels in the World

Travel & Leisure Magazine, January 2011—The annual guide to the 500 best hotels in the world. The list contains the hotels that received the highest rating in the Travel & Leisure reader survey along with opinions and advice of its editors and reporters.

Top 100 Readers' Choice Award

Conde Nast Traveler, November 2011—Voted by readers as one of the top 100 resorts in the United States.

World's Best Awards

Travel & Leisure Magazine, August 2011—Voted by readers as an essential index of the places you want to go in the United States and Canada.

Top 125 Golf Resorts

Conde Nast Traveler, April 2011—Chosen by thousands of readers as a property that marries outstanding golf with fantastic lodging, dining, and service for the avid or casual golfer. Grand Hotel was ranked 4th in the top northern U.S. golf resorts category.

Silver Sage Award

Spa Magazine, 2011 Readers Choice—Selected by readers as one of the top resort/hotel spas in the Midwest.

TripAdvisor 4.0 Rating

July 2011—Grand Hotel received the 2011 Certificate of Excellence from TripAdvisor acknowledging the most powerful recommendation—the endorsement of guests.

Gold Key Award

Meetings & Conventions Magazine, September 2010—Selected by readers of M&C who based their votes on overall professionalism and quality of property. Experienced meeting planners selected their winning properties based on strict industry criteria including staff attitude, quality of meeting rooms, quality of guest service, food and beverage service, and recreational facilities.

10 Best All-Inclusive Family Resorts

FamilyVacationCritic.com—Selected number four in the U.S. and Caribbean in a September, 2010 rating based on setting, activities, food, and overall experience for families.

T+L World's Best Hotels For Families

Travel & Leisure Family Magazine, September 2011—Selected by readers as one of the 50 best family-friendly resorts in the United States and Canada.

Best of MidAmerica

Meetings Focus MidAmerica, August 2012—Selected by readers of Meetings Focus MidAmerica magazine as one of the top properties in the Midwestern United States.

Stay List

National Geographic Traveler, April 2008—Nominated by travel experts and seasoned travelers and then selected as one of 150 properties in the U.S., Canada, Mexico and the Caribbean Region with location-inspired architecture, ambience, and amenities, eco-stewardship, and an ethic of giving back to the community.

Top 10 Historic Hotels

June 2009—Selected by AAA property inspectors as one of their favorite historic hotels.

Award of Excellence

Wine Spectator, August 2010—Recommended as a restaurant where a fascinating wine experience is part of the dining experience. Wine lists are judged by the number of selections, quality of wines chosen, depth of vintages, compatibility with the restaurant menu, inventory, and how easy the lists are to use.

56 Hotels We Love

National Geographic Traveler, September 2004—Named one of the American hotels that deliver a unique experience and a lasting impression.

Award of Excellence

Corporate & Incentive Travel, November 2006—Recognized by subscribers as a resort that has superior staff service, excellence in accommodations and meeting facilities, trouble-free food and beverage functions, smooth set-ups and arrangements for social functions, exceptional ambiance, and convenient and accessible location.

Inner Circle Award

Association Meetings Magazine—Voted by readers as one of the top hotels in the country for meetings.

Planners' Choice Award

Meeting News Magazine—Recognized as one of the best in the industry by conference and convention planners based on the quality of facilities and services provided.

Golden Links Certified

Corporate Meetings & Incentives—Certified by an advisory panel as an outstanding facility for golf and meetings.

Excellence in the East Award

Meetings East Magazine—Chosen by readers as one of the top 56 properties in the Eastern and Midwestern United States and Canada. The properties were selected based on the quality of meeting space, guest rooms, staff, service, food and beverage, amenities, activities, and value from properties that they have used within the last two years.

Playful Travel Award

Nick Jr. Magazine—Chosen by top family travel experts and editors from Nick Jr. Magazine as well as two

Nickjr.com online surveys as a hotel that offers the best facilities and products to suit the needs and tastes of Nick Jr. families. It is accessible, affordable, and ac-

commodating and offers unique features that make kids feel special and make parents feel cared for and comfortable.

Best of the Midwest

Midwest Living Magazine—Featured as one of the top 37 Midwest resorts selected by the editors of Midwest Living in the Best of the Midwest 2006 edition.

Top 25 Around the World

Gourmet Magazine—Selected by Gourmet Magazine as the top hotel in the Midwest and one of the top 25 hotels in the world, in the May 1997 issue.

Greens of Distinction

Corporate & Incentive Travel, 2008—In recognition of outstanding golf facilities and service for corporate meetings and incentive travel programs as a result of a subscriber survey.

STATE OF MICHIGAN

CERTIFICATE OF PROCLAMATION

ON BEHALF OF THE PEOPLE OF MICHIGAN
I, Rick Snyder, governor of Michigan, do hereby proclaim
July 8 through July 14, 2012 as

GRAND HOTEL WEEK

WHEREAS, established in 1887, the Grand Hotel on Mackinac Island continues to be one of America's premier vacation destinations; and,

WHEREAS, in 1957, the Michigan Historical Association designated the Grand Hotel as a state historical building and in 1989, the U.S. Department of Interior designated it a national historic landmark; and,

WHEREAS, known for world-class hospitality and its 660-foot front porch, the world's longest, the Grand Hotel and its staff enjoy more than 130,000 overnight guests each season, and have hosted five U.S. presidents; and,

WHEREAS, during this week, we join with the Woodfill and Musser families and all of the Great Lakes State in recognizing and celebrating the 125th anniversary of the Grand Hotel; we encourage Michigan citizens and visitors alike to visit this true, Pure Michigan attraction;

NOW, THEREFORE, I, Rick Snyder, governor of Michigan, do hereby proclaim Sunday, July 8 through Saturday, July 14, 2012 as Grand Hotel Week in Michigan.

Rick Snyder
Governor

Chairman WALBERG. I thank you and each of the witnesses this morning.

I recognize myself for my 5 minutes of questioning.

Mr. Musser, I detect that there may be a second negative of air conditioning. Not only has it encouraged the expansion of federal government's staying around longer here in Washington, but I am sure it has made it somewhat difficult by opening opportunities in tourist spots other than in Michigan and in the North.

Let me ask you a question. Critics of guest worker programs argue that American workers would fill temporary jobs if they were better able to access information about the positions. Grand Hotel, as you have described, does extensive outreach to connect with American workers, yet you still have to turn to foreign workers.

Can you further describe some of your recruitment efforts, and do they go beyond the requirements of the H-2B program?

Mr. MUSSER. Thank you, Mr. Chairman. And yes, our recruitment efforts do go beyond the requirements. Quite frankly, I would like to hire all Mackinac County residents if I could, but unfortunately, there are just not enough willing to do the job.

We have, in the past, run buses to Detroit to homeless shelters. In addition to the program I outlined in my testimony, we have tried a variety of programs and will continue to do that. The most recent is Job Corps, which is—we have found some good American staff through that, and we will continue to do those.

But unfortunately, you know, we are in this isolated location 300 miles away from the, you know, the largest population base in our state. We are difficult to get to even in the summer, and the idea of individuals leaving their life, if you will, for 6 months—packing up and coming to this isolated location is not a reality, or at least in the numbers that we need to operate.

And I think that as far as the foreign nationals that we do bring in, it is important to note that last year, for example, of the 260 or so H-2B workers we had, 90 percent were returning. So if our wages weren't good and the type of work environment that we work hard to create wasn't good, I don't think those individuals would be returning.

Chairman WALBERG. Your testimony highlights that the Labor Department's new H-2B rules would threaten your ability to fully recover from the recent recession. Explain a little bit in more detail why you say that.

Mr. MUSSER. The costs are problematic. Some of the suggested changes, such as the requirement to accept an individual up to 21 days prior to the need—or the date of starting work is difficult.

If we play by the rules and we do everything in our power to find Americans and then are not able to do it and we are able to bring an H-2B worker, if we are told up to, you know, 3 weeks prior to our opening date that we have to remove that person it is very difficult to reasonably plan for the season and get the crew up to speed and ready for the summer. And then to go through the process again is not realistic to find, if that American doesn't work out, to find an H-2B person to replace him or her.

So the costs and also the timeframes are two areas of difficulties.

Chairman WALBERG. Reality gets in the way.

Mr. MUSSER. Yes.

Chairman WALBERG. Ms. Reiff, your testimony suggests that there should be a lower-skilled guest worker program that does not tie visa-holder to a single employer. Can you elaborate for us on the benefits of that approach?

Ms. REIFF. The idea is that employers in the lesser-skilled areas would be able to actually recruit for positions, show that—do extensive recruitment, show that they couldn't find U.S. workers for particular positions—let's say they are LPNs or CNAs—and then they would register within the system and be identified as an employer that was not able to find X number of workers. Workers, then, that were looking for that type of work overseas would have access to a database to show—or through a foreign recruiter to show that they also qualified for that position. So it was kind of a willing worker, willing employer kind of matching database.

The employer would then be able to get a visa, come in, be registered with that employer, be tracked through a monitoring system, and if the employee decided to leave they could go to another registered employer. So they would be able to leave if they decided that they didn't want to be there. But that employer would still be registered for those particular slots and would be able to recruit another worker, whether it is a U.S. worker or somebody from overseas.

Chairman WALBERG. Okay. Thank you.

My time is expired.

I now recognize the ranking member, my good friend, Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman.

Just to sort of follow up on that point, I mean, your testimony, Ms. Bauer, really was focused a lot on, you know, some real horror stories of people who were sort of trapped under the existing system with an employer and nowhere else to go. I mean, the sort of reform that you were sort of describing in terms of more portability—maybe I just was kind of curious to have you comment on—on whether or not that would improve that obvious problem that your center has identified, and the reports, and actually the GAO also identified.

Ms. BAUER. Well, maybe. And maybe it will make an improvement. But I think it is not a panacea, particularly as described in this proposal, because workers would still have to go to a registered employer; they wouldn't be free to go find a job more generally. Our experience is that that is very difficult for workers to access those jobs and to find a job in the timeframe that is appropriate.

I think more importantly, those jobs would still remain as jobs that would then be available to, presumably, additional guest workers who would come in, and paid under the prevailing wage rate or paid less than the average wage rate, which would have a depressive effect on U.S. wages and working conditions.

Mr. COURTNEY. Right. I mean, the wage issue, which again, I think you did a nice job sort of walking us through that, I mean, that certainly is something that needs to be looked at. But, I mean, the AFL-U.S. Chamber joint statement, which again, I think we have got to embrace whatever sort of traction we can get around this town, you know, when opposing forces are coming—trying to come together, I mean, did actually specifically say that this

present system that, again, locks people into one employer should be reformed. And, you know, I think that is encouraging.

Again, how you do it I guess is really the trick here. And, what is your response to her observation?

Ms. REIFF. Well, I think—there are a lot of negotiations going on right now but I think it was very important to the labor union side to have this portability and the workers being able to vote with their feet. It is also very important for employers who recruit and can't find U.S. workers to be able to have that open slot if they do—if our foreign worker that comes in actually leaves and goes to another employer.

So, for us, I think it is really—it was a big concession to say that portability should be from day one, but we also need to have those slots still open because there is still an open position. That is not to say that a U.S. worker wouldn't fill that position, but it should still be in the database as a position that is open until it is filled. And I think we are on the same page with the unions on that issue.

Mr. COURTNEY. Right.

And, you know, you mentioned database. I mean, it seems that for, you know, a smart reform, you know, we need a system that actually is better, in terms of just helping American workers—we did a job fair in New London County last summer, which we had 33 employersthat was the good news—some in health care, some in hospitality, some in defense—that had openings. We had 1,500 people in the pouring rain an hour or 2 before we opened the doors.

And, you know, it was clear that even though some of these employers had been advertising, the system is really still weak, you know, in terms of people knowing what is out there. And it seems like a reform is going to have to do better, as far as data being available, again, to U.S. workers, in my opinion, at this time of recession. It is so obvious that there is a need there. But also, as the—if we do have a reform, there has got to be a way for people to, you know, know what is going on out there.

Ms. REIFF. Absolutely. And——

Mr. COURTNEY. But that is not the case now, right?

Ms. REIFF. Well, there are different—we don't have a temporary worker program right now aside from the seasonal non-agricultural worker program, so we don't really know exactly how the lesser-skilled—semi-skilled folks—now, this goes all the way up to less than a bachelor's degree—the scope of the program, from "no skill" all the way up to "could be an RN," because RNs don't necessarily need to have a 4-year bachelor's degree.

There has to be ways—we have listed out many different ways to recruit these types of workers. It could be job fairs; it could be in ethnic media; it could be in many different ways. It could be sitting outside the grocery stores. But there are many different ways that we have identified in conjunction with our counterparts on the other side that could adequately test the labor market.

But yes, our workers—our employers want to hire U.S. workers. We want to exhaust the U.S. workforce first and then reach out to the foreign workers.

Mr. COURTNEY. Right.

I yield back.

Chairman WALBERG. Thank the gentleman.

Against my better judgment, and after what Indiana did unfairly to Michigan the other night, I will show grace and recognize my good friend from Indiana for his 5 minutes of questioning.

Mr. ROKITA. Well, thank you for that grace, Reverend—I mean Chairman—I mean both.

Good morning, everyone. Thank you for your testimony. It has given me several questions to think about and ask you about, but only 5 minutes so I will try to get right to it.

I want to draw out the idea of numerical limits. If I understood the testimony correctly—I will just go right down the row—I want to have you cap—summarize your testimony. Do you believe in numerical limits? Do you not? If they are arbitrary, what is a better—what is not arbitrary? Should there be limits at all?

Ms. Reiff? Thank you.

Ms. REIFF. Numerical limits are arbitrary currently. The H-2B program and the H-1B program have set limits that are really not—how do we put this—they were not thoughtfully put together, they are just there—65,000 for H-1B, 66,000 for H-2B.

What we see is a program—a new program that takes into account the market needs, and when——

Mr. ROKITA. And who decides what the market needs are? What would you use?

Ms. REIFF. It is probably a combination of things, but basically demand and——

Mr. ROKITA. As defined by who and what?

Ms. REIFF. Demand probably defined by employers and the testing of the market.

Mr. ROKITA. What kind of employers? The ones that belong to the Chamber of Commerce, or NFIB, or what?

Ms. REIFF. I am not speaking for the Chamber of Commerce here, but——

Mr. ROKITA. That wasn't my question.

Ms. REIFF. It would be a test of the market. After you have done a sufficient test of the market and you can show that——

Mr. ROKITA. Who is you? Department of Labor?

Ms. REIFF. Well, it would be the agency that is charged. Right now the Department of Labor——

Mr. ROKITA. Thank you.

Ms. REIFF [continuing]. Looks at the labor certification application——

Mr. ROKITA. Very good.

Ms. REIFF [continuing]. So yes.

Mr. ROKITA. Thank you.

Mr. Benjamin, same kind of question.

Mr. BENJAMIN. Sir, I don't pretend to be an expert in all the different rules. I can tell you that I live at the ground level, and what that means to me is I have a 24/7/365 responsibility to care for the elderly. And I just want some help to bring new workers in.

Mr. ROKITA. Yes. So as an aside, let's take a specific question I had for you. Your testimony notes that foreign workers interested in the health care field currently face, "insurmountable roadblocks." Elaborate on that, please.

Mr. BENJAMIN. Just being able to get them to come in with the limits that are out there currently.

Mr. ROKITA. These caps I am talking about?

Mr. BENJAMIN. Caps, yes, sir.

Mr. ROKITA. Okay. Any other roadblocks?

Mr. BENJAMIN. Sometimes there are cultural roadblocks, and we deal with those in our orientation process. We try very carefully. We let our residents be involved, for example, in the interview process with people that are going to take care of them.

Mr. ROKITA. Okay. Thank you.

Ms. Bauer, did you want to comment on the 65,000 and 66,000?

Ms. BAUER. Well, the—in the H-2B program the cap has not been reached since 2008, so we are not filling the 66,000 slots that are available.

Mr. ROKITA. But would you agree it is arbitrary nonetheless?

Ms. BAUER. It is not related to changes in the economy but it is certainly clear that in the last several years we haven't needed more workers than that because we haven't filled those slots.

Mr. ROKITA. But would you support a supply-demand kind of scenario that Ms. Reiff was talking about?

Ms. BAUER. Not with a program that is structured as the programs are currently structured, we would not support that.

Mr. ROKITA. And along those same lines, Ms. Bauer, do you think that a sovereign nation has a duty to its citizens or a right of some kind to have an immigration policy that exists solely to serve economic interests of the nation?

Ms. BAUER. No. I think there is a moral component to the conditions that we allow people to work under in the United States, and there will always be an endless supply of people from other countries who are willing to come here and consider it even a good deal to make one or two dollars an hour and to suffer under what we might regard as appalling circumstances, but is that really how we want to structure the work of our nation?

Mr. ROKITA. I would say, shouldn't it be the people's decision to make? We are not forcing them here are we? They are coming here freely. I would like to think that people in this country and in this world can make better decisions for themselves than you can for them.

Ms. BAUER. It may be a good decision for an individual person.

Mr. ROKITA. Okay.

Ms. BAUER. I don't dispute that.

Mr. ROKITA. Thank you. Let me get—because I am running out of time, let me get to Mr. Musser.

You have seen the line of questioning. Can you comment on any of it?

Mr. MUSSER. Yes. In regards to H-2B, I think that the returner worker exemption that had been in place is the answer. You know, that speaks to the individual that is not trying to somehow sneak into our country through the H-2B program. It speaks to the individual that has been vetted before and is not a security concern to our country. It is the, you know, it is the individual that apparently does like our wages and our housing and the things that we do and wants to come back. So I think that addresses the cap issue.

Mr. ROKITA. Thank you, sir, very much.

Mr. Chairman, the gentleman from Michigan with poor basketball skills, I yield back.

Chairman WALBERG. Grace will be remembered.

I thank the gentleman.

And now I am pleased to recognize my friend from New Jersey, Mr. Andrews.

Mr. ANDREWS. Thank you, Mr. Chairman. Thanks for the approach to this issue. It is very important for our country.

And I join Mr. Courtney in saying I am very hopeful and optimistic we will have comprehensive immigration reform this year. Our country needs it.

Ms. Reiff, the core of your argument is that there is an undersupply of labor for—to fill necessary jobs in the United States, and—but the unemployment statistics show that in the construction industry, for example, those who identify their—Americans who identify their last job as construction is a 15.7 percent unemployment rate; hospitality is 11.2 percent.

The AFL-CIO-Chamber principles say that Americans should have first crack at available jobs. Do you subscribe to that agreement?

Ms. REIFF. Absolutely. Yes——

Mr. ANDREWS. And you say in your testimony that there should be "rigorous recruitment by employers who want to take advantage of the H-2B program." I want to flesh out with you what we mean by rigorous recruitment of Americans—rigorous recruitment——

Ms. REIFF. Are you talking about the H-2B program or the new worker program?

Mr. ANDREWS. Well, I am talking about your proposals. You know, the proposals you made——

Ms. REIFF. Okay. The proposal for the new guest worker programs.

Mr. ANDREWS. Yes. It talks about a rigorous attempt to recruit Americans before you could use the new program, as I understand.

Ms. REIFF. Absolutely.

Mr. ANDREWS. Okay.

Ms. REIFF. The—go ahead.

Mr. ANDREWS. I would assume that in reading a GAO report from 2010 you would agree that the following pieces of evidence are not consistent with rigorous recruitment: One employer required American applicants to run with a 50-pound bag to show they were fit for a certain kind of work, which was not terribly related to the work, as I understand it. An Oregon forestry employer placed ads for open positions in newspapers in California and Washington but not in Oregon for the work that was supposed to be done there. Kansas City Star expose reported by the GAO says that one employer scheduled interviews with U.S. workers for 6 p.m. on Christmas Eve to see—does that sound like rigorous recruitment to you?

Ms. REIFF. No, and I am wondering what they are recruiting for. Because again, we don't have this temporary worker program in place at this point.

Mr. ANDREWS. Well, no, they were recruiting for openings in the hospitality industry and in the construction and the forestry industry, and to meet the requirement to show you had tried to recruit U.S. workers this is what they did. What do you think rigorous recruitment would look like? Tell me what an employer would have to do to establish that burden.

Ms. REIFF. Well, there are many different things that recruiters can do, and in some of our negotiations with the—in the current comprehensive reform debate we have come up with lists of probably 26 different things that could be considered rigorous recruitment, so——

Mr. ANDREWS. Could you share a couple with us that you think——

Ms. REIFF. Job fairs, high school job fairs, ethnic media, radio ads, Internet recruitment, going to different perhaps union halls, community centers, different ways of recruiting. There are many different things that are—probably would be considered a little bit archaic in the current——

Mr. ANDREWS. Do you think that definition should be codified in regulations, or issued as guidance, or how do you think employers should know what the ground rules are to meet the burden of vigorous recruitment?

Ms. REIFF. I think the ground rules should be very clear and it should be identified how many forms of recruitment and how that recruitment is conducted. And I think most of the employers, at least the ones you have seen here and part of our coalition, do over and above what is codified right now in terms of recruitment for H-2B and for the permanent residence process.

Employers—good actor employers—want to hire U.S. workers. They don't want to——

Mr. ANDREWS. Do you think that there is a critical error—shortage of needed workers in the construction field in the United States today?

Ms. REIFF. Overall? At a 30,000-foot——

Mr. ANDREWS [continuing]. In construction.

Ms. REIFF [continuing]. At a 30,000-foot level, probably not. However, I am not—I don't represent the construction industry. I am talking on behalf of the Essential Worker Immigration Coalition and people in my practice. We have found situations where there are specialty construction occupations where you cannot find——

Mr. ANDREWS. I understand.

Mr. Benjamin, I want to ask you a question.

Mr. BENJAMIN. Yes, sir.

Mr. ANDREWS. You say that one of the problems in running your facilities—and I know what a challenge it is, "chronic underfunding in Medicare and Medicaid." There is discussion of a proposal that would reduce Medicaid spending by about 18 percent under the next 10 years from $4.1 trillion projected down—well, the cut is $756 billion.

If that cut went into effect would that make your job easier or harder in running your nursing home?

Mr. BENJAMIN. Thank you for asking that question, sir. It would make my job all but impossible.

Mr. ANDREWS. The numbers I cited are from the Ryan budget, which was approved by the House Budget Committee last night and will be on the floor of the House next week. Do you think it is unwise to cut Medicaid by 18 percent?

Mr. BENJAMIN. I can't understand where we would be able to save that kind of money. As I mentioned, we are price-takers, not price-makers. We take the rates that the states—that are, as you

know, are already embattled, and governors all over the country are having difficulty in funding their states.

Mr. ANDREWS. Thank you. As you say, someone who works from the ground up, I think, has given us some very valuable insight on a budget that the House will vote on next week. Thank you.

Mr. BENJAMIN. Thank you.

Chairman WALBERG. I thank the gentleman.

And it would be hoped that we could certainly find significant savings in dealing with waste, fraud, and abuse, and I was—I am certain that Mr. Benjamin would not recognize that problem in the sense of supporting it, so—let me now recognize my good friend from Tennessee, Dr. DesJarlais?

Mr. DESJARLAIS. Thank you, Mr. Chairman.

Thank you all for being here today.

Let me ask, Ms. Reiff, what is the average wage that you offer for most jobs that you are trying to hire—or that are competing with American jobs?

Ms. REIFF. It is quite a range because the scope goes from lesser-skilled—unskilled individuals all the way up to people that may have a 2-year associate's degree or more.

Mr. DESJARLAIS. Just an average, can you——

Ms. REIFF. Could be $27, $28 an hour at some levels. It could be——

Mr. DESJARLAIS. And you are having a hard time filling those jobs with American workers?

Ms. REIFF. Believe it or not, yes.

Mr. DESJARLAIS. Okay.

Mr. Benjamin, what is your average wage for the people that you are having trouble finding American workers for?

Mr. BENJAMIN. For certified nurse's aides the average wage is about $11.50 an hour. For licensed practical nurses the rate—average rate is about $16.50 per hour. For RNs it is in excess of $20.

Mr. DESJARLAIS. Okay.

Mr. Musser?

Mr. MUSSER. About $10 an hour.

Mr. DESJARLAIS. $10 an hour.

Do you find that there is a competitor against finding American worker—who is your biggest obstacle to finding American employees to do these jobs, or what is your biggest obstacle, in terms of applicants?

Mr. MUSSER. Well, in our case it is location and the fact that we are closed for more than half the year, and——

Mr. DESJARLAIS. So there are no workers that are willing to come out there that are maybe single that don't have families. That has been——

Mr. MUSSER. Some. And we certainly encourage and do everything we can to find those individuals. And our experience with the American workforce is that in general if we get you for two seasons we get you for about a decade. But the challenge is getting them to Mackinac, getting them to accept leaving their home for half the year or more than half the year to come to us.

Mr. DESJARLAIS. Okay, that is good.

How about, do you find anybody that is standing in the way of finding American workers, or what might be?

Mr. BENJAMIN. Well, we have—about half of our facilities are in rural locations, so that is a locational disadvantage of substantial nature.

Mr. DESJARLAIS. Well, folks, I am going somewhere with this. I guess I will try to get us there quicker.

I have a lot of nursery workers in Tennessee that hire seasonal workers, and they have tried to get American workers to come out. We have unemployment rates that exceed the national level.

And it seems what I am hearing from them and actually a lot of businesses just around the district that aren't ag-related or construction are saying that they can't compete against the unemployment rates. If the job is not $10 to $14 an hour you can't get people to come off unemployment to take those jobs. And are you finding that or are you——

Mr. BENJAMIN. We don't hire seasonal workers. We have 24/7/365 responsibility.

Mr. DESJARLAIS. Okay. All right.

And then how about working with local colleges, vocational schools. Are we reaching out to them saying, hey, we need workers here; we can't find workers; we are having to get immigrant workers? What are you doing to encourage that type of cooperation?

Mr. BENJAMIN. We have relationships with a variety of local community colleges and many of those individuals, part of their training is that they have to do an internship, and we gladly cooperate with them because we—they are a ready source of labor for us.

Mr. DESJARLAIS. And, Ms. Reiff, did you have something to add to that?

Ms. REIFF. A lot of our employers offer in-house training to U.S. workers. We reach out to vocational schools, to high schools, do all kinds of recruiting to try to get people into the workforce. We do prison-to-work if possible, welfare-to-work, refugee programs, reaching out all over the place looking for the U.S. workers to take the—a lot of these jobs are just very, very demanding and difficult. Being an LPN or a CNA is a very demanding job and it takes a special person to deal with those.

Mr. DESJARLAIS. Okay.

Well, it seems that there might be a little more incentive if it wasn't so easy to get 99 weeks of unemployment that Americans would take these jobs. And I understand there has been studies, I know in the agriculture area, where they have advertised for American workers, they have had big job fairs, they will get 3,000 applicants and maybe three will actually show up for work and less than that make it through the day. They are just not willing to do that job.

So I think we have a big problem here in the federal government by enabling people to not do the work. And I know you said $27 an hour, so we are looking $50-some-thousand a year. I mean, that is unbelievable that we can't find people to take those jobs.

I did want to yield a few seconds to my colleague, Mr. Rokita.

Mr. ROKITA. Thank you, Dr. DesJarlais.

Mr. Benjamin, going back to the Medicare line of questioning——

Mr. BENJAMIN. Yes, sir.

Mr. ROKITA [continuing]. Are you aware that the state of Rhode Island recently received a waiver which capped their Medicaid

funding for a whole 5 years in exchange for being relieved from nearly all the Medicaid laws, and they put their Medicaid patients—the poor that the Medicaid program is supposed to serve—in a managed care and they didn't need any more money? Yes or no?

Mr. BENJAMIN. I am sorry. I didn't understand the question.

Mr. ROKITA. Are you aware of the Rhode Island waiver?

Mr. BENJAMIN. Yes, sir.

Mr. ROKITA. Okay. Are you aware that in the state of Indiana we have a Healthy Indiana plan that is the product of a waiver that in exchange for being released from all the—most of the Medicaid rules and regulations we were able to cover 40,000 more truly poor people without adding a cent more to the budget of either our state or federal line items?

Mr. BENJAMIN. I am aware of those programs.

Mr. ROKITA. Okay. Thank you very much.

My time is expired.

Chairman WALBERG. Gentleman's time is expired.

I now recognize a gentleman who understands the beauty of islands, Congressman Sablan.

Mr. SABLAN. Thank you very much, Mr. Chairman, and thank you for conducting today's hearing. I think it is an issue that we all need to start addressing.

When I am asked what is the two best things that Congress has ever done for the place I am from, and one is to approve the permanent political status relationship we have with the United States, and the second thing that Congress has ever done—the best—second-best thing, I think, is the federalization of immigration system law in the Mariana Islands.

Because, Ms. Bauer, testifying—listening—sitting here listening to you testify, I thought you were just talking about me—my—where I am from. Because we had a guest workers program that is just out of whack. We have our government and big time companies hiring big guns here in D.C. to just continually delay this, and when it was over we found, left with a mountain of nasty—listen, things that I have been spending going on 5 years now trying to correct parts of it, and, because that is for us a wall of shame and it is really hard to do, but.

And, Ms. Bauer, what is the average—what is the amount of—the salary pay for H-2 workers—I mean, H-2 for—H workers in the country?

Ms. BAUER. Well, that varies by locality and industry. I would say that what is particularly relevant is that the salary paid to H-2B workers has been estimated to be as much as $4 to $5 dollars less than the average wage in the industry and in the locality, so that H-2B employers are able to pay less than the average wage. In landscaping that difference has been estimated at about $3 per hour; in seafood processing, more than $4 an hour.

So that is certainly part of the story when we talk about the inability to attract U.S. workers. And the other side of that, of course, is the current recruitment requirements.

Mr. SABLAN. Thank you.

What we need to do here—and this is why I am very grateful to the chairman for bringing this issue up and early is, I do under-

stand that we need to strike a balance between the needs of employers and the—to prevent the exploitation of workers. Again, I am a micro—could somebody say the English word? I am a small example—I am the example of what can happen with a system run amuck.

But the key word here is a balance. That is critical to all of this. I don't like the attestation, because employers do get away with that. I still don't understand whether it is back home—and I come from an island so I can't run away from anyone who wants to see me. They know where—that hole I have lunch at, and—but we—I don't understand why we have unemployment of U.S. workers and yet continue to have a need to bring in workers from third countries.

And I don't call—from where I come from I don't call them guest workers because some of them have been there for 25 years, and I don't call them foreign workers because they are as much a part of our community as anyone else. So I still cannot comprehend whether it is home, where I meet with employers and I meet with workers and I meet with—or here, when we have unemployment at going on 8 percent per, you know, national, and yet you are—some of you are telling us your here that we can't find able and willing workers?

But you can't find them if you advertise for 2 days in the paper because these people don't have jobs and probably can't afford to read the paper. We—but we need to strike—I do understand that a balance.

And, Mr. Musser, for those of your customers who come to you in the winter and they need a place in the summer, there is a—we have islands out there. Beautiful place, too.

But no, seriously, this is an important issue that we need to address and I am also very, very happy going on 5 years now that CIR—comprehensive immigration reform is being addressed by this Congress and we are—last night somebody said that we should get it done by August 1st. I look forward to August 1st.

Thank you very much, Mr. Chairman.

Chairman WALBERG. I thank the gentleman, and we will take that under advisement.

I am now pleased to recognize Ms. Bonamici, from the other end of the country.

Ms. BONAMICI. Thank you very much, Mr. Chairman. I apology for being slightly out of breath. I am participating in a markup in another committee.

I wanted to reiterate the comments of my colleagues about the importance of comprehensive immigration reform, and I am certain that others who have listened to this testimony today would agree that this is yet another example of why we need comprehensive immigration reform.

I want to follow up on the question that Mr. Andrews asked earlier that brought attention to what happened in my home state of Oregon.

And, Ms. Bauer, in 2011 the Department of Labor inspector general reported that the forest contractors in Oregon working on thinning projects under ARRA were able to bring in foreign nationals under the H-2B program even though there was double-digit

unemployment in the counties where the work was being done, and it was stated earlier that the advertising for those jobs was done in other states.

The report, which I would ask be entered in the record, Mr. Chairman——

[The report, "Program Design Issues Hampered ETA's Ability to Ensure the H-2B Visa Program Provided Adequate Protections for U.S. Forestry Workers in Oregon," dated Oct. 17, 2011, may be accessed at the following Internet address:]

http://www.oig.dol.gov/public/reports/oa/2012/17-12-001-03-321.pdf

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Chairman WALBERG. Without objection.

Ms. BONAMICI. Thank you, Mr. Chairman.

Because of the current system that allows for self-attestation regarding efforts to recruit U.S. workers a group of loggers was able to avoid having to interview U.S. workers for available work and the inspector general's report found that most Oregonians were not even aware that the jobs were available. As it was stated, they advertised outside of Oregon. In fact, some of the employers actually discouraged the few U.S. workers they interviewed and then, of course, the foreign nationals were brought in to do the work.

Ms. Bauer, as your testimony noted, there is the Department of Labor's 2012 final rule to protect workers in the H-2B program. This is being challenged and the case is now pending before the 11th Circuit Court of Appeals, and two of my colleagues from Oregon—both Senator Jeff Merkley and Representative Peter DeFazio have filed amicus briefs in this litigation.

So could you talk a little bit about what the rule would have accomplished had it been in place in this Oregon situation? Would the abuses have been prevented?

Ms. BAUER. Well, as you noted, the—those regulations would have required a certification process, which does involve greater oversight by the U.S. Department of Labor. But it also, I think, maybe as importantly, requires far more rigorous recruitment of United States workers.

The current system allows for the advertising of these jobs—2 days in a newspaper 120 days before the job starts. In the world of low-wage workers, that is not a reasonable way to recruit workers for low-paid temporary jobs.

We also see employers fighting against the regulations that would—that would produce an online national registry of these jobs so people could find out about them and determine whether they are good jobs and might be a good fit. Right now it is virtually impossible, because of the—some of the issues you raised in terms of where the advertisement takes place and when the advertisement takes place, for people to find out about these jobs. The——

Ms. BONAMICI. Thank you.

And I read Mr. Musser's testimony from the beautiful Mackinac Island and heard about some of the efforts that he is taking, but certainly not all the employers are taking those efforts. So there has been some suggestion in the testimony today that an employer's self-attestation should be the basis for a guest worker program. Is that a sound way of approaching this policy?

Ms. BAUER. In our view, no. And let me explain just a little bit of what the certification will kind of weed out that the attestation process doesn't. Primarily, the difference in terms of the process and the oversight is that the people who were—the applications that were weeded out under the certification process were applications that had jobs that were permanent, and that was the largest number of applications for H-2B workers that were weeded out by certification that people described them as temporary but the DOL looked at them and said, "No, these are good, permanent jobs." And attestation doesn't allow for that kind of review until after the fact.

Ms. BONAMICI. Thank you.

And my time is about to expire, but we have talked about comprehensive immigration reform, but until we can do that, what needs to be done to make it clear that the Department of Labor does have the legal authority to issue rules under the H-2B program?

Ms. BAUER. Well, we believe the Department of Labor does have that authority, but because a court has indicated that there is less clarity than that court would prefer, we believe that it would be appropriate for Congress to make it abundantly clear that they intended the Department of Labor to have rule-making authority.

Ms. BONAMICI. Thank you very much.

And my time is expired. I yield back. Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentlelady.

And I thank each member of the panel for taking the time to be with us today and adding the expertise and experience that you brought with.

I now recognize my friend, the ranking member, Mr. Courtney, for any closing comments.

Mr. COURTNEY. Thank you, Mr. Chairman.

Again, I just want to reference at the close here the, again, the positive signal that the AFL and the Chamber issued recently in terms of their, you know, joint commitment to try and reform and improve this system. And what the statement said in a—just a small portion of it here is, "our challenge is to create a mechanism that responds to the needs of business in a market-driven way while also protecting the wages and working conditions of U.S. and immigrant workers. Among other things, this requires a new kind of worker visa program that does not keep all workers in a permanent temporary status, provides labor mobility in a way that gives American workers a first shot at available jobs, and that automatically adjusts as the American economy expands and contracts."

I thought that was a very nice way to sort of summarize, you know, what the end game should be here for Congress, and I want to thank the witnesses for their great testimony today because I think it is going to help us guide and direct our way to reach that goal, which again, two sides which normally don't agree on much are already expressing an historic commitment to achieve.

So thank you, Mr. Chairman, for holding this hearing.

Chairman WALBERG. I thank the gentleman and am impressed the attorney with the—that you are with the brevity that you carry on here in committee, and that is a good thing and I will try to follow suit even though I am a pastor by training.

I want to thank the panel again for taking the time to be here. Your experience, your passion with what you do and who you care for, the jobs you provide, the service you provide is much appreciated.

This is an issue and I would concur with both sides of the rostrum here that immigration is a huge issue that we have to address. And what type of reform, we have to address.

And I want to make sure that this subcommittee and our committee plays a key part in making sure that areas that we have purview over and responsibility for are addressed in proper ways that have reality, that meet needs, and as much as possible don't make more problems. We don't need that.

We want to encourage the American dream. We want to encourage people like my grandmother, grandfather brought my father and his brother over from Sweden in the early 1900s, and grandfather and family who helped to build the skyline of Chicago, and a grandmother who cared for the needs of people in Glencoe and the North Shore of Chicago.

And, Mr. Benjamin, I know you, having grown up in Glencoe, understand what that is.

But Grandma was just delighted, as an immigrant, to clean houses, take care of the needs of those people, because her two sons went to Glencoe High School, the same place the wealthy and others went to and gave her the opportunity to share that dream with her children. How she was cared for, I don't know. She never said. But she was delighted for the opportunity of the American dream to be part of her life.

We want that to continue. Immigration expands our country—its creativity, its resourcefulness, and the whole melting pot aspect.

It also spurs those of us who have had the privilege to be American citizens and to grow up here, to be born here, to be all we can be as well, and we certainly want our objective in dealing with H programs—H-2B specifically today, and others, to foster that great experience that this country offers and must continue to offer, as well as the creativity and the strength and resolve of people who yearn to use that in responsible ways to expand what this country can be, as well, to the rest of the world.

And so we will continue looking at this, and I appreciate comments from both sides of this rostrum on our way forward. We will consider that, and ultimately, to have the opportunity to do good work.

I would like also, in conclusion, to enter for the record a letter from representatives of the construction industry who are not in front of us but wanted to have their comments brought forward on this issue, as well as letters from landscaping and hotel and lodging industries, the Center for Global Development, ImmigrationWorks USA, and the H-2B Workforce Coalition.

[The information follows:]

March 13, 2013.

Hon. TIM WALBERG, *Chairman;* Hon. JOE COURTNEY, *Ranking Member,*
Subcommittee on Workforce Protections, U.S. House of Representatives, 2181 Rayburn House Office Building, Washington, DC 20515.

DEAR CHAIRMAN WALBERG AND RANKING MEMBER COURTNEY: The undersigned construction associations represent thousands of employers and hundreds of thousands of workers in all facets of construction-from home building, to road construc-

tion, to heavy industrial production, to specialty trade contractors and material suppliers. Together, we believe that in order to be successful in fixing America's broken immigration system, any viable remedy must do four things: strengthen our national security, create a role for employers in an employment system that functions in a fair, efficient and workable way, address the realities of future workforce needs in the less-skilled sectors, and find a reasonable, rational way of dealing with the current undocumented population in the United States.

As the economy recovers, companies in the construction sector will face more acute shortages of qualified workers-both craft professionals and laborers. Even in recent years during a slow economy, our members have experienced difficulty in finding workers. For decades, the immigrant workforce has played a vital role in the growth and sustainability of our industry, and we are proud to note that for many legal immigrants, jobs in the construction sector have provided them with a key opportunity to gain a foothold in the American middle class. Unfortunately, current immigration laws-which all but ignore the needs of sectors that utilize less-skilled immigrant workers-disproportionately affect construction companies because of their fluctuating work needs.

A major deficiency in the 1986 immigration law was its lack of a legal program to address the issue of a pathway for foreign workers to enter the United States to work. Because the 1986 law did not create a legal system, foreign workers drawn to the United States' dynamic economy came into the country illegally. Congress attempted to resolve this deficiency in 1990, when it created the H-2B classification for low-skilled non-agricultural workers. The program, however, is seriously flawed and unable to meet the market's needs. The program is capped at a mere 66,000 visas per year and is not market-based, which means by definition the supply almost never matches demand.

To resolve this problem going forward, any future immigration law must include a new market-driven program to provide a legal path for foreign workers to enter the United States when the economy needs them, with fewer entering when the U.S. economy contracts.

A successful future guestworker program must include:

- An annual visa cap that fluctuates based on a demand-driven system that reflects the real economic needs of the nation;
- An opportunity for employers to petition for an approved slot that allows them to hire visa-holding foreign workers, and replace those workers if/when they move onto another approved job slot;
- A time period for job slot approvals, and approved visas, that reflects a long enough time period to ensure that the training investment made by employers is not lost;
- A program that requires employers to treat these legal foreign workers in the same manner as U.S. workers-with all of the same benefits, workforce protections and wage rates as similarly-situated workers at the same location; and
- A dual-intent process that allows some foreign workers who have demonstrated a commitment to their jobs and their communities to choose to petition for a change of status to a permanent legal status in the United States, while also incentivizing most foreign workers to return to their home country at the end of their visa period.

We have a unique opportunity before us to reform our immigration policies to enhance our security, protect our economy, and continue our heritage as a welcoming country of immigrants. We urge you to continue working together to craft a reasonable and balanced approach to addressing America's immigration problems in a way that resolves the issue for the long-term. We look forward to working with you, and with the Senate and the Administration, to craft and support immigration reform legislation that can be considered and passed by Congress this year.

Thank you for your consideration of our views.

Respectfully,

ASSOCIATED BUILDERS AND CONTRACTORS,
ASSOCIATED GENERAL CONTRACTORS,
LEADING BUILDERS OF AMERICA,
MASON CONTRACTORS ASSOCIATION OF AMERICA,
NATIONAL ASSOCIATION OF HOME BUILDERS,
NATIONAL ROOFING CONTRACTORS ASSOCIATION.

Prepared Statement of the American Horse Council

The American Horse Council (AHC) appreciates the opportunity to submit testimony concerning the H-2B temporary non-agricultural worker program and the "Role of Lower-Skilled Guest Worker Programs in Today's Economy."

The AHC is a Washington-based association that represents the horse industry before Congress and the federal regulatory agencies. The AHC includes over 120 equine organizations representing all horse breeds and virtually every facet of the horse industry, including horse owners, breeders, veterinarians, race tracks, horse shows, trainers, rodeos, farriers, breed registries, horsemen's associations, state horse councils and commercial suppliers.

Despite substantial efforts to recruit and train U.S. workers, horse industry owners, trainers, and competitors must use the H-2B worker program to bring aliens into the country as temporary, non-immigrant workers. Without these foreign workers, the horse industry could not continue to operate as it does now.

The horse industry, in all its segments of racing, showing, recreation and work horses, involves 9.2 million horses, nearly 2 million horse owners, has a $102 billion impact on the U.S. economy and supports 1.4 million full-time jobs. It involves agriculture, sport, entertainment, gaming, recreation and exercise, all built on the breeding, training, use and enjoyment of horses and horse activities.

The racing and showing segments of the industry are particularly dependent on the H-2B program. The horse racing industry has a $26.1 billion economic impact and supports 380,826 jobs. The horse show industry has a $28.7 billion economic impact and supports 380,416 jobs. The workers provided by the H-2B program are a small portion of horse industry workers, however they play a vital role within the industry.

Most H-2B workers in the industry are directly responsible for the care of the horses upon which the entire horse industry is dependent. Without these workers to care for the industry's horses, many American jobs provided by and supported by the horse industry could be in jeopardy.

Caring for horses is not an easy job. It is hard, dirty work, with often erratic hours. Many owners, trainers, and competitors simply cannot find enough Americans willing to take these jobs, as grooms and stable attendants. Many horse industry participants have reported they have not had a single American apply for these jobs in several years. Furthermore, these jobs are not really unskilled. They require knowledge and understanding of horses, an understanding most Americans no longer have. Many H-2B workers have extensive experience with horses. Often the same H-2B workers have been returning to working for the same employers year after year.

In January 2009, the Bush Administration issued a new rule governing the H-2B program. That rule made major changes to the H-2B program by implementing an "attestation-based" labor process in place of the previous "labor certification" process. This change among others was intended to make the H-2B program more usable and efficient while still providing protections for American and foreign workers. We have heard from many horse industry employers that while it is not perfect the H-2B program under the 2009 rule is working and serving it's intend purpose.

Unfortunately, the Department of Labor (DOL) finalized a new H-2B wage rule on January 19, 2011. This rule artificially increases the wages rates for H-2B workers far above current market based wage rates. Congress realized the adverse impact this rule would have on businesses and has to date prevented it from being implemented. Furthermore, the DOL then finalized a new H-2B rule that would roll back most of the provisions of the 2009 Rule that made the H-2B program more usable and efficient and will add new and burdensome requirements. This rule would make the program vastly more costly, complicated and would make the program unusable for many horse industry employers. The DOL has been prevented from implementing this rule by a federal court in Florida that issued a temporary injunction against it.

The AHC believes Congress must permanently block the DOL from implementing either of these new H-2B rules. Horse industry employers who are forced to utilize H-2B workers are very often small businesses. They will be hard pressed to absorb any increase in costs these rules could force upon users of the program.

The reality in the horse industry is that most Americans are unable or unwilling to take the jobs foreign workers usually fill. These foreign workers make up a small portion of all the workers employed and supported by the horse industry. However, without these foreign workers, the horse industry could not function and the hundreds of thousands of Americans jobs would be lost.

Horse industry employers use the H-2B program because they have to, not by choice, because American workers are not seeking these jobs. In the current economic conditions any changes to the H-2B program that increase the cost of an already costly system could be devastating to those employers who rely on H-2B workers. Most horse industry employers who use the H-2B program also employ American workers in other capacities and support many other jobs. If current users of

the H-2B program are no longer able to afford to participate the jobs of many Americans employed by the horse industry will be put at risk.

It is absolutely vital for of the horse industry to have access to a functioning, efficient and cost effective foreign temporary non-agriculture worker program to meet its labor needs. In light of recent DOL rulemaking, the AHC believes it will be up to Congress to make sure the H-2B program can serve its intended purpose of providing seasonal employers with a legal means to hire workers when no U.S. workers can be found.

The AHC appreciates this opportunity to submit testimony to the committee. If the committee would like any additional information regarding temporary worker programs and the horse industry, please contact us.

MICHAEL A. CLEMENS, PH.D., SENIOR FELLOW,
CENTER FOR GLOBAL DEVELOPMENT, 1800 MASSACHUSETTS AVE NW,
Washington, DC, March 13, 2013.

Hon. TIM WALBERG, *Chairman;* Hon. JOE COURTNEY, *Ranking Member,*
Subcommittee on Workforce Protections, U.S. House of Representatives, 2181 Rayburn House Office Building, Washington, DC 20515.

DEAR CHAIRMAN WALBERG AND RANKING MEMBER COURTNEY:

Foreign Workers Benefit Massively from Guest Work Opportunities: Unequivocal Findings of Economic Research

Leading development economists find that authorized guest workers typically draw massive economic benefits from their work, relative to their best alternatives. They migrate voluntarily, pass on large benefits to their families and home countries, and almost universally return home when guest work programs are well designed. Expanding opportunities for authorized guest work reduces the exploitation of migrant workers by competing directly with the black market for labor.

The Center for Global Development is a non-partisan, independent, and non-profit think tank dedicated to reducing global poverty and inequality through rigorous research. This submission briefly summarizes the latest research by myself and other economists regarding the effects of guest work on guest workers.

Authorized guest work is the economic opportunity of a lifetime.

Authorized guest workers are the opposite of 'cheap labor'. Workers who migrate with a guest work visa raise the value of their labor, and therefore their earning power, enormously. Almost all have no other way to raise the value of their labor to anywhere near the same degree.

First, authorized guest workers' labor would be much cheaper, and they would therefore earn less, if they instead worked in the black market for labor. Today's typical seasonal workers with an H-2 visa earn well above minimum wage; unauthorized workers routinely earn below minimum wage doing the same task.

Second, guest workers' labor would be even cheaper—vastly cheaper—if they could not migrate at all. In a 2008 paper, my co-authors and I estimate that low-skill workers from Mexico, Guatemala, and Haiti who work temporarily in the United States experience life-changing increases in earning power, between 300% and 1,000% or more, depending on the country of origin.[1] No other economic opportunity of this magnitude exists for almost all of these workers, anywhere.

It is incorrect to suggest that participation in authorized guest work programs is typically coercive. My research on the largest US employer of authorized seasonal agricultural guest workers shows that about 4 out of 5 hires each year are repeat hires.[2] The Independent Agricultural Workers Center in Yuma, Arizona, which places about 1,000 authorized Mexican guest workers at US farms each year, has a waiting list of over 7,000 Mexicans, hoping for the chance to work legally US farms. Most already have experience working in the United States on identical tasks.[3]

The vast majority of today's guest workers choose voluntarily to participate in the program based on firsthand experience of its extraordinary benefits. What is cer-

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[1] Michael A. Clemens, Claudio Montenegro, and Lant Pritchett. 2008. "The Place Premium: Wage Differences for Identical Workers across the U.S. Border". Working Paper 148, Center for Global Development. The referenced estimates assume that authorized guest workers remit 60% of their earnings to their home country.

[2] I analyze internal records of the North Carolina Growers Association, the largest single employer of H-2A seasonal agricultural workers, in a forthcoming study from the Partnership for a New American Economy and the Center for Global Development.

[3] Michael A. Clemens. 2012. "This Beats Most Aid by Miles—And It's a Migrati on Non-Profit". Views from the Center, Center for Global Development.

tainly harmful to low-skill foreign workers is the absence of flexible legal channels for US firms to hire them, particularly in non-seasonal sectors.

Authorized guest workers also pass on very large benefits to their families and communities back home. A rigorous evaluation found that the overseas families of authorized guest workers in New Zealand experienced large increases in household consumption, child schooling, and community infrastructure—making this program "among the most effective development policies evaluated to date."[4] I have surveyed the families of Filipinos doing authorized guest work in South Korea in a rigorously controlled study, and I find that they experience dramatic increases in purchasing power, especially for children's education, and decreased indebtedness.[5] In a forthcoming paper I survey the families of authorized Indian guest workers in the United Arab Emirates, finding similar massive, positive effects of having a household member, working abroad earning over four times what he could earn at home.

Guest workers do return home when programs are well designed.

Problems with guest work programs two generations ago—braceros in the United States and Gastarbeiters in Germany—remain a common point of reference. But just as telephone technology has changed since the 1950s, the design of guest work programs has changed as well. Canada and New Zealand now have successful and popular programs for authorized agricultural guest work that are large relative to the size of their economies.

Smart design of guest work programs is critical to their success. In New Zealand, much less than one percent of authorized guest workers fail to return home as promised. This is attributable to key design features such as minimum employment guarantees for complying repeat participants, targeting remote farms, and creating incentives for employer cooperation in monitoring.[6]

It is a myth that all workers who come to work in the United States wish to do so permanently. In fact, circular migration has been integral to US history. Frequent movement back and forth across the border is a generations-old tradition not just for today's Mexican migrants,[7] but for many Southern European migrants to the United States over a century ago.[8]

What clearly deters return migration, as numerous studies have shown, is harsh measures to stop unauthorized migration without creating channels for authorized movement such as opportunities for authorized guest work.[9] Because there is no legal channel for migration, enforcement-only policies lead many unauthorized migrants to fear that they will lose the future option to work in the United States if they return home.

The real alternative to authorized guest work—black market employment—is much more exploitative of foreign workers.

To analyze the impact of temporary guest worker programs on migrants, it is only relevant to analyze guest work relative to migrants' alternatives, which would be to stay home or come to the US as undocumented migrants. It is irrelevant to compare the benefits of guest work to the benefits of legal permanent residence or US citizenship.

In the absence of a guest worker program, workers hoping to migrate to the United States have only two options: participate in the black market for migrant labor and increase their earning potential, or, to remain at home. Neither of these serves the interest of low-skill, low-income foreign workers.

To be concrete: in 2006, the US Senate passed a bill that, if it had been signed into law, would have created 200,000 visas for low-skill authorized guest work. Because those 200,000 slots for authorized guest workers were not created in 2006, almost all of those 200,000 people, who would have migrated each year, have done one of two things: they have either come as undocumented migrants without any legal protections at all, or they have—against their will and despite employers' desire to hire them—been unable to work in the United States. These have been the

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[4] John Gibson and David McKenzie. 2010. "The Development Impact of a Best Practice Seasonal Worker Policy: Newzealand's Recognised Seasonal Employer (RSE) Scheme". Working Papers in Economics 10/08, University of Waikato, Department of Economics.

[5] Michael A. Clemens and Erwin R. Tiongson, "Split Decisions: Family Finance When a Policy Discontinuity Allocates Overseas Work", Policy Research Working Paper 6287, World Bank.

[6] Department of Labour. 2010. Final Evaluation Report of the Recognised Seasonal Employer Policy. Government of New Zealand.

[7] Douglas S. Massey, Jorge Durand, and Nolan J. Malone, eds. 2003. Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration. Russell Sage Foundation.

[8] Dino Cinel. 2002. The National Integration of Italian Return Migration: 1870—1929. New York: Cambridge University Press.

[9] See papers by Fernando Riosmena and by Belinda Reyes in: Jorge Durand and Douglas S. Massey. 2004. Crossing the Border: Research from the Mexican Migration Project. Russell Sage Foundation.

genuine alternatives for potential US guest workers in the past; and it is the harsh conditions experienced by these groups—unauthorized migrants and non-migrants—that is the relevant point of comparison for the lives of authorized guest workers.

Recommendations

• Congress should determine the size and scope of a US guest worker program by balancing the needs of US workers and US employers. No serious economic research supports the notion of limiting the size or scope of a US guest worker program in the interest of current or potential guest workers. Guest workers and their families benefit massively from authorized guest work opportunities, far more than from any real alternative available to most of them.

• Guest work programs are not doomed to fail. The world has moved on from guest work programs of two generations ago, and today's world has examples of successful, popular guest work programs with almost universal return rates. Careful design of the program is key to this success.

• The real-world alterative to guest work visas, in any substantial numbers, is either unauthorized migration, which increases earnings but provides no legal protection, or staying at home without the opportunity to pass on large benefits to their families and home communities. Given these alternatives, a well-designed guest worker program is in the best interests of the potential migrants.

March 14, 2013.

Hon. TIM WALBERG, *Chairman, Subcommittee on Workforce Protections,*
U.S. House of Representatives, 2181 Rayburn House Office Building, Washington, DC 20515.

DEAR CHAIRMAN WALBERG: In conjunction with the Subcommittee's hearing entitled "Examining the Role of Lower-Skilled Guest Worker Programs in Today's Economy," I appreciate the opportunity to provide information to the committee about the importance of the H-2B program to our company, our U.S. workforce, and our community.

I am Vice President and Operations Manager for Progressive Solutions LLC. Our company is headquartered in the small rural town of Marshall, Arkansas, located deep in the heart of the Ozark Mountains. Our business is fairly unique. We perform low volume selective stem back pack herbicide application for a number of clients, including for electric utilities to control brush growing under electrical lines. We provide our services to clients in more than 20 states throughout the Southeast, Midwest and Mid-Atlantic areas of the U.S. with the assistance of more than 300 seasonal H-2B employees that supplement our permanent U.S. workforce.

We work in a difficult outdoor environment. Workers are organized into crews and walk up to 10 miles per day, often over rough terrain and in adverse weather conditions. Our work is performed seasonally, as we can only treat brush when leaves are on the trees—typically late spring to early fall. The work is migratory in nature, with work in any particular area lasting just two to four weeks, and crews having to move locations frequently. It is not unusual for a crew to work at 6-10 locations over a 6 month period, often in three or more states.

In our experience, the difficult nature of the work, the seasonal aspect, and the migratory movements of the crews make this job unappealing to most U.S. workers. Despite aggressive recruitment of U.S. workers each year and the hiring of any able-bodied U.S. worker interested in the job, U.S. workers comprise less than 1% of our migrant workforce. And we pay wages for this work that far exceed the minimum wage. We estimate that within our industry, over 95% of the people performing this work (approximately 2000) are H-2B workers. In fact, this labor intensive work was really never performed by a U.S. labor force because this herbicide application work is so closely related to reforestation work, which is also highly dependent upon H2B workers.

Over the years, the herbicide application work performed as part of reforestation efforts has also been utilized in other forestry and forestry-like settings. Before "back pack application" of herbicide was developed, the control of brush in other forested and overgrown areas, including under electric utility lines, was primarily done using heavy machinery or by helicopters spraying herbicide. Our company's method of clearing bush by, for example, spraying each individual stem that might grow into the electric line and cause an outage, is the most environmentally safe and cost-effective way to tackle the problem of invasive vegetation. This is a critically important role that we perform for utility companies to help ensure they are able to maintain electric reliability. Over 90% of the utilities in states where we operate, rely on migrant crews to help manage their right of ways.

Our company has over 50 U.S. employees that manage our H-2B crews, and perform sales or administrative tasks that keep our company running. We are one of the largest employers in our community and use the services and products of many local and regional businesses. This year alone we will purchase over 30 additional trucks to transport our workers; adding to our existing fleet of 116 company-owned vehicles.

We have been using H-2B workers for over 20 years, and many have been with our company almost that long. The vast majority of our workers return year after year and new workers are typically family members of those who work for us. We have never used the services of recruiters in Mexico. In fact, many of our current employees tell us they have several relatives who would be willing to accept work with us because of their desire to find safe and legal employment in the U.S. Few, if any of our employees, have expressed any desire to stay permanently in the U.S. Rather, they are happy to come to the U.S. on a temporary visa for 6 months of work and then return to their families with the money they have saved during their employment. They use their earnings to improve and enrich their families, farms, and communities in their homeland.

Over the past several years, navigating the administration process to obtain H-2B workers has been extraordinarily difficult, burdensome, and costly. We have spent hundreds of thousands of dollars in legal and administrative fees just to get through the overly bureaucratic process that is the H-2B program. Twenty years of documented history shows that there are virtually no U.S. workers interested in doing this job, yet every year, we begin the year not knowing if we will be able to have H-2B workers certified by the Department of Labor. The stress and uncertainty causes great harm to our company, our employees who depend on us for their livelihood, and our vendors who provide over 12 million dollars in goods and services to our company.

If implemented, the DOL's proposed new wage rule and new program rule (currently on hold because of a court order) will cause irreparable harm to all H-2B employers and to our U.S. workforce. Additionally, we continue to face difficulties with the DOL that specifically affect our industry. Recently, DOL has suddenly taken a new position wherein they are attempting to prevent us from employing H-2B workers at multiple worksites, despite the fact that the very nature of our work is migrant and requires work at multiple worksites. In fact, that is the basis of our entire company and we have been approved by DOL to perform work in that manner for as long as we have been in the H-2B program.

DOL has traditionally processed our workers under forestry-related job codes and allowed us to apply for workers under the Department's "special procedures" for forestry-related work. In recognition of the unique work requirements of migrant employers, which are different from fixed site employers, the special procedures allow an employer to file an application that includes multiple work locations where work will be performed along a tentative itinerary. Recently, and inconsistently, the DOL has arbitrarily determined that we should not perform work in this manner. Instead, they have at times suggested that we should be classified as something like a groundskeeper, which would mean that rather than filing a few applications per year, we would be forced to file nearly a hundred separate applications for each and every separate piece of land where we will work. Aside from the bureaucratic nightmare of so much paper, that process would be logistically impossible because our work crews are constantly on the move and government paper processing, which requires weeks and months, would never be able to keep up. Working in migratory patterns based on weather and working on an itinerary is an essential aspect of the services we provide. Thus far, we have been able to continue our operations, but after several years of correspondence and meetings with the DOL, these issues are still not definitively resolved.

We are prepared to meet with the DOL in good faith with hopes of finding a solution to this problem, but we are concerned about the lack of progress and all of the other uncertainty that surrounds the H-2B program. Our company and our industry, is dependent upon a workable H-2B program that provides a stable regulatory environment appropriate to the work we perform. Many businesses like ours provide employment and security to many, without negatively impacting the U.S. labor market. We hope that members of the Committee will keep these concerns in mind as they consider immigration reform legislation—and particularly the need for a workable lower-skilled guestworker program—during this Congress.

For the committee's reference, I have attached a copy of a report describing the type of work performed by our industry. Thank you for your consideration.

Sincerely,

MICHAEL ECONOMOPOULOS.

H–2B WORKFORCE COALITION

Protecting American Workers Through a Stable and Reliable Seasonal Workforce

www.h2bworkforcecoalition.com

PRINCIPLES FOR COMPREHENSIVE IMMIGRATION REFORM

About the H-2B Program

• The H-2B program is essential for seasonal businesses that cannot fill temporary jobs with American workers despite intensive recruitment efforts. Seasonal non-agricultural industries that use the H-2B program include seafood processing, food processing, horse training, restaurants, hotels, forestry, landscaping, carnivals and amusement parks, and stone quarries. Because the program is expensive, time-consuming and involves four government agencies, employers only turn to the program if they are unable to find legal local workers.

• The H-2B program is important to American workers whose year round positions are reliant upon seasonal laborers during peak seasons. In companies that use the H-2B program, both American full time and H-2B temporary seasonal workers are well compensated; often well above the federal minimum wage and the prevailing wage.

• For H-2B workers, the program provides well-paying seasonal jobs that allow them to provide for their families and still maintain their homes in their native countries. Many of these workers voluntarily return to the same employer year after year.

• The H-2B program is important to the U.S. economy. Without access to a legal source of seasonal labor, employers will be forced to lay off American workers, scale back on vehicle, equipment and supply purchases and perhaps even close their businesses.

Immigration Reform Principles

• Immigration reform must maintain a viable seasonal worker program along the lines of the existing H-2B program for non-agricultural workers.

• Immigration reform should maintain the current protections for American and H-2B workers and not impose costly burdensome new requirements on employers who use the H-2B program such as those created under the temporarily blocked Department of Labor wage methodology and program rules.

• Wage rates required to be paid to H-2B and similarly employed American workers shall be based on economic realities and local markets. Wage rates should not be based on arbitrary formulas that are well above wage rates paid in the local labor market.

• The H-2B returning worker exemption should be re-instated and there should be an expedited process for consular visa processing for H-2B returning workers.

• The number of participants in the program should be market-based, allowing the number of participants to fluctuate up or down based on economic needs.

• Immigration reform should provide sufficient resources for federal agencies to process H-2B applications in a timely manner. States should have an appropriate role in program administration.

• H-2B applications should not be released to the public to protect the confidential business information submitted by employers and to prevent the businesses from being harassed by outside organizations.

• The Coalition supports strong enforcement of all the program rules, including the increased security procedures at US State Department consulate offices. Employers will continue to notify officials when they become aware of workers that may have not complied with the terms of their visas.

Prepared Statement of ImmigrationWorks USA

What's the most important piece of comprehensive immigration reform you never heard of? It's fixing the legal system so it works for the future—for immigrants and for the U.S. economy.

Many Americans think reform is about the 11 million unauthorized immigrants already living in the United States. Many have been here for years and have put down roots. We're not going to deport them—not even the harshest restrictionists think that's practical. Nor are most likely to go "home" voluntarily, no matter how difficult we make their lives with tough enforcement. For the overwhelming majority, America is home by now. And they are sure to be the most contentious issue as the immigration debate heats up in months to come.

But most contentious is not the same as most important.

What most people don't stop to ask: what created this problem in the first place? Exactly what is it about the broken immigration system that produced this vast underground world of workers and families—a population the size of Ohio?

The root cause: for less-skilled foreigners who want to come to work legally in the United States, there is no "line" to get in or wait in—no visas available for workers like them.

The two existing programs for low-skilled temporary workers are for seasonal labor only: farmhands, landscaping crews, summer and winter resort workers. There are virtually no permanent visas for less skilled workers. So there simply is no avenue for an uneducated Mexican unless he has family members living legally in the U.S. who can sponsor him for a family visa.

Many, if not most, of the 11 million already here would have preferred to enter the country legally if that were possible. But they and others like them have no lawful option.

This wouldn't be a problem if we didn't need immigrant workers. But we do. And we're going to need them increasingly as the economy recovers.

This isn't because American workers are somehow lacking or inadequate. On the contrary, for the most part, it's because Americans are doing better than in decades past. We're becoming better educated and aspiring to the kinds of jobs for which our better educations prepare us.

In 1960, half of the native-born men in the labor force were high school dropouts happy to do physically demanding, low-skilled work. Today, less than 10 percent of the native-born men in the labor force are high school dropouts. And meanwhile, far from shrinking, the demand for low-skilled labor is growing over time. In 1955, for example, 25 cents of every dollar spent on food was spent in a restaurant. Today, the figure is nearly 50 cents. And one of the fastest-growing occupations in America is home health aide.

But very few Americans with high school diplomas aspire to careers as busboys or home health aides. And they shouldn't—their educations equip them to do more productive work, making better wages and contributing more to the economy.

U.S. demand for immigrant workers eases somewhat in a down economy—and far fewer workers want to come to the U.S. when jobs are scarce. But even then, we still need some foreign labor, and those workers need a legal way to get here.

The lesson for policymakers: whatever program we create needs to be flexible, growing in good times to accommodate rising labor needs and shrinking in down times when demand subsides.

To be clear, the goal of reform is not to increase the overall number of unskilled immigrants entering the country.

What's needed is to end illegal immigration by creating ways for needed workers to come legally—creating worker visas and establishing a program that allows employers who can't find enough willing and able Americans to connect easily and quickly with lawful immigrants.

This is not just an economic imperative. Without it, there can be no successful immigration law enforcement.

Even the best, most effective enforcement is no match for the dynamism of the U.S. economy. As long as there are jobs available, foreigners will want to come to work here. And if we want to prevent them from coming illegally, we need to create lawful alternatives.

Finding a solution for the 11 million unauthorized immigrants already in the country addresses the mistakes of the past but fixes nothing going forward. Unless we create ways for the immigrants of the future to enter legally, we're going to find ourselves in exactly the same predicament a decade or two down the road—wondering what to do about 10 or 20 million unauthorized immigrants living among us but beyond the rule of law.

The only way to prevent this: a legal immigration system that works—not just an answer for the 11 million and tougher enforcement, but a way for the workers we need to keep the economy vibrant and competitive to enter the country and work legally.

ImmigrationWorks USA is a national federation of employers working to advance better immigration law. The network links major corporations, national trade associations and 25 state-based coalitions of small to medium-sized business owners concerned that the broken immigration system is holding back the nation's economic growth. Their shared aim: legislation that brings America's annual legal intake of foreign workers more realistically into line with the country's labor needs.

Why business needs immigrant workers

On March 1, 2013, ImmigrationWorks sponsored a briefing for congressional staffers: a panel of employers from across the U.S. explaining their reliance on immigrant workers. Panelists included a Georgia restaurateur, a manager of Colorado vacation rentals, a senior vice president at a large Midwest hospital and the vice president of a Maryland construction company. They explained the kinds of jobs available at their businesses, the wages they offer, how they try to hire Americans and how immigrants help them keep their operations running and contributing to the economy.

"Employers who hire immigrants believe the most important piece of the immigration puzzle is fixing the system so it works for the future. That means creating a way for the high- and low-skilled immigrants we need to keep the economy vibrant and competitive to enter the U.S legally and work."

Moderator TAMAR JACOBY, *President, ImmigrationWorks USA.*

"Most Americans apply for front-of-the-house positions. The few who do apply for jobs as cooks and dishwashers usually last only a few days and then quit. Back-of-the-house jobs are very tough—slippery floors, hot fryers and a fast pace all day long. We rely on immigrants to fill our back-of-the-house jobs."

TAD MITCHELL, *Owner, Six Feet Under restaurants.*

"We can't find enough Americans to fill jobs in housekeeping, dietary and other departments in the hospital. If it weren't for the Bosnian refugees, we wouldn't have a housekeeping department."

JOE LEVALLEY, *Senior vice president of planning and advocacy, Mercy Health Network.*

"We place job ads in the paper and on the internet. We go to job fairs and prisons to find ex-offenders who are willing to work. But we cannot find enough American workers. Nearly 80 percent of our 1,500 workers are immigrants. It's hard to find qualified workers. The job is labor intensive and the working conditions are tough—it's cold in winter and hot in the summer. We work early and late."

OTTO GIRR, *Vice president of human resources, Miller & Long Concrete Construction.*

"There has been a dramatic shift in our workforce. Thirty years ago, our workers in housekeeping were all Americans. Today they are all Hispanic. No American has applied for a housekeeping job at my company for more than 15 years. Even in the downturn, we've placed ads in the paper for jobs paying $17 an hour and no one applies."

DALE BUGBY, *Owner, Vail Resort Rentals.*

"The EB-5 investor visa application is 4,000 pages. It's extremely difficult and you get the feeling after a few months that the government is trying to discourage you from obtaining the visa. Many people don't apply because the administrative process is too onerous."

NICHOLAS LOGOTHETIS, *Board member and senior advisor, The Libra Group.*

Prepared Joint Statement of Sabeena Hickman, CAE, CMP, Chief Executive Officer, Professional Landcare Network (PLANET); and Michael V. Geary, CAE, Executive Vice President, American Nursery and Landscape Association (ANLA)

Chairman Walberg, Ranking Member Courtney, and members of the Subcommittee on Workforce Protections, thank you for the opportunity to provide comments on the H-2B program, which is crucial to the landscape industry. The Professional Landcare Network (PLANET) is the national trade association representing more than 100,000 landscape industry professionals, who create and maintain healthy, green living spaces for communities across America. PLANET members are committed to the highest standards in industry education, best practices and business professionalism. Many of PLANET's professionals have attained the status of becoming Landscape Industry Certified, achieving the greatest level of industry expertise and knowledge.

Founded in 1876, the American Nursery & Landscape Association (ANLA) is the national trade association of the vertically-integrated nursery and landscape, or "green" industry. ANLA membership comprises over 10,000 affiliates that grow nursery and greenhouse plants, sell lawn and garden products, design, install, and care for landscapes, and sell supplies to the industry. Typical members include growers, garden center retailers, horticultural distributors, landscape professionals, and suppliers to the industry. A number of firms are engaged in more than one of these operations.

The H-2B program provides a vital and legal source of seasonal labor for the landscape industry and other industries that cannot fill their labor needs with American citizens. Employers who turn to the H-2B program do so as a last resort. The landscape industry is one of the major users of this program because the industry requires numerous workers during the busy spring and summer seasons. Employers are unable to attract significant numbers of American workers for these labor-intensive, short-term, seasonal jobs. Because of the seasonal nature of the industry, traditional sources of manual labor, such as college students, are not available, and the heavy machinery used in the business prohibits companies from hiring high school students. Before they even apply for H-2B workers, companies go through an intensive recruitment period in an attempt to hire Americans and must prove that they cannot find Americans to take the jobs. They would gladly hire American workers if they could.

The landscape industry is a large contributor to the U.S. economy. The industry is composed mostly of small businesses, the engine that drives the U.S. economy. According to the Economic Impacts of the Green Industry in the United States publication by the University of Florida and Texas A&M University, the economic impacts for the U.S. Green Industry in 2007 were estimated at $175.26 billion (Bn) in output, 1,949,635 jobs, $107.16 Bn in value added, and $53.16 Bn in labor income (these values are expressed in 2007 dollars). The largest individual sector in terms of employment and value-added impacts was landscaping services (1,075,343 jobs, $50.3 Bn). When the landscape industry cannot get the H-2B workers it needs, the economic losses have a multiplier effect to suppliers and other jobs throughout the economy.

According to 2007 estimates, approximately 2,800 landscape companies participate in the H-2B program and spend about $77.28 million annually just on landscape equipment. In addition, they spend approximately $115.36 million annually on fleet vehicles, $2.8 million on payroll services, $6 million annually on computers, $4.3 million annually on tires, and $13.6 million on cell phones and wireless radios. Without the H-2B workers, not only will these landscape companies suffer, supplier companies will feel the economic downturn as well.

According to the U.S. Department of Labor Bureau of Labor Statistics, grounds maintenance workers held about 1.3 million jobs in 2010. Employment of grounds maintenance workers is expected to grow about 20 percent between 2010 and 2020. Grounds maintenance workers will have among the largest numbers of new jobs (around 254,600) arise over this 10-year period. There will be an increased need to fill these jobs. The H-2B program is the only legal way that employers can fill these seasonal jobs.

Unfortunately two pending Department of Labor (DOL) regulations would make the program virtually unusable for seasonal employers. Further, the program contains an arbitrary 66,000 cap (33,000 for each half of the fiscal year) on the number of H-2B workers permitted to work in the United States each year. As the economy begins to recover, this low cap could threaten to shut many landscape companies out of the program, as was the case in 2007 and 2008 when Congress allowed the H-2B returning worker exemption to expire and the economy was still strong. A workable H-2B program is vital for seasonal employers and their permanent American workers whose jobs require the support of seasonal laborers.

For the H-2B workers, the program allows workers to provide for their families in their home countries and contribute to the economic development of their communities. Further, the returning workers have proven repeatedly that they will not overstay their visas by returning to their native countries promptly after the completion of their seasonal work assignments.

H-2B workers are well compensated and receive the same wages as Americans would if they applied for and accepted these jobs. The U.S. Department of Labor surveys companies in the geographic area of the employer to see what the industry currently pays workers doing similar jobs and thus sets a minimum variable wage rate per hour. This prevailing wage is always well above the federal minimum wage. Further, many companies pay their employees even more than is required by the Department of Labor.

Unfortunately, DOL has targeted the H-2B program, and by extension those law-abiding employers that are forced to utilize it, for virtual elimination with punitive rules. A January 19, 2011 DOL rule seeks to artificially increase wage rates for the H-2B workers well above rational economic levels. According to DOL's own estimates, the rule will increase H-2B wages in the landscape industry by $4.32 per hour. The actual cost to employers will be much higher than DOL's estimate since DOL fails to account for wage increases for similarly employed American workers or more experienced American workers whose pay should reflect their greater skill or expertise level. The DOL estimate also does not include additional payrolls costs, workers compensation insurance, overtime costs and other associated increases. Luckily, Congress has blocked this rule from taking effect through fiscal 2012 appropriations legislation and subsequent continuing resolutions. We hope Congress will continue to block the regulation after the current continuing resolution expires on March 27.

DOL promulgated another harmful rule on March 18, 2011 that would make the program even more costly and complicated. The rule was so egregious that a federal court in Florida issued a temporary injunction against it. In addition, both the Senate Committee on Appropriations and the House Committee on Appropriations approved legislation during the 112th Congress that would have blocked the rule from being implemented, but Congress adjourned without passing that appropriations bill. We urge Congress to prevent the implementation of this rule, along with the wage rule.

It is clear that the intent of these rules is to ensure that the H-2B program is made unusable, threatening America's seasonal businesses and their full-time employees. In these challenging economic times, the U.S. economy can ill afford the severe economic impacts associated with the loss of American jobs and commerce that are supported by the landscape industry and other seasonal industries that use the H-2B program.

DOL has suggested that these rules are necessary because of employers who abuse the program. However, there is no evident to support the allegation of widespread program abuse. Many landscape contractors have been using the program for more than five years. They are good employers who use a lawful program and treat their workers well, as is evidenced by the fact that the same H-2B employees return year after year. As companies grow, these workers often refer relatives and friends to the employer. For fiscal year 2007 through fiscal year 2012 there were 377,256 visas issued by the State Department under the H-2B program; yet the allegations made about systemic program abuse relate to only a few specific employers. There will always be a few bad individuals who abuse federal programs. They should be fully prosecuted under the law. ANLA and PLANET support the strong enforcement of program abuses.

Most landscape industry businesses assist their H-2B workers with finding places to live, transportation to work, and other living necessities for roughly 10 months. Many rent or own apartments for their employees, provide free English language classes, and a means of transportation to stores, churches, and more. Our industry uses these workers year after year, so they want them to be successful in their jobs and have positive experiences. After their first year of the job, returning workers often refer friends and relatives to the employer because of their positive experiences and the great opportunity that the H-2B program provides.

Further, the H-2B program is expensive. Employers only turn to the program after exhausting efforts to find and retain American workers. An H-2B employer has to pay a $325.00 application fee, a $150.00 anti-fraud fee, and a $1,225 premium processing fee (all do so they are not put at the end of the line of applications) to U.S. Citizenship and Immigration Service. The cost for newspaper advertising for local workers can average around $600.00. Because of the paperwork involved and the need to find workers, the large majority of employers hire a company to help them with processing. This fee can range from $3,000 to $5,000. So an employer can spend between $5,070 and $8,470, which does not include any other expenses spent on the specific employees. Further, these employers are paying both the American and H-2B workers prevailing wages, which are often well above the minimum wage. While incurring these expenses, H-2B employers are sometimes competing against companies that do not pay these fees and wages because they do not share their commitment to retaining a legal workforce.

As Congress debates immigration reform legislation, we urge you and your colleagues to preserve a workable H-2B program free from an arbitrary cap that restricts economic growth and free from the types of regulations that the Department of Labor has promulgated. Wage rates should be based on economic realities and local markets and not arbitrary formulas well above wage rates in the local labor market. We also encourage the re-instatement of the H-2B returning worker exemp-

tion with the number of participants in the program being market-based allowing for much need flexibility.

In addition, we support the development of a non-seasonal temporary worker program for businesses whose labor need are non-seasonal. While most landscape industry jobs do have a seasonal component, there are some areas of the country where landscaping can be done year-around. Further, some seasonal employers may have a few year-round positions that they cannot fill will American workers.

In conclusion, ANLA and PLANET urge Congress to pass legislation continuing to prevent the US Department of Labor from implementing its wage methodology beyond March 27, 2013, as well as legislation preventing DOL from implementing the H-2B program rule. We would also like to see Congress address the arbitrary H-2B cap by re-instating the H-2B returning worker exemption and allowing the number of H-2B workers admitted to the U.S. each year to be based on market demand rather than an arbitrary cap. If the DOL regulations are allowed to go into effect, small businesses, American workers, H-2B workers, and the overall U.S. economy will suffer. The U.S. economy cannot afford the severe economic impacts associated with the implementation of these regulations. Further as the economy grows, Congress must address the H-2B cap so that small and seasonal businesses will have access to the H-2B workers they need to grow and create additional American jobs.

UTILITY SPRAYER ALLIANCE [OCTOBER 2012]

Migrant Spray Industry Report

General Information and History of the Migrant Spray Industry

Note: Although we believe the industry information presented is generally consistent throughout the continental United States, our facts are derived primarily from direct experience and research in the "Greater South Eastern United States" as depicted.

The Migrant Spray Industry is an offshoot and evolution of the migrant reforestation industry (see attachment "Low Volume Backpack Application—A Short History").The practices employed by migrant spray crews did not exist commercially until the mid-1980s and was born out of a combination of new low volume backpack herbicide application technology and an available workforce capable of performing this migrant and labor intensive task (H-2B forestry workers). Prior to the development of this industry, vegetation management was performed with heavy machinery, helicopters or other nonselective application methods.

In the last decade, low volume backpack application has become the primary means of controlling brush on electric utility rights of ways and has become an essential method used by utility companies to ensure electric reliability. The attached document, "The Importance of Backpack Herbicide Treatments for Integrated Vegetation Management Programs," describes in detail the unique and beneficial aspects of migrant spray operations. In summary, these benefits include:

- The selective spraying of individual undesirable target species that pose a hazard or danger of nuisance
- The preservation of species that are endangered, are beneficial as pollinators, establish wildlife habitat, and are competitors to undesirable vegetation
- Increased safety and low impact on the environment with substantially reduced amount of product applied, as compared to other vegetation management methods
- More effective and efficient compliance with governmental regulations, including FERC, NERC and the Clean Water Act.
- Improved cost effectiveness of utility operations, which benefits consumers

According to recent study commissioned by an Arkansas Electric Cooperative and conducted by an independent engineering firm, the projected cost savings by using an Integrated Vegetation Management Program as compared to traditional mechanical methods was expected to be over $50 million dollars. Document attached.

Electric Utilities Rely on Migrant Sprayers

More than 80% of all Electric Utility Companies within the Greater South Eastern United States use low volume backpack application by migrant sprayer crews as a major part of their vegetation management program. These crews perform the same type of work using the same workforce as is used in vegetation management on forest lands, other rights of way, industrial sites and public use areas. More than 2000 H-2B workers are employed by fifteen or more Forestry and Utility Spray companies that annually treat more than 1,000,000 acres for electric utilities.

Electric Utility Companies fall into two broad categories:

Large transmission companies deliver electricity to distribution companies via high voltage electric lines across multi-state areas. Although most of these compa-

nies are investor owned, one of the largest, The Tennessee Valley Authority, is a government agency. It operates over 16,000 miles of line across 7 states and serves over 9,000,000 people. TVA alone treats over 60,000 acres annually using spray contractors who employ H-2B workers.

Private companies of similar size include Duke Energy, the Southern Company, American Electric Power, Inc. and others. These companies are regulated by the Federal Energy Regulatory Commission (FERC) and the North Regulatory Electric Reliability Corporation (NERC) who mandate brush control specifications to maintain electric reliability across the U.S and North America.

Distribution companies deliver electric power to individual customers. In the Greater South Eastern Region, the majority of these companies are Rural Electric Cooperatives (REC), which are not-for-profit entities owned and managed by the members they serve. Typically, an REC will serve multiple rural counties or regions within a state. There are also investor owned and municipal entities that provide electricity and contract brush clearing and spraying to companies that utilize H-2B workers.

The Logistics Associated with Electric Utility Spray Contracts

Although utilities typically establish general annual plans for treating vegetation along specific power lines, many factors can affect the timing and substance of the utility's decisions, including:

- ongoing surveys of vegetation growth, and analysis of what lines are in most need of treatment
- budget availability, which is often determined by the revenue from electric sales in the previous year or fiscal quarter
- mandated treatments to meet FERC and NERC compliance
- local weather conditions
- obtaining approval from Public Service Commissions or other governing bodies

The final decision about what specific areas will be treated is frequently not made by the utility until shortly before the work is to start.

Although some utility companies negotiate their work with a preferred vendor or have multi-year contracts in place, a majority of utilities put their intended work out for bid and contract with a vegetation management company on an annual basis. It is not unusual for final contracts to be awarded to vendors just prior to the commencement of work. It is also not unusual for the scope of work to be changed (increasing or decreasing application areas) after the contract has been awarded in response to the factors described above.

Typically, a utility company does not impose a strict time frame defining the when the work is to be accomplished, other that it must be performed during the "growing season," which may range from April to October, depending on geographical location and seasonal weather conditions. There are many times, however, when weather dictates when the work can and cannot be performed. Drought, rain, flooding, late or early frosts all impact the growing season and can affect and alter work schedules.

The Difficult Nature of the Work

Migrant spraying is labor intensive work that requires workers to walk up to 10 miles per day, regardless of whether the application takes place on forested land, along roads, trails, or rights-of-way. The work is almost exclusively conducted in remote locations far from major roads or towns. Because the vegetation removal occurs during the growing season in the southeastern U.S., the weather is typically hot and humid. The worker must cover this rough terrain carrying a backpack sprayer that weighs as much as 35 pounds, identify target species and apply herbicide. Workers also frequently carry and operate other hand and power tools to remove vegetation.

The Seasonal and Migrant Nature of the Work

Low volume foliar application can only be performed during the growing season and by its nature is a seasonal activity. Typically the work takes place over 8-10 months, depending on geography and weather. Depending on the type of treatment, application can occur at different times during the year. On a calendar-year basis, application of pre-emergent or early post-emergent herbicides typically begins in late winter/early spring (February-March) depending on the locale and application needs. There are some dormant stem treatments that can take place either late fall/early winter (October-November). However, the overwhelming majority of work performed by Migrant Sprayers consists of post-emergent herbicide application occurring from the spring through the fall.

Decisions by utility companies about what power lines to spray, the selection of contractors through the bid process, and changes to the scope of work due to weath-

er, budgets or mandates make advanced scheduling with precision impossible. Spray crews must be flexible in order to respond to these variables and serve the utility industry.

Large transmission utility companies may have work in multiple states, with power lines spanning hundreds of miles, requiring the movement of crews to different locations multiple times during performance of the contract. Larger regional distribution utilities may cover a wide geographical area and require similar movement. Contracts with smaller distribution utilities can often be performed from a single location, but a typical contract only lasts a few weeks and the crew then moves to another location to perform work on another contract. A typical crew might move locations a dozen or more times across several states performing work on several contracts during a single season.

Historical H-2B Certification of Migrant Sprayers

For over two decades the Department of Labor (DOL) had been processing H-2B applications for migratory workers that perform vegetation removal with DOT Job Code 459.67-010 Title: LABORER, BRUSH CLEARING (any industry).

When DOL switched to using O*NET for job classifications, applications for these workers were often processed with the O*NET Code 45-4011, Forestry and Conservation Worker.

Under either code, however, DOL processed H-2B applications for these migrant workers on an itinerary pursuant to TEGL 27-06, Forestry-related Special Procedures, regardless of whether the brush clearing activities were performed on tree plantations or along rights-of-way, trails, roads, or railroad tracks. In addition, these employers that operated under TEGL 27-06 also complied with the Migrant and Seasonal Agriculture Worker Protection Act (MSPA) requirements applicable to forestry workers.

However, in recent years when some employers requested prevailing wage rates for this work under the 45-4011 job code, the DOL sometimes returned wage rates for 37-3012 job code, Pesticide Handlers, Sprayers, and Applicators, Vegetation.

Some employers who then submitted applications for H-2B workers using the 37-3012 job code provided by DOL were subsequently certified under the Forestry-related Special Procedures without question. These employers submitted master applications, itineraries and proof of MSPA compliance. But other employers certified with the 37-3012 job code for the same work were not permitted to work on an itinerary pursuant to the Forestry-related Special Procedures and thus were not required to comply with MSPA.

Still other employers applying with 37-3012 job code provided by DOL for work that included utility right-of-way spraying were provided the option by DOL to utilize TEGL 27-06, if the employer provided additional information about the work itinerary and evidence of compliance with MSPA.

Currently a portion of the industry is working under the 45-4011 code, while others work under the 37-3012 code. Of those working under the 37-3012 code, some are working pursuant to TEGL 27-06, while others are not. Regardless of the Department's inconsistent processing and guidance, however, this work is still migratory in nature even if the employer is not operating on an itinerary.

Rarely, if ever, would an employer have only one contract in a growing season to remove brush in just one localized area. That arrangement would not be a sustainable business model because of the significant capital investment required to perform this work. There is limited work available in any particular localized remote area and that work only lasts for a few weeks, at most. Thus, it would impossible for a vegetation removal company to stay in business for long if it performed only one contract for a few weeks each year. The very nature of this business requires scheduled movement from one contract to the next throughout the growing season in order to provide the maximum amount of work for the company and its U.S. and foreign employees.

Job Categories Associated with Migrant Spraying

Within the industry, there are typically 4 categories of workers associated with vegetation removal that includes spraying. Below are brief sample descriptions of each position category from the lower skill level to the higher skill level:

Migrant Sprayer / Laborer / Groundsman—An entry level, labor intensive position. No experience or minimum education necessary but must be able to identify species of vegetation and apply herbicide properly after training period. Wears backpack and removes brush through various means, including spraying.

Team Leader / Senior Groundsman—A minimum one year experience or equivalent education is required. Employee must have valid driver's license and good driving record to transport workers. Mixes herbicide with supervision, supplies herbicide

mixture to sprayers, keeps spray equipment in working order, and maintain daily records. Employee works under direct supervision of Crew Foreman.

Crew Foreman—Experience as a Team Leader or equivalent education or work history. Responsible for the oversight of two to four Teams (multiple teams make up a crew) with each team typically comprised of a Team Leader and five or more Sprayers/Laborers/Groundsmen. Supervises all aspects of field operations, maintains detailed reporting, and performs other tasks at the direction of a Manager.

Manager—Typically requires formal education or related experience and licensing pursuant to State and/or Federal requirements. Manager is responsible for the oversight of multiple Crews. Manager must possess good communication skills to deal with public and customers. Ensure that crews meet quality/safety standard and complies with applicable State and Federal regulations relating to herbicide application.

Sample Job Descriptions

Although there is presently no O*NET job description for this position, the actual job encompasses virtually the entire description of 45-4011, and could be said to also include a few of the tasks from 37-3012. The following hybrid descriptions would fairly describe how these jobs operate in practice.

1. Sample Job Description of Migrant Sprayer

Under supervision, perform manual labor necessary to clear vegetation, including applying herbicides through sprays, granules, or other chemical application on target trees, shrubs, weeds, vines or grasses on areas such as utility rights of way, highway roadsides, rail road rights of way, forested areas, woodlands, industrial sites, wetlands, and rangelands to control unwanted (target) vegetation. May also use other hand tools to cut, kill or remove vegetation.

This is a seasonal position beginning in spring and ending in the fall, lasting approximately 8-10 months, based on seasonal conditions. Work is typically 5 to 6 days per week, with some overtime may be required based on weather conditions, crew schedules and contract provisions.

Sample of job titles: Brush Clearer, Forestry Worker, Utility Sprayer, Herbicide Applicator, Spray Technician, Laborer, Ground Crewman

MINIMUM REQUIREMENTS FOR MIGRANT SPRAYER

- Must be 18 years old
- No minimum education required
- Must successfully complete one week training session or have previous equivalent experience
- May require State or Federal certification with company to provide paid training to pass certification tests
- Must be physically able to perform outdoor work

—Carry approximately 35 pounds (back pack) and traverse difficult terrains (steep, rocky, brushy) walking up to 10 miles per day

—Be able to work in adverse weather conditions (primarily hot and humid)

—After two weeks be able to meet minimum production standards

—Safely operate tools and equipment, including power tools

- Must be able to travel with crew to various multi-state locations continuously during spray season

PRIMARY TASKS FOR MIGRANT SPRAYER

- Identify target vegetation and spray proper amounts of herbicide on leaves and/or bark.
- Use machete to treat target vegetation too tall or large to spray with backpack, by making cuts in trees at specified intervals and spraying proper amounts of herbicide mix in cuts with spray bottle.
- Check equipment to ensure that it is operating properly.
- Fill backpacks with premixed herbicide mixture.
- Work in coordination with crew to ensure proper coverage of assigned areas.
- Take all precautions necessary to prevent spray drift and/or damage to all non-target species or areas
- Follow all guidelines, procedures and training to maintain a safe operation and prevent injury or damage to self, other persons and/or the environment
- Clean and store equipment properly at end of work day.

PRIMARY TOOLS & EQUIPMENT FOR MIGRANT SPRAYER

- Backpack sprayer

• Machete
• Spray Bottle
• Personal Protective Equipment that may include gloves, glasses, uniforms, or other equipment

SECONDARY TASKS FOR MIGRANT SPRAYER

• Cut or remove vegetation using brush saws, chain saws or other hand tools
• Use power sprayers to treat target brush with proper amounts of herbicide mixture
• Connect and pull hoses associated with power sprayers
• Start motors and engage pumps on power sprayers
• Clean, service and maintain power sprayer, pumps, motors and related equipment

SECONDARY TOOLS AND EQUIPMENT FOR MIGRANT SPRAYER

• Chain saws
• Brush saws
• Power sprayers

KNOWLEDGE, ABILITIES AND SKILLS FOR MIGRANT SPRAYER

• After training, worker must have the ability to identify target species
• After training, worker must have the ability to identify non-target areas
• Worker must be able to follow basic instructions
• After training, worker must be able to operate and maintain basic hand tools associated with job, including power tools
• Worker must have the manual dexterity to operate tools
• Job requires worker to be dependable, responsible and reliable for fulfilling job obligations

This is an entry level, manual labor activity for which all necessary knowledge, ability and skill can be reasonably achieved during an initial one week training period and an additional two weeks of on the job training.

ADDITIONAL INFORMATION REGARDING SPECIFIC INDUSTRY TASKS

Worker's primary task is to selectively spray, cut, treat or otherwise remove unwanted vegetation, referred to as "target vegetation", while preserving desirable vegetation that is environmentally, commercially, aesthetically or otherwise beneficial.

For electric utility companies, workers will selectively control tall growing vegetation that will interfere with electric lines and affect electric reliability or otherwise impede access on rights of ways while not damaging low growing shrubs, grasses or other desirable vegetation, beneficial for wildlife and the environment.

On highway roadsides, workers will selectively control brush and tall growing weeds that create safety hazards by obstructing view, while preserving beneficial low growing grasses that prevent erosion.

In natural areas, rights of way, forests, rangelands, wetlands and on other sites, workers will selectively control invasive species and noxious weeds that pose a hazard to the ecology.

On forested land, workers will selectively control those weed and tree species that adversely impact the growth of desirable timber.

On all sites and in all industries, non-target areas shall include

1. Agricultural crops
2. Fruit trees, ornamentals, and other vegetation in maintained yards unless specifically instructed otherwise
3. Any area not specifically permitted on the herbicide label or by State or Federal Regulation
4. Residential or public use areas unless specifically instructed otherwise

2. Job Description for Migrant Sprayer Team Leader

In addition to the job description for Migrant Sprayer, a Migrant Sprayer Team Leader shall perform the additional tasks and possess the additional knowledge, abilities and skills as listed below:

MINIMUM REQUIREMENTS FOR MIGRANT SPRAYER TEAM LEADER

• Have, obtain, and maintain a valid driver's license and meet DOT driving requirements
• Must have and maintain a good driving record

- Have, obtain, and maintain a valid FLCE license
- Successfully complete Driver Safety Training course
- Minimum one year's experience as Migrant Sprayer or equivalent
- Must be physically able to perform job functions

PRIMARY TASKS FOR EQUIPMENT FOR MIGRANT SPRAYER TEAM LEADER

- Transport assigned crew to designated work locations
- Mix pre-set herbicide mixtures for application
- Keep Migrant Sprayers supplied with herbicide mixture throughout the day
- Communicate with crew and provide information as requested
- Follow mapped locations to determine daily spray routes
- Assist foremen with daily application reports, crew time logs and additional information as needed
- Maintain vehicle in safe, working order

PRIMARY TOOLS & EQUIPMENT FOR MIGRANT SPRAYER TEAM LEADER

- Cell phone and/or two way radio
- Herbicide mixing equipment
- Company vehicle

KNOWLEDGE, ABILITIES AND SKILLS FOR MIGRANT SPRAYER TEAM LEADER

- Must be able to maintain/complete various forms required for daily herbicide application reports and for daily driving logs required by US Department of Transportation
- Must be able to read and follow a map
- Ability to receive instructions from foreman and relay to crew
- Must be able to administer first aid

3. Job Description for Migrant Sprayer Crew Foreman

In addition to the job description for Migrant Sprayer and Migrant Sprayer Team Leader, a Migrant Sprayer Crew Foreman shall perform the additional tasks and possess the additional knowledge abilities and skills as listed below:

MINIMUM REQUIREMENTS

- Must be able to effectively communicate with customers, office staff and teams
- Must be able to manage multiple Teams (Crews)
- Must have basic knowledge of math
- Must be computer literate
- Must be able to operate independently when not directly supervised by manager

PRIMARY TASKS

- Complete electronic daily and weekly reporting
- Coordinate Crews, assign map segments to Team Leaders
- Maintain herbicide inventories at job sites
- Provide on-site training to Crews as needed
- Perform quality control and safety audits, maintain quality and safety standards and compliance with applicable State and Federal Regulations

PRIMARY TOOLS & EQUIPMENT FOR MIGRANT SPRAYER TEAM LEADER

- Computer and GPS Equipment

KNOWLEDGE, ABILITIES AND SKILLS

- Must be able to create work schedule and meet production standards based on weather, holidays, customer demand, regulatory requirements, and other factors
- Must have critical thinking skills to use logic and reasoning to solve problems
- Must have basic knowledge of tools and products used in connection with job

Existing Job Description for Governmental Agency

As previously discussed in this report, one of the largest utilities in U.S., the Tennessee Valley Authority (TVA), is a governmental entity and relies on Migrant Sprayers for vegetation management. Immediately following are pages extracted from TVA's contract specifications relating to employees performing brush clearing and spraying along TVA's rights of way.

Summary of Key Points About Migrant Spray Industry

The migrant spray industry is an evolution of the reforestation industry and began about 2O years ago. Many migrant spray companies also perform spraying on forestry land and use the same work force and brush control techniques regardless of whether the work is performed on rights-of-way, roadsides, or in forests.

Almost all migrant spray work is performed by H-2B workers. These workers did not replace an existing U.S. workforce doing the same type of work. Prior to the availability of a migrant work force, right-of-way brush clearing was done mechanically with heavy equipment or helicopters.

Migrant spray work is now an essential part of Integrated Vegetation Management programs implemented by utility companies to maintain electric reliability. Hand application of herbicide is more effective and environmentally friendly than the outdated mechanical methods.

In just the Greater South Eastern United States, we estimate that there are more than 15 companies employing more than 2000 H-2B workers performing migrant spray work for utility customers. Almost all of the companies that perform this work also perform more traditional forestry related work including tree planting, pre-commercial thinning, as well as forestry spraying for site preparation and herbaceous weed control.

The Department of Labor has been certifying employers with H-2B workers performing migratory brush clearing, including right-of-way spraying, on itineraries for over two decades. Until recently, these H-2B applications have been approved for the job title Brush Clearer (45-4011) exclusively under the Forestry-related Special Procedures outlined in TEGL 27-06. In the last few years, however, some employers have been instructed by DOL to submit H-2B applications for this work under the job title Sprayer (37-3012). Some of these "sprayer" applications have been processed under TEGL 27-06 and others have not.

Utilities that hire companies with migrant sprayers typically do not make final decisions about where vegetation management work will be located until just prior to the work beginning. Even then, weather, budgets, governmental mandates and other factors often change tentative work schedules. Typically there is no specific start or end date mandated by utility companies, other than the general dates associated with the spraying season, spring through fall. Because of the remote locations where the work takes place and the limited amount of work in any specific geographic area, this work is migratory in nature and must be completed along an itinerary.

Prepared Statement of Shawn McBurney, Senior Vice President, Governmental Affairs, American Hotel & Lodging Association

On behalf of the American Hotel & Lodging Association and our members throughout the United States, thank you for allowing me to comment on an acute problem in our industry—the ability to locate and hire lower-skilled workers.

Serving the hospitality industry for more than a century, AH&LA is the sole national association representing all sectors and stakeholders in the lodging industry, including individual hotel property members, hotel companies, student and faculty members, and industry suppliers.

AH&LA's membership ranges from the smallest independent properties to the largest convention hotels with a high degree of franchising and independent ownership. Every hotel or motel in our country is unique due to factors that include size, type, location, services offered, clientele, ownership, and status as an independent or chain affiliate.

Background on Lodging Industry

In 2011, the lodging industry generated $137.5 billion in total revenue, supported 1.8 million jobs, and represented 1% of U.S. GDP. The leisure and hospitality sector is the fifth largest employer in the United States and with the lodging industry alone poised to add 141,000 jobs in the next 7 years according to the U.S. Bureau of Labor Statistics (BLS).

The hospitality sector serves as a top 10 industry in 48 out of 50 states providing employment, investment, and opportunity and leading economic recovery with 12 consecutive quarters of growth and providing job creation in every region of the country.

We are proud that the lodging industry offers career growth potential for our employees where they can rise from entry level to management without the need for a college diploma.

Lodging Industry Recruitment and Retention Efforts

The lodging industry invests heavily in attracting and retaining more employees. For more than 60 years, the American Hotel & Lodging Educational Foundation (AH&LEF) has been the primary source of financial support for industry-related scholarships and maintains school-to-career and workforce development initiatives. The Foundation awarded $7.4 million in scholarships to hospitality management students with $514,500 being awarded in 2012 alone.

Hoteliers spend considerable time, money and resources attempting to fill the jobs they are creating. They advertise in local papers, attend job fairs, work with community-based organizations, canvas job centers, and recruit at military bases, high schools, and colleges. The industry is a leader in both the welfare-to-work and school-to-work efforts, and AH&LA has partnered with prominent organizations to promote careers in lodging.

Despite the generous pay and growth potential the lodging industry offers, many jobs in lodging go unfilled due to the growth of our industry and workers seeking employment in other sectors of the economy.

Lodging employers can legally bring in some temporary workers from abroad through educational and other visas, but not nearly enough to fill all their vacancies. Neither option provides a long-term solution to our worker shortage.

Experience with H-2B Program

While worker shortages are common among hotels throughout the country, the problem is most acute in seasonal properties. This is especially true for many resorts. The ability to keep their doors open and retain their full-time employees is contingent upon making enough money during their peak season to offset the rest of the year when their business is slow.

During their busy seasons, they must supplement their permanent staffs with temporary seasonal employees. In order to fill these positions, they spend thousands of dollars and hundreds of hours in aggressive recruitment. Unfortunately, there are not enough American workers available to fill those positions despite generous pay and benefits offered.

At one time, employers could rely on college students and other individuals who would accept temporary jobs on a seasonal basis. That is no longer the case, however. School and seasonal scheduling has changed—properties have lengthened their seasons into spring and fall, while school years have lengthened, making students simply unavailable. In addition, many students no longer prefer to work in traditional "summer" positions.

As a result of this dramatic decline in workers willing to accept temporary positions, many hoteliers have been forced to turn to the federal government's H-2B worker program as a final option to find short-term workers.

Although it is a complex, time-consuming and expensive process that requires employers to navigate through three separate federal and one state government agency, seasonal employers have turned to the program because their season, and therefore their entire business, depends on the ability to fill temporary seasonal jobs.

Needs in Immigration Reform

Due to the unique nature of seasonal businesses, a new temporary worker program should be crafted that retains the H-2B visa program as a distinct category of visas.

A seasonal hotelier may spend hundreds of hours and thousands of dollars to secure a worker under the H-2B program after efforts to find American workers were unsuccessful. The job the H-2B worker fills may only last approximately four months. That represents a very large investment for a very short-term worker.

Further, if the H-2B program was eliminated and seasonal employers were required to seek workers through a new program that offered positions with multi-year employment, those seasonal jobs would be much less attractive to those workers in comparison, resulting in a more severe worker shortage for seasonal hoteliers.

Given the necessity of the program and the success of the previous H-2B cap exemption policy, Congress should approve a permanent reinstatement of that cap exemption.

Most immediately, the two rules issued by the U.S. Department of Labor (DOL), one on January 19, 2011 and the other on March 18, 2011 should be permanently blocked by Congress. Those two rules would make the H-2B program virtually unusable, if they are allowed to be implemented, many seasonal businesses will be forced to close and lay off their full-time American workers.

A new lower-skilled temporary worker program is necessary to address the worker shortages that hoteliers throughout the country are experiencing (and which will become worse as the economy recovers).

A new program should be established to allow hoteliers to be certified as being unable to find American workers for their available positions and eligible to hire temporary foreign workers through the new program.

Unlike the H-2B program, those positions should be able to be filled for up to two years by a temporary worker, with the option of having that visa renewed. This will permit hoteliers to secure the workers they need and provide some stability in their workforces for non-seasonal properties.

Hotels are in the hospitality business. Hospitality cannot be outsourced or automated. Employees remain the lifeblood of our businesses and it is critical that a legal process is created so that there is access to foreign workers when no Americans are available.

Thank you very much for allowing us to comment on this vitally important issue to our industry.

[VIA EMAIL],
THE NATIONAL HISPANIC LANDSCAPE ALLIANCE (NHLA),
March 13, 2013.

Hon. TIM WALBERG, *Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, Washington, DC.*

DEAR CHAIRMAN WALBERG: We appreciate the opportunity to submit this statement for the record, and thank The House Subcommittee on Workforce Protections for holding a hearing to examine the role of lower-skilled guest worker programs in today's economy. The National Hispanic Landscape Alliance (NHLA) is a member-based trade association that advances the interests of the more than 500,000 Hispanic families that depend upon the landscape industry for their livelihood. The landscape industry in the US conservatively accounts for $18.75 billion, or 3% of total US Latino household income.

It is our view that the current calamity of an estimated 11 million undocumented migrants serves as de facto proof that the nation suffers from unmet labor needs and is critically lacking of an adequate system to address those needs in an orderly manner. It is our hope that in considering the testimony provided, members will gain a greater understanding of the fact that creating the jobs Americans want and are able to fill requires the availability of sufficient workers to fill the jobs Americans do not want and are not able to fill.

This truth is plainly evident to us in the landscape services industry where hard-to-fill seasonal needs, that are met by H-2B visa holders, enable firms to grow and expand the number of higher-level fulltime year-round positions to which American workers aspire, and which Hispanic-Americans due to their linguistic and cultural competencies are especially well suited to fill. We are therefore advocates of a flexible, employment-driven immigration system that is responsive to workplace needs and supportive of economic growth.

Such programs should require employers to demonstrate the need for supplemental labor in a manner similar to that required of employers that utilized the H-2B program prior to the temporarily blocked new Department of Labor wage screening interested foreign workers. We further propose that the size of such visa programs should be determined by workplace needs, as measured by employer ability to demonstrate insufficient workforce supply rather than by caps that are, at best, established using lagging economic data.

A few years ago, one of our member companies committed a filing error and was not certified for the H-2B visa program that year. Unable to fill 48 seasonal positions with foreign workers, and unwilling to hire undocumented immigrants, this employer hired more than 1,300 workers during a nine month period in an attempt to keep the 48 positions filled with US workers. Not only did the high turnover result in great strains of his human resources and training staff, the quality of his work suffered to the extent that a number of customers were lost, and the firm was force to reduce the size of its operations the following year and terminate year-round positions.

We regret efforts by the U.S. Department of Labor (DOL) to burden the H-2B program with a series of rules that would render the program unusable and thus penalize the reputable companies that rely on the program to expand their operations, and the employees that would benefit from such growth. Thankfully, Congressional action has blocked the implementation of some of those new rules and court action has blocked implementation of the others.

In our view, the goals of the DOL can best be advanced through the development of an exemplary H-2B employer recognition program. We believe that such a pro-

gram modeled after the successful OSHA Voluntary Protection Programs (VPP) which recognize the outstanding efforts of employers and employees who have achieved exemplary occupational safety and health, would help raise the bar for practices by many H-2B employers by publicizing the actions of some of the best.

In closing, we'd like to recommend that the H-2B program should remain as a distinct seasonal program in any reform, and that the program be improved by facilitating the year after year renewal of workers returning for subsequent seasons. Know that we welcome any opportunity to be of assistance in this matter.

Sincerely,

RALPH EGUES, JR.,
Executive Director.

Prepared Statement of Keesen Landscape Management, Inc.

KLM has been a leading provider of commercial landscape maintenance services to the Denver metro area since 1972, with peak employment levels of about 220-240 employees. We have been utilizing the H-2B program since the mid-1990's and were one of the first companies in Colorado to do so. During our peak season, approximately 35% of our workforce consists of H-2B workers. All of our employees have been certified through the E-verify program.

The H-2B program is exceptionally expensive and complicated to use; indeed it would be cheaper and easier to use American labor to fill our seasonal labor positions if it was available. But even at the bottom of the job market when unemployment was at its highest point nationally, we were able to fill only a small fraction of the positions needed in order for our company to service its contracts. In 2011 we had a need for 95 seasonal laborers. We were able to fill just 11 spots with American workers. None of these workers lasted more than 45 days on the job and most lasted just a couple of days to a couple of weeks. They were paid the prevailing wage determined by the Department of Labor which was around $9.19 per hour, the same as our H-2B workers. This is the minimum wage we are required to pay an H-2B worker or an American worker that applies for a position we are requesting seasonal labor for. For 2013, the prevailing wage is $9.36 and we need approximately 100 workers. Our efforts to recruit through the newspaper, word of mouth, advertising on our company vehicles and through the state workforce agency netted exactly 1 application. This person did not respond to our attempts by phone or mail to schedule an interview.

Because of the program's myriad of regulations and tight application timeframes, we use a company that is well-versed in cutting though the red tape associated with obtaining temporary workers on an H-2B visa. They navigate the 4 government agencies and masses of paperwork that must be filed each year in order for us to get our approximately 85 seasonal workers that will work from March through November. We begin that process in mid-summer the year prior to the time we will need these workers the following March.

For all of the frustration and cost associated with the H-2B program, there are a great number of benefits derived from this relationship by both the employer and the H-2B workers. We receive reliable, trained workers who eagerly come back to work for us year after year. Indeed, they are like family to us. We cater in lunches and cook breakfast for them as a small way to say thank-you. The workers receive the benefit of job protections, such as worker's compensation and a safe work environment, which may not be available to them in their home country. The local and national economy benefits through increased orders for supplies, equipment and vehicles. And while they are here, they pay taxes on their earnings. They receive fair pay for a job that allows them to provide for their families back home. Those same families that are waiting to greet them when they return to their home country at the end of their visa. This unique relationship helps us keep quality levels high for our customers and allows us to remain competitive in a tight economy where many of our competitors have chosen to cut corners and may not always employ workers that are able to pass the rigors of the E-verify program. Our American workers, most of whom are managers or supervisors that work directly with or manage these H-2B work crews, are not employable if we do not have a trained and reliable source of labor. Their jobs are directly dependent on these H-2B workers.

Perhaps the most important benefit derived from this program, though, is the certainty that it provides to us in terms of knowing that we will have available labor to service our contracts with our customers. This is critical to our ability to plan annually how much new work we can take on. Our employment of our American workers, our orders of supplies and equipment from our vendors—all of this is dependent on having a reliable, trained source of labor. And that is exactly what the

H-2B program provides to us. Could it be less costly and more streamlined to use? You bet. But at this point it is far superior to the only other two options we would have if it were not available. The first option includes drastically cutting back the number of annual contracts we perform, thereby reducing the number of full-time, year around American workers that we employ and resulting in drastic cuts in orders to our vendors for supplies, equipment, and

American-made trucks and trailers. Our other option is to throw in the towel and succumb to the pressures of trying to remain competitive in a system that seems to reward those who choose to circumvent the laws and seemingly seeks to punish the ones doing their very best to play by the rules.

This issue is about small businesses and the jobs they create which allow them to employ America workers. A guest worker program is not a luxury. It is a basic business necessity critical to their survival and the continued employment of their American workers. I hope that message was communicated loud and clear today.

Chairman WALBERG. Without objection, so ordered. I thank them for their valuable input on these important issues.

There being no further business before this committee, the committee stands adjourned.

[A submission from Hon. Robert E. Andrews, a Representative in Congress from the State of New Jersey, follows:]

GOVERNMENT AFFAIRS,
NATIONAL ASSOCIATION OF HOME BUILDERS (NAHB),
March 18, 2013.

Hon. ROBERT ANDREWS, *2265 Rayburn House Office Building, Washington, DC 20515.*

DEAR CONGRESSMAN ANDREWS: On behalf of the more than 140,000 members of the thank you for expressing interest in the health of the construction industry at the Workforce Protections Subcommittee hearing on lower-skilled guest worker programs on March 14, 2013. You questioned a witness from Greenberg Traurig, LLP on the current state of the industry, and while we appreciate and support the witness's testimony, I want reiterate the witness's own words that she does not represent the construction community. I also want to correct an inaccuracy from the witness's response: the residential construction community is, in fact, facing worker shortages at present.

In March 2013, NAHB's Economics Department conducted a robust membership survey to determine the current needs and concerns of the membership at large. More than half of the builders reported that labor shortages over the past six months have caused them to pay higher wages or subcontractor bids to secure projects, and consequently, raise home prices. 46 percent of the builders surveyed experienced delays in completing projects on time. 15 percent of respondents had to turn down some projects, and nine percent lost or cancelled sales as a result of recent labor shortages. The Job Openings and Labor Turnover Survey data from the Bureau of Labor Statistics show that the month of January had the second highest number of unfilled positions in the last seventeen months.

Residential construction is facing tangible worker shortages—worker shortages that are impeding the housing recovery. Recognizing your strong support of the industry, I want to reiterate the importance of the housing industry to the economy at large. Housing construction and the value of housing-related services currently account for approximately 15% of Gross Domestic Product. The construction of 1,000 single-family homes generates 3,050 jobs in construction and construction—related industries, approximately $145.4 million in wages, and more than $89.2 million in federal, state and local tax revenues and fees. It is therefore critical that Congress work to enhance, and not impede, the recovery effort.

NAHB works diligently to address the continuing need for skilled labor within the nation's borders. In partnership with NAHB and Job Corps, the Home Building Institute (HBI) is a national leader for career training and job placement in the building industry. HBI's Job Corps training programs are national in scope but implemented locally, using proven models that can be customized to meet the workforce needs of communities across the United States and internationally. It prepares students with the skills and experience they need for successful careers through pre-apprenticeship training, job placement services, mentoring, certification programs, textbooks and curricula. With an 80 percent job placement rate for graduates, HBI

Job Corps programs provide services for disadvantaged youth in 73 centers across the country.

Yet, NAHB believes strongly that the nation should implement a new market-based visa system that would allow more immigrants to legally enter the construction workforce each year. Despite our efforts to recruit and train American workers, our industry faces a very real impediment to full recovery if work is delayed or even cancelled due to worker shortages. A new, workable visa program would complement our skills training efforts within the nation's borders, and fill the labor gaps needed to meet the nation's housing needs.

For these reasons, NAHB is a member of the Essential Worker Immigration Coalition (EWIC), which advocates for the creation of a new program that will supply the U.S. economy with needed workers, replacing an illegal flow with a legal flow. We believe that a successful future guest worker program must include an annual visa cap that fluctuates based on a demand-driven system that reflects the real economic needs of the nation. This program would have a dual-intent process that allows some foreign workers who have demonstrated a commitment to their jobs and their communities to choose to petition for a change of status to a permanent legal status in the United States, while also incentivizing most foreign workers to return to their home country at the end of their visa period. The program would also require employers to treat these legal foreign workers in the same manner as U.S. workers—with all of the same benefits, workforce protections and wage rates as similarly-situated workers at the same location.

I hope this information is helpful. If you have any additional questions about the health of the residential construction industry, NAHB's door is open to you and your staff for further discussion.

Sincerely,

JAMES W. TOBIN III.

[Questions submitted for the record and their response follows:]

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April 9, 2013

Laura Foote Reiff
Greenberg Traurig, LLP
Tysons Corner Office
1750 Tysons Boulevard
Suite 1200
McLean, VA 22102

Dear Ms. Reiff:

Thank you for testifying at the March 14, 2013 Subcommittee on Workforce Protections hearing entitled, "Examining the Role of Lower-Skilled Guest Worker Programs in Today's Economy." I appreciate your participation.

Enclosed are additional questions submitted by committee members following the hearing. Please provide written responses no later than April 23, 2013, for inclusion in the official hearing record. Responses should be sent to Owen Caine of the committee staff, who can be contacted at (202) 225-7101.

Thank you again for your contribution to the work of the committee.

Sincerely,

Tim Walberg
Chairman
Subcommittee on Workforce Protections

Questions Submitted by Congressman Hudson:

1. We know that the e-Verify system is not working. Many individuals are providing false identification or Social Security numbers to employers that pass through the system. What are your recommendations to improve the e-Verify system so that employers can confidently screen workers and ensure that they are here legally?

2. The regulations surrounding many of the temporary worker programs make them difficult to navigate and create mountains of paperwork on the side of the employer. What are the challenges that employers face when trying to hire temporary workers?

3. How can we streamline this process so industry can hire temporary workers legally and combat fraudulent documentation?

GT GreenbergTraurig

Laura F. Reiff
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April 30, 2013

Chairman, Tim Walberg
Subcommittee on Workforce Protection
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515-6100

Dear Chairman Walberg,

Thank you for allowing me to testify at the March 14, 2013 Subcommittee on Workforce Protections hearing entitled, "Examining the Role of Lower-Skilled Guest Worker Programs in Today's Economy." I appreciate being given the opportunity.

Enclosed please find the answers to the additional questions submitted by the committee members following the hearing.

Sincerely,

Laura Foote Reiff

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*STRATEGIC ALLIANCE

Questions Submitted by Congressman Hudson:

1. We know that the e-Verify system is not working. Many individuals are providing false identification or Social Security numbers to employers that pass through the system. What are your recommendations to improve the e-Verify system so that employers can confidently screen workers and ensure that they are here legally?

I believe the following things would help deal with the problems with the system.

Photo matching: As part of the E-Verify system, every non-citizen should be required to show their "biometric work authorization card," or their "biometric green card." In order for the non-citizen to be cleared for a job, the picture on the card presented by the employee to the employer should have to exactly match the identical picture the employer has on the E-Verify system. The employer should certify that the photograph presented in person matches the identical photograph in the system.

Passports - For U.S. citizens with passports, the picture on the passport presented by the employee should match the identical picture the employer has on the E-Verify system. A driver's license could be used, so long as the citizen's state has agreed to submit a photo to E-Verify.

To provide additional security, USCIS should have a system in place with the capacity to allow employees to "lock" their Social Security number in the E-Verify system so that their number cannot be used by another individual. The number could be unlocked every time the individual seeks new employment and then locked again afterward.

I also believe that technical correction to the E-verify system should be made to correct error rates.

It is also essential that a premium is placed on preemption. The patchwork of state laws and policies that relate to employment verification and E-Verify is a hindrance to the business community, which always places a premium on the certainty of governing rules.

2. The regulations surrounding many of the temporary worker programs make them difficult to navigate and create mountains of paperwork on the side of the employer. What are the challenges that employers face when trying to hire temporary workers?

The key problem with lesser skilled temporary worker programs, as I testified, is that there is no current system for non-seasonal, non-agricultural temporary workers to enter the U.S. legally. When designing such a system, we need to be careful not to re-create systems that have not worked in the past. I would support a new system that gives employers, not the government, the primary say in which workers they need to staff their businesses and gives the U.S. labor market the primary say in how many workers enter the country annually in a legal program.

The market can work in a timely, efficient way to regulate the flow of foreign workers seeking to enter the country. I would support a visa program that admits workers initially on a temporary basis to meet short- to medium-term workforce needs, but then allows those migrants who succeed in the U.S. and meet certain criteria (measured by a performance-based point system) to stay on

permanently, earning legal permanent residence. The employer should be required to demonstrate a need for the worker, in order to justify the granting of the initial visa.

It is also important to streamline the system so that employers are not caught up in a lengthy bureaucracy. An attestation-based application process with back-end audits makes sense. Before an employer can be registered in the system, employers must test the labor market, making a good faith effort to recruit U.S. workers and attest to their recruitment efforts

3. How can we streamline this process so industry can hire temporary workers legally and combat fraudulent documentation. See answers to 1 and 2 above.

[Whereupon, at 11:23 a.m., the subcommittee was adjourned.]

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