

## **Testimony of Jonathan P. Hiatt**

### **Before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law**

May 24, 2007

Madam Chairwoman, members of the subcommittee, thank you for inviting me to testify before your committee on the labor movement's view of immigration reform.

My name is Jonathan Hiatt, and I am General Counsel to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), which is a voluntary federation of 55 national and international labor unions. Members of unions affiliated with the AFL-CIO are construction workers, teachers and truck drivers, musicians and miners, firefighters and farm workers, bakers and bottlers, engineers and editors, pilots and public employees, doctors and nurses, painters and laborers – and more. The AFL-CIO was created in 1955 by the merger of the American Federation of Labor and the Congress of Industrial Organizations. Since its founding, the AFL-CIO and its affiliate unions have been the single most effective force in America for enabling working people to build better lives and futures for their families.

The AFL-CIO has been involved in the struggle on behalf of immigrant workers' rights for decades. In 2000, the AFL-CIO Executive Council adopted an historic resolution that, for the first time, called for legalization of the undocumented population and welcomed immigrants, regardless of immigration status, into the labor movement.

Since then, we have continually supported comprehensive immigration reform, which is now long overdue. The current system is a blueprint for exploitation of workers, both foreign-born and native, and is feeding a multimillion-dollar criminal enterprise at the United States-Mexico border.

Our failed immigration system has created a two-tiered society. Today, there are approximately 12 million undocumented immigrants in the United States, with a net annual increase in the 1990s of approximately 500,000 persons.<sup>1</sup> It is estimated that 80 percent of those persons are working.<sup>2</sup> Undocumented workers have no social safety net

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<sup>1</sup> Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, (Pew Hispanic Trust: 2005), at 1, 10. In the decade 1995-2004, 700-750,000 persons entered the U.S. unlawfully or overstayed a visa, *id.* at 6, but approximately 200,000 died, departed, or regularized their status each year, yielding a net increase in the undocumented population of approximately one-half million persons annually. Jennifer Van Hook, et al., *Unauthorized Migrants Living in the U.S.: A Mid-Decade Portrait* (MPI: 2005), at 2 (estimating that in 1995-2004, 200,000-300,000 undocumented immigrants "leave the United States, die, or become legal immigrants")

<sup>2</sup> *Id.*

(other than emergency medical services), and do not have the protections of U.S. labor and employment laws. Protections against discrimination, for example, are not available at all to undocumented workers in parts of the United States.<sup>3</sup> The result of our failed immigration system is that there are two classes of workers, only one of which can exercise workplace rights. As long as this two-tiered system exists, all workers will suffer because employers will have available a ready pool of labor they can exploit to drive down wages, benefits, health and safety protections and other workplace standards.

The AFL-CIO's answer to the "immigration crisis" is to reform immigration law in a way that places workers' rights at the forefront, and ensures that we will be able to take control of our borders by removing the economic incentives to exploit immigrant workers that are currently driving illegal migration.

Our approach has three core principles: (1) the law must provide a real mechanism by which all undocumented workers can regularize their status; (2) foreign workers must hereafter come into the United States with full and equal access to workplace protections, which means that future flow needs should not be met by temporary worker programs; instead, Congress should reform the employment-based permanent visa system to tie the number of visas available to real economic indicators; and (3) enforcement of labor laws must go hand-in-hand with enforcement of immigration laws.

### ***The Law Must Provide a Clear Path to Legalization***

First, the law must provide a real mechanism so that all undocumented workers can regularize their status. Undocumented workers face serious obstacles in enforcing their labor rights. In addition to language and cultural barriers, workers' lack of formal status forces many of them to work in substandard conditions, because they fear that if they report violations, they will face deportation. Unfortunately, that fear is all too real.

In a well-publicized case in Minneapolis in 1999, workers at the Holiday Inn Express voted in favor of union representation in a National Labor Relations Board (NLRB) election. Days later, the manager called eight of the workers, all Mexicans, into the office, where the workers were met by immigration authorities, who asked them whether they had "papers." When the workers admitted that they did not, they were handcuffed and taken to an INS detention facility.<sup>4</sup>

That scenario is not uncommon. "Undocumented" status has given employers, and their counsel, a powerful tool to use in their attempts to repress worker rights. A recent report by Human Rights Watch that focused on the meatpacking industry, which is known to employ undocumented workers, found that many employers take advantage of

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<sup>3</sup> In the Fourth Circuit, which covers Maryland, Virginia, West Virginia, North Carolina and South Carolina, undocumented workers have no standing to bring complaints under Title VII. *See Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4<sup>th</sup> Cir. 1998).

<sup>4</sup> *Illegal Immigrants Help Unionize a Hotel but Face Deportation*, NY Times, Jan. 12, 2001, A24 col. 1.

workers' fear of drawing attention to their undocumented status "to keep workers in abusive conditions that violate basic human rights and labor rights."<sup>5</sup>

That tool was made even more powerful by the Supreme Court, in *Hoffman Plastic Compounds v. NLRB*<sup>6</sup>, when it held that undocumented workers are not entitled to backpay, the National Labor Relations Board's traditional remedy. This holding has, in practice, made it much more difficult, and in some cases impossible, for an entire class of workers to exercise the right to join a union and bargain collectively.

A group of Spanish-speaking mineworkers in Utah learned that lesson first-hand, when they attempted to organize the Kingston Co-Op Mine in 2003. Workers at that mine earned \$5.25-\$8.00 per hour, with virtually no health care or other benefits, substantially less than the approximately \$20 per hour that unionized mine workers earn.<sup>7</sup> Many of the workers had worked for the Company for many years, and some had returned to Mexico annually. There is evidence that Company representatives had assisted some of the workers to come into the United States to work, and turned a blind eye to the workers' lack of work authorization, until the workers began to organize.

As is common in organizing campaigns, just prior to the union election, the employer sent a letter to most of the workers who would be voting, requiring the workers to provide proof of work authorization. The employer then fired some of the workers, ostensibly for their failure to provide adequate proof of work authorization.

The union filed charges with the NLRB alleging that the employer had fired the workers in retaliation for their attempt to join a union. Even though the Board found merit to the charges, it refused to seek reinstatement or back pay for the great majority of the workers because the Board determined that the workers lacked work authorization.<sup>8</sup>

Undocumented status has also resulted in denial of protections afforded to workers under state laws, further exacerbating the creation of a two-tiered workforce. Following the *Hoffman* decision, several states have limited or eliminated such basic workplace protections as compensation for workplace injuries and freedom from workplace discrimination.<sup>9</sup> These rights and remedies are in some instances the only protections available to workers.<sup>10</sup>

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<sup>5</sup> Lance Compa, *Blood, Sweat and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, (Human Rights Watch: Jan. 2005), available at <http://www.hrw.org/reports/2005/usa0105/>.

<sup>6</sup> 535 U.S. 137 (2002)

<sup>7</sup> Effective January 1, 2006, hourly wages for underground bituminous coal miners as set forth in the National Bituminous Coal Wage Agreement ranged from \$19.35-\$20.42.

<sup>8</sup> C. W. Mining Co. a/k/a Co-Op Mine, NLRB Case Nos. 27-CA-18764-1; 27-CA-19399; 27-CA-19453-1; 27-RC-8326; 27-CA-19481-1; 27-CA-19529.

<sup>9</sup> See, *Crespo v. Evergo Corp.*, 366 N.J. Super. 391 (App. Div. 2004), cert. denied, *Crespo v. Evergo Corp.*, 180 N.J. 151 (2004) (holding that an undocumented worker suing for discriminatory termination could not recover either economic or non-economic damages absent egregious circumstances such as extreme sexual harassment); *The Reinforced Earth Co. v. Workers' Compensation Appeal Board*, 810 A.2d 99 (PA 2002) (holding that injured worker is entitled to medical benefits, but illegal immigration status might justify terminating benefits for temporary total disability); *Sanchez v. Eagle Alloy*, 254 Mich. App. 651 (2003)(Undocumented workers are covered by the state's workers compensation system, but time loss

In fact, some state laws now essentially reward employers for suddenly “discovering” that a worker is unauthorized, thus releasing the employer or workers’ compensation insurance carrier from any back pay or front pay obligation. In Michigan, for example, workers who are injured on the job and who used false documents to secure employment are not entitled to wage loss benefits. Employers are free to “discover” the workers’ use of false documents after the worker is injured, which has encouraged employers to investigate the workers’ documentation only after an injury occurs.<sup>11</sup>

Workers’ rights are being chilled in other equally troubling ways. For example, an Assistant United States Attorney in Kansas has been encouraging employers, insurance companies and others to verify injured workers’ immigration status after workers file a workers’ compensation claim, and refer those cases to his office for prosecution for document fraud. That has resulted in the injured workers being deported and thus unable to pursue workers’ compensation claims.<sup>12</sup>

Workers who try to vindicate their rights through private labor and employment law enforcement, that is, by filing lawsuits, are facing similar obstacles. Employers and their counsel often seek discovery of the immigrant-plaintiffs’ immigration status,<sup>13</sup> an action that serves to chill immigrants’ willingness to pursue their workplace rights.<sup>14</sup>

In one outrageous but not uncommon case, forestry workers in Virginia brought an action alleging violations of minimum wage and overtime laws, as well as state claims related to their housing conditions: they were forced to live in a warehouse surrounded by barbed wire, were locked into the warehouse at night, and had a substantial portion of their pay check deducted to cover their substandard housing. During the plaintiffs’ deposition, which was conducted at the employer’s office, the employer’s counsel asked the plaintiffs whether they had a valid work permit. When counsel for the plaintiffs objected, the employer asked for a break. A short time later, the local police arrived, and

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benefits are suspended from time that unlawful status is discovered); *Tarango v. State Industrial Insurance System*, 25 P.3d. 175 (NV 2001) (workers’ compensation laws apply to all workers regardless of immigration status, but undocumented worker not entitled to rehabilitation benefits); *Cherokee Industries, Inc. v. Alvarez*, 84 P.3d 798 (OK 2003)(same).

<sup>10</sup> Workers often have no choice but to turn to state law for protection. For example, federal anti-discrimination laws only protect employees working for employers who employ at least 15 employees. 42 U.S.C. § 2000e(b). State discrimination laws often protect employees working for employers with fewer employees. See, Cal. Gov Code § 12900 (2007)(any employer five or more employees subject to provisions); ORS § 659.001 (2005)(employer with one or more employees subject to provisions); Rev. Code Wash. (ARCW) § 49.60.040 (2007)(eight employees).

<sup>11</sup> *Sanchez*, 254 Mich. App. at 671-672.

<sup>12</sup> See Brent I. Anderson, *The Perils of United States Employment for Falsely Documented Workers* (and whatever you do, don’t file a work comp claim), paper submitted to American Bar Association, Labor and Employment Law Workers’ Compensation Committee Midwinter Meeting (March, 2006).

<sup>13</sup> See e.g. *Morejon v. Terry Hinge and Hardware*, 2003 WL 22482036 (Cal. App. 2 Dist., 2003); *de Jesus Uribe v. Aviles*, 2004 WL 2385135 (Cal. App. 2 Dist. 2004); *Veliz v. Rental Service Corporation USA, Inc.*, 313 F.Supp.2d 1317 (2003); *Hernandez-Cortez v. Hernández*, 2003 WL 22519678 (D. Kan. 2003).

<sup>14</sup> See *Rivera v. NIBCO, Inc.*, 364 F3d 1057 (9<sup>th</sup> Cir. 2004), cert. denied, *NIBCO, Inc. v. Rivera*, 544 U.S. 905 (2005) (declining to order disclosure of immigration status and noting chilling effect).

asked the workers whether they were illegal aliens. When the workers refused to answer – per the instructions of counsel – the police together with the employer called the Department of Homeland Security (DHS), whose agents arrived at the facility about two hours later. Thanks to the intervention of lawyers from around the country, the plaintiffs were able to convince DHS that this was a labor dispute in which it should not be involved, and the agents left.<sup>15</sup> However, the chilling effect of the employers’ actions was felt by the remaining plaintiffs.

Under current law, the exploitation of undocumented workers is economically attractive. The law has strengthened the perverse economic incentive that employers have to violate immigration laws. As long as employers have access to a class of workers that they can prevent from exercising labor rights by merely asking a simple question: *do you have papers?*, the incentive to exploit will continue.

One key to removing that incentive is to regularize the status of the undocumented population. In order to be effective, a legalization program must be inclusive, practical and swift.<sup>16</sup> Any program that denies a substantial number of workers the ability to adjust their status, either by including burdensome requirements or fees and fines that are outside the reach of the undocumented workers, will exclude millions of workers. A program must also be practical in order to encourage people to come out of the shadows, and it must be implemented quickly. A program that does not meet these criteria will perpetuate a two-tiered system that operates to the detriment of *all* workers in the U.S., because having a large secondary class of workers who cannot exercise workplace rights enables employers to drive down wages, benefits, health and safety protections and other workplace standards across the board.

Unfortunately, the current legislative proposals do not satisfy this first principle. The Security Through Regularized Immigration and Vibrant Economy Act of 2007, the “STRIVE” Act, contains a “touch back” provision that would require workers to leave the United States before they qualify for permanent status. That provision discourages workers from applying for legalization for several reasons. Many workers fear that they would not be able to return if they were required to leave the country, and would opt to remain in undocumented status. Others will likely lose their jobs, given that it is unlikely that employers will hold open jobs for those who are “touching back.”

We understand that politics are pushing legislators to take a punitive approach to legalization. The “touch back” provision is one example. We urge Congress to rethink that approach, because it is not only punishing the undocumented, but also creating obstacles to having one class of workers in the country, with equal rights for all.

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<sup>15</sup> Ana Avendaño and Marielena Hincapie, *The Rollback of Immigrant Workers’ Civil Rights*, Awakening from the Dream (Carolina Academic Press: 2005).

<sup>16</sup> See Ray Marshall, *Getting Immigration Reform Right*, (Economic Policy Institute: 2007), at 6.

### ***Future Foreign Workers Must Come into the U.S. with Full Rights.***

A second guiding principle in AFL-CIO's immigration policy is that workers who come to the United States in the future to fill actual labor shortages should enter with full rights. Current legislation addresses the influx of future workers through guest worker programs or, as they are now sometimes called, "worker visa programs." That is a framework driven entirely by the desire of some in the business community to have a constant and exploitable pool of workers.

Proponents of these temporary worker programs claim that they need guest workers to do the jobs that Americans will not do. However, the reality is that there are no jobs that Americans will not perform if wages and other working conditions are adequate. There is no industry in the United States today that relies entirely on foreign workers, and of 473 occupational titles, only four are even majority foreign-born-- stucco masons, tailors, produce sorters and beauty salon workers.<sup>17</sup> The industries in which the undocumented predominately work – hospitality and janitorial, services, construction, landscaping, meatpacking and poultry, for example – are all staffed by a great majority of U.S. workers.<sup>18</sup> More than 80% of workers in construction and in the janitorial industries are U.S. citizens or lawful permanent residents.<sup>19</sup> The truth is that the business community wants guest workers to fill these jobs because that will allow it to fill permanent, year-round jobs with exploitable temporary workers. The result will be an even further depression in wages, particularly in the low-wage labor market.

A recent report by the non-partisan Congressional Research Service concluded that a guest worker program such as the one approved by the Senate in the 109<sup>th</sup> Congress (S. 2611) "could be expected to lower the relative wages of competing [U.S.] workers," and would have the greatest impact on young native-born minority men and on foreign-born minority men in their early working years.<sup>20</sup> Notably, the size of that guest worker program (capped at 200,000 visas annually) is less than half the size of current proposed programs.<sup>21</sup> Logic dictates that the impact on those workers would be even more profound if a larger program were implemented.

In order to mitigate the negative labor market impact of guest worker programs, longstanding United States guest worker policy requires that temporary workers should be used only to satisfy short-term or seasonal labor needs. The H2-A agricultural guest worker program, the best known of these programs, is designed to satisfy seasonal needs, requiring large numbers of workers during the growing season, which may be as short as 6 weeks. Similarly, the H2-B program allows non-agricultural employers in industries such as landscaping, hospitality and crabbing, to hire non-U.S. workers on a temporary basis to fill their seasonal needs.

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<sup>17</sup> *Id* at p 3.

<sup>18</sup> Passel, *supra*, fn. 1 .

<sup>19</sup> <http://www.bls.gov>.

<sup>20</sup> Gerald Mayer, CRS Report RL33772, *The Comprehensive Immigration Reform Act of 2006 (S. 2611): Potential Labor Market Effects of the Guestworker Program*, December 18, 2006.

<sup>21</sup> The STIVE ACT provides for 400,000 visas in the first year, increasing based on employer demands to 600,000.

The United States has been experimenting with temporary worker programs for almost a century, without a single success.<sup>22</sup> The most famous of those experiments, the Bracero program, began in 1942 as an agreement between the United States and Mexico to address the labor shortages in agriculture and in the railroad industry. More than four and a half million Mexican workers toiled in the United States under the program between 1942 and 1964. Once the contract period ended, however, they were required to turn in their labor permits and leave the United States with no right to long-term or permanent residence.

The failure of guest worker programs has been recognized by every single Congressional Committee that has studied them. For example, in 1977, the Carter Administration included a recommendation in its immigration reform package that a temporary worker program should be given a comprehensive review. The Carter Administration distanced itself from the failed Bracero program – much like all the proponents of current guest worker proposals are doing in the current legislative cycle – but implied that a new framework for a temporary worker program might meet the needs of business while not causing a detrimental impact on wages and working conditions for workers already in the U.S.<sup>23</sup> The Commission for Manpower Policy, responding to President Carter’s charge, disagreed, and concluded after a detailed study that it was “strongly opposed” to any expanded temporary worker program because such programs depress wages and increase the population of undocumented workers.<sup>24</sup>

Similarly, the “Jordan Commission,” which was created by the 1986 Immigration Reform and Control Act to study the nation’s immigration system squarely rejected the notion that guest worker programs should be expanded. In its 1997 final report, that Commission specifically warned that such an expansion would be a “grievous mistake,” because such programs have depressed wages, because the guest workers “often are more exploitable than a lawful U.S. worker, particularly when an employer threatens deportation if workers complain about wages or working conditions,” and because “guest worker programs also fail to reduce unauthorized migration” [in that] “they tend to encourage and exacerbate illegal movements that persist long after the guest worker

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<sup>22</sup> The Immigration Act of 1917 (one of the most restrictive pieces of immigration legislation in U.S. history) included a temporary farm worker program, which lasted until 1922. The program allowed employers to import almost 77,000 workers into the US, fewer than half of whom returned to Mexico once the program was suspended. Vernon M. Briggs, Jr., *Non-Immigrant Labor Policy in the United States*, *Journal of Economic Issues*, Vol. XVII, No. 3, Sept. 1983.

<sup>23</sup> Briggs at 621.

<sup>24</sup> *Id.*

programs end.”<sup>25</sup> In fact, there is not one publicly funded, nonpartisan study that has found any merit in guest worker programs.<sup>26</sup>

Proponents of the latest breed of guest worker programs have distanced themselves from the discredited Bracero and other past programs by labeling the new proposals as “break-the-mold” programs. Yet, the new proposed programs offer even fewer protections to workers than those provided in the Bracero program. Braceros, for example, were entitled to free housing, medical treatment, transportation, and pre-set wages that were at least equal to those of U.S. citizen farm workers, and a contract in Spanish. Despite these protections, Braceros experienced numerous abuses, including racial oppression, economic hardship, and mistreatment by employers, and the program also had a well-documented downward effect on the wages of U.S. citizen farm workers.<sup>27</sup> The new guest workers, who would not even have the promise of such protections, can fare no better.

The H1-B program, which Congress created in 1990 to ease the claimed temporary shortage of skilled workers in the high technology field, also shows why this new approach is flawed. In 1998, as a temporary remedy for a claimed desperate labor shortage in the high technology field, Congress nearly doubled the number of H1B visas available for the following three years, and imposed a fee on employers that was meant to fund training programs to improve the skills of U.S. workers. More than fifteen years after the inception of the H1-B program, employers continue to call for more H1B visas, while little effective training of U.S. workers has been accomplished, and wages and other conditions in the industry have deteriorated.<sup>28</sup>

One of the fundamental flaws in the H1-B program is that it does not test the U.S. labor market. As the DOL acknowledges on its own website, “H1-B workers may be hired even when a qualified United States worker wants the job, and a United States worker can be displaced from the job in favor of the foreign worker.”<sup>29</sup> Employers are simply required to file an attestation of the wages and working conditions offered to the H1-B workers with the Department of Labor’s Employment and Training Administration. The Department of Labor has no authority to verify the authenticity or truthfulness of the

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<sup>25</sup> See United States Commission on Immigration Reform, *Becoming an American: Immigration and Immigration Policy*, United States Commission on Immigration Reform, 1997. An earlier well-known Commission--the Select Commission on Immigration and Refugee Policy (SCIRP)--chaired by Rev. Theodore Hesburgh had reached the same conclusions. See, National Commission on Immigration and Refugee Policy, *United States Immigration Policy and the National Interest: Final Report*. National Commission on Immigration and Refugee Policy, 1981.

<sup>26</sup> By contrast, business groups and political right-wing groups have found common ground. See Tamar Jacoby and Grover Norquist, *Hard Lines Don't Speak for GOP*, Miami Herald, December 19, 2005.

<sup>27</sup> See Ernesto Galarza, *Merchants of Labor: The Mexican Bracero Story* (Rosicrucian Press 1964).

<sup>28</sup> See “H1-B Foreign Workers, Better Controls Needed to Help Employers and Protect Workers,” HEHS-00-157 (September 2000); “High Skill Training Grants from H1B Visa Fees Meet Specific Workforce Needs, but at Varying Degrees,” GAO-02-881 (September 2002); “The State of Asian Pacific America,” Paul Ong (ed.), LEAP Asian Pacific American Public Policy Institute and UCLA Asian American Studies Center, 1994, pp. 179-180.

<sup>29</sup> [http://www.dol.gov/sec/stratplan/strat\\_plan\\_2006-2011.htm](http://www.dol.gov/sec/stratplan/strat_plan_2006-2011.htm); See also, Ron Hira, *Outsourcing America's Technology and Knowledge Jobs* (EPI Briefing Paper: 2007), p. 2.



information; the Department can only review the application for omissions and obvious inaccuracies.<sup>30</sup>

The United States Government Accountability Office (GAO) concluded last year that the DOL was failing even in that minimal task.<sup>31</sup> For example, from January 2002 through September 2005, DOL electronically reviewed more than 960,000 applications and certified almost all of them.<sup>32</sup> Moreover, GAO found over 3,000 applications that were certified even though the prevailing wage rate for the application was lower than what is required by statute, in some cases, more than \$20,000 lower than what is required by law.<sup>33</sup>

The H1-B program was enacted to fill a spot labor shortage, while workers in the U.S. obtained adequate training and education in high tech and professional jobs. In reality, the poor design of the H1-B program has failed to meet the training objectives, and instead has facilitated and accelerated the outsourcing and offshoring of jobs. The largest users of the H1-B program are outsourcing firms, whose business is to move jobs overseas.<sup>34</sup> These firms import H1-B workers, train them in U.S. companies, and then send the workers back home, taking with them the jobs that they were previously doing in the United States.<sup>35</sup> In fact, in many instances, U.S. workers were forced to train their H1-B replacements.<sup>36</sup>

The nation's experience with the H2-B program, aimed at low-wage seasonal jobs, is also instructive, particularly because the new proposed guest worker programs are aimed at much the same population of workers, and in fact, are modeled on the H2-B program. In practice, the H2-B program is rife with abuses. Workers on H2-B visas are particularly vulnerable because they tend to be isolated, transient, non-English-speakers unfamiliar with U.S. laws. Like the workers who would come into the United States under the proposed new programs, H2-B workers have little access to legal services because the Legal Services Corporation (LSC)-funded attorneys are generally not permitted to represent H2-B workers, and very few states have unrestricted legal services offices that represent H2-B workers.<sup>37</sup>

A recent report by the Southern Poverty Law Center exposes the substantial current exploitation of workers in temporary worker programs.<sup>38</sup> For workers who toil in those programs, that exploitation begins at home, where workers are usually recruited by

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<sup>30</sup> 8 U.S.C. § 1182(n)(1)(G)(ii).

<sup>31</sup> H1-B Visa Program: *Labor Could Improve Its Oversight and Increase Information Sharing with Homeland Security* GAO-06-720 Washington, DC: June 22, 2006.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 14.

<sup>34</sup> Ron Hira, *Outsourcing America's Technology and Knowledge Jobs*, *supra n.* 31.

<sup>35</sup> *Id.*

<sup>36</sup> *See, Too Many Visas for Techies? U.S. workers gripe that lax rules may cost them their jobs*, *Business Week*, August 25, 2003.

<sup>37</sup> *See* 45 C.F.R. § 1626.1 *et seq.*

<sup>38</sup> Mary Bauer, *Close to Slavery, Guestworker Programs in the United States*, Southern Poverty Law Center, 2007, available at [www.splcenter.org](http://www.splcenter.org).

labor contractors who require that workers pay a sizeable fee for the opportunity to work in the programs. Guatemalan workers, for example, are charged as much as \$5,000 by the recruiters, and it is not uncommon for workers in Asia to pay as much as \$20,000 for their guest worker visas. Workers who are recruited into these programs are often poor, and are forced to turn to loan sharks in order to finance the recruiters' fees. Workers are also often required to leave behind with an agent of the employer or recruiter collateral, such as a deed to a home or a car, to ensure that workers will comply with the terms of their contracts. The result is that workers arrive in the United States so heavily indebted that they can not leave their jobs, even if the law allowed them to do so.

Once in the United States, guest workers have few labor protections. A major flaw in current guest worker programs is that there is no effective means to enforce the requirements of the program. Even though the current H2-B program requires that employers pay the "prevailing wage," that requirement is often ignored, with impunity.<sup>39</sup> The DOL has determined that it has no authority to enforce the conditions in the employer's applications for guest workers, nor the ability to enforce the terms of workers' contracts.<sup>40</sup> Therefore, workers who are not being paid, or are being paid below the prevailing wage, have no way to enforce those provisions other than through private law suits, which are expensive.

Guest worker programs also allow employers to evade U.S. anti-discrimination laws altogether. Current law allows recruiters and labor contractors to discriminate based on gender, age, and presumably any other category protected under U.S. laws, as long as that conduct takes place outside the United States.<sup>41</sup> If an applicant in the United States is denied a job on the basis that he or she is over 40 years old, and the application was made within the United States, the employer would be violating the Age Discrimination in Employment Act (ADEA)<sup>42</sup> and the worker could sue to recover damages and to enjoin the employer's practice. However, if the employer is applying that practice just across the border in Mexico, and hiring workers who will be entering the United States through a guest worker program, then U.S. laws do not stop that employer from freely discriminating because courts have concluded that our employment laws do not cover conduct outside the United States.

Before Congress expands or creates yet another guest worker program, it must address the flaws in the current programs.

First, Congress must build protections into the infrastructure of the programs that protect against worker abuse. At a minimum, for-profit labor contractors should not be permitted to participate in any temporary worker programs. Only the end-use employer

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<sup>39</sup> *Id.*

<sup>40</sup> *See*, DOL General Administrative Letter No. 1-95.

<sup>41</sup> *See, Reyes-Gaona v. NC Growers' Ass'n*, 250 F.3d 861 (4<sup>th</sup> Cir. 2001)

<sup>42</sup> The ADEA makes it unlawful "for an employer" to "fail or refuse to hire" or "otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

should be able to petition for workers, and employers should be banned from using for-profit foreign labor contractors in the process.

Another fundamental protection that any temporary worker program must provide is an effective mechanism to test the U.S. labor market through a rigorous labor certification process before allowing employers to bring in foreign workers. Attestation programs, which essentially allow employers to monitor themselves, do not protect workers.

We believe that there should be a “two-test” principle for labor certification: a finding that there are no U.S. workers available to fill the position and another that granting certification will not depress the standards of, or otherwise cause harm to U.S. workers. This principle applies to all guest worker programs, whether high skill or low-wage.

A rigorous labor certification process must accurately determine labor shortages, include adequate wage protections, guard against the displacement of U.S. workers, and provide an adequate system for advertising jobs beyond the local labor market. We believe that state Employment Security Agencies must be an integral part of the process, given that they are best positioned to analyze employers’ need for foreign workers, provide assistance to employers regarding the recruitment of U.S. workers, and determine the prevailing wages.

The trigger for any temporary worker program visas should be based on a thorough and adequately funded labor certification process that includes mandatory public posting of the jobs with the state Employment Service, so that the state agencies can review job postings against the visa applications received. Because state Employment Security Agencies are uniquely linked, workers in Kansas can learn that there are openings in landscaping jobs in Iowa, for example, and should be able to apply for those jobs before employers are allowed to import workers.

One of the fundamental flaws of temporary worker programs is that they give employers tremendous control over workers because if a temporary worker loses his or her job, he or she is faced with the choice of leaving the United States or becoming undocumented. Workers do not want to face that choice, and therefore, they do not complain about workplace violations. Two fundamental changes to current programs must be enacted to mitigate this chilling effect: (1) Congress should provide meaningful whistleblower protections, so that workers who expose workplace violations and as a result are fired, do not have to face immediate removal; and (2) workers should have the ability to leave unsatisfactory jobs without having to face the choice of departing the United States or becoming undocumented.

Such appropriate “portability”, however, should not allow a subsequent employer to avoid the requisite labor market testing and certification, since otherwise the essential fundamental labor protections will be undermined. Workers in any non-immigrant category (that is, temporary), and especially those in the low-wage labor market, will

always face pressure to find a new job quickly, because by definition, they are not entitled to unemployment insurance or any other safety net benefits. If subsequent employers do not have to test the labor market and therefore are not subject to prevailing wage standards, those employers will be able to employ the temporary foreign workers at substandard wages and working conditions. Therefore, portability must come with a requirement that every subsequent employer undergo the same U.S. labor market testing and certification process before hiring a foreign temporary worker. The H1-B program currently includes this framework or portability, but given that H1-B employers are not required to test the U.S. labor market to begin with, the H1-B program does not serve as the model of portability.

As discussed above, another flaw of guest worker programs is that they allow U.S. employers to discriminate based on race, gender, age, and national origin, which is outlawed in the U.S.<sup>43</sup> Discrimination in relation to jobs that are performed in the United States should not be tolerated no matter where it occurs. Congress must specify that Title VII, Section 1981, the ADEA, and all other U.S. employment and labor laws govern the conduct of any employer or other labor recruiter who participates in any temporary worker program, even if the conduct occurs outside the United States.

Congress should also specify that workers who labor in temporary worker programs are entitled to workers' compensation coverage and full remedies, even if they leave the U.S. after they are injured on the job. Current law makes it practically impossible for guest workers who are injured on the job to exercise their rights under workers' compensation laws because injured workers are forced to leave the program and return to their home country, or become undocumented.

Statutory labor protections are only as good as their enforcement mechanism. Guest workers face particular difficulties in enforcing their labor rights. Workers often have little education, do not understand the U.S. legal system, have no access to legal aid lawyers, and have great difficulty in finding private lawyers to represent them. Requiring that employers post a bond that is at least sufficient in value to cover the temporary workers' legal wages, and crafting a system to allow workers to make claims against the bonds would make it easier for workers to collect the money they are owed.

Further, a robust remedial scheme is key to discouraging illegal conduct by employers. Penalties for violations of the terms and conditions of temporary worker programs should be strengthened and must include remedies that are real deterrents, including employer debarment. Enhanced monetary penalties such as punitive damages and compensatory damages should also be provided. All of these remedies must be available to workers and their representatives through private rights of action, as well as through strengthened and adequately funded government enforcement programs.

Finally, guest workers must be able to adjust their status if they wish to do so. This "path to permanency" is important, but it does not solve the problems that workers face while they are laboring in the guest worker programs. In other words, if the H2-B

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<sup>43</sup> See *Reyes-Gaona v. NC Growers' Ass'n*, 250 F.3d 861 at 865.

program were to continue with all its current flaws, and Congress simply added a provision that would allow H2-B workers to adjust their status after laboring in H2-B status for a certain number of years, that “path to permanency” would do nothing to fix the problems with recruiters, non-payment of wages, or the inability of H2-B workers to exercise labor rights. All that such a “path to permanency” would do is limit the number of years that the particular workers in question are exploited. It would *not* remove in any way the attraction for employers to use an ever-changing source of foreign workers to depress wages and other labor standards.

The STRIVE Act, unfortunately, provides virtually none of the guest worker program protection recommended above. It greatly expands the number of guest workers that employers are allowed to import every year, and is modeled on the failed and flawed H2-B program. The STRIVE Act is not limited to seasonal jobs, which means that it is expanding significantly the types of jobs that employers would be able to fill with easily exploitable temporary foreign workers, and for the first time opening up permanent jobs to temporary guestworkers. Under the STRIVE Act, employers would be able to import foreign temporary workers to perform all kinds of permanent jobs that don’t require a college degree, such as grocery store clerks, a host of construction jobs, janitors, poultry workers, and truck drivers, just to name a few.

The huge expansion of guest worker programs contemplated by current legislation will not only harm United States workers, but also represents a radical and dark departure from our long-held vision of a democratic United States society. We are not a nation of “guests,” who, by definition, have only short-term and short-lived interests, but a nation of people who believe in investing in our communities, in our future, and in our democracy.

In the AFL-CIO’s view, there is no good reason why any immigrant who comes to this country prepared to work, to pay taxes, and to abide by our laws and rules should be denied what has been offered to immigrants throughout our country’s history: a path to legal citizenship. To embrace instead the creation of a permanent two-tier workforce, with non-U.S. workers relegated to second-class “guest worker” status, would be repugnant to our traditions and our ideals and disastrous for the living standards of working families.

Instead we should revise the current immigration law in a way that guarantees full labor rights for future workers and reflects real labor market conditions by restructuring the current permanent employment visa category. Under current law, Congress has set an arbitrary cap of 140,000 permanent visas (green cards). We propose that the number be adjusted to reflect real employer needs for long-term labor shortages. Employers should be required to test the labor market by first offering jobs to workers who are already in the United States at wages that are attractive to U.S. workers. If there are no workers inside the United States available to fill the job, then the employer should be able to hire a foreign worker and sponsor him or her for a green card. The number of such visas should be tied to real economic indicators that reflect true labor shortages.

The proponents of guest worker programs offer no valid explanation as to why, as a matter of public policy, the permanent system we advocate is not the preferred model. The most common argument they make is that there are new circular migration patterns and workers who come here may not want to stay forever. There is nothing in our proposal, or in current law, that requires that workers who come to United States must stay here. The difference between the AFL-CIO framework and the guest worker framework is that under our model, the workers who don't want to stay here forever have full worker rights while they work here. Subjecting workers to diminished labor rights and protections simply because they will suffer those conditions only temporarily is not sound public policy. Nor is it just.

### ***Immigration Laws Should be Enforced in Tandem with Labor Laws***

The third guiding principle in the AFL-CIO's approach to reform is that enforcement of labor laws must go hand-in-hand with enforcement of immigration laws. Enforcement of immigration laws alone has failed to stem the tide of illegal immigration. The current mechanism for enforcement of those laws in the workplace – the “employer sanctions” provisions included in the Immigration Reform and Control Act of 1986 (IRCA)<sup>44</sup> – completely ignores enforcement of labor and employment protections. Instead, the IRCA adopted the very same focus that the current legislative proposals have taken on: punishment (fines) for employers who knowingly hire and continue to employ undocumented workers. Such sanctions have failed to curtail illegal immigration. In fact, they may well have accomplished the opposite, given that sanctions have become one of the most powerful tools that employers have to defeat workers' attempts to organize or to otherwise enforce their labor rights.

In adopting the IRCA, Congress acted to cut off the “job magnet” that was causing illegal immigration by requiring, for the first time, all workers in the United States to have permission to work in the country and obligating employers to verify that status. Even though that law was designed to hold employers accountable for the hiring of undocumented workers and to stop the exploitation of workers, the result has been quite the contrary: the IRCA essentially privatized immigration policy by deputizing employers to be agents of the immigration service. Employers have repeatedly used the power the IRCA granted them to defeat collective action and to retaliate against workers who attempt to enforce their labor and employment rights.

The principal study conducted on the relationship between workplace immigration enforcement and labor disputes reveals a deep entanglement between workplace immigration enforcement and workers' exercise of labor rights.<sup>45</sup> Government data on workplaces raided in New York, one of the largest DHS districts, reveals that 55% of the workplaces raided by INS were the subject of at least one formal labor complaint – that is, a charge had been filed with a federal or state employment or labor agency. That figure likely underestimates the actual number of workplaces in the midst

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<sup>44</sup> 8 U.S.C. § 1105 *et seq.* (1986).

<sup>45</sup> Michael J. Wishnie, *Current Issues in Immigration Law*, 28 N.Y.U. Rev. L. & Soc. Change 389 (2004).

of a labor dispute at the time of the immigration tip or raid because it does not include informal complaints to employers, much less litigation or union grievances.<sup>46</sup>

Workplace enforcement of immigration laws without regard to workers' rights – as Immigration and Customs Enforcement (ICE) currently operates – lowers standards for all workers because workers are deterred from reporting violations. ICE's blatant disregard of workplace standards was exposed clearly in 2005 when a group of construction workers in North Carolina received a flyer at work, instructing them to attend a mandatory health and safety meeting. The flyer was printed on letterhead of the Occupational Safety and Health Administration (OSHA). However, when the workers arrived at the meeting, no OSHA officials were present. Rather, ICE officials were waiting, arrested more than 20 workers and placed them into deportation proceedings.<sup>47</sup>

Effective enforcement of health and safety laws depends on workers to report hazardous conditions. Genuine health and safety meetings, unlike the sham one that ICE used to trap the workers, are key to that process because they enable workers to learn to identify hazards, and to protect themselves. The chilling effect on worker rights from these types of actions is clear.

The data on workplace enforcement of immigration laws also make clear that the benefit to an employer from exploiting workers is far greater than his cost of violating the immigration law. In fact, the immigration law actually gives employers a powerful weapon to use against workers. In many instances, employers have actually called for raids at their own workplaces, and have been able to effectively intimidate workers in the exercise of workplace rights – from joining a union to filing health and safety claims – without employers having to pay any meaningful penalty for their violations of workplace *or* immigration laws.<sup>48</sup> As long as unscrupulous employers continue exploiting immigrant workers while facing no real chance of being prosecuted for providing unsafe working conditions, or for other violations of labor laws, the rights of all workers will be seriously undermined and illegal immigration will continue.

Moreover, enforcement of U.S. labor and employment laws has been particularly dismal under the Bush administration, which has had an extremely negative impact on low-wage immigrants and U.S. workers. The Department of Labor's (DOL) own studies conducted in 2000 (the last year such were conducted) found that 100 percent of poultry employers were out of compliance with the minimum wage and overtime protections of the Fair Labor Standards Act (FLSA), and as many as 50 to one 100 percent of garment and nursing home employers were in violation of those same protections. And these are industries in which immigrant workers are overrepresented. Yet in the face of these wholesale violations, the Department of Labor's resources dedicated to enforcement have been falling for many years. For example, from 1975–2004, the budget for the DOL's Wage and Hour Division investigators, responsible for investigating and enforcing the

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<sup>46</sup> *Id.*

<sup>47</sup> Steven Greenhouse, *U.S. Officials Defend Ploys to Catch Immigrants*, NY Times, Feb. 11, 2006, A8, col.

<sup>48</sup> See *In re Herrera-Priego* (Lamb, I.J.) (NY July 10, 2003) (where employer called INS raid on itself, during union organizing campaign).

minimum wage laws, decreased by 14% (to a total of 788 individuals nationwide) and enforcement actions decreased by 36%, while the number of workers covered by statutes enforced by the Wage and Hour Division grew by 55%.<sup>49</sup> Today, there is approximately one federal Wage and Hour investigator for every 110,000 workers covered by FLSA.<sup>50</sup> By 2007, the DOL's budget dedicated to enforcing wage and hour laws will be 6.1 percent less than before President Bush took office.<sup>51</sup>

Congress should opt for a far more potent “employer sanction,” one that will remove the perverse economic incentive that is driving employers to recruit and employ undocumented workers, and will therefore stem the tide of illegal immigration. That “sanction” involves the vigorous and adequately funded enforcement of existing labor and employment laws.

### ***Conclusion***

Immigration reform is an emotionally and politically charged issue that affects the supply of labor, wage levels and working conditions for all workers, both immigrant and U.S.-born, in the United States. Any significant changes in United States immigration policy would deeply affect the personal and workplace lives of tens of millions of workers and their families, whether they are citizens, legal residents or undocumented persons. The current system does not serve us well, and the time is right to enact comprehensive immigration reform. For such reform to be meaningful and fair, it must be framed around workers' rights because that is the socially, economically, and morally right thing to do.

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

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<sup>49</sup> Annette Bernhardt & Siobhan McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004*, Economic Policy Brief No. 3 (New York: Brennan Center for Justice at NYU School of Law, September 2003).

<sup>50</sup> *Id.*, at 2. There are nearly 88 million people covered by FLSA.

<sup>51</sup> Judd Legum, Faiz Shakir, Nico Pitney, Amanda Terkel, and Payson Schwin et.al., *Labor—Bush Priorities Hurt Workers, Help Employers (Under the Radar)*, The Progress Report, June 14, 2006.