DO FEDERAL PROGRAMS ENSURE U.S. WORKERS ARE RECRUITED FIRST BEFORE EMPLOYEES HIRE FROM ABROAD?

HEARING

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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DO FEDERAL PROGRAMS ENSURE U.S. WORKERS ARE RECRUITED FIRST BEFORE EMPLOYEES HIRE FROM ABROAD?

Tuesday, May 6, 2008
U.S. House of Representatives
Committee on Education and Labor
Washington, DC

The committee met, pursuant to call, at 11:03 a.m., in room 2175, Rayburn House Office Building, Hon. George Miller [chairman of the committee] presiding.

Present: Representatives Miller, Kildee, Payne, Woolsey, McCarthy, Tierney, Wu, Holt, Davis of California, Grijalva, Bishop of New York, Sánchez, Sarbanes, Sestak, Loebsack, Hirono, Altmire, Yarmuth, Courtney, Shea-Porter, McKeon, Petri, Castle, Ehlers, Biggert, Keller, Wilson, Kline, Boustany, Foxx, and Davis of Tennessee.

Staff Present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Tico Almeida, Labor Policy Advisor; Jordan Barab, Health/Safety Professional; Jody Calemine, Labor Policy Deputy Director; Fran-Victoria Cox, Staff Attorney; Lynn Dondis, Policy Advisor, Subcommittee on Workforce Protections; Michael Gaffin, Junior Legislative Associate, Labor; Brian Kennedy, General Counsel; Thomas Kiley, Communications Director; Danielle Lee, Press/Outreach Assistant; Stephanie Moore, General Counsel; Alex Nock, Deputy Staff Director; Joe Novotny, Chief Clerk; Megan O'Reilly, Labor Policy Advisor; Michele Varnhagen, Labor Policy Director; Mark Zuckerman, Staff Director; Robert Borden, Minority General Counsel; Jim Paretti, Minority Workforce Policy Counsel; Alexa Marrero, Minority Communications Director; Cameron Coursen, Minority Assistant Communications Director; Loren Sweatt, Minority Professional Staff Member; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Senior Legislative Assistant; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel.

Chairman MILLER. The Committee on Education and Labor will come to order for the purposes of conducting a hearing asking the question, Do Federal programs Ensure That U.S. Workers Are Recruited First Before Employers Hire From Abroad? First of all, let me thank everybody. I know that this hearing's time has been adjusted and I appreciate all the cooperation of all the members and

witnesses for this hour as opposed to when it was scheduled earlier.

Hundreds of thousands of foreign guest workers come to the United States each year under various Federal programs. For too many years, these programs have been allowed to operate with little oversight from the Department of Labor. I am proud to say that this Congress has begun the work of examining these programs with a critical eye.

Last June, this committee heard testimony about the need to strengthen labor protections for guest workers in order to prevent workers from being exploited and abused by their employers. To that end, I introduce the Indentured Servitude Abolition Act legislation that would discourage employers from using disreputable guest worker recruiters. And hold foreign labor recruiters and employers accountable for the promises they make. Those and other labor protections were explored in a recent Immigration Subcommittee hearing conducted by Chairwoman Zoe Lofgren on the H2B program.

As we look at greater protections for guest workers, we also have to ask whether the labor protections in these programs is sufficient to shield U.S. workers from downward pressure on their wages and working conditions, and whether we are doing enough to recruit qualified U.S. workers to fill open jobs.

While many honest employers utilize guest worker programs to fill labor needs, this hearing will address the curious situation. At the same time that unemployment is rising, many businesses claim they can not find U.S. workers. The issue is particularly important in the face of the weakening economy.

Today, approximately 7.6 million workers are unemployed and this figure does not include millions of others are too discouraged to look for work. And it does not include the 5.2 million who are forced to enter part-time work because of cutbacks in hours or because they are unable to find full-time jobs.

At the same time the unemployment has risen, many employers say that they can not find available, willing U.S. Workers to fill their labor needs. The Congress has been hearing from industries like hospitality and landscaping who say they cannot find workers for this summer's season, and it is putting their businesses in jeopardy.

This hearing asks the question: In light of these dueling crises the workers can't find jobs, and employers who can't find workers, what labor shortage can or cannot be solved by better matching the available U.S. Workers with the jobs. We will hear testimony from an economist on that very issue.

We will hear testimony from the U.S. Department of Labor. The Department plays a central role in filling employer's labor needs with non migrant, non U.S. workers. The Department helps administer guest worker programs such as the H2A program for temporary agriculture workers and the H2B program for temporary non agriculture workers. These programs have varying requirements for recruiting U.S. workers before utilizing guest workers.

We will explore whether the existing requirements are effective and whether they are effectively enforced. We will hear about recently proposed regulations from the Department of Labor that I

believe will have a negative impact on the recruitment of U.S. Workers for agriculture jobs.

We will also hear testimony about a case in which an employer was certified to hire H2B workers despite the fact that hundreds of U.S. workers had been referred by the Texas State Workforce Agency to the very same job. This case raises concerns about enforcement. When employers misuse the guest worker system, not only do U.S. workers miss out on the jobs, but other employers with legitimate temporary labor needs will miss out on the Visas.

Finally, we will hear testimony about how and why some of the scrupulous employers prefer to hire undocumented workers over U.S. and other legal workers. As we debate reforms on our Nation's immigration laws, I hope that this hearing will highlight the critical need for Congress to enact stronger labor protections that will protect immigrants, guest workers and U.S. workers and for the Labor Department to enforce the protections already on the books.

We have an incredibly distinguished panel of witnesses with us today. And I am pleased to welcome them to the committee. At this time I note the presence of a quorum and yield to Mr. McKeon, the senior Republican, for his opening statement. The gentleman is recognized for 5 minutes.

[The statement of Mr. Miller follows:]

Prepared Statement of Hon. George Miller, Chairman, Committee on Education and Labor

Good morning. Welcome to today's hearing examining whether federal programs adequately ensure that U.S. workers are recruited first before employers hire from abroad.

Hundreds of thousands of foreign guest workers come to the United States each year under various federal programs. For too many years, these programs have been allowed to operate with little oversight from the Department of Labor. I am proud to say that this Congress has begun the work of examining these programs with a critical eye.

Last June, this Committee heard testimony about the need to strengthen labor protections for guest workers in order to prevent workers from being exploited and abused by their employers. To that end, I introduced the Indentured Servitude Abolition Act, legislation that would discourage employers from using disreputable guest worker recruiters and hold foreign labor recruiters and employers accountable for the promises they make. Those and other labor protections were explored at a recent Immigration Subcommittee hearing conducted by Chairwoman Zoe Lofgren on the H-2B program.

As we look at greater protections for guest workers, we also have to ask whether labor protections in those programs are sufficient to shield U.S. workers from downward pressure on their wages and working conditions, and whether we are doing enough to recruit qualified U.S. workers to fill open jobs.

While many honest employers utilize guest worker programs to fill actual labor needs, this hearing will address a curious situation: at the same time that unemployment is rising, many businesses claim they cannot find U.S. workers.

The issue is particularly important in the face of a weakening economy. Today, approximately 7.6 million Americans are unemployed, and this figure does not include the millions of others who are too discouraged to look for work. And it does not include the 5.2 millions who are forced into part-time work because of cutbacks in hours or because they were unable to find a full-time job.

At the same time that unemployment has risen, many employers say that they cannot find available and willing U.S. workers to fill their labor needs. The Congress has been hearing from industries like hospitality and landscaping who say they cannot find workers for this summer's season, putting their businesses in jeopardy. This hearing asks the question, in light of these dueling crises—of workers who can't find jobs and employers who can't find workers—what labor shortages can or cannot be solved by better matching available U.S. workers with jobs?

We will hear testimony from an economist on that very issue.

We will hear testimony from the U.S. Department of Labor. The Department plays a central role in filling employers' labor needs with nonimmigrant, non-U.S. workers. The Department helps administer guest worker programs such as the H-2A program for temporary agricultural workers and the H-2B program for temporary non-agricultural workers.

These programs have varying requirements for recruiting U.S. workers before utilizing guest workers. We will explore whether the existing requirements are effective and whether they are effectively enforced. We will hear about recently proposed regulations from the Department of Labor that I believe will have a negative impact on the recruitment of U.S. workers for agricultural jobs.

We will also hear testimony about a case in which an employer was certified to hire H-2B guest workers despite the fact that hundreds of U.S. workers had been referred by the Texas state workforce agency for those same jobs. This case raises concerns about enforcement. When employers misuse the guest worker system, not only do U.S. workers miss out on jobs, but other employers with legitimate temporary labor needs miss out on visas.

Finally, we will hear testimony about how and why some unscrupulous employers prefer to hire undocumented workers over U.S. or other legal workers.

As we debate reforms to our nation's immigration laws, I hope that this hearing will highlight the critical need for Congress to enact stronger labor protections that will protect immigrants, guest workers, and U.S. workers—and for the Labor Department to enforce the protections already on the books.

We have an incredibly distinguished panel of witnesses with us today, and I am pleased to welcome them to the Committee.

Thank you.

Mr. McKEON. Thank you, Chairman Miller and good morning. For the second time in the 110th Congress, this committee is examining immigration policy in the context of our responsibility for American workers and workplaces. Specifically, the title of this hearing indicates that our purpose is to examine whether Federal programs ensure U.S. workers are recruited before employers hire from abroad.

This morning we will be focusing that question more narrowly on 2 categories of non-immigrant workers. The H2A program through which employers may use unskilled foreign workers for agricultural industry and the H2B program which provides for unskilled foreign workers in non agricultural industries. These are important categories for examination with different issues and challenges than those facing other areas of immigration policy, including for example skilled foreign workers.

In some ways, this is a timely hearing. On February 6th, 2008, the U.S. Department of Agriculture announced proposed rules to modernize the application process for and the enforcement of H2A labor certifications. One of the goals of that proposed role is to provide a timely flow of legal workers for agricultural jobs for which no U.S. workers can be found. That goal is exactly in line with the purpose of today's hearing. And I am pleased to see this alignment between the administration's goals and its bipartisan intent here in Congress. Our goal with this hearing today should be the considerable philosophical and practical considerations of guest worker programs.

Conceptually there are those who argue that such programs are necessary to reduce illegal immigration while simultaneously filling positions that American workers are unwilling to take on. There are others who disagree with this premise, believing that if the conditions are right, American workers can be found to take on any job. And that guest worker programs may promote growth in illegal

populations by bringing in workers who may over stay their visas. Each of these viewpoints deserves thorough debate.

However our discussion must not stop with the theoretical. We have a duty to explore the real world impact of temporary guest worker programs, particularly their economic impact and how they may influence wages and jobs for U.S. workers. Many of us learned a great deal about these issues during last year's hearing when we benefited from the testimony of Dr. James S. Holt, one of the foremost experts on H2A and H2B Visas. Sadly, Dr. Holt passed away recently and I want to take this opportunity to offer my condolences to his family. His contributions to this field were many.

Looking to the future, it is important that we ask how successful the current temporary guest worker programs are in meeting their stated goals. Are employers and the U.S. economy benefiting? What about you individual U.S. workers? What would be the impact on illegal immigration if current guest worker programs are expanded or new programs created? These are all important questions, and that is why I am pleased to be here for today's hearing.

However, it seem to me that the timing of today's hearing is no coincidence. In one committee room after another, the democratic majority has been paying noticeably more attention to the issue of legal and illegal immigration lately. And while I appreciate the long overdue focus on these issues of national importance, I feel obligated to point out that hearings are no substitute for real action.

The fact is, Congress has an opportunity to take action on immigration reform by allowing a vote on H.R. 4088, the Save Act. To date, 187 members have signed a discharge petition to bring that bill offered by a member of the majority party to a vote by the full house. Still the majority has refused to allow an up-or-down vote.

So while I appreciate the opportunity to examine these issues before us today, I would like to state for the record my disappointment at the majority's unwillingness to allow real action on immigration reform. Talk is not enough. Hearings will not divert the attention of the American people. We need real action. I yield back.

[The statement of Mr. McKeon follows:]

Prepared Statement of Hon. Howard P. "Buck" McKeon, Senior Republican Member, Committee on Education and Labor

Thank you Chairman Miller, and good morning. For the second time in the 110th Congress, this committee is examining immigration policy in the context of our responsibility for American workers and workplaces. Specifically, the title of this hearing indicates that our purpose is to examine whether federal programs ensure U.S. workers are recruited before employers hire from abroad.

This morning, we'll be focusing that question more narrowly on two categories of nonimmigrant workers: the H-2A program—through which employers may use unskilled foreign workers for agricultural industry—and the H-2B program—which provides for unskilled foreign workers in non-agricultural industries. These are important categories for examination, with different issues and challenges than those facing other areas of immigration policy, including, for example, skilled foreign workers.

In some ways, this is a timely hearing. On February 6, 2008, the U.S. Department of Labor announced proposed rules to modernize the application process for and the enforcement of H-2A labor certifications. One of the goals of that proposed rule is to provide a timely flow of legal workers for agricultural jobs for which no U.S. workers can be found. That goal is exactly in line with the purpose of today's hearing, and I'm pleased to see this alignment between the Administration's goals and this bipartisan intent here in Congress.

Our goal with this hearing today should be to consider both the philosophical and practical considerations of guestworker programs. Conceptually, there are those who argue that such programs are necessary to reduce illegal immigration while simultaneously filling positions that American workers are unwilling to take on. There are others who disagree with this premise, believing that if the conditions are right, American workers can be found to take on any job, and that guestworker programs may promote growth in illegal populations by bringing in workers who may overstay their visas. Each of these viewpoints deserves a thorough debate.

However, our discussion must not stop with the theoretical. We have a duty to explore the real-world impact of temporary guestworker programs, particularly their economic impact and how they may influence wages and jobs for U.S. workers. Many of us learned a great deal about these issues during last year's hearing, when we benefited from the testimony of Dr. James S. Holt, one of the foremost experts on H2-A and H2-B visas. Sadly, Dr. Holt passed away recently, and I want to take this opportunity to offer my condolences to his family. His contributions to this field were many.

Looking to the future, it's important that we ask how successful the current temporary guestworker programs are in meeting their stated goals. Are employers and the U.S. economy benefiting? What about individual U.S. workers?

What would be the impact on illegal immigration if current guestworker programs were expanded, or new programs created?

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So, while I appreciate the opportunity to examine these issues before us today, I would like to state for the record my disappointment at the majority's unwillingness to allow real action on immigration reform. Talk is not enough. Hearings will not divert the attention of the American people. We need real action.

I yield back.

Chairman MILLER. I thank the gentleman.

Pursuant to committee rule 12(a), any member may submit an opening statement in writing which will be made part of the permanent record.

At this point, I would like to introduce our panel. We have Assistant Secretary For Policy of the U.S. Department of Labor Leon Sequeira, who was nominated by President George Bush in late 2006 and confirmed by the U.S. Senate in early 2007. Secretary Sequeira is a principal advisor to the Secretary on Regulatory Legislative Policy issues affecting the Department and the American workforce.

Dr. William Carlson was appointed administrator for the Office of Foreign Labor Certification for the employment and training administration of the Department of Labor in 2006. Dr. Carlson came to the Department of Labor with over 25 years of experience in managing Federal, State and regional and local government operations.

Bruce Goldstein is the executive director of the Farmworker Justice in Washington D.C., a national advocacy, litigation, education organization for migrant and seasonal farm workers. Mr. Goldstein's work has focused on litigation advocacy and immigration issues and labor law. And his activities on guest worker issues

have included litigation against private employers and the government.

Javier Riojas is an attorney and branch manager of the Texas Rio Grande Legal Aid in Eagle Pass, Texas, a small town on the border with Mexico. He has worked at Texas Rio Grande Legal Assistance since 1984, and he has represented thousands of U.S. Farm workers, H2A agricultural workers and other low income Texans.

John Young has served as treasurer, vice president and president. Now that is a ladder there, Mr. Young. Treasurer, Vice President and President of the National Council of Agricultural Employers. And he is currently the chairman of their immigration committee. He also serves as co-chair of the Agricultural Coalition For Immigration Reform. One busy man here.

Andrew M. Sum is a professor of economics and director of Center For Labor Market Studies at Northeastern University in Boston. He has authored and coauthored numerous articles, books on regional, national and State labor markets.

Bill Beardall is the executive director of the Equal Justice Center. He has practiced as a civil rights and employment lawyer for low income clients since 1978. Throughout his career, he has spearheaded numerous cases and campaigns to improve public justice for the poor.

Secretary Sequeira, we are going to begin with you. As you know we have a system of lights here. There will be a green light when you start and an orange light when there is a minute left in your 5 minutes. At that point, you can think about wrapping it up. But again, we want you to convey the thoughts that you want to convey and complete your sentences. Again, welcome to the committee and thank you for accommodating the time change of the committee hearing.

STATEMENT OF HON. LEON SEQUEIRA, ASSISTANT SECRETARY FOR POLICY, UNITED STATES DEPARTMENT OF LABOR

Mr. SEQUEIRA. Thank you Mr. Chairman and members of the committee. We appreciate the opportunity to be here today to talk about the Department of Labor's role in administering temporary foreign worker programs.

I am going to take just a couple of very quick minutes to describe the department's recent proposal related to the H2A program. And then Dr. Carlson will address specifics regarding the operation of the foreign labor certification process.

The Nation's temporary worker programs, and indeed, our entire immigration system in general, is in dire need of repair. Comprehensive immigration reform would help secure our borders, strengthen our interior enforcement efforts, help meet the demands for labor in our economy and ensure America remains competitive in the global economy.

Many farmers and small businesses rely on temporary foreign labor when they were unable to find sufficient numbers of available U.S. workers to fill temporary or seasonal positions. This is not a new phenomenon. After all, Congress designed the H2A and H2B programs more than 20 years ago. In the 80's, the average unem-

ployment rate in the United States was 7.3 percent, which is substantially higher than today's current rate of 5.1. In fact, foreign farm workers have been coming to the U.S. to work temporarily, to help farmers harvest crops for nearly 100 years. Clearly, the U.S. economy has a need for temporary foreign labor in some occupations and the H2A and H2B programs helped meet those needs.

For years employers, worker advocates, and even Members of Congress, have complained about delays, inefficiencies and shortcomings in these programs. The H2A program in particular has been criticized as so bureaucratic, inefficient and prone to delay that many farmers won't even use it. So last summer, after Congress again failed to pass comprehensive immigration reform, the administration announced more than 2-dozen regulatory and administrative initiatives to improve border security, work site enforcement, and the modernized worker programs.

As part of that effort, the Department was charged with reviewing and proposing reforms to the H2A and H2B programs in order to ensure an orderly and timely flow of legal workers while protecting the rights of U.S. and foreign workers.

This past February, the Department released for public comment a proposed regulatory reform of the H2A program. Our proposal responsded to many of the complaints we have heard about the program for both employers and workers advocates over the years. In fact, responding to suggestions from some of the very organizations represented on this panel, we propose a substantially increased recruitment period for employers to search for U.S. workers before applying to hire foreign workers. We proposed additional regulation over foreign labor contractors. We proposed new prohibitions on employers regarding the shifting of cost to workers, as well as limits on the use of foreign recruiters. Our proposal includes substantial new enforcement tools for the Department including auditing of applications, revocations of certifications for program violations, and expanded authority to debar employers who violate program requirements.

Finally, our proposal includes significant increased and new penalties, including a new penalty of $15,000 for violations that result in the displacement of a U.S. worker. The public comment period on our proposal ended April 14th. The Department is currently reviewing the 12,000 public comments we received and we expect to issue a final rule later this year.

For the H2B program, the Department is currently working on a proposal to reform that program as well and we expect to have that ready for public comment in the coming months.

[The statement of Mr. Sequeira follows:]

Prepared Statement of Hon. Leon R. Sequeira, Assistant Secretary for Policy; William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, U.S. Department of Labor

Mr. Chairman and Members of the Committee, thank you for extending the invitation to us to testify today about the Department of Labor's role in temporary foreign worker programs, and the Department's recent notice of proposed rulemaking regarding the H-2A program. Dr. William L. Carlson is the Administrator of the Office of Foreign Labor Certification of the Employment and Training Administration, and a career executive overseeing the operations of the Department's activities in employment-based immigration programs.

When there are insufficient numbers of U.S. workers available to fill positions in agriculture and other temporary or seasonal jobs, temporary foreign workers are important—and in many cases critical—to the continued viability of many businesses as well as the strength of our economy.

Under current law, the Labor Department has an important role in a number of existing employment-based visa programs. We oversee the labor certification process requiring employers to first test the labor market, where required by statute, for able, available, and willing U.S. workers, before attempting to hire foreign workers. Only if an employer's effort to hire U.S. workers proves unsuccessful, can an employer apply to hire foreign workers under most temporary work visas. The labor certification process is intended to ensure that the employment of foreign workers does not adversely affect U.S. workers.

The Department takes very seriously its statutory responsibility to ensure that our workforce, including foreign workers admitted under a temporary worker program, are protected by our Nation's labor laws. These efforts not only help protect foreign-born workers from exploitation, but also help ensure that the wages and working conditions of U.S. workers are not adversely affected by the employment of foreign workers though a temporary worker program. The Department's Wage and Hour Division of the Employment Standards Administration enforces the terms and conditions of employment in the H-2A program, but Congress has vested the Department of Homeland Security with enforcement responsibility for the H-2B program.

The Nation's temporary worker programs, and indeed our immigration system in general, is in dire need of repair. Comprehensive immigration reform would help secure our borders, strengthen our interior enforcement efforts, help meet the labor demands of our economy, and ensure America remains competitive in a global economy. Congress, however, has been unsuccessful in efforts to pass comprehensive immigration reform legislation.

Because Congress has failed to address the problem through legislative action, last August, the Administration announced a series of administrative initiatives to secure our borders more effectively, improve interior and worksite enforcement, modernize existing worker programs, improve the current immigration system, and help new immigrants assimilate into American culture. Among those initiatives was a charge to the Department of Labor to review and propose reforms to the H-2A agriculture and H-2B non-agriculture temporary worker programs to ensure an orderly and timely flow of legal workers, while protecting the rights of U.S. and foreign workers.

The H-2A agriculture and H-2B non-agriculture programs have been plagued for years by overly bureaucratic processes, inefficiencies, and delays. Even those employers who manage to navigate the bureaucratic maze are often unable to hire workers on time. And in the case of agriculture, those timing problems can have a devastating effect on the ability to harvest crops. Several significant reforms to improve these programs can be made through the regulatory process and do not require statutory changes. The Department has published proposed rules for the H-2A program and will do the same for the H-2B program in the coming months.

On February 13, 2008, the Department published a Notice of Proposed Rulemaking to reform the H-2A agricultural worker program. The H-2A Program has not been updated through substantial rulemaking in more than 20 years. In that time, our economy, the workforce, and the needs of our Nation's farmers have changed considerably. U.S. farms must be able to hire sufficient numbers of workers in a timely manner in order to continue to provide our Nation with a safe and secure domestic food supply.

Farmers who are unable to obtain the U.S. workers they need are increasingly being placed at risk of losing their crops and their livelihood, and furthering our Nation's dependence upon agricultural products produced in foreign countries.

The public comment period on the Department's H-2A proposal closed on April 14. We received about 12,000 comments on the rule. We are currently reviewing the public comments and aim to issue a final rule later this year.

The Administration is determined to make the H-2A program work for its intended purpose. Agricultural job opportunities continue to be a powerful magnet for illegal immigration into the U.S. We cannot let archaic aspects of the H-2A program serve as a barrier or disincentive to its use—and in the process contribute to the influx of illegal labor into the U.S.

We recognize that proposing changes to policies and practices that have been around for decades may be seen as controversial by some. We also recognize, however, that unless we make changes to these programs to more accurately reflect today's economy, the labor challenges confronting U.S. agriculture and businesses will continue to worsen.

The Department of Labor's Role in the H-2A and H-2B Programs

Under the H-2A and H-2B programs, the Department plays a key role in ensuring that U.S. workers are not adversely affected by the hiring of temporary foreign guest workers. The H-2A and H-2B programs were created by the Immigration Reform and Control Act of 1986 (Pub.L. 99-603, Title III, 100 Stat. 3359, November 6, 1986). In both of these visa categories, the Department requires employers to file a labor certification application with the Department if they intend to hire foreign temporary workers.

Under the H-2A and H-2B programs, the labor certification process ensures that the hiring of foreign workers does not occur without an employer first testing the labor market for able, available, and willing domestic workers. An employer must attempt to hire U.S. workers for job openings before applying to hire foreign workers with a temporary work visa. The labor market test also includes offering a specified wage rate for positions that could be filled by a foreign guest worker if U.S. workers are not available. Specifying the wage rate is part of the Department's effort to ensure the employment of guest workers does not adversely affect the wages and working conditions of similarly employed U.S. workers. The Department of Labor is responsible for verifying that an employer who wishes to hire temporary foreign labor has complied with the labor market test.

The Secretary of Labor has delegated her statutory responsibilities for application processing under the temporary foreign labor programs, including H-2A and H-2B, to ETA's Office of Foreign Labor Certification (OFLC). Under the current regulations in both the H-2A and H-2B programs found at 20 CFR 655, Subparts A and B, labor certification applications are processed through the State Workforce Agency (SWA) having jurisdiction over the area of intended employment and the applicable National Processing Center (NPC) within the OFLC.

H-2A

In the H-2A program, the statute sets out specific time requirements that the employer, the Department of Labor, and SWAs must meet in the processing of employer applications. Congress has specified that the Secretary may not require that an application be filed more than 45 days before the employer's date of need 8 U.S.C. 1188(c)(1). The Department must approve or deny a certification no later than 30 days prior to the employer's date of need, provided that all the criteria for certification are met 8 U.S.C. 1188(c)(3). And if the application fails to meet threshold requirements for certification, notice must be provided to the employer within 7 days of the date of filing, and a timely opportunity to cure deficiencies must be provided to the employer.

The employer, the Department and the State Workforce Agency have no more than 15 total days to complete the processing of employer applications. 8 U.S.C. 1188(c). This includes the employer placing a job order with the SWA, conducting other recruitment such as placing advertisements and contacting prior employees, and interviewing candidates; the SWA reviewing the employer's application and recruitment efforts; the Department reviewing the employer's application and recruitment efforts, and then rendering a decision on the application.

Under the Department's current regulations in 20 CFR part 655, subpart B, H-2A labor certification applications are processed concurrently through the SWA having jurisdiction over the area of intended employment and the applicable NPC. The application includes a request for alien employment certification and a job offer to domestic workers, which the SWA uses to place a job order for intrastate and interstate clearance to locate any available domestic workers for the job opportunity. Upon receipt of the employer's application, the SWA and the NPC determine whether the application was timely filed and review the terms of the job offer for any adverse effect on domestic workers.

To allow the employer to begin the mandatory "positive recruitment" of domestic workers and provide an opportunity to amend the application to address any deficiencies, the Department is statutorily required to accept or reject the application within 7 days of receipt. If the application is rejected, the employer must submit amendments within 5 days. During this timeframe, the SWA may not place the job order into the interstate clearance system until the Department has officially accepted the application—and confirming the order has no restrictive job requirements or other problems that could unfairly exclude U.S. workers. Once the application is accepted, the SWA places a job order initiating local recruitment in its state job clearance system.

The Department issues a formal letter to the employer and SWA authorizing conditional entry of the job order into the interstate clearance system, outlining the specific steps the employer must take to actively recruit domestic workers (i.e., positive recruitment), and specifying the time requirements for the employer to submit

any other documentation, such as a housing certification and proof of workers' compensation insurance, before the certification may be issued.

Recruitment of domestic workers includes placement of a local job order by the SWA serving the area of intended employment and clearance of the job order to multiple SWAs within a regional area. In addition, employers are required to conduct positive recruitment by placing two newspaper advertisements, contacting former employees from the previous year to solicit their return to the job, and any other recruitment sources identified by the Certifying Officer based on current information provided by the SWA. The SWA receives and refers all eligible applicants to the employer and tracks their disposition.

If the application is accepted on the day it is filed, the Department has 15 days in which to review the employer's recruitment efforts. During the same timeframe, the SWA must inspect the H-2A worker housing to ensure it meets the applicable Federal, State, or local standards prior to occupancy.

To provide sufficient time for the employer to petition DHS and subsequently obtain visas from the State Department for the foreign workers, Congress has required by statute that the Department issue a labor certification determination no later than 30 days before the date of need, provided that the employer has submitted to the Department all required documentation substantiating that it has met the program criteria for certification.

SWAs coordinate all activities regarding the processing of H-2A applications directly with the appropriate NPC, including transmittal of housing inspection results, prevailing wage surveys, prevailing practice surveys, or any other material bearing on an application. Because this review must take place within a 15-day timeframe, the Department is reviewing employer-generated recruitment reports that may take into account only a week of advertising and interstate recruitment. This requirement underscores the importance of the Department's notification of acceptance, because the employer and SWA cannot initiate additional recruitment efforts for domestic workers without it. For Fiscal Year 2007, the Department accepted nearly 70% of the H-2A applications within the initial 7-day processing window, allowing the maximum amount of time possible to initiate recruitment of domestic workers.

As employer utilization of the H-2A program grows, the volume of applications which must be processed within the 15-day period increases. Frequently, we are forced to transfer staff from another foreign labor certification program to the H-2A program to assist with processing in order to meet the growing demand in light of the 15-day window. This problem is exacerbated because although Congress permits the Department to charge a fee for certified applications, Congress requires that fee be deposited in the U.S. Treasury, rather than be retained by the Department to improve the program. The Department will submit legislation to change this arrangement and institute a cost recovery fee to fund the program.

There have been considerable workload increases for both the Department and the SWAs in recent years. For example, in FY 2007, the Department received 7,740 H-2A employer applications requesting certification of 80,413 positions. Of those applications, the Department certified 7,491 employer applications for 76,818 positions. This was up from 6,717 H-2A employer applications requesting 64,146 positions in FY 2006. That year the Department certified 6,550 employer applications and 59,112 positions.

Once H-2A workers are in the country, the Wage and Hour Division of the Employment Standards Administration within the Department of Labor enforces the terms and conditions of the H-2A job order pursuant to statutory authority in the Immigration and Nationality Act (INA).

H-2B

In the H-2B program, like the H-2A program, the Department's role is to certify that there are not sufficient numbers of able and qualified U.S. workers available for the position sought to be filled and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. DHS regulations provide that an employer may not file a petition with DHS for an H-2B temporary worker unless it has received a labor certification from the Department (or the Governor of Guam, as appropriate), or received a notice from one of these officials that a certification cannot be issued. The Department's role in the H-2B process is described in statute and regulation as actually being only advisory to DHS. 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A). That is, DHS could, if it chooses, approve an employer's petition even if the Department of Labor has denied the employer's labor certification application.

To obtain a temporary labor certification for the H-2B program, the employer must demonstrate that its need for the temporary services or labor meets one of the regulatory standards of a one-time occurrence, a seasonal need, a peakload need, or

an intermittent need. As with the H-2A program, the H-2B program sets filing and processing deadlines requiring that the employer cannot submit its application more than 120 days in advance and fewer than 60 days prior to the date of need. This has traditionally allowed the Department and the applicable SWA 60 days to review the application, ensure that adequate recruitment of U.S. workers is undertaken, and adjudicate the application.

The H-2B non-agricultural program presents a slightly different processing model for employers. H-2B applications that are received by the Department are processed first through the SWA having jurisdiction over the area of intended employment. To allow sufficient time for the recruitment of U.S. workers and sufficient time for processing by the states and NPCs, the SWAs advise employers to file requests for temporary labor certification at least 60, but no more than 120 days, before the worker(s) is needed.

The SWAs review the application and job offer, compare the wage offer against the prevailing wage for the position, supervise U.S. worker recruitment, and forward the completed applications to a NPC for final review and final determination. Recruitment includes placement of a job order with the SWA (or multiple SWAs for multiple locations) for 10 calendar days, newspaper advertisement for 3 consecutive calendar days, and contacting union and other recruitment sources, as appropriate for the occupation and custom in the industry. The SWA refers all applicants to the employer and tracks their disposition.

The H-2B program requires that the employer must offer and subsequently pay for the entire period of employment a wage that is equal to or higher than the prevailing wage for the occupation at the skill level and in the area of intended employment. Additionally, the employer must provide terms and conditions of employment for the position that are not less favorable than those terms and conditions the employer otherwise offers to U.S. workers for similar jobs.

Once the application is reviewed by the SWA, and after the employer conducts its required recruitment and submits a recruitment report to the SWA of the results of its recruitment of U.S. workers, the SWA sends the complete application to the appropriate NPC. The NPC Certifying Officer, on behalf of the Secretary, reviews the application and all recruitment documentation, and if satisfied that the application is complete either issues a labor certification for temporary employment under the H-2B Program, denies the certification, or issues a notice that such certification cannot be made. If additional recruitment is required, the NPC remands the application to the SWA to conduct that additional recruitment.

There have been considerable workload increases for both the Department and the SWAs in recent years. For example, in Fiscal Year (FY) 2007, there was an approximate 30 percent increase in H-2B applications received by the Department as compared to FY 2006.

In FY 2007, the Department received 14,565 H-2B employer applications requesting certification of 360,147 positions. The Department certified 10,797 H-2B employer applications for 254,615 positions. This was up from 11,267 employer applications requesting 247,218 positions in FY 2006. That year the Department certified 7,532 H-2B employer applications and 168,471 positions.

While our approval rate of applications has remained relatively constant, the number of H-2B worker positions requested per application has increased in recent years. An increasing workload and possible processing delays, particularly at the state level, remain of concern to the Department. Contrary to expectations of some, the expiration of the H-2B returning worker exemption has not resulted in a significant decrease in the volume of work of the Department. The Department processes all applications received, on a first come, first served basis without regard to the status of the cap. We have no information about whether the employer is seeking a new or returning worker.

The INA does not authorize the Department to charge a fee to employers for processing an H-2B application. The Department will submit proposed legislation to Congress that would amend the INA to allow the Department to seek a cost recovery fee from those who use the program.

Unlike the H-2A program, Congress has specifically vested the Department of Homeland Security with enforcement of the terms and conditions of the H-2B job orders, as specified in the INA. Therefore, the Department of Labor currently has no statutory authority to enforce the H-2B job orders like we do with other temporary worker programs.

STATEMENT OF WILLIAM CARLSON, ADMINISTRATOR, OFFICE OF FOREIGN LABOR CERTIFICATION, EMPLOYMENT AND TRAINING, UNITED STATES DEPARTMENT OF LABOR

Mr. CARLSON. Mr. Chairman, good morning and thank you for the opportunity to be here. Very briefly, I was going to speak to both the H2A and H2B programs that we currently administer. And the Department has several key statutory responsibilities that are related to U.S. workers. These include first ensuring that there are not sufficient domestic workers ready and available for these jobs prior to an employer seeking a foreign worker. What we refer to as the labor market test.

And second, that the employment of a foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. Again, what we refer to as there being no adverse impact. Together, these two standards once satisfied constitute the basis for the Department to grant a labor certification.

Very briefly, I wanted to mention a couple of key points for your consideration. Under current regulations labor certification applications are processed through the State Workforce Agency having jurisdiction over the area of intended employment in a DOL national processing center. In the H2A program the statute sets out very specific time requirements that the employer, the Department and the States must meet in processing applications. Congress has specified that an H2A application may not be filed more than 45 days before the employers state a need.

We must approve or deny certification no later than 30 days prior to the date of need. So together, we have 15 days to complete the entire process. This tight processing time frame in conjunction with a steady growth in the number in complexity of applications being filed and declining resources challenges our processing capabilities. Frequently we are forced to transfer non H2A staff in our centers to assist with processing in order to meet the filing demands in light of the 15-day window.

In the H2B program the Department's role is described in statute as being advisory to the Department of Homeland Security. In other words, DHS can, if it so chooses, approve an employer's petition even if the Department of Labor has denied labor certification. To obtain H2B certification, employers cannot submit applications more than 120 days prior to their date of need. Employers may not also file less than 60 days prior to their date of need. This window allows the Department and the State 60 days to review and completely adjudicate all applications we receive.

Last, there have been considerable workload increases for both the Department and the States were trending at approximately 30 percent increase over the last fiscal year, and in previous fiscal years over fiscal year 2007. The Department process is all applications we receive on a strict first-in/first-out basis. The H2B program applications, like those filed under the H2A program, are processed manually and are not part of an automated processing system.

Thank you again for the opportunity to be here this morning and discuss these important matters.

STATEMENT OF BRUCE GOLDSTEIN, EXECUTIVE DIRECTOR, FARMWORKER JUSTICE

Mr. GOLDSTEIN. Mr. Chairman and members of the committee, thank you for the opportunity to testify.

Chairman MILLER. Is your mike on?

Mr. GOLDSTEIN. Mr. Chairman and members of the committee, thank you for the opportunity to testify regarding the H2A temporary foreign worker program and the needs of migrant and seasonal foreign workers.

Congress must act now to address the needs of agricultural workers, employers and the Nation. The solution is ag jobs, the Agricultural Job Opportunities Benefits and Security Act, a bipartisan labor management compromise.

Rather than promote ag jobs, the administration proposed changes to the H2A program regulations that would slash H2A wage rates down to the level acceptable to undocumented workers, minimize recruitment of U.S. Workers, end the obligation to provide workers with housing, eliminate most oversight of employers applications, and eliminate the 50 percent job preference for U.S. workers. It also is considering eliminating transportation cost reimbursements. Even the notorious Bracero Guest Worker program had more protections.

The majority of farm workers are undocumented. The Bush proposal would do nothing to change that reality. Still, 30 percent to 45 percent of farm workers, roughly 750,000 to 1.1 million farm workers are U.S. citizens and lawful resident immigrants. Under the H2A law, they are entitled to first crack at agricultural jobs and to be treated decently. We urge Congress to stop the Bush administration from finalizing its proposed changes to the H2A program. Ag jobs is a responsible solution. It would revise the H2A programs in balanced ways and allow undocumented farm workers to earn legal immigration status by continuing to work in agriculture for 3 to 5 more years. Congress should pass it immediately.

The Department of Labor routinely violates its obligations under the H2A program now. I will highlight just a few examples of problems U.S. Workers face when trying to get jobs at H2A employers. Many employers prefer guest workers because they will work for less than U.S. workers and can be controlled more easily, because they can not switch employers and they depend on their employers for a visa in the following season.

Sabrina Steele is a farmer in Blount County, Tennessee. She recently decided to seek work off her farm. She applied for jobs at farms listed at her State workforce agency. These farms participate in the H2A program. She was amazed in her inability to get hired. Employers refused to give her a job application, told her the job was filled despite her entitlement to be hired during the first half of the season, told her that she'd have to work 80 hours a week, and didn't accept her assertion that she could do the hard work of farming. As the newspaper coverage pointed out, she was astonished at the H2A employers stereotyping and discrimination against American workers as lazy and incompetent. The H2A program is it supposed to prevent these things but did not.

Recently, a large California company called Tanimura & Antle received approval to employ H2A lettuce harvesters. The company

laid off 15 people in December 2007, even as there were H2A workers employed by the company. Two laid off U.S. workers filed a complaint with the help of the United Farm Workers stating that they inquired about the other job upon being laid off, but were told there were no positions. Tanimura then said it would allow the laid off workers to apply for jobs in its fields. But one laid off worker was told by a company official that he could not have a job because he had been quoted in a newspaper story about the discriminatory conduct. The company also offered the laid-off workers a lower wage rate than required. The DOL should prevent such abuses instead of waiting for workers to file complaints.

When DOL plays a role, it often is to workers' detriment. Last year, the Hawaiian Queen Company applied for H2A workers to raise queen bees. The company's H2A application described a workweek of 50 hours based on a 9-hour day, 5 days a week and 5 hours on Saturday. A U.S. DOL official in an e-mail asked the company's agent, "Is there some particular reason the employer wants to promise the worker an extra 10 hours of work per pay period?" The ¾ guarantee more difficult to achieve at 50 hours per week required than 40 hours per week. The company said, okay, change it.

So the DOL official changed the employer's application to state that the job was for 8 hours of work Monday through Friday, no work on the weekend. An employer is supposed to honestly state the workweek's hours. That helps U.S. Workers and foreign workers know how much work there will be, how much they can earn and what their schedule will be. What was going on here? DOL persuaded the employer to evade the potential for having to pay compensation to U.S. And foreign workers under the ¾ minimum work guarantee.

Rather than guaranteeing workers over the course of the season that they would have the opportunity to work at least 37½ hours a week, the employer would only be guaranteeing 30 hours a week. DOL should stop telling employers to misstate the numbers of hours of work.

To conclude, the Department of Labor knows that there are rampant violations of workers modest rights under H2A program. Instead of enforcing worker protections however, DOL is now proposing to eliminate most of the worker protections. Congress needs to stop DOL from moving forward on these H2A regulations that are ill-advised, and anti worker, and needs to pass Ag jobs. Thank you.

Chairman MILLER. Thank you.

[The statement of Mr. Goldstein follows:]

Prepared Statement of Bruce Goldstein, Executive Director, Farmworker Justice

Mr. Chairman and Members of the Committee: thank you for the opportunity to testify regarding the access of United States farmworkers to jobs at employers that use the H-2A temporary foreign agricultural guestworker program. My organization, Farmworker Justice, is a national advocacy organization for migrant and seasonal farmworkers that has sought to protect guestworkers and U.S. workers from abuses under the H-2A program and its predecessor since our founding in 1981.

My two main points are these: First, the Department of Labor is violating its obligations under the H-2A program and has announced plans that would harm workers still further. Second, there is an urgent need by agricultural workers and em-

ployers for Congress to act now to address immigration and labor issues in the agricultural sector by passing the AgJOBS compromise. Until Congress takes such action, it should stop the Department of Labor from finalizing its plans to change the H-2A regulations in ways that would be devastating to workers.

Here is the situation on the ground:

• There are about 2.5 million farmworkers on ranches and farms in the United States.

• The majority of farmworkers—55% to 70%—are undocumented. (The National Agricultural Workers Survey of the Department of Labor estimated that 53% of workers in fruits, vegetables and other crops were undocumented, but some say it is higher.)

• That means 30% to 45% of farmworkers—roughly 750,000 to 1,125,000—are U.S. citizens and lawful-resident immigrants performing farm work.

• The H-2A program is used by an increasing, but still small, number of employers. Perhaps 75,000 or 3% of the nation's farmworkers are now H-2A guestworkers.

Only Congress can resolve these urgent issues for several reasons:

• There is no immigration law program that allows the hundreds of thousands of hard-working undocumented farmworkers to obtain a legal immigration status. Agricultural employers have no way to help their undocumented farmworkers convert to legal status.

• Our immigration law bars an undocumented worker in the U.S. from obtaining an H-2A visa to work in the United States, even if the worker returns to his or home country first.

• Both agricultural employer trade associations and farmworker advocacy organizations agree that the H-2A guestworker program reform cannot be the sole solution to this current problem. Immigration policy must be changed.

• The Bush Administration has proposed changes to the H-2A program regulations that would decimate labor protections for U.S. and foreign workers and return us to an era of abuses we thought had ended long ago by removing protections that existed even under the old Bracero guestworker program. Congress needs to stop this from happening.

Congress Should Enact the AgJOBS Compromise

There is a compromise between labor and management, Republicans and Democrats, called AgJOBS, the Agricultural Job Opportunities, Benefits and Security Act, H.R. 341, S. 370. Congress should pass it immediately. It has broad support resulting from years of tough negotiations between the United Farm Workers and major agribusiness groups, as well as numerous members of Congress. It contains many concessions we never thought we could accept, but it's time for action. AgJOBS is fair to workers, fair to employers and would benefit the nation. AgJOBS has two parts: (1) an earned legalization program and (2) a set of changes to the H-2A program. We urge Congress to pass AgJOBS.

We also urge Congress to stop the Bush Administration from moving forwarded on the ill-advised, one-sided changes it has proposed to the H-2A program's regulations. These changes would only worsen conditions under the H-2A program for workers and poison the atmosphere for the kind of compromise that was reached in AgJOBS between farmworker advocates and agricultural employers.

The Department of Labor Fails to Enforce H-2A Program Protections

It would take too long to catalogue all the problems that U.S. workers and foreign workers face under the H-2A program. I will highlight just a few examples related to the problem of U.S. workers getting jobs at employers that want to use the H-2A program. This problem, however, is only one of many, and these examples are emblematic of widespread abuses.

The H-2A program inherently contains risks of abuses.

• First, the H-2A visa effectively restricts the foreign worker's ability to demand better, or even legal, wages and working conditions from their employers for fear of being deported or not being invited back in a following season. The H-2A worker may only work for the one employer that obtained the visa for them and must leave the country when the job ends. The worker has no right to a visa in a future year; the employer (absent a union contract) decides for whom it will request a visa. See 8 C.F.R. § 214.2(h)(v).

• Second, the poor economic circumstances of most H-2A workers cause them to be willing to accept less than what a U.S. worker will accept and less than what the law allows. Most H-2A workers are poor and come from poor nations, particularly Mexico, Guatemala, Jamaica, and Thailand.

• Third, the legal structure of the program deprives U.S. workers and foreign workers of economic power to demand better wages and working conditions. Under

the H-2A program, an employer must offer at least the special minimum wage rate and benefits required by the program, but need not offer any more. 20 C.F.R. § 655.101. A U.S. or foreign worker who offers to work for 25 cents an hour above the minimum required wage can be deemed to be "unavailable" for work and substituted for a guestworker who accepts the minimum.

For these reasons, the H-2A program contains two basic protections. 8 U.S.C. § 1188(a)(1).

• The H-2A employers must seek approval from the DOL for a recruitment plan. 20 CFR § 655.102(d). They must recruit U.S. workers meaningfully through several methods, using both private-market mechanisms and the interstate job service offices. They must engage in the same kind and degree of recruitment inside the U.S. that they engage in to find foreign workers abroad. § 655.105(a), 655.103(f). Qualified U.S. workers who apply through the first half of the season must be hired under what is called the "50% rule." § 655.103(e).

• Second, the H-2A employer's job offer must contain certain minimum wages and working conditions to prevent employers from creating an artificial labor shortage. No amount of recruiting will succeed at attracting or retaining U.S. workers if the wages and working conditions are substandard or illegal.

Unfortunately, H-2A employers routinely discriminate against U.S. workers and the Department of Labor allows systematic discrimination. In fact, because the Department of Labor refuses to regulate the hiring process in the foreign countries, U.S. employers routinely discriminate on the basis of gender, age and disability. H-2A employers almost never hire women as guestworkers because they prefer young men. When employers can select foreign workers based on stereotypes and other prejudices to achieve the workforce they desire, they are less likely to be willing to hire U.S. workers who fall outside those stereotypes and prejudices.

Occasionally, H-2A employers admit that they engage in the very harm the law is intended to prevent. A Georgia grower of Vidalia onions told a newspaper reporter a few years ago:

If we had a bunch of American workers, we would have to hire someone like a personnel director to deal with all the problems * * * The [migrants] we have now, they come and work. They do not have kids to pick up from school or take to the doctor. They do not have child support issues. They do not ask to leave early for this and that. They do not call in sick. If you say to them, today we need to work ten hours, they do not say anything. The problems with American workers are endless.[1]

Yes, the "problem" with American workers is that that they are human beings who have some economic freedom, must pay the cost of living in the United States, and even may have children to take care of. That "problem" should not disqualify them.

There are many ways employers can carry out their preference for guestworkers. The most obvious is a simple refusal to hire a US worker who manages to apply. The Department of Labor has permitted H-2A employers to hire guestworkers without requiring any meaningful recruitment. We have been reviewing H-2A applications and the recruitment plans are often limited to a phrase promising to comply with DOL's instructions or just placing an ad in a newspaper that few farmworkers read.

More subtle methods of avoiding or deterring U.S. workers include giving workers the "run around" when they try to apply for a job (e.g. by requiring a job application at inconvenient times or exhibiting a lack of willingness to hire a qualified U.S. worker who applies), imposing unusual or onerous job qualifications that deny jobs to US workers or cause them to avoid pursuing the job (like submitting a resume, requiring extensive experience in a particular job, demanding unrealistic productivity), or unnecessarily changing the length of the season so that it no longer meshes with a migrant worker's itinerary along the migrant stream.

We offer here a few recent examples of how the Department of Labor and H-2A employers obstruct recruitment of United States workers deny jobs to U.S. workers.

The Hawaiian Queen Company: DOL Encourages Employers to Evade the Law

Recently, the US Department of Labor suggested (and persuaded) a company to alter its application to misstate the number of hours per week for several H-2A jobs. The understating of actual hours is illegal. Another impact is avoidance of the H-2A minimum work guarantee.

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[1] Chicago Tribune, "Immigration Clash Leaves Vidalia Onion Farmers Bitter," May 28, 1998.

An H-2A employer must file with its H-2A application a "job order" that states the hours it expects employees to work each week. The job order is used to recruit U.S. workers.[2]

The accurate statement of hours of work is a simple but important requirement. If the employer falsely advertises a job as having relatively few hours per week, U.S. workers may not choose to apply because they may seek full-time work that will yield greater weekly earnings. Further, workers who apply and are hired based on the false description of hours may quit because they were misled by the employer and the job's schedule may conflict with family obligations.

The statement of hours is also important to the three-fourths minimum work guarantee. An H-2A employer must offer workers at least three-fourths of the hours stated in the job offer or pay compensation for the shortfall. This longstanding obligation ensures workers a reasonable earnings opportunity. It also discourages employers from over-recruiting and then lowering their wage offers to the desperate people who came looking for work. If an employer's job is 40 hours per week for 10 weeks, or 400 hours, then the three-fourths guarantee would ordinarily entitle the worker to the opportunity to work at least 300 hours (absent an Act of God). An employer should not understate the actual number of hours the job requires in an effort to reduce the three-fourths minimum work guarantee. 20 C.F.R. § 655.102(b)(6).

In August 2007, the Hawaiian Queen Company, which raises and sells queen bees for agricultural purposes, applied for several H-2A workers for jobs on the big island of Hawaii. The company's application to the Department of Labor and the Hawaii job service stated that the workers would be employed for 50 hours per week, based on a 9-hour day, 5 days per week, and 5 hours on Saturday. On the form, it listed 40 hours per week as the basic hours and 10 hours a week of "overtime" (however, farmworkers are excluded from federal overtime pay so the wage rate was not time-and-one-half). At the H-2A minimum wage in Hawaii of $10.32 per hour, a 50-hour week would yield $516 per week. For the full season, October 1, 2007 through July 31, 2008, about 44 weeks, a worker could expect to earn $22,704.

Through a request under the Freedom of Information Act, and a lawsuit to force responses from the Department of Labor, we obtained the application and the correspondence between the company and the Department of Labor regarding the approval of the H-2A application and the job terms. (Excerpts of the application and correspondence are in Exhibit 1.)

On August 10, 2007, a US DOL official wrote to the consulting firm that handled the H-2A application for the Hawaiian Queen Co. and suggested that she be permitted to change the company's stated number of hours for the job. She wrote, referring to the H-2A application:

Item 10 of the ETA 750 states that 40 hours in [sic] the norm with 10 hours OT. Item 8 of the ETA 750 states 50 hours. Is there some particular reason the employer wants "to promise" the worker an extra 10 hour of work per pay period? The ¾ guarantee is more difficult to achieve at 50 hours per week required than 40 hour [sic] per week. If the employer requires 40 hours per week but offers the workers 50 hours per week, the extra 10 hours each pay period goes toward the ¾ guarantee.

The agent for the company responded by email on August 13 at 7:37 am, "please base on 40 hour work week." (See p. 29 of Exhibit 1.) The DOL official replied, "Do you want to remove the mandatory 10 hours per week OT?" The agent answered, "Please and thank you." Apparently realizing that another form (the Job Order) had to be consistent with the change made to the H-2A application, and that the 10 hours per week difference had to be accounted for by changing more than the Saturday hours, the DOL official wrote another email to the company at 8:50 am saying the following: "Hello again. It [sic] order to make Item 8 of the ETA 790 compute correctly the 9 hours should be changed to 8 with no hours showing on Sat. and Sun." The company's agent replied, "Please go ahead and make the necessary changes to the ETA 790."

The DOL official made changes on the forms submitted by the employer but did not do so consistently. Consequently the application contains contradictions. The H-2A application form (Form 750) in item 11, on the first page, was not altered and remained 7am to 4 pm, which would be 9 hours per day or 45 hours per week (not 40). The job order (Form 790) contains changes to the hours in handwriting and a pen that differs from those submitted on the original form by the employer. The number of hours per week is changed from 50 to 40 hours. The "9" for each weekday is changed to an unusual-looking "8" and the "5" hours per day on the weekends are crossed out. Item 8 in the Attachment to Form 790, was not changed and contin-

[2] 20 CFR §653.501(d)(2)(iii)-(iv); 20 CFR § 655.103(d), 655.104(a), 655.106(a).

ued to state 9 hours per day, 5 days per week with 5 additional hours on the Sabbath or holidays.

Several U.S. workers expressed interest in the job. As far as they knew, the job opportunity only paid $412.80 per week, or $18,163 over the 44 weeks, which is 20% less than what the company admitted is the reality.

The H-2A official's suggestion was intended to undermine workers' right to the ¾ minimum work guarantee. Suppose the H-2A workers who were hired averaged only 36 hours per week. DOL would take the position that the employer had offered 90% of the promised work (of 40 hours a week), which is more than the required three-fourths (75%) minimum work guarantee. If the stated work week were 50 hours, then the minimum guarantee would be 37.5 hours per week on average, and the workers would be owed compensation for 1.5 hours of work per week. DOL should reverse its action and ensure that workers receive any three-fourths guarantee compensation under the proper analysis. DOL should stop telling employers to misstate the number of hours of work.

A Tennessee Farmer/Farmworker Can't Get a Job at Local H-2A Employers

Sabrina Steele lives in Blount County, Tennessee, population 118,000; it is south of Knoxville. She has been a farmer for several years. She decided to seek work off her farm by contacting the Tennessee Career Center. She obtained information on several firms that were seeking work and had advertised with the state job service because they participate in the H-2A program or the H-2B program. She was amazed at her inability to get hired. Employers sought to dissuade her from applying for a job, refused to give her a job application, told her the job was filled despite the 50% rule that requires employers to offer qualified U.S. workers the job until half the season has elapsed, told her she'd have to work 80 hours a week, didn't accept her assertion that she could do the hard work of farming, and otherwise simply wouldn't hire her.

Her statement (Exhibit 2) and a local newspaper article, (Exhibit 3), about her unsuccessful efforts to gain a job at these employers, demonstrate that once a company decides to hire guestworkers, it often loses interest in hiring a U.S. citizen or permanent resident immigrants.

Ms. Steele was astonished at the stereotypical, discriminatory attitudes about "American workers" that she confronted. Her statement is consistent with the local newspaper's report about her efforts. The owner of a foreign labor contracting service that supplies H-2A workers in Kentucky and Tennessee said to the newspaper, "American farmers are frustrated * * * by American workers who takes [sic] jobs and then quit after a few days. This [the H-2A program] is the only way our farmers can know that they'll have a crew the next morning when they wake up." Treating all "American workers" as worthless is discriminatory, and contrary to the reality of hundreds of thousands of American farmworkers who work hard to put food on our tables for little money. That attitude also serves the interests of the labor contractors who make their money by recruiting foreign workers and make less money if a U.S. worker fills the job.

Tanimura & Antle; Laying Off U.S. Workers and Hiring H-2A Guestworkers

A large California company applied for and received approval to employ H-2A guestworkers in the lettuce harvest from November 2, 2007 to March 31, 2008. The company, Tanimura & Antle, laid off about 15 people on December 15, 2007 but gave the workers no opportunity to fill the positions that had been offered to H-2A workers. Under the H-2A program, an employer is obligated to recruit U.S. workers actively and is expected to offer the position to former employees. Qualified U.S. workers are entitled to the job as long as they apply during the first half of the season (which would have been mid-January). Two such workers filed a complaint through the United Farm Workers stating that they inquired about other jobs at Tanimura & Antle upon being laid off in December, but were told that there were no positions. (Exh. 4, p. 2.)

After receiving notice of the complaint to the Department of Labor, Tanimura & Antle notified workers who had been laid off that they would be hired for the last month of work under the H-2A labor certification, in its fields near Yuma, Arizona and Bard, California. After the Fresno Bee ran a story about the layoff and the hiring of H-2A workers, the company agreed to offer work to the-laid off employees. However, one of the workers who was interviewed by the newspaper was told by a company official that he could not have a job due to publicly raising the issue. (Robert Rodriguez, "Laid-off worker says Salinas firm didn't try to rehire him," Fresno Bee, March 14, 2008). The United Farm Workers has filed a complaint on the worker's behalf with the U.S. Department of Labor.

The company said that any re-hired workers in Arizona would be paid $9.20 per hour and that any that were assigned to nearby Bard, California would be paid $9.72 per hour. The United Farm Workers supplemented its complaint on behalf of the workers because the wage in Arizona should have been $9.72 per hour, as the company had promised as part of the H-2A application to pay all the workers in the lettuce harvest at the applicable higher California H-2A rate. (Exh. 5 at p. 3 of H-2A application.)

The Department of Labor seemed to play no role in these developments despite its obligation to oversee the operation of the H-2A program. There are several complaints that the United Farm Workers has filed which the DOL is investigating.

Conclusion

DOL has before it ample evidence that the recruitment requirements in the H-2A program should be enforced more vigorously to reverse widespread violations of U.S. workers' rights to be recruited effectively for jobs by H-2A employers. Instead of proposing regulatory changes to weaken recruitment and enforcement, DOL should enforce the law. Congress needs to act to stop the DOL from changing the H-2A regulations. Congress also needs to pass the bipartisan labor-management compromise called AgJOBS to address the legitimate needs of workers, employers and the nation.

Chairman MILLER. Mr. Riojas.

STATEMENT OF JAVIER RIOJAS, ATTORNEY/BRANCH MANAGER, TEXAS RIO GRANDE LEGAL AID

Mr. RIOJAS. I work for Texas RioGrande Legal Aid and one of the program's missions is to represent Texas migrant and seasonal farm workers who are displaced by guest workers. And today, I have the privilege of conveying to the committee the experience of 22 of 720 Texas workers that applied for a job with a major watermelon grower.

This grower strives to have year round produce by planting its crops in various locations in Mexico and in Texas. And it succeeded in getting foreign guest workers basically by misclassifying its jobs as non agriculture. This grower uses 2 farm labor contractors basically to plant, grow, harvest and package its produce within its own facilities. Yet, by using the H2B program it was able to obtain foreign guest workers without offering those jobs to the Texas workers that sought those jobs. Here is how they did it. Basically, from 2001 through 2004 they represented to the Department of Labor that they were doing agricultural produce packing and it was going to start in Arkansas. They disclosed that the produce packing in Arkansas was harvesting and packing sweet corn in Newport, Arkansas in early February. At that time of the year, there is no sweet corn to harvest in Arkansas. But by disclosing that they were able to take advantage of the 10-hour window that the Department provides for recruiting U.S. workers.

Under that 10-hour window they basically advertised the jobs in the local area for 3 days in a local newspaper and keep a job order open. Obviously no workers are going to respond to that work opportunity that does not exist.

In the meantime, when the work actually started in Texas, they did no recruitment where the work actually was in Edinburg, Quemado and Plains. So no Texas workers were getting a shot at those jobs. My clients who were seasonal workers who were doing these work for years would go to the job sites. And were told no, there is no work. We already have a complete crew and that crew was H2B workers that were coming in.

From 2004 to 2007 once the Department caught on to that fictitious first leg in the itinerary, they started disclosing the work involved in produce packing at a fixed site in Edinburg, which is in the Rio Grande Valley. By doing this they only had to recruit for those 10 days in the Edinburg area and they didn't disclose to subsequent sites where the harvesting moved to Quemado, the area of Eagle Pass and further on up into west Texas.

What was happening to the workers, my clients were applying for the job, those that were from the Rio Grande Valley and they were getting the runaround. They applied, called the employers and they weren't returning calls. If they answered, they were telling the workers, no, the work doesn't pay 8.62 an hour, as was disclosed in the job order, we pay 5.59. No, it is not just working in Edinburg at the warehouse, it will actually be harvesting watermelons in the field. And you will have to go to Quemado and Plains and you will have to pay for your own housing and transportation. But the workers still wanted those jobs because the pay was good, it was 8.82.

The employer kept changing the dates of need, call back later, call back later. Eventually they sent a mass mailing to the workers. We haven't heard from you, if we don't hear from you in 10 days we will assume you are not interested type stuff. And the workers responded to those letters. They kept insisting I want that job, I want that job. Well, it is going to start at a later date, we will give you a call. That call never came. The jobs came and went and my clients didn't get to work.

The workers moved from the valley to Eagle Pass where I work. I have clients who are seasonal workers there and they had been doing these jobs for years. They would go to the packing shed and apply for the job, I want work. And they were told there is no work. We have already got a complete crew. And there they had the H2B workers who were allegedly working in warehouse packing harvesting crops out in the fields.

And this continued until this year when a worker at the Texas Workforce Commission finally went and discovered that the site where the packing shed was actually a vacant lot. They discovered that the work actually was agricultural work and that the packing sheds were in the field that belonged to farmer. And so they were forced to apply for H2A workers. The workers responded and again they were not hired. Instead the employer went through the applications and basically the opportunity disappeared for the Texas workers. Thank you.

[The statement of Mr. Riojas follows:]

Prepared Statement of Javier Riojas, Attorney, Branch Manager, Texas RioGrande Legal Aid, Inc.

Thank you for inviting me to discuss our lawsuit, Riojas, et al. v. Chao, et al.,[1] involving the U.S. Department of Labor's ("DOL") unlawful administration of the H-2A and H-2B guestworker programs. In the case, we represent 22 of the hundreds of U.S. workers who were rejected on H-2 job orders from 2001 to 2007. Unfortunately, our clients could not testify in person because of work conflicts.

My name is Javier Riojas. I am a 1981 graduate of Brown University and a 1983 graduate of the University of Texas School of Law in Austin. I am an attorney and branch manager for Texas RioGrande Legal Aid, Inc. (TRLA) in Eagle Pass, Texas, a small town on the border with Mexico. I have worked for TRLA since 1984 and have represented thousands of U.S. farmworkers, H-2A agricultural guestworkers

and other low-income Texans. I grew up as a migrant worker and traveled north every year with my family from our home in Eagle Pass.

I. Summary of Riojas, et al. v. Chao, et al.

We represent 22 U.S. citizens and legal permanent residents, who are migrant and seasonal farmworkers that tried to obtain and hold H-2 jobs. We sued three south Texas agricultural employers—a watermelon grower, two farm labor contractors, their shared immigration attorney and DOL. We alleged that the employers falsely misclassified their jobs as nonagricultural in order to qualify for H-2B workers and avoid the H-2A program's relatively more stringent recruitment requirements for U.S. workers, free housing and transportation, Adverse Effect Wage Rate, fifty percent rule, three-fourths guarantee, and other benefits.[2] The employers acquired over 400 Mexican H-2B workers from 2001 to 2007 to work mainly harvesting watermelons and onions in their fields in Edinburg, Quemado, and other areas in Texas. The Texas and Arkansas workforce agencies referred about 720 U.S. workers for the H-2 jobs. See Exhibit 3 for a partial list of Texas referrals. Almost all of them were rejected outright or received the "run-around." Exhibits 1, 5 and 6. The few U.S. workers who were hired suffered abusive treatment and received lower pay and fewer benefits than the H-2 workers. Year after year, DOL continued to approve the employers' fraudulent applications despite mounting evidence of visa fraud and U.S. worker discrimination.

II. H-2 Programs' Adverse Effects on Our Clients: U.S. Workers

Maria R. and her daughter Romelia R. are legal permanent residents. They worked for the companies for several years until their employers began to use H-2B workers. In 2005, Maria R. and Romelia R. contacted the companies several times and went to the packing shed for a job as they had each year for several years. They were told to wait and there might be work later. They waited all day. When Maria R. picked up a broom and began to sweep, the supervisor shouted at her to leave because all the jobs were filled.

Bladimir G. is a U.S. citizen. He is one of four adult children in a family of migrant farmworkers. They travel and work together. His family applied at TWC for several of the H-2 jobs for the 2005 and 2007 seasons. They never got the jobs. Instead, they got the H-2 "run-around." The 2005 job advertisement attracted the family because of a wage of $8.75 per hour, full-time local work indoors in a packing shed in nearby Edinburg, Texas for eleven months. The ad stated no minimum requirements and sixty positions available. The family called the company five times in the two months leading up to the job's starting date. The company always told them to await a return call. When the family called, the company gave them different information than that stated in the job ad. The company said the work was outdoors, in the fields cutting onions and watermelons. The work would start in Edinburg and then move to west Texas, where the family would need to find its own housing. Although disappointed by the changed job terms, the family was still willing to accept the job. The family called two days before the job was supposed to begin in January 2005 and was told that the work would start in March, and to wait for a call then. Bladimir G.'s father called the company in February and the company told him for the first time that they were not going to hire the family.

Benigna and Eustaquio L. have been married for 26 years. They are legal permanent residents. They have performed farm work together for eleven years. They too got the H-2 "run-around." Benigna L. tells her story in an affidavit, attached as Exhibit 1. The couple called the company several times over two months and was told to expect return calls. The couple quit calling about the job when they learned from a TWC official that the company had mockingly told another U.S. applicant to quit trying. The company never overtly refused to hire the pair, and like many workers they just quit trying.

III. Current Status of the Case

We settled our case with the employers, who acknowledged the work was agricultural and agreed to hire U.S. workers first, and if they cannot find enough, then they will apply for H-2A workers. Our suit against DOL is ongoing. DOL filed a motion to dismiss for failure to state a claim. We responded and reasserted our allegations that DOL specifically violated the law several times in our case, and that the agency's general administration of the H-2 programs violates the Administrative Procedures Act (APA).

IV. DOL Knowingly Approved Employers' Fraudulent H-2B Applications

In our case, DOL knowingly approved the employers' fraudulent H-2B applications. In 2005, DOL's Wage and Hour Division conducted a field inspection of one

of the employers and reported H-2B workers in the field. Exhibit 4. DOL continued to certify the employer for H-2B workers for two more years.

In 2002, one of the farm labor contractors applied for H-2B workers to pack sweet corn in Newport, Arkansas starting in February 2003, and then other work in the Rio Grande Valley and west Texas the rest of the year. Because of the H-2B program's fewer U.S. worker recruitment requirements, the employer only needed to recruit U.S. workers for ten days in Newport in the fall, and avoided recruiting farmworkers in Texas in the spring and summer. Still, at least twelve U.S. workers applied and the farm labor contractor hired zero because they lacked "experience." DOL certified the application even though sweet corn is not ready to harvest or pack in Arkansas in February.

Each year from 2005 to 2007, the Texas Workforce Commission sent numerous warnings to DOL that the employers were discriminating against U.S. referrals. Exhibit 5. Finally in 2007, DOL required one of the three employers to submit an H-2A application, which the agency approved despite multiple unlawful rejections of U.S. workers. Exhibit 6.

V. DOL's Administration of the H-2 Programs Is Unlawful

DOL unlawfully administers the H-2 programs. DOL has never promulgated substantive rules for the H-2B program. Its operative H-2B rule states that the H-2A policies should be followed in certifying H-2B applications.[3] Instead, DOL has issued a series of substantive memos[4] that were never subjected to notice and comment rulemaking as required by the APA.[5] These guidance letters prescribe the procedures, benefits and protections of the H-2B program, which are far fewer than its H-2A counterpart. As a result, many U.S. workers are harmed, violating the two-part statutory mandate that U.S. must be recruited first, and their wages and working conditions must not be adversely affected by the employment of foreign guestworkers.[6]

VI. DOL Argues that Congressional Silence Allows it Broad Discretion over the H-2B Program

DOL's main argument in its motion to dismiss is that Congress was silent about the H-2B program when it passed the Immigration Reform and Control Act (IRCA) of 1986. IRCA bifurcated the H-2 visa category into the H-2A agricultural and H-2B nonagricultural programs. In contrast, Congress codified the then existing regulations for H-2 agricultural workers, which were fairly detailed, into the H-2A provisions now in the statute.[7] Therefore, argues the agency, because Congress did not issue any similar H-2B provisions, Congress intended fewer benefits and protections for American and foreign workers in the H-2B program, or at least allowed DOL to prescribe fewer. In 1996, a federal court agreed with DOL on this interpretation.[8] Ironically, DOL uses its discretion to prescribe fewer procedures for the H-2B program while claiming that it lacks authority to enforce the H-2B contracts.

VII. Our Response to DOL Lists Nine Ways the Agency Should Comply with its Statutory Mandate to Protect U.S. Workers

In our response to DOL's motion to dismiss, we stated nine ways DOL should comply with the statute so that U.S. workers are hired first, and their wages and working conditions are not adversely affected by foreign guestworkers.[9] First, the agency should incorporate the H-2A program's benefits and protections into the H-2B program according to 20 C.F.R. § 655.3(b). Second, DOL should cease its practice of "one-to-one" labor certifications which allows employers to over-apply for H-2 workers and then unlawfully reject any U.S. workers that apply.[10] For example, in our case, an employer applied for 40 H-2A workers. The employer unlawfully rejected 37 U.S. applicants. DOL sent a letter that denied certification for 37 openings and approved three. DOL's letter even detailed the unlawful rejections of the U.S. workers. Exhibit 6. Third DOL should use its expertise and data to set an objective threshold like 8 percent local unemployment, above which H-2 workers will only be certified during an extraordinary, bona fide labor shortage. In our case, the agency approved hundreds of H-2 workers in areas of south and west Texas with double-digit unemployment rates. Fourth, DOL should enforce H-2B rules. Fifth, the agency should use a standard like "reasonable suspicion" to bar, suspend, reject, revoke noncompliant employer applications and job orders before harm occurs to U.S. workers. DOL currently requires the results of a completed investigation before ceasing service to an employer, and will often force state workforce agencies like the Texas Workforce Commission to circulate job orders that state officials suspect to be fraudulent. Many Texas farmworkers and SWA officials no longer trust job orders with H-2A job terms after years of rejection and the H-2 "run-around" when they try to contact the employer. Sixth, DOL should reinstate the coordinated enforcement activities at 29 C.F.R. Part 42, which the agency has suspended.

Finally, we stated three ways that DOL should comply with the law in the context of large grower operations with packing sheds and food processing areas, like our in our case. Packing sheds are a gray area in between the H-2A and H-2B programs. Sometimes the work is agricultural, and sometimes it is nonagricultural depending on various factors like the source of the produce. Thus, many employers have learned to manipulate the job description to qualify for H-2B workers, or they are confused. DOL should classify all packing shed work as agricultural, and thus make it subject to the H-2A program. Alternatively, the agency should prescribe special H-2B procedures for packing sheds similar to the H-2B special procedures for tree planters and entertainers.[11] Third, DOL should require special assurances from registered farm labor contractors who seek H-2B nonagricultural workers.

VIII. Employers Fraudulently Apply for Misclassified H-2B Workers to Avoid the Benefits, Protections and Costs of the H-2A Program

Because of the disparities between the benefits and protections in the H-2A and H-2B programs, employers like the defendants, prefer H-2B workers because there are much fewer requirements for recruiting U.S. workers and because it is cheaper to employ them. Therefore, the differences between the H-2A and H-2B programs provide an incentive for unscrupulous employers to abuse the guestworker programs and commit visa fraud.

One historical limitation on employers' preference for H-2B workers was the statutory cap of 66,000 annual visas.[12] The Save Our Seasonal Businesses Act of 2005[13] increased the cap for three years and led to a huge expansion of the H-2B program. The cap increase expired in fall of 2007 and Congress is currently debating whether to extend it.

The H-2A program better tests the availability of American workers. H-2A employers must actively recruit U.S. workers for 45 days in comparison to the ten day recruitment period for the H-2B program.[14] In addition, whereas the 45-day H-2A recruitment period directly precedes the start of the work, the 10-day H-2B recruitment period occurs several months before the start of the work thereby discouraging U.S. applicants who need immediate employment.[15] An H-2A employer must hire U.S. applicants for the job until 50 percent of the visa period has elapsed, even if the employer must displace H-2A workers.[16] The H-2B program has no such requirement as currently administered.

The H-2A program requires employers to submit a work itinerary that lists the location and dates of all job sites.[17] The H-2A employer must cooperate with the State Workforce Agency (SWA) to locally recruit U.S. workers at each location on the itinerary.[18] An H-2B employer, however, is not required to recruit U.S. workers locally for each job site on the itinerary.[19] Also, the H-2B employer need only pay the prevailing wage from the first job site at subsequent job sites.[20]

The H-2A program provides more benefits and protections for U.S. and foreign workers than does the H-2B program as administered by DOL. For example, an H-2A employer must pay the "Adverse Effect Wage Rate," and provide free housing and transportation, meals or a kitchen facility, tools, workers compensation insurance and a three-fourths work guarantee during the visa period.[21] H-2B workers receive a lower "prevailing wage," or the minimum wage, and none of the foregoing benefits.[22] In our case in 2007, the H-2B prevailing wage for packers was $6.53 per hour whereas the H-2A Adverse Effect Wage Rate was $8.66. The company was offering the U.S. workers $5.59. Exhibit 5.

IX. Because of Legal Services Corporation Restrictions, TRLA could not Represent 400 Ineligible H-2B Workers who should have been Eligible H-2A Agricultural Workers

One unfortunate irony about our case is that TRLA could not offer representation to the 400 H-2B guestworkers because of Legal Services Corporation restrictions imposed by Congress.[23] We are authorized, however, to represent H-2A workers with matters related to their H-2A contract.[24] Here, because the employers misclassified the workers as H-2B workers, we could not offer them representation even though they were employed in agricultural and should have received H-2A visas.

During outreach in 2005, we located twenty of the H-2B workers in a run-down apartment building in Eagle Pass. Twelve workers shared a vacant unit with air mattresses on the floor. Only one H-2B worker, Isidro A., had the guts to speak up. Exhibit 2. We were lucky to get him a local private attorney, with knowledge of immigration law, who was generous enough to co-counsel on the case for the prospect of "peanuts" in compensation. Isidro A. patiently waited in his small village in central Mexico for three years as the private attorney investigated, filed and then settled his case, in conjunction with workers represented by TRLA.

The farm labor contractor always recruited crews of young men from Isidro A.'s village. When the employer learned about the lawsuit, he intimidated Isidro A.'s sister in Texas to get Isidro A. to drop the suit. The employer also blamed Isidro A. for not getting any more H-2B visas for the villagers. As a result, Isidro A. has been ostracized locally in Mexico for exercising his rights in the United States. If TRLA had been able to offer representation to the twenty H-2B workers that night in 2005, maybe Isidro A.'s coworkers would have joined the suit and Isidro would not have been isolated and ostracized.

X. Conclusion

Thank you for inviting me to testify about our case. I welcome your questions.

EXHIBITS*

1. Affidavit of U.S. Worker, 2008
2. Affidavit of H-2B Worker, 2008
3. TWC print-outs of U.S. job referrals, 2006-2007
4. DOL Wage & Hour Division Field Inspection Report, 2005
5. TWC Emails to DOL, 2007
6. DOL H-2A Certification Letter, 2007

ENDNOTES

[1] Riojas, et al. v. Chao, et al., No. DR-07-CV-058 (W.D.Tex. filed Oct. 9, 2007).
[2] See infra VIII.
[3] 20 C.F.R. § 655.3(b).
[4] General Administration Letter (GAL) No. 10-84, 49 Fed. Reg. 25,837 (June 25, 1984); General Administration Letter No. 1-95, 60 Fed. Reg. 7216 (Feb. 7, 1995); Training and Employment Guidance Letter No. 21-06, Change 1, 72 Fed. Reg. 38621 (July 13, 2007).
[5] 5 U.S.C. §§ 553 et seq.
[6] 8 U.S.C. § 1188(a); 20 C.F.R. § 655.0(a)(1).
[7] 8 U.S.C. § 1188.
[8] Martinez v. Reich, 934 F.Supp. 232, 237-38 (S.D.Tex. 1996).
[9] 8 U.S.C. § 1188(a); 20 C.F.R. § 655.0(a)(1).
[10] DOL actually articulated this practice of "one-to-one" partial certification in the H-2B program with TEGL 21-06, Change 1 (V)(E): "If one or more U.S. workers * * * were unlawfully rejected by the employer * * * the NPC Certifying Officer has the authority to issue a partial certification for only those job opportunities that remain unfilled by qualified U.S. workers * * * *"
[11] See Training and Employment Guidance Letters No. 27-07 (June 12, 2007) and No. 31-05 (May 31, 2006).
[12] 8 U.S.C. § 1184(g)(1)(b).
[13] Save Our Small and Seasonal Business Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (codified in 8 U.S.C. § 1184(g)(9)).
[14] Compare DOL H-2A Handbook I-50, 20 C.F.R. §§ 655.100(b), 655.101(c), 655.103(d) and 655.105 with TEGL 21-06, Change 1 (IV)(C).
[15] TEGL 21-06, Change 1 (III)(E) and (F).
[16] 20 C.F.R. § 655.103(e).
[17] ETA H-2A Handbook No. 398 (I)(A)(2)(C).
[18] Id.
[19] TEGL 21-06, Change 1 (IV)(C) and (D).
[20] TEGL 21-06, Change 1 (IV)(A).
[21] See e.g. 20 C.F.R. §§ 655.90(a)(2), 655.100(b), 655.102(b)(1), 655.102(b)(5)(i), (ii) and (iii), and 655.102(b)(6).
[22] TEGL 21-06, Change 1 (IV)(A).
[23] 45 C.F.R. § 1626.5 implementing Omnibus Consol. Rescissions & Approps. Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 1321-53 to -56, and subsequent appropriation bills.
[24] 45 C.F.R. § 1625.11.

Chairman MILLER. Thank you, Mr. Young.

STATEMENT OF JOHN YOUNG, PAST EXECUTIVE DIRECTOR, NEW ENGLAND APPLE COUNCIL

Mr. YOUNG. Mr. Chairman and members of the committee, I am a fourth generation apple farmer from New Hampshire. I have used H2A workers on my farm for 46 years. I have been an officer in several regional and national employer associations. I consult

*Exhibits 1-6, submitted by Mr. Riojas, are available for public review in our Committee's main office, 2181 Rayburn House Office Building.

with employers from other parts of the country, who have used both H2A and H2B workers.

I am testifying today on behalf of the New England Apple Council. Apple council members have employed H2B or H2A workers every year since 1943. We have an agricultural labor crisis. And to address it I was involved from the beginning in the negotiations with the farm worker advocates, which resulted in the ag jobs legislation. It is a pleasure to be working together with Congressman Berman and Mr. Goldstein and his associates to pass Ag jobs.

It was only after a careful examination of the current H2A program that the Ag jobs legislation was drafted. We tried to improve the existing H2A program and allow an orderly transition of the present workforce to a legal status. Enforcement alone without reliable guest worker programs is doomed for failure. Without passage of a comprehensive immigration reform legislation in the near future, the safety, quality and quantity of domestically produced food will be at risk because of the of labor.

As an employer, it makes sense to hire available local workers, because it is simply more cost effective. Yet my experience in New England and elsewhere demonstrates that very few unemployed accept agricultural or H2B work. Despite advertising, contacts with former employees, placing a job order in local, as well as interstate, recruitment and now also electronic placement, few and usually no workers are interested in employment.

Our job offers are cleared to Puerto Rico and even from there, which is a traditional supply state for agricultural labor, few people are interested. Those who are interested often do not show and many leave before the season's end.

Over the last 3 years, the New England's Apple Council has arranged 233 H2A referrals yearly from Puerto Rico. About half of them are not really interested in work, but they have been encouraged by the employment service to apply. Less than 25 percent of those referred actually start work. And of those who do start work, less than half of them complete the season.

One of our largest Connecticut growers has over the last 4 years had 103 referrals from Puerto Rico, 16 percent started work and 11 percent finished the season. More than 60 percent of this employer's workforce is made up of local workers. And nationally, it must be noted that less than 2 percent of the agricultural workforce are H2A workers. The overwhelming proportion, 98 percent, are hired as U.S. workers.

My written comments give several examples of major recruitment efforts undertaken giantly by employers in the government. In New England, California, Washington State, each effort has failed. Unemployment rates have had very little impact on the number of referrals. I have also attached to my written comments 3 studies done by the first pioneer farm credit done in New York, New Jersey and New Hampshire. The studies show what the economic impact will be of a farm labor shortage resulting from significantly enhanced immigration enforcement actions without new guest workers provisions. In New Hampshire as much as 40 percent of the agricultural production will be lost, 58 million. In New Jersey, 475 million. And in New York, a whopping 700 million. The

total loss in agricultural production in only 3 northeast States will be $1.23 billion.

It has been suggested that a longer recruitment period would produce more workers. It is my experience that in both H2A and H2B jobs, recruiting closer to the date of need produces more applicants. Most people who fill these jobs in both H2A and H2B work do not look for work 120 days or 45 days in advance. They look for work when their current employment ends and they are not sitting around waiting for a job to start in the future.

The most productive tool for recruiting workers is contacting former employees. Even if they are not available, the word gets out to family and friends. The National Agricultural Workers survey study has confirmed the fact that most agricultural workers find jobs through word of mouth. Additional advertising will not produce additional workers.

The Department of Labor's recently issued guidance letter requiring State agencies to verify employment eligibility of referrals was issued and this is a welcomed and a positive step. My experience of other H2A users demonstrates that unauthorized workers are often referred to employment. It is very important that employers can be assured that referrals are legally authorized to work.

In conclusion, the best solution to domestic recruitment is a solution which has achieved the support of farm employers and worker advocates. That solution is Ag jobs, as authored by Representative Berman, Senator Feinstein and many Republican colleagues. Ag jobs provides balanced protections for workers, as well as improvements to the H2A program. These improvements include recruitment. Ag jobs must be enacted this year. Thank you.

Chairman MILLER. Thank you very much.

[The statement of Mr. Young follows:]

Prepared Statement of John Young, Past Executive Director, New England Apple Council

Chairman Miller, Ranking Member McKeon, Distinguished Members of the Committee: I appreciate the opportunity to testify today. I am a fourth generation apple farmer and have farmed in NH for the last 46 years. I am testifying today on behalf of the New England Apple Council, for which I have been Treasurer and Executive Director. I have used H2 or H2A labor for all of the 46 years that I have been in business. In fact there have been H2 or H2A workers employed by Apple Council members every year since 1943. As Executive Director of the Apple Council I have been responsible for filing the paper work at USDOL and USCIS, and the recruiting, and hiring more than 2000 workers annually in both H2A and H2B jobs, for the Apple Council's 200 members. My son and I also have a consulting business, HELP, and we consult for both H2A and H2B employers in areas outside of New England—VA, NY, MO, MI, OK, to name a few.

I am a past president of the National Council of Agricultural Employers and serve as co-chair of the Agriculture Coalition for Immigration Reform. I was chairman of NCAE H2A and Immigration committee whose members include the largest associations and employers using H2A workers. In that respect, I have for years interacted with H-2A users across the country. The New England experiences I will describe in detail are similar to the experiences others share.

I also was involved from the beginning in the negotiations with the farm worker advocates which resulted in the AgJOBS legislation. It is a pleasure to be working together with Congressman Berman, and Mr. Goldstein and farmworker advocates to pass AgJOBS. A comprehensive approach to immigration reform is necessary to achieve a program that works for all of us, employers and workers. It was only after careful examination of the current H2A program that the AgJOBS legislation was drafted. AgJOBS would improve the existing H2A program, allow an orderly transition of the present workforce into legal status, and enable greater long-term reliance on H2A. Enforcement alone, without reliable guest worker programs won't work.

The reason the 1986 immigration reform failed was the lack of reliable legal channels, including guest worker programs. Without passage of immigration reform legislation in the near future the safety, quantity, and quality of domestically produced food will be at risk.

Current Domestic Worker Recruitment Efforts Are Substantial

My experience in New England and other areas of the country demonstrates that there are very few unemployed who will accept agricultural work or seasonal H2B work. Despite advertising, contacts with any former employees, placing a job offer in local as well as interstate recruitment and now also electronic placement, few and usually no workers are interested in employment. Our job offers are cleared to Puerto Rico and even from there, a traditional "supply state" for agricultural labor, few people are interested. Those who are interested often do not show and many leave before the end of the season.

New England Apple Council members try their very best to recruit US workers. The first reason is to meet their obligations under the H2A regulations, but also because U.S. workers are less costly than foreign workers. The costs of transportation and housing add at least $2.00 per hour to the employer's costs, and for short term jobs the number can be in the neighborhood of $4.00 per hour. In an industry with very close profit margins employers do not bring in foreign workers unless they absolutely need to.

Some examples of experiences encountered in recruitment areas follows. Over the last three years NEAC has averaged 233 H2A referrals from Puerto Rico, through the interstate recruitment service, about half of them are not really interested in the work but have been encouraged by the employment service to apply. Less than 25% of the referrals start work, and of those who do start less than (12.5%) complete the season. One of our larger Connecticut growers has over the last four years had 103 referrals from Puerto Rico; 16 (16%) started work and 11 (11%) finished the season. More than 60% of this employer's seasonal workforce is made up of local workers. Nationally it must be noted that less than 2% of the agricultural workforce are H2A workers, the overwhelming proportion, 98% are domestic workers (whether legally authorized to work or in reality falsely documented).

A recent personal example of local recruitment: last year a young fellow from Manchester NH applied for work at my farm, at the beginning of the season. He was a newly arrived immigrant who had some farm experience in his home country. He was hired, he came daily as agreed, and was a good worker, but after two weeks, on Friday, stated that the work was too hard and he wouldn't be back on Monday. I had put an H2A worker on hold and was short handed for the week it took for him to arrive.

In both of the above cases the employers are trying to meet their obligations under the law but also to save money. In these examples, employers can save more than $1500 per worker when using local US workers. Some of the recruitment efforts beyond those required by law taken by our members over the years have included:

- actually going to Florida and visiting local employment services offices;
- doing a pilot program with youth from inner cities;
- employing prison inmates;
- recruiting SAW workers (who legalized under IRCA) from Texas;
- employing foreign J visa workers.

None of these recruitment efforts turned out to be successful or sustainable.

We currently contact all former workers, file job orders and cooperate with the employment service in local and interstate recruitment, place local advertising, and many employers place posters in their retail operations and other local locations.

Two recent examples of exceptional recruitment efforts in both California and Washington State produced results similar to those that we have had in the northeast. One was undertaken in 1998 in California's Central Valley at the urging of Senator Dianne Feinstein, after Congressional passage of landmark welfare reform legislation. Sen. Feinstein was concerned about high unemployment in the region. Growers and grower associations cooperated with county welfare and employment agencies to identify employment needs and to plan training and outreach efforts. Of roughly 140,000 individuals identified and targeted for placement in the workforce, only 503 applied for available positions, and only three were successfully placed. The study showed that welfare agencies were training the unemployed for year-round jobs, not seasonal jobs in agriculture and many of the unemployed were single women with children, for whom child care was a problem. A number were physically unable to perform farm jobs.

In 2006, Washington State apple growers and their associations partnered with the administration of Gov. Christine Gregoire and county agencies to conduct an in-

tense advertising and training program that sought to attract domestic workers for the apple harvest. Roughly 1700 positions needed to be filled. About 40 workers were successfully recruited. Washington State agriculture director Valoria Loveland documented the effort in a letter last year sent to the Senate Judiciary Committee.

Are Changes to the Recruitment Process Needed and Justified?

In order to meaningfully answer this question, one must consider the demographics and employment dynamics in agricultural and seasonal employment. The data are richest in agriculture, due to the initiation of the National Agricultural Worker Survey, or NAWS, shortly after the passage of the Immigration Reform and Control Act in the fall of 1986.

The first NAWS asked seasonal agricultural workers whether they were authorized to work in the United States. In the FY 1989 survey 7% of U.S. seasonal agricultural workers said they were unauthorized. By the FY 1990-91 survey the figure was 16%. By FY 1992-93 it was 28%. By FY 1994-95 it was 37%. By the FY 1997-98 survey it was 52%. A straight line extrapolation to 2005 of the statistics from 1989 through 1998 suggests the percentage of U.S. farm workers who are unauthorized to work in 2005 was 76%. Most observers believe that percentage is about right.

More astonishing still is the legal status of new agricultural labor force entrants—seasonal agricultural workers who had newly entered U.S. agriculture in the year of the survey. By the FY 1994-95 survey, 70 % of new entrants into the U.S. agricultural work force were unauthorized to work. The USDOL did not publish these figures for the 1997-98 survey, but a special tabulation for the eastern half of the U.S. by Dr. Dan Carroll of the USDOL, who then directed the survey, revealed that an astounding 99% of new labor force entrants into the agricultural work force in the eastern states were unauthorized to work in the United States.

The late Dr. James Holt, a former professor of agricultural economics at Penn State University and later an agricultural labor and H-2 program expert for the balance of his career, said the following in a 2005 speech to the California Board of Food and Agriculture:

"Some commentators suggest that U.S. agriculture is at "fault" for not retaining its U.S. work force. I believe that is misplaced blame. The decade of the 1990's was a period of unprecedented economic growth and job creation in the U.S. But it was also a decade when the rate of growth in the native-born U.S. work force continued to slow, and the number of legally admitted foreign workers was far below the rate of new job creation. At the beginning of the decade of the 1990's 31 % of the U.S. seasonal agricultural work force was still U.S. born. By the end of the decade, only 19 % was U.S. born. During the decade of the 1990's the real hourly wage rate in agriculture increased at a more rapid rate than for the non-agricultural work force. But the lure of year round work, easier jobs and more pleasant working conditions in most non-agricultural employment was obviously enough to attract many U.S. workers out of agriculture even into jobs in which the nominal hourly wage was lower than in agriculture."

By the FY1997-98 NAWS survey, 81% of U.S. seasonal agricultural workers were foreign born and 77% were born in Mexico. More than one-third were under the age of 25, and two-thirds were under the age of 35, reflecting the fact that many agricultural jobs are relatively entry level, and arduous. Meanwhile, USA Today just published a report based on U.S. Census data showing that the number of Americans aged 25 to 44 has dropped 1.5% since 2000, thus shrinking the pool of young workers. The starkest decline in young workers occurred in the Northeast and New England, frankly in the same states in which we operate: Vermont saw a 10.4% decline in younger workers. Connecticut saw a 9.9% decline; Massachusetts, a 9.6% decline; Rhode Island, an 8.8% decline; Maine, an 8.7% decline, New Hampshire, a 7.5% decline.

As I discuss, the existing H-2 programs hold users accountable to positive actions to recruit any and all available and interested domestic workers. And, as it stands, these programs fill a tiny fraction of jobs in the affected industries. In the case of H-2A, DOL certified about 60,000 job opportunities in 2006. That represents literally 1.9% of the roughly 3 million job opportunities available annually in American agriculture. I can attest, as an H-2A user myself and through my work with the New England Apple Council, that the program's bureaucracy, unresponsiveness, and cost are major deterrents to wider usage.

In the case of H-2B, DOL certified almost 255,000 job opportunities in 2007. Employers had requested over 360,000 workers, so DOL certified the positions for only slightly over two-thirds of seasonal workers requested. Certainly the DOL, in overseeing the labor certification process and in rejecting a third of applications, is not rubber-stamping employers' requests. Further the time and costs associated with applying for H-2B workers and the uncertainty associated with whether or not the

employer will actually be able to receive workers before the arbitrarily low cap of 33,000 for each half of the fiscal year is reached, makes the program truly an option of last resort when no American workers can be found. If American workers could be found, employers would gladly hire them.

The realities I just described, especially the shrinking younger workforce which would be the same workforce most likely to seek agricultural and seasonal jobs, beg the question: just who would we be protecting if new recruitment burdens were layered on top of existing H-2 program requirements, when faced with a dwindling pool of American workers, for whom agricultural jobs and seasonal jobs are generally going to be the least attractive, the jobs of last resort?

While in our experience recruitment by state workforce agencies has not resulted in many referrals, those who are referred are, in a number of instances, unauthorized to work in the U.S. At a time when the Department of Homeland Security's Immigration and Customs Enforcement bureau is increasing worksite enforcement, it is concerning that we could lose our workforce after an audit. This could be very disruptive of a workforce through loss of workers during key harvest times. We commend the Department of Labor for its recently issued Training and Employment Guidance Letter (TEGL) that strongly encourages state workforce agencies to verify the work authorization of workers they refer.

It has been suggested that a longer recruitment period would produce more workers. It is my experience that in both H2A and H2B jobs the closer to the date of need that you recruit, the more applicants the recruitment produces. Most people who fill these jobs do not look for work 120 or even 45 days in advance. They look when their current employment ends, and they won't sit and wait for a job to start 45-120 days in the future.

Additional advertising would not produce more workers. The effectiveness of advertising has proven to be very unproductive. Ads seldom produce any applicants, and the use of expensive-to-purchase papers, such as Sunday major dailies, is simply an additional price employers pay which produces no results. The most productive tool for recruiting workers is contacting former employees. Even if they are not available the word gets out through the underground. The National Agricultural Worker Survey has confirmed this.

It is no secret that the H-2A program has significantly greater recruitment and other program obligations. At a recent hearing held by the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, at least one Member suggested that perhaps some of the additional requirements associated with H-2A should be considered for the H-2B program. Practically speaking, H-2A supplies only 1.9% of the workforce precisely because the program is so burdensome and unresponsive. H-2A needs major reform, and should not be looked to as a model.

Changing Workforce Underscores Need for H2A, H2B

As stated earlier, the population of 25-44 year old males in the New England states has declined by anywhere from 7.5 to 10.5% since 2000. According to the USDA research report Demographic and Employment Profile of US Farm Workers this is the age bracket that most agricultural workers come from. The decline in younger workers despite an increase in the country's overall population leaves a smaller and smaller pool of workers to draw from. Of course seasonal and agricultural jobs are the first to go unfilled.

Why does the effort to recruit end up finding so few workers? I believe most who want farm work go back to the same employer year after year. As stated above the pool of workers available is aging and the quality committed farm workers have employment, leaving a very small pool to draw from. While some people would say anyone can do farm work, in reality the work is strenuous, the weather is often uncomfortable and at peak times of the year the hours long.

In my experience with the use of H2B workers, the same reasons that sufficient workers can not be recruited to fill needs apply. A shrinking younger workforce leaves a smaller pool to draw from. In the Northeast any job that is not year-round is very difficult to fill. The shortage in visas for H2B workers combined with enhanced immigration enforcement will cause severe economic damage to many Northeast industries. Recreation, hotels, restaurants, landscapers, and processors, to name a few will be forced to severely cut back. Some will go out of business. This will have a serious effect on the economy and the future in the affected States.

Similar to agriculture, seasonal industries like tourism are already at a significant risk of seeing domestic and international visitors avoid traveling to or vacationing within the United States, effectively diminishing our national tourism industry. An example of why it is difficult to find sufficient local workers can be found in Branson, MO. A town with a population of 6,000, they expect to see 7,000,000

tourists this year in the 10 month tourist season. There are 23,000 motel rooms in Branson that need cleaning daily at peak times, there just are not enough people residing in the Branson area to fill the employers' needs.

Without the nearly 500 certified H-2B job opportunities in the Branson, MO area during the FY2007 fiscal year, there is little chance that the expected 7 million visitors to Branson would be eager to return given either a diminished level of service, or inflated costs resulting from desperate employers bidding up wages in a zero-sum effort to steal employees from others. The Missouri Division of Tourism reported that in FY2007, Taney County, in which Branson is located, generated nearly $500 million in tourism-related revenue, producing $9.4 million in local tax revenue, while supporting over 10,000 tourism-related jobs in the county. The failure to extend the H-2B returning guest worker exemption, or the detrimental effects of applying ill-conceived recruitment policies to the program, would have a significant negative impact on Branson and Taney County, as it would in tourist destinations across the country.

Jobs and Economy at Risk without Stable, Legal Agricultural and Seasonal Workforce

As one considers the impact of these programs, one must consider the economic sectors at risk, the positive ripple effects of the agricultural and seasonal workforce, and the role of the H-2A and H-2B programs now and into the future. I have attached to my testimony three studies done by First Pioneer Farm Credit in NY, NJ, and NH. The three studies show what the economic impact will be of a farm labor shortage resulting from significantly enhanced immigration enforcement actions without new guest worker provisions. In NH as much as 40% of the agricultural production worth $58 million annually will be lost and 22,000 acres of land will likely leave agricultural production. In NJ at risk is annual agricultural production worth $475 million and NY could lose production valued at $700 million annually. In total the loss in agricultural production in only these three northeast States could reach $1,233,000,000.

In agriculture, economists who have studied the relationship between production and jobs in the surrounding economy conclude that at least three jobs in the general economy exist for each farmworker job. These upstream and downstream jobs in packing, processing, equipment, supplies and inputs, and so forth are vulnerable to moving to wherever the production takes place. So if through an enforcement-only approach to immigration enforcement our government hastens the off-shoring of labor-intensive agricultural sectors, literally hundreds of thousands or even millions of American jobs will move too. Here is the projected job loss in terms of on-farm jobs, and off-farm jobs supported because the production is here, that would result from an enforcement-only approach including a failure to improve the existing but meager legal channels for seasonal workers:

NEW YORK: On-farm jobs at risk: 6984; Off-farm jobs at risk: 15,833.
NEW JERSEY: On-farm jobs at risk: 6198; Off-farm jobs at risk: 19,438.
NEW HAMPSHIRE: On-farm jobs at risk: 632; Off-farm jobs at risk: 4385.

Again, in order to fully frame the choices before us relating to agricultural labor, I quote from labor expert Dr. Holt's earlier-referenced speech:

"Some suggest that agricultural employers should be left to complete in the labor market just like other employers have to do. Under this scenario, there would be strict workplace enforcement and no guest workers. To secure legal workers and remain in business, agricultural employers would have to attract sufficient workers away from competing non-agricultural employers by raising wages and benefits. Those who were unwilling or unable to do so would have to go out of business or move their production outside the United States. Meanwhile, according to this scenario, the domestic workers remaining in farm work would enjoy higher wages and improved working conditions."

Holt continued:

"No informed person seriously contends that wages, benefits and working conditions in seasonal agricultural jobs can be raised sufficiently to attract workers away from their permanent nonagricultural jobs in the numbers needed to replace the illegal alien agricultural work force and maintain the economic competitiveness of U.S. producers. U.S. growers are in competition with actual and potential growers around the globe. Hired labor constitutes approximately 35 percent of total production costs of labor intensive agricultural commodities, and 1 in 8 dollars of production costs for agricultural commodities generally.

Substantial increases in wage and/or benefit costs will have a substantial impact on growers' over-all production costs. U.S. growers are economically competitive with foreign producers at approximately current production costs. If U.S. producers' production costs are forced up by, for example, restricting the supply of labor, U.S.

production will become uncompetitive in foreign and domestic markets in which foreign producers compete. U.S. producers will be forced out of business until the competition for domestic farm workers has diminished to the point where the remaining U.S. producers' production costs are approximately at current global equilibrium levels.

The end result of this process will be that domestic farm worker wages and working conditions (and the production costs of surviving producers) will be at approximately current levels, while the volume of domestic production has declined sufficiently that there is no longer upward pressure on domestic worker wages. Given the large proportion of illegal workers in the current farm labor market, that reduction in domestic production is likely to have to be very substantial. Consumers, however, will feel little impact, because the market share abandoned by domestic producers will be quickly filled by foreign production."

Regarding seasonal employment and H-2B, a look at just one economic sector reliant on H-2B is revealing. Many landscaping-related jobs are inherently seasonal. In 2007, DOL certified just under 65,000 landscape-related job opportunities for H-2B. Of course, in FY08, only a fraction of these positions could be filled by H-2B workers because of the failure of Congress to renew the cap exemption which allows experience and law-abiding workers to return to their cyclical employment opportunities. Congress urgently needs to extend the H-2B returning worker exemption that expired at the end of fiscal 2007 to allow seasonal employers access to the workers they so desperately need. These employers have already undertaken extensive recruitment efforts and cannot find legal domestic workers to fill these jobs. Further, the stability of employers' year round American workforce is dependent on access to seasonal workers during their busiest times of the year.

Total employment in the landscape sector, according to DOL's Bureau of Labor Statistics, was 681,000 in 2006. This means that less than 10% of total job opportunities in a highly seasonal economic sector were certified for H-2B. Yet a look at the American employment supported by these workers shows that over 15,000 Americans were employed in landscape-related management occupations, with a mean annual salary of $82,150. Over 5000 were employed in business and financial support functions, with a mean annual salary of about $50,000. Over 55,000 first-line supervisors are employed in the sector, with a mean annual salary of about $40,000. Over 14,000 sales-related positions exist, with mean annual salary over $40,000. These and many other categories in the sector provide Americans good jobs. All are at risk if seasonal, labor-intensive production jobs go unfilled.

In conclusion, what is the solution to any concerns about domestic recruitment? I believe it is AgJOBS, H.R.371 and cosponsored by many others of both parties including Members of this committee, as well as its companion, S.340, sponsored by Senator Feinstein. My colleague Bruce Goldstein and his associates in the farmworker advocacy community support this legislation. It is the result of years of discussion between farm worker and grower representatives which we believe has balanced protections for workers as well as improvements to the H2A program, including in the area of recruitment. AgJOBS must be enacted this year!

[Additional submissions from Mr. Young follow:]

FIRST PIONEER FARM CREDIT—YANKEE FARM CREDIT

Farm Labor and Immigration Reform Economic Impact to New Hampshire State Agriculture

Farm businesses throughout the state of New Hampshire depend on a stable workforce to produce a safe and reliable food supply as well as other horticultural products. Immigrant workers have been and continue to be part of that workforce.

First Pioneer Farm Credit and Yankee Farm Credit serve farmers and farm-related businesses in New Hampshire and have undertaken the following analysis to better understand the economic impact of a farm labor shortage resulting from significantly enhanced immigration enforcement actions and no new guest worker provisions. Without immigrant labor, many farm businesses in New Hampshire and nationwide will face critical labor shortages.

New Hampshire agriculture includes significant production in dairy, greenhouse-nursery, fruit and vegetables. These sectors of New Hampshire agriculture can be most vulnerable to shortages of labor. The fact is that labor disruptions can quickly result in severe financial problems on many farms. Most farms simply do not have the financial resources to survive if they can not produce and market their products. With the increasing consumer demand for quality products, a delay in harvesting can also have a dramatic negative impact.

New Hampshire agriculture has come to rely on immigrant workers who present the necessary identity documents and are then employed on the same Federal and New Hampshire terms as American workers. This includes deducting and remitting the appropriate fiduciary payroll obligations on behalf of these workers. These hard-working individuals are filling jobs that Americans just do not want under any circumstances—whether their location outside of major urban areas, working out of doors in variable weather conditions, and/or the substantial physical stamina required for them. Quite simply, there are not American workers available to fill these jobs in either the numbers or at the wage rates that will allow New Hampshire farm employers to profitably sustain their businesses.

Although difficult and costly to utilize, some New Hampshire fruit operations utilize the H-2A agricultural guest worker program for seasonal workers. Some agricultural sectors are unable to utilize this program and significant reforms are necessary to make it a viable program for all farms.

This following analysis is based on Census of Agriculture data for New Hampshire as of 2002 (*http://www.agcensus.usda.gov/Publications/2002/index.asp*), and considers the number of workers employed on farms, farm types (some farm types have more hired labor than others), and the value of agricultural production.

This report is prepared by the First Pioneer Farm Credit Knowledge Exchange Program with assistance from the First Pioneer Bedford Office and Yankee Farm Credit. First Pioneer Farm Credit, ACA serves approximately 8,500 customers in the states of New Jersey, Connecticut, Massachusetts, Rhode Island and major parts of New York and New Hampshire. Yankee Farm Credit serves 1,200 customers in the State of Vermont and parts of New Hampshire and New York. Part of the nationwide Farm Credit System, First Pioneer and Yankee are customer-owned lenders dedicated to serving farmers, commercial fishermen and the forest products sector.

Farm Credit Analysis on Labor Shortages

As part of the analysis, farms are segmented based on the amount of wages for hired labor and subjectively assessed a degree of vulnerability to an immigration enforcement-only scenario (as determined by Farm Credit based on knowledge of New Hampshire agriculture). Consideration was also given to the impact of a reduction in the state's agricultural output on total agricultural sector business employment, i.e., both upstream and downstream jobs in addition to on-farm jobs.

The Farm Credit analysis indicates that a prolonged severe disruption in labor availability as a result of enhanced immigration enforcement actions without new worker programs would have the estimated following impacts:

• Farm Numbers: Approximately 35 to 45 New Hampshire farm operations are highly vulnerable to going out of business or being forced to severely cut back their farm operations. The primary impact would be on greenhouse-nursery and vegetable sectors, but the fruit and dairy sectors would also be impacted. Farm businesses can not survive if they can not fully plant, cultivate, prune and harvest their production at the times required. Farm businesses operate with very narrow profit margins and can not withstand losing part of their income due to labor disruptions and shortages.

• Market Value of Agricultural Production: These vulnerable farms have total sales estimated to be in excess of $58 million. Based on the 2002 Census of Agriculture, this constitutes nearly 40% of the value of farm production in New Hampshire.

• Farm Employment: Realistically, as many as 630 FTE positions (Full Time Equivalents) would be impacted. This is in addition to the farm owner-operators.

• Farmland: These farms operate in excess of 22,000 acres. If these farm businesses were to cease operating, some of this acreage would switch into less intensive agriculture, but thousands of acres would be vulnerable to being discontinued from crop production and converted to non-farm uses.

NEW HAMPSHIRE: HIGHLY VULNERABLE FARMS AND FARM RELATED JOBS FROM SEVERE LABOR SHORTAGES

(Estimated Impact—February 2008)

Number of Farms: Approximately 35–45 farm operations

Value of NH Ag Production: $58 million in reduced farm production

Farmland: 22,000 acres operated by farms that are highly vulnerable

Loss of Employment (NH); Number of Jobs (Full Time Equivalents)

Farm 632 Agricultural Services and Input 1,703 Agricultural Processing and Marketing 2,682

Total Farm Sector Employment Vulnerable: 5,017

Farm-Related Economic Impact: The economic impact goes well beyond the farm-gate and could undermine, in part, the state's agricultural infrastructure that all farms depend on. In addition to the loss of farm employment, jobs would decline in the farm service.

Farm Credit Analysis on Labor Shortages

• Input, processing and marketing sectors. It is estimated that 4,385 jobs in farm-related businesses in New Hampshire could be impacted.

• Economic Activity in Local Communities: Farm owners, farm employees and farm related business employees expend millions of dollars in New Hampshire which flows through the economy as local purchases and downstream jobs. This economic multiplier impact creates economic activity outside of the farm economy and supports the local tax base. As local farms go out of business or cut back production and layoff employees, local communities will have less economic activity.

• Less Locally Grown Farm Products and More Imported Foods: Without the necessary labor force, we will see a significant decrease in local production, which will require the importation of more food and horticultural products from other countries. Consumers will have fewer opportunities to buy locally-grown farm products.

• Planning for the Future: This issue weighs heavy on the minds of virtually all New Hampshire farmers who employ labor. The tremendous uncertainty of their labor supply has a profound impact on their outlook for the future and their planning horizon. This can affect everything from whether to build a new greenhouse, to buying the farm next door, to encouraging the 22-year old son or daughter to come home to the family farm business. New Hampshire farmers need and deserve the opportunity to plan and invest for their farms and their industry knowing that a source of willing labor will be available.

For More Information

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FARM LABOR AND IMMIGRATION REFORM

Economic Impact to New Jersey State Agriculture

Farm businesses throughout the state of New Jersey depend on a stable workforce to produce a safe and reliable food supply as well as other horticultural products. Immigrant and guest workers have been and continue to be part of the workforce on farms throughout our nation.

First Pioneer Farm Credit serves farmers and farm-related businesses in New Jersey and has undertaken the following analysis to better understand the economic impact of a farm labor shortage resulting from significantly enhanced immigration enforcement actions and no new guest workers provisions. It is estimated that nationwide approximately 75% of the hired farm work is unauthorized (Dr. James Holt statement before House Agriculture Committee, October 2007). Without immigrant and guest labor many farm businesses will face critical labor shortages.

New Jersey agriculture includes significant production in vegetable, fruit, greenhouse-nursery and dairy sectors. These sectors can be most vulnerable to shortages of labor. The fact is that labor disruptions can quickly result in severe financial problems on many farms. Most farms simply do not have the financial resources to survive if they can not produce and market their products. With the increasing consumer demand for quality products, a delay in harvesting can also have a dramatic negative impact.

New Jersey agriculture has come to rely heavily on immigrant workers who present the necessary identity documents and are then employed on the same Federal and New Jersey terms as American workers. This includes deducting and remitting the appropriate fiduciary payroll obligations on behalf of these workers. These hard-working individuals are filling jobs that Americans just do not want under any circumstances—whether their location outside of major urban areas, working out of doors in variable weather conditions, and/or the substantial physical stamina required for them. Quite simply, there are not American workers available to fill these jobs in either the numbers or at the wage rates that will allow New Jersey farm employers to profitably sustain their businesses.

This following analysis is based on Census of Agriculture data for New Jersey as of 2002 (*http://www.agcensus.usda.gov/Publications/2002/index.asp*), and considers the number of workers employed on farms, farm types (some farm types have more hired labor than others), and the value of agricultural production.

As part of the analysis, farms are segmented based on the amount of wages for hired labor and subjectively assessed a degree of vulnerability to an immigration enforcement-only scenario (as determined by Farm Credit based on knowledge of New Jersey agriculture). Consideration was also given to the impact of a reduction in the state's agricultural output on total agricultural sector business employment, i.e., both upstream and downstream jobs in addition to on-farm jobs.

First Pioneer Farm Credit, ACA Your First Choice for Financial Solutions

Farm Credit Analysis on Labor Shortages

The Farm Credit analysis indicates that a prolonged severe disruption in labor availability as a result of enhanced immigration enforcement actions without new worker programs would have the estimated following impacts:

• Farm Numbers: Over 500 New Jersey farms are highly vulnerable to going out of business or being forced to severely cut back their farm operations. The primary impact would be on greenhouse-nursery and vegetable sectors, but the fruit and dairy sectors would also be severely impacted. Farm businesses can not survive if they can not fully plant, cultivate, prune and harvest their production at the times required. Farm businesses operate with very narrow profit margins and can not withstand losing part of their income due to labor disruptions and shortages.

• Market Value of Agricultural Production: These 500 vulnerable farms have total sales estimated to be in excess of up to $475 million.

• Farm Employment: Realistically, as many as 6,200 FTE positions (Full Time Equivalents) would be impacted. This is in addition to the farm owner-operators.

• Farmland: These farms operate approximately 155,554 acres. If these farm businesses were to cease operating, some of this acreage would switch into less intensive agriculture, but thousands of acres would be vulnerable to being discontinued from crop production and converted to non-farm uses. This would be at strong cross purposes to the State of New Jersey's long-standing efforts to maintain farmland in productive agriculture.

• Farm-Related Economic Impact: The economic impact goes well beyond the farm-gate and could undermine, in part, the state's agricultural infrastructure that all farms depend on. In addition to the loss of farm employment, jobs would decline in the farm service, input, processing and marketing sectors. It is estimated that 19,500 jobs in farm-related businesses in New Jersey could be impacted.

New Jersey: Highly Vulnerable Farms and Farm Related Jobs From Severe Labor Shortages (Estimated Impact—February 2008)

Farm Type: Vegetable 161; Fruit 89; Dairy 21; Greenhouse/Nursery 236.

Number of Farms—Total Farms: 508

Value of NJ Ag Production: $475 million in reduced farm production

Farmland: 155,554 acres operated by farms that are vulnerable

Loss of Employment (NJ) Number of Jobs (Full Time Equivalents): Farm—6,198; Agricultural Services and Input—8,792; Agricultural Processing and Marketing—10,646

Total Farm Sector Employment Vulnerable—25,636

Farm Credit Analysis on Labor Shortages

Economic Activity in Local Communities: Farm owners, farm employees and farm related business employees expend millions of dollars in New Jersey which flows through the economy as local purchases and downstream jobs. This economic multiplier impact creates economic activity outside of the farm economy and supports the local tax base. As local farms go out of business or cut back production and layoff employees, local communities will have less economic activity.

Less Locally Grown Farm Products and More Imported Foods: Without the necessary labor force, we will see a significant decrease in local production, which will require the importation of more food and horticultural products from other countries. Consumers will have fewer opportunities to buy locally-grown farm products.

Planning for the Future: This issue weighs heavy on the minds of virtually all New Jersey farmers who employ labor. The tremendous uncertainty of their labor supply has a profound impact on their outlook for the future and their planning horizon. This can affect everything from whether to build a new greenhouse, to buying the farm next door, to encouraging the 22-year old son or daughter to come home to the family farm business. New Jersey farmers need and deserve the opportunity to plan and invest for their farms and their industry knowing that a source of willing labor will be available.

For More Information

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First Pioneer Farm Credit, ACA serves approximately 8,500 customers in the states of New Jersey, Connecticut, Massachusetts, Rhode Island and major parts of New York and New Hampshire. Part of the nationwide Farm Credit System, First Pioneer is a customer-owned lender dedicated to serving farmers, commercial fishermen and the forest products sector. First Pioneer Farm Credit is the leading lender to agriculture in the Northeast with $2.6 billion in loans.

Farm Credit Associations of New York
Background Analysis

Farm Labor and Immigration Reform
Economic Impact to New York State Agriculture

Farm businesses throughout the New York State depend on a stable workforce to produce a safe and reliable food supply as well as other horticultural products. Immigrant workers have been and continue to be part of that workforce.

The Farm Credit associations that serve farmers and farm-related businesses in New York State have undertaken the following analysis to better understand the economic impact of a farm labor shortage resulting from significantly enhanced immigration enforcement actions and no new guest workers provisions. Without immigrant labor, many farm businesses in New York and nationwide will face critical labor shortages.

New York agriculture includes significant production in dairy, vegetable, fruit and the greenhouse-nursery sectors. These sectors can be most vulnerable to shortages of labor. The fact is that labor disruptions can quickly result in severe financial problems on many farms. Most farms simply do not have the financial resources to survive if they can not fully harvest their products. With the increasing consumer demand for quality products, a delay in harvesting can also have a dramatic negative impact.

This analysis is based Census of Agriculture data for ***New York State*** (http://www.agcensus.usda.gov/Publications/2002/index.asp) and considers the number of workers employed on farms, farm_types (some farm types have more hired labor than others), and the value of agricultural production. As part of the analysis, farms are segmented based on the amount of wages for hired labor and subjectively assessed a degree of vulnerability to an immigration enforcement-only scenario (as determined by Farm Credit based on knowledge of New York agriculture). Consideration was also given to the impact of a reduction in the state's agricultural output on total agricultural sector business employment, i.e., both upstream and downstream jobs in addition to on-farm jobs.

The Farm Credit analysis indicates that a pro-longed severe disruption in labor availability as a result of enhanced immigration enforcement actions without new worker programs would have the estimated following impacts:

Farm Credit

Farm Credit Analysis on Labor Shortages 2

- Farm Numbers: Over 800 New York farms are highly vulnerable to going out of business or forced to severely cut back their farm operations. The primary impact would be on dairy farms with fruit, vegetable and greenhouse-nursery also severely impacted. Farm businesses can not survive if they can not fully plant, cultivate, prune and harvest their production at the times required. Farm businesses operate with very narrow margins and can not withstand losing part of their income due to labor disruptions and shortages.

- Market Value of Agricultural Production: These vulnerable farms have total sales estimated to be in excess of to $700 million.

- Farm Employment: Realistically, as many as 7,000 FTE positions (Full Time Equivalents) would be impacted. This is in addition to the farm owner-operators.

- Farmland: These farms operate approximately 750,000 acres. If these farm businesses were to cease operating, some of this acreage would switch into less intensive agriculture, but hundreds of thousands of acres would be vulnerable to being discontinued from crop production and converted to non-farm uses.

- Farm-Related Economic Impact: The economic impact goes well beyond the farm-gate and could undermine, in part, the state's agricultural infrastructure that all farms depend on. In addition to the loss of farm employment, jobs would decline in the farm service, input, processing and marketing sectors. It is estimated that 15,823 jobs in farm-related businesses in New York could be impacted.

New York State: Highly Vulnerable Farms and Farm Related Jobs From Severe Labor Shortages (Estimated Impact – October 2007)

Farm Type	**Number of Farms**
Vegetable	184
Fruit	163
Dairy	445
Green / Nursery	40
Total Farms	**832**
Value of Agricultural Production:	**$700M in reduced farm production in NYS**
Farmland:	**750,000 acres operated by farms that are vulnerable**
Loss of Employment (NY)	**Number of Jobs (Full Time Equivalents)**
Farm	6,984
Agricultural Service and Input	9,463
Agricultural Processing and Marketing	6,360
Total Farm Sector Employment Vulnerable	**22,817**

Chairman MILLER. Professor Sum.

STATEMENT OF ANDREW SUM, DIRECTOR/PROFESSOR, CENTER FOR LABOR MARKET STUDIES, NORTHEASTERN UNIVERSITY

Mr. SUM. Thank you. My testimony today is predicated on the notion that public policy debates over guest worker programs and immigrant labor policy in general ought to be based on 3 fundamental considerations, one of which is what is happening in overall labor markets across the country.

Secondly, what is going on in the local labor markets in which H2A and H2B programs operate. To let me paraphrase the old Tip O'Neill remark, all labor markets are local.

And third, what are the impacts of these programs on teenagers, young adults, both native born and established immigrants here in the United States? Who benefits and who loses from the operation of these programs?

I will focus on four basis key points: First, what has happened in the United States to labor markets for our teenagers and young adults over the last 7 years? There has not been much said here so far by the presenters so far. The facts that I have indicated to you in 2 papers I provided the committee are as follows over the last 7 years in the United States we have not hired one single net knew 16 to 24-year old adult, not one. There are fewer people under 25 working today than was true in 2000. Yet at the same time, we hired 2½ million new immigrant workers in the United States.

Second the teen labor market in this country reached a new historical low last year. Only 34 percent of teenagers across the country held a job at any time during the year. That was 11 points lower than what it was in 2000. It is 15 points lower than what it was in 1989. And it represents as I said the lowest employment rate since 1948 since this data has been collected.

I indicated that we also, last summer, hit a new record low for teenagers last summer. And our papers suggest that that summer will represent a new historical low for Nation's teenagers. The job loss has not only been confined to teens. Among young adults 20 to 24, employment rates have also fallen considerably below those in 2000. When you look at who has lost the most it is primarily those groups that are most competitive in the labor market for young immigrant workers. They are native born and established immigrant males, workers with no post secondary schooling, minority groups, second generation immigrants, established immigrants and minority dropouts.

We estimate last year there would have been 2½ million more Americans under 25 working if we had only maintained the employment rates that we had back in 2000. About 6 years ago Secretary Chao said we will leave no worker behind. We have leave millions behind in this country.

Now you might ask how are these results affected by new immigrants inflows? There is a growing body of evidence in the United States on the impact of immigrants in general on workers, wages, earnings and physical impacts. One of these issues is how the immigrant inflows affects employment opportunities.

I would argue that in recent years, including the work by Chris Smith, an MIT and economist, George Boathouse at Harvard, Jeff Grogger at NBR, and staff at my center indicates that there is significant displacement of new immigrants on young U.S. workers, including established immigrants and second generation immigrants.

Two main points on this. Between 2000 and 2007, there were 3 million fewer young Americans under age 30 who held a job. While at the same time the Nation's employers hired 2½ million new immigrant workers. There is nearly a 1-for-1 trade off, every new im-

migrant worker is accompanied by one less new native born and established immigrant worker. Results of empirical analysis suggests that the greatest displacement has been on teens, young adults, males without post secondary schooling, black workers and second generation Hispanics.

Third, having said this you might ask is there a need for H1B and H2B programs? My argument is there clearly is. One could legitimately argue that we should operate some version of an H2B program in a number of labor markets. Cape Cod as one example has a very unique set of characteristics in which seasonal employment dominates. Summer employment is 30 percent higher than what it is during the rest of the year.

At the same time a number of our communities have been simply become retirement communities, with very few young families, few teenagers and young adults to fill the jobs. So on a case-by-case basis, we could argue that H2B program can make some contributions.

Let me conclude in the following way, rather than cursing the darkness, let me light a candle. There are six things that I think the U.S. Congress should consider doing to help make immigration policy and workforce development policy more compatible. One, let's set a multi year limited goal for H2B permits. And let's have every H2B permit be accompanied by a fee similar to H1B. $1500 per worker to be used for youth training and recruitment.

Two, all Social Security taxes and unemployment insurance taxes paid by employers and workers be set aside to put into a training fund to help recruit young and older workers to help fill the jobs in the future.

Three, Federal Government must make sure that the value of wages, salaries, housing allowances and food allowances be set at market wage that are offered to every native born worker. We offer them a wage package equal to that.

Four, we developed a coordinated program using cooperative education at the secondary and post secondary level with academic credit for work and summer learning. Summer should be a time for learning and earning in which we recruit larger numbers of young people to hold those jobs.

Five, last, what we need to do as a country that cares about youth is set up what I call an earned income employment and training tax credit in which we would provide 25 percent bonus for all workers for every dollar they earned. It could be set aside for education and training to help finance a college education. Work and schooling should go together. Thank you.

Chairman MILLER. Thank you.

[The statement of Mr. Sum follows:]

The Nation's Temporary Guest Worker Program, the New Immigrant Workforce, and The Steep Deterioration in the Nation's Youth Labor Markets: The Case for Comprehensive National Policy Reform

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May 2, 2008

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Introduction

Today's hearing on the nation's temporary worker visa programs (including H2A and H2B) needs to be placed in the broader context of overall labor market developments and workforce development policies affecting the employment of teens and young adults (20-24 years old) in the U.S., especially those without post-secondary degrees.[1] America's teen and young adult labor markets have been devastated over the past seven years. Employment levels and rates of employment among all teens and most young adult subgroups (20-24 years old) have declined markedly since 2000, especially males, those with no post-secondary schooling, and youth from low income families.[2] (See Charts 1 and 2).

A variety of demand, supply, and institutional forces have been at work in reducing young employment opportunities. Unprecedented levels of legal, illegal and temporary immigration have been one of the factors underlying this deterioration in youth labor markets.[3] Declines in youth employment have been matched almost one for one with increased employment of new arrivals over the past 7 years. This summer we project that U.S. labor markets will have the lowest rate of teen employment since we have kept data going back to 1948. Summer seasonal jobs as a proportion of all jobs in the U.S. economy will also be the lowest over the past 30 years. In other words, the relative increase in aggregate employment during the summer months of June-August in recent years is the lowest over the past 30 years.

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[1] Some of our policy recommendations for H2B reform apply with equal force to the nation's older workers (55 and older), especially less educated and low income older workers.

[2] See: Andrew Sum, Joseph McLaughlin, Ishwar Khatiwada, et. al., The Collapse of the Nation's Teen Job Market and the Outlook for the 2008 Summer Job Market for Teens, Report Prepared by the Center for Labor Market Studies, Northeastern University, Boston, April 2008. An earlier version of this paper was presented in testimony to a Hearing of the U.S. House of Representatives, Subcommittee on Labor, Health, and Human Services, Education and Related Agencies, Washington, D.C., March 11, 2008.

[3] For recent studies examining the impacts of new immigrant arrivals on the employment experiences of teens, young adults, and less educated male adults in the U.S.,
See: (i) Chris Smith, Dude, Where's My Job?" The Impact of Immigration on the Youth Labor Market, Ph.D. Dissertation in Economics, MIT, Cambridge, November 2007; George Borjas, "The Demand Curve for Labor is Downward Sloping," Quarterly Journal of Economics, October 2003, pp.1335-1371; (iii) Steven A. Camorata, Dropping Out: Immigrant Entry and Native Exit from the Labor Market, 2000-2005, Center for Immigration Studies, March 2006; (iv) Andrew Sum, Tim Barnicle, Ishwar Khatiwada, Joseph McLaughlin, et. al., Educational and Labor Market Outcomes for the Nation's Teens and Young Adult: Since the Publication of America's Choice: A Critical Assessment, National Center on Education and the Economy, Washington, D.C., 2006; (v) Andrew Sum, Paul Harrington, Ishwar Khatiwada; et. al., New Immigrant Workers in the U.S., 2000-2005 Their Estimated Numbers, Gender-Age Characteristics, Legal Status and Their Impacts on Native Born Young Workers and the Changing Job Structure, Report Prepared for the Center for Immigration Studies, Washington, D.C., May 2006.

Chart 1:
Trends in the Teen Summer Employment Rate, U.S., Selected Years1989-2007
(Annual Averages, in %)

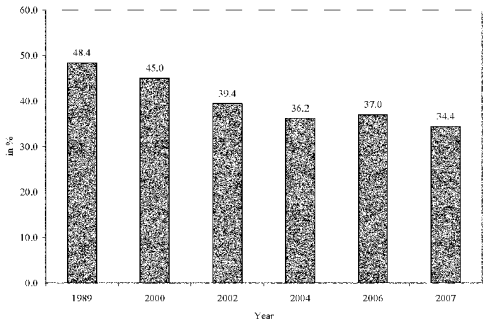
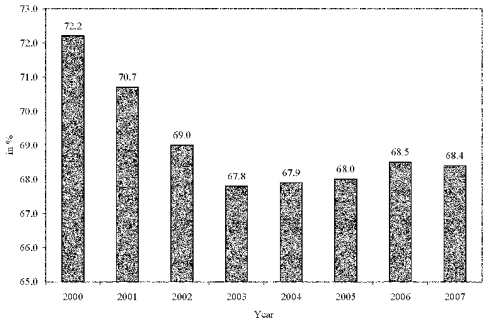


Chart 2:
Trends in the Employment/Population Ratio of 20-24 Year Old Adults, U.S., 2000-2007
(Annual Averages in %)



The aggregate size of the "summer job market" in the U.S. appears to have declined considerably in both an absolute and relative sense since the late 1970s. Over the 1978-79 period, there were 3.62 million more persons (16+) employed in the summer months of June – August than in the February – April period of these two years.[4] (Table 1). This "summer employment market" was equivalent to 3.8% of the number of persons employed between February and April. By the late 1980s, the absolute number of "summer jobs" fell only modestly to 3.48 million, but in relative terms this represented only 3.05% of the February-April pool of employed persons. By the late 1990s, however, both the absolute and relative size of the summer job market had declined considerably, falling to only 2.14 million or 1.63%. Finally, by 2006-2007, the relative number of "summer jobs" had fallen to only 1.50%, a ratio below 40 percent of its relative size at the end of the 1970s. These findings indicate that the nation's employers have revamped the seasonal pattern of their hiring to employ far fewer workers during the summer months alone (Table 1).

Table 1:
Changes in Total, Civilian Employment (Persons 16+) Between the February – April and June – August Months of Selected Years from 1978-79 to 2006-2007
(Numbers in Million, Not Seasonally Adjusted)

Time Period	(A) Change in Number of Employed Persons (2 Year Averages, in Millions)	(B) Change in Employment During Summer as % of Employment in February – April
1978-79	3.618	3.80
1988-89	3.480	3.05
1992-93	3.561	2.97
1998-99	2.138	1.63
2006-2007	2.168	1.50

Source: U.S. Bureau of Labor Statistics, web site, www.bls.gov, tabulations by authors.

It is in these inauspicious circumstances that the U.S. Congress is considering the reform of the H2B program to bring temporary guest workers to fill summer jobs for which it is claimed that there are insufficient native teens or young adults or older workers available to fill these openings. And, it must also be assumed that the hundreds of thousands of U.S. workers, including both native born workers and immigrants who have been laid-off over the past 12

[4] The late 1970s were characterized by an above average number of federally-funded summer job opportunities for the nation's teens under the CETA legislation and the Youth Employment and Demonstration Projects Act of 1977. A separate federally-funded summer youth employment program existed through the summer of 2000.

months will not take them. Or the hundreds of thousands of older workers who have returned back into the labor force partly due to an economic necessity to take lower-end jobs to meet rising costs of living and local property taxes.

An economist would assume that, in a national labor market downturn including a comparative depression for youth and young adults, and with a surging reserve army of unemployed adults some of whom are desperate to find work on any job paying a competitive wage that these jobs could be readily filled. An economist might also assume that any job paying a non-competitive wage could also be filled by workers from other countries where standards of living and job options are often considerably lower.

An observant labor market economist might also assume that there would be a shortage of native applicants for any job where for which there was little or no open recruiting, where the jobs were traditionally filled by foreigners, where there were no informal referral networks for natives, where work conditions had been adapted to compliant foreign temporary workers, where workers were recruited in early April when school for most teenagers did not let out in June, or where decisions were made at the last minute as to how many H2Bs would be let in and how many native workers needed to be recruited.

In past decades, millions of teens and young adults would have flooded into the labor market during the summer to take such jobs. During my teen years from 13 to 19, I delivered newspapers, cut lawns, stocked grocery shelves, unloaded food trucks, and worked as an operative and production recorder for U.S. Steel. My colleague Bob Taggart's wife worked every summer as a teen on Cape Cod cleaning hotel rooms. Some of today's teens may be less inclined to work or might be viewed by some observers as even lazy, but on average, there are still many more youth able and willing to fill the declining number of seasonal and summer jobs. Go to Iowa, Maine, North Dakota, Idaho, and Nebraska where there are relatively few guest workers or immigrants, and you will find much higher rates of teen employment (in the mid to high 50s), as well as teens working in the types of jobs that it is claimed no one wishes to take.

Trends in the Nation's Youth Labor Markets

Employment opportunities for the nation's 16-24 year olds have been very limited over the past seven years, especially for teens and 20-24 year olds with limited to no post-secondary

schooling. In 2007, the total number of employed 16-24 year olds in the U.S. was still 449,000 below its level in 2000, a decline of somewhat over 2%. The steep decline in the number of employed teens (-1.187 million) accounted for all of the net decline in the pool of employed 16-24 year olds. Yet, over this same seven year period, the nation's employers hired nearly 1.2 million new young immigrant workers (16-24).[5] These new immigrant workers, a substantial majority of whom were 20-24 year old males with limited schooling, had arrived in the U.S. sometime between 2000 and the time of the monthly CPS household surveys in 2007. The nation's private sector employers were bypassing the available pool of native born and established immigrant youth to hire new immigrants.

Table 2:
Trends in the Number of Employed 16-19 and 20-24 Year Olds in the U.S., 2000 to 2007
(Annual Averages, in 1000s)

	(A)	(B)	(C)
Age Group	2000	2007	Absolute Change
16-19	7,245	6,058	-1,187
20-24	13,224	13,962	+738
16-24	20,469	20,020	-449

Source: 2000 and 2007 Current Population Survey, public use files, tabulations by authors.

The drop in the number of employed 16-24 year olds in the nation took place at a time when the total number of 16-24 year olds in the civilian non-institutional population was increasing steadily throughout this seven year period. The growth in the number of 20-24 year olds (2.116 million) was particularly strong. Overall, the 16-24 year old population increased in size from 34.2 million in 2000 to 37.4 million in 2007, a rise of nearly 3.2 million or close to 10 percent (Table). Despite this substantial rise in the young adult population, the total number of employed 16-24 year olds actually declined.

[5] As will be revealed below, there was a substantial gap in the difference between the growth in the estimated number of employed persons in the U.S. (16+) in private sector, wage and salary jobs and the growth in the reported number of wage and salary workers on the payrolls of the nation's private, nonfarm employers between 2000 and 2007. This gap indicates a rise in the number of workers being hired off the books or as independent contractors.

Table 3:
Growth in the Number of 16-24 Year Olds in the
Civilian Non-Institutional Population of the U.S., 2000 to 2007
(Annual Averages, in 1000s)

Age Group	(A) 2000	(B) 2007	(C) Absolute Change
16-19	15,924	16,982	1,058
20-24	18,311	20,427	2,116
16-24	34,235	37,409	3,174

Source: 2000 and 2007 Current Population Survey, public use files, tabulations by authors.

Changes in the Employment Rates of the Nation's 16-24 Year Olds by Nativity Status

Between 2000 and 2007, the employment rates of the nation's teens and young adults had dropped considerably. To identify how different demographic groups of teens and young adults were affected by these changing demographic developments, we classified members of each age group into the following three nativity groups: the native born, established immigrants (foreign born individuals who had arrived in the U.S. prior to calendar year 2000, and those who arrived in the U.S. from 2000 onward.[6] The former group of foreign born persons will be referred to as "established immigrants" while the latter group will be categorized as "new immigrant" arrivals. Estimates of the 2000 and 2007 employment rates of teenagers and young adults (20-24 years old) in each of these three nativity groups are displayed in Table 4.

[6] The monthly CPS questionnaires collect information on the country of birth of each sample respondent and the timing of their arrival in the United States.

Table 4:
E/P Ratios of Teens and 20-24 Year Olds in the U.S., All and by Nativity Status, 2000 to 2007
(in Percent)

Age Group/ Nativity Status	(A) 2000	(B) 2007	(C) Percentage Point Change
16-19			
All	45.5	35.7	-9.8
Native Born	46.3	35.9	-10.4
Established Immigrants	35.3	31.4	-3.9
New Immigrants	42.0	34.6	-7.4
20-24			
All	72.2	68.4	-3.8
Native Born	73.3	69.0	-4.3
Established Immigrants	68.2	64.0	-4.2
New Immigrants	64.0	65.0	+1.0

Among teens, employment rates declined among all three nativity status groups between 2000 and 2007 with an especially large decline among native born teens (-10.4 percentage points) (Table 5). Both native born male (-11 percentage points) and female teens (-9.5 percentage points) experienced very substantial declines in their employment rates over this 7 year period. Among 20-24 year olds, the employment rate in 2007 was approximately four percentage points below that of 2000, with native born and established immigrants in this age group accounting for all of the decline in the E/P ratio among this age group. The 2007 employment rate of 20-24 year old new immigrants was actually one percentage point above that of 2000. Among 20-24 year old native born youth and established immigrants, the employment rate declines were much higher among men than among women. Native born, young males with no post-secondary schooling encountered the largest drops in their employment rates. They were the ones facing the most direct competition from newer immigrant arrivals since 2000. This evidence suggests that there were substantive job displacement effects among less educated, native born males and established immigrant males from new immigrant labor inflows over the past seven years.

Table 5:
E/P Ratios of Male Teens and 20-24 Year Olds in the U.S.,
All and by Nativity Status 2000 to 2007
(in %)

Age Group/ Nativity Status	(A) 2000	(B) 2007	(C) Percentage Point Change
16-19, Male			
All	45.5	34.9	-10.6
Native Born	45.7	34.6	-11.1
Established Immigrants	37.2	33.5	-3.7
New Immigrants	49.4	44.2	-5.2
20-24			
All	76.5	71.7	-4.8
Native Born	76.3	70.8	-5.5
Established Immigrants	77.1	72.5	-4.6
New Immigrants	78.7	80.4	+1.7

Estimates of Hypothetical Employment Levels Among the Nation's Teens and Young Adults in 2007 and Comparisons with the Flow of New Immigrant Arrivals

The sharp decline in the employment rates of the nation's teens and young adults (both native born and established immigrants) between 2000 and 2007 took place at a time when their overall population levels were rising substantially reduced their potential employment levels. To estimate the magnitude of these hypothetical employment declines, we calculated the levels of employment among teens and young adults for the native born and established immigrants that would have prevailed in 2007 if they had maintained their 2000 employment rates. The results are summarized in Table 6 for teens and young adults in each age group and each nativity status groups and for all 16-24 year olds combined.

If teens had matched their year 2000 employment rates in 2007, there would have been 7.727 million teens at work in that year versus the actual 6.058 million workers, a difference of approximately 1.67 million or 27%, a very sizable gain. These employment gains would have been overwhelmingly concentrated among native born teens (96%). Among 20-24 year olds, the net gain in employment from maintaining employment rates at their 2000 values would have been 786,000 or nearly 6%. The native born and established immigrants (those arriving in the

U.S. before 2000) would have accounted for all of the net gain in employment among 20-24 year olds. Combining the results for teens and young adults yields a net hypothetical gain in employment of just under 2.5 million, with the native born and established immigrants accounting for nearly 99 percent of the hypothetical change in employment among 16-24 year olds.

Table 6:
Number of Additional Teens (16-19) and Young Adults (20-24) that Would Have Been Employed in 2007 if They Had Matched Their E/P Ratios of 2000, All and by Nativity Status
(in Millions)

Age Group/ Nativity Status	(A) Actual Employed	(B) Hypothetical Employed	(C) Hypothetical – Actual
16-19			
All[1]	6.058	7.727	1.669
Native Born	5.587	7.198	1.611
Established immigrants	.246	.276	.030
New immigrants	.225	.273	.048
20-24			
All[1]	13.962	14.748	.786
Native Born	12.08	12.838	.756
Established immigrants	.911	.972	.061
New immigrants	.968	.952	-.016
16-24			
All	20.020	22.475	2.455
Native Born	17.669	20.036	2.367
Established immigrants	1.157	1.248	.091
New immigrants	1.193	1.225	.032

Note: Totals for teens and 20-24 year old will not automatically equal the sum of the three subgroups due to compositional shifts in nativity status over time.

The nation's 25-29 year olds also did not recapture their 2000 employment rate by 2007. If their 2000 employment rate had been maintained, there would have been an additional 520,000 adults (25-29 years old) employed in 2007. The sum of the hypothetical employment gains of 16-19, 20-24, and 25-29 year old native born and established immigrant adults in 2007 would have been just under 3 million (Table 7). Over the 2000-2007 period, the number of 16-29 year old new immigrant arrivals that became employed by 2007 was 2.461 million, equivalent to 83 percent of the hypothetical job loss of the nation's 16-29 year olds who were native born or

established immigrants. These results clearly suggest a rather high degree of job displacement of young native born and established immigrant adults by newly arrived immigrants.[7] There is a high degree of overlap in the industrial and occupational employment distributions of the jobs held by the native born/established immigrants and new immigrant arrivals. In a growing number of cases, new immigrant workers appear to have become the preferred source of employees by private businesses across the country. The informal hiring network for many young immigrant workers appears to be quite efficient especially among less educated males. For example, the employment rate of 16-24 year old immigrant males with no high school diploma is well above that of native born male dropouts especially Black workers.

Table 7:
Numbers of New Immigrant Workers Aged 16-29 in 2007 and the Number of Additional Native Born and Established Immigrant Persons that Would Have Been Employed in 2007 if They Had Maintained Their 2000 E/P Ratio
(in 1000s)

Age Group	(A) New Immigrant Workers	(B) Additional Number of Native Born and Established Immigrants Who Would Have Been Employed in 2007
16-19	225	1,641
20-24	966	817
25-29	1,270	520
16-29, Total	2,461	2,978

[7] In an earlier research study by several of the authors of this paper, we estimated that each one percentage point rise in a state's resident labor force due to new immigrants would significantly reduce the probability of employment among 16-24 year olds in the state by 1.2 percentage points. For states with a large influx of new immigrants between 2000 and 2003, this reduction in employment could be quite substantial. Job displacement effects were largest for men, in –school youth, males with no post-secondary schooling, and Black dropouts.
See: Andrew Sum, Paul Harrington and Ishwar Khatiwada, op. cit.

The Character of the New Jobs Created in the U.S. Economy Over the Past Seven Years: A Growing Informal Labor Market

Growing concerns over the changing nature and quality of employment relationships in the U.S. have been expressed by a number of labor market analysts in recent years.[8] The apparent growth of the informal labor market involving independent contractors, outsourcing, and off-the-books work, has been accompanied by declining real wages, employee benefits, and job quality. To identify trends in the structural features of recent employment growth, we compared the growth of civilian employment from the CPS household survey with growth in the number of nonfarm wage and salary jobs from the U.S. Department of Labor's monthly payroll survey of the nation's nonfarm employers, both public and private over 2001 I to 2007 IV time period.[9]

There are some important differences in the underlying employment concepts and measures from these two national surveys. We will make a number of adjustments to both surveys' employment estimates to make them more compatible with each other. The estimates of overall employment growth from both surveys over this seven year period are displayed in Table 8. According to the findings of the national CPS household survey, total employment of persons 16 and older, including legal and illegal immigrants, rose by 8.567 million while the monthly payroll survey yielded a gain of only 5.530 million nonfarm wage and salary jobs over this same time period.[10] There is a major difference of 3.037 million between these two employment growth estimates with the CES survey indicating a 35% lower level of employment growth than the CPS survey.[11] The CPS household survey's employment count includes the self employed,

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[8] For a recent review of changing job quality in the U.S. over recent decades,
See: (i) John Schmitt, "The Decline of Good Jobs." in Challenge: The Magazine of Economic Affairs, January – February 2008, pp. 5-25; (ii) David Howell and Mamadou Diallo, "The Importance of Accounting for Job Quality", Challenge: The Magazine of Economic Affairs, January – February 2008, pp. 26-44.

[9] The CPS household survey measures the number of employed civilians 16 and older including the self-employed and unpaid family members who work 15 or more hours in a family owned business. Each employed person is counted only once regardless of the number of jobs held. The CES payroll survey measures the number of wage and salary jobs on the payrolls of nonfarm, private sector firms and government agencies. It excludes the self-employed and unpaid family members but will count multiple wage and salary jobs held by the employed.
See: U.S. Bureau of Labor Statistics, Employment and Earnings, January 2007, "Appendix A and B", U.S. Government Printing Office, Washington, D.C., 2007.

[10] If we substitute the CPS employment series adjusted for population controls over this time period, the gain in CPS employment falls to slightly below 8 million and the gap between the two series falls to 2.5 million.

[11] For an earlier review of gaps in CPS/CES employment growth estimates,
See: Andrew Sum, Paul Harrington, and Ishwar Khatiwada, New Immigrant Workers in the U.S., 2000-2005, Report Prepared for the Center for Immigration Studies, Washington, D.C., 2006.

farm workers, and unpaid family workers while the CES excludes these individuals from their jobs universe. After excluding these groups from the CPS employment count, the gap between the two surveys' employment growth estimates rises to 3.244 million, with the CES estimate of job growth being 37% below that of the CPS. This implies the existence of a large number of new wage and salary workers on the CPS survey that are not being reported by employers as being on their official payrolls. This group would include workers being hired as independent contractors often in violation of existing contractor law and those hired off the books including undocumented immigrants.

Table 8:
Comparisons of Changes in Total, National Civilian Employment form the CPS Household Survey and Changes in Nonfarm Payroll Employment from the Current Employment Statistics Program, 2001 I – 2007 IV
(in Thousands, Seasonally Adjusted)

Employment Measure	(A) CPS Survey	(B) CES Payroll Survey	(C) CES – CPS	(D) CES – CPS as % of CPS Change
Total employment	8,567	5,530	-3,037	-35.4%
Nonfarm wage and salary employment	8,774	5,530	-3,244	-37.0%
Nonfarm, private sector wage and salary employment	7,301	4,136	-3,165	-43.3%

Sources: (i) U.S. Bureau of Labor Statistics, CPS household survey, www.bls.gov; (ii) U.S. Bureau of Labor Statistics, CES payroll survey, www.bls.gov.

Most employees reported to be working for the federal, state, or local government in the CPS survey would be expected to appear on the official payrolls of those government agencies.[12] Our last comparison excludes all government workers from both surveys. The CPS estimate of growth in nonfarm, private sector wage and salary employment was 7.30 million versus only a 4.13 million gain in CES private sector, wage and salary employment. The difference between these two surveys' estimates of employment growth was equal to 3.165 million or 43%, a very large gap whose origins need to be more fully understood to properly interpret structural changes in U.S. labor markets over the past seven years.

[12] Persons working for the government as a paid consultant or as an independent contractor will not appear on their official payrolls.

A high share (62%) of employment growth from the CPS survey in the U.S. over the past seven years was attributable to new foreign immigrant arrivals, a relatively high share of whom have been estimated to be undocumented workers.[13] Among males, the new important share was 75% of the net change in male employment. Many of these undocumented workers will obtain work in the informal labor market including off-the-books jobs. If this hypothesis is generally correct, one would expect that the largest gaps between the CPS and CES employment growth estimates at the state level would prevail in those states with largest numbers of new immigrant workers. For the 2000-2007 period, we estimated the absolute size of the gaps between the estimates of employment growth from the CES payroll survey and the CPS-based estimates of resident employment for each state. We then ranked each state by the size of its gap between the CPS-CES employment growth estimates and compared these gaps to the number of new immigrant workers in the state as of 2007. Fifteen states had a CPS-CES employment growth gap of 100,000 or more (Table 9). Most of these states were quite large from a population perspective. They included California, Texas, Florida, New York, Ohio, Michigan, and Georgia. In these 15 states combined, the CPS-CES employment growth gap was 3.319 million. In these same 15 states, there were 4.216 million new immigrants at work in 2007 ("new immigrants" are those who arrived in the U.S. from 2000 onward and were working at the time of the 2007 CPS surveys). There, thus, appears to be a strong link between the growth of the informal labor market and the growth of the new immigrant worker population across many states over the 2000-2007 period. Jobs in this informal/black labor market are typically filled through informal, word of mouth recruitment methods rather than through formal listings with the general public.

[13] Based on a methodology for identifying the number of newly arrived unauthorized immigrants, we earlier estimated that 65% of new immigrant workers between 2000 and 2005 were undocumented. Estimates of the number of unauthorized immigrants by region of the world as of 2005 were generated by Jeffrey Passel of the Pew Hispanic Center.
See: Jeffrey S. Passel, The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey, Pew Hispanic Center, Washington, D.C., March 2008.

Table 9:
Comparisons of Changes in CES Payroll Employment and
CPS Household Survey Employment at the State Level and
Employment Levels of New Immigrants by State, 2000 to 2007

CES-CPS Gap Rank	State	(A) CES	(B) CPS	(C) Net Difference (B – A)	(D) New Immigrant Employment in 2007
1	California	675,000	1,277,366	602,366	1,070,220
2	Ohio	-200,200	178,688	378,888	73,432
3	Georgia	197,700	550,780	353,080	210,039
4	Florida	971,900	1,287,275	315,375	647,570
5	Texas	927,200	1,162,815	235,615	607,328
6	Illinois	-63,400	142,282	205,682	260,141
7	Colorado	116,400	320,453	204,053	76,476
8	Washington	220,700	383,690	162,990	124,891
9	New York	99,600	246,758	147,158	430,342
10	Virginia	244,200	379,397	135,197	171,585
11	Arizona	423,300	552,806	129,506	138,514
12	Pennsylvania	104,500	232,306	127,806	89,730
13	North Carolina	230,600	339,764	109,164	155,275
14	Tennessee	67,700	176,561	108,861	90,396
15	Michigan	-414,900	-311,398	103,502	70,380
	Fifteen State Total	3,600,300	6,919,543	3,319,243	4,216,219

Source: U.S. Bureau of Labor Statistics, Current Employment Statistics Survey, and Current Population Survey Data Seasonally Adjusted Quarterly Average Data, Downloaded from WWW.BLS.Gov May 18, 2006.

Another statistical analysis of the links between the size of the CPS-CES employment gaps and the hiring of new immigrants, especially undocumented immigrants, involves comparisons of the relative size of the gaps between CPS/CES employment growth estimates by major industry group with the industrial distribution of new immigrant workers across the country between 2000 and 2007. Our analysis revealed that the following major industries were among those characterized by the largest relative differences between CPS and CES employment growth estimates over the 2000-2007 time period.

- Retail trade 3.83
- Transportation and warehousing 2.87
- Construction 2.33

- Business services (including labor leasing/temporary held/office cleaning)1.65

Many of the industries in which CPS employment growth substantially outpaced that from the CES were substantial employers of new immigrants, especially young, non-college educated male immigrants with country of origin backgrounds that would place them at a high probability of being undocumented. Many of the jobs they held in recent years were in the same types of occupations and industries that male teens and young adults with no post-secondary schooling would have held in prior years. America's "Forgotten Half" has largely been forgotten by the nation's economic policymakers in formulating immigration policy.[14]

Assessing the Local Labor Markets In Which H2B Programs Operate

Many of the labor markets in which H2B workers find employment are local rather than national in scope; i.e., the firms hiring H2B workers primarily recruit in the local labor market rather than engaging in regional or national recruitment. H2B employers, however, may find that unutilized workers in surrounding local labor markets may be willing to accept temporary employment in these job slots if transportation can be arranged and competitive wages are offered.

Some of the local labor markets in which the H2B program has operated at a reasonable scale such as the Cape Cod area of Massachusetts, have been characterized by a combination of highly seasonal employment patterns and changing demographics that have created some mismatches between the seasonal growth in demand for labor and the available local supply of labor. For example, in Barnstable County, the geographic area encompassing Cape Cod, total payroll employment in recent years rose from approximately 92,000 wage and salary workers in the winter months of January-March to more than 112,000 workers in the peak summer months (June-August), a gain of more than 20,000 or 22% versus a seasonal employment gain of only 97,000 or 3% for the state as a whole. Over the past few decades, Cape Cod has gradually become more of a retirement community. In 2006, 23% of the regular resident population were 65 and older versus only 13% of the state's resident population.[15] Both teens (16-19) and young

[14] The term "Forgotten Half" was originally applied in the late 1980s by the W.T. Grant Foundation to those American youth who did not complete any years of post-secondary schooling. For a more recent update on their educational and economic well-being.
See: Samuel Halperin, "Today's Forgotten Half: Still Losing Ground," in The Forgotten Half Revisited, American Youth Policy Forum, Washington, D.C., 1998.
[15] These estimates are based on the findings of the 2006 American Community Survey.

adults (20-24) are under-represented among the Cape Cod population. Workers in these age groups would normally be a primary source of labor for many of the jobs for which local employers have sought H2B immigrant recruits. A labor market rationale for the H2B program can be found here, but much more can be done by local employers and workforce development agencies to recruit and attract teens, young adults, and older adults (60+) residents of surrounding communities, and college students from across the state to fill more of these H2B positions. Our recommendations for reforming the existing H2B program to help achieve the desired goals of employing more teens, young adults, and older workers are presented below.

What Can Be Done?

Efforts to reform the existing H2B worker visa program should be designed to encourage the employment of more American teens and young adults (as well as older adults) in the summer and winter months. This should be seen as the first step in a comprehensive series of reforms that are needed to set long-term employment and training policies to start rebuilding our youth labor markets. Among the primary goals of such policies should be to substantially raise the year-round and summer employment rates of teens and young adults and to increase their access to jobs in a wide array of industries and occupations. Strategies for achieving these goals should include the following:

1. The U.S. Congress should set a multi-year declining goal for H2B permits and reform the program to be more like the H1B program where the employer will put up $1,500 or more for each slot. These funds could be used for youth training and recruiting. When the allocated slot is filled with a native-born worker instead, the employer gets the $1,500 back, giving them an incentive to hire natives and permanent legal immigrants.
2. The federal government must enforce the collection of all employer social security and unemployment insurance taxes, roll them into a single tax fund for each H2B hire, and put these monies plus the worker's social security contribution into a youth training and recruitment fund. This also will assure that employers pay the same taxes for H2Bs as they do for native workers and legal immigrants.
3. The federal government must guarantee that the hourly wages and housing and food benefits paid to H2B workers are in compliance with existing wage and hours laws. We

should calculate the real wage value of that package. Such a wage package would be on offer for native workers who do not need housing and food to support themselves.

4. We should use public revenues from the two above tax sources to recruit both out-of-school youth and young adults from high schools and colleges under a cooperative education arrangement for early release where necessary, with academic credit for work, with summer learning options, and with scholarship and trainingship accrual at the end of the summer.
5. The U.S. Congress should establish a new earned income education and training credit (EIETC) that would be implemented for all youth (under 25 years of age) so they would have a greater incentive to begin work early and often and use these funds to finance their college education or post-secondary training.
6. All native workers, including legal immigrants, employed as "replacements" in H2B slots would be enrolled in a local WIA career center and be given follow-up services for transition into full-time jobs and training. WIA would also be used to perform recruitment, screening, and guaranteed job filling for this program.

These are only recommendations to address this one narrow area of concern: what to do about addressing the labor market issues surrounding the H2B program. But this is a good place to get started. As a nation, we have to strengthen youth labor markets across the board. We can continue to consciously recruit foreign workers in the midst of a severe jobs recession for youth and just call it a day for youth employment, or we can begin to rebuild a youth jobs network that has been torn down over the last few decades.

Let us conclude with a paraphrase of the views of the late Senator and Vice-President Hubert Humphrey on the moral test of a nation's government[16]:

" The moral test of a nation's workforce development policy is how it treats those who are in the dawn of their working life (teenagers and young adults), those who are in the twilight

[16] The original quotation of Senator Humphrey appears on the walls of a hearing room in the U.S. House of Representatives, Rayburn House Building.

of their work lives (the older workers), and those who are in the shadows of the labor market (the dislocated, the discouraged, and the working poor)."[17]

We need to begin to coordinate and reform our workforce and immigration policies to help us pass this crucial moral test, especially for the nation's youngest workers.

[17] This revised quotation of Senator Humphrey was developed by one of the authors in a previous research monograph on youth labor market issues, see: Andrew Sum, Neeta Fogg, and Garth Mangum, Confronting the Youth Demographic Challenge, Sar Levitan Center for Social Policy Studies, Johns Hopkins University, Baltimore, 2000.

Chairman MILLER. Mr. Beardall.

STATEMENT OF BILL BEARDALL, DIRECTOR, EQUAL JUSTICE CENTER

Mr. BEARDALL. My name is Bill Beardall, I am the executive director of the Equal Justice Center. I have represented low income working people for more than 30 years. And I am a clinical professor of law at the University of Texas Law School where I direct the trends national worker rights clinic. Through these organizations and for the last three decades, I have provided representation to U.S. citizens, to work authorized immigrants and to undocu-

mented immigrants, primarily on recovery of unpaid wages and enforcement of other fundamental labor laws.

Today I would like to focus on three key points about an additional way in which Federal programs have failed to support the job opportunities, wages and working conditions for U.S. workers, not only in guest worker programs, but in the broader labor market.

First, our Federal Government's failure to enforce wage laws and other employment protections for all workers has had the effect of increasing the exploitation of undocumented workers and thereby depressing the wages, working conditions and job opportunities for U.S. workers.

Second, the best and most immediately available method we have to sustain job opportunities and wages for U.S. workers is to ensure that the wage laws and other labor protections are fully enforced for all workers regardless of their immigration status.

Third, future immigration reform legislation and guest worker policies are doomed to fail U.S. workers if they don't include full labor protections and full ability to enforce those labor protections for all workers, regardless of their immigration status.

The failure to enforce our labor and employment laws has created an ironic incentive for unscrupulous employers to actually prefer hiring undocumented workers over U.S. workers. The main reason so many employers prefer hiring undocumented workers is because in the absence of effective Federal enforcement of worker protection employers know their undocumented workers are easier to exploit and easier to intimidate into silence.

I provided the committee with a graphic illustration of the way that this exploitation an intimidation work in the form of an audio recording. A transcript is attached to my written testimony and the committee has the audio recording. The recording is a voice message left by an employer for a worker whose name is Gabriel. The employer had failed to pay Gabriel for his labor on a home construction job. The worker had merely returned to the work site looking for the employer hoping to get paid the money he was owed. I just want to read this brief message, but I want to apologize in advance for the foul language used by the employer, though it does capture the menacing nature of the recording and this type of intimidation.

I am quoting from the recording now, "Gabriel, it is"—employer name—"I just got a call from the homeowners of the house that you all did work at and they said you went by looking for money? Gabriel, if you ever f'ing do that again, I will turn your f'ing brown A into INS and I will personally escort you to the GD border. F with me anymore and I am going to ruin you, Gabriel. Don't F with my anymore. You go back to that house and I swear to God I will take this to the next level and I will turn you into the sheriff's department. Good luck on getting any more money." That is the end of the message.

The recording helps to illustrate how some employers use the workers undocumented status to exploit them. It illustrates why so many employers hire undocumented workers over U.S. workers who would not be so subject to this kind of intimidation and exploitation. And it illustrates the grave need for more vigorous enforce-

ment of our wage laws and employment protections for all workers, documented and undocumented. And that is essential if we ever hope to uphold the basic employment rights and opportunities for U.S. workers. Thank you.

[The statement of Mr. Beardall follows:]

Prepared Statement of Bill Beardall, Director, Equal Justice Center

Mr. Chairman, members of the Committee, thank you for the opportunity to address the critical issue of whether federal programs adequately protect the jobs and working conditions of U.S. workers in a labor market that includes high numbers of documented and undocumented immigration.

I am the Executive Director of the Equal Justice Center and have practiced as an employment lawyer for low-income working people for 30 years. I also serve as a clinical professor of law at the University of Texas Law School, where I direct the Transnational Worker Rights Clinic.

The Equal Justice Center (EJC) is a privately-funded, non-profit employment justice organization based in Texas which helps low-income working men and women enforce their employment rights, especially when they have not been paid for their labor. In the Transnational Worker Rights Clinic at the University of Texas School of Law, our law students represent low-wage workers in cases to recover their unpaid wages, while pioneering new methods for protecting the wage rights of all workers in our transnational labor economy. Both programs represent low-income working people regardless of their immigration status and many of our clients are U.S. citizens and legal immigrants.

Summary

In my testimony before this Committee, I would like to focus on three key points which I hope will assist the Committee in devising wise and realistic policies related to immigrant labor and protection of U.S. workers:

1) Our federal government's failure to enforce wage laws and other employment protections for all workers has increased the exploitation of undocumented workers and thereby depressed the wages, working conditions, and job opportunities of U.S. workers.

2) The best and most immediately available means to sustain job opportunities and wages for U.S. workers is to ensure that wage laws and other labor protections are fully enforced for all workers regardless of their immigration status.

3) Future immigration reform legislation and guestworker policies are doomed to fail U.S. workers, if they do not include full labor protections and full ability to enforce these protections for all workers regardless of their immigration status

The Federal Government's Failure to Enforce Wage Laws and Other Employment Protections for All Workers Has Increased the Exploitation of Undocumented Workers and Thereby Depressed the Wages, Working Conditions, and Job Opportunities of U.S. Workers

This Committee has heard testimony today, and on many previous occasions, about the failure in our federal guestworker programs to ensure that U.S. workers are given full and fair opportunity to secure those jobs at fair wages and decent working conditions. Serious as the failure has been in these guestworker programs, there is another federal program failure that has an even larger adverse effect on job opportunities, wages and working conditions of U.S. citizens and legal work-authorized immigrants—and that is the federal government's failure in the broader low-wage labor market to enforce our most basic labor, employment, and civil rights laws. I am speaking here of the federal government's failure to fully and effectively enforce the minimum wage and overtime laws, our workplace safety laws, union and collective bargaining rights, and laws forbidding discrimination on the basis of race, national origin, and gender.

This failure to enforce workplace protections has had the effect of depressing wages and working conditions for all workers—especially for U.S. citizens and legal work-authorized immigrants. Moreover, the failure to enforce our labor, employment, and civil rights laws has created an ironic incentive for unscrupulous employers to actually prefer hiring undocumented immigrants over U.S. workers. The main reason so many employers prefer hiring undocumented workers is because—in the absence of effective federal enforcement of worker protection laws—employers know their undocumented workers are easier to exploit and easier to intimidate into silence.

A Graphic Illustration of How Some Employers Use Immigration Status to Exploit Workers

I would like to illustrate how I see this harsh reality play out every day with a graphic example, which comes from my own practice: I have provided the Committee with an audio recording of a voice mail message that was left on the cellphone voice mail of one of my clients, by his employer.

Background to the recorded message: My client, whose name was Gabriel, had performed some basic landscaping labor on a home construction project. Gabriel came to our office because his employer had failed to pay Gabriel approximately $600.00 owed to him for a couple of weeks of work. Gabriel explained that, in his continuing effort to collect the wages he had earned, he had gone back to the worksite to look for the employer. The employer was not there, but the homeowner was and the homeowner asked Gabriel why he was looking for the employer. Upon hearing Gabriel's explanation, the homeowner, wanting to be helpful, said he would try to get a message to the employer on Gabriel's behalf. The employer apparently got the message and then called Gabriel on his cell phone leaving the voice message that is transcribed in Attachment A to this statement.

In the voice message (Attachment A), the employer, in language that is both explicit and menacing, threatens to turn Gabriel over to both immigration authorities and local enforcement and to use Gabriel's perceived immigration status to "ruin" him. At the end of the message, the employer makes it clear he will continue to refuse to pay the worker his earnings.

What is remarkable about this audio recording is not that the employer sought to intimidate the employee in this fashion; such threats are made, in one form or another, probably thousands of times a day across our nation. The only thing that makes this message unique is that it was captured on an audio recording and that it is so disturbingly explicit.

This recording helps illustrates (1) how some employers use their workers' undocumented status to exploit them; (2) why it is many employers prefer to hire undocumented workers over U.S. workers who would not be so subject to intimidation and exploitation of this type; and (3) how more vigorous enforcement of wage laws and other employment protections for all workers—documented and undocumented—is essential if we ever hope to uphold basic employment rights and opportunities for U.S. workers.

Federal Government Enforcement of Wage Rights and Other Employment Protections for All Workers is Vital to Sustaining Wages, Working Conditions, and Job Opportunities for U.S. Workers.

It should be noted here, that under our system of employment laws, all workers have historically been protected by the same wage, safety, and labor protections—regardless of their immigration status.[1] We have always observed this principle as a nation for the very sound reason that, if we allow one group of workers to be treated as second-class employees with second-class employment rights, this would inescapably lead many employers to prefer those second-class workers and would thereby undermine the employment rights of all other working people.

But just as important as ensuring that all workers are nominally covered by the same wage and other employment protections, it is vital to that we effectively enforce those wage and employment protections fully for all workers—and equally regardless of the workers' immigration status. So long as we continue failing to effectively enforce the wage laws and other employment protections for any workers, the special vulnerability and exploitability of undocumented workers will cause them to be, in effect, second class workers with second class employment rights and will perversely make them more attractive to many employers. Easy exploitation of such second-class workers undermines the wages and working conditions of all workers because it stimulates a "race to the bottom" competition and reduces opportunities for workers to protect their wages and working conditions through collective action.[2]

If we are successful in returning the federal government to its historic role of protecting the rights of working men and women, it will be crucial that the responsible federal agencies enforce the laws vigorously for all workers, regardless of their immigration status. Otherwise, the differential enforcement would continue to consign undocumented workers and guestworkers to the status of second-class workers with second-class rights status and would perpetuate the exploitative preference for undocumented workers and the self-defeating adverse impact on employment opportunities and employment protections for U.S. workers that have been noted above.

Future Immigration Reform Legislation and Guestworker Policies are Doomed to Fail U.S. Workers, if They do not Include Full Labor Protections and Full Ability to Enforce these Protections for All Workers Regardless of their Immigration Status

Immigration reform measures and guestworker policies that do not have as a central element the full enforcement of full labor protections for all workers—docu-

mented and undocumented—will inevitably be self-defeating. As outlined above, the lack of wage and other labor protections—or equally important the ability to enforce these protections—gives many employers a powerful incentive to prefer these more tractable and exploitable employees. History teaches us that a willing and desperate workforce will find employers willing to take advantage of their availability, reduced-cost, and exploitability. This preference for undocumented workers is not theory. It is exactly what happened in the late 1980's and 1990's in response to the imposition of a ban on hiring unauthorized immigrants (so-called "employer sanctions") in the 1986 Immigration Reform and Control Act.[3]

Moreover, as illustrated by the audio recording discussed above, without vigorous and affirmative enforcement of wage laws and other labor protections, many employers twist immigration law into a tool to intimidate or punish workers seeking to enforce their labor rights. Many of them knowingly violate IRCA's employment verification provisions to hire undocumented workers whom they know will then be reluctant to hold them accountable for labor law violations. As in the audio recording, it is common practice for these same employers to use the existence of the employer sanctions scheme to threaten undocumented workers with deportation if they do indeed complain about non-payment of wages or other deplorable working conditions. In other examples, an employer may not verify a worker's employment authorization at the time of hire but will conveniently remember the requirements under IRCA only after the worker complains of some labor violation or attempts to organize a union to improve their working conditions. Implementation of a system that only enforces hiring sanctions without increased enforcement and improvement of existing labor and employment protections will further exacerbate these problems, and create additional incentives for unscrupulous employers to recruit, hire and exploit even more unauthorized workers. This exploitation of course not only harms the undocumented worker, it just as surely harms U.S. born workers who find their job opportunities, wages and working conditions undermined by the incentives thus created for employers to hire and take advantage of vulnerable undocumented workers.

These same dynamics are true for guestworker programs. If guestworkers are not protected by the full set of labor and employment protections, or if they are not afforded fully effective and affirmative government and private enforcement measures, then employers have a strong incentive to prefer hiring the guestworkers over U.S. workers—and an equally strong incentive to exploit them in ways that undermine job opportunities, wages and working conditions of U.S. citizens and permanent resident immigrants.

In addition to increasing the opportunity for exploitation of vulnerable workers, an immigration policy that relies on employer sanctions and lacks strong labor rights enforcement will be counter-productive for three other important reasons: First, it will create an economic incentive for even more employers to hire workers "off-the-books" in unreported, cash-based employment relationships.[4] Second, it will encourage more employers to evade employer sanctions by misclassifying their employees as "independent contractors." Third it will encourage companies to interpose substandard, middleman labor contractors between themselves and their employees, pretending the workers are employees of these sham contractors and exposing the workers to marginal fly-by-night employment practices by the middlemen. All of these practices in fact increased dramatically following the imposition of employer sanctions in the 1986 IRCA. And all of these practices have harmful economic and social impacts beyond the increased exploitation of workers. For example, they increase our reliance on an unregulated cash economy; reduce the collection of payroll and income taxes; reduce participation in the unemployment insurance, workers compensation and social security safety net programs; reduce the ability of government regulators and workers to monitor and enforce basic labor protections; and reduce employers' general respect for operating legally and above-board. These substandard practices have an adverse effect on everyone in our society, but they are especially—and ironically—harmful for U.S. workers, whose employers will be forced to compete with a growing sector of businesses that are unconstrained by the regulatory apparatus that is supposed to protect us all and is designed to underpin our basic standard of living.

Indeed it is not just unscrupulous employers who respond to the negative incentives created by the lack of vigorous enforcement of wage and employment rights. Even legitimate employers end up being compelled to rely more on low-cost undocumented labor and substandard employment practices or to contract their work out to exploitative contractors or suffer a competitive disadvantage and risk going out of business.

Stronger Enforcement of Wage and other Employment Protections for All Workers is the Single Most Promising Strategy that is Immediately Available to Manage our Immigration Challenge and Support U.S. Workers

As a practical matter, the only law enforcement approach that is very likely to succeed in addressing the problems associated with unauthorized employment in our economy is the comprehensive enforcement of labor and employment protections for all working people without regard to their immigration status. This would be by far the most effective way to remove employers' incentive to hire and exploit unauthorized workers, while also removing employers' incentive to adopt substandard employment practices that evade our core tax, social benefit, and regulatory systems. On the other hand, ramping up enforcement of employer hiring sanctions alone will surely do more harm than good, at least without vastly increased enforcement of employment protections for both undocumented and documented workers.

If immigrants enjoy the same workplace protections and economic mobility as others, they will be less subject to exploitation at the hands of employers whose practices will then undermine the wages and working conditions of other workers. In addition, there is evidence that raising the wages and working conditions of low-wage workers will actually reduce immigration by making the existing workforce of U.S. workers more attractive to employers relative to undocumented workers.[5] Therefore, it is imperative, for the benefit of all workers, to eliminate the vulnerabilities and marginalization inherent in the existence of a large, economically vulnerable undocumented workforce. In the long run the only practical way to do this is to enact comprehensive immigration reforms that (1) provides a comprehensive path to earned legal status for currently undocumented immigrants; and (2) provides an orderly and realistic means for the future flow of immigrant workers to be employed in our economy while upholding U.S. labor standards for all workers. But in both the short- and long-terms the most important step we must take is to ensure that all immigrants—current and future, documented and undocumented—are protected by full labor and employment rights and by fully effective status-blind enforcement of those rights.

The U.S. Department of Labor Should Attend to Three Special Aspects of Its Enforcement of Wage and Hour Laws to Effectively Uphold the Rights of Both U.S. Workers and Immigrant Workers

Three special points should be emphasized regarding enforcement of the wage and hour laws by the U.S. Department of Labor (USDOL). First, it is not enough for the Department of Labor to enforce wage and hour laws based mainly on complaints by made by employees. As noted, undocumented workers are particularly vulnerable to intimidation and have reason to be particularly reticent about enforcing their employment rights or otherwise making themselves visible—particularly to an agency of the federal government. For that reason the USDOL must return to aggressively exercising its traditional authority to undertake investigations and enforcement actions on its own initiative, especially in those industries where exploitation of undocumented workers is widespread.

Second, it is critical that USDOL enforcement of wage and hour laws be carefully separated from enforcement of immigration laws by the Department of Homeland Security (DHS). Under a now long-standing Memorandum of Understanding between the USDOL and the former Immigration and Naturalization Service (and now with the DHS), the USDOL is not to undertake enforcement of immigration laws in connection with investigations driven by complaints from workers. That is not currently true however for investigations of wage violations that are undertaken by the USDOL on its own initiative. Nevertheless separation of wage and hour enforcement from immigration enforcement should be maintained in both types of USDOL investigation. Otherwise, workers, who are normally key witnesses in such cases will not make themselves available to assist the USDOL investigation and USDOL enforcement capability will be dramatically undermined, to the detriment of U.S. workers who depend on such investigations to uphold wage and hour standards for all employees. USDOL should reaffirm, update and refine its policies on separation wage and hours enforcement from immigration enforcement.

Third, the USDOL should revise and strengthen its policies with respect to workers' ability to make anonymous complaints and with respect to keeping the identity of complaining workers confidential in appropriate cases. Workers' organizations and employee advocates would gladly cooperate with the USDOL to devise new policies that appropriately balance employees' need to be protected from retaliation by their employers against the need to properly verify the authenticity of complaints and ensure due process for employers. Strengthened policies in this area are especially vital to ensure that employers are not able to underpay undocumented workers to the detriment of all workers, including citizens and lawful work-authorized immigrants.

The Private Right of Action is a Vital Form of Federal Enforcement and Should be Preserved and Strengthened in Future Labor and Immigration Legislation

Since the establishment seventy years ago of the federal wage and hour laws, a critical component of the federal enforcement policy has been enforcement of the law by employees themselves, through their ability to enforce their rights through private actions in the courts. This has proven to be an indispensible aspect of enforcement which complements agency enforcement by the USDOL. Indeed in recent years as agency enforcement efforts by the USDOL have flagged, this private right of action has had to shoulder most of the burden of sustaining enforcement of the wage and hour laws and has served as the most effective on-going check against employer abuses of all workers, including U.S. workers. Moreover, the private right of action is an especially cost-effective enforcement tool in that it imposes very little direct expense on the federal government and the ordinary taxpayer; instead it shifts the cost of enforcement onto those employers who are proven to have violated the law and harnesses free market incentives to encourage compliance with the law.

As the Congress considers future legislation related to guestworker programs and immigration reform, it should make optimum use of the private right of action approach, supporting the right of all working people to full and equal access to the courts and equal ability to enforce their wage rights and other employment protections regardless of their immigration status. This is an area in which it is particularly important to avoid consigning guestworkers, transitional immigrant workers, and undocumented workers to a second-class set of rights, with a consequent adverse impact on U.S. citizen employees and other lawful immigrant workers.

Restrictions on the Federal Legal Services Program have Resulted in a Failure to Ensure that Job Opportunities, Wages, and Working Conditions of U.S. Workers are Protected

The private right of action is one of the most effective, cost-efficient, and available remedies through which working people can enforce their wage and hour rights. However, for most low-income working people the only viable avenue for obtaining legal representation to help them enforce their wage and hour rights or other labor protections, is through legal aid programs funded through the federal Legal Services Corporation. Yet for the last decade, these federally funded legal services programs have been prohibited from providing legal assistance to immigrant workers who are undocumented, or to immigrants lawfully present in the U.S. under the H-2B guestworker program, or to lawful immigrants residing in the U.S. under several other forms of immigration status. The fact that these workers do not have an effective means to enforce their wage and other employment rights has made them especially attractive to many employers and has fed these employers' preference for hiring these workers over U.S. citizens and other documented workers. This restriction on the federal Legal Services Corporation and its grantees turns out to be one of the principal mechanisms that has turned undocumented workers and hundreds of thousands of legally-documented into a huge underclass of second-class workers with second-class employment rights. And as noted above, the resulting exploitability of this huge underclass of workers has severely undermined the job opportunities, wages, and working conditions of all U.S. workers.

Congress Should Enact Legislation to Eliminate the Adverse Impact of the Hoffman Plastic Decision on Enforcement of Labor Protections for All Workers, but in the Meantime Agencies Such as the USDOL Should Not Be Deterred from Enforcing Wage Laws and Other Labor Protections

While it has been noted above that all workers, regardless of immigration status, continue to be covered under labor and employment protective laws, a 2002 Supreme Court decision, Hoffman Plastic Compounds, Inc. v. NLRB,[6] has had a dampening effect on immigrant workers' ability to exercise some of their rights. The Hoffman decision found that undocumented workers who are illegally fired for engaging in union organizing activities are not entitled to receive back pay wages, the only really effective remedy available under the National Labor Relations Act (NLRA). The Hoffman decision was limited to undocumented workers' right to back pay under the NLRA, but employers have attempted to extend the scope of the decision to workers who have filed complaints of discrimination, minimum wage and overtime violations, health and safety violations, and even personal injury cases.[7] A 2004 Human Rights Watch report noted that "[e]mployment law in the wake of Hoffman Plastic remains in flux, and immigrant workers' rights remain highly at risk."[8]

The Hoffman decision has actually undermined the employer sanctions system by creating a new economic incentive to hire undocumented workers: companies benefit if they hire undocumented workers because they perceive such workers as carrying reduced liability for labor law violations.[9] The decision also weakens the position of authorized workers confronting abuse or exploitation because their undocumented

coworkers have fewer legal avenues for redress of labor violations, including unlawful retaliation, and therefore they have far less incentive to participate in efforts to improve conditions, such as by serving as a witness in a sexual harassment, discrimination, or wage claim. Businesses that take advantage of this situation can cut legal corners and thereby gain a competitive advantage over law-abiding employers.

Strong labor law protections for all workers can be meaningfully realized only if the law prohibits employers from using a worker's immigration status to interfere with these rights. The fear and division resulting from the Hoffman decision has had an adverse impact on all workers' rights, including the right to organize and bargain collectively.[10] Hoffman also has resulted in limiting workers' access to the legal system, particularly since many of the cases being litigated arise from defendants seeking discovery into the plaintiffs' immigration status, which serves to chill and intimidate immigrants from pursuing legal claims.[11]

For these reasons, the Congress should act to restore the fundamental employment rights that were diminished by the Hoffman Plastic ruling, rejecting the Supreme Court's supposition that our immigration laws "trump" our employment laws. As long as the Hoffman Plastic is the law of the land, it will undermine job opportunities and employment protections for U.S. workers as much or more than for undocumented immigrants.

In the meantime, however, courts have continued to emphasize that the Hoffman Plastic ruling does not diminish the rights of any worker under the Fair Labor Standards Act to recover unpaid wages for labor they have already performed.[12] It is especially important for the USDOL to vigorously enforce the wage and hour laws and workplace safety laws under its jurisdiction without regard both to immigration status, both to protect the rights of U.S. workers and immigrant workers and to dispel the widespread mistaken impression among many employers that somehow the Hoffman Plastic decision gives them a free hand to hire and then exploit undocumented immigrants without fear of enforcement by these immigrant workers.

Expanding Sanctions on Employers for Hiring Unauthorized Workers and Requiring an Electronic Employment Verification System as Currently Proposed Would Do More Harm than Good for U.S. Workers

The solution to our current immigration challenge lies in (1) reforming our immigration laws in a comprehensive and realistic way—one that also includes strengthening our labor, employment, and civil rights laws, and (2) vigorously enforcing these laws. The Equal Justice Center does not support an expansion of the employer sanctions scheme, including the pending legislation that would mandate an Electronic Employment Verification System (EEVS), because of the way in which such schemes have been used to circumvent and weaken workers' rights. The currently pending EEVS proposals would result in negative consequences for workers who are U.S. citizens and work-authorized immigrants and they do not include basic safeguards that are necessary to deter employers from knowingly hiring and exploiting undocumented workers.

As Congress considers creating a mandatory EEVS, this Committee must understand that an approach that relies only on enforcement of hiring sanctions will not solve the problems associated with unauthorized employment. In fact it is doomed to fail—again—as it did after 1986. An employment verification system has no real chance of succeeding unless it is also accompanied by (1) a comprehensive opportunity for currently undocumented immigrants to earn legal status; (2) a realistic opportunity for the future flow of immigrant workers to work in our economy with fully effective employment rights; (3) vigorous, status-blind enforcement of our nation's labor and employment laws for U.S. workers, documented immigrant workers and undocumented immigrant workers alike.

It is in this context that we ask Congress to consider an approach to immigration worksite enforcement that doesn't rely only on enforcement of hiring sanctions, but also addresses the way in which immigration law often "trumps" labor law. Without addressing this problem, an enforcement-only policy will be counter-productive because it will not address the economic incentive that employers have to hire undocumented workers through subterfuges that entirely bypass out system of basic wage and employment protections, including moving into the underground economy, misclassifying workers as independent contractors, and using sham subcontracting arrangements.[13]

This last point is critical: the main effect of the EEVS proposals currently pending in the Congress will likely be to encourage many employers to evade the EEVS system by misclassifying their employees as independent contractors or by pretending that their employees are employed by some fly-by-night, sham entity. Since and employer would only be responsible for verifying its own employees under the EEVS, this simple evasion, based on sham mischaracterization of the workers' employment status, would sidestep the intended purpose of the EEVS. This has already been one

of the primary consequences of the IRCA employer sanctions and the current EEVS proposals would merely intensify this effect. Moreover, when we induce employers to mischaracterize the true employer-employee status of their workers, we deny the working men and women of our nation the basic employment protections which apply to employees but not to independent contractors—protections like the minimum wage, overtime compensation, unemployment insurance, workers compensation.

There is also another simple device many employers would be given an incentive to use to avoid the pending EEVS proposals. Just as the IRCA employer sanctions have done, the pending EEVS proposals would encourage many employers to simply conduct their employment relationships entirely off-the-books in an underground cash economy, often without even bothering to characterize the worker as an independent contractor since no payroll records or reporting are done anyway.

The ease with which the simple evasions can be accomplished serves to point out again how no scheme of immigration control—even the most carefully crafted—can be successfully and constructively implemented unless they are accompanied by comprehensive and vigorous enforcement of labor and employment laws as an integral component of the scheme.

In addition, to protect U.S. workers and authorized immigrants, who will all be required to comply with any mandatory EEVS system, any EEVS legislation should include safeguards—not found in the current proposals—to ensuring that: (1) The EEVS requirements are phased in at a realistic rate after meeting objective benchmarks for database accuracy, privacy, and employer compliance with system requirements; (2) The EEVS requirements will apply only to new hires; (3) Enforceable measures are in place to prevent employer misuse of the electronic database to discriminate or retaliate against workers; (4) Workers have due process protections against erroneous determinations; (5) Strict privacy and identity theft protections are in place; (6) There will be independent monitoring and reporting on the accuracy and integrity of the system and on any employer misuse of the system; (6) Employees will have realistic flexibility in the documents they can provide to demonstrate that they are work-authorized; (7) Newly legalized immigrant employees will show up in the verification system; and (8) The Social Security Administration and apparatus will not be diverted from its core function of providing a social safety net for workers who retire or become disabled.

Conclusion

In our legitimate efforts to uphold job opportunities and employment protections for U.S. workers in our now thoroughly global economy and labor market, it is critical to remember that enforcement measures intended to control undocumented immigration may instead have the unintended and counter-productive effect of encouraging many employers to hire and exploit of undocumented immigrants. Moreover, in the real world labor market, the unchecked exploitation of undocumented immigrants depresses the wages and working conditions of U.S. workers and undermines the integrity of our system of employment laws. The only effective method for upholding job opportunities and employment protections for U.S. workers is to vigorously and comprehensively enforce our wage laws and other employment protections for all workers, regardless of their immigration status. While comprehensive enforcement of employment laws is not a magic bullet that will solve the entire immigration challenge, it is the most effective method currently available for dealing with that challenge—and no approach to the immigration dilemma can succeed without comprehensive enforcement of the employment rights of all workers in our economy.[14]

ATTACHMENT A

Transcript

Voice message left by an employer on the cell phone of an employee who was seeking to be paid for his labor, Austin, Texas—June 2004, (see background following the transcript)

> "Gabriel, its _____. I just got a call from the homeowners of the house that y'all did work at and they said that y'all went—that you went by looking for money. Gabriel, if you ever f ____ing do that again, I will turn your f ____ing brown ass into INS and I will personally escort you to the g ____d ____ border. F ____ with me anymore, and I'm gonna ruin you, Gabriel. Don't f ____ with me anymore. You go back to that house, and I swear to God I will take this to the next level and I will turn you in to the Sheriff's department. Good luck on any—on getting—on getting any more money." [end of message]

Background

Employee, Gabriel, had performed some basic landscaping labor on a home construction project in Austin, Texas. Gabriel came to the Equal Justice Center, office because his employer had failed to pay Gabriel approximately $600.00 owed to him for a couple of weeks of work. Gabriel explained that, in his continuing effort to collect the wages he had earned, he had gone back to the worksite to look for the employer. The employer was not there, but the homeowner was and the homeowner asked Gabriel why he was looking for the employer. The homeowner, wanting to be helpful, said he would try to get a message to the employer on Gabriel's behalf. The employer apparently got the message and then called Gabriel on his cell phone leaving the voice message that is transcribed above.

ENDNOTES

[1] An important, but still-limited, recent exception to this principle is the U.S. Supreme Courts holding in Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 122 S.Ct. 1275 (2002). See further discussion of this ruling and its consequences below.

[2] See, for example., Amy M. Traub, PRINCIPLES FOR AN IMMIGRATION POLICY TO STRENGTHEN & EXPAND THE AMERICAN MIDDLE CLASS: 2007 EDITION (Drum Major Institute for Public Policy, 2007), available at *http://drummajorinstitute.org/immigration/*; Jennifer Gordon, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES (Fordham University School of Law, June 21, 2005), available at *http://judiciary.house.gov/OversightTestimony.aspx?ID=431.*

[3] Donato, K. M., J. Durand and D. S. Massey. 1992. Stemming the Tide? Assessing the Deterrent Effects of the Immigration Reform and Control Act, Demography 29: 139-158.

[4] See Jim McTague, "The Underground Economy: Illegal Immigrants and Others Working Off the Books Cost the U.S. Hundreds of Billions of Dollars in Unpaid Taxes," THE WALL STREET JOURNAL CLASSROOM EDITION, April 2005, *http://wsjclassroom.com/archive/05apr/econ—underground.htm*; Lora Jo Foo, "The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation," YALE LAW JOURNAL, 103 Yale L.J. 2179, May 1994, available at www.wiego.org/papers/FooImmigrantWorkers.pdf.

[5] "How L.A. kept out a million migrants" Ivan Light, Los Angeles Times, April 16, 2006.

[6] 535 U.S. 137, 122 S.Ct. 1275 (2002).

[7] See, e.g., cases where Hoffman has been expanded to deny immigrant workers basic employment and labor rights: Crespo v. Evergo Corp., N.J. Super. Ct. App. Div. No. A-3687-02T5 (Feb. 9, 2004) (denying victim of pregnancy discrimination back pay, economic damages for emotional distress); Renteria v. Italia Foods Inc., N.D. Ill., No. 092-C-495 (Aug. 21, 2003) (workers fired for filing an overtime pay), see www.nilc.org/immsemplymnt/emprights/emprights067.htm; Majlinger v. Casino Contracting, et al., 2003 N.Y. Misc. LEXIS 1248 (Oct. 1, 2003) (workers' compensation denied to injured worker), see www.nilc.org/immsemplymnt/emprights/emprights072.htm.

[8] BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS (Human Rights Watch, 2004), www.hrw.org/reports/2005/usa0105/.

[9] See, for example, Christopher Ho and Jennifer C. Chang, "Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies For Protecting Undocumented Workers in the Title VII Context and Beyond," HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL, Vol. 22:473, 2005, available at *http://www.hofstra.edu/pdf/law—labor—Ho—Chang—vol22no2.pdf.*

[10] id.

[11] See Rivera et al., v. Nibco, Inc., 364 F.3d 1057 (9th Cir. 2004) (upholding a protective order prohibiting the disclosure of plaintiffs' immigration status noting that "while documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution").

[12] E.g., Ponce v. Tim's Time Inc., 2006 WL 941963 (N.D. Ill., 2006); Galaviz-Zamora v. Brady Farms, 230 F.R.D. 499 (W.D. Mich. 2005); Bernal v. A.D. Willis Company, Inc., No. SA-03-CA-196-OG (W.D. Tex., San Antonio Div., April 1, 2004, unpublished order denying motion to compel); Renteria v. Italia Foods, Inc., 2003 WL 21995190 (N.D. Ill. Aug. 2, 2003); Flores v. Amigon, 233 F.Supp.2d 462 (E.D.N.Y. 2002); Zeng Liu v. Donna Karan International, Inc., 207 F.Supp.2d 191 (S.D.N.Y. 2002);, citing In Re Reyes, 814 F. 2d 168 (5th Cir. 1987); Flores v. Albertsons, Inc. 2002 WL 1163623 (C.D. Cal. April 9, 2002); Singh v. Jutla, 214 F.Supp.2d 1056 (N.D. Cal. 2002); Cortez v. Medina's Landscaping, No. 00 C 6320, 2002 U.S. Dist. LEXIS 18831 (N.D.IL. Sept. 30, 2002).

[13] See fn. 4 supra.

[14] I wish to acknowledge the National Immigration Law Center for its contribution to much of the analysis, content, and research included in this statement.

Chairman MILLER. Thank you very much to you all of you for your testimony. Part of the discussion has been on proposed regs. I would like to raise an issue and I would like to see if Secretary Sequeira, whether you want to testify or Dr. Carlson and Mr. Goldstein back and forth. And that is this question about changing the

calculation of the wages. It appears to me that an employer would be allowed to pick one of four categories of wages, but the bottom category, the lowest wage would reflect what local farm workers are paid in the area. I hope I am phrasing this correctly, correct me if I am not, but it would seem to me that allows for the inclusion of illegals, undocumented workers in that pool in calculating the wages. My sense tells me that that is somewhat of a depressed wage. And if you pick that, any idea that you are going to get American workers in any numbers to come to those jobs would be farm workers or others, they will go look somewhere else for a different wage. Can you comment on this?

Mr. SEQUEIRA. Mr. Chairman, the Department's proposal related to the wage is simply a change, we have proposed to change the methodology by which those wages are calculated.

Chairman MILLER. I got that much.

Mr. SEQUEIRA. And we would rely on the Bureau of Labor Statistics, Occupational Employment Statistics Program, which is the most comprehensive survey the Federal Government does outside of the U.S. census. It provides very robust data on wages at very precise geographic localities as well as by skill level and occupation. It is much more precise than the current survey data that is done by the Department of Agriculture.

Chairman MILLER. But it would include the wages paid to those with undocumented workers who are working in that area?

Mr. SEQUEIRA. I think the Bureau of Labor Statistics data there is a possibility that it could include data from undocumented workers just as the current survey used by the Agriculture Department could capture wage data from undocumented workers.

Chairman MILLER. Mr. Goldstein?

Mr. GOLDSTEIN. The wage proposal is actually very, very complicated. It took us 30 pages in consultations with economic experts and other outside help to figure out what the proposal really would mean. The current H2A wage rate, the adverse effect wage rate, is based on a survey that the U.S. Department of Agriculture has been doing for years. They survey basically all non supervisory farm workers. It includes undocumented workers. And so the wage required by the H2A program currently is depressed by the presence of undocumented workers.

The Department of Labor is proposing to switch the survey from the U.S.D.A. farm labor survey, which is very highly regard for what it does, to the Bureau of Labor Statistics occupational employment survey. It does not survey farms. So the idea that this is a more precise survey to us really is very, very inaccurate. It only surveys companies that support agricultural production. It does not survey farms. What does that mean? Well, mostly it is surveying farm labor contractors who are known to be hiring undocumented workers in much higher percentages than the farmers. And so you are focusing on undocumented workers. So the results of the wage survey will be even lower than they are now for that reason and about five others.

Chairman MILLER. Before I will run out of time here, if you both respond, how do you square that with the history of making sure you do not adversely affect the wages of U.S. farm workers?

Mr. GOLDSTEIN. Well, it has always been understood that you are not supposed to allow H2A employers to offer wages at levels that only undocumented workers and guest workers will accept. We have gotten away from that a little bit. What they are proposing would be a fundamental change that would slash the wage rates to basically what undocumented workers are willing to accept.

Chairman MILLER. Secretary Sequeira?

Mr. SEQUEIRA. The Department's proposal to use OES data from the Bureau of Labor Statistics is much more precise, much more accurate at providing market based wages at the local level to specific occupations.

Chairman MILLER. If that market has a heavy reliance on undocumented workers, are we are going to translate that into the wages of other farm workers?

Mr. SEQUEIRA. Well, Mr. Goldstein seems to be suggesting that farm worker contractors are more likely to violate the law by hiring U.S. Workers, but then when contacted by the Bureau of Labor and Statistics, they are willing it provide truthful data that they are supplying a substandard wage for those undocumented workers. I am not sure that that necessarily follows. The OES data is reliable and statistically valid. It is certainly better at getting accurate wages at a local level, more accurate than the U.S. Department of Agriculture survey, which Mr. Goldstein readily admits probably includes illegal farm labor.

Chairman MILLER. Thirty seconds.

Mr. GOLDSTEIN. There would have to be a lot more information provided in the Federal Register notice than DOL provided to figure out whether this a statistically valid methodology, it is not explained.

Chairman MILLER. Mr. McKeon.

Mr. MCKEON. Thank you Mr. Chairman. This has been, I think, very enlightening and it gives me a little reason to know why we haven't passed legislation. You see it is emotional, it is adversarial and we just don't seem to want to come together to really get a grip on this.

Mr. Secretary, how many people, bodies do you have in the Department to oversee some of the cases that we have heard about? How many people do you have investigating claims of taking advantage of people?

Mr. SEQUEIRA. I will have to defer to Dr. Carlson who oversees the office, the processes of these applications.

Mr. MCKEON. Approximately.

Mr. SEQUEIRA. Although—is your question with regard to overseeing applications?

Mr. MCKEON. How many people.

Mr. SEQUEIRA. Overseeing applications or subsequently when workers are in the country, how many people are involved in enforcement?

Mr. MCKEON. Let's say the number of people investigating complaints to see if laws are being violated.

Mr. SEQUEIRA. The wage-an-hour division within the Department of Labor investigates compliance with the H2A. There are about 750 wage-an-hour investigators.

Mr. MCKEON. 750?

Mr. SEQUEIRA. Yes.

Mr. MCKEON. Mr. Young, you represent a national association, a lot of the growers. Do you have an idea how many growers, farmers around the country we have that are employing people to bring in the crops, plant the crops?

Mr. YOUNG. How many employers?

Mr. MCKEON. No, how many growers. I understand there are employers that employ workers and bring them to the fields, but how many growers do we have, farmers?

Mr. YOUNG. I don't know on a national basis how many there are. I mean, our association has 200 farmers that are involved in using the H2A program.

Mr. MCKEON. Two hundred farmers?

Mr. YOUNG. That is just in the New England area, And it is not a 100 percent usage. There are some growers in the Vermont area that are not a member of our association.

Mr. MCKEON. Do you visit with other associations? Do you have an idea how many there are, say, in California?

Mr. YOUNG. The H2A program has been historically located pretty much on the east coast: New York, New England, Virginia, and Florida. It is only in the last 10 years that it has expanded to the west coast, and that pretty much has coincided with the shortage of agricultural workers that is developing in the country.

The question that was asked about the wage and hour——

Mr. MCKEON. I kind of got the feeling from some of the testimony that all growers are corrupt and that they are trying to take advantage of people. I really doubt that that is the case. But if that were the case, and we have got 700 people trying to ferret out these cases and trying to solve this problem, it seems to me that it is impossible.

Professor Sum, you indicate that basically young people aren't working anymore in these jobs, and almost that they are not working anymore, period. Is that true?

Mr. SUM. That they are working less than ever before, but——

Mr. MCKEON. Do you know why?

Mr. SUM. Well, sir, a number of our surveys suggest that large numbers of young people do in fact look for work and can't find work, and, shortly after not being able to find work, withdraw from active participation. But when they are asked whether they look for work, many young people themselves report much higher unemployment than is true, that we will find from our BLS Labor Report Surveys which I, by the way, have many of my statistics from.

But one thing I would say, Mr. McKeon, though, is this. If you look across the country at the likelihood that young people work during the given year, including teenagers, that you will find—if I take you to Iowa, North Dakota, South Dakota, Montana, Minnesota, Wisconsin, you will find 55 to 60 percent of the young people in those States working. If I take you to California and New York and New Jersey, you will find 20 to 15 percent of its young people working.

What I find is a strong correlation between the work rate of teenagers in the State and the fraction of that State's population that consists of new immigrants. The lower the share of new immigrant workers in the State, the consistently higher the share of young

people working, and the effects are consistently high. So this is only one factor. But immigration has played one role in driving down the rates of work, because employers have largely substituted immigrant workers, including older immigrant workers, for teenagers, whether they are first- or second-generation.

Mr. MCKEON. The country is changing.

I see my time is up, Mr. Chairman. Thank you very much.

Chairman MILLER. Thank you.

Ms. WOOLSEY. Thank you, Mr. Chairman.

There is this big question, in my mind anyway, and maybe you have the answer to it, before we get into H2A visas or H2B programs. Is there a need for immigration in this country as workers, because we don't have enough U.S. workers? Question one. Or, is it because we want to have a lower wage workforce? Or, if wages were higher, if housing was improved, if relocation was at least provided, if not paid, to move work seasonal workers from one area to another, would we not then have our teens working and would we not have our legal immigrants doing—and our own people working as well? Not that legal immigrants aren't our own people. That was not correct. But what is the need here? Mr. Goldstein.

Mr. GOLDSTEIN. Look, we are in the situation we are in; 50 to 70 percent of farm workers are undocumented. We have got to do something now to address the need. But getting a little more directly to your point, if you look at the history of objective analysis of agriculture from the time of the Commission on Country Life—which made recommendations to President Teddy Roosevelt—to the President's Commission on Migratory Labor in 1951, to the Commission on Agriculture Workers in 1982, they all say the same thing and they all say they are saying the same thing as the last report. And that is, agribusiness has to stop relying on new waves of foreign workers. It needs to improve wages and working conditions and modernize labor relations to make workers more productive, to make agriculture more productive, and to stabilize the workforce. And we are not doing that.

But having said that, we are in the situation we are in. We need to do something to address the current needs. Employers are hiring undocumented workers; they are working hard, they are doing these jobs. They are often paying taxes. We need to legalize them. We need to give them a chance to earn legal immigration status, and we need to come up with a balanced solution to the issue of these H2A program regulations.

And John Young and I are both saying—we don't agree on almost anything else—we are both saying we have a solution for you. It is ag jobs.

Ms. WOOLSEY. Mr. Young.

Mr. YOUNG. I think the thing we have to be careful of is that if we increase costs of growing and harvesting our food in this country to a higher level, we will not be producing the food here. We are in a global economy. I am not an economist and Mr. Holt is not here to testify today; I believe he has testified many times that there is a level at which production ceases, and the apples are brought in from Chile or South Africa, and we will just shift our production. Too much enforcement will drive employers over the border into Mexico. And that is happening right now. There are

several large agricultural employers that have shifted large pieces of their production from California and Arizona into Mexico.

So, it is a very, very tight rope that we walk here. But, as Mr. Goldstein said, we believe that ag jobs are the answer because it is a three-pronged method of solving the immigration problem.

Ms. WOOLSEY. Well, you don't think that new influx of ag workers will then become the next group of illegal farm workers? I mean, that they will go underground. They are not going to go home.

Mr. YOUNG. The H2A workers do not traditionally go AWOL. We have 2,000 workers that come in every year, and over the last 10 years, our average is less than 20 workers that go AWOL a year, and in most years it is in the numbers of 10.

If we have a working program and a program that people can be assured that they will have a chance to come back year after year, they do not go AWOL and go into the underground.

Ms. WOOLSEY. Anybody else want to respond to that?

Mr. RIOJAS. I come from Texas, and it is known as the labor surplus State. It is the home base for a lot of migrant workers. And I see that the employers who really want to get the Texas workers advanced transportation, the employers who want to get foreign guest workers want the workers to bear that cost. And so if the employers truly want those U.S. workers, we should think about amending the regulations to require advanced transportation. They are required to reimburse them at the end of the season anyway. Why not just give it to them up front?

Ms. WOOLSEY. Thank you, Mr. Chairman.

Chairman MILLER. Thank you. Mrs. Biggert.

Mrs. BIGGERT. Thank you, Mr. Chairman.

My first question would be for Mr. Young. Do you use the E-Verify program at all to check the legal status of workers?

Mr. YOUNG. There are two answers to that. The Association of New England Apple Council does not. Some of our members do, but most of them do not.

Mrs. BIGGERT. Is there a reason for that?

Mr. YOUNG. The major reason is that the program is not going to produce the intended results at this point. We would know that, for instance, all of our H2A workers are not in the database. And if we were to have employers enter into use of the system without doing the verifying on their H2A employees, it would open them up to possible litigation and discrimination.

Mrs. BIGGERT. The E-Verify program, I think, is going to go mandatory, or that is what has been proposed. So how could we improve the program?

Mr. YOUNG. The database has to be not only accurate but it has to be immediate. We have to know who comes through the border that day, and it has to be in the system so that by the time the worker gets from the Mexican border or from the entry in Miami to Hartford, Connecticut, we can tell just like that. That does not exist today.

Mrs. BIGGERT. Mr. Secretary, I would pronounce your last name but I don't think I can. When an employer wants to use the H2A or the H2B workers, they are required to certify that there are an insufficient number of U.S. Workers available for the work. So if

I am an employer, what do I have to do to certify that there is an insufficient number?

Mr. SEQUEIRA. I believe Dr. Carlson could probably provide the most comprehensive explanation.

Mr. CARLSON. Yes. Certainly before an employer can apply for guest workers under either program, they have to satisfy the labor market test. And the two programs are slightly different in their requirements; and that documentation is something that is reviewed by the applicable State workforce agency, and then Federal staff through one of our centers.

Mrs. BIGGERT. As a business owner, what would I do to out—how would I do that?

Mr. CARLSON. It begins with advertisements, typically newspaper ads. We have a national public workforce system, a one-stop system where job orders are placed both intra, within the State, and interstate job clearance systems. So anyone going into an employment service, a one-stop center across our country, would be apprised of these job openings and make them available to workers.

We do newspaper ads. It depends in part—on the H2B program, for example, if the work is customary to the industry, that there is a labor union, jobs, there are notification requirements there. The H2A program, we may use radio spots. The traditional labor supply States of which there are four, we will refer employers there to post and recruit. With the different programs, they are sort of structured slightly different, depending on statute and regulations.

But the intent is certainly—and we take it very seriously—that employers duly consider U.S. workers and legitimately recruit them prior to moving on in the immigration process.

Mrs. BIGGERT. So if there is an investigation, you go in and you look at the documentation that an employer has made on each worker to certify that?

Mr. CARLSON. I wish we had both the resources and the time to be able to literally go in. It is typically, given the volume and the national focus, information is provided to either the State and then us, shipped in for our review. So we are relying on the veracity of the information that we typically receive, unless we have some reason to question, for which we will request additional information, initiate an audit, those kinds of things where we have concerns about an application.

Mrs. BIGGERT. So are there any incentives for me as an employer to adequately search out American workers when I could just apply for a guest worker?

Mr. CARLSON. I think there are. The H2A program, and, clearly, Congress has been dealing with that, and you all with the H2B, with no returning workers. You need talented workers, the domestic labor market of testing workers there. Some of the other presenters have mentioned that it is cheaper to have domestic workers in your area of intended employment as opposed to getting into what may be international recruitment costs, transportation costs, other issues like that.

So, yes, certainly I would suggest from an employer's perspective, a number of reasons why I would want to fully consider U.S. workers first.

Mrs. BIGGERT. Thank you. I yield back.

Chairman MILLER. Mrs. McCarthy.

Mrs. MCCARTHY. Thank you, Mr. Chairman.

Let me first say that I happen to think that we should be doing whatever we can to make sure that American workers fill the jobs that are there. But I am going to change the conversation a little bit. My concern is the shortage of nurses in this country. And I think any statistic, it doesn't matter where you are in this country, we have a shortage. And yet, and I know working with the State Department but also the Department of Labor has a hand in this, that it takes a hospital—and I will talk about South National Community Hospital. They are waiting now over 2 years to have 200 nurses come in. And it is not just for their hospital. They actually spend the time and the money with the resources from other hospitals to train them, make sure they pass the State boards to fill these needs throughout Long Island, and throughout the country, to be honest with you.

We need to do something a little bit better. They have gone through the pipeline. We hopefully, through the Higher Education Act, we have solutions in that legislation to train more nurses in this country with our citizens. But up to that time, I would like to know through Mr. Sequeira on why we are having such a problem on bringing trained nurses into this country. They have to pass the State boards, they have to go through the clinical. The hospitals pay them the same pay as any of our other nurses do, but yet we can't. If you don't have a healthy Nation, you are not going to have basically a healthy county, and we need this right now.

Mr. CARLSON. A very good question. One of the programs that we administer, the Permanent Labor Certification Program, the Green Card Program, the Department of Labor has very much recognized the point you made; in addition to nurses, physical therapists, we have in essence declared that there is a national workforce shortage. And those applications filled by hospitals and others immediately skip the Department of Labor and go to the Department of Homeland Security for filing. We have recognized that there is indeed a labor market shortage and it is national in nature.

Mrs. MCCARTHY. With that being said, I know it goes through the Department of Homeland Security also. But with the background checks and everything else, when we have, in my opinion it is a crisis in this country right now on all health care workers, that there has got to be a faster way of having them go through security, having them go through the background checks. Obviously, this is something that the Department of Labor and the State Department and Homeland Security should be putting as far as a priority until we pass legislation and can get more nurses through our own universities to graduate. We have plenty of people, Americans, that want to be nurses; unfortunately, it is a two-pronged problem: We don't have enough professors to teach the nurses.

So I am hoping, what do you suggest that we as this committee could do to try and clarify this so that we can start getting these particular nurses from the foreign countries to come into work so that we can have this crisis at least manageable?

From what I understand from my hospitals, if we started tomorrow, it is a 2-year process to get the nurses in, go through the

training that they need to have to get on to the floor. That is a real problem. And you wonder why there are so many mistakes being made in our hospitals; because our nurses can't handle the work anymore, because they are working double shifts, they are asked to come in on their day off. This is not healthy.

Mr. SEQUEIRA. Let me just say, I understand certainly your concerns. And as Dr. Carlson said, the Department of Labor is really, with regard to nurses, out of the process. We have declared that there is a national shortage so they skip that step. I think your concerns about processing times are shared among many, and it is a problem in various visa programs with the Department of Homeland Security and with the Department of State. Unfortunately, I am not prepared to comment on their processes because I am not familiar.

Mrs. MCCARTHY. I understand that. But being that you know it is a national crisis, we know we have a problem with departments talking to other departments, isn't there a possibility being that there is a national crisis here in this country on that, that you could all get together and come up with a solution or come to us and ask us what can we do to have a solution come forward?

Mr. SEQUEIRA. I am certainly happy to speak with my counterparts at Homeland Security and State about that. I am not sure. They may have emergency procedures that they could institute. Again, I am just not familiar enough with internally how they process these; but that might be something worth looking at.

Mrs. MCCARTHY. I would appreciate if you would follow up with me on any correspondence you have with them and what I need to do to follow up. Because we write letters; even in January wrote a letter, and we just got a response now. And the same thing that 2 years ago when we started talking about that, nothing is being done. But it is a health care crisis in this country. You all know it. And I think it is up to the Department of Labor to push to say the shortage is only getting worse.

I yield back the balance of my time.

Chairman MILLER. Mr. Ehlers.

Mr. EHLERS. Thank you, Mr. Chairman. First of all, I just want to register my agreement with the comments of Mrs. McCarthy. It is a national problem. We face the same difficulty in our area, and I believe it is everywhere within the country.

In regard to the issue before us, I just want to offer a slightly different perspective from the apple growers in my district. And I have quite a few of them, not as many as Mr. Young represents, but I think they grow better apples than are grown in New England. But the problem they have is getting anyone to come and pick their apples, and it has become a major problem to them.

Last year, they showed me pictures of bushels and bushels of apples strewn around the grounds simply because they hadn't been able to get anyone to pick them. Their normal crews had always come up from Texas. They were on a regular cycle. They come up and pick the apples and move on and deal with other crops elsewhere, and that seems to have stopped. And I suspect it may be because we have cracked down on the number of people coming across the border improperly, so there is just a general shortage. So they did what everyone says we should do: They tried to hire

students. They advertised; they didn't get enough response, and the ones they got were not nearly as good as the pickers who normally did it. They would drop apples, they would bruise them and so forth.

They went through the Michigan Unemployment Security Commission trying to get unemployed people to come out. The same problem. They didn't work very well, they didn't do the job right, and they generally only worked a day or two and left.

So I just wanted to mention that. I am not asking you to solve that problem here, but I wanted you to be aware of that in another section of the country there is a very substantial problem and no obvious solution to it. It is hard for them. These are generally smaller farmers, and it is hard for them to prove that they can't get employees, because they can. They hire them; they work for 2 days, at most a week, and they just don't come back. And it is hard to prove that there is no labor available because if they advertise, they do get laborers, but they don't work out. So it is just a different dimension.

I am not asking for any responses. I just wanted you to hear that from the best apple growers in the country. Thank you.

Chairman MILLER. Thank you. Mr. Grijalva.

Mr. GRIJALVA. Thank you, Mr. Chairman, and thank you for this hearing.

As the son of a brassero that came to this country under that—some call it notorious program, which it was—I hope that as we look at these proposed regulations, that we are not sliding back into those dark ages; and, that the Department of Labor considers not only the proposed regulation but the history of abuse and the history of exploitation of workers across the pages of the history of this Nation.

But if I may, Mr. Beardall, let me ask you. In the past, I think you testified before Congress about the failures or the narrowness of talking only about enforcement only when it comes to the issue of immigration. You spoke about your concerns of the mandating of E-Verify and the homeland no match. I come from the State of Arizona that is on the, I consider, potentially very dangerous experiment with this. But can you just quickly talk about those concerns of enforcement only and the legislation that is being talked about in Congress which would mandate E-Verify for the entire Nation as a Federal mandate.

Mr. BEARDALL. I believe that ramping up the existing employer sanctions and requiring tighter verification, at least in the form that is proposed in E-Verify, will do more harm than good for U.S. workers. And the biggest reason for that is, just as happened over the last 20 years with the employer sanctions generally, E-Verify would only push more and more employers to take their workers outside the whole scope of our employment protections. More and more employers would be encouraged to just evade the E-Verify system by hiring their workers off the books in a cash underground employment transaction, or misclassify their workers as independent contractors, or create these sham independent contractors to make them these "pretend" employer of the workers.

The reason that is so dangerous is when that happens, those workers are removed entirely from our social safety net scheme

and our employment protection schemes, whether it is minimum wage, overtime, unemployment insurance, workers comp, and so on.

Mr. GRIJALVA. Let me follow up with you, if I may. The ability to pay low wages is put as the reason employers turn to undocumented workers. There are other motivations. Maybe you can outline some of those other motivations other than the lower pay.

Mr. BEARDALL. I think it has a lot to do with the controllability of those workers through the kinds of tactics, intimidation tactics of the kind I cited in my testimony. I do want to say, graphic as that particular example that I provided the committee with is—and it does happen all the time in that graphic and direct a way. In most cases, the intimidation is much more subtle. Workers know that they shouldn't become visible, they shouldn't enforce their rights. And, if they try to, they are in deep difficulty. And that ends up undermining the rights of all workers.

Mr. GRIJALVA. Thank you.

Mr. Goldstein, I understand Farm Worker Justice and United Farm Workers are suing the Department of Labor over unfilled Freedom of Information requests. Can you give the committee some information on that?

Mr. GOLDSTEIN. Yes. Part of our job and the United Farm Workers Union, is to obtain the H2A applications filed by employers, to take a look at them and distribute them so that U.S. workers who are looking for jobs can learn about them. Because the information that is posted on line very often isn't very detailed. In fact, in a lot of places the H2A employers' names are not even on the Web site where the job is posted. And so we get this information and we distribute it, and we also check to make sure that the job terms in the application for H2A workers, that the job terms are legal.

Well, the Department of Labor was not responding within the 20 days required by the Freedom of Information Act, in fact they were taking months and months to give us these application. By the time we would get them, it would be too late to help any workers. So we filed a lawsuit under the Freedom of Information Act, and we are now getting the documents. They were also charging us fees when these documents should be exempt from fees, and they seem to be waiving those fees now.

Mr. GRIJALVA. Thank you. Thank you, Mr. Chairman.

Mr. SUM. Mr. Congressman, could I just make one quick comment? What Mr. Beardall said about his fears about if you would go to E-Verify, whether there would be an increase in the use of unauthorized and off-the-books workers. But in our paper, we try to show that in the last 7 years, of the 7.5 million new workers in this country who claim that they are working were not working 7 years ago, we find that only 55 percent of them have ended up on the official formal payrolls of any private sector employer or any government agency. So the growth of the informal labor market in the United States off the books, black market, independent contractors has been huge so far. Whether this would make that more intense is a separate empirical issue. But I don't think we should underestimate how far our labor markets have become unstructured and away from the old New Deal worker rights policy in the last 7 years in this country.

Chairman MILLER. Thank you. Mr. Boustany.

Mr. BOUSTANY. Thank you, Mr. Chairman.

Mr. Sequeira, you noted in your testimony that the Department of Labor will publish proposed rules to the H2B program in upcoming months. Can you elaborate on what the Department hopes to accomplish in this whole area with H2B visas?

Mr. SEQUEIRA. Unfortunately, I am afraid I can't provide much information about that. The proposal is still being developed. It is currently at the Office of Management and Budget, undergoing review. And once that is concluded, and we are ready to publicly release it, I would be happy to come back and speak with the committee here, or individually with members about what is contained in there.

Mr. BOUSTANY. Do you have a timeline on that?

Mr. SEQUEIRA. Before the summer.

Mr. BOUSTANY. The second question for you: Are there other changes to the H2A program which the Department cannot address by way of regulation at this time? For example, are there statutory changes that would help the Department achieve its goal of ensuring an orderly and timely flow of legal workers while protecting rights of U.S. and foreign workers as well?

Mr. SEQUEIRA. Our proposal is—of course, a regulatory proposal contains changes that we thought were warranted that we have heard a lot of discussion about. There are certainly other structural elements to the program, I think, that could be considered by Congress. I am not prepared to discuss those today, but we would certainly be willing to provide technical assistance and provide advice to offices if they are interested in statutory changes to the program.

Mr. BOUSTANY. I guess one last question. With regard to businesses and companies that do the recruiting of H2B workers, can you talk a little bit about—I know what employers have to do to demonstrate the need and so forth. There is a process that they follow. But can you talk a little bit about the companies and the Department's oversight of those companies? Is that something that you are actively engaged with? Do you keep track of the number of groups that do this recruiting activity?

Mr. SEQUEIRA. Recruitment of workers really would fall under two categories. There is domestic recruitment, companies that operate in the U.S. And they recruit workers; and then there are recruiters abroad. Labor recruiters abroad are a particularly difficult problem, involves numerous legal issues and extraterritorial jurisdiction, and how can the U.S. Government control the action of private parties in foreign countries.

We know this has been a problem and a concern to many people. Our proposal, regulatory proposal, contains a proposed restriction on U.S. employers who use foreign labor recruiters abroad, that they prohibit those recruiters from charging fees to workers in foreign countries. So we have tried to go at the problem with the U.S. employers who are actually using the recruiters rather than the foreign recruiters themselves.

Mr. BOUSTANY. Do you see the need for perhaps some kind of licensure program under, I guess, the umbrella of the Department

of Labor with regard to these, say, even these U.S. recruiters so as to have a better handle on this?

Mr. SEQUEIRA. That specifically wasn't contained in our proposal. That is something worth looking at. Our proposal did require foreign labor contractors, those contractors working in the U.S. who put together a work crew made up of H2A workers. We did institute a new requirement that those people register with the Department so that we can track them, we know who they are. We also require in our proposal that they post a surety bond so that in the event they don't pay workers the wages that are due, we can claim against the bond if we are not able to find the contractor.

Mr. BOUSTANY. In looking at this from a broader standpoint, I know when workers come in under the H2B program, and let's say they have an accident or they get sick, they go to a U.S. hospital in the location where they happen to be and they get emergency treatment under the Medicaid program at U.S. taxpayer expense.

I am just wondering if there is a way, as we look at the H2B visa program, to work out something perhaps with the Mexican Government so that there would be maybe some sort of temporary insurance program for these workers when they are in the U.S.? Because that way, we take the burden off the taxpayer. Given the fact that Mexico, for instance, gets $26 billion back in remittances, it seems we have a leverage point with the Mexican Government as we work to try to restructure this program, that that may be something we want to look at. Do you have any thoughts on that?

Mr. SEQUEIRA. I think that is certainly worth exploring. Of course, the State Department would have a great deal to say about that. But I certainly would be happy to mention that to them and see.

Mr. BOUSTANY. I would hope to stimulate a little interagency discussion on that to see if that is something we might be able to do to make the whole system better. Thank you. I appreciate the answers.

I yield back.

Chairman MILLER. Mr. Altmire.

Mr. ALTMIRE. Secretary Sequeira, in your opening statement you chided Congress for what you termed our failure to pass comprehensive immigration reform. I was wondering if you could outline how you are defining "comprehensive," and in particular what that would mean to the 12 million undocumented workers that are currently in this country.

Mr. SEQUEIRA. Well, let me apologize if I came across as chiding Congress. I certainly would never want to do that. The administration I think, as you know. Is——

Chairman MILLER. You are the only American that wouldn't. But go ahead.

Mr. SEQUEIRA. The administration, as you know, was intensely involved in negotiations for the last couple of years, leading up to last summer, over comprehensive immigration reform. I don't want to rehash all the particulars of that today, but by "comprehensive" we crafted a plan, we worked with both Members of the House and the Senate on both sides of the aisle on a plan that would comprehensively address the issues, including undocumented in this country.

Mr. ALTMIRE. So would it be safe to assume that were the House to bring to the floor an immigration bill similar to what Mr. McKeon and others have described here today, that the administration would play an active role in pursuing comprehensive immigration reform and adding to it a path to citizenship?

Mr. SEQUEIRA. The administration is interested in working with Congress on a comprehensive solution if Congress wants to take up a bill that, rather than narrowly fixes particular problems in particular areas, then, yes, we are prepared to engage with the Congress in that effort.

Mr. ALTMIRE. Okay. Thank you. And Chairman Miller asked you about the OES survey and whether undocumented workers were included in that, and you have answered that question.

And I guess what I am trying to get a handle on with regard to the four levels, level one being the one with the lowest salaried workers, the lowest paid workers, why wouldn't level one wages be set by what employers pay undocumented immigrants in particular? And then doesn't that lead to essentially allowing undocumented workers rather than U.S. workers to set the market wage rate for those industries?

Mr. SEQUEIRA. The four skill levels in the occupational employment data is actually something that was mandated by Congress. We borrowed that from the H1B program; it is utilized in the other temporary programs, both the use of BLS data as the source for determining market-based wages as well as the skill levels. Again, I can't—I left home without my labor economist, but I can't tell you precisely what estimate of undocumented workers would make up the sample size.

Again, our point is the Bureau of Labor Statistics data is, by virtually any measure, more accurate at providing market-based wages than the current survey. So what we have proposed is just to use a different mechanism to determine those wages that is more accurate.

Mr. ALTMIRE. I will wrap up so someone else can ask a question.

Chairman MILLER. Ms. Clarke.

Ms. CLARKE. Thank you very much, Mr. Chairman.

To Dr. Sum, I have a question about what you believe is the impact that H2B and undocumented workers have in the construction industry on the availability of apprenticeship programs for young Americans.

Mr. SUM. I don't claim to have an easy answer to that. What I would say, though, is the following. Our analysis shows that in the construction industry in the last 10 years that there has been a disproportionate share of new hires that have not appeared on the formal payrolls of construction companies; that there has been known in specific State studies to be a high degree of violation of independent contractor laws, as well as we find a strong correlation between the influx of new illegal immigrants and the number of workers that are appearing off the books on those industries' payroll. And we have documented that in several, several papers.

When you take hiring off the books and when you take hiring and independent contractor basis, it then becomes removed of all of the use of apprenticeships in construction. The number of apprenticeships in construction to share of total employment has de-

clined. There are fewer apprenticeships in that area today than there have been in a long time.

So the answer is, is once you restructure the work in the industry so that it does not become part of the formalized process of referral and training, whether union or nonunion, then you basically reduce the amount of training that takes place in the industry. And the construction industry has gone in that direction. Native-born U.S. Workers as well as established immigrant workers who have been here more than 10 years received a less-than-expected increase in the share of all construction jobs over the last 7 years. And we attribute that low share of their employment to the fact that these jobs have gone off the books and been removed from a formal referral and training network, which I believe is not in the long-term interests of this country, because apprenticeship training has a strong effect on the supply of skilled labor, on the wages of workers, and is one of the few options that young adults without college degrees have had to try to achieve an adequate standard of living in the United States, which has again gone down in the last 7 years for young workers.

We are losing large numbers of our families. It is not a trivial issue. We are forming far fewer families with married couples today than any time in our history. There has been a decline in the earnings of young families, a rise in share of the children raised in poverty. At the same time, we are finding these developments in our labor markets.

I would hope that the committee would give this serious consideration in the rest of this year that we go back on, and we make a commitment to young families, young workers in the United States. We have lost a lot of ground.

Ms. CLARKE. Thank you, Professor Sum.

Mr. Beardall, in your testimony, you point out that unscrupulous employers are using the status of undocumented workers to exploit them. You also note that effective immigration policies must not only assure that there is no built-in advantage to hiring undocumented workers, but also must include effective labor laws and strict enforcement of those laws.

If you were drafting immigration policy, how would you address these issues in your immigration policy?

Mr. BEARDALL. First of all, I think it is extremely important that whatever program might be created eventually to legalize some of the current undocumented workers through an earned legalization program, that that be structured so that they have all the full employment rights and all the full enforcement rights that U.S. workers have.

Secondly, any new guest worker programs that are created, or modifications to current guest worker programs, really need to pay a lot of attention to ensuring full protections and full enforcement, not a second-class set of protections and a more limited kind of enforcement.

And, thirdly, a piece of the package really needs to be, in my opinion, a dramatically improved enforcement mechanism for all workers, whether they are citizens, work-authorized immigrants, or undocumented immigrants. Otherwise, we will still continue to replicate the problem.

Ms. CLARKE. Thank you, Mr. Chairman.

Chairman MILLER. Mr. Sestak.

Mr. SESTAK. Thank you, Mr. Chairman. I just had three quick questions, more for my edification and understanding.

I was quite taken, Professor Sum, by your testimony. There were some interesting statistics, and the intangible impacts upon them are something that I think needs to be thought about. So when I look at the H2B, and in my district it impacts, let's say, landscapers a lot. We are coming into that season when high schoolers kind of come out of school. Why, Mr. Secretary, is it good for us, then, to say that 4 months before these kids come out of school is when we go give the announcement? And if within 10 days nobody applies—because, boy, when I was in high school I sure didn't pay attention to summer jobs 4 months before I graduated. Why don't we make it like the H2A, where they can do it right up through 50 percent, but at least up to the day it begins, if the importance of this is to protect American jobs if the workers are available?

Mr. CARLSON. If I may, I think the H2A program, as I mentioned in my comments, the processing window and the time frame is very short but prescribed in statute. The statute is silent on that with respect to the H2B program.

In the 120 days that you mentioned—I apologize if I wasn't clear in my comments—that is the outside that we don't let them file any——

Mr. SESTAK. Correct. But the point is, then why only 10 days? Why not the 45 days that the H2A has? Are you saying it is Congress' fault because the statute doesn't say anything?

Mr. CARLSON. No, I am not. I am not saying it is fault. I am just saying that this statute is silent.

Mr. SESTAK. Why don't you then—since your memo sets some of this up, why don't you make it like the H2A? Wouldn't this help this problem over here with teenagers getting jobs?

Mr. CARLSON. The 120- and the 60-day process we have, given how the program is currently structured with applications being filed first with the State to start the recruitment process, what we have allowed for both the State—between the State and the Federal Government, is a grand total of 60 days to process applications from start to finish. Whether we have to request new information, we go back to the employee, they weren't clear about something.

Mr. SESTAK. Why not just make it up to the day that the job begins, like the H2A?

Mr. CARLSON. If we did that, we would not allow an employer time to recruit and send that information to us so that we could verify that indeed actual bona fide labor market test had occurred.

Mr. SESTAK. Mr. Sum, do you have a recommendation on this? I know you have grander recommendations. But would this help at all? Would it be more fair to the American worker?

Mr. SUM. I would say this, sir. The programs that I have been involved with, and youth programs for more than 30 years—and one of my colleagues is here in the back of the room—we have always shown that substantial lead time to help develop jobs for young people is a crucial part of this process. We spend 5 to 6 months before the summer in many of our programs lining up em-

ployers and jobs to do this. The more lead time you have in announcements, the more time you have for schools and CBOs and employment and training agencies and colleges to prepare young people to fill these jobs. I believe we could fill a large number of these jobs.

Mr. SESTAK. So, should we have 120 days, whenever you want to begin that, start whenever you want, but keep the window open as long as possible?

Mr. SUM. What I would say is, we provide as long a lead time as possible. But not only that, we know for a number of these jobs the amount of lead time that is necessary, that the work is going to be there next year, and that we begin to engage in programs with all these agencies to organize young people to be given a sufficient release time to be available to fill those jobs. It can be done. It can be done, sir. A large number.

Mr. SESTAK. The last question. Why? Is it because the statute is silent on it? Is that also the reason why for H2As and H2Bs? One example: Housing is given for one, but not the other.

Mr. CARLSON. Yes. Certainly in H2A, housing and a variety of other benefits are authorized in the statute, and in H2B the statute is silent.

Mr. SESTAK. Do you think that is right?

Mr. CARLSON. I don't think that is for me to speak to today.

Mr. SESTAK. Thanks very much.

Chairman MILLER. Mr. Payne.

Mr. PAYNE. Let me just ask a quick question. Maybe Representatives from the Department of Labor. What is the current unemployment rate, do you know, more or less, in the U.S.?

Mr. SEQUEIRA. In April, it was 5.1 percent.

Mr. PAYNE. What do you think the real unemployment rate is?

Mr. SEQUEIRA. You mean an unemployment rate different than what was reported by the Bureau of Labor Statistics?

Mr. PAYNE. Yes. Do you think it is 5.1? They say it is 5.1, so it is 5.1.

Mr. SEQUEIRA. Yes.

Mr. PAYNE. Do they count people who have not been in the employment system?

Mr. SEQUEIRA. The unemployment rate is determined based upon those who are actively seeking work.

Mr. PAYNE. So anyone seeking work is counted. Okay. So those who aren't seeking work, you couldn't count those because they are not seeking work.

Mr. SEQUEIRA. Those not actively seeking work are not considered to be in the labor force and therefore aren't calculated in determining the unemployment rate.

Mr. PAYNE. What are they called? I mean, they are not unemployed, they are not employed. Is there a terminology for them? Because I am trying to figure out how many of them are around.

Mr. SEQUEIRA. They are not actively seeking work.

Mr. PAYNE. But what do you think that number is?

Mr. SEQUEIRA. I don't have an estimate. I would be happy to consult with the Department's economist and get back with you; but off the top of my head, I don't know.

Mr. PAYNE. Because that is really, I think the whole crux, H1B, H2A, all the rest is really a way out of us shucking the responsibility of really trying to prepare a workforce that is going to seek work. That is not in your purview, but it is in the whole purview of education, of people seeking employment. You try to figure out why wouldn't a person not seek employment.

So I think, first of all, we get a distorted number of the unemployment rate. It is probably about 15 percent, probably even higher, of those who are not working. We use these visa programs to say that we can't find enough workers. And the other things that we throw around terms is that it does not adversely affect the wages or working condition of U.S. workers. That is not true. Because if in a supply-and-demand when you can take on migrant workers, you are indirectly reducing the supply and demand, and therefore it is an advantage for the employer.

So, we really don't have time. But I would like some time for us to really talk about employment in this country, unemployment, those seeking employment, those not seeking employment; these programs that give us the opportunity not to work with potential employees, because if we can just bring in people from somewhere else so we don't have to worry about trying to educate people or train people so that they can be employable, because we have got another industry for that, just put them into prison because we need to—that keeps employment up in another area.

So these programs are mere shams. They are really not necessary. If we did the job right, if the Department of Labor did what it was supposed to do, if the Department of Education did what it was supposed to do, that we have enough Americans and people who can do it. I am not opposed to immigration. I have always been for people coming into this country, no question about it. But I think that these programs are shams. They give us the way to just have to not worry about tough things that do and just let people come in so that we take advantage of it. And all this gobbledegook about it doesn't impact wages and doesn't have any impact on American workers I think is a lot of malarkey.

I yield back.

Chairman MILLER. Secretary Sequeira, you say there are 750 wage-and-hour investigators. That is not just for these programs.

Mr. SEQUEIRA. That is total.

Chairman MILLER. That is the total for the whole Nation.

Mr. SEQUEIRA. Correct. The wage-and-hour investigation does not allocate their investigators by specific statute. They investigate all the applicable statutes, Fair Labor Standards Act, Family Medical Leave Act.

Chairman MILLER. Some of my colleagues thought that this was for this program. I just wanted to develop that for the record. I am going to let you go here in a minute because we are going to have a series of votes, and at the rate this vote is going it could be an hour and a half before we are back here.

Mr. Riojas, you described the movement of these workers by employers from what probably would have been an H2A workers to H2B, which didn't sound legal to me at the outset. Forget all the deception by which they got there. But that simple decision in and of itself, is that not a violation of the law?

Mr. RIOJAS. It is in violation of the law. Basically, the employers were engaging in visa fraud, disclosing that they were seeking non-ag workers, when in reality it was ag work. And by doing this, they saved tremendously in terms of denying the workers certain benefits that are required by the H2A program, such as workers comp, the three-quarter guarantee, free tools, free housing, and they were shifting all those costs to the workers that were being hired including the H2B and the situation.

Chairman MILLER. But Mr. Young has to absorb all these and his growers when they employ people under H2A. Do you not?

Mr. YOUNG. Yes, that is correct.

Chairman MILLER. So what is the problem with the other? Just chooses not to incur those costs by the subterfuge of putting people into H2B. That is what you are saying, right, Mr. Riojas?

Mr. RIOJAS. That is correct.

Chairman MILLER. What is the rationale for the continuation of the H2B program?

Mr. RIOJAS. In certain, I guess, situations there probably are legitimate shortages and so there is a need for the program. But everybodyhas got to work.

Chairman MILLER. I understand there are shortages. But you can meet shortages with the program. There obviously is a disincentive now, and some people are working the groove between these two programs to appear to be using what would be H2A workers, but getting the savings by using the H2B program.

Mr. RIOJAS. Correct. And, unfortunately, in my case, the H2B workers were actually paid lower than what was required by the job offer. And the Department of Labor knew all this was going on because they did field checks, and they found that these workers were harvesting crops in the field and these workers were not getting paid the prevailing wage, they were getting paid by the piece, and they knowingly allowed it to continue. There needs to be better coordinated enforcement. We have got one branch of the Department not communicating with the other branch and basically letting this happen.

Chairman MILLER. Mr. Young.

Mr. YOUNG. Well, there is a very, very fine line at times between H2A and H2B workers.

Chairman MILLER. Some people can't see the line, it is so fine.

Mr. YOUNG. If I have workers that come to an orchard in Central Massachusetts and pack only fruit that is grown by that grower, they are an H2A person. If that same grower brings in fruit of a sufficient quantity and packs it for other growers in the area, it becomes an H2B worker. We have had instances where the Labor Department decided that pressing cider was not an agricultural job and we had to bring in H2B workers to press cider on the same farm.

There is a very fine line in between the two. And in a lot of cases it isn't that a grower is trying to get around the issue, it is the fact that the way that the jobs are classified drives them in one direction or another.

Chairman MILLER. This is in contention, but there are two story lines about what will happen if these H2A regulations are adopted or not. If the story line is accurate that this is going to continue

to put a downward pressure on wages, why would we have an H2B program? If you bring people in for the hospitality industry, you bring people in for the amusement parks, fine, just go through and provide travel and provide this and all of the rest of it. Why do you keep an underclass here that sort of keeps dragging down the people above them? I don't understand.

Mr. GOLDSTEIN. I think this country needs to revisit this whole idea of guest worker programs. If we need people to work in this country, we are a Nation of immigrants, not a Nation of guest workers. They should be brought in as immigrants. The guest workers, by definition, hold a non-immigrant temporary work visa; they can only work for the one employer that got them the visa. That means that if they are fired or quit, they have to go home. If they want to come back in the following season, they have to hope that that one employer will request a visa for them. So they are really under the thumb of the employer.

Also, under these guest worker programs, once an employer offers the minimum required wage rate and other benefits of the program, if a farm worker or a hotel worker says to the employer, you are offering that low minimum wage required by the H2B or H2A program, but I will work for 25 cents an hour more because I am the fastest farm worker in the United States, and I want 25 cents an hour more, the employer is legally allowed to say, look, I only have to offer the legal minimum. If you don't take the 25 cents, I am allowed to replace you with another guest worker from abroad who will accept the wage. And it is true. That is the way these guest worker programs are structured. I think immigration is a much better model for this country.

Having said that, I will say that ag jobs is the best solution given——

Chairman MILLER. I understand that. And you and Mr. Young and a lot of other people agree. Everybodyis for it, but we somehow can't get it moving.

I go back to when I was doing this years ago in Belle Glade, Florida. We had this huge labor pool of Haitian cane cutters, but no grower would use them because they wanted to bring in Jamaicans, because obviously the Jamaicans were essentially without status. So you had some of the most efficient cane cutters in the entire Caribbean who couldn't get a job in the town in which they were living. So this program obviously leads to huge distortions in that fashion. We bring these people here that came as refugees. We welcomed them to open shores, and we wouldn't let them work because people wanted to use Jamaicans who they could send back.

Mr. GOLDSTEIN. Right. And also for the Jamaicans, under H2A, the employers don't have to pay to the Social Security trust fund or unemployment tax fund, and so they are saving money there that they would have had to have paid on the Haitian workers' Social Security taxes and unemployment taxes. So there are lots of reasons.

Chairman MILLER. I think you can hear from—I will just speak for the members on our side of the aisle here, on the Democratic side of the aisle. I think there is a growing concern about these programs, the administration of these programs, incentives built into these programs. They are starting now, we have always be-

lieved we had this adverse effect wage rate and this was enforced, starting to work against the interests of certainly U.S. farm workers. But I suspect it all—that this is showing up in terms of whether or not other individuals are available to take those jobs or want those jobs. And this is a matter I think that the committee is going to continue to give serious concern to because it is this displacement of those workers, forget all the shenanigans, just on the natural, that displacement worries me. And I do—and I appreciate the explanation by the Department. I do worry that this new wage arrangement under H2As is also putting downward pressure on wages and more likely to exclude U.S. farm workers. So we will continue this effort.

I want to thank all of you for your time and your testimony. And my apologies about changing the time, and now the votes. But this has been very helpful. And I think you can see the interest from the members of the committee, and we appreciate that.

And members will have 14 days to submit additional materials on this hearing record. And I would also hope that, if members do have follow-up questions, that you would be available to answer those if they submit them to you in writing.

Thank you again for your time and your testimony.

[The information follows:]

[Letter from the AFL–CIO, submitted by Mr. Miller, follows:]

Washington, DC, May 5, 2008.

Hon. GEORGE MILLER, *Chairman,*
House Committee on Education and Labor, 2181 Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN MILLER: The AFL-CIO strongly supports your efforts to examine existing statutory requirements placed on employers to recruit U.S. workers before hiring guest workers from abroad.

By their very nature, temporary guest worker programs place foreign workers in a vulnerable position with very little bargaining power relative to their employers. Without regulation, unscrupulous employers exploit this vulnerability to subject guest workers to substandard working conditions and drive down wages and benefits for U.S. workers. In recognition of this reality, guest worker programs in the U.S. have always included provisions to accord additional labor protections to guest workers and to prevent harm to domestic labor markets, including obligations to recruit domestic workers.

The employer-driven demand for the growth of guest worker programs must be tempered with controls to ensure that adequate recruitment of U.S. workers is taking place. Unfortunately, a review of the original laws that established the H-2A, H-2B and H-IB programs and recent proposed regulatory changes reveals an erosion of legal standards for recruitment and a troubling pattern of relaxing, rather than enhancing, federal agency enforcement.

Recently we have seen essential safeguards under attack through proposed regulatory changes to the H-2A agricultural guest worker program. The original H-2A law requires the Department of Labor (DOL) to ensure that employers who claim that they need to hire guest workers from abroad in order to fill alleged labor shortages first engage in a series of labor market tests to demonstrate a meaningful effort to recruit job applicants from among U.S. workers. DOL has recently proposed changes that would systematically eliminate or significantly weaken many of these recruitment requirements and would, if enacted, create impediments to the referral of domestic workers to H-2A employers, inevitably leading to the replacement of U.S. farm workers with foreign temporary workers.

Similarly, the H-2B guest worker program must be reformed to prevent unscrupulous employers from lowering wages and weakening workplace protections for all workers in affected industries. Tragically, many of the fundamental legal protections afforded to H-2A workers do not apply to guest workers under the H-2B program. DOL never promulgated regulations to implement these substantive labor protections. For example, even though the H-2B program requires that employers pay a

prevailing wage to H-2B workers, DOL has on several occasions testified before Congress that they have no legal authority to enforce this requirement.

H-2B workers are inherently more vulnerable than their U.S. counterparts. The H-2B program must be reformed to ensure that employers are not being encouraged to seek out guest workers even when U.S. workers are available. We must ensure that workers within the H-2B program are offered and truly paid prevailing wages so that employers are not encouraged to keep labor costs down by hiring guest workers, thereby discouraging U.S. workers from seeking these jobs.

As evidenced by the witnesses featured at the hearing tomorrow, H-2A workers are often intentionally misclassified as H-2B workers, which suggests employers understand that workers are paid substantially less than the accurate wage rate and are denied substantially greater legal protections in the H-2B program, with very little federal agency oversight or enforcement. The result is downward pressure on wages and workplace protections in H-2B industries.

The H-IB high-skilled guest worker program has perhaps the weakest standard on U.S. worker recruitment and displacement. Perhaps the Department of Labor states this fundamental flaw best in its own Strategic Plan for Fiscal Years 2006-2011: "an H-IB worker may be hired even when a qualified U.S. worker wants the job, and a U.S. worker can be displaced from the job in favor of the foreign worker." The legal standard of labor certification within the H-IB program has deteriorated and been replaced with a labor attestation, essentially a promise by the employer that it has sought U.S. workers to fill job vacancies prior to importing workers. The validity of this promise is even more compromised given that, as found by the Government Accountability Office (GAO) in a recent investigation of the H-IB program, "DOL has no authority to verify the authenticity or truthfulness of the information (provided on H-IB applications) * * * DOL can only review applications for obvious omissions and obvious inaccuracies."

The AFL-CIO has joined with many other organizations in recognizing that our immigration system is broken. However, we differ with those who suggest that guest worker programs are the solution. Clearly, tomorrow's hearing will reveal that the strategy of over-reliance and expansion of flawed federally-sponsored temporary guest worker programs will harm all workers rather than mitigate the tragic consequences of our broken system.

Instead, we must search for comprehensive solutions that will both provide relief for the millions of undocumented workers who work every day yet are afforded no legal protections and also ensure that we are safeguarding quality jobs with fair wages for all who labor within our borders.

WILLIAM SAMUEL, *Director,*
Government Affairs Department.

[The statement of Ms. Shea-Porter follows:]

Prepared Statement of Hon. Carol Shea-Porter, a Representative in Congress From the State of New Hampshire

Thank you, Chairman Miller for holding this hearing today. As the Representative of the First District of New Hampshire, I am pleased to be here today on behalf of my constituents and the small businesses and farmers that I represent. I would like to ask unanimous consent that along with the full text of my statement, letters from the New Hampshire Lodging and Restaurant Association, the Mount Washington Resort and NH State Representative Ed Butler, owner of the Notchland Inn be entered for the record as well.

In our Seacoast towns, northern mountain resorts, and across the state, the tourism industry thrives in New Hampshire. Because of the seasonal nature of our businesses such as ski resorts, summer landscaping, restaurants and hotels, many employers have trouble filling vital staff positions. This is due partly to the temporary nature of the work, the long commutes that may be required and, in some cases, the lack of a labor pool. The H-2B program plays a large part in providing the workforce that sustains these businesses. That is why it is vitally important that this hearing be held today and that we work quickly to address the current regulatory issues, ensure compliance with worker's rights protections, and relieve the current strains that small businesses, like many in New Hampshire, are suffering.

It is also important that, as we consider the H-2 programs, we take into consideration some of the testimony that we received during our June 7, 2007 hearing entitled, "Protecting U.S. and Guest Workers: the Recruitment and Employment of Temporary Foreign Labor." During that hearing, we heard about a March 12, 2007

report from the Southern Poverty Law Center, criticizing the program for reported abuses of guest workers, accusing employers of abuse and exploitation.

While these accounts must be considered and the well-being of workers enrolled in these programs protected, I have met and spoken with many of the business owners in New Hampshire who use the H-2 program to find seasonal workers. They are good employers who care about their staff. I have also heard from guest workers, who have only good things to say about their employers and their work experiences. So, as the larger issue of reforming these programs is discussed, it is important that we extend the exemptions to the cap on the H-2B program.

Without the exemption in place, the 66,000-visa cap on the program does not allow for a sufficient number of seasonal employees to sustain the many industries that rely on this source of labor. In New Hampshire alone, we see over 1,000 applicants a year for H-2B workers and over 300 applications for H-2A. For 2008, we have already had 640 H-2B applicants.

Last year, with the H-2B exemption in place, an additional 69,000 workers were granted permits to work in this country. Without similar relief this year, many businesses may be forced to have their year-round, full-time staff take on additional responsibilities, putting extra strain on employees and distracting them from essential duties. In short, our small seasonal businesses will suffer. Some may have to scale back the services they offer to guests and customers, and some may even have to close their doors.

It is incredibly important to the New Hampshire economy that we act quickly to resolve this issue. And it is also important that this Committee, and Congress as a whole, work to ensure that worker's rights are protected, that American workers have access to good-paying jobs and that our business owners have access to the employees they need to run successful businesses. Thank you again, Mr. Chairman, for holding this hearing, and I look forward to working with all of my colleagues on this issue.

[Letter from Ed Butler, submitted by Ms. Shea-Porter, follows:]

NOTCHLAND INN,
CARROLL COUNTY DISTRICT 1,
May 1, 2008.

Hon. CAROL SHEA-PORTER,
1508 Longworth HOB, Washington, DC

DEAR CONGRESSWOMAN SHEA-PORTER: I realize that it's a bit silly to head this letter with two logos but I do it to emphasize that I am writing to you about the H2B Visa issue from my two roles: as small business owner and NH Representative for District 1 in Carroll County.

As one of the owner/managers of our inn, we have hired two H2B workers for the summer and fall seasons over the past several years. This year we are, of course, unable to bring them back and are at a loss to how we will manage without them. We are networked with many other hospitality businesses throughout our district & New England and I have heard from many of them that they are very worried that they will not have the needed staff to operate their businesses effectively without the H2B workers they have come to rely on.

Did you know that we are required, by law, to advertise locally for all positions that we will try to fill with H2B workers? In our applications, we must include tear sheets from the papers in which we advertise and report on what, if any, response we've had. Of course you know that the minimum rates of pay are set by the Department of Labor and must be the industry standard for the work category. Why then would any of us be spending the time and money (both of which are not insignificant) to bring in H2B workers if we were able to find qualified and willing local New Hampshire workers? For many of us looking for housekeepers; restaurant workers of various kinds; landscapers and other laborers, there are simply no other alternatives.

To my mind there can be no reason for preventing those businesses who need H2B workers from hiring them. From our experience and that of many other businesses that we know and have heard from, the H2B workers do not, in any way, threaten the access of local workers to our jobs.

Please do all in your power to increase the caps, or do whatever is necessary, for qualified employers to hire H2B workers when local American workers are not available to fill the need.

Thank you,

ED BUTLER, *NH Representative and Innkeeper,*
Carroll County District 1, The Notchland Inn, Hart's Location.

[Letter from Michelline Dufort, submitted by Ms. Shea-Porter, follows:]

May 5, 2008.

Hon. CAROL SHEA-PORTER,
1508 Longworth HOB, Washington, DC

DEAR CONGRESSWOMAN SHEA-PORTER: As a representative of the tourism industry, I strongly urge for your continued support of the H2B workers program.

As a representative of New Hampshire, you are well aware of the importance tourism plays to our entire state's economy. The ability to keep hospitality doors open and retain full-time employees is contingent on making enough money during our peak seasons to sustain most operations during the 'shoulder seasons'. During the peak tourism seasons, operators must supplement permanent staff with temporary seasonal employees. In order to fill these positions, thousands of dollars and hundreds of hours are spent in aggressive recruitment. Unfortunately, enough workers for these positions cannot be found despite the generous pay and benefits offered. The levels of compensation vary across the state, but are consistently well above minimum wage, and in fact, at a competitive market value. Despite all of these factors, even job fairs are not bringing about the domestic workers so now vitally needed to cover these now void positions

As a result of the lack of local labor available, both past and present, many have counted on the federal H-2B program which allows the hire of temporary seasonal labor to support our industry. As you are aware, not only do they allow us to maintain our level of service, they abide by all terms of the program, have taxes deducted from their pay, do not burden any social services, and go back home after their work period has expired. As they only work for three to four months, this is not an immigration issue but a small business issue.

I continue to hear from owners and operators about the crucial state of business in not being able to secure these workers. Stories range from cutting back on services, such as lunch service, to escalating marketing costs as businesses step up their efforts to secure alternative employment.

Therefore, despite the cumbersome, lengthy and expensive process in applying for H-2B workers, we still desperately need the program. Without this program, many will be forced to keep part of the property closed, cut back services, cancel events, or possibly lay off many of full-time employees. Decreased service results in decreased and compromised service, which results in a lackluster tourism season; a factor New Hampshire cannot afford to take.

Thank you for your attention to this matter. I have enclosed a synopsis of the state of H2B's in New Hampshire for your information.

Sincerely,

MICHELLINE DUFORT, *President & CEO,*
New Hampshire Lodging & Restaurant Association.

[Statement of Claire Gruenfelder, submitted by Ms. Shea-Porter, follows:]

Prepared Statement of Claire Gruenfelder, Human Resource Director, Mount Washington Resort

We very much rely upon the seasonal work of our H2B's. We are a year round resort with two defined seasons; summer and winter. In both seasons our workforce spikes significantly, as do our business levels and we depend on our H2B workforce to assist us through those two seasons. We manage to hire highly skilled individuals on the H2B visa, many whom have been in U.S prior working on a J-1 visa. The employees we have on the H2B visa possess exceptional English abilities, which have an impact on the exceptional level of service we provide to our guests.

We make every possible effort to recruit local candidates, although our remote location (especially with today's gas prices) makes us an unattractive employer. We participate in local job fairs, including ones at local high schools and universities. We have done a road show of job fairs at local New Hampshire Employment Security Offices, which have allowed us to use their office space to recruit. Twice a year we host our own in house job fairs (May and October) and use every media possible to advertise our job fairs, including the use of radio advertising. We have also done a tremendous amount of out reach with local agencies that work with veterans, people with disabilities, recovering addicts and former prisoners on furlough recog-

nizing that anybody who is willing to learn and wants to be part of this industry, we shall invest the time to train them.

We pay our H2B workers the prevailing wage, as determined by our state. Many of our H2B workers are in positions where they receive cash tips as well as their hourly wage, which contribute greatly to their incomes. An average Housekeeper on the H2B program can make $10 per hour (including tips), Food Service Professional $12—$15 per hour (including tips) and Cooks $11 per hour. We provide housing at very low cost to our H2B workers, offer three meals a day in our cafeteria, organize trips to local towns so our H2B workers can do their banking, shopping and participate in other recreational activities. Our H2B workers have the opportunity to receive the same benefits as our U.S workers, including complimentary access to all the activities and amenities we have at our resort, including free ski passes, golfing privileges, horse riding, swimming, tennis, full gym facilities, racquetball, mountain biking, hiking, and much more.

Some of our H2B workers live in housing we provide, others choose to move off property, opting to purchase their own vehicles for more independence. Our housing is separated by gender and most employees who live in our housing have a room to themselves, in larger rooms some share with one or two other employees.

We have many H2B workers that we have come back to us seasonally we welcome their return to us. We offer our H2B workers a great place to work, good incomes, and the opportunity to advance themselves as we have promoted several of our H2B workers. Our H2B workers are treated the same as our native workforce, just last month one of our food service professionals was awarded the Golden Star of the Month Award for March 2008 for her exceptional service. For that award, that H2B worker received an overnight stay at another hotel in New Hampshire and $100 in spending money.

Without our H2B workforce two repercussions would happen; we would either have to reduce our operations, forced to close certain services on our property or we would be forced to back fill the seasonal positions that our H2B workers fill with far less skilled workers which would ultimately affect the guest experience we highly pride ourselves on.

[Letter from Save Small Business, dated May 7, 2008, submitted by Mr. Bishop of New York, follows:]

MAY-07-2008 10:39 From:MOCERS LAW 3016520422 To:2022254744 Page:1/5

SAVE SMALL BUSINESS

P.O. Box 30912
Bethesda, MD 20824-0912
240.238.4412
www.savesmallbusiness.org

A network of small and seasonal business owners dedicated to saving American commerce by supporting and advancing the H-2B Non-Immigrant Worker Program.

May 7, 2008

Josephine Eckert
Legislative Assistant
Congressman Bart Stupak
2352 Rayburn House Office Building
Washington, DC 20515

P: 202-225-4735
F: 202-225-4744

Dear Josephine,

Jack Brooks from J.M. Clayton Seafood in Cambridge, Maryland asked that we fax the attached letter to Representative Stupak. He would like this to be added to the record for yesterday's hearing.

Bill Selling, Executive Director of BSIA, and I attended the hearings. He is the author of the letter.

Please call or email me if you have any questions or need additional follow up.

Regards,

Claire Cassard
Save Small Business
ccassard@savesmallbusiness.org

[Letter from Chesapeake Bay Seafood Industries Association (CBSIA), dated May 6, 2008, submitted by Mr. Bishop of New York, follows:]

CBSIA Chesapeake Bay Seafood Industries Association
110 Severn Ave. ◆ Annapolis, MD 21403 ◆ 410-507-3249 ◆ Fax 410-990-0721 ◆ CBSIA@comcast.net

May 6, 2008

The Honorable George Miller
Chair
Committee on Education and Labor
US House of Representatives
Washington, DC 20515

The Honorable Howard McKeon
Ranking Member
Committee on Education and Labor
US House of Representatives
Washington, DC 20515

Dear Representatives Lofgren and King:

As Executive Director of the Chesapeake Bay Seafood Industry Association (CBSIA), I am writing today in support of the H-2B program and the H-2B Returning Worker Exemption. This program is vital to our industry and it has worked for over a decade with results that have benefitted both small business and the Americans who work for them. This is not a new program. It deals only with temporary seasonal workers who come to the US to perform seasonal work and then return home at the end of the season.

Our industry has a proud tradition. Seafood processing started on Maryland's Eastern Shore in the mid 1800's and has continued until today. It is a significant industry that has defined the State of Maryland, particularly the Eastern Shore. The seafood industry has built and sustained many small towns and villages. The seafood industry is a way of life in these communities. Unfortunately, this way of life is being jeopardized by the continuing absence of available Americans who are willing and able to perform seasonal work.

In the past, these small family owned crabmeat processing plants relied on the family members of watermen for their workforce. The watermen and their families would wake daily at about 3 am. Their families helped watermen prepare for work on the Chesapeake, and then they would go to the crab factory to pick crabs that had been harvested the previous day.

In the 1970's many of the family members left the seafood processing industry, attracted to new industries in the community that provided steady, year-round employment and more conventional work hours. This was the first major labor challenge presented to the industry. In response, a crab picking machine was invented and used to reduce the dependence on seasonal workers. While it did help some, the machine still required 40 people to operate in what has developed to be an even shorter season. Our staffing challenges grew worse every year as industry and services continued proliferate throughout the Eastern Shore.

President, Jack Brooks; *Vice President*, J.C. Tolley; *Secretary/Treasurer*, Bill Brooks; *Executive Director*, Bill Stelling
Board Members: Dan Lyons, Robin Hall, Jerry Harris, Jay Newcomb, Casey Todd, Roy Tod, Roger Van Dyke

The 1980's ushered in an even more improved economic situation to our region, including more year round employment opportunities for our traditional workers. This in turn greatly increased the strain to provide workers for our small seasonal businesses. The seafood industry businesses began to look for the first time at potential workers in different places and outside of our immediate neighborhoods. Some of the efforts to hire and retain local workers include:

- Working with area vocational tech centers
- Aggressively participating in summer job programs for students and teachers
- Working with state employment agencies
- Recruiting from local and regional and state detention centers for work release programs
- Increasing advertising in local and regional newspapers
- Working to hire mentally and physically handicapped folks through different organizations
- Participating in local and regional job fairs
- Working with private industry councils
- Sending a bus daily to Baltimore (80 miles one way) to bring in workers from depressed inner-city neighborhoods.
- Working with religious organizations to set up job fairs in the metropolitan areas of Washington to solicit legal workers to come to the shore to work

Again, with so many more year round employment opportunities available, none of these efforts met with success. The situation continues today.

In the early 1990's Maryland's seafood business were at the "breaking point" – after significant downsizing, if employees could not be hired to pick the crabs the entire seafood business would have begun to collapse. One or two companies began using the H-2B program to survive. Soon nearly all of these small seasonal businesses began supplementing their local workers with temporary seasonal foreign workers.

In the mid 1990's our industry began facing stiff competition (largely as a result of what we believe was illegal dumping of huge amounts of cheap imported crabmeat coming in to the U.S. markets) from processors in Asia. While they used a completely-different species of crab, these foreign companies still marketed their processed product as "Blue Crab". This cheap imitation of our domestically-processed blue crab caused confusion at the market place, and began to take away tremendous market share because of the significantly cheaper cost. This supply of "cheap" imported crabmeat continued to increase into the late 90's to the point many crabmeat businesses from Texas to Maryland went out of business. The remaining crab companies had to restructure their marketing to get away from large accounts such as chain stores and move towards niche markets where consumers demanded and would pay a little extra for "real Chesapeake crabmeat". The surviving crab businesses have been able to stay in business by buying, cooking, picking, processing and marketing their authentic

"Grown in the USA" domestic crabmeat. In recent years the market has continued to evolve and change, and now China and Venezuela ship literally tons and tons of cheap crabmeat into the United States.

The only word to describe the situation today is "desperation."

We have provided a detailed history of our industry because, despite the great challenges we have faced, seafood processors continue to provide significant benefit to our region's economy. In fact, the University of Maryland has conducted extensive economic studies in our region, including detailed evaluations of the impact of Maryland's crab industry. Using scientifically-collected data, University economists have determined that for each H-2B worker in our industry, **2.5 local American jobs have been retained or created.** With these foreign temporary workers our industry and our year-round American workforce are able to survive. Without them, our businesses would fail and our Americans would lose their jobs.

The closure of so many seafood processing plants around the country in the face of cheap foreign imports has placed additional responsibility on surviving companies. At various times of the year, the volume of raw seafood product outstrips the ability of local plants to process it. This has meant that raw product must be shipped across state borders to plants where the season has not peaked. While this has resulted in increased transportation costs, it has also lengthened the period of time our companies operate. This has in turn placed additional pressure on the need to find available seasonal workers.

Our companies that apply for H-2B workers follow rigorous guidelines for approval before any foreign seasonal worker can be hired. They conduct extensive recruitment campaigns by advertising in local papers to recruit available Americans. They also participate in local job fairs, and even recruit released former convicts, among the activities they pursue. Our members pay well above the minimum wage – they pay the "prevailing wage", and they make available fully-furnished and comfortable living quarters (down to bed and bath linens) each year. Be assured that our members participating in the H-2B program hold themselves to high standards and comply with all labor laws, including paying a fair wage (above minimum wage), providing workman's compensation coverage, withholding and matching social security and Medicare taxes, withholding federal and state income taxes, and paying state and federal unemployment taxes.

The businesses that use temporary foreign seasonal workers are proud of the close relationships that they have developed. In fact, many are family-like relationships. Most guest workers return year after year, and often bring family members to work with them through the program. It is not unusual for husband/ wives, brother/sister combinations, cousins/cousins, inlaws/inlaws to be working and living together here. They are very, very happy to have a job and spend money in the local community. They arrive in the USA every spring with a small bag of personal belongings, but leave with several suitcases and boxes with as much as they can take back to family members in Mexico. With the money they earn, they provide for family members back home (including small children and elderly parents) in

ways we take for granted. They return each year to Maryland, where they proudly tell us that they had built bathrooms, provided plumbing to their houses, bought land or performed other similar significant deeds with the funds they earned in the US. Perhaps they are most proud of the fact that with their earning they can provide for extensive medical care to their families in Mexico, paying for operations and needed medicine at home.

These H-2B workers often get involved after hours, especially with community and religious organizations. They have taken courses to learn English, first aid, and participated in outreach programs through their churches. In turn, they have been able to inject a measure of Mexican culture in our isolated communities, setting up celebrations, encouraging us to improve our Spanish language capabilities, and generally ensuring that we appreciate the great and proud traditions and cultures they have carried with them to the US.

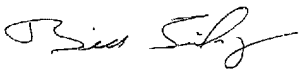
I can say without hesitation that these temporary H-2B workers play a key role in preserving a way of life for the Eastern Shore of Maryland. Without these workers, the seafood processing industry will disappear in a very short timeframe. Generational family businesses will close. The trickle down support industries will suffer or close. Fishing communities will disappear. There will be higher unemployment for the American workers laid off because of the business closures. Families will be split up and no longer working together. Small businesses, the backbone of our country (as it is often said) will suffer and decline. More people will be dependent on government services to survive since many manufacturing jobs have been moved out of our communities, state and country.

There are critics of the H-2B program who say "let these seasonal businesses disappear – America will be better off for it." If Maryland's Eastern Shore is any indication, no corner of America could ever be better off without small and seasonal businesses. We cannot allow an American way of life to disappear. It may be ironic that we must turn to H-2B workers to preserve an American way of life, but this is the way it is.

Please help to save our small seasonal businesses. Please help keep Maryland's Eastern Shore strong by passing an extension of the H-2B Returning Worker Exemption.

Thank you for your taking our needs into consideration.

Sincerely yours,



Bill Sieling
Executive Director,
Chesapeake Bay Seafood Industries Assn.

[Inclusion of Mrs. McMorris-Rodgers follows:]

Congresswoman Cathy McMorris Rodgers
Statement for the Record
Hearing: Do Federal Programs Ensure U.S. Workers Are Recruited First Before Employers Hire From Abroad?
May 6, 2008

I'd like to take this opportunity to submit for the record a copy of a letter from the Director of the Washington State Department of Agriculture detailing the labor challenge farmers are facing in Washington state.

As this letter demonstrates, the agriculture industry in Washington is currently experiencing overall labor shortages. I learned first hand when I visited Crane and Crane Orchards in Brewster, a number of years ago about how labor shortages are hurting their business. In 2005, over 80,000 boxes worth of apples were left on the trees because they didn't have enough labor. The orchards are experiencing labor shortages despite the fact that they pay between 10 to 12 dollars an hour and provide housing to their workers.

In Congress my priorities include growing our economy and keeping our nation and community safe, and in my opinion, this includes providing a comprehensive immigration policy that addresses the serious growing problems related to illegal immigration, fixing our broken immigration system, and ensuring our efforts do not unduly hurt our local and national economy.

May 14, 2007

Members of the U.S. Senate Committee on the Judiciary

Dear Senator:

As Congress prepares to tackle the tough but critical issue of immigration reform, I want to share an important experience that happened last year in my home state of Washington. I serve as the director of the Washington State Department of Agriculture, and as President of the National Association of State Departments of Agriculture (NASDA). The agricultural industries I represent in Washington State are in desperate need for Congress to act on immigration reform, and I hear from my colleagues from coast to coast that we are not alone.

Agricultural employers are facing a rapidly worsening labor shortage. During the critical harvest periods of our highly perishable fruit and vegetable crops, growers have difficulty finding enough people available to work. Shortages exist despite efforts to recruit former employees, recruit through the government job services, and even to keep current employees on the payroll during slow periods so that they will be there for later harvest periods. I have watched as farm employers have increased wages as much as they can in an attempt to attract workers. Sometimes this means attracting workers who are working in crops in other states and sometimes it means attracting workers from neighbors. We have even seen "wage wars" in which growers attempt to outbid each other for a limited workforce during a critical period. In every case, rarely do people who have not done farm work leave other jobs -- even those that pay less -- to do tough and seasonal field work.

My state produces sixty percent of the nation's apple crop. Last year, we expected a worker shortage. We sought to avert it by turning over every stone to seek local labor. Serious efforts to recruit local residents who have not been employed in farm work were not productive. In late August, 2006 the Washington State Department of Employment Security and the Washington Growers League teamed up to recruit local people to pick apples. They established a series of apple picking orientations and job referral events in the six major towns in eastern Washington apple country, at which instruction in apple picking was provided by local growers, and WorkSource (Job Service) staff stood by to refer attendees to open jobs.

At each of the orientation events a full complement of equipment was provided to familiarize the attendees with the practical skills and techniques of apple harvest. Growers brought bins, picking bags, orchard ladders and branches loaded with apples that they had cut out of their orchards. The attendees were shown how to use the equipment and the various techniques for picking apples without bruising the fruit or pulling the fruiting spurs off of the tree. They were then given the opportunity to use the equipment, set and climb the tripod ladders, try on and use the picking bags, gently dump the apples into the bin and to practice actually picking apples from one of the many full branches brought by the growers.

After going through this orientation, a person would not be "totally green" and would have a basic idea of what to do if they took a job the next morning (in some cases, jobs were ready that afternoon) picking apples. WorkSource staff from the state Department of Employment Security stood by to refer attendees to open jobs.

There were about 1,700 job openings for apple pickers listed with WorkSource at the time the orientations started during the last week of August. Advertisements were placed on the mainstream news/talk radio stations and in all of the major newspapers in eastern Washington orchard country. The Washington WorkSource offices listed the orientations on bulletin boards and websites. The Growers League had radio interviews, newspaper articles and television interviews about the orientations prior and during the one week orientation campaign. Even after all of this publicity and advertising, a total of only 40 people showed up for all six of the orientation events, far short of the 1,700 needed.

Obviously, the results were disappointing. Our industry made an extra effort to fully utilize local labor. The result offered valuable insight on the reality of our local labor market: local people who want to work are already employed, or are not interested in doing the seasonal and physically demanding work that characterizes our specialty crop production. Again, I hear from my colleagues across the country that our situation is not unique.

NASDA has carefully considered the farm labor issue, and has concluded that we need Congress to enact immigration reform legislation that provides workable and fair legal channels for farmworkers to enter the country, work, and return home when the season is over. At the same time, there is a clear and compelling need for experienced farmworkers who lack legal status to be given a chance to earn legal status over time, subject to strict conditions.

The best opportunity to achieve both of these goals is the bipartisan and time-tested Agricultural Job Opportunities, Benefits, and Security Act of 2007, or AgJOBS (S.340 and H.R.371). I join my NASDA colleagues in urging Congress to enact AgJOBS swiftly, either as part of a comprehensive package, or as a stand-alone measure. Our agricultural producers need the reforms of AgJOBS. Millions of American jobs that depend on agricultural production, and our food security as a nation, will be enhanced if Congress finally acts.

Sincerely,

Valoria H. Loveland

Valoria H. Loveland
Director, Washington State Department
of Agriculture
NASDA President

[Questions for the record and responses received from Mr. Sequeira follow:]

COMMITTEE ON EDUCATION AND LABOR,
U.S. HOUSE OF REPRESENTATIVES,
Washington, DC, May 9, 2008.

[VIA FACSIMILE]
Hon. LEON R. SEQUEIRA, *Assistant Secretary for Policy,*
U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, DC.

DEAR ASSISTANT SECRETARY SEQUEIRA: Thank you for testifying before the May 6, 2008, Committee on Education and Labor hearing entitled "Do Federal Programs Ensure U.S. Workers Are Recruited First Before Employers Hire From Abroad?" We write to ask follow-up questions from that hearing. We are deeply concerned that recent proposals by the U.S. Department of Labor (DOL) will drag down the wages paid to U.S. workers to the lower wage levels currently paid to undocumented immi-

grant workers. The proposed regulations announced by the DOL on February 13, 2008, appear to use undocumented workers, earning below-market wages, to set the market rate for much of the wages in the agricultural industry.

At the hearing, we each asked you questions about the DOL's proposed new methodology for calculating wages in the H-2A agricultural guest worker program. As you know, Congress has placed upon DOL a statutory obligation to ensure that the H-2A program "will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1)(B). However, your answers failed to provide us with sufficient assurances that the wages of U.S. workers would be protected from downward pressure, and therefore we ask you to provide answers to the following questions in bold:

1. Wage Survey Calculations

You testified that the DOL plans to revise the H-2A program wage calculation so that it will be determined by the Bureau of Labor Statistics' Occupational and Employment Statistics (OES) survey. The OES calculation would replace the Adverse Effect Wage Rate (AEWR) currently used in the program, which requires employers utilizing H-2A guest workers to pay at least the average market wage for agricultural work in a particular region. The proposed use of the OES calculation would appear to be designed to generally lower the wage requirements for the H-2A program, to something below the average market rate. We understand that, under the Department's proposal, the OES survey for any given occupational category in any given geographic area would be broken down into four wage levels. It is our understanding that the DOL first estimates Level I and IV wages directly from OES wage data by setting OES Level I wage as the average wage for the bottom third of the earnings distribution, and the Level IV wage as the average of the top two-thirds of the earnings distribution. The two intermediate levels are created by dividing the difference between Level I and Level IV by 3, and adding the quotient to the first level and subtracting that same quotient from the fourth level. **Please confirm how the DOL calculates the four wage levels in the proposed methodology.**

2. Using the Four Wage Levels

It is our understanding that the four wage levels would then be used as the prevailing rates for agricultural jobs based on the skill and experience level required by the employer. For example, if an employer applying for H-2A workers says a job requires low skills and little experience, then the employer would be allowed to pay Level I wages for that job. If the above explanation of the OES survey calculation is correct, however, the four wage levels themselves do not reflect skills and experience. In other words, Level I does not necessarily reflect the wages of workers in the jobs that require the least skills or experience but merely the wages of the lowest paid workers.

If the DOL adopts the four level OES wage system for the agricultural industry, we are concerned that the DOL will allow employers to choose Level I when hiring guest workers and recruiting U.S. workers in virtually all instances and regardless of the actual job requirements for the job. Indeed, this fear was heightened by comments that you made in a public meeting with the California Farm Bureau on March 12, 2008. (See notes from 3/12/08 public meeting on DOL webpage, available at: *http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480408221.*

According to the notes for this meeting, a participant asked you: "Will the majority of H-2A employers be seeking certification for Level 1 jobs?" The notes provide the following record of your answer:

Mr. Sequeira replied that the job skill level for which to seek certification is up to the employer. An employer would not be expected to seek certification for a job as a Level 2 or higher job, regardless of how many years of experience a given employee might have, if the job is in fact a Level 1 job. (Emphasis added.) These notes seem to confirm the fears of the many critics of the DOL's proposed regulations. **Therefore we ask that you confirm approximately what percentage of H-2A applications you foresee that will be approved by the DOL at the Level 1 wage level, and whether such determinations will be made "regardless of how many years of experience a given employee might have."**

3. Undocumented Workers in the OES Wage Survey

At the hearing yesterday, the Committee heard testimony that there are approximately 2.5 million farm workers on ranches and farms in the United States, and that somewhere between 55% to 70% of those workers are undocumented immigrants. We also heard testimony that the lowest paid farm workers tend to be undocumented immigrants, whereas farm workers who are U.S. citizens or legal permanent residents tend to be paid at the top end of the wage distribution in the agri-

cultural industry. It was also noted that the OES survey, like the current USDA Farm Labor Survey, does not account for workers' immigration status and therefore includes undocumented worker wages. This testimony strongly suggests that those farm workers in the bottom one third of the earning distribution—which is the data set for calculating the OES Level I wage—are comprised mostly and perhaps overwhelmingly of undocumented immigrants. Please confirm whether you agree with this analysis and whether there are any assurances that Level I wages (i.e., the average of the bottom third of wages) will not overwhelmingly reflect the wages paid to undocumented workers.

The issues presented above suggest that DOL's proposed changes would have the effect of bringing the wages paid to H-2A workers—and consequently to U.S. workers who apply for jobs set at those same wages—down to the level of wages currently paid to undocumented immigrants. The DOL's own Notice of Proposed Rule Making admits that "U.S. workers cannot fairly compete against undocumented workers, who may accept work at below-market wages * * *" (73 Fed. Reg. at 8549). It would appear that the DOL's proposed rule seeks to use undocumented workers' "below-market wages" as the benchmark for most agricultural jobs. Employers seeking guest workers could use undocumented workers' low wage rates when recruiting U.S. workers. **Such an outcome strikes us as a violation of the statutory obligation that Congress placed on the DOL to prevent such adverse effects for U.S. workers, and therefore we seek your written response to this concern.**

Please send your written response to the Committee staff by COB on Tuesday, May 20, 2008—the date on which the hearing record will close. If you have any questions, please contact the Committee.

Thank you for your testimony before our Committee, as well as for your prompt response to the points raised in this letter.

Sincerely,

GEORGE MILLER,
Chairman.

JASON ALTMIRE,
Member of Congress.

COMMITTEE ON EDUCATION AND LABOR,
U.S. HOUSE OF REPRESENTATIVES,
Washington, DC, May 8, 2008.

[VIA FACSIMILE]
Hon. LEON R. SEQUEIRA, *Assistant Secretary for Policy,*
U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, DC.

DEAR ASSISTANT SECRETARY SEQUEIRA: Thank you for testifying at the May 6, 2008, Full Committee hearing on "Do Federal Programs Ensure U.S. Workers Are Recruited First Before Employers Hire From Abroad?"

Congressman Rubén Hinojosa has submitted the following questions for a response from you for the hearing record:

1. The Department's proposed rules for the H2A program seem to place the convenience and ease of use for employers above the interests of the workers—both domestic and foreign. Please explain how allowing employers to provide housing vouchers rather than requiring them to arrange for and provide adequate housing will result in workers actually having an adequate place to live during their period of employment in the United States? What steps has the Department been taking to enforce the current regulation? How would enforcement be different under the proposed regulation?

2. The Department's proposed regulations would further reduce government oversight of H2-A applications. Given the long and continued history of abuse in this program, what is the rationale for less oversight?

Please send your written response to the Committee staff at by COB on Tuesday, May 20, 2008—the date on which the hearing record will close. If you have any questions, please contact the Committee. Once again, we greatly appreciate your testimony at this hearing.

Sincerely,

GEORGE MILLER,
Chairman.

Congressman Ruben Hinojosa, May 8 questions

1. The Department's proposed rules for the H-2A program seem to place convenience and ease of use for employer above the interests of the workers – both domestic and foreign. Please explain how allowing employers to provide housing vouchers rather than requiring them to arrange for and provide adequate housing will result in workers actually having an adequate place to live during their period of employment in the United States? What steps has the Department been taking to enforce the current regulation? How would enforcement be different under the proposed regulation?

Answer:
Under the Immigration and Nationality Act employers are required to provide housing to H-2A workers and to U.S. workers who are hired during the H-2A recruitment period and who are unable to return to their residence within the same day. This employer-provided housing must meet either the Department's Occupational Safety and Health Administration (OSHA) standards or applicable H-2A program standards. If an employer chooses to arrange for rental, public accommodation, or other similar housing, the statute requires that the housing must meet the applicable local or State standards. In the absence of applicable local or State standards, the rental, public accommodation or other similar housing must meet Federal standards.

The Department's recent NPRM asked for public comment on whether employers should have an additional housing option – that is, providing a housing voucher to H-2A workers that they could use to secure housing. The Department's proposal makes clear, however, that even if such a voucher system were implemented, any housing secured through a voucher would have to meet the applicable housing standards. A voucher could not be used to circumvent or avoid the H-2A housing requirements.

Nothing in the Department's NPRM alters the employer's statutory obligation related to housing. As our NPRM notes, if acceptable housing cannot be obtained using the voucher, the employer is not relieved of his or her obligation to arrange for or provide housing that meets the applicable safety and health standards. Because the Department has not reviewed all public comments on the proposed rule, the Department has not adopted a final position on this issue.

2. **The Department's proposed regulations would further reduce government oversight of H-2A applications. Given the long and continued history of abuse in the program, what is the rationale for less oversight?**

Answer:
Rather than reduce government oversight, the Department proposes to increase its oversight of the H-2A program by strengthening worker protections and increasing penalties for violations of H-2A program requirements, and by instituting audits of H-2A applications. The Department's Employment and Training Administration (ETA) and the Wage and Hour Division (WHD) would both receive enhanced oversight authority under the proposed rule. ETA would have the authority to conduct both directed and complaint-driven audits of applications to ensure program integrity. ETA would use its authority to revoke temporary agricultural labor certifications in appropriate instances. The WHD would be authorized to debar employers and/or refer cases to ETA for revocation of certifications based on WHD investigative determinations. The Department's authority to debar employers who substantially violate the terms of a prior labor certification for up to 3 years would also be clarified and improved to ensure program integrity. Because the Department has not reviewed all public comments on the proposed rule, the Department has not adopted a final position on these issues.

Chairman George Miller and Congressman Jason Altmire, May 9, questions

3. Wage Survey Calculations: You testified that the DOL plans to revise the H-2A program wage calculation so that it will be determined by the Bureau of Labor Statistics' Occupational and Employment Statistics (OES) survey. The OES calculation would replace the Adverse Effect Wage Rate (AEWR) currently used in the program, which requires employers utilizing H-2A guest workers to pay at least the average market wage for agricultural work in a particular region. The proposed use of the OES calculation would appear to be designed to generally lower the wage requirements for the H-2A program, to something below the average market rate. We understand that, under the Department's proposal, the OES survey for any given occupational category in any given geographic area would be broken down into four wage levels. It is our understanding that the DOL first estimates Level I and IV wages directly from OES wage data by setting OES Level I wage as the average wage for the bottom third of the earnings distribution, and the Level IV wage as the average of the top two-thirds of the earnings distribution. The two intermediate levels are created by dividing the difference between Level I and Level IV by 3, and adding the quotient to the first level and subtracting that same quotient from the fourth level. Please confirm how the DOL calculates the four wage levels in the proposed methodology.

Answer:
The Department has proposed using data from the Occupational Employment Statistics (OES) program to determine the Adverse Effect Wage Rate (AEWR) for the H-2A program. Using OES data to calculate H-2A wage rates would provide market-based wage rates that are precisely tailored by locality, occupation, and skill level. The four skill levels for each occupation afford the employer and the Department the opportunity to more closely associate the level of skill required for the job opportunity to the relevant OES occupational category and skill level. Whether workers are classified at Level I, Level II, Level III, or Level IV, the applicable wage rate would closely approximate the average wage paid to other workers for specified jobs in the same location, occupation, and skill level. As you may know, the current AEWR methodology makes no distinction based on skill, so that a relatively high skilled H-2A worker receives the same adverse effect wage as a relatively low skilled H-2A worker in the same occupation.

As you correctly point out, the Department would base the Level I and Level IV wage rates on OES data. As you may know, the four skill level differentiation was developed by Congress (Consolidated Appropriations Act of 2005, Pub. L. 108-447, Division J, Title IV, Section 423) and is used in the Department's other temporary worker programs (i.e., H-1B and H-2B). The Level I value is equal to the mean wage for the bottom third of the earnings distribution and Level IV value is equal to the mean wage of the top two-thirds of the earnings

distribution. The difference between Level IV and Level I is divided by three. This value is added to the Level I wage to obtain the Level II wage, and the same value is subtracted from the Level IV wage to obtain the Level III wage. Because the Department has not reviewed all public comments on the proposed rule, the Department has not adopted a final position on this issue.

4. Using the Four Wage Levels: It is our understanding that the four wage levels would then be used as the prevailing wage rates for agricultural jobs based on the skill and experience level required by the employer. For example, if an employer applying for the H-2A workers says a job requires low skills and little experience, then the employer would be allowed to pay Level I wages for that job. If the above explanation of the OES survey calculation is correct, however, the four wage levels themselves do not reflect skills and experience. In other words, Level I does not necessarily reflect the wages and workers in jobs that require the least skills or experience but merely the wages of the lowest paid workers.

If the DOL adopts the four level OES wage system for the agricultural industry, we are concerned that the DOL will allow employers to choose Level I when hiring guest workers and recruiting U. S. workers in virtually all instances and regardless of the actual job requirements for the job. Indeed, this fear was heightened by comments that you made in a public meeting with the California Farm Bureau on March 12, 2008. (See notes from 3/12/08 public meeting on DOL webpage, available at: http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480408221).

According to the notes for this meeting, a participant asked you: "Will the majority of H-2A employers be seeking certification for Level I jobs?" The notes provide the following record of your answer:

> Mr. Sequeira replied that the job skill level for which to seek certification is up to the employer. An employer would not be expected to seek certification for a job as a Level 2 or higher job, regardless of how many years of experience a given employee might have, if the job is in fact a Level I job.

These notes seem to confirm the fears of the many critics of the DOL's proposed regulations. Therefore we ask that you confirm approximately what percentage of H-2A applications you foresee that will be approved by the DOL at the Level I wage level, and whether such determinations will be made "regardless of how many years of experience a given employee might have."

Answer:
The Department cannot predict the percentage of workers to be employed at any particular skill level because those determinations are based on individual job opportunities.

Moreover, the question seems to be based on a misunderstanding of the Department's role in the labor certification process. The Department certifies

that no qualified, available and willing U.S. workers could be found for job opportunities that an employer then seeks to fill with an H-2A worker. The Department does not certify individual workers as being eligible or qualified for particular jobs. In fact, the Department has no idea what specific worker, if any, will ultimately fill any of the positions it certifies, let alone what any worker's qualifications or experience may be. The Department evaluates the job description to ensure the appropriate wage is assigned to the job opportunity. Of course, it is the employer who is responsible for describing his available job opportunity and the skill required to perform the job. The Department verifies that the offered wage matches the job described by the employer. That job description is then the basis of the employer's recruitment efforts. It is the employer who is responsible for recruiting and hiring qualified workers to fill his advertised job opening. The Department has the capability to sanction employers who fail to meet their responsibilities. That is how the H-2A process has traditionally operated and there is nothing in the Department's proposal to change that process.

As the Department noted in the NPRM, the four levels in the H-2A program would roughly serve as proxies for skill, in the same way they serve as proxies for skill in the Department's other temporary worker programs. As previously mentioned, the four skill level concept is one that Congress devised. The existing differences among occupations, skill levels, and geographic areas means the current pay rate using a one-size-fits-all wage methodology results in some workers being paid less than the actual market wage and some workers being paid more than the actual market wage for that occupation, skill level and geographic area. This disconnect from market-based wages is often cited as a major shortcoming of the current program. The Department's proposal suggests one approach to addressing this problem. Because the Department has not reviewed all public comments on the proposed rule, the Department has not adopted a final position on this issue.

5. Undocumented Workers in the OES Wage Survey: At the hearing yesterday, the Committee heard testimony that there are approximately 2.5 million farm workers on ranches and farms in the United States, and that somewhere between 55% to 70% of those workers are undocumented immigrants. We also heard testimony that the lowest paid farm workers tend to be undocumented immigrants, whereas farm workers who are U.S. citizens or legal permanent residents tend to be paid at the top end of the wage distribution in the agricultural industry. It was also noted that the OES survey, like the current USDA Farm Labor Survey, does not account for workers' immigration status and therefore includes undocumented worker wages. This testimony strongly suggests that those farm workers in the bottom one third of the earning distribution – which is the data set for calculating the OES Level I wage – are comprised mostly and perhaps overwhelmingly of undocumented immigrants. Please confirm whether you agree with this analysis and whether there are any assurances that Level I wages (i.e., the average of the bottom third of wages) will not overwhelmingly reflect the wages paid to undocumented workers.

Answer:
I am not able to verify several assumptions stated in the question. As the Department mentioned in its NPRM, USDA data from 2006 indicates there are about 1.2 million hired farm workers in the U.S. The Department's NPRM also noted that at least 50% and perhaps 70% or more of farm workers are in the country illegally. The OES survey is conducted by the Bureau of Labor Statistics and is the preeminent U.S. government data collection instrument for wage information. The OES survey is accurate, produces statistically valid wage rates, and has been successfully used for years by the Department of Labor in administering other temporary worker and permanent labor programs. The OES data represents actual wages paid to employees of businesses that provide agricultural labor services. The Department has no data on the wages of illegal farm workers as compared to legal farm workers. None of the federal government's wage data collection instruments includes information on the legal status of workers.

In addition, I do not agree with what appears to be an assumption implicit in the question that a knowing employer of an illegal worker who pays that worker below market wages would, when surveyed by the federal government, truthfully report that it is in fact paying a worker substandard wages. As I stated at the hearing, the OES survey data may possibly contain information about the pay of an illegal worker, just as the NASS survey may contain such data, but it is impossible to say definitively whether that is the case and whether the reported pay data provided about an illegal worker is accurate. After all, if an employer knowingly employs an illegal worker and underpays that worker, it

seems unlikely that the employer would then truthfully report the substandard wages on a survey, or otherwise, that it pays to the worker.

The Department's National Agricultural Workforce Survey estimates over 51% of the workforce on American farms are undocumented workers who are filling jobs that should first be offered to U.S. workers and that if U.S. workers are not available, then those jobs could be filled by H-2A workers who are subject to specified wage standards and other worker protections that help ensure their employment does not adversely affect U.S. workers. Because the Department has not reviewed all public comments on the proposed rule, the Department has not adopted a final position on this issue.

May 15 additional questions for the record from Congresswoman McCarthy and Congressman Ehlers.

6. What efforts has the Department made to coordinate with the other agencies to bring nurses into the U.S.? What communication has the Department made with the State Department and the Department of Homeland Security on this issue?

There are several avenues employers can use to bring foreign nurses into the U.S. The Nursing Relief for Disadvantaged Areas Act of 1999 and its subsequent reauthorization in December of 2006 allows qualifying hospitals to employ temporary foreign workers as Registered Nurses for up to three years under H-1C visas. Congress established a cap of 500 H-1C visas each year during the current three-year period of the H-1C program (2006-2009). Under this program, eligible hospitals file an application with the Department of Labor (DOL) which, when approved, support nonimmigrant worker petitions filed with the Department of Homeland Security. By statute, the sponsoring employer is required to meet strict criteria to employ foreign RNs under the H-1C program. These include: be a "subsection D" hospital under the Social Security Act; be located in a Health Professional Shortage Area as of March 31, 1997; have at least 190 acute care beds according to the 1994 cost report; have a Medicare population of 35% according to the 1994 cost report; and have a Medicaid population of 28% according to the 1994 cost report. The qualifying RN also must have a full and unrestricted license to practice in the country where the nursing education was obtained, or have received a nursing education in the U.S. The RN must have also passed the examination given by the Commission on Graduates for Foreign Nursing Schools (CGFNS) or be licensed in the state where he or she will work. Furthermore, the RN must be qualified and eligible under the laws governing the place of intended employment to engage in the practice of professional nursing as a registered nurse immediately upon admission to the U.S. and must be authorized under such laws to be employed by the facility.

Employers may also hire a nurse with an H-1B visa. The H-1B program requires, however, that a nurse have a bachelor's degree, and that the job at issue requires a bachelor's degree. USCIS ultimately makes the decision as to whether or not a job qualifies for an H-1B visa. Nurses from Mexico and Canada are also eligible to enter the U.S. under the TN visa, pursuant to the North American Free Trade Agreement, if they meet certain educational criteria.

Employers with positions that qualify for the H-1B program may also hire nurses for permanent positions using the permanent labor certification (green card) program. Professional nurses have long been declared a shortage occupation by

the Department of Labor and are listed on what is called "Schedule A." Schedule A is a list of occupations for which the Department has already determined there are not sufficient U.S. workers who are able, willing, qualified and available to fill job opportunities. In addition, Schedule A establishes that the employment of aliens in such occupations will not adversely affect the wages and working conditions of U.S. workers similarly employed. Employers wishing to hire foreign workers to fill job openings in occupations listed on Schedule A are not required to apply for a labor certification from DOL and instead file their petitions directly with the DHS.

Because of the way Congress designed employment based visa programs, employers are required to apply through several different federal agencies. As you know, Congress also set strict limits on many of these visa programs and the demand for visas almost always exceeds the supply. Unless Congress changes the visa caps to make more visas available, there will likely continue to be more demand than there is supply for many visas. The Department of Labor frequently consults with the Department of Homeland Security specifically concerning the use of Schedule A applications and has coordinated documentation requirements for those applications to improve the application process. In addition, the Department of Labor is frequently in contact with the Department of Homeland Security and the Department of State about the processing of all types of visas and how to improve processing within the system Congress created.

[Whereupon, at 1:00 p.m., the committee was adjourned.]

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