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

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

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

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

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

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

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

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

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

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

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

Guestworker Programs Are Inherently Abusive

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Virtually No Legal Protections Exist for H-2B Workers

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

The H-2A Program

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

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

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

H-2A workers also were legally entitled to:

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

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

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

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

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

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

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

---

[3] 20 C.F.R. § 655.102(b)(9)

[4] 45 C.F.R. § 1626.11

The H-2B Program

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

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

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

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

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

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

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

---

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

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

DOL Has Utterly Failed to Protect H-2B Workers

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

Example: Eller and Sons Trees

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

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

---

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

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

company's representation that it would change its practices.

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

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

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

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

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

DOL Is Ill-equipped to Serve Transnational Migrant Workers

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

---

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

[23] 8 U.S.C.A. § 1184(c)(1)(2006).

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

[25] 6 U.S.C. §§ 202, 236.

[26] 6 U.S.C. § 552.

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

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

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

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

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

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

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

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

---

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

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

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

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

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

Substantial Changes Are Necessary to Reform These Programs

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

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

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

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

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

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

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

The SPLC recommends that Congress take the following actions:

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

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

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

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

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

---

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

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

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

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

Conclusion

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

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